MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

January 15, 2020

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB39

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of Maryland and of the District of Columbia. 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 ("HQL") and a certified NRA instructor in rifle, pistol and personal protection in the home and outside the home and in muzzle loader. I appear today as President of MSI in opposition to SB39.

The Statutory Scheme of Existing Maryland Law:

This bill would include ANDERSON MANUFACTURING .223 CALIBER AM–15 AND .300 CALIBER AM–15 on the list of guns set forth in MD Code Public Safety 5-101(r)(2) that are now classified as assault weapons and thus were banned in 2013, with enactment of the Firearms Safety Act of 2013. Section 5-101(r)(2)(xv) already lists (and thus bans) the "Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle."[1]

As of enactment of the Firearms Safety Act of 2013, any gun on that list set forth in Section 5-101(r)(2) was deemed to be an "assault long gun." MD Code, Criminal Law, § 4-301(b). An "assault long gun" is part of the definition for "assault weapon" under Section 4-301(d) ("'Assault weapon'" means: (1) an assault long gun; (2) an assault pistol; or (3) a copycat weapon."). An "assault pistol" is defined in MD Code, Criminal Law, § 4-301, to include a long list of pistols as well as any "copy." MD Code, Criminal Law, § 4-303(a) provides that "[e]xcept as provided in subsection (b) of this section, a person may not: (1) transport an assault weapon into the State; or (2) possess, sell, offer to sell, transfer, purchase, or receive an assault weapon." These provisions have teeth. MD Code, Criminal Law, § 4-306(a)

[1] An H-BAR rifle is a heavy barrel rifle used in competitions. Such HBAR rifles are typically quite expensive and are used extensively where high quality, reliability and accuracy are essential. For example, LWRC, a company located in Easton, Maryland, manufactures heavy barrel rifles of this type. Its basic model costs approximately $2,000.00. Similarly, Adcor Defense, a company based in the Highlandtown area of Baltimore, manufactures these sorts of rifles. Their base HBAR model is also $2,000.00. The original exception for HBARs thus recognized that HBARs were a special class of firearm, uniquely necessary for firearms competition. From the beginning, HBAR rifles were exempted from regulation as "regulated firearms" when that category was first established in 1996 with enactment of Maryland Gun Violence Act of 1996 (SB 215). HBARs have thus always been treated differently under Maryland law.

provides that "[e]xcept as otherwise provided in this subtitle, a person who violates this subtitle is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both." There is a "grandfather clause" in MD Code Criminal Law 4-303(b)(3), which provides that "[a] person who lawfully possessed, has a purchase order for, or completed an application to purchase an assault long gun or a copycat weapon before October 1, 2013, may: (i) possess and transport the assault long gun or copycat weapon."

The Bill Is Redundant of Existing Law And Unnecessary:

The bill would place the ANDERSON MANUFACTURING .223 CALIBER AM–15 AND .300 CALIBER AM–15 on the list of guns set forth in MD Code Public Safety 5-101(r)(2) and thus would purport to ban these rifles as assault long guns under Section 4-301(d). The apparent motivation for this addition is that an Anderson Manufacturing receiver was used in a Dayton, Ohio mass shooting this last summer. However, the Dayton gun was an "AR-15-style ***pistol***" in .223 caliber that used an Anderson Manufacturing receiver. The Anderson AM-15 rifles were **not** used in that crime. That particular pistol used in Dayton was equipped with a 100-round magazine. See https://www.npr.org/2019/08/08/748665339/the-pistol-that-looks-like-a-rifle-the-dayton-shooters-gun. We note that any magazine in excess of 10 rounds of capacity is already banned for manufacture, sale, purchase or receipt in Maryland. See MD Code, Criminal Law § 4-305.

Indeed, the Dayton .223 pistol is already banned in Maryland under existing law. Any pistol is not legal for sale in Maryland unless it is on the Handgun Roster. See MD Code Public Safety, § 5-406. The Roster is set forth on the Maryland State Police website, https://licensingportal.mdsp.maryland.gov/MSPBridgeClient/#/home/. The Roster shows that the Anderson Manufacturing AM-15 **EXT** pistol **in the .300BLK** has been approved for sale. That approval is, however, limited to pistols chambered for the .300BLK; any Anderson Manufacturing pistol chambered for .223 is **not** approved for sale in Maryland. Thus, the .223 pistol used in the Dayton shooting **is already banned in Maryland**.

The Dayton .223 **pistol** is not the same thing as the AM-15 **rifle**, and yet this bill purports to ban the AM 15 **rifle.** The distinction between pistols and rifles is particularly important in the law. Under federal law, for example, a pistol becomes a short-barrel rifle if such weapon, as modified, has an overall length of less than 26 inches **or** a barrel or barrels of less than 16 inches in length. See 26 U.S.C. § 5845; 27 CFR § 479.11. Under the National Firearms Act of 1934, such short-barrel rifles must be registered with the ATF and their owners are subject to an intensive background investigation, including fingerprinting. See https://www.atf.gov/rules-and-regulations/final-rule-41f-background-checks-responsible-persons-effective-july-13. From the published photographs of the gun, the Dayton shooting pistol may have been modified by adding a shoulder stock to the pistol and thus making the gun into an illegal, short-barrel rifle. There is no suggestion in the reporting that the Dayton gun was ever registered with the ATF and the shooter subject to a background investigation. A violation of the National Firearms Act is a federal felony, 18 U.S.C. § 922(a)(4), punishable by five years of imprisonment. 18 U.S.C. 924(a)(1)(B). Thus, the gun actually used in Dayton may have been already illegal under federal law (in addition to being already banned in Maryland). But even if the stock was simply an arm brace (and thus a legal pistol configuration), it is still not on the Roster and is thus already banned in Maryland.

Even more fundamentally, the Anderson Manufacturing AM-15 **rifle** in .223 caliber, as specified in this bill, **is also already banned** in Maryland, as a copy of a Colt AR-15. See https://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Firearms/FirearmSearch.aspx. Obviously, there is no point in banning it twice over. Thus, not only is the Anderson AR15 .223 *pistol* already banned in Maryland (because it is not on the Roster), so is the Anderson AR15 .223 *rifle* (because it is a copy of the Colt AR15).

The Anderson Manufacturing AM-15 rifle in **.300 BLK** is not currently banned, as it is not a copy of the Colt AR15 rifle. (Id.). That status is for good reasons. The reference to ".300BLK" is to a particular caliber and cartridge, *viz.,* the .300 Blackout round. It is a .30 caliber round, the same bullet diameter used in guns chambered for the 30.06 or .308 cartridges, which are widely used for deer hunting in Maryland and elsewhere. A rifle chambered for the .300BLK round is likewise suitable for hunting. In contrast, the standard .223 round is generally not suitable for deer hunting in Maryland (and in most other states as well) because of its low muzzle energy, particularly as compared to larger caliber ammunition, such as .30 caliber cartridges. In addition, guns chambered for the .300 Blackout round are relatively uncommon and the ammunition is twice as expensive compared to the much more popular and inexpensive .233 cartridge. Because of these realities, the .300 Blackout round is very seldom used in crimes of violence. In sum, there is thus simply no reason to ban rifles using the .300 Blackout cartridge.

The Bill Would Affect a "Taking" Under The Maryland and Federal Constitutions:

Adding the Anderson .300BLK rifle to the Section 5-101(r) banned list would also create serious "takings" issues under both the Maryland Constitution and the Fifth Amendment to the federal Constitution, as both fully protect private, personal property. See *Horne v. Dep't of Agric.*, 135 S.Ct. 2419 (2015); *Serio v. Baltimore County*, 384 Md. 373 (2004). Maryland's Takings Clause is violated "[w]henever a property owner is deprived of the beneficial use of his property or restraints are imposed that materially affect the property's value, without legal process or compensation." *Serio*, 384 Md. at 399. Here, adding these rifles to the Section 5-101(r) list would effectively mean that those rifles were banned as of October 1, 2013, the date that the Firearms Safety Act of 2013 became effective. As noted above, the grandfather clause in that legislation only protected guns on the Section 5-101(r) list if they were purchased prior to that date. Thus, adding the Anderson AM-15 .300BLK rifle to that list will ban and thus effectively "take" any such rifle that was purchased since October 1, 2013. See *United States v. General Motors*, 323 U.S. 373, 378 (1945) ("The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.").

The State's "police power" cannot be used to justify such a Taking without compensation. For example, in *Serio*, the Maryland Court of Appeals applied these principles to invalidate as a "Taking" the seizure by the police of all the property rights of a convicted felon in the value of his firearms that he could no longer possess. As stated in *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 623 (2002), under the Maryland Constitution, *"[n]o matter how 'rational' under particular circumstances*, the State is constitutionally precluded from abolishing a vested property right or taking one person's property and giving it to someone else." (Emphasis added). The rule is the same under the Fifth Amendment. See, e.g*., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ("[T]he legislature's recitation of a

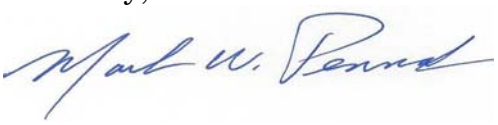
noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982) (finding a Taking in that case regardless of "the public interests that it may serve").

The Supreme Court stressed this point in *Lucas*, stating "[a]s we have said, a "'State, by *ipse dixit*, may not transform private property into public property without compensation....'" *Lucas*, 505 U.S. at 1031, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). That is exactly what banning this rifle retroactively to October 1, 2013, would do. See also *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), affirmed, 742 Fed.Appx. 218 (9th Cir. 2018) (relying on *Horne*, *Lucas* and *Lorretto* to preliminarily enjoin, as a taking, enforcement of California's ban on continued possession of certain firearm magazines). Under the Maryland Constitution, any law that affects a taking without providing for just compensation may be enjoined on that basis alone. *Department of Natural Resources v. Welsh*, 308 Md. 54, 65 (1986).

Gun Bans Do Not Work:

Finally, we are constrained to point out that gun bans simply don't work. The Dayton shooter committed mass murder. Banning a particular gun will not deter or pose an obstacle for persons intending to commit murder. Under the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the State generally may not ban firearms, so that option is not available to the State. Mass murder is a capital offense in Ohio, punishable by death, and yet that did not deter or stop the Dayton shooter. Banning this rifle will likewise not deter or inhibit any such a deranged individual. For all these reasons, we request an unfavorable report.

Sincerely,



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