MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 910 and SB 958

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 Bar 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, personal protection in the home, personal protection outside the home and in muzzle loader. I appear today as President of MSI in opposition to HB 910 and SB 958.

These Bills

3-D Printers: These bills contain three main parts. First, the bills would enact a new Section 4-602 of the Criminal Law article to the Maryland code in order to ban the use of a 3-D printer TO MANUFACTURE, CAUSE TO BE MANUFACTURED, ASSEMBLE, OR CONSTRUCT A FIREARM; OR DISTRIBUTE A COMPUTER PROGRAM DESIGNED FOR THE SPECIFIC PURPOSE OF MANUFACTURING, CAUSING TO BE MANUFACTURED, ASSEMBLING, OR CONSTRUCTING A FIREARM USING A 3–DIMENSIONAL PRINTER. This new section would also provide that A PERSON MAY NOT POSSESS, SELL, OFFER TO SELL, TRANSFER, PURCHASE, OR RECEIVE A FIREARM MANUFACTURED, ASSEMBLED, OR CONSTRUCTED IN VIOLATION OF SUBSECTION (C)(1) OF THIS SECTION [the ban on the use of a 3-D printer].

Covert guns: The bills would then enact a new Section 4-603 to ban "COVERT FIREARMS," which are then listed in the bills. The bills would also ban "UNDETECTABLE FIREARMS," which is defined by reference to an undefined "security exemplar," or by reference to those firearms which cannot be detected by an x-ray machine "COMMONLY USED AT AIRPORTS." The bills then provide that a person may not (1) MANUFACTURE, CAUSE TO BE MANUFACTURED, ASSEMBLE, OR CONSTRUCT A COVERT FIREARM OR AN UNDETECTABLE FIREARM; OR (2) POSSESS, SELL, OFFER TO SELL, TRANSFER, PURCHASE, OR RECEIVE A COVERT FIREARM OR AN UNDETECTABLE FIREARM.

Serial numbers: Next, the bills would enact new Section 4-604 to provide that a person may not:
(1) MANUFACTURE, CAUSE TO BE MANUFACTURED, ASSEMBLE, OR CONSTRUCT A FIREARM THAT IS NOT IMPRINTED WITH A SERIAL NUMBER ISSUED BY A

FEDERALLY LICENSED FIREARMS MANUFACTURER OR FEDERALLY LICENSED FIREARMS IMPORTER IN COMPLIANCE WITH ALL FEDERAL LAWS AND REGULATIONS REGULATING THE MANUFACTURE AND IMPORT OF FIREARMS; OR
(2) POSSESS, SELL, OFFER TO SELL, TRANSFER, PURCHASE, OR RECEIVE:
(I) A FIREARM THAT IS NOT IMPRINTED WITH A SERIAL NUMBER ISSUED BY A FEDERALLY LICENSED FIREARMS MANUFACTURER OR FEDERALLY LICENSED FIREARMS IMPORTER IN COMPLIANCE WITH ALL FEDERAL LAWS AND REGULATIONS REGULATING THE MANUFACTURE AND IMPORT OF FIREARMS; OR
(II) AN OBJECT MARKETED OR ADVERTISED TO BE, OR THAT A REASONABLE PERSON WOULD UNDERSTAND TO BE, DESIGNED FOR THE PURPOSE OF BEING MANUFACTURED, ASSEMBLED, OR CONSTRUCTED INTO THE FRAME OR RECEIVER OF A FIREARM THAT IS NOT IMPRINTED WITH A SERIAL NUMBER ISSUED BY A FEDERALLY LICENSED FIREARMS MANUFACTURER OR FEDERALLY LICENSED FIREARMS IMPORTER IN COMPLIANCE WITH ALL FEDERAL LAWS AND REGULATIONS REGULATING THE MANUFACTURE AND IMPORT OF FIREARMS.

A. Homemade Guns Are Not Used In Crime And Existing Owners Are Law-Abiding Hobbyists, Not Criminals

These new provisions, if enacted, would severely criminalize a harmless activity that has been perfectly legal under federal and state law for the entire history of the United States, *viz.*, the manufacture of homemade guns for personal use. Under federal law, a person may legally manufacture a firearm for his own personal use. See 18 U.S.C. § 922(a). However, "it is illegal to transfer such weapons in any way." *Defense Distributed v. United States,* 838 F.3d 451, 454 (5th Cir. 2016). This manufacture "involves starting with an '80% lower receiver,' which is simply an unfinished piece of metal that looks quite a bit like a lower receiver but is not legally considered one and may therefore be bought and sold freely. It requires additional milling and other work to turn into a functional lower receiver." (Id).

Manufacturing an "80% lower" into a "functional lower receiver" is not a trivial process. It takes machine tools, expertise and hours of time. Miscues are common and, when made, essentially convert the "80% lower" into scrap metal. Individuals who undertake this process are hobbyists, not criminals. Even after the receiver is successfully made, the owner would still have to purchase the additional parts, such as a barrel, the trigger, slide and all the internal parts to complete the assembly. All these additional parts are expensive. With the cost of the tools to mill the receiver, plus the cost of the parts, a final assembled homemade gun costs **roughly twice** as much to make as it would to actually buy an identical gun from a dealer.

Moreover, such 3-D printed guns are almost never used in a crime if only because of all the time and expense that is necessary to make such guns. It is far easier and far cheaper to buy an illegal gun on the streets than to make a gun. Yet, these bills would ban the hobby and imprison the hobbyist for the continued possession of any gun that the hobbyist constructed prior to the enactment of the law. That likely includes literally thousands of law-abiding people in Maryland.

Indeed, it is actually **more** expensive to use a 3-D printer to manufacture a firearm from an "80% lower." Manual manipulation is still required. Precision cutting and drilling is still necessary and the chance of errors, while reduced, still abound. Purchase of other parts and assembly is still required. The same federal proscriptions on sale or transfer of such guns still apply. Again, it is far easier and cheaper for the criminals to obtain firearms on the street. Using a 3-D device simply makes that process somewhat easier than the existing manual process that has existed in this country for centuries.

There is nothing threatening or dangerous about this process. Using a computer does not produce any firearm that could not be otherwise produced by hand, using manual processes and hand tools. The use of the computer just ameliorates the risk of the possible errors associated with milling the 80% lowers into a functional receiver. **The resulting receiver is the exactly the same, functionally, as a receiver milled by hand.** Any sale of a finished receiver is banned by federal law, regardless of how it is manufactured. That is because a finished receiver is classified as a 'firearm" under federal law, 18 U.S.C. 921(a)(3), just as it is under existing Maryland law, MD Code, Public Safety, § 5-101(h)(1)(ii). Thus, the receiver can only be used in a homemade gun made solely for personal use.

Moreover, the idea that 3-D printed guns are undetectable is nonsense. Current federal law makes it unlawful to "manufacture, import, sell, ship, deliver, possess, transfer, or receive" any firearm that is not "detectable" by a "Security Exemplar" or any "major component" of which does not show up accurately on airport x-ray machines. See 18 U.S.C. § 922(p). A knowing violation of that prohibition is a federal felony, punishable by five years of imprisonment and a fine. See 18 U.S.C. § 924(f). As a practical matter, a 3-D gun would need to have a metal barrel and a metal firing pin, at the very least. Both of these items would easily satisfy the requirement of being detectable by a Security Exemplar as firearm component. See Section 922(p)(2). The idea that an owner could easily 3-D print a barrel is unfounded. 3-D printed plastic barrels simply would quickly deteriorate upon use, even assuming that it withstood the firing of the first round of any modern ammunition. For example, a standard 9mm handgun round generates around 36,000 PSI in the chamber upon firing. https://www.gunnuts.net/2009/04/03/9mm-nato-vs-9mm-luger/. Firing a 3-D gun with a plastic barrel borders on Russian roulette.

B. These Bills Would Do Nothing To Prevent Or Deter Criminals From Acquiring Guns While Criminalizing Existing, Law-Abiding Owners

The bans on manufacturing and possession imposed by the bill would also not stop any person from actually acquiring "80% lowers" or the other parts necessary to manufacture firearms. Such items are not "firearms" under federal law and thus are not regulated by federal law. These "80% lowers" and other parts are available across state lines, over-the-counter, on-line and by mail order and would remain thus available, even if these bills should become law. The bills would simply criminalize the manufacture and possession of an actual firearm created using a 3-D printer. Nothing in all the bans imposed by this bill would actually stop any criminal or disqualified person from acquiring all the hardware necessary to make his own gun, including the 80% lower. The computer software that this bill would attempt to ban is freely available in multiple places on the Internet. See, e.g., https://www.recoilweb.com/where-to-find-3d-printed-gun-files-140438.html. These bills cannot possibly stop that publication – it is available to every person with a computer and

a connection to the Internet. A disqualified person or criminal would not be deterred by the ban on downloading the software or the ban on manufacturing or possession of a completed gun, since such a disqualified person is **already** precluded by federal law from possessing **any** modern firearm or modern ammunition of **any** type. 18 U.S.C. § 922(g). Actual or constructive possession of a modern firearm or ammunition by a person subject to this firearms disability is a felony, punishable by up to **10** years imprisonment under federal law. See 18 U.S.C. § 924(a)(2). The same disqualification and similar punishments are also **already** imposed under existing Maryland law. See MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1).

In contrast, if this bill became, few existing, otherwise law-abiding owners of these homemade guns will know or realize that they have become criminals. Actual compliance by existing owners will thus likely be virtually non-existent. Enforcement on this ban on possession of the software and the completed gun will be both very difficult and arbitrary. In short, these bills are utterly **pointless** as a public safety measure. It would succeed only in criminalizing and potentially imprisoning otherwise law-abiding hobbyists. That result is impossible to justify as a matter of sound public policy. Plainly, little thought has gone into this bill.

C. The Bills Violate The First Amendment

The whopper in these bill is that it would provide that a person may not "DISTRIBUTE A COMPUTER PROGRAM DESIGNED FOR THE SPECIFIC PURPOSE OF MANUFACTURING, CAUSING TO BE MANUFACTURED, ASSEMBLING, OR CONSTRUCTING A FIREARM USING A 3–DIMENSIONAL PRINTER." This ban is a gross violation of the First Amendment.

First, there is no doubt that computer "software" or a "computer program" is fully protected by the First Amendment. See, e.g., *Junger v. Daley*, 209 F.3d 481, 482 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) ("[C]omputer code, and computer programs constructed from code can merit First Amendment protection."). Banning computer programs is thus akin to banning a book and banning distribution of computer code is thus akin to banning the distribution of a book. If passed, the General Assembly would turn law enforcement officers into censors.

Second, even worse, the ban imposed by these bills is a purely "content-based" prior restraint on a First Amendment activities. See *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). Under *Reed*, a facially content-neutral law will still be categorized as content based if it "cannot be "'justified without reference to the content of the regulated speech,'" or ... adopted by the government 'because of disagreement with the message [the speech] conveys.'" Id. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Here, there is nothing facially neutral about the ban imposed by this bill. Rather, the bill is expressly content-based as it bans specifically only software that is "DESIGNED FOR THE SPECIFIC PURPOSE OF MANUFACTURING, CAUSING TO BE MANUFACTURED, ASSEMBLING, OR CONSTRUCTING A FIREARM USING A 3–

DIMENSIONAL PRINTER." The ban is based on the sponsor's "disagreement with the message." Such a prior restraint on the message cannot stand.

A "law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal*, 535 U.S. 234, 244 (2002). A content-based regulation of speech is subject to strict scrutiny. *Reed*, 135 S.Ct. at 2231. Under this standard, the government must prove "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Id. (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2817 (2011)). See also *Cahaly v. Larosa*, 796 F.3d (4th Cir. 2015) (applying *Reed* to invalidate a state statute that banned politically-related unsolicited calls made by automatically dialed announcing devices"). There is thus no doubt that the bill is content-based suppression of speech.

Moreover, every American has a First Amendment right to receive information. Although the First Amendment refers only to the right to speak, courts have long recognized that the Amendment also protects the right to receive the speech of others. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (stating that the "First Amendment ... afford[s] the public access to discussion, debate, and the dissemination of information and ideas") *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (ban on advertising of prescription drug prices overturned); *Bigelow v. Virginia*, 421 U.S. 809, (1975) (ban on abortion advertising invalid); *Lamont v. Postmaster General*, 381 U.S. 301, (1965) (a postal regulation limiting the importation of Communist publications overturned); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (ordinance prohibiting door-to-door solicitation invalid as to distribution of leaflets announcing a religious meeting). Thus, every person in Maryland has a constitutional right to receive, purchase or otherwise obtain the very computer software or programs that these bills would ban. The bills are blatantly unconstitutional in banning distribution of protected speech.

Even more fundamentally, the bans imposed by this bill are a form of prior restraint of First Amendment protected material, as the bills broadly state that a person may not DISTRIBUTE A COMPUTER PROGRAM DESIGNED FOR THE SPECIFIC PURPOSE OF MANUFACTURING, CAUSING TO BE MANUFACTURED, ASSEMBLING, OR CONSTRUCTING A FIREARM USING A 3–DIMENSIONAL PRINTER. It is well-established that prior restraints to speech are "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Government thus carries "a heavy burden of showing justification for the imposition of such a restraint." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). The case law uniformly holds that in order to justify a prior restraint, the Government must show that the "expression sought to be restrained surely will result in direct, immediate, and irreparable damage." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980). See also *N.Y. Times*, 403 U.S. at 730. There must be no "alternative measures" available, and the restraint must "effectively ... operate to prevent the threatened danger." *Nebraska Press*, 427 U.S. at 562, 565, 569–70.

Here, using a 3-D printer simply helps in the manufacture of a homemade firearm. This computer code is harmless and as far as we know, has not been used to commit any crime at all, nation-wide. As explained, such manufacture of a homemade gun for personal use is and has been **completely legal** since before the Founding of the United States. There is, in

short, no threat of a legally cognizable "harm" or "danger" whatsoever. The State of Maryland simply may not ban the distribution of this speech.

D. The Bills Are Unconstitutional Under The Second Amendment

Proposed Section 4-604 of these bills create a possession offense, providing that a person may not "POSSESS, SELL, OFFER TO SELL, TRANSFER, PURCHASE, OR RECEIVE:
(I) A FIREARM THAT IS NOT IMPRINTED WITH A SERIAL NUMBER ISSUED BY A FEDERALLY LICENSED FIREARMS MANUFACTURER OR FEDERALLY LICENSED FIREARMS IMPORTER IN COMPLIANCE WITH ALL FEDERAL LAWS AND REGULATIONS REGULATING THE MANUFACTURE AND IMPORT OF FIREARMS; OR
(II) AN OBJECT MARKETED OR ADVERTISED TO BE, OR THAT A REASONABLE PERSON WOULD UNDERSTAND TO BE, DESIGNED FOR THE PURPOSE OF BEING MANUFACTURED, ASSEMBLED, OR CONSTRUCTED INTO THE FRAME OR RECEIVER OF A FIREARM THAT IS NOT IMPRINTED WITH A SERIAL NUMBER ISSUED BY A FEDERALLY LICENSED FIREARMS MANUFACTURER OR FEDERALLY LICENSED FIREARMS IMPORTER IN COMPLIANCE WITH ALL FEDERAL LAWS AND REGULATIONS REGULATING THE MANUFACTURE AND IMPORT OF FIREARMS. Section 4-604 is thus a gun ban, pure and simple.

The criminalization of existing gun owners who have own a firearm without a serial number is vast overkill. Indeed, that criminalization extends not only to the completed firearm, but to any "object" that was marketed as or could be reasonably understood to be for the purpose of being "manufactured" into a "frame or receiver" if the object was without a serial number. This aspect of the bill would thus ban a solid block of aluminum if it was advertised as a "0% lower," *viz.,* a block of solid metal that had not been machined in any way whatsoever.

That overreach violates the Second Amendment right of owners to possess firearms under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742, 750 (2010). Even under the least demanding test ("intermediate scrutiny"), if the State can accomplish its legitimate objectives without a ban (a naked desire to criminalize gun owners is not legitimate), then the State must use that alternative. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). Stated differently, under intermediate scrutiny, the State has the burden to demonstrate that its law does not "burden substantially more [protected conduct] than is necessary to further the government's legitimate interest." Id. at 2535 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). See also *NY State Rifle & Pistol Ass'n. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 2486 (2016) (striking down a 7 round load limit in a firearm magazine because the limit was "untethered from the stated rationale"). See also *Reynolds v. Middleton*, 779 F.3d 222, 232 (4th Cir. 2015) (holding that, under the intermediate scrutiny test as construed in *McCullen*, the government must "*prove* that it actually *tried* other methods to address the problem"). (Emphasis in original).

The test for "strict scrutiny" is even more demanding as, under that test, the State must prove both a "compelling need" and that it used the "least" restrictive alternative in addressing that need. See *United States v. Playboy Entm't. Grp., Inc.*, 529 U.S. 803, 813 (2000). And in *NYSRPA v. NYC*, 883 F.3d 45 (2d Cir. 2018), *cert. granted,* 139 S.Ct. 939 (2019) (S.Ct. Jan 22, 2019), now pending before the Supreme Court on the merits, the Court may well reject both immediate and strict scrutiny tests and hold that the constitutionality

of gun laws must be analyzed under the "text, history and tradition" test that was actually **used** in *Heller* and *McDonald*. See, e.g., *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). There is no "text, history or tradition" that could possibly support the type of ban imposed by these bills.

Again, the use of a 3-D printer to create a perfectly legal homemade gun or gun component does not make that gun illegal in the slightest under long-standing federal law. Banning manufacture or the mere possession of any gun made, in part, by a 3-D printer, cannot be justified under any of these tests. Indeed, the bills' ban on the use of computers is akin to the argument that the Second Amendment protects only muskets that were used during the Revolutionary War, a contention that the Court in *Heller* rejected as "bordering on the frivolous." *Heller*, 554 U.S. at 582.

Heller thus held that guns in "common use" by law abiding persons are prima facie protected arms under the Second Amendment. *Heller*, 554 U.S. at 627. Homemade guns easily satisfy this requirement as there are literally tens of thousands of such guns made over many years throughout the United States. The General Assembly simply may not disregard that reality. See *Caetano v. Massachusetts*, 136 S.Ct.1027 (2016) (summarily reversing Massachusetts' highest court for failing to follow the reasoning of *Heller* in sustaining a state ban on stun guns); *Ramirez v. Commonwealth*, 479 Mass. 331, 332, 352 (2017) (on remand from *Caetano*, holding that "the absolute prohibition against civilian possession of stun guns under § 131J is in violation of the Second Amendment" and declaring the State's absolute ban to be "facially invalid"). Homemade guns are at least as much "in common use" as stun guns at issue in *Caetano*.

Here, these bills purport to address guns without serial numbers because such guns are not "traceable." As explained above, that concern is utterly misplaced as homemade guns are hardly ever used in a crime so there is no need (much less a "compelling" need) to "trace" such guns. Indeed, tracing runs out after identification of the gun's first purchaser and firearms may be sold and resold many times in their lifetime. Criminals, who may not possess firearms at all, will not be deterred by these bills as possession of a firearm by a prohibited person is already a 10-year federal felony. See 18 U.S.C. § 922(g). Few crimes that are solved by tracing guns left at a crime scene as only a small fraction of guns used in crimes are actually traced by the ATF. See David B. Kopel, Clueless: The Misuse of BATF Firearms Tracing Data. http://www.davekopel.org/2A/LawRev/CluelessBATFtracing.htm. See also Police Departments Fail to Regularly Trace Crime Guns. https://www.thetrace.org/2018/12/police-departments-gun-trace-atf/. The ATF itself has cautioned against any use of trace data, noting that "[t]he firearms selected [for tracing] do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe." Bureau of Alcohol, Tobacco, Firearms and Explosives. Firearms Trace Data, 2016: Maryland, https://www.atf.gov/docs/163521-mdatfwebsite15pdf/download. As the ATF further notes, "[n]ot all firearms used in crime are traced and not all firearms traced are used in crime," stating further that "[f]irearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime."

But, if the concern is truly that these guns lack a serial number (rather than a desire to criminalize gun owners), then that concern can be addressed without banning homemade guns and severely criminalizing the owners. Specifically, there are alternatives to bans. For example, a new law passed in California (which is ranked by the Giffords Law Center as having the most restrictive gun laws in the nation) provides that a new resident to the state shall apply to the Department of Justice for a unique serial number within 60 days of arrival for any firearm the resident wishes to possess in the state that the resident previously self-manufactured or self-assembled or a firearm the resident owns, that does not have a unique serial number or other mark of identification. As of July 1, 2018, prior to manufacturing or assembling a new firearm, a person is required to apply to California for a unique serial number. The gun owner is then simply required to engrave that number onto the receiver and report back to California that he or she has done so. As of January 1, 2019, owners of existing guns were required to apply for such serial numbers and perform this engraving. See California Penal Code §§ 29180-29184.

In short, assembly of new homemade guns and existing possession is permitted as long as this serial number is obtained, engraved and reported. California Penal Code §29180. In this way, the owner is identified and the gun is fully "traceable" and thus no longer a so-called "ghost gun." As this law indicates, there is no reason to take the extreme step of flatly banning homemade guns or converting existing owners into criminals. Under *Heller*, the State may not simply reject this alternative simply because a general ban is more convenient or cheaper for the State. Gun owners may not be criminalized for such flimsy reasons. See, e.g., *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 702 n.10 (1989); *Heller v. District of Columbia*, 801 F.3d 264, 310 (D.C. Cir. 2015) (Henderson, J., concurring in part and dissenting in part). Indeed, just this last Session, the House Judiciary Committee favorably reported a bill (HB 740) that expressly required the State Police to conduct a study of this California alternative and that approach was adopted by the full House on third reader. Unaccountably, these bills simply drop an approach that has already passed the House. **Why?**

E. The Bills contain no *Mens Rea* requirement

Nothing in these bills purport to impose any *mens rea* requirement. For example, Section 4-602 bans the use of a 3-D printer to construct a firearm and then states that a person may not "possess, sell, offer to sell, transfer, purchase or receive a firearm" that was made through such a use of a 3-D printer. Such "possession" or "receipt" is a strict liability crime and thus the jail time imposed by the bill could be imposed without regard to whether the possessor even knew if the firearm was made using a 3-D printer. Similarly, mere possession of an "undetectable" firearm is a crime regardless of whether the owner knew that the firearm was "undetectable." The same is true for the ban on possession of any "object," that was advertised as something that could be manufactured into a receiver without a serial number. As noted above, that section punishes mere possession of a raw, solid block of aluminum even though the person never knew that the block had been thus advertised by some vendor, somewhere, sometime in the past.

The lack of any *mens rea* element means that unlike federal firearms law, these bills would impose strict liability for any unwitting or unintentional violation. See *Rehaif v. United States*, 139 S.Ct. 2191 (2019) (holding that the "knowingly" requirement on the federal ban on possession of a firearm by an illegal alien required proof that the alien actually knew

that he was illegally in the United States). Federal law, for example, requires that the person knowingly possess an undetectable firearm of the type covered by 18 U.S.C. 922(p). See 18 U.S.C. 924(f) (imposing punishment for "a person who knowingly violates section 922(p)"). Yet, these bills contain no such *mens rea* requirement.

The absence of reasonable notice and any *mens rea* requirement pose serious Due Process Clause problems. In *Owens v. State*, 352 Md. 66, 679 (1999), the Maryland Court of Appeals ruled that it is "[a] fundamental tenet of due process is that persons of ordinary intelligence and experience have a reasonable opportunity to know what actions are prohibited so that they may conform their conduct according to the law." These bills fail that test. For example, these bills does not purport to prohibit the possession of guns made without the use of a 3-D printer. Yet, such guns may be literally indistinguishable from a gun made with a 3-D printer, as a 3-D printer may have simply been used to make single part, such as a receiver. The ban on "receive" is undefined, thus the bill would impose criminal penalties for the simple act of "receipt" regardless of whether it was a temporary receipt and regardless of whether the person receiving such a gun had any reason to know that a part was manufactured using a 3-D printer. That result is impossible to justify.

Nothing in these bills contain any *mens rea* requirement and thus the bills create, on their face, strict liability crimes. The federal courts "apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text." *Rehaif*, 139 S.Ct. at 2195. Maryland State courts, however, do not follow the same approach, especially where the relevant statute uniformly does not contain any *mens rea* requirement, such as in these bills. See *State of Maryland Central Collection Unit v. Jordan*, 405 Md. 420 (2008). Thus, if the General Assembly does not specify a *mens rea* element, then the risk is real that a person innocent of any conscious wrongdoing will go to jail. The General Assembly should expressly apply a *mens rea* requirement to all parts of these bills, just as the Supreme Court insisted, in *Rehaif*, on applying the "knowingly" requirement under federal firearms law in accordance with the "basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called 'a vicious will.'" *Rehaif*, 139 S.Ct. at 2196, quoting 4 W. Blackstone, Commentaries on the Laws of England 21 (1769). "Scienter requirements advance this basic principle of criminal law by helping to 'separate those who understand the wrongful nature of their act from those who do not.'" (Id.).

F. The Bills Violate The Takings Clause Of The Federal And State Constitutions

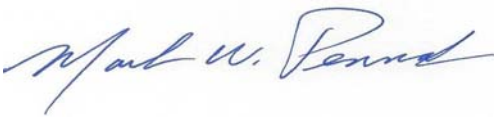
The bills also suffer from a massive Takings problem. Proposed Section 4-604 provides that a person may not (2) **POSSESS**, SELL, OFFER TO SELL, TRANSFER, PURCHASE, OR RECEIVE: I) A FIREARM THAT IS NOT IMPRINTED WITH A SERIAL NUMBER ISSUED BY A FEDERALLY LICENSED FIREARMS MANUFACTURER OR FEDERALLY LICENSED FIREARMS IMPORTER. This prohibition would ban the mere **possession** of any (post-1968) unserialized firearm. That is a Taking under both federal and statute constitutions. Stated differently, because firearms are existing lawful property, such firearms are protected by the Takings Clause of the Fifth Amendment and Article 40 of the Maryland Constitution, both of which indisputably fully protect personal property. *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.

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"). 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 enjoin enforcement of California's ban on continued possession of certain firearm magazines).

Here, the ban on the continued possession of existing firearms obviously "deprives" the existing lawful owner of any "beneficial use" of his property. *Serio*, 384 Md. at 399. Such owners cannot even recover the value of these guns via an out-of-state sale before the effective date of the bill because such a sale is barred by existing federal law. Accordingly, if the State bans continued possession of existing homemade guns, it will be required to pay just compensation. To avoid that result, these bills must, at the very least, be amended to include a "grandfather clause" to protect the property rights of existing owners. A failure to include such a clause will quite likely result in an injunction. Under Maryland law, it is well established that a court may enjoin a statute that violates Article 40 until compensation is provided. *Department of Natural Resources v. Welsh*, 308 Md. 54, 65 (1986). These bills, if enacted, face the same fate. For all these reasons, the bill should receive an unfavorable report.

Sincerely,



Mark W. Pennak
President, Maryland Shall Issue, Inc.
mpennak@marylandshallissue.org