MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 23, 2022

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 659 AND SB 676

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4) all-volunteer, non-partisan, non-profit 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 659 and SB 676.

The Bills:

The bills would amend MD Code Criminal Law § 4-104. Specifically, current law provides that "[a] person may not store or leave a loaded firearm in a location where the person knew or should have known that an unsupervised child would gain access to the firearm." A child is defined for these purposes as a person "under the age of 16 years." These bills would change the definition of a child to any minor (a person under the age of 18 years). The bills then provide that a person may not store or leave any firearm, loaded or unloaded, in a location where a person knew or reasonably should have known that an unsupervised MINOR IS LIKELY TO gain access to the firearm.

The bills then create three categories of prohibitions concerning such access. The first is simply that A PERSON MAY NOT STORE OR LEAVE A FIREARM IN A LOCATION WHERE THE PERSON KNEW OR REASONABLY SHOULD HAVE KNOWN THAT AN UNSUPERVISED MINOR IS LIKELY TO GAIN ACCESS TO THE FIREARM, but the minor does **not** actually gain access. Such storage is punishable with 90 days in prison or a fine of $1,000 or both. The second category is where such storage occurs and AN UNSUPERVISED MINOR DOES GAIN ACCESS TO THE FIREARM. Such storage is punishable by imprisonment by up to 2 years and a $2,500 fine or both. The third category is that the firearm is left WHERE THE PERSON KNEW OR REASONABLY SHOULD HAVE KNOWN THAT AN UNSUPERVISED MINOR IS LIKELY TO GAIN ACCESS and the minor's access RESULTS IN HARM TO THE MINOR OR TO ANOTHER PERSON. Such storage is punishable by up to 3 years imprisonment and a fine of $5,000.

The bills also create a number of "safe harbors" for certain conduct or storage which are exempt from the bills' prohibitions. Specifically, the bills retain current law exemptions for when minor access is supervised by a person 18 or older and where the minor's access is the result of unlawful entry. The bills add an exemption for firearms that are stored UNLOADED, and the ammunition for such firearm is IN A SECURE LOCATION WHERE A MINOR IS NOT LIKELY TO GAIN ACCESS TO THE AMMUNITION **and** THE FIREARM: 1. SECURED IN A LOCKED CONTAINER THAT IS EQUIPPED WITH A TAMPER-RESISTANT LOCK; OR 2. RENDERED INOPERABLE TO ANYONE OTHER THAN AN AUTHORIZED ADULT. The bill also retains the existing law's exemption for a minor who has a certificate of firearm and hunter safety issued by the State, but restricts that access solely to a rifle or shotgun and adds the caveat that the minor must have BEEN GIVEN EXPRESS PERMISSION BY THE MINOR'S PARENT OR GUARDIAN TO ACCESS THE RIFLE OR SHOTGUN FOR THE PURPOSE OF ENGAGING IN A LAWFUL ACTIVITY.

Due Process:

Hopelessly vague is the exemption for firearms left or stored unloaded **and** "RENDERED INOPERABLE TO ANYONE OTHER THAN AN ADULT." It is virtually impossible to know what this means, as a practical matter. We know of no manner of storage in which the firearm **is** operable by an 18-year-old, but **is not** operable by a 17-year-old. The bills offer no definition for such storage and the ordinary gun owner would simply have to guess at the meaning of this requirement. Under the Due Process Clauses of the Fifth and Fourteenth Amendments, a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). See also *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.").

The same is true under Article 24 of the Maryland Declaration of Rights. Under Article 24, "[t]he void-for-vagueness doctrine as applied to the analysis of penal statutes requires that the statute be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Galloway v. State*, 365 Md. 599, 614, 781 A.2d 851 (2001). Under Article 24, a statute must provide "legally fixed standards and adequate guidelines for police ... and others whose obligation it is to enforce, apply, and administer [it]" and "must eschew arbitrary enforcement in addition to being intelligible to the reasonable person." (Id. at 615). Under this test, a statute must be struck down if it is "'so broad as to be susceptible to irrational and selective patterns of enforcement.'" (Id. at 616). Thus, as the Maryland Court of Appeals has stressed, the General Assembly has an "obligation to establish adequate guidelines for enforcement of the law." *Ashton v. Brown*, 339 Md. 70, 88, 660 A.2d 447, 456 (1995). These bills are penal statutes and utterly fail to satisfy either the Due Process Clause or Article 24. If enacted, the bills will fail in a pre-enforcement challenge on these grounds alone. *Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 343-44, 235 A.3d 873 (2020).

Similarly vague is the exemption for a firearm that is stored UNLOADED and where the ammunition is stored in A SECURE LOCATION WHERE A MINOR IS NOT LIKELY TO

GAIN ACCESS TO THE AMMUNITION and where the firearm itself is SECURED IN A LOCKED CONTAINER THAT IS EQUIPPED WITH A TAMPER–RESISTANT LOCK. The bills do not attempt to define a "SECURE location" which is a requirement **in addition to** the requirement that the location must be where a minor IS NOT LIKELY TO GAIN ACCESS. One would have thought that a location where the minor is not likely to gain access to the ammunition would be sufficiently secure, but not under these bills. The location must also be "SECURE," a term that the bills do not define. The owner is left at sea as to the meaning of SECURE locations. The bills do not even define "unloaded," a term that is open to multiple meanings.

Finally, in order for the owner to be entitled to rely on this exemption, the firearm itself must be SECURED IN A LOCKED CONTAINER THAT IS EQUIPPED WITH A TAMPER–RESISTANT LOCK. The bills contain no definition or any standard to assess the meaning of "TAMPER-RESISTANT." The dictionary definitions for the term "tamper-resistant" address the term in the context of prescription bottles or electronic devices, but those definitions do not address locks used to store items such firearms. The term is not in general usage in the firearms industry. Need the lock be tamper-resistant to a small child or to a 17-year-old or both? The bills give no clue. This requirement of a tamper-resistant lock is also unnecessary. It should be quite sufficient to the bills' purpose that the firearm is unloaded, that the ammunition is inaccessible to a minor and the firearm itself is locked in some manner.

Second Amendment:

The bills also create massive problems under the Second Amendment. A criminalization of home possession of a firearm is flatly unconstitutional under *District of Columbia v. Heller*, 554 U.S. 570 (2008). Under *Heller*, responsible, law-abiding adults have a constitutional right to keep firearms in the home in order to exercise their right of armed self-defense. The Second Amendment **"elevates above all other interests** the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Thus, in *Heller*, the Supreme Court struck down as unconstitutional DC's safe storage law that required a firearm to be "disassembled or bound by a trigger lock at all times." (Id. at 628). The Court held this requirement unconstitutionally burdened the right to self-defense in the home because the requirement prevented residents from rendering their firearms "operable for the purpose of ***immediate*** self-defense." Id. at 635 (emphasis added).

In *Heller*, the Court ruled that handguns could not be banned as "the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Under these bills, an unsupervised minor with a firearms safety certificate is only allowed to access a rifle or a shotgun with the express permission of his or her parents, and is completely barred from accessing a handgun (loaded or unloaded). There is no exemption for emergency access to a handgun (or to a long gun if the minor does not have a certificate), such as to repel an armed intrusion into the home. Yet, such preclusion of emergency access to a firearm is flatly inconsistent with MD Code, Public Safety, § 5-133(d)(2)(iv), which allows possession of a handgun by a person under 21 "**for self-defense or the defense of others against a trespasser into the residence of the person in possession or into a residence in which the person in possession is an invited guest**." Such self-defense uses by minors are hardly uncommon. https://lawnews.tv/examples-of-kids-using-guns-to-defend-themselves/. See also https://www.wymt.com/content/news/14-year-old-girl-fires-gun-to-save-sisters-

from-intruder-526603881.html (14 year old girl used a 9mm pistol to defend herself and her younger sisters from a home break-in). Under these bills, such access by a minor for self-defense could result in three years of imprisonment for the minor's parents, if the minor actually "harms" the home invader, and two years of imprisonment if the intruder runs away and the minor does not "harm" anyone. And that would true even though the minor's possession was perfectly legal under Section 5-133(d)(2)(iv). Respectfully, that result is absurd.

While the bills pertain to storage rather than requiring that the firearms be locked up "at all times," storage is a practical necessity for possession in the home as it is utterly impossible to wear or carry a firearm 24/7. For example, one does not sleep or take a shower while carrying a firearm on one's person. In *Jackson v. San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*, 576 U.S. 1013 (2015), the Ninth Circuit sustained a San Francisco safe storage law that required that **a handgun** be locked up in a container **or secured with a trigger lock**, but exempted from that requirement a "handgun is carried on the person of an individual over the age of 18." These bills would likewise permit a person to carry a firearm on his or her person in the home, a right recognized by other Maryland law. See, e.g., MD Code, Criminal Law, § 4-203(b)(6). Yet, even though the Supreme Court denied review of the Ninth Circuit's decision, the dissent of Justice of Justice Thomas and Justice Scalia from that denial is particularly powerful. That dissent would have taken the case because that San Francisco law "burdens their right to self-defense at the times they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed." *Jackson v. San Francisco*, 576 U.S. at 1013 (2015) (Thomas, J., dissenting). It is, of course, well established that a denial of certiorari has "no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Reed v. Texas*, 140 S.Ct. 686, 689 (2020) (Sotomayor, statement respecting the denial of certiorari) (citation omitted). These bills, if enacted, would create an ideal opportunity for litigating the scope of *Heller's* holding on this issue. As noted below, the Court has recently resumed granting review in Second Amendment cases after a decade-long hiatus.

In any event, these bills apply to **all** firearms (other than antiques), not merely handguns, as in *Jackson*, and the storage requirements are more severe than presented in either *Heller* or in *Jackson*. Specifically, these bills create an exemption only where 1. the firearm is unloaded, 2. the ammunition for the firearm is stored in a "secure" location where a minor's access is unlikely, and 3. the firearm itself must be locked up in a CONTAINER that has a TAMPER-RESISTANT LOCK. A trigger lock, which DC thought sufficient under the statute **invalidated** in *Heller* as did San Francisco under the ordinance sustained in *Jackson*, is **insufficient** under these bills. Ironically, a trigger lock is sold as a security device approved by the Maryland Roster Board under MD Code, Public Safety § 5-132(c). Indeed, it would appear that **none** of the devices on that Roster Board list would be sufficient under these bills. http://bitly.ws/oE4X. Such devices also satisfy 18 U.S.C. § 921(a)(34) (defining a "secure gun storage or safety device" to mean "a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device"). Such devices meet the requirement imposed on federal licensees by 18 U.S.C. § 923(d)(1)(G), to have safety storage devices available at dealer locations. We see no possible justification for eliminating such approved devices. Under these bills, a person purchasing a firearm with such an approved safety device could still become a criminal the moment he or she arrived home. Another trap for the unwary.

The proper analysis for cases arising under the Second Amendment is presently before the Supreme Court on a writ of certiorari granted in *NYSRPA v. Bruen*, No. 20-843, *cert. granted*, 141 S.Ct. 2566 (2021), a case involving a challenge to New York's "good cause" requirement for carry permits. That case was orally argued before the Court on November 3, 2021, and awaits a decision by the Court. We believe that it is highly likely that the Supreme Court will, in *Bruen*, strike down the New York law at issue in that case. In so holding, the *Bruen* Court also may well make clear that the "text, history and tradition" test, actually used in *Heller*, is controlling in determining the constitutionality of gun control legislation – not tiers of scrutiny employed by lower courts. Petitioners in *Bruen* have specifically requested such a ruling in briefing and the issue came up repeatedly at oral argument. Indeed, the amicus brief, filed by the United States in *Bruen,* likewise endorsed this test, at least in part.

Four members of the Supreme Court recently endorsed this text, history and tradition approach in *NY State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S.Ct. 1525 (2020). See id. at 1526 (Kavanaugh, J.) (concurring in judgment of mootness). Id. at 1540-41 (Alito, J., dissenting from the judgment of mootness). Justice Thomas made the same point very recently in another case. *Rogers v. Grewal*, 140 S.Ct.1865, 1868 (2020) (Thomas, J., dissenting from denial of certiorari). See also *Heller v. District of Columbia* (i.e. "*Heller II*"), 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."). With Justice Barrett now joining the Court, we believe that a solid majority of the Court will adopt the "text, history and tradition" test as controlling. See *Kanter v. Barr*, 919 F.3d 437, 452-53 (7th Cir. 2019) (Barrett, J., dissenting). These bills will not survive scrutiny under that test as there is no history or tradition at the time of the Founding for storage requirements, such as imposed by these bills. Nothing in the text of the Second Amendment makes it inapplicable to storage requirements, as *Heller* makes clear.

In any event, these storage requirements will fail even under a tiers of scrutiny approach. From the time that it adopted the two-part analysis in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), the Fourth Circuit has stated repeatedly that if a challenged law implicates the core right of a law-abiding, responsible citizen to possess a firearm in his or her home, the law is subject to a strict scrutiny analysis. To satisfy strict scrutiny, the State must establish that the challenged laws are narrowly tailored to promote a compelling government interest. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 189 (4th Cir. 2013). To be narrowly tailored under strict scrutiny, the law must employ **the least restrictive** means to achieve the interest. There is nothing "least restrictive" about these bills as the bills impose storage requirements, such as tamper-resistant locks and containers, which are not the least restrictive means for the protection of minors.

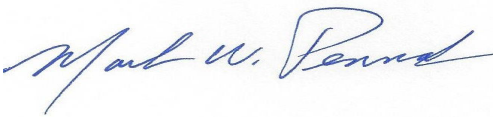
The State will have a difficult time carrying its burden to justify these storage requirements, even under intermediate scrutiny. Even under intermediate scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The Supreme Court has made clear that "to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" *Packingham v. N.C.*, 137 S. Ct. 1730, 1732 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). These bills would fail that test. See *Johnson v. Lyon*, 406 F.Supp.3d 651, 669 (W.D. Mich. 2018) (denying the State's motion to dismiss a suit challenging firearm safe

storage requirements for foster parents under intermediate scrutiny). These bills are simply not "narrowly tailored." After all, these bills **broaden** the prohibitions set forth in current law and thus make it *more* difficult for the homeowner to access a firearm for "immediate" self-defense.

The Bills' Treatment of Unloaded Guns Is Unconstitutional and Unnecessary:

The bills would change the focus of existing law on access to a "loaded" gun into a ban on access to either a loaded or an **unloaded** gun. Reasonable limits on access to a loaded gun might make sense in some circumstances, as an untrained small child in the home might accidentally discharge a loaded gun. But to criminalize the possibility that a minor (any minor) might access an **unloaded** gun makes no sense at all. An unloaded gun is no more dangerous than a brick and far less dangerous than a knife or a baseball bat or many other household items. In *Heller*, the Court stated that its ruling invalidating the DC law did not suggest "the invalidity of laws regulating the storage of firearms to prevent **accidents**." (554 U.S. at 632). That *dicta* cannot be read as swallowing the holding in *Heller*. Again, *Heller* held that the Second Amendment "elevates above **all other interests** the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. "All" means all. See *Heller*, 554 U.S. at 636 ("the enshrinement of constitutional rights necessarily takes certain policy choices off the table"). Thus, storage laws may not make it impossible or difficult for the owner to use the firearm for "immediate" self-defense. Requiring a firearm to be stored "unloaded" ensures that firearm will not be available for immediate use for self-defense in the home. Criminalizing storage of an unloaded gun is thus particularly unjustifiable under *Heller*. We urge an unfavorable report.

Sincerely,



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