MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 2, 2024

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN IN OPPOSITION TO SB 324 AND HB 546

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), 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 SB 324 and its cross-file, HB 546.

The Bill

This Bill creates a new section 5-315 of the Public Safety Article of the Maryland Code to require that every person who holds a wear and carry permit in Maryland must sign up for and receive additional training within 6 months of any "accidental discharge" by such person of any firearm. The term "accidental discharge" is broadly defined to mean THE UNINTENDED DISCHARGING OF A FIREARM THAT CAUSES: (I) INJURY TO OR DEATH OF A PERSON; OR (II) PROPERTY DAMAGE." Such a person must register for a certified firearms safety training within 90 days of the accidental discharge and complete such training within 6 months. The Bill further directs the State Police to revoke the revocation of the wear and carry permit for any failure to register for or obtain the required training within these specified time limits.

The Bill Is Overbroad:

The Bill proceeds on the mistaken premise that every unintended discharge is evidence of a need for additional training. Under existing Maryland law, as amended last Session with the enactment of HB 824, 2023 Maryland Session Laws, Ch. 651, every permit holder (except for those who are exempted) must receive 16 hours of training. That training includes live fire training in a State Police created

course of fire that is designed to test proficiency and safe handling skills. See MD Code, Public Safety, § 5-306(a-1). Indeed, HB 824 instructed the State Police to "develop, publish, update, and distribute to all State-certified firearms instructors a curriculum of instruction for the topics required for classroom instruction in subsection (a-1) of this section." Id., at § 5-306(a-2). The State Police have implemented that direction. See https://bit.ly/42op9cl. The training mandated by Section 5-306 encompasses every subject specified in this Bill. Every student in these classes must demonstrate safe handling to the satisfaction of a State certified instructor. Every renewal of a wear and carry permit is conditioned on 8 hours of training in these same subjects, including taking and passing the State Police mandated live-fire course. Except for New York (which oddly requires 18 hours of instruction), no State requires more training than Maryland.

The first rule of firearm safety taught in these classes (or any firearms safety course) is that a person must **always** point the firearm in a safe direction. Drilled into each student is the point that a "safe direction" is the direction which would result in the **least amount** of harm, either to persons or to property, from an unintended discharge. Such "damage" may be as simple as an easily patched hole, without more. This Bill covers every unintended discharge that results in **any** damage to property. What the Bill fails to recognize is that such discharges causing minimal damage are evidence that the training **has been successful**, not necessarily evidence that more training is needed. Accidents will happen. Existing training, already mandated by Section 5-306, is designed to lessen the incidence of such discharges **and** to minimize adverse consequences when accidents do occur. In short, an unintended discharge does not necessarily mean that the training failed or that more training is necessary or would prevent any such unintended discharges in the future. Permit holders are the **least** likely persons to have unintended discharges precisely because of the mandated training.

The Bill also premised on the notion that unintended discharges are caused by mishandling. That premise fails to recognize that such an unintended discharge may be caused by a mechanical failure within the firearm itself, not from any failure to follow safe handling procedures. Firearms sometimes fail to work as designed. No amount of safety training will have any effect on unintended discharges caused by mechanical failure. That is part of the reason that individuals are trained to **always** point a firearm in a safe direction. Requiring additional training for persons who have experienced these types of unintended discharges is thus pointless. Yet this Bill would require additional training for every unintended discharge without regard to the reasons for the discharge or the fault of the individual.

The Bill Is Unconstitutional:

In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court confirmed that the Second Amendment protects a "general right to publicly carry arms for self-defense," *id.* at 2134, and therefore held that New York

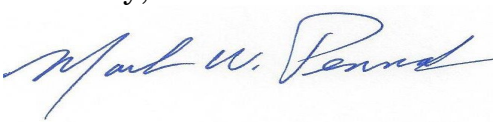
violated the Second Amendment by restricting carry licenses to individuals who could demonstrate a "special need for self-protection distinguishable from that of the general community," *id.* at 2123. The Court suggested, in *obit dicta*, that States may condition the exercise of that right by requiring permits, as long as the permit was issued on a "shall issue" basis by reference to otherwise reasonable and objective criteria. *Bruen*, 142 S.Ct. at 2138 n.9. Permits in Maryland are now issued on a "shall issue" basis. See *Matter of Rounds*, 255 Md.App. 205, 213, 279 A.3d 1048 (2022) (invalidating the "good and substantial reason" requirement then found in MD Code, Public Safety, § 5-306(a)(6)(ii), as contrary to *Bruen*). Within these parameters, the right to carry outside the home is a constitutional right, not a privilege.

The State is not free to tack on additional requirements that condition the exercise of this constitutional right without demonstrating that the restriction is supported by well-established and representative analogous regulations from the Founding era (1791) when the Second Amendment was ratified. Specifically, the *Bruen* Court ruled that "the standard for applying the Second Amendment" "is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129. Under this test, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127.

These principles place a heavy burden on the State. As the Court of Appeals for the Third Circuit very recently explained, "[a]ssessing the similarity of current regulations to those of the founding era calls on us to consider both 'how and why the regulations [being compared] burden a law-abiding citizen's right to armed self-defense.'" *Lara v. Commissioner State Police,* --- 4th ---, 2024 WL 189453 (3d Cir. Jan. 18, 2024), quoting *Bruen*, 142 S.Ct. at 2133) (brackets the court's). Stated simply, there is no "historical tradition of firearm regulation" from the Founding (or any other era) that could possibly justify or be analogous to a statute that mandates the revocation of a person's constitutional right to carry outside the home because of an unintended discharge. The training historically required of members of the militia was limited to the militia, not everyone who carried a weapon outside the home. Moreover, that training was for the purpose of preparing the militia for war, not for the purpose of limiting the right to carry for self-defense, the right protected by the Second Amendment. The 'how and why" of such training are simply different. See *MSI v. Moore*, 86 F.4th 1038, 1048 (4th Cir. 2023), *rehearing en banc granted on other grounds,* 2024 WL 124290 (4th Cir. Jan. 11, 2024) (discussing the militia requirement). The burden would be on the State to prove otherwise. See *Id.,* at 1048-49; *Kipke v. Moore,* --- F.Supp.3d ---, 2023 WL 6381503 (D.MD Sept. 29, 2023) (applying the *Bruen* test to invalidate portions of HB 1, 2023 Maryland Session Laws, Ch. 651, enacted last Session by the General Assembly). The Bill's revocation provisions likely will not survive constitutional challenge.

Nothing in the foregoing discussion should be understood as making light of unintended discharges. It also should be stressed that unintended discharges are already regulated. In some cases, such discharges may be criminal under Maryland reckless endangerment statute. See MD Code, Criminal Law, § 3-204(a) ("a person may not recklessly: (1) engage in conduct that creates a substantial risk of death or serious physical injury to another"). Or the person may be prosecuted for involuntary manslaughter or for assault. See, e.g., *Williams v. State*, 100 Md.App. 468, 486, 641 A.2d 990 (1994) ("'[T]he act of pointing a firearm at a nearby human being, without being certain that the weapon will not discharge, generally is sufficiently reckless to support a conviction for involuntary manslaughter where the unintended discharge of the weapon results in death. Similarly, here, where the discharge of the weapon resulted in a wounding short of death, the same degree of recklessness supports the battery conviction."), quoting *Duckworth v. State*, 323 Md. 532, 541, 594 A.2d 109 (1991). Or a person may be held civilly liable in tort for harm to a person or property. These potentially severe legal consequences provide strong incentives for the safe handling of firearms. Those incentives apply not only to persons who hold a wear and carry permit, but also to all persons who handle firearms. We urge an unfavorable report.

Sincerely,



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