President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 28, 2024

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 430

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 the District of Columbia and the Bar of Maryland. 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 and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in OPPOSITION to HB 430.

The Bill: This Bill amends MD Code, Public Safety, § 5-133(b), to provide that a person may not possess a regulated firearm (a handgun) if the person "HAS BEEN CONVICTED OF FAILING TO MAINTAIN FIREARM LIABILITY INSURANCE UNDER § 5–902 OF THIS TITLE." The Bill then adds Section 5-902 to provide that A PERSON MAY NOT WEAR OR CARRY A FIREARM UNLESS THE PERSON HAS OBTAINED AND IS COVERED BY LIABILITY INSURANCE ISSUED BY AN INSURER AUTHORIZED TO DO BUSINESS IN THE STATE UNDER THE INSURANCE ARTICLE TO COVER CLAIMS FOR PROPERTY DAMAGE, BODILY INJURY, OR DEATH ARISING FROM AN ACCIDENT RESULTING FROM THE PERSON'S USE OR STORAGE OF A FIREARM OF UP TO $300,000 FOR DAMAGES ARISING FROM THE SAME INCIDENT, IN ADDITION TO INTEREST AND COSTS. In addition to the disqualification imposed by the amendments to Section 5-133, new Section 5-902 provides that A PERSON WHO VIOLATES THIS SECTION IS GUILTY OF A MISDEMEANOR AND ON CONVICTION IS SUBJECT TO LOSS OF THE PERSON'S RIGHT TO POSSESS A REGULATED FIREARM, A RIFLE, AND A SHOTGUN. The Bill provides under new Section 5-903 that a person who is convicted of failing to obtain or maintain the $300,000 insurance policy may regain the right to possess a regulated firearm a rifle or a shotgun by thereafter submitting proof to State district court that such insurance has been since obtained.

The Bill Is Unconstitutional Under the Second Amendment.

The insurance mandate imposed by this Bill is flagrantly unconstitutional under the Second Amendment. Section 5-902 enacted by this Bill would abrogate a person's right to "wear and carry a firearm" if the person does not obtain the required $300,000 liability insurance. By amending Section 5-133, the Bill also makes clear that such a failure to obtain such insurance **also** abrogates the right to merely **possess** a handgun (or other regulated firearm). And, worse still, a violation of Section 5-902 also would result in the abrogation of a person's right to possess any handgun, rifle, or shotgun. In short, the failure by a person who has a "wear and carry" permit to obtain insurance would destroy the Second Amendment right to "keep and bear" **any** arms whatsoever. As such the Bill is plainly unconstitutional under the Second Amendment.

New York State Rifle & Pistol Association v. Bruen, 597 U.S. 1 (2022), established the straightforward standard governing all Second Amendment challenges. First, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." Id. at 17. Second, a law burdening that protected conduct is unconstitutional unless the government "demonstrate[s] that the regulation is consistent with this Nation's historical tradition of firearm regulation." Id. The government's only way to meet that burden is to "affirmatively prove" based on "historical precedent" that an "enduring" and "comparable tradition of regulation" supports the challenged law. Id. at 19, 27, 67. Bruen requires courts to examine the "how and why" of supposedly analogous laws when analyzing the historical record—i.e., "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." Id. at 29.

The Second Amendment's "plain text covers" the right of law-abiding citizens to possess a handgun for self-defense in the home. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding Second Amendment's text "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"). And in *Bruen*, the Supreme Court likewise confirmed that the Second Amendment protects a "general right to publicly carry arms for self–defense," 597 U.S. at 31, 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 12.

This Bill conditions that right to carry outside the home recognized in *Bruen* by imposing an insurance mandate on persons who have a State-issued wear and carry permit. It then enforces that mandate by punishing a violation with a complete abrogation of the person's right to even possess a handgun, a rifle, or a shotgun. In imposing that condition on wear and carry permit holders and in banning possession of regulated firearms, rifles and shotguns, the Bill obviously intrudes on conduct protected by the text of the Second Amendment. Thus, under step two of the *Bruen* test, the burden is **on the State** to prove that the insurance mandate "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. The relevant historical period for these purposes is the Founding Era,

i.e., around 1791. See *Lara v. Commissioner Pennsylvania State Police,* 91 F.4th 122, 134 (3d Cir. 2024) ("to maintain consistency in our interpretation of constitutional provisions, we hold that the Second Amendment should be understood according to its public meaning in 1791").

The Bill's insurance mandate fails that historical inquiry. There simply were not insurance mandates during the Founding, much less any tradition abrogating the right to keep and bear arms for failure to obtain such insurance. Indeed, in the modern era, only **one** State has imposed such a mandate. That State is New Jersey, and this Bill is obviously modelled after the New Jersey statute. See N.J. Stat. Ann. §§ 2C:58-4.3. In *Koons v. Platkin*, 2023 WL 3478604, at *62 (D.N.J. May 16, 2023), *appeal pending,* Nos. 23-1900 & 23-2043 (3d Cir.), the federal district court in New Jersey struck down that mandate on grounds it lacked any analogous historical support required by *Bruen*. See *Koons*, 2023 WL 3478604 at *38–*42. This Bill will suffer the same fate for the same reasons. New Jersey's appeal (and the cross-appeal) on this and other issues in *Koons* was argued on October 25, 2023. A decision is likely soon.

The only other authority on insurance mandates is *National Association for Gun Rights, Inc. v. City of San Jose*, 2023 WL 4552284 (July 13, 2023), *appeal pending* No. 23-16091 (9th Cir.), and that case involved a city–imposed insurance mandate, not a State mandate. The district court there had previously recognized that an insurance mandate squarely implicated the Second Amendment's text. *National Association for Gun Rights, Inc. v. City of San Jose*, 618 F.Supp.3d 901, 915-16 (N.D. Cal. 2022). In a subsequent decision on step two of the *Bruen* test, the court ruled there that historical surety laws were sufficiently analogous under *Bruen*. That latter holding in *City of San Jose* is simply wrong.

First, as *Bruen* explained when examining these **very same laws**, the surety statutes required "only those" "reasonably accused of intending to injure another or breach the peace" "to post bond before carrying weapons in public"—and, even then, there is "little evidence that authorities ever enforced surety laws." 597 U.S. at 57-58. As the Court noted, the burdens imposed by surety laws "on the right to public carry" were "insignificant." Id., at 57. See also *Wrenn v. District of* Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017) (noting "surety laws * * * only burdened someone reasonably accused of posing a threat," noting further that a person subject to such a bond "could go on carrying without criminal penalty").

The insurance mandate and the firearms disqualifications imposed by this Bill, are not even remotely "comparable" to surety laws. The Bill also fails the "how and why" inquiry required by *Bruen*. The "why" of a surety law is to address a person judicially found to pose an actual threat. No such finding is required by this Bill. The "how" was merely to require an "insignificant" restriction on the right to carry in public (a bond), not to impose total firearms disqualifications on the possession and/or carry of any firearm, such as imposed by this Bill. For these reasons, the district court in *Koons* expressly rejected surety laws as analogous under *Bruen*. See *Koons*, 2023 WL 3478604 at *38-*41. The *Koons* court also noted that unlike the New Jersey law (and unlike this Bill) the San Jose ordinance did not impose a firearms disqualification and its firearms impoundment provision was rendered

"'inoperable' because the City of San Jose recognized that 'there [was] no currently federal or state law authorizing the City to impound firearms' under the local law." Id. at *40. The firearms disqualifications created by this Bill thus impose a far greater burdens on Second Amendment rights than at issue in *City of San Jose*.

The Mandated Insurance Is Not Commercially Available.

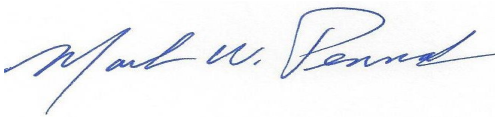
The Bill requires a wear and carry permit holder to obtain a type of insurance that is simply not available. While homeowner and rental insurance policies offers general liability insurance, such policies do not mention or address CLAIMS FOR PROPERTY DAMAGE, BODILY INJURY, OR DEATH ARISING FROM AN ACCIDENT RESULTING FROM THE PERSON'S USE OR STORAGE OF A FIREARM, the type of claim specified in this Bill. Nor do such policies necessarily offer $300,000 in liability protection. The policies are silent on such harms. We have found no case that has applied general liability coverage language to the type of claims specified in this Bill. See, e.g., *Smith v. Stover*, 179 N.C.App. 843, 635 S.E.2d 501 (2006) (denying coverage for the use of a firearm). Indeed, carriers often exclude such claims. See, e.g., *Hunt v. Capitol Indem. Corp.*, 266 S.W.3d 341, 344 (Missouri Ct. of Apps. 2000).

But even assuming *arguendo* that insurance for renters and homeowners covers such liability, nothing in Maryland law conditions the availability of a wear and carry permit on being a renter or homeowner. Nor would such irrational discrimination against non-renters or non-homeowners be constitutional under the Second Amendment or the Equal Protection Clause of the Fourteenth Amendment. It is certainly clear that "[n]o major national or regional insurer offers separate gun liability coverage." https://www.forbes.com/advisor/homeowners-insurance/gun-insurance/. In short, the Bill mandates a specific type of insurance coverage that is simply not commercially available.

There is no assurance that insurance carriers licensed to do business in this State will offer such insurance should this Bill be enacted into law. Such policies may be viewed as exposing carriers to "reputational risk" and impose difficult (if not impossible) uncertainties for calibrating risk for purpose of arriving at a premium. Indeed, New York forced insurance carriers in that State to cancel similar policies for carry permit holders because of "reputational risk." See *National Rifle Association of America v. Vullo,* 49 F.4th 700, 706 (2d Cir. 2022), *cert. granted*, 144 S.Ct. 375 (Nov 03, 2023). Insurance carriers are, by nature, risk averse (especially where premiums are difficult to calculate) and may not wish to insure against the type of claims specified in this Bill. Nothing in this Bill would force any carrier to provide such insurance. State law may not demand the impossible or the unworkable. See, e.g., *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 580 U.S. 386, 393 (2017).

For all the foregoing reasons, we urge an unfavorable report.

Sincerely,



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