MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 5, 2024

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN SUPPORT OF HB 268 and HB 269

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 SUPPORT of HB 268 and HB 269.

The Bills: HB 268 amends the definition of "expunge" and "expungement" as used in Maryland law, MD Code, Criminal Procedure, § 10-101(d) and (e), to delete that part of the definition that refers to "public inspection." HB 269 amends MD Code, Criminal Procedure, §10-109(a)(3)(ii) and (iii), to make clear that the refusal of a person to give information about an expunged conviction does not, by itself permit the State or a political subdivision of the State "to deny the person's application FOR A LICENSE, PERMIT, REGISTRATION, 1OR GOVERNMENTAL SERVICE" or for "AN EDUCATIONAL INSTITUTION TO EXPEL OR REFUSE TO ADMIT THE PERSON. The Bills do not add to or subtract from the scope or availability of expungements under existing Maryland law. See MD Code, Criminal Procedure, § 10-105.

The Statutory Scheme: Federal and State law has long recognized the restoration of rights by expungement. For example, federal law, 18 U.S.C. § 921(a)(33)(B)(ii), makes clear that conviction of an otherwise disqualifying "misdemeanor crime of domestic violence" under State law is not disqualifying if the conviction "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." Similarly, 18 U.S.C. § 921(a)(20) provides that "[a]ny conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

Maryland law likewise allows for expungement of convictions or arrests for a variety of offenses, none of which are violent crimes. See MD Code, Criminal Procedure, §§ 10-105, 10-110. Maryland law makes clear that the term "convicted of a disqualifying crime" "does not include a case" * * * (ii) that was expunged under Title 10, Subtitle 1 of the Criminal Procedure Article." MD Code, Public Safety, § 5-101(b-1)(2). Maryland law, MD Code, Criminal Procedure, § 10-108, further provides that these expunged records are sealed, stating that "[a] person may not open or review an expunged record or disclose to another person any information from that record without a court order from: (1) the court that ordered the record expunged; or (2) the District Court that has venue in the case of a police record expunged under § 10-103 of this subtitle.

Indeed, Section 10-108(d) currently makes it a crime to improperly access expunged records, providing that "[a] person who violates this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year or both." In addition, "an official or employee of the State or a political subdivision of the State who is convicted under this section may be removed or dismissed from public service." Section 10-108(c) does permit a State's Attorney to reopen and examine expunged records where "(i) the expunged record is needed by a law enforcement unit for a pending criminal investigation; and (ii) the investigation will be jeopardized, or life or property will be endangered without immediate access to the expunged record." These Bills leave *unchanged* all these provisions of State law. Nothing in these Bills would expand expungements or allow violent criminals to obtain expungements. State's Attorneys would continue to get notice of any application for an expungement and would continue to enjoy the right to object to any expungement application. MD Code, Criminal Procedure, § 10-105(c).

The Bills Are Necessary:

The FBI has informed the Maryland State Police that, in its view, Maryland expungements are not "expungements" under federal law, as defined in 18 U.S.C. § 921(a)(20), and 18 U.S.C. § 921(a)(33)(B)(ii), because the Maryland definition of expungement merely applies to removal of records "from public inspection." The FBI controls the NICS database authorized by the Brady Handgun Violence Act, Pub. L. 103-412 (1993). That NICS database is used by firearms dealers and the Maryland State Police for background checks on firearms purchases and transfers. See 18 U.S.C. § 922(t). It is also used by the State Police for doing background checks for the Handgun Qualification License and the Maryland wear and carry permit. Accordingly, the FBI's stance effectively continues to disqualify Maryland residents whose convictions remain in the NICS database even if those convictions have been expunged and therefore are no longer disqualifying under State law. HB 268 removes the phrase "from public inspection" from the definition of "expunge" and "expungement" and will thus obviate the FBI's objection and give full effect to Maryland expungements. Bill 269 further implements these changes by making clear that a person may rely on the expungement when applying "FOR A LICENSE, PERMIT, REGISTRATION, OR GOVERNMENTAL SERVICE" or for purposes of being admitted to or remaining at "AN EDUCATION INSTITUTION."

These Bills will give full effect to Maryland expungements and that is as it should be. The whole point of expungement is to allow individuals a "second chance," not only from the prying eyes of private employers and educational institutions but also as to continued use of expunged convictions by the government itself. An example illustrates the point.

Maryland law allows expungement for convictions for marijuana possession. MD Code, Criminal Procedure, § 10-105(a)(12). That expungement provision is for good reasons. In 2022, a majority of Maryland voters approved the 2022 Maryland Question 4 referendum to legalize recreational use of cannabis, with 67.2% of voters in favor and 32.8% against. That constitutional amendment took effect on July 1, 2023. Marijuana possession for personal use is now fully legal in Maryland, MD Code, Criminal Law, § 5-601(a)(1)(ii).

However, it was not that long ago that possession of marijuana in Maryland was a serious crime, punishable by imprisonment for up to four years. Such a crime was then and still is a fully disqualifying offense. It wasn't until 2011 that Maryland carved out special legalized treatment for medical marijuana. See 2011 Maryland Session Laws Ch. 215. And it wasn't until 2012 that Maryland created a lesser (non-disqualifying) penalty for the possession of small amounts ("less than 10 grams") of marijuana. See 2012 Maryland Session Laws Ch. 194. "In 2010, Maryland had the fifth-highest overall arrest rate for marijuana possession in the United States, with 409 arrests per 100,000 residents." https://en.wikipedia.org/wiki/Cannabis_in_Maryland#cite_note-11. Those arrests disproportionably affected minorities. *Id.* It stands to reason that the convictions that resulted from these arrests are still recorded in the FBI's NICS database and thus continue to be disqualifying.

Federal law, as noted above, expressly accords conclusive weight to State expungements for purposes of federal disqualifiers. In *United States v. Essick*, 935 F.2d 28, 31 (4th Cir. 1991), the Fourth Circuit held that "[i]n enacting the Firearm Owners' Protection Act in 1986, Congress clearly empowered each state" to expunge otherwise disqualifying convictions. See also *United States v. Laskie*, 258 F.3d 1047, 1050-52 (9th Cir. 2001) (overturning a conviction for being a felon in possession of a firearm because an "honorable discharge" of a previous drug conviction was "unequivocal," changed the finding of "Guilty" to "Not Guilty," and released Laskie from "all penalties and disabilities resulting from the crime of which he has been convicted"); *United States v. Aka*, 339 F.Supp.3d 11, 19 (D.D.C. 2018) (holding that DC's disqualifying statute was controlling on the question of disqualification under federal law); *Siperek v. United States*, 270 F. Supp.3d 1242, 1249 (W.D. Wash. 2017) (concluding that the expungement of plaintiff's juvenile adjudication was established under federal law because "Washington law clearly dictates that ... the sealing of a juvenile record constitutes expungement of the juvenile offense" because the statute explicitly states that "the proceedings in the case shall be treated as if they never happened"). The simple amendments made by these Bills will ensure that Maryland expungements fully qualify under federal law.

Second Amendment Issues:

These Bills are intended to give full force to Maryland expungements. Any failure to do so will expose the State to the prospect of liability under *NYSRPA v. Bruen*, 142 S.Ct. 2111 (2022). For example, a federal district court very recently struck down California's disqualification law as applied to individuals whose convictions in other states had been vacated or expunged by these other states. *Linton v. Bonta*, 2024 WL 846241 (N.D. Calif. Feb. 28, 2024). The court in that case recognized that, under *Bruen*, the burden is on the State "'to produce representative analogues to demonstrate that the challenged law is consistent with a historical tradition of regulation.'" Id. at *9, quoting *United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023), quoting *Bruen*, 597 U.S. at 24. As the court

stressed, while that "analogue 'need not be a 'historical twin,' but it must be 'relevantly similar' to the challenged regulation 'as judged by 'at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.'" Id., quoting *Alaniz*, quoting *Bruen*, 597 U.S. at 30, 29. The court held that California had failed to meet that standard. That holding and its reasoning makes clear that any State failure to give full effect to expungements would likely be unconstitutional under *Bruen*.

Even apart from expunged convictions, firearms disqualifications are under heavy legal assault. For example, it is an open question under *Bruen* whether convictions under 18 U.S.C. § 922(g)(3) (imposing a firearms disqualification on any "user" of illegal drugs, including any user of marijuana) can be disqualifying. The Fifth Circuit, in *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023), *petition for certiorari filed, No.* 23-376 (Oct. 10, 2023), held that Section 922(g)(3) was facially unconstitutional under *Bruen*. The district courts in other circuits are split on the point. *Compare Fried v. Garland*, 640 S.Supp.3d 1252 (N.D. Fla. 2022) (prohibiting possession of firearms by unlawful users of controlled substances was consistent with historical tradition of firearms regulation); *United States v. Posey*, 655 F.Supp.3d 762 (N.D. Ind. 2023) (same), *with United States v. Harrison,* 654 F.Supp.3d 1191 (W.D. Okla. 2023) (holding that Section 922(g)(3) was unconstitutional under *Bruen* as applied to the defendant).

Similarly, in *Range v. United States*, 69 F.4th 96 (3d Cir. 2023) (*en banc), petition for certiorari filed,* No. 23-374 (Oct. 10, 2023), the Third Circuit held *en banc* that the firearms disqualification imposed on a non-violent misdemeanant under 18 U.S.C. § 922(g)(1), was unconstitutional as applied to the plaintiff in that case. The violation of the State law at issue in *Range* (food stamp fraud) was punishable by up to 5 years of imprisonment. The Third Circuit recently adhered to *Range* recently in *Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122, 130-31 (3d Cir. 2024). The court also held in that case that "the Second Amendment should be understood according to its public meaning in 1791" when the Bill of Rights was ratified, not 1868 when the Fourteenth Amendment was ratified. 91 F.4th at 134. That holding reinforces the analysis of the district court in *Linton*, discussed above.

The United States has filed petitions for certiorari in both *Range* and in *Daniels* and those petitions are being held by the Supreme Court pending a decision in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *petition for certiorari granted*, No. 22-915, 143 S.Ct. 2688 (June 30, 2023) (argued Nov. 7, 2023). *Rahimi* involves the facial validity of the firearms disqualification imposed by 18 U.S.C. § 922(g)(8), which applies to persons subject to a non *ex parte* court order that:

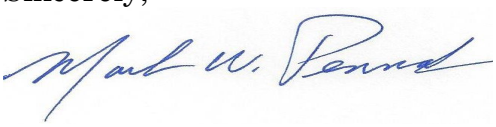
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

Maryland imposes a similar firearms disqualification on a person subject to a non *ex parte* civil protective order entered under Section 4-506 of the Family Law Article or is subject an order for protection under Section 4-508.1 of the Family Law Article. MD Code, Public Safety, §§ 5-133(b)(12), 5-205(b)(12). However, those provisions of the Family Law Article allow a protective order for "abuse," but that term is not limited in the manner specified by Section 922(g)(8). Maryland's disqualification is thus arguably **broader** than the disqualification imposed by the federal law at issue in *Rahimi*.

It should be obvious that a decision in *Rahimi* could well require Maryland to repeal or modify current State law imposing firearms disqualifications. Under current Maryland law, Maryland imposes a life-time firearms disqualification upon conviction of any felony (violent or non-violent) as well as for any conviction for any misdemeanor (including wholly non-violent misdemeanors) punishable by imprisonment for more than two years. See MD Code, Public Safety, § 5-101(g); MD Code, Public Safety, § 5-133(b) (regulated firearms); MD Code, Public Safety, 5-205(b) (long guns). The Court may well hold in *Rahimi* that such disqualifications are impermissible for non-violent offenses or for persons who have not been adjudicated as "dangerous" for some other reason. See, e.g., *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019), *two-step, interest balancing analysis abrogated by Bruen*, 597 U.S. at 18 (Barrett, J., dissenting) ("The historical evidence does, however, support * * * that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety."). Such a holding in *Rahimi* would also put at risk the federal firearms disqualification imposed for any conviction "in any court" of any State or federal felony (violent or non-violent) punishable by more than 1 year of imprisonment, 18 U.S.C. § 922(g)(1), or conviction of any State misdemeanor punishable by imprisonment for more than 2 years. See 28 U.S.C. § 921(a)(20)(B). Failing to give full force and effect to Maryland expungements will likely be even more problematic after *Rahimi*. Of course, these issues await a ruling in *Rahimi*, which will be decided by the end of the Court's Term in June. In the meantime, it makes sense to enact these Bills to give full effect to existing Maryland expungements.

We urge a favorable report on both Bills.

Sincerely,



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