March 11, 2020

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 664

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 SB 664.

This Bill:

This bill proposes an amendment to the Maryland Constitution to create a new State constitutional right of privacy in a new Article 48. The bill provides:

(A) THAT EACH INDIVIDUAL HAS A NATURAL, ESSENTIAL, AND INHERENT RIGHT TO PRIVACY THAT GUARANTEES FREEDOM FROM GOVERNMENT INTRUSION.

(B) THE RIGHT TO PRIVACY INCLUDES THE RIGHT OF AN INDIVIDUAL TO LIVE FREE FROM INTRUSION CAUSED BY OR DIRECTLY TRACEABLE TO THE UNAUTHORIZED COLLECTION OF DATA CONCERNING THE INDIVIDUAL BY ANOTHER.

(C) THE RIGHT TO PRIVACY DOES NOT PROHIBIT THE STATE FROM REGULATING THE SALE OR PURCHASE OF A FIREARM OR AMMUNITION.

(D) THE RIGHT TO PRIVACY MAY NOT BE INFRINGED WITHOUT A SHOWING OF A COMPELLING STATE INTEREST.

(E)(1) THE GENERAL ASSEMBLY MAY PROTECT THE RIGHT TO PRIVACY THROUGHAPPROPRIATE LEGISLATION. (2)THE GOVERNOR MAY ENFORCE THE RIGHT TO PRIVACY THROUGH APPROPRIATE EXECUTIVE ACTION.

The Bill Is Unconstitutional In Its Carve-Out of Gun Owners From The Right of Privacy.

The "right to privacy" created by this bill would recognize the right of persons to a "right to privacy that guarantees freedom from government intrusion" and protect the right of individuals "to live free of intrusion" that would arise from the "unauthorized collection of data by another." The scope of this new right of privacy is, of course, quite unclear. But, no matter unclear in other respects, one thing is clear: this right would not apply to gun owners as it provides that this right of privacy "does not prohibit the state from regulating the sale or purchase of a firearm or ammunition." Thus, as long as the State can justify its governmental "intrusion" and "data collection" as a regulation of "the sale or purchase of a firearm or ammunition" the right to privacy created by the bill would not exist. Under this bill, gun owners, alone of all the citizens in Maryland, are carved out as a special class of citizens who are not protected by this new right of privacy. This carve-out is nothing short of outrageous. It is also blatantly unconstitutional under the 14th Amendment.

The Equal Protection Clause of the 14th Amendment to the Constitution provides that "no State" may "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause prohibits states from creating unreasonable, arbitrary, and invidious classifications. In particular, the State violates this Clause if the law employs suspect classification *or significantly burdens a fundamental right*. See *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988). The courts "apply strict scrutiny under the Equal Protection Clause where * * * the challenged action interferes with a fundamental right." *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County, Maryland*, 915 F.3d 256, 265 (4th Cir. 2019). Under that test, the "government decision fails strict scrutiny if it is not narrowly tailored to advance a compelling state interest." Id., citing *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (citing *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978)).

Here, the Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that all law-abiding, responsible citizens have a constitutional right protected by the Second Amendment to own and use firearms for self-defense. In *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010), the Supreme Court applied *Heller* to the States, holding that"[a] survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms ***among those fundamental rights necessary to the Nation's system of ordered liberty."*** (Emphasis added). The right to own and acquire firearms is no less fundamental than the right to privacy, including the right to marry recognized in *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604-05 (2015) (holding that state laws regulating marriage are "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples"), and the right to privacy addressed by the Supreme Court in other contexts. See, e.g., *Griswold v. Connecticut*, 381 U.S. 478 (1965) (birth control law); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives).

Certainly gun owners have an abiding interest in their personal information and their privacy. See *Ferguson v. City of Charleston*, 186 F.3d 469, 482 (4th Cir. 1999), *rev'd on other grounds* 532 U.S. 67 (2001) (recognizing that an individual's constitutional right to privacy may be implicated when a public official discloses "information that touch[es] on rights that are fundamental or implicit in the concept of ordered liberty." Gun owners, no less than any other law-abiding persons are entitled to protection from "the unauthorized collection of

data concerning the individual by another." Gun owners, no less than anyone else, are entitled to the "natural, essential, and inherent right to privacy that guarantees freedom from government intrusion." See *Whalen v. Roe*, 429 U.S. 589, 599 & n.25 (1977) (recognizing that individuals possess a constitutional "interest in avoiding disclosure of personal matters"). That is especially true where the disclosures of information touch on rights that "are fundamental or implicit in the concept of ordered liberty." *Paul v. Davis*, 424 U.S. 693, 713 (1976). As *McDonald* holds, the fundamental right to keep and bear arms protected by the Second Amendment is "implicit in the concept of ordered liberty."

In short, excluding gun owners from this newly minted State right of privacy is a violation of the Equal Protection Clause because it facially accords persons who have purchased "a firearm or ammunition" disfavored treatment. Such a "purchase" is part and parcel of the Second Amendment right. See *Dearth v. Holder*, 641 F.3d 499, 502 (D.C. Cir. 2011); *Teixeira v. City of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc). See also *Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014) ("[T]he right to keep and bear arms for self-defense under the Second Amendment . . . must also include the right to *acquire* a firearm.") (emphasis in original). Cf. *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010) ("If there were somehow a categorical exception for [commercial] restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*."). The State has no "compelling interest" in facially excluding all gun owners from the right of privacy. Certainly there is nothing "narrowly tailored" associated with such a facial exclusion. The bill would thus fail strict scrutiny.

Stated differently, the State is not empowered to pick and choose fundamental constitutional rights that it will respect and those to which the State will ignore or accord second-class treatment. As the Supreme Court stated in *McDonald,* the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald*, 561 U.S. at 799. See also *Caplin & Drysdale v. United States*, 491 U.S. 617, 628 (2012) ("there is no such distinction between, or hierarchy among, constitutional rights"). The bill, as written, will not survive judicial review should it become part of the Maryland Constitution. We urge an unfavorable report.

Sincerely,

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