MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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# WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 636 AND SB 646

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 HB 636 and SB 646

## The Bills:

These 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." This bill would change the definition of a child to a person under the age of 18 years and modifies the prohibition to provide that a "person may not store or leave a loaded OR UNLOADED firearm in a location where the person knew or should have known that an unsupervised child COULD gain access to the firearm, UNLESS THE FIREARM IS LOCKED." The bills will likewise repeal the exception in existing law that allows a child to have access to firearms if the child has a certificate of firearm and hunter safety issued under § 16 10–301.1 of the Natural Resources Article.

It also changes the punishment. Current law punishes a violation of this section as "a misdemeanor and on conviction is subject to a fine not exceeding $1,000." No prison time is imposed under current law. These bills would create three new layers of offense with increasing punishments. Merely leaving a LOADED or UNLOADED firearm in a "location where the person knew or should have known that an unsupervised MINOR COULD gain access to the firearm," is punishable with 90 days imprisonment and a $1,000 fine. At the next level, leaving a LOADED or UNLOADED firearm in a "location where the person knew or should have known that an unsupervised MINOR COULD gain access to the firearm," and the minor actually gains access is punishable with 2 years of imprisonment and a fine of $2,500. And at the final level, leaving a LOADED or UNLOADED firearm in a "location where the person knew or should have known that an unsupervised MINOR COULD gain

access to the firearm," and "THE FIREARM CAUSES HARM TO THE MINOR OR TO 3 ANOTHER PERSON" is punishable with 5 years of imprisonment and a fine of $5,000.

## THE BILLS ARE DRACONIAN, IMPOSSIBLE TO COMPLY WITH AND PATENTLY UNCONSTITUTIONAL

### Youth Hunting:

As noted, these bills repeal the exception found in current law for a child with a State-issued hunter safety certificate. Such an exception absolutely necessary for youth hunting in this state. It is a traditional for hunters in this state and elsewhere to instruct their sons and daughters in hunting, often starting at a very young age. When such minors are ready (in the judgment of their parents), they are typically allowed to hunt on their own. Such hunting often occurs on the farms or other property of the parents or on property owned by family friends. These bills would criminalize such hunting, thus effectively banning youth hunting in Maryland. The number of hunters is already dropping in Maryland. Yet, Maryland, like other states, is heavily dependent on the fees and taxes paid by hunters to manage wildlife and promote conservation. Thus, Maryland, like other states, is actively seeking to encourage more hunting. See https://www.washingtonpost.com/local/maryland-hopes-to-recruit-new-hunters--and-promote-conservation/2018/11/29/69cccf3e-ecf3-11e8-96d4-0d23f2aaad09_story.html ("The Maryland Department of Natural Resources received $11 million last year, including $7.8 million from hunting expenditures").

This public policy fully applies to youth hunting. Indeed, Maryland law accords "a 1-year gratis hunting license to a Maryland resident under the age of 16 years who has successfully completed a hunter safety course," MD Code Nat. Resources §10-301.l(f)(l), and creates special youth hunting days for hunters under the age of 16. See https://dnr.maryland.gov/huntersguide/Pages/JrHunters.aspx. Over time, these bills, if enacted, will radically reduce youth hunting and hunting in general in Maryland. The General Assembly should seek input from the Department of Natural Resources before enacting these bills.

We know of no state that bans access to minors who are hunters. See, e.g, N.Y. Penal Code 265.45 ("It shall not be a violation of this section to allow a person less than sixteen years of age access to: (i) a firearm, rifle or shotgun for lawful use as authorized under paragraph seven or seven-e of subdivision a of section 265.20 of this article, or (ii) a rifle or shotgun for lawful use as authorized by article eleven of the environmental conservation law when such person less than sixteen years of age is the holder of a hunting license or permit and such rifle or shotgun is used in accordance with such law.").

These bills are a breach of trust. In 2013, when Governor O'Malley pushed hard for enactment of the Firearms Safety Act of 2013 (SB 281), he wrote an email to hunters in Maryland stating that "Let me be clear: We are committed to protecting hunters and their traditions. That's why we specifically carved out shotguns and rifles from the licensing requirements of our bill." https://www.washingtontimes.com/blog/guns/2013/feb/12/miller-omalley-emails-licensed-hunters-push-gun-co/. (Emphasis added). As a licensed hunter in Maryland, the undersigned received that email. There is no more fundamental aspect to "hunters and their traditions" than youth hunting. Now, a mere six years later, "hunters

and their traditions" are under direct assault by these bills. That promise has been broken. The lesson is clear: the General Assembly cannot be trusted.

**Due Process:**

These bills change Section 4-104 from a safe storage measure into a truly draconian and vague law that would severely punish otherwise innocent conduct. It now will severely punish any storage that "could" result in access to the firearm, not "would." That change is highly significant. The Maryland courts commonly refer to standard dictionaries in interpreting legislative language. *Marriott Employees Federal Credit Union v. Motor Vehicle Admin*. 346 Md. 437, 449, 697 A.2d 455 (1997). Under virtually all dictionary definitions in this context, "could" is defined in terms of what is "possible." See, e.g., https://www.englishpage.com/modals/could.html ("'Could' is a modal verb used to express possibility"); The American Heritage Dictionary 232, 330 (2d college ed.1985) (noting that "could' is the past tense of "can," which is defined as "[u]sed to indicate possibility or probability."). See also *Keene v. Ault*, 2005 WL 1177905 at *7 (D. Iowa 2005) (applying "could" in this manner).

Changing "would" to "could" is a radical change because it would literally require prescience for owner to know what a child, any child, under the age of 18 "could" do. As a rule, [t]he law does not require prescience." *Raffucci Alvarado v. Sonia Zayas*, 816 F.2d 818, 820 (1st Cir. 1987). See also *Goldsborough v. De Witt*, 171 Md. 225, 242 (1937) ("The law does not require infallibility of decision in its fiduciaries nor prescience"); *Ditto v. Stoneberger*, 145 Md.App. 469, 499 (2002) ("'The law requires proof of probable, not merely possible, facts, including causal relations'"), quoting *Charlton Bros. Transportation Co. v. Garrettson*, 188 Md. 85, 94 (1947). Under this "could" standard, the mere possibility of access would be sufficient. The bills are not limited to minors in the household and thus include the entire universe of minors (other than intruders). The bills thus include minors with tools and knowledge sufficient to crack a safe or break into locked storage. Such knowledge is obtainable from the Internet and the requisite tools are easily found at any hardware store.

There is no safe harbor provision in these bills. There is no *mens rea* requirement. The bills impose strict liability upon gun owners if any minor "could" break into any storage and obtain access. Even worse, if the minor somehow does gain access, the gun owner can go to jail for 2 years. These bills make the gun owner into a guarantor against the misconduct of every minor. That's absurd burden to place on any law-abiding person. Such absolute guarantor liability is not even imposed under tort law, much less criminal law. See Restatement (Second) of Torts § 448. Upon the effective date of these bills, every gun owner in Maryland would be immediately guilty of this crime because no gun owner would ever be able to say that it was impossible for a minor to gain access. Arbitrary or discriminatory enforcement is thus virtually guaranteed. See *McDonnell v. United States*, 136 S. Ct. 2355, 2373–74 (2016) (noting that "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly'") (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

Such a law violates substantive due process. The State may not constitutionally condition the legality of possession of constitutionally protected property, such as a firearm, on compliance with prerequisites that are literally impossible to achieve. See, e.g., *Usery v.*

*Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (noting a due process violation is established where "the legislature has acted in an arbitrary and irrational way"); *MHC Financing Ltd. Partnership v. City of San Rafael*, 714 F.3d 1118 (9th Cir. 2013), *cert. denied*, 571 U.S. 1125 (2014) ("We will strike down a statute on substantive due process grounds if it is arbitrary and irrational."). See also *Broderick v. Rosner*, 294 U.S. 629, 639 (1935) (Brandeis, J.) (invalidating a statute, in part, because it "imposes a condition which, as here applied, is legally impossible of fulfillment"). These bills fail that test.

Alternatively, the use of "could" also makes these bills hopelessly vague and thus a violation of the Due Process Clause. 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."). If the bills do not demand the impossible, then the language of the bills in their use of "could" is divorced from any notice of what is prohibited, leaving gun owners literally at sea concerning what is required and what is not. Such a law is unconstitutionally vague.

Second Amendment:

Such criminalization of home possession of a firearm is also 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. 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 "[t]his makes it impossible for citizens to use them [firearms] for the core lawful purpose of self-defense." (Id. at 630).

These bills are even worse than the DC law struck down in *Heller*. Here, the gun owner is criminally liable if a minor "could" gain access, even though the LOADED OR UNLOADED firearm was fully locked up or disassembled. That sort of law is unprecedented. For example, in *Jackson v. San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*. 135 S.Ct. 2799 (2015), the Ninth Circuit sustained a San Francisco safe storage law that exempted from its coverage a "handgun is carried on the person of an individual over the age of 18." These bills make no such exemption. Indeed, under these bills such carriage would be illegal, as a minor "could" gain access to a firearm carried on the person. The Supreme Court denied review of the Ninth Circuit's decision over the vigorous dissent of Justice Thomas and Justice Scalia, who opined that even that law was contrary to *Heller*. Id. 135 S.Ct. at 2800-02. The Ninth Circuit's decision is indeed an outlier. No other circuit has allowed such a law and such strict laws are virtually unknown. See, e.g., Cal. Penal Code § 25100 (a person may not "**negligently** store[] or leave[] a firearm in a location where the person knows, or reasonably should know, that **a child is likely to gain access** to the firearm without the permission of the child's parent or legal guardian, **unless reasonable action is taken by the person to secure the firearm against access by the child**") (emphasis supplied). In sum, these bills are blatantly unconstitutional under *Heller*.

What's worse, the bills would change the focus of existing law on a "loaded" gun into a ban on access to both a loaded and an **unloaded** gun. Reasonable limits on access to a loaded gun may make sense, as an untrained child might accidentally discharge a loaded gun. But to criminalize the possibility that a minor "could" access to 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 dozens of 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*. Thus, storage laws may not make it impossible or unreasonably difficult for the owner to use the firearm in self-defense. For example, there is no risk of an "accident" with an unloaded gun. Criminalizing storage of an unloaded gun is thus particularly unjustifiable under *Heller*. Indeed, what's next? Bans on unsupervised access to kitchen knives? We urge an unfavorable report on these extreme bills.

Sincerely,

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