



February 02, 2021

## WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN SUPPORT OF SB 221

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 support of SB 221.

### The HQL Statute and the Bill:

This bill would amend MD Code, Public Safety, 5-117.1 (HQL statute). That Section prohibits law-abiding, responsible Maryland citizens from acquiring a handgun unless they have a Handgun Qualification License (“HQL”). Md. Code Ann., Pub. Safety, § 5-117.1(c). Subsection (d) imposes training requirements, including a (i) a minimum of 4 hours of instruction by a qualified handgun instructor” consisting of “(ii) classroom instruction on: 1. State firearm law; 2. home firearm safety; 3. handgun mechanisms and operation; and (iii) a firearms orientation component that demonstrates the person’s safe operation and handling of a firearm.” In regulations, the Maryland State Police have added a new and additional live-fire training requirement, mandating that the HQL applicant “safely fires at least one round of live ammunition.” COMAR 29.03.01.29(C)(4). That live round requirement is not found in the statute.

In the interests of full disclosure, we note that the live-fire requirement, along with the rest of the HQL statute, is presently being challenged by MSI in federal court. See *MSI v. Hogan*, 2017 WL 3891705 (D. MD. 2017) (denying the State’s motion to dismiss). The district court, in a later decision, held that the plaintiffs lacked standing without reaching the merits of the constitutionality of the HQL statute. **That decision was very recently reversed on appeal.** See *MSI v. Hogan*, 971 F.3d 199 (4th Cir. 2020). Further proceedings are now being conducted in district court on remand. On the merits, we believe that it is highly likely that the Supreme Court will, in an appropriate case, soon make clear that the “text, history and tradition” test is controlling in determining the constitutionality of gun control legislation – not tiers of scrutiny. Four members of the Supreme Court recently employed this very approach in *NY State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S.Ct. 1525 (2020), where a majority of the Court held that the case was mooted by the repeal of the offending

City of New York ordinance, but the concurring Justice and the three dissenting Justices discussed the merits in separate opinions. See *Id.* at 1526 (Kavanaugh, J.) (concurring in judgment of mootness, but agreeing with Justice Alito’s discussion of *Heller* and *McDonald* on the merits; *Id.* at 1540-41 (Alito, J., joined by Justices Thomas and Gorsuch, dissenting from the judgment of mootness but noting further on the merits that the City’s ordinance violated the Second Amendment under *Heller* and *McDonald*). Justice Thomas made the same point very recently in another case. *Rogers, et al. v. Grewal*, 140 S.Ct.1865, 1868 (2020) (Thomas, J., dissenting from denial of certiorari). See also *Heller v. District of Columbia* (i.e. “*Heller II*”), 670 F.3d 1244, 1269 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (“In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”).

With Justice Barrett now joining the Court, we believe that a solid majority of the Court will adhere to these principles when the issue is presented. See *Kanter v. Barr*, 919 F.3d 437, 452-53 (7th Cir. 2019) (Barrett, J., dissenting). In *Wrenn v. D.C.*, 864 F.3d 650 (D.C. Cir. 2017), the D.C. Circuit applied this text, history and tradition test in striking down the carry statute enacted by the District of Columbia. The DC statute that was invalidated was materially identical to the Maryland carry statute. The HQL statute will likely fail under the text, history and tradition test, just as the D.C. carry statute failed in *Wrenn*. Ironically, eliminating the live fire requirement will simply help the State defend this statute in this ongoing litigation. A failure to enact this bill will help MSI and the other plaintiffs win the case on the merits. Should MSI and the other plaintiffs prevail, in whole or in part, the State would be liable for substantial attorneys’ fees and costs under federal law, 42 U.S.C. §1988. That cost will likely be several hundreds of thousands of dollars.

### **The Live-Fire Requirement Is Not Authorized By the HQL Statute and Is Discriminatory:**

It is well-established in Maryland law that “[a]n agency’s authority extends only as far as the General Assembly prescribes.” *Thanner Enters., LLC v. Balt. Cty.*, 995 A.2d 257, 263 (Md. 2010). Thus, an agency’s rule or regulations cannot “contradict the language or purpose of the statute.” *Medstar Health v. Md. Health Care Comm’n*, 827 A.2d 83, 96 (Md. 2003). Here, the Maryland State Police has grafted onto Section 5-117.1(d)(3)(iii)’s requirement of a “firearms orientation component” an entirely new “practice component” under which the applicant must safely fire “at least one round of live ammunition.” COMAR 29.03.01.29C(4). Although Section 5-117.1(n) provides that “[t]he Secretary may adopt regulations to carry out the provisions of this section,” it does not allow the Maryland State Police to add new “provisions,” such as adding “a practice component” so as to mandate live-fire.

The State Police rule is directly contrary to legislative intent. As originally proposed, the HQL bill required a safety course that included “a firearms qualification component that demonstrates the person’s **proficiency** and use of the firearm.” 2013 Leg. Sess. SB 281 (First Reader) at 17.9. By common usage of these terms, a “qualification component” that demonstrates “proficiency” calls for live-fire. This “qualification component” was deleted by the General Assembly, however, and Section 5-117.1(d)(3)(iii) was changed to its current language by amendment in the House of Delegates proffered by then-Delegate McDermott. Chapter 427 of the 2013 Laws of Maryland. The debate on the floor of the House of Delegates confirms that the amendment was intended to eliminate a live-fire requirement that would have been associated with the “proficiency and use” language of the original bill. See

General Assembly of Maryland, 2013 Regular Session Proceedings – House Audio, April 2, 2013, Session 2, at 19:05 (April 2, 2013). The General Assembly’s rejection of this language in the law that passed means that live-fire training exceeds the scope of the statutory grant. This body should insist that the State Police follow the law that the General Assembly actually passed.

The live-fire requirement is not only unauthorized, it effectively discriminates against residents of the City of Baltimore and the poor populations in Maryland. This requirement is designed to erect a barrier to access for those living in urban areas like Baltimore City where no ranges can be found or reached by mass transportation. Imposition of a live fire requirement by the State is simply a means to further burden and discourage law-abiding Maryland citizens from acquiring a handgun. Specifically, training without a live-fire requirement can take place anywhere, while training that must include live-fire can only take place at a firing range, the availability of which is highly limited (there are **none** in Baltimore City). The need for a range, in turn, acts as a complete barrier to the acquisition of a HQL License by persons, especially the poor, minorities and the disadvantaged, who live in areas, such as Baltimore and most of urban Maryland, where access to a shooting range is highly limited or non-existent. Range access is also expensive and requiring it means that the cost of the training is likewise expensive. Indeed, the discharge of such live ammunition, required by the State Police regulation, is flatly banned by local law in the urban portions of Maryland, including all of the City of Baltimore, all of Prince Georges County and most of Montgomery County and the entire Metro area of Baltimore County. The sole exception is for discharges taking place on “established ranges” which are protected from local regulation by state law, MD Code, Criminal Law § 4-209(d)(2). Again, there are very few such ranges in these areas (and **none** in Baltimore City).

There is no justification for a live-fire requirement that has this sort of intentional discriminatory impact. The residents of Baltimore and the urban areas of Maryland should not be placed at such a profound disadvantage. Persons with means will be able to pay a private instructor who will have access to a range. Cost will not be a barrier for these individuals. They will be able to obtain an HQL. Poorer Marylanders are out of luck. That is intolerable. Like it or not, under the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), all law-abiding, responsible adult citizens have a right to buy a handgun for self-defense. Period. Full stop. Not even the State Attorney General has disputed that basic premise in the *MSI* litigation. That right should be available to every law-abiding responsible citizen, regardless of whether they live in Baltimore or somewhere else in Maryland. By reversing the discriminatory requirement of live-fire, this bill will help ensure that right is available to all law-abiding citizens, just like other constitutional rights. The HQL statute will eventually fail to survive constitutional challenge. In the meantime, the law-abiding citizens of Baltimore and of the other urban portions of Maryland should enjoy the same rights as enjoyed by persons with means. We urge a favorable report.

Sincerely,



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