



March 1, 2021

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 175

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 175.

The Bill

For the first time in the history of Maryland, this bill attempts to impose a vast regulatory regime on the sale of ordinary ammunition in Maryland. First in a newly minted Section 5-703 of the Public Safety Article of the Maryland Code, the bill would require every ammunition vendor to confirm the identity of every would-be purchaser by demand government issued identification. Next, the bill would command the vendor to “CONDUCT A BACKGROUND CHECK ON THE PURCHASER OR TRANSFEREE THROUGH THE NICS INDEX.” In a newly minted Section 5-704, the bill would impose electronic record-keeping requirements on the vendor and on the Maryland State Police by requiring the vendor to report to the State Police the date of the or transfer, the purchaser’s identification number, the “brand, type and amount” of ammunition purchased, the purchaser’s full name and signature, and the purchaser’s full address, date of birth and telephone number and finally, the name of the salesperson who made the sale. Any violation of these and other provisions of the bill would be a civil offense subject to a fine of “not less than \$1,000 for each violation.” The bill would also exempt from its requirements sales to persons holding a Handgun Qualification License and sales to active Maryland and federal law enforcement officers.

A. The Bill Requires A Patently Illegal NICS Background Check On Ammunition Sales

As noted, this bill requires a vendor to conduct a NICS check for each and every sale of ordinary ammunition. That requirement is flatly illegal under controlling federal law. The NICS system is run by the FBI, as required by the Brady Handgun Violence Prevention Act of 1993, Public Law 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.C. § 922(t). <https://www.fbi.gov/services/cjis/nics>. The Maryland State Police is a FBI-approved, Point of

Contact agency for NICS checks for **handgun** sales in Maryland. <https://www.fbi.gov/file-repository/nics-participation-map.pdf/view>. Under federal law, the federal NICS system may be used to institute a background check **only** on actual transfers of firearms **that are regulated by the Brady Act. Furthermore, under federal law, only federally licensed firearm licensees (FFLs) and designated Point of Contract State agencies are permitted access to the NICS system.** No other vendor, or person or agency may have access to the NICS system under federal law. See 28 C.F.R. §25.1, et seq. While a federal license is required to engage in the business of importing or manufacturing ammunition, 18 U.S.C. § 922(a)(1)(B), no federal license is required simply to sell ordinary small arms ammunition. 28 C.F.R. § 478.41. See <https://www.atf.gov/firearms/qa/license-required-engage-business-selling-small-arms-ammunition> (“A license is not required for a dealer in ammunition only.”). Such non-licensed vendors of ammunition typically include hardware stores and small businesses, especially in rural areas. Because these vendors are not FFLs they do not have **any** access to the NICS system.

Stated simply, ammunition sales are not governed by any provision in the Brady Act. Federal regulation of ammunition sales was largely repealed by Congress in 1986 with enactment of the Firearm Owners Protection Act of 1986, Public Law 99-308, 100 Stat. 449 (May 19, 1986). That repeal was based on realization that regulating ammunition sales was “just a waste of time” and had “no substantial law enforcement value.” See Federal Firearms Reform Act of 1986, House Report 99-495, 99th Cong., 2nd Sess., 17 (1986) (emphasis added). See Congressional Record—House, Apr. 9, 1986, at 6850 (“Fourth, it repeals ammunition recordkeeping requirements (except armor-piercing bullets) which BATF and Treasury says have no substantial law enforcement value.”); 6861 (same); 6864 (same); 6869 (“[W]e also limit the licensing of ammunition dealers because ammunition and recordkeeping for ammunition, BATF and most everybody agrees, there is just a waste of time because you cannot trace ammunition.”).

That ammunition sales are not subject to the Brady Act (passed in 1993) is widely understood and acknowledged, even by pro-gun-control advocacy groups. See, e.g., <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ammunition-regulation/>. Federal law does provide that a licensed dealer may not sell shotgun or rifle ammunition to a person younger than 18 years of age and may not sell handgun ammunition to a person younger than 21 years of age. 18 U.S.C. § 922(b)(1). And, of course, neither modern ammunition nor modern firearms may be possessed by prohibited persons. 18 U.S.C. §922(g). Similarly, it is a federal felony “to sell **or otherwise dispose** of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person” is a prohibited person. 18 U.S.C. § 922(d). Maryland likewise criminalizes such sales for regulated firearms under State law, and imposes a total ban on the transfer of any ammunition to minors. MD Code, Public Safety, § 5-134. Maryland formerly regulated the mere **possession** of ammunition designed solely for regulated firearms, but the General Assembly repealed that Maryland law in 2011, no doubt realizing that such regulation was unnecessary and impossible to enforce. See Acts 2011, c. 343, § 1.

However, because federal law does not regulate ammunition sales, federal law does not **permit** any NICS background check for ammunition sales. Indeed, federal regulations are quite explicit that a FFL may not access the NICS system for any purpose other than those sales of **firearms** subject to the Brady Act. 28 C.F.R. § 25.6(a) provides that “FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as

required by the Brady Act. FFLs **are strictly prohibited** from initiating a NICS background check **for any other purpose.**” (Emphasis added). Similarly, the Federal Firearms Licensee Manual issued by the FBI states that an FFL is never authorized to utilize the NICS for employment or other type of non-Brady Act-mandated background checks. See 27 C.F.R. 478.128(c) (“Any * * * licensed dealer * * * who knowingly makes any false statement or representation with respect to any information required by the provisions of the Act * * * under the Act or this part shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both.”).

The same rule applies to a State which serves as a Point of Contact for purposes of accessing the NICS system. A State or a FFL that requests a NICS check not authorized by Federal law is subject to a \$10,000 fine **and a termination of access to the NICS system.** 28 C.F.R. § 25.11. Termination of such NICS access would, of course, gut the ability of the Maryland State Police to conduct full background checks on sales of any regulated firearm (including handguns). Termination of access would also bar the State Police from doing NICS background checks for the Handgun Qualification License under MD Code, Public Safety § 5-117.1, and issuing a wear and carry permit under MD Code, Public Safety, § 5-306, as otherwise permitted by Federal law. See 28 C.F.R. § 25.6(j).

As Nevada learned to its chagrin when it tried to force dealers to do NICS checks not authorized by federal law, the FBI will not permit FBI resources and the NICS system to be commandeered by States. See *Zusi v. Sandoval*, No. A-17-762975-W, slip op. at 4 (Nev. Dist. Ct. August 20, 2018) (holding unenforceable a Nevada law that “sought to require the FBI through NICS to perform background checks”), available at <http://www.clarkcountycourts.us/judge-issues-order-in-background-check-case-zusi-vs-sandoval/>. The FBI is not bound by Maryland law. That means that **neither** a FFL nor the State Police may, under any circumstances, conduct a NICS check on the sale of ammunition. **Period. Full Stop.** Requiring a vendor to conduct a NICS check is thus flatly illegal under federal law. Any dealer conducting such a NICS check on an ammunition sale would risk losing his or her FFL license without further ado. 28 C.F.R. § 25.11. The dealers, of course, all know this and thus will refuse to comply with the requirements that would be imposed by this bill. If forced to comply, dealers will simply stop selling ammunition altogether thereby making it that much more difficult to stay in business. An honest title for this bill would thus be: “**Elimination of Maryland Dealers Act of 2021.**” And, as explained above, non-FFL vendors **cannot access the NICS system at all.** Thus, these ammunition vendors would also have to stop selling ammunition under this bill.

In short, by requiring the legally impossible (a NICS check on ammunition sales), the bill would effectively ban the sale of ammunition in Maryland. The bill would thus fail a federal court challenge under the Second Amendment as law-abiding citizens have a constitutional right to acquire ammunition for their lawfully owned firearms. See, e.g., *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), *cert. denied*, 576 U.S. 1013 (2015) (“without bullets, the right to bear arms would be meaningless. See also *District of Columbia v. Heller*, 554 U.S. 570 (2008). A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose.”). A federal court challenge would lie under 42 U.S.C. §1983, to seek equitable relief, plus attorneys’ fees under 42 U.S.C. § 1988. See, e.g., *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (“[F]ederal courts may in some circumstances grant injunctive relief against state

officers who are violating, or planning to violate, federal law.”) (citing *Ex Parte Young*, 209 U.S. 123, 150-51 (1908)).

B. The Bill’s Recording-Keeping Requirements Will Be Costly For Vendors And For The Maryland State Police While Being Easily Avoided By Purchasers.

The bill would impose extremely burdensome record keeping requirements on the vendor and the Maryland State Police alike. The end result would be to create a vast new database of all ammunition sales that will be expensive to establish and expensive to maintain. Such costs are far from trivial. Roughly 8 billion rounds of ammunition are produced every year and many millions are sold in Maryland, every year. Maintaining a database of that size would be a monumental task. And all this to little or no point. Any purchaser could easily sidestep these requirements simply by driving to a neighboring state and making ammunition purchases in those states. Federal and state law in neighboring states do not regulate these sales to Maryland residents who are free to purchase ammunition in any amount as often as they like without enduring any of the burdensome requirements imposed by this bill. No neighboring state imposes any background checks for the sale of ammunition. Indeed, only one State (California) has even attempted to do so by requiring a background check of **State** databases (**not** a NICS check) and a federal district court has already preliminarily enjoined that California statute as violative of the Second Amendment. See *Rhode v. Becerra*, 445 F.Supp.3d 902 (S.D. Calif. 2020), appeal pending, No. 20-55437 (9th Cir.).

Indeed, if only as a matter of principle, law-abiding gun owners in Maryland will massively resist these requirements by flocking to out-of-state retail stores for their ammunition needs. The losers here would be Maryland retailers and, of course, the Maryland State Police, which would be required to create a massive new State database for ammunition sales. That database would be no more useful for solving crimes than the spent shell casing storage requirement previously imposed on the State Police by Maryland law. That casing requirement **was repealed** by the General Assembly in 2015. See former MD Code, Public Safety, § 5-131, **repealed by** Acts 2015, c. 379, §§ 1, 2, 3 (effective Oct. 1, 2015). That repeal will **save** the State Police millions of dollars over time. In contrast, this bill would **impose** millions of dollars in new expenses over time. Indeed, this bill would impose these record keeping requirements for **every sale** of **single** box of .22 rimfire cartridges that cost approximately \$3 to purchase. See, e.g., Remington Target 22 Long Rifle, Target Sports USA, <https://tinyurl.com/y439gx6u> (last visited February 20, 2021) (<\$3 for a box of 50 .22LR cartridges). By any measure, the bill imposes a massive misallocation of resources.

C. The Bill Misuses the Handgun Qualification License

The bill exempts from its coverage sales of ammunition to persons who have a Handgun Qualification License, issued pursuant to MD Code, Public Safety, § 5-117.1. That incorporation of the HQL statute is a patent misuse of the HQL statute. The HQL statute was never intended to serve as some sort of **uber alles** stamp of approval for all gun owners. By its terms, possession of an HQL is required for **sales, rentals or transfers of handguns only**. Handguns are regulated firearms under Maryland law. MD Code, Public Safety, 5-101(r). Ordinary rifles and shotguns are not regulated firearms. Obtaining an HQL so as to purchase a handgun takes four hours of training, live fire and costs more than \$200 in expenses for training, fingerprinting and application fees. It imposes costs on the State

Police which must process an HQL application within 30 days. It would be grossly excessive to impose those requirements on a law-abiding citizen simply in order to purchase a box of ammunition for lawfully owned firearms, including hunting rifles and shotguns.

Persons are not required to have an HQL in order to continue to lawfully possess and use previously owned handguns and are free to purchase ordinary long guns, subject to background checks imposed by the Brady Act, all without possessing an HQL. This bill would thus regulate ammunition sales of ordinary hunting ammunition and for firearms **not even subject** to the HQL requirements. The bill would, for example, impose its requirements on sales of ordinary .22 rimfire ammunition used in basic rifle instruction for the Boy Scouts and other youth groups, including instruction for the Firearm and Hunter Safety Certificate issued by the Maryland Department of Natural Resources under MD Code, Natural Resources, § 10-301.1. Yet, Maryland does not regulate **the sale** of .22 rimfire **rifles** (other than to minors). See, e.g., MD Code, Criminal Law, § 4-301(e)(1) (defining a copycat weapon to include only **semiautomatic centerfire** rifles); Indeed, under Maryland law, it is perfectly legal to purchase and possess .22 rimfire rifles with tubular magazines in excess of 10 rounds of capacity. MD Code, Criminal Law, § 4-305 (exempting .22 caliber rifles “with a tubular magazine” from the 10 round limit). Non-regulated firearms and ammunition may be possessed by minors in Maryland; it would be quite impossible to conduct youth hunting without such possession. Compare MD Code, Public Safety, § 5-133(d) (restricting possession of **regulated** firearms by minors). Regulating the **sale** of ordinary ammunition used in **non-regulated** firearms is at odds with this complex statutory maze of regulation.

Moreover, under Section 5-117.1(a), the HQL requirements do not even apply to active or retired federal or Maryland law enforcement officers **or** to active or retired members of the armed forces or the National Guard of the United States. All these individuals may purchase handguns in Maryland without an HQL. Yet, except for an exemption for active duty Maryland and federal officers, this bill imposes the record keeping requirements on sales to these categories of persons who are totally exempt from the HQL requirements. Indeed, the bill would even apply to ammunition purchases by active law enforcement officers who live or shop in Maryland, but work for a police agency located outside of Maryland, such as the Virginia State Police or the Pennsylvania State Police. It would likewise impose these requirements on sales to retired State and federal officers who are entitled, under the federal Law Enforcement Officers Safety Act, 18 U.S.C. § 926C (LEOSA), to carry a concealed firearm in public without obtaining a State carry permit.

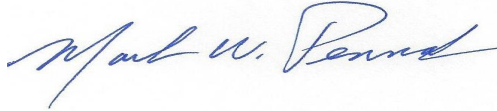
In sum, the HQL requirements were designed to apply only to handgun transfers and should not be applied outside of that context. Even in that limited sphere, those requirements will fail should MSI prevail in its ongoing suit challenging the constitutionality of the HQL statute under the Second Amendment. See *MSI v. Hogan*, 971 F.3d 199 (4th Cir. 2020) (reversing the district court’s standing dismissal and remanding for further proceedings on the merits). Incorporating the HQL statute into other legislation places such other legislation at risk as well.

CONCLUSION

Given all the problems, detailed above, the bill has obviously not been fully thought out and should be withdrawn. It is overbroad, illegally requires NICS background checks flatly

prohibited by federal law and imposes huge costs on retailers and the Maryland State Police without any point. For all these reasons, if the bill is not withdrawn, the Committee should issue an unfavorable report.

Sincerely,

A handwritten signature in blue ink, reading "Mark W. Pennak". The signature is fluid and cursive, with the first name "Mark" and last name "Pennak" being the most prominent parts.

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