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Maryland General Assembly
Judiciary Committee
90 State Circle
Annapolis, MD 21401

RE: OPPOSE SB 479 AND HB 200

Committee Chair, Vice Chair, and Committee Members,

Thank you for opportunity to provide testimony. I urge you to oppose SB 479 and HB 200 as neither bill will do anything to prevent nor curtail crimes involving firearms in the State of Maryland. Simple inspection of a small sampling of crime data demonstrates this. If either of these bills are enacted, law abiding firearms owners can be criminalized simply by the semantics and wording of the laws.

The effects and impacts bills will have, if enacted into law, must properly assessed and vetted PRIOR TO their enactment. The following information, provided by Mark W. Pennak, President, Maryland Shall Issue, Inc., can assist with proper assessment and vetting of HB200:

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." The bill 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. Instead, for minors under the age of 18 and who have the hunter safety certificate, the bill allows access to a rifle or a shotgun if the minor has been given express permission by a parent. That access is permitted, however, only if the person who stores or leaves the firearm stores the firearm unloaded and stores the ammunition "in a secure location where a minor could not reasonably gain access to the ammunition." Finally, the bill provides an exception if "THE FIREARM IS LEFT OR STORED UNLOADED AND HAS BEEN RENDERED INOPERABLE TO ANYONE OTHER THAN AN ADULT." The bill does not define "access" or "could" or "inoperable."

The bills also change the punishment for a violation of Section 4-104. Current law punishes a violation as "a misdemeanor and on conviction is subject to a fine not exceeding $1,000." No prison time is imposed under current law. The bills would create three new layers of offense with increasing punishments, including prison time for each layer. 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 ANOTHER PERSON" is punishable with 5 years of imprisonment and a fine of $5,000.

THE BILL IS DRACONIAN, IMPOSSIBLE TO COMPLY WITH AND PATENTLY UNCONSTITUTIONAL

Youth Hunting:

As noted, the bills repeal the exception found in current law for a child with a State-issued hunter safety certificate and substitutes an extremely awkward language. Specifically, the bill imposes an ammunition access restriction on the person (including the minor) who leaves or stores the rifle or shotgun, requiring that such person store the ammunition in such a way that "MINOR COULD NOT REASONABLY GAIN ACCESS TO THE AMMUNITION." Under this provision, a minor is allowed access to a rifle or shotgun for legitimate purposes (such as hunting) with parental consent, but is not allowed access to the ammunition for that firearm. The bill thus allows the minor (as a "person") to store the firearm, as long as the firearm is unloaded. Yet, the minor is criminally liable if he or she fails to store the ammunition in the "secure location" where he or she "could not" gain access. That result is little short of bizarre. The bill expressly exempts from its coverage a minor's access to a rifle and shotgun if he or she has a hunter safety certificate and has permission. Yet, that same minor must then store ammunition in a way to make it inaccessible to himself or herself! Plainly, if a particular minor with a hunter safety certificate is permitted access to the firearm for legitimate purposes, then that minor should likewise be allowed to access the ammunition for the very firearms he or she is allowed to access. After all, a rifle or shotgun is useless for legitimate purposes (e.g., hunting or varmint control) without ammunition. Yet, that access to ammunition is not allowed by this bill. The bill thus imposes nonsense restrictions on ammunition.

These bizarre requirements create a compliance nightmare and directly burden hunting. It is 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. The bill would criminalize such hunting by criminalizing access to ammunition by the minor. Mere possession of ammunition by a minor with a hunter safety certificate would be evidence of the very access banned by the bill. No sane parent will take the risk of criminal

prosecution of their child or of themselves by allowing their child to possess ammunition. That reality will effectively ban 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, the bill, if enacted, will radically reduce youth hunting and hunting in general in Maryland. Again, no sane parent who is aware of this law would allow a child access to ammunition for hunting or for any other legitimate lawful purpose. After all, access to ammunition, under this bill, cannot be afforded to minors with the hunter safety certificate. Either that, or the law will be widely ignored, thereby creating large numbers of new criminals among minors and their parents, especially in rural areas. Law enforcement officers will be free to pick and choose who to arrest and prosecutors will likewise have free reign in picking who to prosecute. The potential for arbitrary and discriminatory enforcement is self-evident.

We know of no state that bans access to ammunition or firearms 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."). Similarly, California allows full access to a firearm if access is with parental permission. Cal. Penal Code §25100(2). Neither New York nor California impose this sort of novel restriction on the storage of ammunition.

The bill 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 the bill. That promise has been broken. The lesson is clear: the General Assembly cannot be trusted.

Due Process:

The bill changes 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 (the bill is not limited to children who reside in the home), 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 bill is not limited to minors in the household and thus include the entire universe of minors (other than intruders). The bill thus includes minors, anywhere, who have the 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. For some safes, all it would take is a diamond edge blade on a circular saw or even a crowbar. Trigger locks, which are often supplied by dealers and universally accepted as a means of securing firearms, can be defeated with tools and a little time. All of this is "possible" for a minor.

Indeed, this bill would effectively repeal MD Code, Public Safety, §5-132(c)(1), which requires that a dealer may not sell a handgun without "unless the handgun is sold, offered for sale, rented, or transferred with an external safety lock." Federal law, 18 U.S.C. §922(a)(1), imposes a similar requirement, providing that "it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun." Section 921(a)(34), 18 U.S.C. §921(a)(34), in turn defines the term "secure gun storage or safety device" to mean "(A) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device; (B) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or (C) a safe, gun safe, gun case, lock box, or other

device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means."

Pursuant to this legislation, the Maryland Handgun Roster Board has published a list of approved safety devices that the dealer may offer at the time of sale. (Attached). These devices likewise satisfy the requirements of federal law. Every one of these devices "could" be defeated by a minor, given time and tools. See, e.g., https://www.youtube.com/watch?v=U05ixDwsnNs (video demonstrating using a Bic pen to remove the Roster Board-approved Omega Gunlock very commonly sold with handguns in Maryland). None of these devices actually would deny access to the firearm itself. The bill bans all possible access, even to guns locked with Roster Board-approved locks or locks of the type specified in Section 921(a)(34) of federal law. The bill effectively nullifies these requirements imposed by existing law. The bill could even ban, for example, access to a quick-release safe containing a firearm because the safe itself could be pried from its moorings, picked up and stolen. "Access" is simply not defined. So what's next, a requirement that the dealers sell guns only with impenetrable safes that must be bolted to a concrete floor?

There is no appropriate mens rea requirement in the bill. The bill imposes liability upon gun owners if the owners knew or should have known that any minor "could" break into any storage and obtain access, viz., knew or should have known whether such access was "possible." That is not a defensible mens rea. The bill requires knowledge of all possible facts, and thus cannot be said to indicate any sort of guilty state of mind. As the Supreme Court has stated, "the basic principle [is] that 'wrongdoing must be conscious to be criminal.'" Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001, 2009 (2015) (citation omitted). That means that "a defendant generally must 'know the facts that make his conduct fit the definition of the offense.'" Id., quoting Staples v. United States, 511 U.S. 600, 608, n.3 (1994). See also Rehaif v. United States, 139 S.Ct. 2191, 2196 (2019) ("the understanding that an injury is criminal only if inflicted knowingly 'is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil'") (citation omitted). The bill fails these principles, as a person cannot be reasonably charged with knowledge of the infinite variety of facts that are "possible." It is quite impossible for the average gun owner "to choose between good and evil" under the bill. (Id.).

Even worse, the bill makes the gun owner into a guarantor against the merely possible misconduct of every minor, any minor. That's absurd burden to place on any law-abiding person. See Elonis, 135 S.Ct. at 2007 (The "reasonable person" standard "is inconsistent with the conventional requirement for criminal conduct—awareness of some wrongdoing"). See also United States v. White, 810 F.3d 212, 220 (4th Cir. 2016). 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 the bill, 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)). As Lavrentiy Beria, who was Stalin's ruthless secret police chief during the reign of terror, liked to brag: "Show me the man and I'll show you the crime" https://www.oxfordeagle.com/2018/05/09/show-me-the-man-and-ill-show-you-the-crime/. That is exactly what the bill does every gun owner in Maryland. The arbitrary enforcement sanctioned by the bill will undoubtedly be suffered most heavily by the poorer, least educated population of Maryland. These citizens are the least able to defend themselves from such enforcement. See, e.g., https://www.hrw.org/legacy/campaigns/race/criminal_justice.htm.

The bill 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, viz., the knowledge of all means of access that are possible. 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"). The bill fails these basic principles.

Likewise hopelessly vague is the exemption for firearms left or stored unloaded and "RENDERED INOPERABLE TO ANYONE OTHER THAN AN ADULT." It is virtually impossible to know what this means, as a practical matter. We know of no manner of storage in which the firearm is operable by an 18 year-old, but is not operable by a 17 year-old. The bill offers no definition for such storage. The ordinary gun owners would simply have to guess at the meaning of this requirement. Such a statute is facially unconstitutional. 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."). Thus, as the Maryland Court of Appeals has stressed, the General Assembly has an "obligation to establish adequate guidelines for enforcement of the law." Ashton v. Brown, 339 Md. 70, 88, 660 A.2d 447, 456 (1995). This bill utterly fails that "obligation."

For the same reasons, the use of "could" makes the bill hopelessly vague and thus a violation of the Due Process Clause. The language of this bill leaves gun owners literally at sea concerning what is required and what is not and is an open invitation to arbitrary and discriminatory enforcement. Such a law is unconstitutionally vague. See Williams v. State, 329 M.1, 9, 616 A.2d 1275, 1279 (1992) ("a statute must eschew arbitrary enforcement in addition to being intelligible to the reasonable person"). These vagueness principles are especially vigorously enforced by the courts where the vague statute could impact the exercise of constitutional rights. For example, in the City of Chicago v. Morales, 527 U.S. 41,

54 (1999), the Court struck down a Chicago ordinance that banned loitering as void for vagueness, noting that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause." Morales, 527 U.S. at 53. The Court found highly significant that the ordinance was a "criminal law that contains no mens rea requirement" and concluded "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." Id. at 55. As explained below, law abiding citizens have a constitutional right to possess firearms in their homes. Vagueness in the scope of the bill is thus particularly intolerable. There is nothing "imaginary" about the chilling effects the bill would have on a law-abiding adult's constitutional right to possess an operable firearm in the home. Babbitt v. United Farm Workers Nat. Union, 442 U.S 289, 302 (1979). This bill fails these elementary notions of due process.

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. The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 554 U.S. at 635. 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 the requirement prevented residents from rendering their firearms "operable for the purpose of immediate self-defense." Id. at 635 (emphasis added).

The storage requirements imposed by the bill do not permit a homeowner to store a firearm that is "operable for the purpose of immediate self-defense." Indeed, the bill denies to the minor any access necessary for his own self-defense or the defense of the family. Such instances do happen and the use of the firearm by a minor has saved lives. See, e.g., https://www.wsaz.com/content/news/Teenager-saves-sisters-from-intruder-526277011.html; and https://www.chicagotribune.com/nation-world/ct-alabama-boy-shoots-intruder-20160501-story.html and https://abc7.com/goldboro-police-goldsboro-break-in-s-william-street-shooting-12-year-old-shoots-at-home-intruders/10339097/ and https://www.gunsandammo.com/editorial/14-year-old-boy-shoots-armed-intruder-i-home/250189. That right of self-defense possessed by the minor is protected by existing Maryland law. Specifically, MD Code, Public Safety, § 5-133(d), provides that no person under the age of 21 may possess a regulated firearm (a handgun) unless supervised by a parent, an instructor or by a person over the age of 21. However, Section 5-133(d)(vi) expressly exempts from that prohibition "the possession of a firearm for self-defense or the defense of others against a trespasser into the residence of the person in possession or into a residence in which the person in possession is an invited guest." This bill criminalizes the very possession expressly allowed by Section 5-133(d)(iv), with 2 years of imprisonment and/or a fine not exceeding $2,500. It common that older minors are left to supervise younger children in the household. This bill makes it impossible for a 17 year-old to defend herself or other members of the household, no matter how well trained that 17 year-old might be. Nothing in this bill allows access for purposes of self-defense or defense of others.

The bill is 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 locked up or even disassembled. That requirement applies unless "THE FIREARM IS LEFT OR STORED UNLOADED AND HAS BEEN RENDERED INOPERABLE TO ANYONE OTHER THAN AN ADULT" (whatever that means). Such storage makes it impossible to make use of the firearm for "immediate self-defense." Heller, 554 U.S. at 635. That sort of law is unprecedented. For example, in Jackson v. San Francisco, 746 F.3d 953 (9th Cir. 2014), cert. denied. 576 U.S. 1013 (2015), the Ninth Circuit sustained a San Francisco safe storage law that required that a handgun be locked up in a container or secured with a trigger lock. The Supreme Court denied review of the Ninth Circuit's decision over the vigorous dissent of Justice Thomas and Justice Scalia, who opined that that law was contrary to Heller. Id. 135 S.Ct. at 2800-02. This bill applies to all firearms, not merely handguns and the storage requirement is more severe in that the firearms under the bill must be rendered inoperable to everyone other than an adult and punishes mere access that "could" be obtained. Locking up the firearms or attaching a trigger lock is insufficient under this bill.

We believe that it is highly likely that the Supreme Court will, in an appropriate case, 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 text, history and tradition 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. 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, Thomas, Gorsuch, JJ., 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 in an appropriate case. See Kanter v. Barr, 919 F.3d 437, 452-53 (7th Cir. 2019) (Barrett, J., dissenting). Indeed, in Wrenn v. District of Columbia, 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. Nothing in the text, history or tradition of the Second Amendment would remotely support the restrictions imposed by the bill.

In any event, these storage requirements will fail under a tiers of scrutiny test. From the time that it adopted the two-part analysis in United States v. Chester, 628 F.3d 673 (4th Cir. 2010), the Fourth Circuit has stated repeatedly that if a challenged law implicates the core right of a law-abiding, responsible citizen to possess a firearm in his or her home, the law is subject to a strict scrutiny analysis. To satisfy strict scrutiny, the State must establish that the challenged laws are narrowly tailored to promote a compelling government interest. Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 189 (4th

Cir. 2013). To be narrowly tailored under strict scrutiny, the law must employ the least restrictive means to achieve the interest. There is nothing "least restrictive" about the bill. Even under intermediate scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State." United States v. Virginia, 518 U.S. 515, 533 (1996). The State will have a difficult time carrying its burden to justify these storage requirements, even under intermediate scrutiny. The Supreme Court has made clear that "to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" Packingham v. N.C., 137 S. Ct. 1730, 1732 (2017) (quoting McCullen v. Coakley, 573 U.S. 464, 486 (2014)). This bill would fail that test as it is hardly "narrowly tailored." See Johnson v. Lyon, 406 F.Supp.3d 651, 669 (W.D. Mich. 2018) (denying the State's motion to dismiss a suit challenging firearm safe storage requirements for foster parents under intermediate scrutiny).

The Requirements Are Extreme:

The strict storage requirements imposed by the bill stand alone. Only eleven states even have laws concerning storage. https://giffords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/safe-storage/. No other state has ever enacted any requirements that come even close to those imposed by the bill. For example, only Massachusetts even requires that firearms be stored in a locked container and even that statute does not regulate minor access, much less access that "could" be had by a minor. Mass. General Laws c.140 § 131L(a). That statute does not apply to firearms "carried by or under the control of the owner or other lawfully authorized user," including minors. (Id.). California addresses access by minors, providing, in Cal. Penal Code § 25100, that 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). California also creates safe harbors under Calif. Penal Code 25105, providing that the safe storage requirements of Section 25100 do not apply where "[t]he firearm is kept in a locked container or in a location that a reasonable person would believe to be secure," or where the "[t]he person who keeps a firearm on premises that are under the person's custody or control has no reasonable expectation, based on objective facts and circumstances, that a child is likely to be present on the premises." Similarly, New York very recently (2019) enacted a storage bill which requires that a firearm be locked up if the owner "KNOWS, OR HAS REASON TO KNOW, THAT A PERSON LESS THAN SIXTEEN YEARS OF AGE IS LIKELY TO GAIN ACCESS." Senate Bill S.2450 (2019), amending N.Y. Penal Code 265.50. That bill completely exempted from its coverage a person under the age of 16 "WHO IS THE HOLDER OF A HUNTING LICENSE." It further provides that the penalty for a failure to safety store firearms "IS A VIOLATION PUNISHABLE ONLY BY A FINE OF NOT MORE THAN TWO HUNDRED FIFTY DOLLARS." Id.

The bill goes far beyond such requirements. Indeed, the only general exemption from the criminal provisions of the bill is for firearms that are both stored unloaded and "RENDERED INOPERABLE TO ANYONE OTHER THAN AN ADULT." Again, that provision is hopelessly vague; it is virtually impossible to think of a manner of storage in which the firearm is operable by an 18 year-old, but rendered inoperable by a 17 year-old. That requirement might be read, at best, as requiring that the firearm be stored completely inoperable, which was, of course, the very requirement that was struck down in Heller. The bill creates the impossible standard that the guns be operable only by an adult and thus access to an

inoperable gun would violate the bill if it was possible for a minor to render it operable. If it possible for an adult to render the gun operable it most certainly will be possible for a 17 year-old to render it operable. The bill is too clever by half in its attempt to evade Heller. These requirements will not survive a court challenge.

Finally, the bill 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 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 many 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 for “immediate” 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. What’s next? Bans on unsupervised access to kitchen knives?

Thank you for reading my testimony and I urge you to oppose this legislation.

Chris Vincent