MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 10, 2022

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 780

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), 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 in OPPOSITION to HB 780 as President of MSI, as a citizen, and as a parent of my 22 year-old daughter currently attending an institution of higher learning in Maryland.

The Bill:

This bill would amend MD Code, Criminal Law, 4-102(b) to provide that:

(2) EXCEPT AS PROVIDED IN PARAGRAPH (3) OF THIS SUBSECTION, A PERSON MAY NOT CARRY OR POSSESS A FIREARM ON THE PROPERTY OF A PUBLIC INSTITUTION OF HIGHER EDUCATION.
(3) A PERSON MAY NOT KNOWINGLY CARRY OR POSSESS A FIREARM ON THE PROPERTY OF A PUBLIC INSTITUTION OF HIGHER EDUCATION IF THE PERSON WAS PREVIOUSLY FOUND GUILTY OF A VIOLATION OF PARAGRAPH (2) OF THIS SUBSECTION.

The bill punishes a violation of new subsection (b)(2) as a civil offense with a fine of $2,500. The bill provides that a violation of new subsection (b)(3) is a misdemeanor, punishable with 18 months in prison and a fine not exceeding $1,000, or both.

The bill makes a few exceptions, such as for armored car employees, individuals authorized to carry a firearm in the "regular course of employment" and persons who

have written authorization or invitation from a college PRESIDENT for display or "historical demonstration." The bill also exempts:

THE AREA SURROUNDING A BUILDING OWNED OR OPERATED BY A PUBLIC INSTITUTION OF HIGHER EDUCATION FOR THE PURPOSE OF STUDENT HOUSING, TEACHING, RESEARCH, OR ADMINISTRATION, IF:
(I) THE AREA IS NOT LOCATED OTHERWISE ON A CAMPUS OF A PUBLIC INSTITUTION OF HIGHER EDUCATION; AND
(II) THE POSSESSION OF A FIREARM IN THE AREA IS NOT OTHERWISE PROHIBITED BY LAW.

The bill also exempts PROPERTY USED BY A PUBLIC INSTITUTION OF HIGHER EDUCATION THAT IS OWNED BY AN INDIVIDUAL OR A PRIVATE ENTITY, **unless** THE PROPERTY IS USED FOR STUDENT HOUSING. Finally, the bill would amend Section 15–134 of the Education article of the Maryland Code to require colleges to post signs at PROMINENT LOCATIONS ON THE PROPERTY OF THE PUBLIC INSTITUTION OF HIGHER EDUCATION that are DESIGNED TO PROVIDE NOTICE OF THE PROVISIONS OF § 4–102(B)(2) OF THE CRIMINAL LAW ARTICLE PROHIBITING THE POSSESSION OF FIREARMS. The bill contains no exemption for carry permit holders who have been screened and investigated by the Maryland State Police under MD Code, Public Safety, § 5-306.

The Bill Is Bad Policy And Unconstitutional

First, this bill is a solution in search of a problem. It creates and imposes punishments on a whole new class of individuals **without any showing of need**. For example, the University of Maryland Code of Student Conduct §10(d) already bans and makes subject to disciplinary action any "[u]nauthorized on campus or illegal off campus use, possession, or storage of any weapon." The Frostburg State University Policy Statement, in rural western Maryland, takes a slightly different approach. Instead of a flat ban, the college's Policy Statement provides that "[p]ossession of firearms or potentially dangerous weapons or explosives is not permitted on university property *unless they have been properly registered and secured with University Police*." (§11) (emphasis added). That policy allows students to "check out" firearms from the campus police for recreational use, such as hunting, which is a common, lawful pursuit in rural Maryland. (Id.).

We are aware of no evidence suggesting that these sorts of regulations have not been fully effective. Yet this bill would ban Frostburg State's practice by prohibiting any possession of the "checked out" firearm on the way to and from the campus police station. By banning and punishing the mere innocent possession of a firearm on college property, the Bill eliminates the ability of college administrators to create its own policies appropriate to the area and apply and enforce their own rules in each case in light of the particular circumstances presented. The bill takes these

judgments away from college administrators and effectively creates a mandatory enforcement framework, the sort of criminal law that the General Assembly has sought to avoid in recent years. Every arguably unauthorized but otherwise innocent firearm possession will escalate from a possible disciplinary issue into a State law violation with the obvious potential to adversely affect the future of the persons involved.

Second, unlike existing State law that addresses possession of weapons by **minors at school** (MD Code, Criminal Law, § 4-102), this bill completely disarms otherwise law-abiding **adults in their homes**, including the apartments of older students. The Bill specifically bans firearm possession on PROPERTY USED BY A PUBLIC INSTITUTION OF HIGHER EDUCATION THAT IS OWNED BY AN INDIVIDUAL OR A PRIVATE ENTITY if such property IS USED FOR STUDENT HOUSING. That coverage would even include off-campus housing occupied by older graduate students, such as the Graduate Gardens and Graduate Hills apartment communities used by graduate students attending the University of Maryland. http://reslife.umd.edu/housing/graduate/.

A ban on home possession of a firearm by adults is flatly 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. (Emphasis added). 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). These considerations apply to publicly-owned housing no less than to private housing. See, e.g., *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014) (applying the Delaware Constitution's counterpart to the Second Amendment).

The proper analysis for cases arising under the Second Amendment is presently before the Supreme Court on a writ of certiorari granted in *NYSRPA v. Bruen*, No. 20-843, *cert. granted*, 141 S.Ct. 2566 (2021), a case involving a challenge to New York's "good cause" requirement for carry permits. That case was orally argued before the Court on November 3, 2021, and awaits a decision by the Court. We believe that it is highly likely that the Supreme Court will, in *Bruen*, strike down the New York law at issue in that case. In so holding, the *Bruen* Court also may well make clear that the "text, history and tradition" test, actually used in *Heller*, is controlling in determining the constitutionality of gun control legislation – not the more permissive "tiers of scrutiny" employed by lower courts. Petitioners in *Bruen* have specifically requested such a ruling in briefing and the issue came up repeatedly at oral

argument. Indeed, the amicus brief, filed by the United States in *Bruen,* likewise endorsed this test, at least in part.

Four members of the Supreme Court also recently endorsed this text, history and tradition approach in *NY State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S.Ct. 1525 (2020). See id. at 1526 (Kavanaugh, J.) (concurring in judgment of mootness). Id. at 1540-41 (Alito, J., dissenting from the judgment of mootness). Justice Thomas made the same point very recently in another case. *Rogers 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 adopt the "text, history and tradition" test as controlling, either in *Bruen*, or in the next case in which the issue is presented. See *Kanter v. Barr*, 919 F.3d 437, 452-53 (7th Cir. 2019) (Barrett, J., dissenting). The bill will not survive scrutiny under that test as there is no history or tradition at the time of the Founding for banning the mere possession of firearms by adult students.

Third, the bill's exclusion of all permit holders from college property is unwarranted and unwise. Persons issued such permits are the most law-abiding individuals in the country, with a crime rate lower than that of sworn, active duty police officers. See http://crimeresearch.org/2014/07/new-report-from-crime-prevention-research-center-shows-11-1-million-americans-hold-concealed-carry-permits/. For example, researchers found that "concealed carry licensees [in Texas] had arrest rates far lower than the general population for every category of crime." H. Sterling Burnett, Nat'l Ctr. For Policy Analysis, Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors 1 (2000). Florida has issued nearly 3.5 million concealed carry licenses since 1987 and has revoked less than 0.5% of them for any reason, with the vast majority of those revocations having nothing to do with misuse of a firearm. See Florida Dep't Of Agric. & Consumer Servs. Div. Of Licensing, Concealed Weapon Or Firearm License Summary Report, Oct. 1, 1987 - January 31, 2017.

Similarly, the recent study (January 2019) published by the American College of Surgeons (hardly a gun group) found that there was "no statistically significant association between the liberalization of state level firearm carry legislation over the last 30 years and the rates of homicides or other violent crime." https://www.sciencedirect.com/science/article/pii/S107275151832074X. The FBI has found that permit holders have stopped violent crime repeatedly. Specifically, the FBI found that out of the 50 mass shooting incidents studied, "[a]rmed and unarmed citizens engaged the shooter in 10 incidents. They safely and successfully ended the shootings in eight of those incidents. Their selfless actions likely saved many lives." FBI, Active Shooter Incidents in the United States in 2016 and 2017 at 8. Available

at https://www.fbi.gov/file-repository/active-shooter-incidents-us-2016-2017.pdf/view.

In short, there is every reason to allow persons with carry permits to carry widely. That point is, if anything, even more applicable to Maryland as Maryland subjects permit applicants to extremely intensive background investigations, including personal interviews and vetting by the State Police. An applicant for a permit must not only demonstrate a "good and substantial reason" to have a permit, he or she must undergo 16 hours of intensive training, including instruction in the law, and pass a difficult live-fire qualification requirement. Excluding such lawful permit holders from college property is nonsensical.

Lawfully armed individuals have actually stopped such mayhem on a college campus, such as at the 2002 shooting at the Appalachian Law School in Virginia. See https://en.wikipedia.org/wiki/Appalachian_School_of_Law_shooting. Studies confirm that "[c]oncealed carry permit holders have stopped attacks at schools and other places before police arrived" including shootings in Pearl, Miss., and Edinboro, Pa.," and "in busy downtowns such as Memphis; in churches such as the New Life Church in Colorado Springs; in malls in Portland, Ore., and Salt Lake City; and outside an apartment building in Oklahoma." http://crimeresearch.org/2014/07/new-report-from-crime-prevention-research-center-shows-11-1-million-americans-hold-concealed-carry-permits/. "According to the Centers for Disease Control and Prevention, almost every major study on defensive gun use has found that Americans use their firearms defensively between 500,000 and 3 million times each year." https://datavisualizations.heritage.org/firearms/defensive-gun-uses-in-the-us/.

Fourth, in broadly banning firearms from college property, the bill uses vague, undefined terms. For example, the bill exempts THE AREA IS NOT LOCATED OTHERWISE ON A CAMPUS OF A PUBLIC INSTITUTION OF HIGHER EDUCATION, but the bill never defines "campus" or what is covered by this exclusion. While the term "campus" is easy to apply for some areas, it is far less so for other areas. The term might include parking areas, as well areas located all over Maryland, including rural areas, such as the Clarksville Facility, https://agresearch.umd.edu/cmrec/clarksville-facility, and the "Terp Farm" located 15 miles from College Park in Upper Marlboro, http://terpfarm.umd.edu/ and the extensive acreage in agricultural extension facilities located all over the State, https://extension.umd.edu/. The average individual is left in the dark concerning such areas. Defining terms should be part and parcel of any criminal legislation. This bill does not even attempt such definitions.

The use of such undefined terms in a criminal statute is a violation of due process under the Article 24 of the Maryland Declaration of Rights. See *Galloway v. State*, 365 Md. 599, 614, 781 A.2d 851 (2001) ("The void-for vagueness doctrine as applied to the analysis of penal statutes requires that the statute be 'sufficiently explicit to

inform those who are subject to it what conduct on their part will render them liable to its penalties.'") (citation omitted). Under Article 24, a statute must provide "legally fixed standards and adequate guidelines for police ... and others whose obligation it is to enforce, apply, and administer [it]" and "must eschew arbitrary enforcement in addition to being intelligible to the reasonable person." (Id. at 615). These vagueness concerns also apply to statutes that impose **only** civil penalties. See *Madison Park North Apartments, L.P. v. Commissioner of Housing and Community Development*, 211 Md. App. 676, 66 A.3d 93 (2013), *appeal dismissed,* 439 Md. 327, 96 A.3d 143 (2014). This bill imposes both types of punishments. Defining terms is not that hard. While the bill requires signage, nothing in the bill limits the reach of these penalty provisions to only those areas which are signed. A college's failure to post or maintain the required signs is not a defense to the penalties imposed by the bill.

Fifth, by banning virtually all otherwise lawful possession of firearms on college property, this bill would actually make colleges more likely to be attacked by a mass shooter, rather than less likely. Everyone is less safe. Certainly, there is no evidence that a gun-free zone actually makes people safer. See https://www.rand.org/research/gun-policy/analysis/gun-free-zones.html. A potential mass shooter, willing to commit murder, will simply not care that this bill would make his possession of a firearm illegal. The numbers are chilling: between 1950 and 2018, 94% of all mass shootings (as properly defined by the FBI) have taken place in gun free zones. https://bit.ly/3CkVKmA. Between 1998 and December 2015, the percentage is 96.2%. https://bit.ly/3hJKBlT.

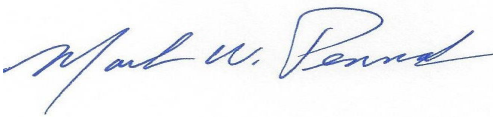
Mass shooters are drawn to gun-free zones as they know that they will be unopposed for extended periods while they commit their horrific rampages. See Report from the Crime Prevention Research Center (Oct. 2014), at 10 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629704) ("mass public shooters pay attention to whether people with guns will be present to defend themselves."). No sane person would post a gun-free zone sign outside their own home. There is no value in eliminating all doubt about whether an intruder will encounter armed resistance to a break-in. Yet, the bill violates this common sense tenet by actually **requiring** the college to announce to the world its status as a gun-free zone, as the Bill amends Section 15-134 of the Education article to require signs to that effect be posted all over college property.

The gun-free zones thus created are immense in size. The main campus alone of the University of Maryland in College Park is 1,335 acres. It is quite impossible to control access to such areas and the bill contains no provision requiring a college to do so. If the State is going to impose a gun-free zone, then it should fund and provide adequate armed security for such zone. Otherwise the gun-free zone is simply a "sitting duck" zone. The bill fails to provide such security. See https://thefederalist.com/2019/08/16/im-professor-carry-gun-campus-heres/.

Sixth, actual enforcement of these prohibitions will quite likely be haphazard, difficult and discriminatory. Like most gun control laws, the burdens imposed by this bill will fall most heavily on persons from disadvantaged or minority communities who are more likely to be illegally searched and arrested. Such illegal and unconstitutional practices are, of course, at the heart of the reasons for the imposition of a federal Consent Decree on the Baltimore Police Department. See *United States v. Baltimore Police Dept.*, 249 F.Supp.3d 816, 817 (D. Md. 2017) ("The United States alleged Defendants had engaged in a pattern or practice of conduct by law enforcement officers that deprives persons of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States."). See also *Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330, 347 (4th Cir. 2021) (en banc) (reversing dismissal of a civil rights suit alleging that BPD's aerial surveillance program violated the Fourth Amendment protection against unreasonable searches, noting that the "heaviest" impact of such programs fall on "disadvantaged" communities, and noting further that "[b]ecause those communities are over-surveilled, they tend to be over-policed, resulting in inflated arrest rates and increased exposure to incidents of police violence."); *Rich v. Hersl*, 2021 WL 2589731 (D. Md. 2021) (a civil rights case discussing the "now defunct and disgraced Gun Trace Task Force ("GTTF"), a unit within the Baltimore City Police Department").

The bill is poorly thought out. We urge an unfavorable report.

Sincerely,



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