MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 14, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 745

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4) all-volunteer, non-partisan, non-profit 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 SB 745.

The Bill:

MD Code Criminal Law § 4-203(**a**), sharply limits the right of otherwise law-abiding Marylanders to wear, carry or transport a handgun in the State. Specifically, subsection 4-203(a)(1) provides in pertinent part: "(a)(1) Except as provided in subsection (b) of this section, a person may not: (i) wear, carry, or transport a handgun, whether concealed or open, **on or about the person**; (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State." Subsection 4-203(a)(2) provides that "[t]here is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly." This law broadly bans such wear, carry or transport **everywhere** in Maryland.

Subsection 4-203(**b**) then establishes exceptions to the broad ban by subsection 4-203(**a**). One of those exceptions is for "the wearing, carrying, or transporting of a handgun, in compliance with any limitations imposed under § 5-307 of the Public Safety Article, by a person to whom a permit to wear, carry, or transport the handgun has been issued under Title 5, Subtitle 3 of the Public Safety Article." See subsection 4-203(b)(2). Other exceptions include the wear, carry and possession "on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases" (subsection 4-203(b)(6)), the wear, carry or transport on the person or in a vehicle while the person is transporting the handgun to or from the place of legal purchase or sale, or to or from a bona fide repair shop, or between bona fide residences of the person, or between the bona fide residence and place of business of the person, if the business is operated and owned substantially by the person if each handgun is unloaded and carried in

an enclosed case or an enclosed holster." Subsection 4-203(b)(3). Any wear, carry or transport of a handgun that is not encompassed by an exception is a crime punishable under current law with 3 years of imprisonment on first offense and/or a fine of $2,500. **This Bill would increase that term of imprisonment from 3 years to 5 years.**

Bruen: The proper analysis for cases arising under the Second Amendment is set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S.Ct. 2111 (2022), where the Court struck down as unconstitutional New York's "proper cause" requirement for issuance of a permit to carry a handgun in public. *Bruen* squarely holds that Second Amendment protects the right to carry in public while also making clear that a State may condition that right on obtaining a wear and carry permit from the State, as long as the permit is issued on an otherwise reasonable and objective "shall issue" basis. *Bruen*, 142 S.Ct. at 2138 & n.9.

Prior to the Supreme Court's decision in *Bruen*, the Maryland State Police enforced the requirement, found in MD Code, Public Safety, § 5-306(b)(6)(ii), that an applicant for a wear and carry permit demonstrate a "good and substantial reason" for wishing to carry a firearm in public. In *Bruen*, the Court specifically cited this statutory requirement as the functional twin of New York's "good cause" requirement and thus, by necessary implication, likewise invalidated Maryland's "good and substantial reason" requirement for a carry permit. See *Bruen*, 142 U.S. at 2124 n.2 (citing the Maryland statute as one of six State statutes that had "analogues to the 'proper cause' standard" of the New York statute invalidated in *Bruen*). As a result, the Maryland Attorney General and the Governor instructed the State Police that the "good and substantial reason" requirement could no longer be enforced. https://bit.ly/3UraHuB. The Maryland Court of Special Appeals agreed. *Matter of Rounds*, 255 Md.App. 205, 213, 279 A.3d 1048 (2022) ("We conclude that this ruling [in *Bruen*] requires we now hold Maryland's 'good and substantial reason' requirement unconstitutional."). Maryland wear and carry permits are thus now issued on a "shall issue" basis to all applicants who otherwise satisfy the stringent training, fingerprinting and investigation requirements otherwise set forth in MD Code, Public Safety, § 5-306(a)(5),(6).

The *Bruen* Court ruled that "the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S.Ct. at 2127. Under that standard articulated in *Bruen*, "the government may not simply posit that the regulation promotes an important interest." 142 S.Ct. at 2126. Likewise, *Bruen* expressly rejected deference "to the determinations of legislatures." Id. at 2131. *Bruen* thus abrogates the two-step, "means-end," "interest balancing" test that the courts had previously used to sustain gun laws, including the storage law at issue in *Jackson*. 142 S.Ct. at 2126. Those prior decisions are no longer good law.

The constitutionality of Section 4-203(a)'s broad ban on wear, carry and transport obviously turns on strict adherence to *Bruen*. As long as Maryland issues carry permits on an otherwise objective and reasonable basis, then the State may condition the wear, carry and transport of handguns in the State on obtaining such a permit. That said, the Maryland carry permit under existing law is quite difficult and expensive to obtain. Permit holders in Maryland are fingerprinted, thoroughly investigated by the State Police and, unless exempt,

receive at least 16 hours of training by a State-certified, private instructor. MD Code, Public Safety, § 5-306(a)(5),(6). These training requirements include a mandatory, course of live-fire in which the applicant must achieve a specific minimum score. COMAR 29.03.02.05 C.(4). Private instruction for the permit averages around $400-$500 per person. Add to that sum the $75 application fee, and the roughly $70 in fingerprint fees plus any incidental costs, such as ammunition, the cost of obtaining a permit is at least $600.00. Of the 43 "shall issue" States identified in *Bruen*, 142 U.S. at 2123 n.1, only Illinois requires as much training as Maryland. Permit holders, nationwide, are the most law-abiding persons in America, with crime rates a fraction of those of police officers. See https://bit.ly/3IeqtGu.

The Bill Wrongly *Increases* the Punishment For Exercising A Constitutional Right: Section 4-203(a) was enacted in 1972, long before Maryland or the Supreme Court recognized that public carry is a constitutional right. Under *Bruen*, there is a right to carry in public by an otherwise law-abiding citizen of the State. *Bruen* allows the State to demand that citizens obtain a carry permit, but the underlying holding of *Bruen* is that "the Second Amendment guarantees a general right to public carry," 142 S.Ct. at 2135, and that there is a "general right to publicly carry arms for self-defense." *Bruen*, 142 S.Ct. at 2134. In contrast, Section 4-203(a) was premised on the theory that carry was a privilege and that the Second Amendment did not even embody an individual right at all, much less that the right applied to the States. Those assumptions were abrogated by the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (recognizing an individual right to keep and bear arms), and *McDonald v. City of Chicago*, 561 U.S. 742, 783-84 (2010) (holding that the Second Amendment was a fundamental right and thus incorporated as against the States).

Bruen now makes clear that the right to keep and bear arms extends outside the home. After *Bruen*, all 50 States and the District of Columbia are now "shall issue" jurisdictions. Twenty-four States are "constitutional carry" jurisdictions in which carry is permitted without any permit at all. Those States are Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia and Wyoming. See https://bit.ly/3QM6Ms0. Almost all these States enjoy a violent crime rate well below that of Maryland. For example, Maryland's murder rate **substantially** exceeds that of neighboring Pennsylvania and Virginia, where "shall issue" carry permits have long been issued and carry is widely practiced. Maryland has the 4th highest murder rate in the country at a rate of 9 per 100,000. Pennsylvania comes in 19th highest at a rate of 5.8 per 100,000 and Virginia's rate is even lower at 5.3 per 100,000. http://bit.ly/3IdEFzr. Yet, Pennsylvania has over 1.5 million current carry permit holders and Virginia has over 800,000 permit holders (resident and non-resident). See http://bit.ly/3xca7bb (at 18). Open carry is permitted in both States. At the end of 2022, even after the surge of permit applications after *Bruen*, the State Police informed the Senate Judicial Proceedings Committee in January that Maryland had only about 80,000 permits issued by the end of 2022. http://bit.ly/3E0lAOB. Any thinking person in Maryland concerned about murder would gladly trade spots with Virginia or Pennsylvania. Honestly, does any member of this Committee truly feel unsafe in Virginia or Pennsylvania?

As explained, all law-abiding citizens enjoy this right to carry in public, subject only to the condition that a State may require such persons to obtain a "shall-issue" permit in order to exercise the right in public. After the decision in *Bruen*, State's Attorneys across the State

were forced to dismiss charges against persons who were merely carrying without a permit and who were not otherwise disqualified and had not been arrested for any other crime. Thus, the effect of Section 4-203(a) is to severely punish those persons who cannot afford the high costs of getting a permit, or have not yet, for some reason, had an opportunity to obtain a carry permit. This Bill increases the penalty for carry by these otherwise innocent people from 3 years to 5 years of imprisonment. It simply has no other application.

That increase to 5 years is unconscionable. The State should be **reducing** its penalties for unpermitted carry by otherwise law-abiding persons, not increasing such penalties. The current 3-year penalty is disqualifying under both State and federal law. See MD Code, Public Safety, 5-101(g)(3); 18 U.S.C. 922(g)(1); 18 U.S.C. 921(a)(20). Thus, a conviction under Section 4-203 permanently strips a person of his or her Second Amendment rights. A 5-year penalty would likewise be permanently disqualifying. Under *Bruen*, the State's interest in punishing carry outside the home is constitutionally limited to encouraging otherwise law-abiding persons to obtain a carry permit, which the State Police must now issue on a "shall issue" basis. Thus, the penalty for non-permitted carry should be set at the lowest level sufficient to encourage individuals to obtain the carry permit (along with the associated training and background checks). We suggest a penalty of no more than a fine. At a minimum, the penalty should not *exceed* 2 years imprisonment, which is the level at which a conviction becomes permanently disqualifying under State and federal law.

Attaching a disqualifying punishment for carry by the law-abiding is unlikely to survive judicial review post-*Bruen*. Under this standard adopted in *Bruen*, it is highly questionable whether the State may impose a firearms disqualification for a misdemeanor violation not involving a violent crime. For example, the Court of Appeals for the Fifth Circuit just applied *Bruen* to invalidate 18 U.S.C. § 922(g)(8), which imposes a firearms disqualification on a person subject to a domestic violence restraining order. See *United States v. Rahimi*, 59 F.4th 163 (5th Cir. Feb. 2, 2023), *as revised and superseded by* --- F.4th ----2023 WL 2317796 (5th Cir. March 2, 2023). Similarly, the court in *United States v. Quiroz*, --- F.Supp.3d ----, 2022 WL 4352482 (W.D. Tex. 2022), invalidated 18 U.S.C. 922(n) (imposing a disqualification for persons under indictment). And in *United States v. Harrison*, --- F.Supp.3d ---, 2023 WL 1771138 (W.D. Okla. 2023), the court invalidated 18 U.S.C. 922(g)(3), which imposes a disqualification on users of substances made unlawful by the federal Controlled Substances Act, including cannabis. See also *United States v. Price*, --- F.Supp.3d ---, 2022 WL 6968457 (S.D. W.Va. 2022) (invalidating 18 U.S.C. § 922(k), holding that criminalizing the knowing possession of a firearm with an obliterated serial number was unconstitutional under *Bruen*).

The Court of Appeals for the Third Circuit, sitting en *banc*, has just heard oral argument in *Range v. United States*, 53 F.4th 262 (3d Cir. 2022), *rehearing en banc granted*, 56 F.4th 992 (3d Cir. Jan. 2023). The issue in *Range* is whether a firearms disqualification for a non-violent State misdemeanor violation punishable by more than 2 years imprisonment is constitutional under *Bruen*. Federal law imposes that disqualification under 18 U.S.C. § 922(g), as defined in 18 U.S.C. § 921(a)(20). As noted, Maryland imposes the same disqualification under MD Code, Public Safety, § 5-101(g)(3). While a decision in *Range* has yet to issue, from the oral argument it appears that the odds are good that such a disqualification will not survive. While Maryland is in the Fourth Circuit, such a holding in *Range* will likely lead to challenges to a broad range of disqualifications imposed by Maryland law, including the disqualifications imposed by Section 4-203.

Severely penalizing carry without a permit is also counterproductive and punishes the otherwise law-abiding who carry out of fear. There is no doubt that ordinary, law-abiding citizens in Baltimore are carrying, notwithstanding Section 4-203. A 2020 Johns Hopkins study found that carry by otherwise law-abiding persons in Baltimore is very common **because** of violent crime and the lack of trust in the ability of the police to protect them. See Johns Hopkins Center for Gun Policy and Research, *Reducing Violence and Building Trust* at 5 (June 2020) ("In Baltimore neighborhoods most impacted by gun violence, residents lack faith in BPD's ability to bring individuals who commit violence to justice. Perceived risk of being shot and perceptions that illegal gun carrying is likely to go unpunished lead some residents to view gun carrying as a necessary means for self-defense.") (available at https://bit.ly/3DYKgXV). The law enforcement abuses of the Gun Trace Task Force in Baltimore are too numerous and too recent to ignore. http://bit.ly/3ZEJwAo. The social justice issues associated with further criminalizing these individuals should be apparent.

As much as some may assert that carrying is not the "answer" to violent crime, that emotionally driven belief is not shared by those who are most at risk of a violent attack. As the Hopkins study confirms, otherwise law-abiding people who fear for their safety will simply ignore State laws banning carry, **regardless** of the penalties. Increasing punishments on carrying will not deter people who perceive that their survival is at stake. As Johns Hopkins Professor Daniel Webster told the Senate in January, the data is clear that longer sentences do not deter crime. http://bit.ly/3E0lAOB (starting at 1:00 hr.). That is confirmed by the Department of Justice's National Institute of Justice, which has stated, "[r]esearch shows clearly that the chance of being caught is a vastly more effective deterrent than even draconian punishment." https://nij.ojp.gov/topics/articles/five-things-about-deterrence. Increasing the penalty for such otherwise innocent persons cannot be justified.

Such a reduction of penalties for the otherwise law-abiding would not hamper enforcement of existing laws that bar **disqualified** persons from possessing (much less carrying) firearms. Illegal carry by disqualified persons, MD Code, Public Safety, § 5-101(g) (defining "disqualifying crime"), is separately and severely punished. Under federal law, the mere possession of any firearm or modern ammunition by a disqualified person is a 10-year federal felony. 18 U.S.C. § 922(g)(1), 18 U.S.C. § 921(a)(20)(B). Under Maryland State law, mere possession of a handgun by any disqualified person who was not previously convicted of a felony is a serious misdemeanor and is punishable by up to 5 years imprisonment and a $10,000 fine. MD Code, Public Safety, § 5-144(b). Mere possession by persons previously convicted of **a felony** is an additional felony and is punishable by not less than 5 years but not more than 15 years in prison. MD Code, Public Safety, § 5-133(c)(1). Possession by a disqualified person of a long gun is a serious misdemeanor and is punishable by up to 3 years in prison. MD Code, Public Safety, § 5-205(d). As is apparent, the Bill is unnecessary to address carry of a handgun by a disqualified person as those persons are already severely punished under existing law.

Yet, bizarrely, this Bill would punish carry by **non**-disqualified persons **more** severely than carry of a long gun by **disqualified** persons and inflict the same penalty for the carry of a handgun by a (non-felon) **disqualified** person. It should be obvious that carry by disqualified persons warrants harsher sanctions than carry by ordinary law-abiding persons who are **NOT** disqualified. After all, disqualified persons have already been convicted of a serious crime punishable by more than 2 years of imprisonment. The NON-disqualified person may

have a completely clean record and may be carrying because she is living in fear of violent attack. The Bill ignores these differences in circumstances. Those circumstances matter.

Amendments to Section 4-203 Are Required By *Lawrence v. State*: and *Bruen*. Instead of increasing penalties under Section 4-203, the General Assembly should be paying heed to the Maryland Court of Appeals' (now renamed as the Maryland Supreme Court) decision in *Lawrence v. State*, 475 Md. 384, 408, 257 A.3d 588, 602 (2021). As noted, Section 4-203(a)(1)(i) criminalizes the wear, carry, and transport of a handgun "on or about the person." In *Lawrence*, Maryland's highest court held that the General Assembly intended to impose "strict liability" for any violation of Section 4-203(a)(1)(i). Strict criminal liability means that the defendant can be held to be criminally liable without regard to the defendant's actual knowledge or state of mind. But, in so holding, the Court stressed the importance of a *mens rea* requirement in the context of Section 4-203(a). While finding it unnecessary to resolve the issue in that case, the *Lawrence* Court suggested that a strict liability law, like Section 4-203(a) could violate the Due Process Clause for lack of notice because it not only bans wear, carry or transport "on or about" a person "leaves some questions about the notice afforded to defendants alleged of wearing, carrying, or transporting a handgun 'about' their person." 475 Md. at 421. The Court in *Lawrence* thus stated it was appropriate "**to signal to the General Assembly"** that, "in light of these policy concerns, ... **legislation ought to be considered**" to address "the scope CR § 4-203(a)(1)(i) given its classification as a strict liability offense." (Id. at 422). As a matter of good government, the General Assembly should respect such a "signal" from the State's highest court and "consider" changes to Section 4-203(a)(1)(i). This Bill should be amended to do so.

The changes "signaled" by *Lawrence* are easy to accomplish. The ban on carry, wear or transport "about" the person basically allows the arrest and prosecution of multiple occupants of a residence for the presence of a firearm in that location, regardless of whether a particular person even knew of the presence of the firearm. See *Jefferson v. State,* 194 Md.App. 190, 213-15, 4 A.3d 17 (2010). That result is both unfair and actively promotes discriminatory or arbitrary enforcement by the police and prosecutors. Such an abuse of gun laws and search and seizure laws is well documented in Baltimore and led to a federal consent decree that remains in force. http://bit.ly/3yyESaU. Such misconduct by law enforcement officers led to the arrest, prosecution and conviction of members of Baltimore's infamous Gun Trace Task Force. https://www.gttfinvestigation.org/. Given this sorry history, the mere prospect of such enforcement generates distrust in the community.

It should be obvious that few law-abiding citizens follow the legislative sausage-making of the Maryland General Assembly or are aware that Section 4-203(a)(1)(i) imposes strict liability. *Lawrence* makes clear that this lack of a *mens rea* requirement plus the use of vague, ill-defined terms ("on or about the person") will mean that Section 4-203 is at risk of being struck down as unconstitutionally vague in an appropriate case. This Bill does nothing to fix the constitutional concerns identified by the *Lawrence* Court. The Committee should exercise leadership and take up and resolve this issue, as the Maryland Supreme Court has requested. In our view, the correct approach under *Bruen* is to minimize the risk of unfair application of Section 4-203 to otherwise innocent persons who are merely exercising a constitutional right, albeit without a permit.

Federal law is instructive. Federal firearms law imposes specific *mens rea* requirements for virtually every firearms crime. For example, a violation of 18 U.S.C. § 922(a)(1)(B) (barring

"any person" except federal licensees from engaging in the "business" of the manufacture of firearms) is not a crime unless the person "willfully" violates that provision. See 18 U.S.C. § 924(a)(1)(D). Such a "willful" violation is a 5-year federal felony. (Id.). The Supreme Court has held that "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Bryan v. United States*, 524 U.S. 814, 191-92 (1998), quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (emphasis added). Similarly, a false statement on federal form 4473 used for purchasing a firearm is not a crime unless the false statement was made "knowingly." See 18 U.S.C. 922 (a)(6). See also 18 U.S.C. 924 (a)(2) (requiring that the violation of "subsection (a)(6), (h), (i), (j), or (o) of section 922" be done "knowingly").

No such *mens rea* requirement is found in this Bill or in Section 4-203(a)(1)(i). There is no excuse for this absence. After all, MD Code, Public Safety, § 5-144, expressly precludes a conviction for any violation of any provision of subtitle 1 of Title 5 of the Public Safety article (governing regulated firearms) unless the violation was done "knowingly." See *Chow v. State,* 393 Md. 431, 903 A.2d 388, 413 (2006) ("a person must know that the activity they are engaging in is illegal"). That provision likewise imposes a five-year term of imprisonment. As *Chow* recognizes, Section 5-144 embodies the commonsense realization that before people may be incarcerated for such lengthy times, the State should be required to prove a culpable state of mind. The same point is equally applicable to violations of Section 4-203.

Indeed, subsection 4-203(a)(2) creates the *opposite* presumption, providing that "[t]here is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly." Subsection 4-203(a)(1)(ii) applies to the "wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle." Such a presumption is of dubious constitutionality where (as is often the case) it is applied to justify the arrest of every person in a vehicle upon discovery of a single firearm in the vehicle. See *Leary v. United States*, 395 U.S. 6, 36-38 (1969) (striking down a statutory presumption and holding "that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, **unless** it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"). (Emphasis added). Stated simply, it is "not more likely than not" that every person in a vehicle would know that someone else in the vehicle was illegally transporting a handgun. The presumption thus, once again, acts to criminalize the innocent. It has been enforced in an arbitrary and discriminatory manner in the past and will be in the future unless the General Assembly amends the statute.

Finally, the United States Supreme Court so strongly disfavors strict liability criminal statutes that it will read in a *mens rea* requirement where none is in the text of the statute. See, e.g., *Staples v. United States*, 511 U.S. 600, 619 (1994) (holding that the government was required to prove that the defendant "knew" that his rifle possessed the characteristics of a prohibited machine gun). Similarly, in *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019), the Supreme Court held that the government must prove that an alien unlawfully in the United States, who is otherwise barred from possessing a firearm by federal law, knew that his presence in the United States was unlawful. The Court relied on the "longstanding presumption, traceable to the common law, that [the legislature] intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" Id. (citation omitted).

Lawrence rejected that presumption as to Section 4-203 because of *stare decisis*, but it did so with obvious misgivings about the lack of notice provided by Section 4-203. This Bill makes the situation even worse by increasing the penalty for violating what the *Lawrence* Court has found to be a strict liability law that fails to give adequate notice. Those misgivings noted in *Lawrence* are now even more warranted after *Bruen*, which held that there is a constitutional right to carry outside the home. This Bill ignores all these considerations and **increases** the punishment for people who may be "entirely innocent." *Staples*, 511 U.S. at 614. This Bill will not promote public trust in Maryland's failing criminal justice system.

Even apart from *Lawrence,* the Supreme Court's decision in *Bruen* requires that the State adjust its *mens rea* approach to the carriage of firearms outside the home in recognition that such carriage involves a constitutional right. In that context, ambiguity is intolerable in a strict liability statute. See *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) ("a criminal law that contains no *mens rea* requirement, * * * and infringes on constitutionally protected rights, * * * is subject to facial attack"). At minimum, such an adjustment should abolish the strict liability imposed by Section 4-203(a)(1). Such vagueness "may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; [and] it may authorize and even encourage arbitrary and discriminatory enforcement." Id. One need only review the actions of the Gun Trace Task Force to see such arbitrary and discriminatory enforcement of Section 4-203. See also *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("The Court has made clear that scienter requirements alleviate vagueness concerns.") (collecting case law).

Suggested Amendments To Section 4-203: We respectfully suggest the following amendments to this Bill to address these concerns identified in *Lawrence* and that arise from the holding in *Bruen*. As noted, *Lawrence* was concerned about the ambiguity associated with the use of "on or about" in Section 4-203(a)(1)(i), which contains no *mens rea* requirement and thus imposes strict liability. That subsection should thus be amended to strike "about" and to insert a "knowingly" *mens rea* provision into Section 4-203(a)(1). The "knowingly" requirement in 4-203(a)(1)(ii), could then be stricken as redundant. Taken together, the provisions would read (strikeout is a delete, bold is added language):

> Except as provided in subsection (b) of this section, a person may not **knowingly**:
> (i) wear, carry, or transport a handgun, whether concealed or open, on ~~or about~~ the person;
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State.

This "knowingly" *mens rea* is used in other provisions of Maryland firearms law. See, e.g., MD Code, Public Safety, § 5-138 (knowing possession or sale of stolen firearms), § 5-141 (knowing participation in a straw purchase) and § 5-144 (knowing violation of any provision in the subtitle). It is also, as noted above, the standard imposed in federal statutory law and by the Supreme Court in *Staples*. This *mens rea* requirement protects the innocent and establishes an appropriate threshold of culpability for prosecutions under Section 4-203(a), no less than for prosecutions under these other statutes. See *Liparota v. United States*, 471

U.S. 419, 426 (1985). The "rebuttable presumption" set forth in current law, § 4-203(a)(2), should be stricken as constitutionally problematic for the reasons outlined above.

As explained above, the decision in *Bruen* that law-abiding persons have a constitutional right to carry outside the home also requires an adjustment to the penalty provisions of Section 4-203(c). Specifically, Section 4-203(c) should be amended to reduce the penalty for carrying without a permit where the carry is by an otherwise law-abiding person who **would have been** eligible for a permit. As noted, under *Bruen*, a non-disqualified person has a constitutional right to carry outside the home and, under *Bruen*, Maryland is now a shall-issue State. Thus, for such persons, carrying without a permit is, at most, a failure to jump through all the expenses and other hoops necessary to procure a permit. As noted elsewhere, it costs roughly $600 to obtain a permit in Maryland ($400 for the 12 hours of mandatory training, $75 for the application fee, $70 for the live-scan fingerprint and the cost of ammunition for the live-fire training required by the State Police. The State may well have a legitimate interest in requiring persons to obtain a permit, but the State lacks a sufficient reason to attach a permanent disqualification for the failure to do so. The disparate impact of current law on persons from disadvantaged communities should not be perpetuated. Under *Bruen*, every law-abiding person, the rich and poor alike, have a right to armed self-defense.

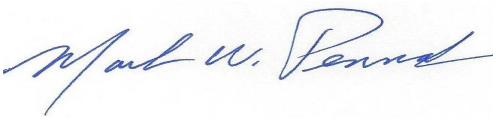
First offenses should be treated differently. Thus, at minimum, the penalty for a first offense by such an otherwise-eligible person should be reduced to less than 2 years, as crimes punishable by more than 2 years are defined as disqualifying under MD Code, Public Safety, § 5-101(g)(3). More fundamentally, we believe that the threat of imprisonment is utterly unnecessary to provide the necessary incentive to obtain a permit. A substantial civil fine will serve that objective without needlessly incarcerating or criminalizing people for what is, in essence, a permit violation. The penalty provisions of Section 4-203(c) should thus be amended to so provide.

Accordingly, we suggest the following amendment to Section 4-203(c) (new language is in bold):

> (2) If the person has not previously been convicted under this section, § 4-204 of this subtitle, or § 4-101 or § 4-102 of this title**, and if the person otherwise may possess a handgun under State and Federal law, then the person is subject to a civil fine not exceeding $1,000.00, otherwise:**
> (i) except as provided in items (ii) of this paragraph, the person is subject to imprisonment for not less than 30 days and not exceeding 3 years or a fine of not less than $250 and not exceeding $2,500 or both; or
> (ii) if the person violates subsection (a)(1)(iii) of this section, the person shall be sentenced to imprisonment for not less than 90 days

We urge an unfavorable report of the Bill as written. The Bill's imposition of a 5-year term of imprisonment for a violation of Section 4-203 is redundant of current law with respect to carry of a handgun by disqualified persons and is far too severe with respect to carry by otherwise law-abiding persons who are exercising the right recognized in *Bruen*, but simply have not yet obtained a carry permit.

Sincerely,



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