MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 9, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN SUPPORT OF SB 463

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 as President of MSI in SUPPORT of SB 463.

The Bill:

This Bill is very simple. It requires the State Police to refund the application fee ($75) for a wear and carry permit governed by MD Code, Public Safety, § 5-306, for any application that was denied between July 5, 2019, and July 5, 2022. The Bill requires that any person whose application was denied during that time period must file a claim for this refund and submit "supporting documents."

The Bill is Appropriate: On June 23, 2022, the Supreme Court decided *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). In *Bruen*, the Court struck down as unconstitutional New York's "proper cause" requirement for issuance of a permit to carry a handgun in public. Maryland's "good and substantial reason" requirement, found in MD Code, Public Safety, 5-306(a)(6)(ii), is indistinguishable from New York's "proper cause" requirement. Both New York and Maryland employed "may issue" statutes, as identified by the Court in *Bruen* itself. See *Bruen*, 142 U.S. at 2124 n.2 (identifying Maryland as a "may issue" State like New York). On July 5, 2022, the Maryland Attorney General and the Governor instructed the State Police that the "good and substantial reason" requirement could no longer be enforced. http://bit.ly/3Ss0fUt. 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."). As of July 5, 2022, Maryland wear and carry permits began to be issued on a "shall issue" basis to all applicants who otherwise satisfy the stringent training, fingerprinting and investigation requirements set forth in MD Code, Public Safety, § 5-306(a)(5),(6).

Under *Bruen*, the good and substantial reason requirement of Maryland law has always been unconstitutional. It is well-established that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97-98 (1993). See, e.g., *Watkins v. Healy*, 986 F.3d 648, 665 (6th Cir. 2021) (applying *Harper* to a claim of immunity).

That principle means that every past application of the "good and substantial reason" requirement was unconstitutional when it was applied and remains unconstitutional to this day. The 3-year period noted in this Bill applies the 3-year statute of limitations period set out in State law. MD Code, Courts and Judicial Proceedings, § 5-101. The recovery period is measured from July 5, 2022, the point at which the State stopped applying the "good and substantial reason" requirement after *Bruen*.

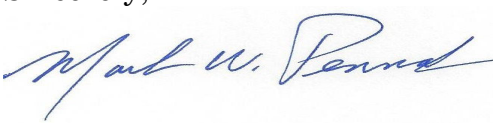
Under *Harper* and on these facts, if the "good and substantial reason" requirement had been imposed by a municipality, a damages suit under 42 U.S.C. § 1983, would undoubtedly lie to recover the costs suffered by the applicant because of the requirement. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Starbuck v. Williamsburg James City County School Board*, 28 F.4th 529, 533-34 (4th Cir. 2022). See also *Prince George's C. v. Longin,* 419 Md. 450, 19 A.3d 859 (2011) (applying Local Government Tort Claims Act, noting "we think it highly unlikely that Article 24 contains any exemption from liability for an unconstitutional pattern or practice").

The State and State agencies may be sued in State and federal courts for prospective equitable relief under the *Ex parte Young* doctrine. See, e.g., *Berger v. North Carolina State Conference of the NAACP,* 142 S.Ct. 2191, 2197 (2022); *Glover v. Glendening,* 376 Md. 142, 829 A.2d 532, 536-37 (2003). But, with the limited exceptions noted below, the State (and State agencies) generally enjoy sovereign immunity from *damages* actions. See *Haywood v. Drown*, 556 U.S. 729, 735 n.4 (2009); *Baltimore Police Dept. v. Cherkes*, 140 Md.App. 282, 780 A.2d 410, 425-26 (2001). Only because of sovereign immunity has the State escaped such damages suits under Section 1983 or in State court. Sovereign immunity has saved the State from paying for the consequences of its unconstitutional policies.

Sovereign immunity prevents recovery by those who have been wronged by the State. The proper approach is for the General Assembly to enact a bill that generally waives sovereign immunity for all unconstitutional actions of the State, just as it has for State torts. Indeed, there is no sovereign immunity under State law for violations of self-executing State constitutional provisions. *Benson v. State*, 389 Md. 615, 887 A.2d 525, 532 (Md. 2005) ("A private right of action for violation of Article 14 may lie because it is a self-executing constitutional provision."). Suits for damages are available under this analysis where "the constitutional provision at issue conveyed an individual right" and where a damages action would be otherwise available under Maryland common law, such as for violations of "the right to be free from unreasonable searches and seizures or the right to be free from the taking of private property without just compensation." Id. at 534. It would be a small step for the State to create a general waiver for suits in which violation of all constitutional rights, State and federal, is alleged and proven. The General Assembly certainly has that power. *Rodriguez v. Cooper*, 458 Md. 425, 430, 182 A.3d 853 (2018). The General Assembly need only amend MD Code, State Government, § 12-104, to so provide.

This bill is very narrow, as it is confined to violations of the federal constitutional right recognized in *Bruen*. Simple fairness and equity require that the State compensate applicants who were denied their constitutional rights to a carry permit because of the imposition of the "good and substantial reason" requirement during the statute of limitations period. Every such unsuccessful applicant expended far more than the $75.00 application fee. Such applicants also paid for fingerprinting and background checks, an amount that is roughly $70.00. Every applicant not otherwise exempt had to pay for 16 hours of instruction from a State-certified firearms instructor. That training runs roughly $400 and up. None of these costs account for the time lost taking the training and submitting the application. The very least the State can do is refund the application fee it charged for its unconstitutional practice. The number of such unsuccessful applications is relatively few, and the bill requires documentation from the unsuccessful applicant. This State can afford it. We urge a favorable report.

Sincerely,



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