MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 1 and SB 118

Introduction: 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. This testimony is respectfully submitted in OPPOSITION to SB 1 and SB 118.

SB 1: SB 1 provides that "A PERSON MAY NOT KNOWINGLY WEAR, CARRY, OR TRANSPORT A FIREARM ONTO THE REAL PROPERTY OF ANOTHER UNLESS THE OTHER HAS GIVEN PERMISSION, GENERALLY, EXPRESS EITHER TO THE PERSON OR TO THE PUBLIC TO WEAR, CARRY, PROPERTY. OR TRANSPORT A FIREARM ON THE REAL PROPERTY." A violation of this provision is punishable by imprisonment up to 1 year.

SB 1 also provides "A PERSON MAY NOT KNOWINGLY WEAR, CARRY, OR TRANSPORT AFIREARM WITHIN 100 FEET OF A PLACE OF PUBLIC ACCOMMODATION." A violation of this provision is likewise punishable by imprisonment by up to 1 year. The Bill does not allow for any exceptions to this ban. As written, the ban applies to the owners and operators of every such "place of public accommodation." Such owners are not allowed to give permission to anyone.

For purposes of this provision, a "place of public accommodation" is defined by reference to the meaning of that term set forth in MD Code, State Government, § 20-301, which very broadly defines the term to mean any place that "provides lodging to transient guests," any "restaurant" or similar location that sells "food or alcohol" for consumption "on or off the premises," any "retail establishment" that is operated by any "private or public entity" and "offers goods, services, entertainment, recreation or transportation."

SB 118: SB 118 provides that "A PERSON MAY NOT KNOWINGLY WEAR, CARRY, OR TRANSPORT A FIREARM ON PRIVATE PROPERTY OWNED BY ANOTHER UNLESS:

(1) THE OWNER OF THE PROPERTY HAS GIVEN THE PERSON EXPRESS PERMISSION TO WEAR, CARRY, OR TRANSPORT THE FIREARM ON THE PROPERTY, OR

(2) THE OWNER OF THE PROPERTY HAS POSTED A CLEAR AND CONSPICUOUS SIGN INDICATING THAT IT IS PERMISSIBLE TO WEAR, CARRY, OR TRANSPORT A FIREARM ON THE PROPERTY."

In a separate section, SB 118 provides that "A PERSON MAY NOT KNOWINGLY WEAR, CARRY, OR TRANSPORT A FIREARM IN OR ON PROPERTY CONTROLLED BY THE FEDERAL GOVERNMENT, THE STATE GOVERNMENT, OR A LOCAL GOVERNMENT." SB 118 creates a "REBUTTABLE PRESUMPTION" that any violation of its provisions is done "knowingly." A violation of these provisions is punishable by up to 2 years in prison and a $5,000 fine.

Introduction And The Current State of the Law: These Bills are in response to the June 2022 decision of the Supreme Court 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. That holding effectively abrogated Maryland's "good and substantial reason" requirement for permits, found in MD Code, Public Safety, 5-306(a)(6)(ii), as there is not a scintilla's worth of difference between New York's "proper cause" requirement and Maryland's "good and substantial reason" requirement. 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 background investigation requirements otherwise set forth in MD Code, Public Safety, § 5-306(a)(5),(6). The General Assembly should thus repeal the "good and substantial reason" requirement. Neither of these Bills purport to do so.

Bruen holds that "the Second Amendment guarantees a general right to public carry." 142 S.Ct. at 2135. See also *Bruen*, 142 S.Ct. at 2156 ("The Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions."); id., at 2134 (there is a "general right to publicly carry arms for self-defense." A "general right" to carry in public cannot be reasonably limited to particular places. *Bruen* explains that the "'textual elements' of the Second Amendment's operative clause— 'the right of the people to keep and bear Arms, shall not be infringed'— 'guarantee the individual right to possess and carry weapons in case of confrontation.'" 142 S.Ct. at 2134, quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The right to bear arms thus "naturally encompasses public carry" because confrontation "can surely take place outside the home." Id. The text of the Second Amendment is thus informed by the right of self-defense. No one can dispute that *Bruen* recognizes that the right of self-defense extends outside the home. See also *United States v. Rahimi*, --- F.4th ----, 2023 WL 1459240, slip op. at 12 (5th Cir. Feb. 2, 2023).

For the reasons explained below, if enacted into law, these extreme Bills (SB 1 and SB 118) would be "dead on arrival" in federal court as these bills are plainly intended to ban the very "general right" to carry in public that *Bruen* expressly holds that the State must allow under the Second Amendment. As Congressman Raskin recently stated in the context of a carry bill enacted by Montgomery County, "there is no reason for us to be passing ordinances that we know that will be struck down." https://youtu.be/TrM4_JVlURs?t=733 (at 13:56).

The Bills are extreme. Both Bills ban the possession of any firearm on the private or real property of "another" unless given permission by the owner, either via express permission (SB 1) or via signage (SB 118). Yet even such permission would be insufficient at or within 100 feet of any place of "public accommodation," where the ban would be total. SB 118 (unlike SB 1) also broadly bans possession of any firearm, without exception, 'in or on property controlled" by *any* governmental entity. Both Bills are unprecedented in American law. *Bruen* holds that a State may not enact legislation that "would in effect exempt cities from the Second Amendment" because such laws "would eviscerate **the general right to publicly carry arms for self-defense**." *Bruen*, 142 S.Ct. at 2134. The Court thus stated "there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department." Id. Taken together, the Bills would effectively "eviscerate" the right to carry in cities and throughout much of Maryland. Maryland's urban areas are no more "sensitive" than Manhattan.

Indeed, it is hard to think of a single location in urban Maryland at which firearms would not be banned as the Bills, taken together would ban possession on all private property open to the public and on all government-controlled property, regardless of whether a person had a wear and carry permit. Carry on private property is presumptively banned. SB 118 bans carry in or on any government "controlled" property. What's left? Indeed, these Bills would quite literally ban all firearms by any person at the store of a **federally licensed or state licensed firearms dealer and thus force the closure of every such dealer**. The Bill would also literally prevent every business owner from carrying a firearm in his own business if it was open to the public. Yet, such business possession is currently allowed, without a carry permit, by MD Code, Criminal Law, §§ 4-203(b)(6) and 4-203(b)(7). By banning all firearms on or in all property controlled by any government, the Bills would literally ban hunting on all public lands and mandate the closure of firing ranges currently maintained by the Department of Natural Resources. The Bill would thus devastate economies of rural areas of the State that rely on hunting and deprive owners of much-need access to public ranges where skills can be honed and practiced. This ban on possession on government-controlled property would preclude the mere possession of firearms in locked containers and being shipped at airports in accordance with TSA regulations. 49 C.F.R. § 1540.111(c), 1544.203(f). One must seriously question whether any thought given to these realities in crafting the Bill.

A word on penalties. SB 1 punishes violations by up to one year of imprisonment. The punishment for a violation of SB 118 is up to (but not exceeding) 2 years imprisonment. Neither punishment creates a disqualification for the possession of firearms. See MD Code, Public Safety, § 5-101(g) (defining disqualifying crime as a misdemeanor punishable by

more than 2 years imprisonment); 18 U.S.C. § 921(a)(20) (same). But, for permit holders (and for everyone with respect to handguns), the penalty is likely to be much higher. That is because nothing in these Bills amends the broad ban on the wear, carry and transport of handguns imposed by MD Code, Criminal Law, § 4-203(a), subject to specific exceptions in subsection 4-203(b). Pursuant to the authority granted by MD Code, Public Safety, § 5-307, the State Police have placed a restriction on every permit providing that the permit is "not valid where firearms are prohibited by law." That means every "sensitive place" ban on firearms imposed by the State, by an agency regulation or by a locality invalidates a permit at that location and makes the permit holder open to prosecution under MD Code, Public Safety, 4-203(a), a violation of which is punishable by up to 3 years imprisonment for the first offense. Section 4-203(a) is a strict liability criminal statute, and thus does not require the State to satisfy any *mens rea* requirement. See *Lawrence v. State*, 475 Md. 384, 257 A.3d 588 (2021). A conviction under Section 4-203(a) results in a life-time firearms disqualification under State and federal law. A simple mistaken entry into a "sensitive place" can thus have draconian consequences for a permit holder. Indeed, broad "sensitive area" restrictions would effectively ban all firearms in places where persons are specifically **allowed** to wear, carry and transport **handguns**, such in businesses and other locations specified in subsection 4-203(b). State-issued permits should thus be narrow, well-defined and governed by **very clear** State-wide rules and regulations.

Highly restrictive "sensitive place" laws were enacted after the decision in *Bruen* by New York and New Jersey. Those bans were promptly enjoined by the federal courts, including by separate federal district courts in New York and by the federal district court for the District of New Jersey. See *Koons v. Reynolds*, --- F.Supp.3d ----2023 WL 128882 (D.N.J. Jan. 9, 2023) (granting a temporary restraining order); *Siegel v. Platkin*, 2023 WL 1103676 (D.N.J. Jan. 30, 2023) (same); *Antonyuk v. Hochul*, --- F.Supp.3d ---, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022) (granting a preliminary injunction) and *Christian v. Nigrelli*, --- F.Supp.3d ---, 2022 WL 17100631 (W.D.N.Y. Nov. 22, 2022) (same). In *Hardaway v. Nigrelli*, --- F.Supp.3d ---, 2022 WL 16646220 (W.D.N.Y. Nov. 3, 2022) (preliminary injunction), and *Hardaway v. Nigrelli*, --- F.Supp.3d ---, 2022 WL 11669872 (W.D.N.Y. Oct. 20, 2022) (TRO), the court enjoined that part of the New York statute that banned possession in houses of worship. That holding was followed in *Spencer v. Nigreilli*, 2022 WL 17985966 (W.D.N.Y. Dec. 29, 2022) (preliminary injunction).

Particularly instructive for purposes of these Bills are the decisions in *Antonyuk*, *Christian*, *Siegel* and *Koons*. *Antonyuk* and *Christian* held that New York may not constitutionally establish a "default rule" that would presumptively ban carry on private property without the owner's express permission. That is precisely the sort of ban imposed by these Bills. The court in *Antonyuk* ruled that New York's attempt to impose such a presumptive ban on all carry on private property "appears to be a thinly disguised version of the sort of impermissible "sensitive location" regulation that the Supreme Court considered and rejected in *NYSRPA*." 2022 WL 16744700 at *81. That court found no historically appropriate analogue for such a ban. Id. at *80. Likewise in *Christian*, the court held that historically "carrying on private property" was "generally permitted absent the owner's prohibition," 2022 WL 17100631 at *9, and that the right to exclude persons from private property "has always been one *belonging to the private property owner*—not to the State."

Id. (emphasis the court's). The *Christian* court thus concluded New York's "current policy preference" for such a presumptive ban "is one that, because of the interest balancing already struck by the people and enshrined in the Second Amendment, is no longer on the table." Id., citing *Heller*, 554 U.S. at 636, and *Bruen*, 142 S.Ct. at 2131.

Similarly, in *Koons*, the New Jersey federal district court granted a TRO to enjoin New Jersey's presumptive ban with respect to carry on private property, stating that the New Jersey defendants "seem to turn a private property owner's lack of consent and/or right to exclude into a general proposition that the Second Amendment does not presume the right to bear arms on private property. Nothing in the text of the Second Amendment draws that distinction." 2023 WL 128882 at *16. As the court explained, "the State is, in essence, criminalizing the conduct that the *Bruen* Court articulated as a core civil right." Id. In *Siegel*, the court enjoined New Jersey bans on the carrying of firearms in parks, beaches, recreational facilities, public libraries, museums, bars, restaurants, where alcohol is served, entertainment facilities, in vehicles and on private property without the prior permission of the owner. In each instance, the court found that "the Second Amendment's plain text covers the conduct in question (carrying a concealed handgun for self-defense in public)." Slip op. at 23, 29, 30, 31, 32, 46 (emphasis added). In so holding the court relied on the very "textual elements" identified in *Bruen*, *viz.,* the right to be armed "'in a case of conflict with another person,'" noting that "this definition naturally encompasses one's right to public carry on another's property, unless the owner says otherwise." Id. at 38. The same analysis applies, *a fortiori*, to the possession and carry on public property, such as on a public sidewalk or in other public places where confrontation can and does take place.

These holdings are consistent with and, indeed, mandated by *Bruen's* holding that there is a general right to carry in public, subject to narrowly confined restrictions. Indeed, the bans imposed by these Bills are even more extreme than imposed by New York and New Jersey. For example, under the New York law, shop owners had the option of allowing carry by permit holders at their places of business, either by signage or by express permission. See *Christian*, 2022 WL 17100631 at *1. The same is true under the New Jersey statute at issue in *Koons* and *Siegel Koons*, 2023 WL 128882 at *2. In contrast, SB 1 bans all carry at any place of "public accommodation" (a term that includes every retail store or location open to the public), **regardless** of whether permission is granted. Bill SB 1 thus does not merely establish a presumptive ban on carry at such private property, it **totally** bans such carry without regard to the private owner's preferences. The statutes at issue in New York are New Jersey are already extreme, but neither State sought to go that far. Maryland would be the first and only State to impose that restriction on the general right to carry articulated in *Bruen*.

New York has appealed the preliminary injunctions issued in these cases to the Court of Appeals for the Second Circuit. That court has stayed these preliminary injunctions pending appeal and ordered expedited briefing and argument. However, that stay order expressly exempts from the stay that part of the any preliminary injunction that enjoined the New York's ban on possession in places of worship for persons "tasked" with protection of these places. The Supreme Court has allowed the Second Circuit's stay to remain in place pending a merits decision, but Justices Alito and Thomas cautioned in a separate statement that the

Supreme Court's order was not on the merits. Rather, it was entered simply to allow the Second Circuit to manage its docket. See *Antonyuk v. Nigrelli,* 143 S.Ct. 481 (2023) (Mem). These two Justices likewise noted that "[t]he New York law at issue in this application presents novel and serious questions under both the First and the Second Amendments." Id. A similar order denying a stay was issued by the Supreme Court in *Gazzola v. Hochul*, ---- F.Supp.3d ----2022 WL 17485810 (N.D.N.Y. 2022), a case involving claims by firearms dealers challenging several different New York laws under a variety of claims. See *Gazzola v. Hochul*, 2023 WL 221511 (S.Ct. Jan. 18, 2023) (denying an application for a stay).

It is thus fair to say that these issues are already on the Supreme Court's radar. Indeed, Justices Alito and Thomas invited the *Antonyuk* plaintiffs to again seek relief from the Supreme Court "if the Second Circuit does not, within a reasonable time, provide an explanation for its stay order or expedite consideration of the appeal." 143 S.Ct. at 481. As a result, the Second Circuit quickly expedited these cases and has scheduled oral argument for March 20, 2023, in all five of these appeals (*Antonyuk*, *Christian*, *Hardaway*, *Spencer* and *Gazzola*). No appeal has been filed in *Koons* and *Siegel* (TRO orders are generally not appealable). We expect a preliminary injunction to be issued soon in both cases. New Jersey may then elect to appeal such an order to the Court of Appeals for the Third Circuit under 28 U.S.C. § 1292(a)(1).

***Bruen* Holdings:** 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. The relevant time period for that historical analogue is 1791, when the Bill of Rights was adopted. 142 S.Ct. at 2135. That is because "'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" Id., quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–635 (2008). As stated in *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 417 (4th Cir.), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021), *cert. denied*, 142 S.Ct. 1447 (2022), "[w]hen evaluating the original understanding of the Second Amendment, 1791—the year of ratification—is 'the critical year for determining the amendment's historical meaning." 5 F.4th at 419, quoting *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (citing *McDonald*, 561 U.S. at 765 & n.14). Thus, "'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" represented a "critical tool of constitutional interpretation.'" *Bruen*, 142 S.Ct. at 2136, quoting *Heller*, 554 U.S. at 605. The Court stressed, however, that "to the extent later history contradicts what the text says, the text controls." Id. at 2137. Similarly, "because post-Civil War discussions" of the right to keep and bear arms "took place 75 years after the ratification of the Second Amendment, **they do not provide as much insight into its original meaning as earlier sources**.'" Id., at 2137, quoting *Heller*, 554 U.S. at 614 (emphasis added).

Under *Bruen*, the historical analogue necessary to justify a regulation must also be "a well-established and representative historical analogue," not outliers. Id. at 2133. Thus, historical "outlier" requirements of a few jurisdictions or of the Territories are to be

disregarded. Id. at 2133, 2153, 2147 n.22 & 2156. Such outliers do not overcome what the Court called "the overwhelming evidence of an otherwise enduring American tradition permitting public carry." 142 S.Ct. at 2154. Laws enacted in "the latter half of the 17th century" are "particularly instructive." Id. at 2142. In contrast, the Court considered that laws in enacted in the Territories were not "instructive." Id. at 2154. Similarly, the Court disregarded "20th century historical evidence" as coming too late to be useful. Id. at 2154 n.28.

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 bans. 142 S.Ct. at 2126. Those prior decisions are no longer good law. So, the constitutionality of SB 1, and SB 118 will turn exclusively on an historical analysis, as *Heller* and *Bruen* make clear that the term "keep and bear arms" in the text of the Second Amendment necessarily includes the right to possess ("keep") and the right to carry ("bear").

Bruen also holds that governments may regulate the public possession of firearms at **five** very specific locations, *viz.*, "legislative assemblies, polling places, and courthouses," "in" schools and "in" government buildings. *Bruen*, 142 S.Ct. at 2133, citing *Heller*, 554 U.S. at 599. These five all are historically justified and share the common feature that all are discrete locations that are easily identifiable. These locations are also places where armed security may be provided by the government, thus making it unnecessary for an individual to be armed for self-defense. *Bruen* states that "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." (Id.).

Again, this historical inquiry focuses on the Founding era. Thus, in *Bruen*, the Court rejected New York's reliance on "a handful of late-19th-century jurisdictions," stating these laws did not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense." 142 S.Ct. at 2138. The Court rejected New York's reliance as well on other post-1791 statutory prohibitions, holding that "the history reveals a consensus that States could *not* ban public carry altogether." 142 S.Ct. at 2146 (emphasis the Court's). Thus, the State is not free to enact "sensitive area" legislation that that "would in effect exempt cities from the Second Amendment" because such laws "would eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 142 S.Ct. at 2134. See *Koons,* 2023 WL 128882 at *12 (holding that "'sensitive place' is a term within the Second Amendment context that should not be defined expansively").

In order to be a well-established, representative historical analogue, the historical law must be "relevantly similar" to the modern law (Id. at 2132). *Bruen* makes clear that this analogue inquiry is controlled by two "metrics," viz., "how and why the regulations burden a law-abiding citizen's right to armed self-defense." Id. at 2133 (emphasis added). The inquiry is "whether modern and historical regulations impose a comparable burden on the right of armed self-defense." Id. at 2133 (emphasis added). The Court thus ruled that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*'

considerations when engaging in an analogical inquiry." (Id.) (emphasis added). See *Koons*, slip. op. at *15-*16. This focus on self-defense rules out, for example, any reliance on historical statutes that were "anti-poaching laws." *Antoynuk*, 2022 WL 16744700, at *79-81. That is because such laws were **not** intended to restrict the right of self-defense, they were intended to protect game and the property owner's right to hunt game on his own land. Those rights of owners are well recognized. For example, current Maryland law provides that owners and their families are not required to obtain a hunting license to hunt on the owner's farmland, MD Code, Natural Resources, § 10-301, and owners are allowed to bar access to their land by others simply by marking their property. MD Code, Natural Resources, § 10-411.

The *Bruen* Court remarked that the analogue inquiry might be different where the regulation was prompted by some "unprecedented societal concerns or dramatic technological changes" id. at 2132, these Bills do not purport to identify any such matters. Gun violence is hardly new or "unprecedented." The bans imposed by these Bills apply to all firearms and thus do not involve any "dramatic technological change." Thus, the analysis is "straightforward" and controlled by "the lack of a distinctly similar historical regulation." Id. Again, a State may not enact "sensitive places" legislation that that is so broad that it "would eviscerate the **general right** to publicly carry arms for self-defense." *Bruen*, 142 S.Ct. at 2134 (emphasis added).

Nothing in *Bruen* can be read to allow a State to establish any "buffer zone" around such sensitive places, such as the 100-foot zone created around all places of "public accommodation" by SB 1. Such a broad ban on carry would cover sidewalks and could easily extend into the street and thus effectively ban public carry in virtually all urban areas and many rural areas. Such a ban would plainly violate the holding in *Bruen* that the Second Amendment protects a broad, "general right" to carry in public, including in cities. For example, *Bruen* rejected New York's attempt to justify its "good cause" requirement as a "sensitive place" regulation, holding that a government may not ban guns where people may "congregate" or assemble. 142 S.Ct. at 2133-34. The Court held that such a ban on places where people typically congregate "defines the category of 'sensitive places' far too broadly" and, if allowed, "would eviscerate the general right to publicly carry arms for self-defense." Id. at 2134. These Bills effectively "eviscerate" that general right to carry by banning possession by a permit holder on any property "of another" and at or within 100 feet of any place of "public accommodation" (regardless of permission of the owner) and on or in any property "controlled" by any government entity. Under these Bills, there is hardly **any** public place where carry **is** permitted. The Bills would thus effectively "eviscerate" the general right to carry recognized in *Bruen*.

Bruen ruled that the State may ban guns "in" a "**government building**," but the Court did not thereby bless gun bans on any "*property*" that a government might merely "*control*." Bans in or on government-controlled property would sweep far too broadly. It would, for example, include vast tracts of State Forest lands and parks and other places where there is no historical support for such bans. See, e.g., *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 652 (Del. 2017) (holding that State parks and forests were not "sensitive places" and that Delaware's regulation broadly banning firearms in such places was unconstitutional under Delaware's version of the Second Amendment"); *Ezell v. City of*

Chicago, 846 F.3d 888, 894-95 (7th Cir. 2017) (holding that Chicago's zoning restrictions for firing ranges could not be justified as a restriction on sensitive places); *Solomon v. Cook County Board of Commissioners,* 550 F. Supp.3d 675, 690-96 (N.D. Ill. 2021) (invalidating a county ban on carry in parks); *Morris v. Army Corps of Engineers*, 60 F. Supp. 3d 1120 (D. Idaho 2014), *appeal dismissed,* 2017 WL 11676289 (9th Cir. 2017) (rejecting the government's argument that Corps' outdoor recreation sites were sensitive places).

The term "government building" as used in *Bruen* also plainly implies that "*government*" functions are performed in the building and thus that the building is secured accordingly. Such government functions do not include *proprietary* interests, such as mere ownership or control. As noted, *Bruen* made clear that a government may not ban guns in any place where people may "congregate" or assemble, and that rule does not turn on ownership. 142 S.Ct. at 2133-34 (holding that such a ban on places where people typically congregate "defines the category of 'sensitive places' far too broadly"). Indeed, there is a model for a proper regulation on government property, found in 18 U.S.C. § 930. That law bans firearms in "federal facilities" where such possession is done "knowingly." 18 U.S.C. § 930(a),(b). See *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (discussing the meaning of a "knowing" violation). Whether an act is done "knowingly" is determined by the trier of fact based on the circumstances presented in the case.

Section 930 does not create any "presumption" that any possession is done "knowingly." Indeed, the Bill 118's "rebuttable presumption" that a person "knowingly" possesses a firearm on the private property of another or on government "controlled" property is of dubious constitutionality. 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"). Stated simply, it is "not more likely than not" that any person would know the **meaning** of the term "property controlled" by a government, much less the **boundaries** of all such property and thus cannot be presumed to knowingly violate this prohibition. Private property lines are often likewise indistinct or lacking in notice.

Such actual notice is critically important to compliance. For example, Section 930 specifically provides that "[n]otice of the provisions of subsections (a) and (b) *shall be posted conspicuously* at each public entrance to each Federal facility," and that "*no person shall be convicted* … if such notice is not so posted at such facility, unless such person had actual notice" of this law. 18 U.S.C. § 930(h) (emphasis added). Finally, Section 930 narrowly defines "federal facility" to mean "a building or part thereof owned or leased by the Federal Government, *where Federal employees are regularly present for the purpose of performing their official duties*." 18 U.S.C. § 930(g)(1) (emphasis added). This federal ban also applies only to possession "**in**" a federal facility and thus does not impose any "buffer zone." In other words, a federal facility is **not** covered by this provision *unless* federal employees are "regularly" present in that building for work. Section 930 passes muster under *Bruen*. A ban on all property controlled by a government does not.

Remarkably, SB 118 also presumes to regulate possession on all property controlled by the federal government. There are many tracts of property over which the federal government constitutionally exercises *exclusive* jurisdiction. See U.S. Const. Article I, § 8, cl. 17; 18 U.S.C. § 7. Stated simply, the State has no jurisdiction to regulate **at all** in such areas. Examples of such exclusive jurisdiction areas include military installations, federal buildings, post offices, and some high-value or security-sensitive sites, all of which are abundant in Maryland. SB 118 is thus flatly unconstitutional under Article I, § 8, cl. 17, to the extent it purports to ban firearms on **all** property "controlled" by the federal government. Exclusive means just that, exclusive.

To be sure, federal law may *incorporate* State laws by *reference* as to lands over which there is *concurrent* jurisdiction (but not as to exclusive jurisdiction areas). See Assimilative Crimes Act, 18 U.S.C. § 13 ("ACA"). Such "assimilated" crimes are enforced by federal law enforcement and are tried in federal court. But even then, such incorporation may not occur if the State law is contrary to federal policy. See, e.g., *United States v. Kelly*, 989 F.2d 162, 164 (4th Cir.), *cert. denied,* 510 U.S. 114 (1993) ("federal courts have consistently declined to assimilate provisions of state law through the ACA if the state law provision would conflict with federal policy"). For example, federal policy specifically addresses possession in the National Park System. Pub. Law 113-287, § 3, 128 Stat. 3168 (2014), codified at 54 U.S.C. § 104906. That legislation provides that "[f]ederal laws should make it clear that the 2d amendment rights of an individual at a System unit should not be infringed," 54 U.S.C. § 104906(a)(7). Permit holders throughout the United States thus may carry in the National Park System. SB 118 would flatly ban such carry and is thus contrary to federal policy.

The "Critical Year" Under *Bruen* Is 1791: Again, the relevant date for historical analogues is 1791, when the Bill of Rights was adopted. See *Bruen*, 142 S.Ct. at 2136 ("when it comes to interpreting the Constitution, not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."). Thus, the Supreme Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 142 S.Ct. at 2137. *Bruen* thus looked primarily to 1791 in conducting its historical analysis. *Bruen*, 142 S.Ct. at 2144-46. The Court also examined and rejected New York's reliance on post-Civil War history, stating "because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" 142 S.Ct. at 2137, quoting *District of Columbia v. Heller,* 554 U.S. 570, 614 (2008). The appropriate line is thus the Civil War, the late 19th century. As noted, Territorial laws and laws enacted in the 20th century may not be considered.

That line is fully consistent with the Court's reliance on the "relatively few 18th- and 19th-century" laws in identifying the five sensitive places found by the Court. 142 S.Ct. at 2133. Given the Court's reluctance to rely on post-Civil War laws, that reference to "relatively few 18th- and 19th-century" laws can only be reasonably understood to refer to laws in the 1700s and early 1800s. Indeed, the Court cautioned "against giving post-enactment history more weight than it can rightly bear." 142 S.Ct. at 2136. Thus, as Justice

Barrett noted in concurrence, "today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights." *Bruen*, 142 S.Ct. at 2163 (Barrett, J., concurring). In short, 1868 is of minor importance in the analogue analysis. See *NRA v. BATFE*, 714 F.3d 334, 339 n.5 (5th Cir. 2013) (Jones, E., J. dissenting from the denial of rehearing en banc and joined by six other circuit judges) ("*Heller* makes plain that 19th-century sources may be relevant to the extent they illuminate the Second Amendment's original meaning, but they cannot be used to construe the Second Amendment in a way that is inconsistent with that meaning");

Importantly, the Second Amendment cannot mean one thing for the States and another thing for the federal government. Any such suggestion was squarely rejected in *McDonald v. City of Chicago*, 561 U.S. 742, 783-84 (2010). There, the Court held that "if a Bill of Rights guarantee is fundamental from an American perspective, then . . . that guarantee is fully binding on the States." *Bruen* held that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." 142 S.Ct. at 2137. Thus, cases involving federal restrictions are directly precedential in cases involving State restrictions.

The *McDonald* Court found that Second Amendment rights were "fundamental to our scheme of ordered liberty and system of justice." McDonald, 561 U.S. at 764. Nothing in that analysis speaks to "investing" 1791 rights with "new 1868 meaning" or the intent of the "people" in 1868. Quite to the contrary, the right was "fundamental" because "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." Id. The incorporation of the Second Amendment into the 14th Amendment is by operation of law; it does not rely on any legal fiction that the "people" desired to incorporate the Bill of Rights when the 14th Amendment was adopted. The incorporation doctrine emerged long after 1868, as *McDonald* makes clear. 561 U.S. at 759-60.

Bruen relies on two very recent decisions, *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), and *Timbs v. Indiana*, 139 S.Ct. 682 (2019), in holding that the Bill of Rights is the same for both the federal government and the States. Ramos held that the Sixth Amendment right to a unanimous jury verdict was incorporated against the States and overruled prior precedent that had allowed the States to adopt a different rule under a "dual track" approach to incorporation. In so holding, the Court relied on 1791 as the relevant historical benchmark. *Ramos*, 140 S.Ct. at 1396. Similarly, in *Timbs*, the Court held that the Excessive Fines provision of the Eighth Amendment was incorporated as against the States. *Timbs*, 139 S.Ct. at 686-87. In so holding, the Court once again looked to the scope of the right as it existed in 1791. Id. at 688. The *Timbs* Court found that this scope was simply confirmed by "an even broader consensus" in 1868. Id. *Ramos* and *Timbs* make clear that 1791 is the controlling inquiry and that later understandings may be viewed as confirmation, not changing the right itself. In all cases, the text is controlling over history. *Bruen*, 142 S.Ct. at 2137 ("the extent later history contradicts what the text says, the text controls") (citation omitted). The text of the Second Amendment thus controls over history and that text did not change in 1868.

No court, including the pre-*Bruen* State law cases, has suggested that the 1868 meaning applies to the federal government. The few cases involving State laws looked to 1868 without examining whether 1868 is controlling as to the federal government. Those prior decisions pre-date not only *Bruen*, but came before *Ramos* and *Timbs*, where the Court made clear that the Bill of Rights mean the same thing for both the federal government and the States. While the Third Circuit's 2021 decision in *Drummond v. Robinson Township*, 9 F.4th 217, 227 (3d Cir. 2021), made a reference to "the Second and Fourteenth Amendments' ratifiers," it did not address, much less resolve, the question of whether the 1868 meaning is controlling, even as to State laws. It certainly did not suggest that 1868 was controlling for federal laws. Indeed, if 1868 is controlling there would have no point to the court's reliance on Second Amendment "ratifiers." Likewise, *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018), never addressed whether the 1868 meaning was controlling for the federal government.

In *Hirschfeld v. BATF,* 5 F.4th 407, 417 (4th Cir.), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021), *cert. denied,* 142 S.Ct. 1447 (2022). (decided in 2021), the Fourth Circuit held that "[w]hen evaluating the original understanding of the Second Amendment, 1791—the year of ratification—is 'the critical year for determining the amendment's historical meaning.'" Id. at 419. In so holding, *Hirschfeld* quotes and relies on *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012), where the Seventh Circuit looked to 1791 as the "critical" period in invalidating a State law (Illinois) that had restricted the right to the home. *Hirschfeld* and *Moore* are not alone in looking to 1791. See *United States v. Rowson*, 2023 WL 431037 at *22 (S.D.N.Y. Jan. 26, 2023) ("Viewing these laws in combination, the above historical laws bespeak a 'public understanding of the [Second Amendment] right' in the period leading up to 1791 as permitting the denial of access to firearms to categories of persons based on their perceived dangerousness."); *United States v. Connelly*, 2022 WL 17829158 at *2 *n.5 (W.D. Tex. Dec. 21, 2022) (rejecting the government's reliance on "several historical analogues from 'the era following ratification of the Fourteenth Amendment in 1868'"); *United States v. Stambaugh*, --- F.Supp.3d ---, 2022 WL 16936043 at *2 (W.D. Okl. Nov. 14, 2022) ("And since '[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them,' the government must identify a historical analogue in existence near the time the Second Amendment was adopted in 1791.") (citation omitted); *United States v. Price,* --- F.Supp.3d ----, 2022 WL 6968457 at *1 (S.D. W.Va, Oct. 12, 2022) ("Because the Second Amendment was adopted in 1791, only those regulations that would have been considered constitutional then can be constitutional now.").

Hirschfeld involved a federal statute (the ban on sales of handguns to 18-20-year-olds codified at 18 U.S.C. § 922(b)(1)), but the court's holding that 1791 was the "critical" period and its reliance on *Moore* is plainly at war with any notion that the 1868 meaning controls the scope of the right for either the federal government or the States. The General Assembly should follow *Hirschfeld*.

Outlier History Must Be Disregarded: As noted above, *Bruen* holds that the text and history of the Second Amendment establish a "general right" to public carry subject only to the five exceptions specified by the Court, *viz.*, schools, government buildings, polling places,

legislative assemblies and courthouses. While *Bruen* did not rule out other locations, the Court made clear that the burden is on the government to justify additional locations by reference to Founding era laws that were "relevantly similar" and "comparable" under the two metrics specified by the Court. See *Bruen*, 142 S.Ct. at 2132-34. Those two metrics are "how and why the regulations burden a law-abiding citizen's right to armed self-defense." Id. at 2133. Historical laws that did not or were not intended to burden that right in comparable ways are simply not analogues. Such "[a]nalogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances." *Bruen*, 142 S.Ct. at 2133 n.7. That approach "is not an invitation to revise" "the balance struck by the founding generation" "through means-end scrutiny." Id.

Any attempt to abrogate *Bruen*'s recognition of a "general right" to carry in public through the imposition of a multitude of locations and/or or exclusion zones cannot possibly be justified. *Bruen* holds that courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." 142 S.Ct. at 2133 (citation omitted). That point is particularly applicable to legislative schemes, like New York's and New Jersey's, that effectively sought to do away with the "general right" to carry in public. Our "ancestors" would have "never accepted" such a law. That the New York and New Jersey laws have been enjoined is thus not surprising. Any attempt to enact similarly broad bans on the general right to carry in public will meet the same fate.

The five locations specified in *Bruen* are easily identified, discrete and quite limited in scope. The Court was willing to accept these five locations only because there was solid support from the Founding era for such very limited exceptions to the "general right" to carry and the Court was "aware of no disputes regarding the lawfulness of such prohibitions." 142 S.Ct. at 2133. Again, these discrete five locations do not materially detract from the "general right" to carry in public, as they can be easily identified and avoided by a permit holder. To be comparable, any additional locations would need to make a similar historical Founding era showing for each location using the Court's two metrics and demonstrate that the County's bans do not materially and adversely affect the "general right" to carry in public. Laws that "eviscerate the general right to publicly carry arms for self-defense" are not acceptable under any circumstances. *Bruen*, 142 S.Ct. at 2134. SB 1 and SB 118 plainly "eviscerates" that right by making it impossible to legally travel throughout the State with a carry permit. Again, any law enacted for the very purpose of minimizing the right to carry would be manifestly illegitimate.

McDonald holds that federalism principles are simply irrelevant under the incorporation doctrine. See *McDonald*, 561 U.S. at 784 (noting that "[t]ime and again, however, those pleas [to federalism] failed" in prior cases). Certainly, the test adopted in *Bruen* leaves no room for consideration of federalism principles. After *Bruen* was decided, the Supreme Court vacated and remanded the Fourth Circuit's decision sustaining Maryland's ban on assault weapons for reconsideration in light of the decision in *Bruen*. *Bianchi v. Frosh*, 142 S.Ct. 2898 (June 30, 2022). The Court likewise vacated and remanded decisions from the Ninth Circuit, Third Circuit and First Circuit for reconsideration in light of *Bruen*. See *Morin v. Lyver*, 143 S.Ct. 69 (Oct. 3, 2022) (First Circuit, sustaining a denial

of a license to carry); *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Bruck*, 142 S.Ct. 2894 (June 30, 2022) (Third Circuit, sustaining a ban on large capacity magazines); *Duncan v. Bonta*, 142 S.Ct. 2895 (9th Cir. June 30, 2022) (Ninth Circuit, same); *Young v. Hawaii,* 142 S.Ct. 2895 (June 30, 2022) (Ninth Circuit, sustaining denial of carry permit). In short, *Bruen* applies across the board.

Permit Holders under *Bruen*: *Bruen* squarely holds that the Second Amendment protects the general 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, if the permit is issued on an otherwise reasonable and objective "shall issue" basis. 142 S.Ct. at 2138 & n.9. As this holding recognizes, permit holders are treated as a separate class as such individuals have been thoroughly vetted through a permit process. Through their fingerprints, all permit holders in Maryland are identifiable by the FBI's RAP BACK system, under which a mere arrest of any permit holder anywhere in United States will be immediately reported to the Maryland State Police. https://bit.ly/3B8l142.

All permit holders in Maryland have also received at least 16 hours of training, as required by MD Code, Public Safety, § 5-306(a)(5), unless they are otherwise exempted from such training by MD Code, Public Safety, § 5-306(a)(6), such as law enforcement officers and certified firearms instructors. Every renewal of a permit must be accompanied by proof of an additional 8 hours of training, again unless the permit holder is training exempt. All permit holders are screened and thoroughly investigated by the State Police, including being fingerprinted. As part of the training requirement, permit holders must demonstrate proficiency by passing a live-fire qualification course and achieve a minimum score. COMAR 29.03.02.05 C.(4). The State Police will deny a permit to any person who has "exhibited a propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or to another." MD Code, Public Safety, § 5-306(a)(6)(i). The State Police have continued to enforce all these requirements, even after *Bruen*. See Maryland State Police Advisory, LD-HPU-22-002 (July 5, 2022). Of the 43 "shall issue" States identified in *Bruen*, 142 U.S. at 2123 n.1, only Illinois requires as many hours of training as Maryland.

As of the end of 2022, the Maryland State Police had issued 85,266 permits. https://bit.ly/3kolxVR. That number is comparably quite small for a State with a population of over 6 million. For example, as of August 2022, Pennsylvania had 1.486 *million* permits and Virginia had 717,290 resident permits and 54,404 non-resident permits. Massachusetts had issued 470,012 permits while, as of the end of June of 2021, Florida had over 2.5 *million* permits. Even New York, which was a "good cause" state like Maryland, had 194,145 permit holders as of June 30, 2021, a year prior to the decision in *Bruen* which, as noted, struck down New York's good cause requirement. Nationally, there are over 21 million permit holders. Stated differently, 8.3% of the adult population in the United States have carry permits. See Lott, J., *Concealed Carry Permit Holders Across the United States*: 2021 (2021) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3937627. 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. In short, Maryland is already an outlier in every respect.

The Public Safety: Permit holders are among the most law-abiding individuals in America. Prior to *Bruen*, 43 States issued permits on a "shall issue" basis. *Bruen*, 142 S.Ct. at 2123 & n.1 (listing these States). The crime rate of the permit holders in these States is but a small fraction of that of commissioned police officers. See Lott, at 43-44. Permit holders are simply not the problem. Possession and transport of firearms by **non**-permit holders continues to be strictly regulated by State criminal law. For example, MD Code, Criminal Law, § 4-203(a), bans **any** "wear, carry or transport" of a handgun, subject to limited exceptions, like in the home or transport of an unloaded handgun to a dealer or to a range for target shooting or by an owner of a business. Illegal carry by non-permit holders is already punished by up to 3 years in prison. MD Code, Criminal Law, § 4-203(c)(4)(ii). These Bills do not change such laws.

Gun control advocates generally do not dispute that permit holders are extremely law-abiding and don't commit crimes with the weapons that they carry. This Committee heard as much from Everytown and Professor Webster of Johns Hopkins University at the Committee's briefing on *Bruen*. These advocates do argue, however, that that shall-issue laws are "associated with" (read "correlated") violent crime. Such advocates do not assert that shall-issue laws actual "cause" violent crime, as even the most ardent advocate cannot dispute that correlation is not causation. In any event, the assertion that shall-issue laws are even properly correlated with violent crime **is not a given**, as it hotly contested in the scientific literature. In a recent publication, those studies are critically examined and summarized by the Rand Corporation, which does not otherwise take sides in this debate. See Rand Corporation, *The Science of Gun Policy*, *A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States*, 277 et seq. (2d Ed. 2020) (available at https://www.rand.org/pubs/research_reports/RR2088.html).

This Rand publication found that many studies on which gun control advocates typically rely were flawed methodologically. The Rand publication concludes that there is "*inconclusive evidence for the effect of shall-issue laws*" with respect to homicides, robberies and assaults. Id. at 301 (emphasis in original). Similarly, this Rand publication concludes that there is "*inconclusive evidence for the effect of shall-issue laws on mass shootings*." (Id. at 307) (emphasis in original). It likewise found that "there is *inconclusive evidence for the effect of shall-issue concealed-carry laws on unintentional firearm injuries and deaths*." Id. at 304 (emphasis in original). This Committee thus should not assume that restricting carry with permits will have **any** positive effect on public safety. It is **just as likely** that *restricting* public carry with a permit will *adversely* affect public safety by eliminating the ability to defend oneself and others, as found in multiple studies noted by Rand. Id. at 283 (Table summarizing findings of various studies). All doubts should be resolved in favor of self-defense, as self-defense is a fundamental human right and is constitutionally protected, as *Bruen* and *Heller* make clear. Certainly, the shoppers at an Indiana mall are grateful that legally armed Elisjsha Dicken was in the mall one day this last summer when a deranged

individual opened fire. https://nypost.com/2022/07/19/indiana-mall-hero-elisjsha-dicken-returned-fire-just-15-seconds-into-shooting/.

We believe that substantial public safety benefits would be realized by holding wrong-doers to account through a vigorous enforcement of existing laws. Illegal carry by **disqualified** persons, MD Code, Public Safety, § 5-101(g) (defining "disqualified person"), is severely punished under State and federal law. 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), 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). Mere 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).

Yet, notwithstanding these draconian laws, 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. https://besttoppers.com/murder-rate-by-state/#C4. The idea that permit-holders are a danger to public safety simply does not jib with the experience of Maryland's neighbors. Rather, Maryland should focus on combatting recidivism among violent criminals. See, e.g., Prescott, et al, *Understanding Violent-Crime Recidivism*, 95 Notre Dame L. Rev. 1643-98 (May 2020).

Certainly, it is no answer to *Bruen* to assert that violent crime in Maryland is rampant. Violent crime **is** widely perceived as getting worse and worse, but as noted, permit holders are not remotely the reason. Until *Bruen* was decided in June of 2022, the number of permit holders in Maryland was truly tiny. They can hardly be blamed for Maryland's crime rate. The right "to keep and bear Arms" is "an individual right," *Bruen*, 142 S.Ct. at 2125, and for individuals who may find themselves at imminent risk of death or severe bodily harm, a gun may well be the only way for such a person to survive. *Bruen*, 142 S.Ct. at 2158 (Alito, J., concurring) (noting that "defensive firearm use occurs up to 2.5 million times per year"). The law-abiding citizen's right to armed self-defense is thus important *because* of violent crime. See id. at 2159 ("it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense"). It is questionable that the public safety was promoted by the wholesale release of 2,000 prisoners in 2020 or the more than 700 additional persons released by executive order that year. http://bit.ly/3XvYtmJ. See also http://bit.ly/3XUlGyL. The history of non-prosecution and non-enforcement in Baltimore should also not be ignored. That history is documented in Johns Hopkins Center for Gun Policy and Research, *Reducing Violence And Building Trust* (June 2020).

Indeed, that same 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."). That lack of trust is well-founded. The law enforcement abuses of the Gun Trace Task Force in Baltimore were too numerous and are 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 more guns are not the "answer" to violent crime, that belief is not shared by those who are most at risk of a violent attack. https://americangunfacts.com/guns-used-in-self-defense-stats/. 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. Layering on still more punishments and restrictions will not deter people who perceive that their survival is at stake. For these people, the far superior option is for them to fulfill the training requirements and obtain carry permits. At least that way, these individuals will have an opportunity to be vetted and trained and are thus more likely to carry responsibly. Restricting carry with permits is obviously incompatible with that objective.

Any Desire To Curtail *Bruen* Is Constitutionally Illegitimate: A government may not suppress possible adverse secondary effects flowing from the exercise of a constitutional right by suppressing the right itself. See, e.g., *City of L.A. v. Alameda Books, Inc.,* 535 U.S. 425, 449-50 (2002) (Kennedy, J., concurring) ("It is no trick to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech"). See *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 742 (4th Cir. 2010) (same); *St. Michael's Media, Inc. v. Mayor and City Council of Baltimore*, 566 F.Supp.3d 327, 374 (D. Md. 2021), *aff'd.*, 2021 WL 6502219 (4th Cir. 2021) (same). This point applies to Second Amendment rights no less than to other constitutional rights. *Grace v. District of Columbia*, 187 F.Supp.3d, 124, 187 (D.D.C. 2016), *aff'd, sub. nom. Wrenn v. Dist. of Columbia,* 864 F.3d 650 (D.C. Cir. 2017) ("it is not a permissible strategy to reduce the alleged negative effects of a constitutionally protected right by simply reducing the number of people exercising the right") (quotation marks omitted). See *Bruen*, 142 S.Ct. at 2126, 2148 (citing *Wrenn* with approval). "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. As the Supreme Court noted in *Bruen*, "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 142 S.Ct. at 2156 (citation omitted).

The Senate leadership has suggested that the exercise of Second Amendment rights by permit holders under *Bruen* is outweighed by the fears or discomforts the non-permit holding members of public may have that a permit holder may be carrying a concealed firearm nearby. See https://www.youtube.com/watch?v=wx0ZJm69X7E&t=1599s starting at minute 28.00. However, legislation based on that notion is constitutionally illegitimate. Any law enacted for the avowed purpose of minimizing or curtailing the exercise of a constitutional right is "patently unconstitutional." See *Saenz v. Roe*, 526 U.S. 489, 499 n.11 (1999) ("[i]f a law has 'no other purpose . . . than to chill the assertion of constitutional rights

by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'"), quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968) (brackets and ellipsis the Court's).

Fundamentally, unpopular constitutional rights may not be suppressed merely because their exercise might cause discomfort in others. *Kenney v. Bremerton School District*, 142 S.Ct. 2407, 2427-28 (2022) (rejecting a "heckler's veto"). See also *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be ... punished ... simply because it might offend a hostile mob."). *Bruen* abrogated "means-end," interest-balancing under which such concerns might have been relevant and made clear that "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 142 S.Ct. at 2156 (citation omitted). See *Koons*, slip op. at *9 ("a balancing of interests" is something "this Court cannot do" under *Bruen*).

It is no answer to *Bruen* to emotionally assert that guns are not the answer to violent crime. Law-abiding residents of Maryland are rushing to obtain carry permits after *Bruen* because Maryland, with all its highly restrictive gun-control laws and policies, has been singularly **unsuccessful** in controlling violent crime, particularly in urban areas. *Bruen* confirms that law-abiding people have a constitutional right to obtain carry permits on a "shall issue" basis so that they may defend themselves with firearms. As the segregationists discovered in the 1950s and 1960 when they refused to accept *Brown v. Board of Education*, defying the Supreme Court ultimately fails. It also results in massive attorneys' fees awards against the State and local governmental defendants under 42 U.S.C. § 1988. For example, the attorneys for plaintiffs in *Bruen* have sought a fee award of $1,269,232.13, and will likely receive most if not all of that amount. And that litigation proceeded very quickly. More importantly, restricting the right to carry and imposing still more gun control restrictions will not make people feel safer. People feel *less* safe when they cannot defend themselves, which is why, as noted above, otherwise law-abiding people carry in Baltimore.

Insanity is commonly defined as "doing the same thing over and over and expecting different results." These Bills fit that that definition. The General Assembly should stop focusing on inanimate objects and restricting the rights of law-abiding citizens and start insisting on (and funding) accountability from State government agencies and local government officials who are in the position to bring justice to disqualified persons who illegally possess and carry firearms. Persons who use firearms for criminal purposes must be arrested and prosecuted and thus individually held accountable. Consequences need not be harsh; they **must** be reasonably certain to be effective as a deterrent. As the Department of Justice's National Institute of Justice 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. Maryland fails miserably on that score.

Hunting: Remarkably, SB 118 imposes an absolute ban on the wear, carry or transport of **any** firearm by any person (whether that person is a permit holder or not) anywhere in or on the property "controlled" by any governmental entity. The Bill admits of no exceptions to this ban. This ban thus bans hunting (with a firearm) on all public lands, including State

Forests and lands managed or controlled by the Department of Natural Resources for marksmanship or hunting. See https://www.eregulations.com/maryland/hunting/public-hunting-lands/. The Bill would effectively end hunting on public lands in the State.

One must wonder whether there was been any consultation with the Maryland Department of Natural Resources before this Bill was drafted and filed. Hunting in Maryland is a multi-million industry and is essential to the economies of rural areas across the State. The rich and connected have access to private lands, but most hunters in this State do not. We know of no public safety rationale that could possibly justify this class-based ban on hunting in the State. Indeed, the Bill will likely have a direct impact on Maryland's receipt of federal funding under the Pittman-Robertson Wildlife Restoration Act, 16 U.S.C. § 669 et seq. That federal legislation provides matching grants to the States as measured by "the number of paid hunting-license holders of each State." 16 U.S.C. § 669c(b). "According to the Congressional Sportsmen's Foundation, in 2017 alone, state fish and wildlife agencies received over $629 million from Pittman-Robertson funds." http://bit.ly/3Dbozn3. Much of these federal funds are generated by federal taxes on the sale of firearms. http://bit.ly/3Wyfmw1. The Bill's effective ban on hunting on public lands will undoubtedly adversely impact the number of hunting licenses sold in this State and thus diminish this federal funding for the State. The State's wildlife restoration efforts will suffer as a result. A performative and emotionally driven dislike of firearms cannot rationally be allowed to trump all other considerations.

Preemption: A final note. State law, MD Code, Criminal Law, 4-209(a) broadly preempts local regulation of firearms subject to the limited exceptions specified in subsection 4-209(b)(1). Other express preemptions of local regulation are found at Section 6 of Chapter 13, of the 1972 Sessions Laws of Maryland (preempting local regulation of the wear and carry of a handgun); MD Code, Public Safety, § 5-134(a) (preempting local regulation of *transfers* of regulated firearms); MD Code, Public Safety, § 5-207(a) (preempting local regulation of *long gun transfers*); MD Code, Public Safety, § 5-133(a) (preempting local regulation of *possession* of a regulated firearm); and MD Code, Public Safety, § 5-104 (preempting local regulation of *the sale* of a regulated firearm). Such preemption statutes necessarily embody a recognition that regulation of firearms is an important State-wide matter. Indeed, the latest of these preemption provisions, Section 5-207(a), was enacted in 2020 as part of the long-gun background check legislation (SB 208).

Notwithstanding these preemption provisions, some jurisdictions, such as Montgomery County, and even more recently, Charles County, have exploited the limited exception provisions of subsection 4-209(b)(1) to restrict permit holders. Such a broad application of the limited authority accorded by this subsection is highly problematic as a matter of State law. In *Mora v. City of Gaithersburg*, 462 F.Supp.2d 675, 689 (D.Md. 2006), *modified on other grounds,* 519 F.3d 216 (4th Cir. 2008), a federal district court here in Maryland held that "the Legislature" has "occup[ied] virtually the entire field of weapons and ammunition regulation," holding further there can be no doubt that "the exceptions [in Section 4-209(b)] to otherwise blanket preemption [in Section 4-209(a)] are narrow and strictly construable." That holding is in accord with the general rule that exceptions to an otherwise broad provision, such as the preemption imposed by subsection 4-209(a), are to be narrowly

construed. See, e.g., *Blue v. Prince George's County*, 434 Md. 681 76 A.3d 1129 (2013) ("Under the canons of statutory construction, '[w]hen a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.'") (citation omitted). Of course, the scope of authority conferred by subsection 4-209(b)(1) is irrelevant to the constitutionality of any law, as the Constitution is controlling over local law *and* State law.

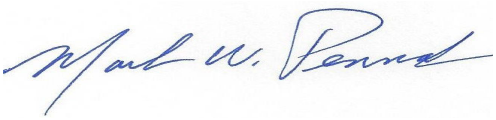
The constitutionality and legality of the Montgomery County ordinance (Bill 21-22E) is currently being challenged by MSI and others in federal district court. *MSI et al. v. Montgomery County, MD,* No. 21-01736 (D. Md.). Plaintiffs have filed a motion for a TRO and a preliminary injunction under the Second Amendment with respect to the County's ban on carry by permit holders and a decision on that motion should issue soon. The Charles County bill was withdrawn after encountering furious opposition at the public hearing held January 11, 2023. Given Montgomery County's example, other local jurisdictions can be expected to follow suit. Such local regulation will create a potential minefield of criminal restrictions that will likely widely vary from County to County, jurisdiction to jurisdiction. That reality creates massive traps for the unwary. Permit holders, like most Marylanders, do not live their lives in one county but rather routinely travel throughout the State.

The same standards for permit holders should apply State-wide. Permits are issued by one State agency, the Maryland State Police, under specific laws enacted by the General Assembly, MD Code, Public Safety, §§ 5-303, 5-304, 5-305 and 5-306. Those permits apply throughout the State. The State Police are authorized to impose restrictions on permits by MD Code, Public Safety, § 5-307, and the scope of carry is controlled by those restrictions under MD Code, Public Safety, § 4-203(b)(2) (providing that carry under a permit must be "in compliance with any limitations imposed" under Section 5-307). As noted above, the State Police have implemented that authority by placing a restriction on *every* permit, providing that the permit is "not valid where firearms are prohibited by law." That means every "sensitive place" ban on firearms imposed by the State, by an agency regulation or by a locality makes the permit holder open to prosecution under MD Code, Public Safety, 4-203(a), a violation of which is, as noted, punishable by up to 3 years imprisonment for the first offense.

Accordingly, MD Code, Criminal Law, 4-209(b) should be amended to make clear that the exceptions found in subsection § 4-209(b)(1) do not authorize local regulation **of permit holders**. A similar limitation on local regulation is already found in subsection 4-209(b)(2), which provides that a locality "may not prohibit the teaching of or training in firearms safety, or other educational or sporting use of the items listed in subsection (a) of this section." A new subsection 4-209(b)(3) should be enacted to provide that localities may not regulate permit holders or the places where a permit holder may carry. State law should supersede such local regulation and provide that any local regulation concerning wear and carry permits is superseded and future local regulation of permit holders and carry by permit holders is preempted. Such language may be easily adapted from the preemption language found in the preemption provision enacted in 2020 as part of MD Code, Public Safety, § 5-207(a) ("This section supersedes any restriction that a local jurisdiction in the

State imposes on the transfer by a private party of a rifle or shotgun, and the State preempts the right of any local jurisdiction to regulate the transfer of a rifle or shotgun.").

Sincerely,



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