MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 8, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 704

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a 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 and personal protection in the home and outside the home and in muzzle loader. I appear today as President of MSI in OPPOSITION to HB 705.

The Bill:

This bill would add sections to the Public Safety article to provide A PERSON MAY NOT ENGAGE IN A BULK FIREARM TRANSFER UNLESS EACH FIREARM THAT IS PART OF THE TRANSFER CONTAINS AN EMBEDDED TRACKER. It further provides that A SELLER OR OTHER TRANSFEROR WHO ENGAGES IN A BULK FIREARM TRANSFER SHALL TRANSMIT INFORMATION REQUIRED TO BE ENTERED IN THE DATABASE ESTABLISHED UNDER § 5–903 OF THIS SUBTITLE IN A MANNER REQUIRED BY THE SECRETARY.

The term "embedded tracker" is defined to mean an object that (1) IS EMBEDDED IN THE FRAME OR RECEIVER OF A FIREARM; (2) EMITS UNIQUE TRACKING INFORMATION; AND (3) IS NOT READILY CAPABLE OF BEING REMOVED, DISABLED, OR DESTROYED WITHOUT RENDERING PERMANENTLY INOPERABLE OR DESTROYING THE FRAME OR RECEIVER. The term "bulk firearm transfer" is defined to mean THE SALE OR OTHER TRANSFER OF 10 OR MORE FIREARMS TOGETHER FROM ONE PARTY TO ANOTHER PARTY. The term "unique tracking information" is defined to mean A UNIQUE RADIO FREQUENCY IDENTIFICATION CODE THAT CAN BE ASCERTAINED AND RECORDED USING EQUIPMENT approved by State Police. The bill creates a "rebuttable presumption" that A PERSON WHO SELLS OR OTHERWISE TRANSFERS 10 OR MORE FIREARMS TO ANOTHER WITHIN A 30–DAY PERIOD HAS ENGAGED IN A BULK FIREARM TRANSFER.

Firearms Required By this Bill Do Not Exist: First, the "embedded" RFID technology demanded by this Bill is extreme. This Bill does not merely require RFID tags, it requires that the RFID tag be so integrated in the frame of the firearm that removal of the tag would

destroy the firearm. No such firearms are currently manufactured in the United States. Indeed, it is doubtful that such embedding of a passive RFID chip would even work in a metal frame, as the metal of the frame itself would likely block the signal. The RFID chip would also fail simply because the antenna was damaged in ordinary use. An active embedded RFID chip requires a power source, such as battery, which would eventually fail. The Bill would go into effect on October 1, 2023. There is no chance that such technology or firearms could possibly be devised and manufactured by then. The effect would be to ban all bulk transfers.

This Bill also applies to any "person" which obviously includes federal firearms licensees, including manufacturers and dealers. It would purport to regulate transfers from a manufacturer to a dealer, or from dealer to dealer, an activity that is controlled and heavily regulated by federal law, under 18 U.S.C. § 923, and 18 U.S.C. § 922. By banning any bulk purchase and presuming that sales to a dealer of 10 or more firearms per month are covered "bulk" transfers, the Bill would effectively destroy sales to Maryland dealers by manufacturers and put virtually every Maryland dealer out of business. The Maryland market for firearms simply is not big enough to justify making Maryland-specific firearms. Virtually all Type I retail FFLs sell or transfer more than 10 firearms a month and many dealers sell more than 10 firearms per month from the same manufacturer. Those sales would cease, as no such licensee would be permitted to receive 10 or more firearms from a manufacturer in any month unless the firearms contained this "embedded tracker."

The Bill Is Preempted By Federal Law: The Bill is also likely preempted by federal law. While States have broad leeway to regulate firearms under 18 U.S.C. § 927, States may not enact statutes that create "a direct and positive conflict between such provision [of federal law] and the law of the State so that the two cannot be reconciled or consistently stand together." Conditioning the sale of firearms to dealers by manufacturers in this way does precisely that as it directly interferes with sales directly controlled by the licensing and regulatory provisions of Section 923 and other federal laws. Stated differently, banning sales to dealers of firearms for failure to contain a technology that does not exist in any modern firearm currently manufactured cannot be reconciled with federal law that expressly allows such sales to dealers licensed under federal law. See *DuBerry v. District of Columbia*, 824 F.3d 1046, 1053 (D.C. Cir. 2016) (citing Section 927).

Indeed, Section 923 specifically addresses bulk sales and transfers under Section 923(g)(3)(A) (providing that "each licensee shall prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totaling two or more, to an unlicensed person"). No such duty is imposed on sales or transfers to other dealers or as to transfers from licensed manufacturers. Section 923(g)(3)(B) further provides that State agencies must destroy any such records of multiple sales within 20 days of receipt of any notice of such multiple sales. All these provisions would be effectively nullified by this Bill.

The Bill Is Pointless As, Under the Fourth Amendment, Tracking Devices May Not Be Installed Without A Search Warrant Based On Probable Cause Of A Crime:

Even if it were possible to manufacture and install such devices and even assuming *arguendo* that dealers could remain in business under these requirements, any sales of such

firearms by the dealer would be at retail to a customer. That customer would thus then be subject to the tracking device no less than the dealer. That is undoubtedly intended by this Bill. The Supreme Court has made clear in recent decisions that the use of tracking devices without warrants would violate the Fourth Amendment to the Constitution. In *United States v. Jones*, 565 U.S. 400 (2012), the Supreme Court held that the government's attachment of the GPS device to a vehicle, and its use of that device to monitor the vehicle's movements, constituted a search under the Fourth Amendment, requiring a search warrant. Such a search, the Court ruled, was a "trespassory intrusion on property." (565 U.S. at 414). Justice Sotomayor concurred, stating flatly that "[w]hen the Government physically invades personal property to gather information, a search occurs." Id. Such a search requires that the government obtain a judicial warrant based on probable cause of a crime.

The Court's decision in *Jones* was followed by *Carpenter v. United States*, 138 S.Ct. 2206 (2018). There, the Supreme Court concluded that the Fourth Amendment was violated by the warrantless search of cell phone records held by **third parties** (wireless carriers) of a person's physical movements as captured by cell-site location information. Relying on the principles recognized in *Jones*, the Court held that "[w]hether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information]." (138 S.Ct. at 2217). The en banc Fourth Circuit applied these principles in striking down the aerial surveillance project adopted by the Baltimore Police Department. See *Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330 (4th Cir. 2021) (*en banc*) (applying *Jones* and *Carpenter*). The court ruled that Baltimore's program violated the Fourth Amendment because the aerial surveillance technology "opens an intimate window into a person's associations and activities, it violates the reasonable expectation of privacy individuals have in the whole of their movements." Id. at 342.

Under *Jones* and *Carpenter*, the State may not require the insertion or attachment of tracking devices, either on existing firearms or new firearms, without a warrant issued based on probable cause of a crime. Exactly like the GPS tracker used in *Jones*, such telematics equipment contemplated by this Bill would constitute a "trespassory intrusion" on private property without the consent of the owner. Just as in *Carpenter*, records of any movement of firearms to which the telematics equipment is attached are governed by the Fourth Amendment, as it would permit the State to monitor firearms owners as they move around with their firearms. See also *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019) (applying *Jones* to the government's use of chalk to mark tires of legally parked cars). These concerns are at their zenith here, as firearms are typically stored in the home, and thus any firearm sold at retail with a tracking device would involve an intrusion into the home itself, as well as any movements outside the home.

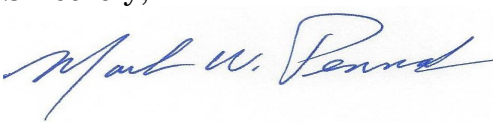
Indeed, the Bill is Orwellian in its implications. The risk is real that such tracking devices would be misused by law enforcement to illegally track or surveil the movements of gun owners, just as the GPS device was illegally used in *Jones*. See *United States v. Terry,* 909 F.3d 716, 722 (4th Cir. 2018) (holding that a warrantless use of a GPS device was a "flagrant disregard" of *Jones*). Gun owners have a constitutionally protected interest in their movements. The State may not require firearm owners to relinquish their Fourth Amendment right to privacy. Whatever State interest this Bill would serve it is simply not sufficient to justify the trespassory intrusions associated with the ability to monitor the

movements of these firearms and their owners. Indeed, this Bill is even worse than Baltimore's program struck down in *Leaders of a Beautiful Struggle*, as it would allow surveillance of the movement *of a constitutionally protected item of commerce* inside the home **and** outside the home.

The Bill Violates the Second Amendment: This Bill affects the exercise of Second Amendment rights. Under the Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), law-abiding gun owners with carry permits have a Second Amendment right to carry in public. 142 S.Ct. at 2135. There is also a well-recognized right to acquire a firearm in this State under the Second Amendment. See *Maryland Shall Issue v. Hogan,* 566 F.Supp. 3d 404, (D. MD 2021). With that right comes the ancillary right to sell firearms, as without dealers, there can be no acquisition. See, e.g., *Andrews v. State*, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair."); *Teixeira v. City of Alameda,* 873 F.3d 670, 677 (9th Cir. 2017) (en banc), *cert. denied,* 138 S.Ct. 1988 (2018) ("the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms"). This Bill would certainly impede the ability of purchasers to acquire firearms because dealers are unlikely to survive.

The State may not condition these Second Amendment rights by subjecting such dealers and customers to potential surveillance without a warrant. Under the "unconstitutional conditions doctrine," the State may not condition the exercise of a constitutional right by demanding that a person give up another constitutional right. See, e.g., *Simmons v. United States*, 390 U.S. 377, 393-394 (1968) (it is "intolerable that one constitutional right should have to be surrendered in order to assert another"). Cf. *Perry v. Sindermann,* 408 U.S. 593, 597 (1972) (a government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech"); *Elrod v. Burns,* 427 U.S. 347, 359 (1976) (same). That would be true even if there was no Second Amendment right involved at all. See *United States v. American Library Assn., Inc.*, 539 U.S. 194, 210 (2003) ("the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit"). See also *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006) (applying the doctrine to the Fourth Amendment context). It is no answer to these points to assert that the government would not abuse this technology to conduct warrantless surveillance. This "just trust us" approach does not pass constitutional muster. Courts may "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). See also *McDonnell v. United States*, 579 U.S. 550, 576 (2106) (same); *Legend Night Club v. Miller,* 637 F.3d 291, 301 (4th Cir. 2011) (same). This Bill, if enacted, will not survive judicial review. We urge an unfavorable report.

Sincerely,



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