February 22, 2023`

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 824

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 824.

The Bill:

This bill would add sections to MD Code, Public Safety, § 5-133(b), to prohibit the possession of a regulated firearm (a handgun) if a person is on supervised probation from any crime punishable by more than 1 year of imprisonment, has been convicted of driving under the influence of alcohol or drugs, has violated a protective order entered under the Family Law article of the Maryland code, or has been convicted a second time of a violation of the storage provisions of MD Code, Criminal Law, 4-104 or has been convicted of violating Section 4-104 if the violation resulted in the use of a loaded firearm by a child causing death or serious bodily injury. It would further provide that a person who has been convicted of any violation of Section 4-104, even a first-time conviction, would be barred from possessing a regulated firearm for 5 years. It would likewise amend Section 5-133 to ban possession of a regulated firearm by any person who suffers from a "mental disorder" as defined by MD Code, Health General 10-101(I)(2) and by any person who is the respondent to a civil protective order under Section 4-506 of the Family Law article.

The bill would amend MD Code, Public Safety, § 5-304 to double the fees that may be charged by the State Police. The fee for an initial application for wear and carry permit is doubled to $150 for an initial application. The fee for a renewal is doubled to $100 for a renewal, and the fee for a duplicate or modified permit is doubled to $20. The bill would then amend MD Code, Public Safety 5-306 to limit wear and carry permits to persons who are at least 21 years of age (or is a member of the armed forces or National Guard). The bill prohibits the issuance of a permit to persons who are on supervised probation for any crime punishable by more than 1 year, for any violation of Section 21-902 of the Transportation article (relating to driving under the influence), or for violating a domestic protective order, for any violation of a second violation of Section 4-104 or if the violation of Section 4-104 led

to use of a loaded firearm by a child causing death or serious bodily injury, and bars the issuance of a permit to any person for 5 years for *any* violation of Section 4-104.

The bill also amends Section 5-306 to specify that the instruction for wear and carry permit include live-fire shooting, safe-handling of a handgun and "shooting proficiency with a handgun." It would further require instruction on State self-defense law, including on the justifiable use of force, the proportional use of force, and conflict de-escalation and resolution. Bill repeals the "good and substantial" reason requirement of Section 5-306(a)(6)(ii). The bill then amends MD Code, Public Safety, 5-309 to change the time period permit renewals from 3 years to 2 years.

The bill amends MD Code, Public Safety, § 5-310 to require that the State Police to revoke a permit if the permit holder would no longer be qualified to receive a permit and requires the State Police to REGULARLY REVIEW INFORMATION REGARDING ACTIVE PERMIT HOLDERS USING THE CRIMINAL JUSTICE INFORMATION SYSTEM CENTRAL REPOSITORY OF THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES TO DETERMINE WHETHER ALL PERMIT HOLDERS CONTINUE TO MEET THE QUALIFICATIONS DESCRIBED IN § 5–306 OF THIS SUBTITLE. It provides further that the State Police may revoke a permit if the permit holder violates Section 5-308 (requiring the permit holder to possess the permit while carrying). The bill amends MD Code, Public Safety, § 5-311 to make changes to the appeal procedures relating to any denial of a permit, including providing written notice and a statement of reasons. It then adds reporting requirements imposed on the State Police concerning permits. The bill amends MD Code, Public Safety, § 5-312 to impose additional reporting requirements on the Office of Administrative Appeals regarding permits.

The Bill Is Unnecessary: The training requirements newly imposed by this bill for the issuance of a wear and carry permit reflect current practice. Most, if not all, instructors, including the undersigned, already provide detailed instruction on all these topics under current law. The State Police already expressly require live-fire and impose a live-fire qualification course and other requirements that every instructor must certify that a student has passed. See generally COMAR § 29.03.02.05. These requirements are enforced vigorously by the State Police. This bill adds nothing to those existing requirements.

Likewise unnecessary are many of the disqualifications newly imposed by this bill. For example, the State Police do not issue permits to persons who are subject to a domestic violence protective order as such persons are already disqualified. See 18 U.S.C. § 922(g)(8), (9); MD Code, Public Safety, § 5-134(b)(10). The same is true for persons who suffer from a mental disorder, as defined in Section 10-101(i)(2), or who have been confined to a mental hospital. See MD Code, Public Safety, § 5-134(b)(8), (9). The State Police likewise require the disclosure of any arrest, regardless of conviction, and then consider that information in assessing whether a person should be issued a permit under MD Code, Public Safety, § 5-306(a)(6)(i). That subsection requires the State Police to conduct "an investigation" and precludes the issuance of a permit **unless** the State Police determine that the person "has not 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." The State Police conduct a vigorous investigation, consulting not only the NICS federal database and 17 different State databases.

Every applicant for a permit must sign a comprehensive waiver to allow the State Police to investigate any mental health issues and the applicant's background. Under this waiver, the applicant authorizes "the full and complete disclosure of the records of educational institutions, financial or credit institutions, and the records of commercial or retail mercantile establishments and retail credit agencies; medical and psychiatric consultation and/or treatment, including those hospitals, clinics, private practitioners, the U.S. Veterans' Administration, and all military and psychiatric facilities; public utility companies; employment and pre-employment records including background investigations reports, the results of polygraph examinations, efficiency ratings, complaints or grievances filed by or against me; of complaints of a civil nature made by or against me, for the internal purposes of the Licensing Division, Department of the State Police." The waiver could hardly be any broader.

The shortening of the renewal period from 3 years to 2 years is likewise ill-advised as it will impose substantial costs on the applicant **and on the State Police** for no good reason. Current law provides that the first permit is valid only for two years, with a 3-year period only applicable to subsequent renewals. Three years is already highly atypical. For example, Florida permits are good for 7 years. Permits issued by Virginia, Utah, New Hampshire and Pennsylvania are good for 5 years. Maine permits are valid for 4 years. Even New York allows permit renewal every three years. With modern technology, already in use by the State Police, frequent renewals are not necessary to ensure continued validity of any permit. The high costs associated with 2-year permits are pointless.

Every applicant is fingerprinted using the latest live-scan technology and the Maryland Department of Safety and Correctional Services keeps all the data from those prints. Through their fingerprint data, all permit holders 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. Upon receipt of this information, the State Police then act to revoke or review any wear and carry permit. If warranted, the State Police will likewise use that information to revoke any Handgun Qualification License. The State Police will then seize, as appropriate, any firearms that the permit holder may already possess. The requirement imposed by this bill that the State Police "regularly review information regarding active permit holders" does little more than impose costs. The State Police are already vigilant about revoking permits for any person who becomes disqualified. And any disqualified person who continues to possess any firearm (not merely a handgun) commits a serious federal felony under 18 U.S.C. § 922(g)(1), as well as a serious misdemeanor or felony under State law. See MD Code Public Safety, § 5-133(e). The State Police have better things to do with their limited resources. The Committee should trust the State Police to do its job.

Parts of the Bill Violate 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. *Bruen* squarely holds that the Second Amendment protects the right to carry in public while also making clear that a State may condition that right on obtaining a wear and carry permit from the State, if the permit is issued on an otherwise reasonable and objective "shall issue" basis. 142 S.Ct. at 2138 & n.9. The Court was, however, careful to cabin a State's discretion. Permits must be issued on a "shall issue" basis and permit statutes may "contain only

narrow, objective, and definite standards guiding licensing officials . . . rather than requiring the "appraisal of facts, the exercise of judgment, and the formation of an opinion." (Internal quotes and citations omitted).

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). Under that standard articulated in *Bruen*, "the government may not simply posit that the regulation promotes an important interest." 142 S.Ct. at 2126. *Bruen* expressly abrogates the two-step, "means-end," "interest balancing" test that the courts had previously used to sustain gun bans. Id. Those prior decisions applying interest balancing and a "means-end" test are no longer good law.

Under this standard adopted in *Bruen*, it is highly questionable whether the State may impose a firearms disqualification for a misdemeanor violation not involving a violent crime. For example, the Court of Appeals for the Fifth Circuit just applied *Bruen* to invalidate 18 U.S.C. § 922(g)(8), which imposes a firearms disqualification of person subject to a domestic violence restraining order. See *United States v. Rahimi*, --- F.4th ----, 2023 WL 1459240 (5th Cir. Feb. 2, 2023). Similarly, the court in *United States v. Quiroz*, --- F.Supp.3d ----, 2022 WL 4352482 (W.D. Tex. 2022), invalidated 18 U.S.C. 922(n) (imposing a disqualification for persons under indictment). And in *United States v. Harrison*, --- F.Supp.3d ---, 2023 WL 1771138 (W.D. Okla. 2023), the court invalidated 18 U.S.C. 922(g)(3), which imposes a disqualification on users of substances made unlawful by the federal Controlled Substances Act, including cannabis. See also *United States v. Price*, --- F.Supp.3d ---, 2022 WL 6968457 (S.D. W.Va. 2022) (invalidating 18 U.S.C. § 922(k), holding that criminalizing the knowing possession of a firearm with an obliterated serial number was unconstitutional under *Bruen*).

Persons between the ages of 18 and 21 also have Second Amendment rights. In *Firearms Policy Coalition, Inc. v. McCraw*, --- F.Supp.3d ---, 2022 WL 3656996 (Aug. 25, 2022), a federal district court struck down, under *Bruen*, a Texas ban on carry of a handgun by 18–20-year-olds. And Tennessee has just consented to the entry of judgment in federal district court overturning its ban on carry by 18-20-year-olds. That consent was filed in *Beeler v. Long*, No. 3:21-cv-152 (E.D. Tenn. 2023). Indeed, 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), the Fourth Circuit (which includes Maryland) applied intermediate scrutiny and held, pre-*Bruen*, that the federal ban on the sale of handguns to persons between the ages of 18-20, 18 U.S.C. § 922(b)(1), was unconstitutional under the Second Amendment and could not be justified, even under intermediate scrutiny. See generally, David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 Southern Illinois University Law Journal 495 (2019). Under this body of case law, the ban imposed by this bill on permits for adults under the age of 21 is likely unconstitutional.

The Court of Appeals for the Third Circuit, sitting en *banc*, has just heard oral argument in *Range v. United States*, 53 F.4th 262 (3d Cir. 2022), *rehearing en banc granted*, 56 F.4th 992 (3d Cir. Jan. 2023). The issue in *Range* is whether a firearms disqualification for a non-violent State misdemeanor violation punishable by more than 2 years imprisonment is constitutional under *Bruen*. Federal law imposes that disqualification under 18 U.S.C. § 922(g), as defined in 18 U.S.C. § 921(a)(20). Maryland imposes the same disqualification under MD Code, Public Safety, § 5-101(g)(3). While a decision in *Range* has yet to issue, from the oral argument it appears that the odds are good that such a disqualification will not survive. While Maryland is in the Fourth Circuit, such a holding in *Range* will likely lead to challenges to a broad range of disqualifications imposed by Maryland law, including the disqualifications imposed by this bill for driving under the influence or for violations of the storage provisions of Section 4-104. Such disqualifications are unlikely to survive scrutiny under this emerging body of case law. Allowing the State Police to revoke the permit simply because the permit holder forgot to carry it on his person, as this bill mandates, is particularly and egregiously unconstitutional.

The Doubling of Fees Is Likely Unconstitutional: We question as well whether doubling the fees associated with the permit process, as imposed by this bill, will be sustained after *Bruen*. It is well-established that State's power to impose fees on the exercise of a constitutional right is very limited. See *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court invalidated a city ordinance which as construed and applied, required distributors of religious literature to pay a flat license fee as a prerequisite to conducting their activities, holding that a "State may not impose a charge for the enjoyment of a right granted by the Federal Constitution." 319 U.S. at 113. Under these rulings, a fee imposed on the exercise of a constitutional right must not be a general "revenue tax," but such a fee is lawful if it is instead designed "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox*., 312 U.S. at 577. See also *S. Oregon Barter Fair v. Jackson Cty.,* 372 F.3d 1128, 1139 (9th Cir. 2004) (holding that a "state may ... impose a permit fee that is reasonably related to legitimate content-neutral considerations, such as the cost of administering the ordinance" in question, as long as the ordinance or other underlying law is itself constitutional).

To justify the fees imposed by this bill, the State would be required, at a minimum, to satisfy this test. The burden would be on the State to show that the fees are limited to the "cost of administering" otherwise reasonable and appropriate provisions of the permit process. Id. See also *Ne. Ohio Coal. for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109–10 (6th Cir. 1997) ("The lesson to be gleaned from *Cox* and *Murdock* is that an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest."). The doubling of fees has not been justified by any such analysis. Without such proof, the doubling of fees will not survive judicial review.

Indeed, it is an open question whether this *Cox* and *Murdock* analysis, developed in First Amendment litigation, is even applicable to Second Amendment challenges under the text, history and tradition test articulated in *Bruen*. That test applies to **all** statutes that regulate activity protected by the text of the Second Amendment and we know of no historical analogue that would permit the imposition of fees. For example, a "tiers of scrutiny"

approach applies to First Amendment cases, but the Court expressly rejected that approach under the Second Amendment. Thus, there is no deference to legislative judgments under the Second Amendment. See *Bruen*, 142 S.Ct. at 2131 ("But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here."). The State would be wise to **reduce** the cost of the permitting process, not add to it. The State may well be stuck with the tab for all these costs.

A Final Note: The multiple new requirements imposed by this bill bespeaks of a fundamental hostility to the exercise of the right identified in *Bruen*. Such a motivation is constitutionally illegitimate. Any law enacted for the purpose of discouraging 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).

Similarly, 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). The same point applies to Second Amendment 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.

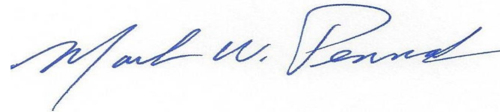
Bruen makes clear that "[t]he constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" 142 S.Ct. at 2156 (citation omitted). Ironically, the more requirements that the State piles on the permitting process, the more likely those requirements will result in a successful challenge to the Maryland permitting process. For example, such a suit might well lead to the invalidation of subsection 5-306(a)(6)(i), which allows the State Police to deny a permit to persons who, in the State Police's sole judgment, show a "propensity for violence." Nothing in this bill provides any "objective criteria" for that assessment. *Bruen* expressly disallows any shall-issue permitting process that allows "the 'appraisal of facts, the exercise of judgment, and the formation of an opinion.'" 142 S.Ct. at 2138 n.9 (citation omitted).

This bill impermissibly adds *more* such discretion to the permitting process, not less. The bill should thus be amended to provide objective criteria to the subsection 5-306(a)(6)(i) inquiry. As the Court stated in *Bruen*, "we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry." 142 S.Ct. at 2138 n.9. This

bill, with its multiple disqualifications for non-violent misdemeanors, unnecessary provisions, and doubling of fees, crosses that line. If this bill is enacted into law, the State will not be able to say that it wasn't warned.

This Bill is unnecessary and likely unconstitutional. We urge an unfavorable report.

Sincerely,



Mark W. Pennak
President, Maryland Shall Issue, Inc.
mpennak@marylandshallissue.org