March 6, 2024

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN IN SUPPORT OF HB 1178

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4) all-volunteer, non-partisan, non-profit organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of Maryland and of the Bar of the District of Columbia. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland firearms law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License ("HQL") and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home and in muzzle loader. I appear today as President of MSI in SUPPORT of HB 1178.

The Bill:

The Bill amends MD Code, Natural Resources, § 5-209, to provide in new subsection (f) that (1) THE DEPARTMENT MAY NOT PROHIBIT AN INDIVIDUAL TO WHOM A PERMIT TO WEAR, CARRY, OR TRANSPORT A HANDGUN HAS BEEN ISSUED UNDER TITLE 5, SUBTITLE OF THE PUBLIC SAFETY ARTICLE FROM WEARING, CARRYING, OR TRANSPORTING A HANDGUN IN A STATE PARK OR FOREST, SUBJECT TO ANY LIMITATIONS IMPOSED UNDER § 5–307 OF THE PUBLIC SAFETY ARTICLE.. It further amends adds that (2) THIS SUBSECTION MAY NOT BE INTERPRETED TO AUTHORIZE AN INDIVIDUAL TO USE A HANDGUN TO HUNT WILDLIFE IN VIOLATION OF DEPARTMENT REGULATIONS. This provision would effectively reverse current Maryland regulations issued by the Department of Natural Resources that ban the mere possession of firearms in Maryland State Parks and in Maryland State Forests and Chesapeake Forest lands. See COMAR 08.07.06.04 (State parks); COMAR 08.07.01.04 (State forests); COMAR 08.07.01.14 (State Chesapeake Forest lands). These regulations have been challenged as unconstitutional in two lawsuits filed in 2023. See *Novotny v. Moore*, No. 1:23-CV-01295 (filed May 16, 2023, D. Md.), and *Kipke v. Moore*, No. 1:23-CV-01293 (filed May 16, 2023, D. Md.). Those two cases have been consolidated in federal district court.

Bruen: The proper analysis for cases arising under the Second Amendment is set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S.Ct. 2111 (2022), where the Court struck down as unconstitutional New York's "proper cause" requirement for issuance of a permit to carry a handgun in public. *Bruen* squarely holds that Second Amendment protects the right to carry in public while also making clear that a State may condition that

right on obtaining a wear and carry permit from the State, as long as the permit is issued on an otherwise reasonable and objective "shall issue" basis. *Bruen*, 142 S.Ct. at 2138 & n.9.

Prior to the Supreme Court's decision in *Bruen*, the Maryland State Police enforced the requirement, found in MD Code, Public Safety, § 5-306(b)(6)(ii), that an applicant for a wear and carry permit demonstrate a "good and substantial reason" for wishing to carry a firearm in public. In *Bruen*, the Court specifically cited this statutory requirement as the functional twin of New York's "good cause" requirement and thus, by necessary implication, likewise invalidated Maryland's "good and substantial reason" requirement for a carry permit. See *Bruen*, 142 U.S. at 2124 n.2 (citing the Maryland statute as one of six State statutes that had "analogues to the 'proper cause' standard" of the New York statute invalidated in *Bruen*). The Maryland Court of Special Appeals agreed. *Matter of Rounds*, 255 Md.App. 205, 213, 279 A.3d 1048 (2022) ("We conclude that this ruling [in *Bruen*] requires we now hold Maryland's 'good and substantial reason' requirement unconstitutional."). Maryland wear and carry permits are thus now issued on a "shall issue" basis to all applicants who otherwise satisfy the stringent training, fingerprinting and investigation requirements otherwise set forth in MD Code, Public Safety, § 5-306(a)(5),(6).

The constitutionality of Section 4-203(a)'s broad ban on wear, carry and transport obviously turns on strict adherence to *Bruen*. As long as Maryland issues carry permits on an otherwise objective and reasonable basis, then the State may condition the wear, carry and transport of handguns in the State on obtaining such a permit. That said, the Maryland carry permit under existing law is quite difficult and expensive to obtain. Permit holders in Maryland are fingerprinted, thoroughly investigated by the State Police and, unless exempt, receive at least 16 hours of training by a State-certified, private instructor. MD Code, Public Safety, § 5-306(a)(5),(6). These training requirements include a mandatory, course of live-fire in which the applicant must achieve a specific minimum score. COMAR 29.03.02.05 C.(4). Private instruction for the permit averages around $400-$500 per person. Add to that sum the $75 application fee, and the roughly $70 in fingerprint fees plus any incidental costs, such as ammunition, the cost of obtaining a permit is at least $600.00. Of the 43 "shall issue" States identified in *Bruen*, 142 U.S. at 2123 n.1, only Illinois requires as much training as Maryland. Currently only New York requires more training with its odd requirement of 18 hours. Permit holders, nationwide, are the most law-abiding persons in America, with crime rates a fraction of those of police officers. See https://bit.ly/3IeqtGu.

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

Bruen now makes clear that the right to keep and bear arms extends outside the home. After *Bruen*, all 50 States and the District of Columbia are now "shall issue" jurisdictions. Twenty-eight (28) States are "constitutional carry" jurisdictions in which carry is permitted without any permit at all. https://bit.ly/3S2nbde. *Most of these constitutional States enjoy a violent crime rate well below tha*t of Maryland. For example, Maryland's murder rate **substantially** exceeds that of neighboring Pennsylvania and Virginia, where "shall issue" carry concealed carry permits have long been issued and open carry is widely practiced. In 2023, Maryland and Tennessee at near the top of the national scale (at 8th and 9th highest murder rates) with a murder rate of 12.2 murders per 100,000. By comparison Pennsylvania had a rate of 9.2 per 100,000 and Virginia's rate is even lower at 7.2 per 100,000. http://bit.ly/3IdEFzr. And **Baltimore** had the third highest murder rate of cities in the United States at a rate of **58.1** murders per 100,000. That rate is topped only by New Orleans (74.3) and St. Louis (68.2). http://bit.ly/3IdEFzr. Yet, Pennsylvania has over 1.5 million current carry permit holders and Virginia has over 800,000 permit holders (resident and non-resident). See http://bit.ly/3xca7bb (at 18). Neither State requires any training for open carry **without a permit,** which is lawful in both States. Any thinking person in Maryland would gladly trade spots with Virginia or Pennsylvania. Maryland's strict carry laws have not made this State (or especially Baltimore) safe.

Bruen explicitly rejected New York's attempt to justify its "may issue" restriction as analogous to a historical "sensitive place" regulation. 142 S.Ct. at 2133-34. The Court explained that a state may not simply ban guns wherever people may "congregate" or assemble. A rule that "expand[ed] the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly." 142 S.Ct. at 2134. As the Court explained, "[p]ut simply, 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. at 2133-34. If a state seeks to restrict firearms in a particular location as a "sensitive place," then it must prove that its current restriction is sufficiently analogous to "well-established and representative historical analogue."

In *Bruen*, the Court identified only few such locations: "schools and government buildings" as well as "legislative assemblies, polling places, and courthouses." Id. at 2133, citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). *Bruen* held that the lower "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. 40. *Bruen* further establishes several requirements to determine whether a historical regulation is sufficiently analogous. First, the relevant time period for the historical analogue must be the Founding, centering on 1791. *Bruen*, 142 S.Ct. at 2135-36. Second, the historical analogue must be "representative." Historical "outlier" requirements of a few jurisdictions or of the Territories are to be disregarded. *Bruen*, 142 S.Ct. at 2133, 2153, 2147 n.22 & 2156. Third, the historical analogue must be "relevantly similar," which is to say that it must burden ordinary, law-abiding citizens right to carry in a similar manner and for similar reasons. *Bruen*, 142 S. Ct. at 2132.

The District Court Ruling And The Bill.

As noted above, this Bill effectively would reverse pre-*Bruen* regulations issued by the Department of Natural Resources that effectively ban carry by permit holders in State

Parks, State Forests and State Chesapeake Forest lands. The Maryland State Park System covers **142,433** acres as of 2022. Maryland At A Glance, Parks & Recreation, State Parks, MARYLAND MANUAL ON-LINE, https://bit.ly/3MmHhfm. Maryland has over **214,000** acres of State Forest. Maryland's State Forests, MARYLAND DEP'T. OF NAT. RESOURCES, https://bit.ly/3BGjwK5. Chesapeake Forest Lands are an additional **75,376** acres. Chesapeake Forests, MARYLAND DEP'T. OF NAT. RESOURCES, https://bit.ly/3OHgSf9. Throughout these lands, Marylanders are deprived of their Second Amendment rights by virtue of administrative regulations promulgated long before *Bruen* was decided. There is nothing remotely "sensitive" about these vast tracts of land under *Bruen*. Indeed, Federal law expressly permits the carrying of firearms in the National Park System if "the possession of the firearm is in compliance with the law of the State in which the System unit is located." 54 U.S.C. § 104906(b). Congress enacted this provision to ensure against the "override [of] the 2d amendment rights of law-abiding citizens on 83,600,000 acres of System land." Id. § 104906(a)(6). Maryland carry-permit holders thus may freely carry a firearm within the National Park System. After *Bruen*, there is no rationale for the State's ban on firearms on the tens of thousands of acres of State parks and forests.

As noted, these regulations have been challenged in federal district court as unconstitutional under *Bruen*. In a memorandum opinion issued on September 29, 2023, the federal district court struck down as unconstitutional some aspects of SB 1, 2023 Maryland Session Laws Ch. 680, but declined to invalidate on a motion for a preliminary injunction the pre-existing regulations at issue here. *Kipke v. Moore*, --- F.Supp.3d ----, 2023 WL 6381503 (Sept. 29, 2023, D.Md). In so holding, the court **rejected** Maryland's argument that the State was free to restrict access to these State lands without regard to the Second Amendment, holding that "although the State owns the property in its parks, parks are not businesses, and State Defendants have not established Maryland acts as a market participant by owning parks open to the public." 2023 WL 6381503 at *9. The court likewise held that that "**State Defendants have also failed to show that parks are sensitive places**," agreeing with plaintiffs that "Maryland's parks cover thousands of miles, and while children surely visit these parks for education or recreation, State Defendants do not allege that the parks are primarily geared towards children or any other vulnerable population." Id. (emphasis added).

The *Kipke* district court nonetheless held that the regulations were "consistent with historical firearm regulation" as measured exclusively by regulations and laws dating after 1868, when the 14th Amendment was ratified. The court followed the same exclusive reliance on post-1868 analogues approach adopted by the court in *Maryland Shall Issue, Inc. v. Montgomery County*, --- F. Supp. 3d ---, 2023 WL 4373260 (D. Md. July 6, 2023), *appeal pending,* No. 23-1719 (4th Cir). As detailed below such reliance on post-1868 analogues has been overwhelmingly rejected by other courts, including two federal appellate courts and will thus likely fail in this circuit as well.

First, the reliance on post-1868 analogues to ban carry in all parks is highly questionable under *Bruen* itself. If New York could not ban all carry for self-defense on the island of Manhattan, as *Bruen* held, then *a fortiorari*, Maryland may not ban all such carry in tens of thousands of acres comprising rural parks and forests. Virtually all the State parks and forests and Chesapeake Forest lands covered by the regulations addressed by this Bill are quite **rural** in nature. Many of these State forests are open to hunting and a few even permit target shooting on designated ranges, but all are closed to carry for self-defense. That is a

perverse and senseless limitation on the right. Self-defense is the "central component" of the Second Amendment and that was no less true in 1868. See *Bruen*, 142 S.Ct. at 2150 ("public carry for self-defense remained a **central component** of the protection that the Fourteenth Amendment secured for all citizens") (emphasis added).

More specifically, *Bruen* reaffirmed that the relevant period centers on the Second Amendment's adoption in 1791. See *Bruen*, 142 S. Ct. at 2135–36. Even before *Bruen*, the Fourth Circuit explicitly 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.'" *Hirschfeld v. A.T.F.*, 5 F.4th 407, 419 (4th Cir.), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021) (quoting *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). *Bruen* also stated that "[t]his Court gives less weight to laws enacted within a few years of the 20th century because they provide little insight into the public's understanding of the Second Amendment either in 1791 or 1868." *Bruen*, 142 S. Ct. at 2154 (explaining that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence"). Id. at 2154 n.28 ("We will not address any of the 20th-century historical evidence brought to bear by respondents or their amici.').

Second, such exclusive reliance on post-1868 analogues have since been squarely rejected by the Court of Appeals for the Third Circuit in *Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122, 134 (3d Cir. 2024), where the court held that "the Second Amendment should be understood according to its public meaning in 1791," when the Bill of Rights were ratified, not 1868. The court held that such reliance on 1791 instead of 1868 was necessary "to maintain consistency in our interpretation of constitutional provisions" which are likewise interpreted by reference to 1791. The district court's holding as to parks has also been expressly rejected by other district courts which hold that the post-1868 historical analogues on which the State relies are not sufficient under *Bruen*. See, e.g., *Wolford v. Lopez*, --- F.Supp.3d ---- 2023 WL 5043805 at *22-*23 (D. Haw. 2023) ("this Court respectfully disagrees with that district court's finding that the laws it reviewed demonstrate a national historical tradition of prohibiting carrying firearms in parks"); *Springer v. Grisham*, --- F.Supp.3d ----2023 WL 8436312 at *7-*8 (D.N.M. 2023) (same).

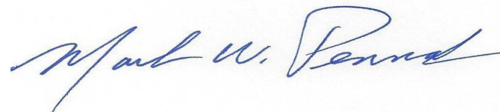
Third, in *Antonyuk v. Chiumento*, 89 F.4th 271, 356 (2d Cir. 2023), the Second Circuit recently held, in its view, that there was a sufficient historical record to support regulation only as to "*urban* parks" but "not necessarily as to *rural* parks." (Emphasis the court's). *Antonyuk* also disavowed exclusive reliance on 1868, preferring to look both at the Founding era and the Reconstruction era. See 89 F.4th at 303 n.11. Other, more recent decisions likewise reject reliance on 1868 as the controlling historical period. *Worth v. Harrington*, --- F.Supp.3d ----, 2023 WL 2745673 *10 (D. Minn. 2023) (carry by 18–20-year-olds); *Koons v. Platkin*, --- F.Supp.3d ---, 2023 WL 3478604, at *83 (D. N.J. 2023) (parks and other locations). The only court to hold that 1868 era is the controlling period for the historical inquiry is a panel decision in *NRA v. Bondi*, 61 F.4th 1317 (11th Cir. 2023), but the en banc Eleventh Circuit vacated that decision and granted rehearing **on that very question**. See *NRA v. Bondi*, 72 F.4th 1346 (11th Cir. 2023) (en banc). The *Bondi* panel's decision thus no longer has any precedential effect.

Lara and this other subsequent case law are before the federal district court in the SB1 litigation with respect to the currently pending cross-motions for summary judgment filed

by plaintiffs and the State in that case. The court is free to revise its earlier preliminary injunction rulings in deciding those summary judgment motions, and is likely to do so, given the uniform weight of the more recently decided precedent, noted above. The court has, as noted, already held that these places are not remotely "sensitive" locations. A decision on those motions may come down at any time. Enacting this Bill would effectively moot the challenges to these regulations and thus significantly narrow the litigation. Unlike the regulations affected by this Bill, the SB1 restrictions at issue in the litigation were enacted after *Bruen*. Acting to moot the challenge to these pre-*Bruen* regulations is tactically sound for the State and will avoid what promises to be an adverse ruling with broader ramifications. See *NYSRPA v. NYC*, 140 S.Ct. 1525 (2020) (holding the case was moot after the State and City of New York amended their laws). The Bill offers the State a chance to take the same path employed by New York. It should take it.

We urge a favorable report of the Bill.

Sincerely,



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