President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 20, 2025

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 1050 AND SB 943

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 the District of Columbia and the Bar of Maryland. 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 and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today IN OPPOSITION to HB 1050 and the cross-file, SB 943.

The Bill

This Bill amends MD Code, Family Law, § 4-504 to impose additional disclosure requirements on petitioners seeking a protective order from domestic abuse to include whether the respondent has a Handgun Qualification License ("HQL") or owns or possesses a firearm. If the respondent has an HQL or a firearm, then the Bill requires the Petitioner to state whether the petitioner has an HQL or owns or possesses a firearm along with a long list of other information regarding firearms owned or possessed by the respondent.

The Bill would amend MD Code, Family Law, § 4-504.1 to provide that an interim protective order SHALL ORDER THE RESPONDENT TO SURRENDER TO LAW ENFORCEMENT AUTHORITIES ANY FIREARM IN THE RESPONDENT'S POSSESSION, AND TO REFRAIN FROM POSSESSION OF ANY FIREARM,FOR THE DURATION OF THE INTERIM PROTECTIVE ORDER. Interim order issued under Section 4-504-1 may be entered by a court "commissioner and where the "commissioner finds that there are reasonable grounds to believe that the respondent has abused a person eligible for relief. Such orders are entered *ex parte*, without any hearing and are based solely on the contents of the petition for a protective order. MD Code, Family Law, § 4-504.1(b).

The Bill would also amend MD Code, Family Law, § 4-505 to impose the same disqualification whenever a "TEMPORARY PROTECTIVE ORDER" is issued under that section of the code. Section 4-505(a) provides that "[i]f, after a hearing

on a petition, whether ex parte or otherwise, a judge finds that there are reasonable grounds to believe that a person eligible for relief has been abused, the judge may enter a temporary protective order to protect any person eligible for relief from abuse." The Bill specifically deletes existing language found in Section 4-505(a)(2)(viii) that conditions an order directing the seizure of firearms on findings that the respondent used a firearm against the petitioner or threatened the petitioner with a firearm or otherwise inflicted or threatened to inflict "serious bodily harm" on the petitioner.

The amendments made to Section 4-504.1 and Section 4-505 are incorporated into the final protective orders authorized by MD Code, Family Law, § 4-506(c)(1). Section 4-506(c)(1)(ii) provides that a final protective order may be entered "if the judge finds by a preponderance of the evidence that the alleged abuse has occurred." Section 4-506(f) provides that "[t]he final protective order shall order the respondent to surrender to law enforcement authorities any firearm in the respondent's possession, and to refrain from possession of any firearm, for the duration of the protective order." Nothing in Section 4-506 conditions that firearms disqualification on any finding that the respondent has engaged in or threatened physical harm or misused a firearm in any way. Indeed, Section 4-506(c)(3)(ii) authorizes "mutual final protective orders" against both the petitioner and the respondent "only if the judge makes a detailed finding of fact that: 1. both parties acted primarily as aggressors; and 2. neither party acted primarily in self-defense."

The Bill also amends MD Code, Family Law, § 4-506.1 to impose new requirements associated with any surrender of a firearm by a respondent under these sections. Those requirements include mandating that the respondent II) PROVIDE WRITTEN PROOF OF THE SURRENDER TO THE COURT AND THE LOCAL SHERIFF'S OFFICE WITHIN 2 BUSINESS DAYS AFTER THE SURRENDER. (2) IF THE RESPONDENT DOES NOT POSSESS A FIREARM, THE RESPONDENT SHALL SUBMIT AN AFFIDAVIT TO THE COURT TO THAT EFFECT SIGNED UNDER PENALTY OF PERJURY WITHIN 2 BUSINESS DAYS AFTER THE SURRENDER. (3) IF THE RESPONDENT HAS LAWFULLY SOLD OR TRANSFERRED A FIREARM WITHIN THE PRIOR 30 DAYS, THE RESPONDENT SHALL SUBMIT THE TRANSFER PAPERWORK TO THE COURT WITHIN 2 BUSINESS DAYS AFTER THE SURRENDER.

The Bill also amends Section 4-506.1 to provide that a law enforcement officer may enforce the provisions of subtitle 5 of Title 4 by authoring the officer to PROCEED WITHOUT THE RESPONDENT'S PRESENCE, IF NECESSARY, TO ANY PLACE WHERE THE LAW ENFORCEMENT OFFICER HAS PROBABLE CAUSE TO BELIEVE A FIREARM IN THE POSSESSION OF THE RESPONDENT IS LOCATED TO ENSURE THAT THE RESPONDENT DOES NOT GAIN ACCESS TO A FIREARM. No warrant is required by the Bill for such seizures. The Bill amends MD Code, Family Law, § 4-509 to extend its enforcement provisions to the amendments made by the Bill. Under Section 4-509(b), a failure to comply with the any protective order including the newly minted disqualifications imposed by the Bill, is a misdemeanor punishable (1) for a first offense, a fine not exceeding $1,000

or imprisonment not exceeding 90 days or both; and (2) for a second or subsequent offense, a fine not exceeding $2,500 or imprisonment not exceeding 1 year or both.

The Disarmament Provisions Violate the Fourth Amendment and Article 26 of the Maryland Declaration of Rights.

The first issue is that this Bill amends both Section 4-504-1 (interim protective orders) and Section 4-505 (temporary protective orders) to allow a seizure of firearms without any showing of probable cause. As amended, Section 4-504-1 authorizes the seizure of firearms via an interim protective order based on a finding "that there are reasonable grounds to believe that the respondent has abused a person eligible for relief." See Section 4-504-1(b). As amended, Section 4-505(a) authorizes a temporary protective order to seize firearms if "a judge finds that there are reasonable grounds to believe that a person eligible for relief has been abused."

By mandating seizures of personal property based solely on "reasonable grounds" the amendments made by the Bill violate the Fourth Amendment. The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, . . . and effects, against unreasonable searches and seizures, shall not be violated, **and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation** . . . ." (Emphasis added). Article 26 of the Maryland Declaration of Rights provides: "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." "Article 26 of the Maryland Declaration of Rights provides that "all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." Article 26 provides "the same protections as the Fourth Amendment." *Rovin v. State*, 488 Md. 144, 183, 321 A.3d 201 (2024).

These constitutional provisions apply to any seizures of personal property, regardless of terminology. "[T]his Court has never interpreted the warrant requirement of the Fourth Amendment to require a particular label." *Whittington v. State*, 474 Md. 1, 25 (2021). Courts in Maryland have thus held that the failure to use the word "warrant" does not absolve a court order of its "probable cause" burden. See *Whittington*, 474 Md. at 27. See also *Yith v. Nielsen*, 881 F.3d 1155, 1166 (9th Cir. 2018) (noting a warrant is a "writ directing or authorizing someone to do an act, esp. one directing a law enforcer to make an arrest, a search, or a seizure" (quoting Black's Law Dictionary (10th ed. 2014))); *In re Subpoena Duces Tecum*, 228 F.3d 341, 348 (4th Cir. 2000) ("A warrant is a judicial authorization to a law enforcement officer to search or seize persons or things."); *United States v. Leon*, 468 U.S. 897, 920 n.21 (1984) ("A warrant is a judicial mandate to an officer to conduct a search or make an arrest ...."); *Utah v. Strieff*, 579 U.S. 232, 240 (2016). The protective orders for the seizure of firearms authorized by this Bill are

unquestionably "warrants" within the meaning of the Fourth Amendment and Article 26 of the Maryland Declaration of Rights.

In *United States v. Place*, 462 U.S. 696, 701 (1983), the Supreme Court held that "the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." See also *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."). A warrant based on probable cause is therefore indisputably required for the seizure of personal property unless some recognized exception applies. See *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). Nothing in the Bill falls conditions these mandated seizures upon any showing that falls with any recognized exception to the warrant requirement. Indeed, as amended by this Bill **every** protective order issued under these statutory provisions **must include** a seizure order.

Stated simply, "reasonable grounds" is not "probable cause." In *United States v. Carpenter*, 585 U.S. 296 (2018), the Supreme Court held that a court order failed to comply with the Fourth Amendment where the statute under which the order issued only required "'*reasonable grounds'* for believing records were 'relevant and material to an ongoing investigation,'" a standard that the Court ruled "falls well short of the probable cause required for a warrant." *Id.* at 317 (emphasis added). Likewise, the Maryland Supreme Court has repeatedly held that "the term 'reasonable grounds' . . . means 'reasonable articulable suspicion' and *not preponderance of the evidence or probable cause.*" *Motor Vehicle Admin. v. Shepard*, 399 Md. 241, 254 (2007) (emphasis added).

This point was stressed in *Motor Vehicle Admin. v. Kraft*, 452 Md. 589, 607 (2017), where the Court stated that it "has interpreted the 'reasonable grounds' standard to mean 'reasonable articulable suspicion' and to be a lower standard than preponderance of the evidence or probable cause." *Id.* (quoting Shepard, 399 Md. at 254; citing *Motor Vehicle Admin, v. Dove*, 413 Md. 70, 95 (2010); *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 19 (2010)); see also *Motor Vehicle Admin. v. Usan*, 486 Md. 352, 365 n.4 (2024) ("'We have explained that "reasonable suspicion requires less in the way of quantity and quality of evidence than is required for probable cause and it falls considerably short of satisfying a preponderance of the evidence standard."'). Amending Section 4-504-1 and Section 4-505 to allow seizures of personal property (firearms) based on nothing more than "reasonable grounds" would make those Sections unconstitutional under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights.

The Bill Violates the Second Amendment

The constitutionality of the firearms disqualifications imposed by these Sections violates the right to keep and bear arms under the Second Amendment. Under *NYSRPA v. Bruen*, 597 U.S. 1 (2022), as construed and applied in *United States v.*

Rahimi, 602 U.S. 680 (2024), any disqualification is unconstitutional unless "relevantly similar" or "distinctly similar" restrictions were imposed during the Founding era of 1791. Those provisions of the Family Law Article allow a protective order for "abuse," but that term is not limited to and does not require a finding that a person had inflicted actual harm or posed a credible risk of physical harm. Indeed, Maryland case law does not require any showing that the "abuse" constitute physical abuse or even the risk of physical harm. Rather, the petitioner may obtain such a protective order for "mental abuse." *C.M. v. J.M.*, 258 Md.App. 40, 57, 295 A.3d 1 (2023).

These provisions are thus much broader than the federal qualification specified by 18 U.S.C. § 922(g)(8)(C)(i), the portion of Section 922(g)(8) adjudicated in *Rahimi*. Section 922(g)(8)(C)(i) imposes a federal firearms disqualification on a person who is subject to a court order that "includes a finding that such person represents a credible threat to **the physical safety** of such intimate partner or child." (Emphasis added). *Rahimi*, sustained that provision as historically justified. See 602 U.S. at 693 ("Our analysis starts and stops with Section 922(g)(8)(C)(i) because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others.").

None of protective order provisions, including the sections amended by this Bill conditions the firearms disqualification on any such finding. Indeed, the Bill actually repeals existing provisions of Section4-505 that linked misuse of firearms to the seizure authorized by existing law. In *Rahimi*, the individual (Rahimi) had been previously found by a court to pose a credible threat to the physical safety of another and the Court sustained the disqualification based on that prior judicial finding. But, in so holding, the Court also rejected the government's argument that only "responsible" individuals enjoyed Second Amendment rights. See 602 U.S. at 703 ("in holding that Section 922(g)(8) is constitutional as applied to Rahimi, we reject the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.'").

After *Rahimi*, any disqualification provision that does not require a finding that the respondent "represents a credible threat to the **physical safety** of such intimate partner or child" is likely to fail. This focus on dangerousness was outcome-determinative in *Range v. United States*, 124 F.4th 218 (3d Cir. 2024) (*en banc*), where the Third Circuit very recently held, post-*Rahimi*, that the firearms disqualification imposed on a non-violent misdemeanant under 18 U.S.C. § 922(g)(1), was unconstitutional under *Bruen* and *Rahimi* as applied to the plaintiff in that case. See also *United States v. Williams*, 113 F.4th 637, 658–61 (6th Cir. 2024), *cert. denied sub nom Boima v. United States*, No. 24-6021 (Jan. 23, 2025) (post-*Rahimi,* distinguishing between crimes that "pose a significant threat of danger," and crime that that posed no such risks). We have found no historical tradition at the Founding that imposed disarmament based on non-dangerous behavior. Mental abuse on its face does not constitute "a credible threat to the

physical safety" of any person, much less the type of prior, individualized determination of the type required by federal law as adjudicated in *Rahimi*.

The Disqualification Provisions Violate the Due Process Clause

The interim and temporary protective order provisions amended by this Bill mandate the imposition of the disqualification without so much as hearing at which the respondent has an opportunity to be heard, including the right to cross-examine witnesses and present evidence. This Bill thus further departs from the disqualification imposed by Section 922(g)(8), because Section 922(g)(8) conditions the disqualification upon a hearing at which the respondent has a full right to participate. Section 922(g)(8)(A) imposes such disqualification only "after a hearing of which such person received actual notice, *and at which such person had an opportunity to participate*." (Emphasis added). *Ex parte* hearings do not qualify. As noted, there is no such right to participate accorded by Section 4-504.1 or Section 4-505.

Allowing the seizure of property and imposing a disqualification on a constitutional right allowing the respondent due process is a basic violation of an individual's right to be heard under the Due Process Clause of the Fourteenth Amendment. Lawful owners of firearms have a Second Amendment right to possess their firearms and may be deprived of that constitutional right only after receiving proper notice and a opportunity to be heard. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 577–78 (1972). And because possession of firearms is constitutionally protected by the Second Amendment, that right to be heard must include more elaborate procedural rights—such as the rights to present evidence, to cross examine adverse witnesses, and to be represented by counsel. See *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) ("the Court usually has held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property"). *Ex parte* proceedings cannot be used to strip people of their constitutional right to keep and bear arms. See *Henry v. County of Nassau*, 6 F.4th 324, 334 (2d Cir.2021) (holding that *ex parte* proceedings could not be used to justify stripping a person of his Second Amendment rights).

The procedures associated with Sections 4-504.1 and 4-505 proceedings come nowhere close to meeting these requirements. It is not until a final protective order proceeding under Section 4-506 do respondents have **any** right and opportunity to be heard and even that provision does not purport to guarantee the right to cross-examine witnesses or submit evidence. See Section 4-506(a). And that post-deprivation hearing could come as much as 6 months after the entry of the temporary order. See Section 4-505(c)(2). That delay is intolerable. A post-deprivation hearing is constitutionally sufficient only where there is "necessity of quick action" or "impracticality." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436

(1982). The disqualifications imposed by this Bill are not dependent in the slightest on any need for quick action or any showing of "impracticality."

The Bill Violates the Fifth Amendment Privilege Against Self-Incrimination

Remarkably, the Bill amends Section 4-506.1 to require the respondent to speak by providing "written proof of the surrender" of the firearms, or an "affidavit" signed under penalty of perjury that the respondent does not possess any firearms and to provide submit "transfer paperwork" to the court demonstrating that the respondent has lawfully sold or transferred a firearm transferred his or her firearms. Any failure to make these statements presumably may be punishable as contempt of court. A false statement made under penalties for perjury is a serious offense punishable under MD Code, Criminal Law, § 9-101(b) by imprisonment for a term "not exceeding 10 years."

These provisions compel the respondent to be a witness against himself and that is a basic violation of the Fifth Amendment. In *Haynes v. Unites States*, 390 U.S. 85 (1968), the Supreme Court struck down part of the National Firearms Act that allowed the use in a criminal prosecution information that the law required to be submitted during the registration process. The Court reasoned that the person making the compelled information "realistically can expect that registration will substantially increase the likelihood of his prosecution" and "facilitate his prosecution." *Id.* at 977. The *Haynes* Court thus held "that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under § 5841 [of the NFA] or for possession of an unregistered firearm under § 5851 [of the NFA]." 390 U.S. at 100.

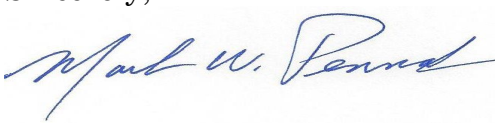
In response to *Haynes*, Congress amended the National Firearms Act to eliminate the registration requirement. Instead, Congress established a whole new system where a transferee of an NFA item is not required to register. Under those amendments, only the transferor registers the item and is not allowed to transfer the item until the government confirms that the transferee may take possession. Thus, the transferee becomes registered without having to make any statements. This system was sustained by the Supreme Court in *United States v. Freed* , 401 U.S. 601, 605 (1971). Under those amendments, the transferee never is required to make any statements that could later be used against him or her and the information provided by the transferor is "not available to state or other federal authorities and, as a matter of law, cannot be used as evidence in a criminal proceeding with respect to a prior or concurrent violation of law." *Id.* at 605-06. See *United States v. Aiken*, 974 F.2d 446, 448 n.3 (4th Cir. 1992). No such assurances are provided by this Bill.

These principles have direct application to the disclosures compelled by the Bill. The protective orders compel dispossession of firearms, as does Section 4-506.1(a)(1)(i), as amended by the Bill. A failure to comply with the protective orders is a misdemeanor offense, punishable by fine and imprisonment. Requiring the respondent to submit "written proof of the surrender" to the court and the local

sheriff's office or submit a sworn affidavit thus compel the respondent to be a witness that he or she has complied with these criminal provisions. In principle, those compelled statements are indistinguishable from the compelled registration at issue in *Haynes*. As in *Haynes*, a person who fails to submit this "proof" or "affidavit" can "reasonably fear" that the failure will increase the risk of prosecution. *Haynes*, 390 U.S. at 97. The information or the required affidavit create "hazards of incrimination" that are both "real and appreciable." *Id.* No more is required to invalidate these provisions under the Fifth Amendment.

We urge an unfavorable report.

Sincerely,



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