MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 5, 2025

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN IN SUPPORT OF HB 354

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 354.

Existing Law and The Bill:

MD Code Criminal Law § 4-203(**a**), sharply limits the right of otherwise law-abiding Marylanders to wear, carry or transport a handgun in the State. Specifically, subsection 4-203(a)(1) provides in pertinent part: "(a)(1) Except as provided in subsection (b) of this section, a person may not: (i) wear, carry, or transport a handgun, whether concealed or open, **on or about the person**; (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, **in a vehicle** traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State." Subsection 4-203(a)(2) provides that "[t]here is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly." This law broadly bans such wear, carry or transport of a handgun **everywhere** in Maryland.

Subsection 4-203(**b**) then establishes exceptions to the broad ban by subsection 4-203(**a**). One of those exceptions is for "the wearing, carrying, or transporting of a handgun, in compliance with any limitations imposed under § 5-307 of the Public Safety Article, by a person to whom a permit to wear, carry, or transport the handgun has been issued under Title 5, Subtitle 3 of the Public Safety Article." See subsection 4-203(b)(2). Other exceptions include the wear, carry and possession "on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases" (subsection 4-203(b)(6)), the wear, carry or transport on the person or in a vehicle while the person is transporting the handgun to or from the place of legal purchase or sale, or to or from a bona fide repair shop, or between bona fide residences of the person, or between the bona fide residence and place of business of the person, if the business is operated and owned substantially by the person if each handgun is unloaded and carried in

an enclosed case or an enclosed holster." Subsection 4-203(b)(3). Any wear, carry or transport of a handgun that is not encompassed by an exception is a crime punishable under current law with 5 years of imprisonment on first offense and/or a fine of $2,500.

This Bill makes several small changes to this statutory scheme. First, the Bill attaches a "knowingly" *mens rea* to both offenses listed under Section 4-203(a)(1), *viz.,* the offense in subsection (i) (wearing, carrying or transporting a handgun on or about the person) and the separate offense in subsection (ii) (wearing, carrying or transporting a handgun in a vehicle). Currently, only subsection 4-203(a)(1)(ii) has such a "knowingly requirement" and that requirement is **presumed** to be present by subsection 4-203(a)(2). The Bill likewise removes "or about" from subsection 4-203(a)(1)(i), so that subsection 4-203(a)(1)(i) would provide that a person may not KNOWINGLY wear, carry, or transport a handgun, whether concealed or open, on the person." The Bill also repeals the rebuttable presumption, found in Section 4-203(b)(2), "that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly." These changes are in direct response to the Maryland Supreme Court's recent holding and reasoning in *Lawrence v. State*, 475 Md. 384, 408, 257 A.3d 588, 602 (2021). *Lawrence* is discussed below.

The Bill also amends the punishment that may be imposed for **a first offense** by a person who is not otherwise disqualified from possessing a firearm. Under current law a first offense makes such a person "subject to imprisonment for not less than 30 days and not exceeding 5 years or a fine of not less than $250 and not exceeding $2,500 or both." The Bill would amend this punishment for a first offense by such a person to provide that IF THE PERSON VIOLATES SUBSECTION (A)(1), (2), OR (5) OF THIS SECTION THE PERSON SHALL BE SUBJECT TO A FINE NOT EXCEEDING $1,000 IF THE PERSON IS NOT OTHERWISE PROHIBITED BY LAW FROM POSSESSING A FIREARM. This amendment recognizes that a first offense by a non-disqualified, law-abiding person **should** be treated differently. This Bill does that by imposing a $1,000 fine for the first offense by an otherwise law-abiding person. The threat of imprisonment is utterly unnecessary to provide the necessary incentive to obtain a permit. A substantial civil fine will serve that objective without needlessly incarcerating or criminalizing people for what is, in essence, a **mere failure to obtain a permit**. The Bill's amendments to the penalty provisions of Section 4-203(c) are appropriate and necessary.

***Bruen*:** The proper analysis for cases arising under the Second Amendment is set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 597 U..S. 1, 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, then 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, must obtain at least 16 hours of training by a State-certified, private instructor. MD Code, Public Safety, §§ 5-306(a)(5),(6), 5-306(a-1). 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 $125 application fee (increased from $75 with the enactment of HB824 last Session), and the roughly $70 in fingerprint fees plus any incidental costs, such as ammunition and range fees, 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. Only New York currently requires more training with 18 hours. Permit holders, nationwide, are the most law-abiding persons in America, with crime rates a fraction of those of police officers. See John Lott, Carlisle E. Moody, and Rujun Wang, *Concealed Carry Permit Holders Across the United States: 2024*, at 42-43 (2024) ("it is impossible to think of any other group in the US that is anywhere near as law-abiding," noting further that "concealed carry permit holders are even more law-abiding than police") (available at https://bit.ly/3Pyv8G0).

The Bill Recognizes that Carry Is A Constitutional Right:

Section 4-203(a) was enacted in 1972, long before Maryland or the Supreme Court recognized that public carry is a constitutional right. See 1972 Maryland Session Laws, Ch. 13. 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, Section 4-203(a) was premised on the theory that carry was a privilege and that the Second Amendment did not even embody an individual right at all. 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 (29) States are "constitutional carry" jurisdictions in which carry is permitted without any permit at all. https://bit.ly/3S2nbde. *Many of these constitutional carry States enjoy a violent crime rate well below* that of Maryland. https://worldpopulationreview.com/state-rankings/crime-rate-by-state. And that point includes murder rates. 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. 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). Open carry **without a permit** is lawful in both States. 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 was topped only by New Orleans (74.3) and St. Louis (68.2). http://bit.ly/3IdEFzr. Any thinking person in Maryland concerned about murder would gladly trade spots with Virginia or Pennsylvania. Maryland's strict carry laws have not made this State (or especially Baltimore) any safer.

As explained, all law-abiding citizens enjoy a constitutional right to carry in public, subject only to the condition that a State may require such persons to obtain a "shall-issue" permit in order to exercise the right. After the decision in *Bruen*, State's Attorneys across the State were forced to dismiss charges against persons who were merely carrying without a permit and who were not otherwise disqualified and had not been arrested for any other crime. Thus, the effect of Section 4-203(a) is to severely punish those persons who cannot afford the high costs of getting a permit, or have not yet, for some reason, had an opportunity to obtain a carry permit. The penalty for carrying these otherwise innocent people was increased from 3 years to 5 years of imprisonment with the enactment of HB 824 last Session. See 2023 Maryland Session Laws, Ch. 651.

That increase to 5 years was unconscionable for persons who are not otherwise prohibited persons. Because carry is a constitutional right, the State should be **reducing** its penalties for unpermitted carry by otherwise law-abiding persons, not increasing such penalties. The current 5-year penalty is disqualifying under both State and federal law. See MD Code, Public Safety, § 5-101(g)(3); 18 U.S.C. § 922(g)(1); 18 U.S.C. § 921(a)(20). Thus, a conviction under Section 4-203 permanently strips a person of his or her Second Amendment rights. Under *Bruen*, the State's interest in punishing carry outside the home is constitutionally limited to encouraging otherwise law-abiding persons to obtain a carry permit, which the State Police must now issue on a "shall issue" basis. Thus, the penalty for non-permitted carry should be set at the lowest level sufficient to encourage law-abiding individuals to obtain the carry permit (along with the associated training and background checks). This Bill does that by imposing a fine of $1,000 if the person is not otherwise prohibited by law

from possessing a firearm. That puts that individual on notice that he or she must obtain a carry permit.

Attaching a disqualifying punishment for carry by the law-abiding is unlikely to survive judicial review post-*Bruen*. The issue is now being actively litigated across the United States. The constitutionality of the firearms disqualification imposed by Section 922(g)(3) (disqualification for marijuana or drug use) under *NYSRPA v. Bruen*, 597 U.S. 1 (2022), as construed and applied in *United States v. Rahimi*, 602 U.S. 680 (2024), is an open question. *Compare Fried v. Garland*, 640 F.Supp.3d 1252 (N.D. Fla. 2022) (prohibiting possession of firearms by unlawful users of controlled substances was consistent with historical tradition of firearms regulation); *United States v. Posey*, 655 F.Supp.3d 762 (N.D. Ind. 2023) (same), *with United States v. Harrison,* 654 F.Supp.3d 1191 (W.D. Okl. 2023), *appeal pending*, No. 23-6028 (10th Cir.) (holding that Section 922(g)(3) was unconstitutional under *Bruen* as applied to the defendant). The Fifth Circuit, in *United States v. Daniels*, 124 F.4th 967 (5th Cir. 2025), very recently held, post-*Rahimi*, that Section 922(g)(3) was *facially* constitutional under *Bruen* but nonetheless sustained an "*as applied*" challenge by the individual in that case.

The "as applied" approach followed in *Daniels* follows the approach taken in *Rahimi* where the Court sustained the facial validity of 18 U.S.C. 922(g)(8) (disqualifying persons convicted of domestic violence), and separately analyzed (and rejected) the "as applied" challenge as well on grounds that the individual (Rahimi) had been previously found to pose a credible threat to the physical safety of another. 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.'"). See *Rahimi*, 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.").

After *Rahimi*, broad Maryland disqualification provisions are open to an "as applied" challenge for firearms disqualifications for offenses that do not involve any "credible threat to the physical safety of others." For example, *Rahimi* could affect the disqualification for all felonies and otherwise disqualifying misdemeanors involving non-dangerous offenses. Maryland currently imposes a disqualification for **all** misdemeanor convictions punishable by imprisonment for more than two years. See MD Code, Public Safety, § 5-101(g). Maryland law also expressly imposes such disqualifications in MD Code, Public Safety, § 5-133(b) (regulated firearms); MD Code, Public Safety, § 5-205(b) (long guns). *Rahimi* also puts at risk the federal firearms disqualification for any State or federal felony conviction for non-dangerous offenses, 18 U.S.C. § 922(g)(1), or any conviction of any State misdemeanor for non-dangerous offenses punishable by imprisonment by more than 2 years imprisonment. See 28 U.S.C. § 921(a)(20)(B). The same is true for State law disqualifications.

Currently, there is an even split in the circuits on this Section 922(g)(1) issue which the Supreme Court will undoubtedly have to resolve soon. In *Range v. United States*, 124 F.4th 218 (3d Cir. 2024) (*en banc*), 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. As the same court held in *Binderup v. Att'y Gen.*, 836 F.3d 336, 351–52 (3d Cir. 2016) (*en banc*) (plurality), such non-violent actions include carrying without a permit. A violation of the State law at issue in *Range* (food stamp fraud) was punishable by the State in case by up to 5 years of imprisonment. That "as applied" approach is in accord with the approach followed in *Daniels* with respect to the disqualification imposed by Section 922(g)(3) for marijuana use disqualification. The Sixth Circuit followed this approach in denying an "as applied" challenge in *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,* categorizing crimes as crimes against the person, crimes like burglary and drug trafficking that "pose a significant threat of danger," and nondangerous ones).

In contrast, in *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024), the Fourth Circuit staunchly adhered to pre-*Rahimi* circuit precedent (*Hamilton*) to hold, post-*Rahimi*, that persons who are disqualified under 18 U.S.C. § 922(g)(1) (convicted felons and persons convicted of a State misdemeanor punishable by more than 2 years), fell outside the scope of the Second Amendment **entirely.** In an alternative ruling, the court held that "as applied" challenges for non-violent offenses failed under Step Two of the *Bruen* analysis. Step Two requires that the government justify the regulation by reference to historical and representative analogues from the Founding era. See *Rahimi*, 602 U.S. at 692 ("A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances."), quoting *Bruen*, 597 U.S. at 29. The court in *Hunt* found that Section 922(g)(1) disqualifications were historically justified as involving categories of dangerous people and thus rejected any "as applied" challenge. 123 F.4th at 708. The Eighth Circuit followed the same path in *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024) (holding post-*Rahimi* that Section 922(g)(1) disqualifications were categorically justified as involving dangerousness). As this writing, the time for seeking certiorari from the Supreme Court in *Range*, *Hunt* and *Jackson* has not yet run.

Disqualification For Carry By The Otherwise Law-Abiding Is Ill-Advised

Severely penalizing carry without a permit punishes the otherwise law-abiding who carry out of fear. There is no doubt that ordinary, law-abiding citizens in Baltimore are carrying, notwithstanding Section 4-203. A 2020 Johns Hopkins study found that carry by such 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.") (available at https://bit.ly/3DYKgXV). The law enforcement abuses of the Gun Trace Task Force in Baltimore are too numerous and too recent to ignore. http://bit.ly/3ZEJwAo. The social justice issues associated with criminalizing these individuals who are forced to carry for their own self-defense or defense of their loved ones should be apparent.

As much as some may assert that carry is not the "answer" to violent crime, that emotionally driven belief is obviously not shared by large numbers of those who are most at risk of a violent attack. 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. These people understand that armed self-defense is, by far, the most **effective** means of self-defense, as the mere display of a firearm is often enough to stop an attack. See *Bruen*, 597 U.S. at 74 (Alito, J., concurring) ("Ordinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to 2.5 million times per year."). The potential for disqualifying punishments on carrying will not deter people who perceive that their survival is at stake. Harsh penalties for otherwise innocent people will not stop such individuals from carrying where they justifiably fear attack.

Such a reduction of penalties for the otherwise law-abiding would not hamper enforcement of existing laws that bar **disqualified** persons (criminals) from possessing (much less carrying) firearms. Illegal carry by disqualified persons, MD Code, Public Safety, § 5-101(g) (defining "disqualifying crime"), is separately and severely punished. Under federal law, the mere possession of any firearm or modern ammunition by a disqualified person is a federal felony. 18 U.S.C. § 922(g)(1), 18 U.S.C. § 921(a)(20)(B). That felony is punishable by up to 15 years imprisonment. 18 U.S.C. § 924(a)(8). 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). 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). This Bill does not disturb penalties for carry of a handgun by a disqualified person. Those people are and will remain severely punished under existing law.

Yet, bizarrely, Section 4-203(a) now punishes carrying by **non**-disqualified persons **more** severely (with imprisonment up to 5 years) than carry of a long gun by **disqualified** persons (up to 3 years imprisonment) and it inflicts the same penalty for the carry of a handgun by a **non-disqualified** person as it does for a **disqualified** person. It should be obvious that carry by disqualified persons warrants harsher sanctions than carry by ordinary law-abiding persons who are **NOT** disqualified. After all, disqualified persons have already been convicted of a serious crime punishable by more than 2 years of imprisonment. That person is on notice that further possession of a firearm is a serious offense and can be severely punished. The non-disqualified person may have a completely clean record and may be carrying because she is living in fear of violent attack. The Bill gives effect to these differences.

Amendments to Section 4-203 Are Required By *Lawrence v. State*: and *Bruen*.

The General Assembly should pay heed to the Maryland Court of Appeals' (now renamed as the Maryland Supreme Court) decision in *Lawrence v. State*, 475 Md. 384, 408, 257 A.3d

588, 602 (2021). As noted, Section 4-203(a)(1)(i) criminalizes the wear, carry, and transport of a handgun "on or about the person." In *Lawrence*, Maryland's highest court held that the General Assembly intended in 1972 to impose "strict liability" for any violation of Section 4-203(a)(1)(i). Strict criminal liability means that the defendant can be held to be criminally liable without regard to the defendant's actual knowledge or state of mind. But, in so holding, the Court stressed the importance of a *mens rea* requirement in the context of Section 4-203(a). While finding it unnecessary to resolve the issue in that case, the *Lawrence* Court suggested that a strict liability law, like Section 4-203(a) could violate the Due Process Clause for lack of notice a "broad application of the term 'on or about' leaves some questions about the notice afforded to defendants alleged of wearing, carrying, or transporting a handgun 'about' their person." 475 Md. at 421. The Court in *Lawrence* thus stated it was appropriate "**to signal to the General Assembly"** that, "in light of these policy concerns, ... **legislation ought to be considered**" to address "the scope of CR § 4-203(a)(1)(i) given its classification as a strict liability offense." (*Id.* at 422) (emphasis added). As a matter of good government, the General Assembly should respect such a "signal" from the State's highest court and "consider" changes to Section 4-203(a)(1)(i). This Bill does so.

This Bill makes the very changes "signaled" as necessary by *Lawrence*. First, it repeals the ban on carry, wear or transport "about" the person. As *Lawrence* recognized, that ban on carry "about" the person is incredibly vague and has been broadly used as a basis for the arrest and prosecution of multiple occupants of a residence for the presence of a firearm in that location, regardless of whether a particular person even knew of the presence of the firearm. See *Jefferson v. State,* 194 Md.App. 190, 213-15, 4 A.3d 17 (2010). That result is both unfair and actively promotes discriminatory or arbitrary enforcement by the police and prosecutors. Such an abuse of gun laws and search and seizure laws is well documented in Baltimore and led to a federal consent decree that remains in force. http://bit.ly/3yyESaU. Such misconduct by law enforcement officers led to the arrest, prosecution and conviction of members of Baltimore's infamous Gun Trace Task Force. https://www.gttfinvestigation.org/. Given this sorry history it should come as no surprise that there is massive distrust of the police in Baltimore communities.

This Bill also addresses the Maryland Supreme Court's suggestion that strict liability is not appropriate. *Lawrence* makes clear that this lack of a *mens rea* requirement plus the use of vague, ill-defined terms ("on or about the person") means that Section 4-203 is at risk of being struck down as unconstitutionally vague in an appropriate case. This Bill addresses these constitutional concerns identified by the *Lawrence* Court by imposing a "knowingly" *mens rea* requirement. A failure to enact such *mens rea* requirement will likely result in the invalidation of Section 4-203(a)(1) in an appropriate case soon.

Federal law is instructive. Federal firearms law imposes specific *mens rea* requirements for virtually every firearms crime. For example, a violation of 18 U.S.C. § 922(a)(1)(B) (barring "any person" except federal licensees from engaging in the "business" of the manufacture of firearms) is not a crime unless the person "willfully" violates that provision. See 18 U.S.C. § 924(a)(1)(D). The Supreme Court has held that "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Bryan v. United States*, 524 U.S. 814, 191-92 (1998), quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (emphasis added).

Similarly, a false statement on federal form 4473 used for purchasing a firearm is not a crime unless the false statement was made "knowingly." See 18 U.S.C. 922 (a)(6). See also 18 U.S.C. 924 (a)(2) (requiring that the violation of "subsection (a)(6), (h), (i), (j), or (o) of section 922" be done "knowingly"). In *Staples v. United States*, 511 U.S. 600, 619 (1994), the Supreme Court held that the government was required to prove that the defendant "knew" that his rifle possessed the characteristics of a prohibited machine gun. In *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019), the Supreme Court held that the government must prove that an alien unlawfully in the United States, who is otherwise barred from possessing a firearm by federal law, knew that his presence in the United States was unlawful. The Court relied on the "longstanding presumption, traceable to the common law, that [the legislature] intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Id.* (citation omitted).

No such *mens rea* requirement is found in Section 4-203(a)(1)(i). There is no excuse for this absence. The "knowingly" *mens rea* adopted by this Bill is used in other provisions of Maryland firearms law. See, e.g., MD Code, Public Safety, § 5-138 (knowing possession or sale of stolen firearms), § 5-141 (knowing participation in a straw purchase). For example, MD Code, Public Safety, § 5-144, expressly precludes a conviction for any violation of any provision of subtitle 1 of Title 5 of the Public Safety article (governing regulated firearms) unless the violation was done "knowingly." See *Chow v. State,* 393 Md. 431, 903 A.2d 388, 413 (2006) ("a person must know that the activity they are engaging in is illegal"). As *Chow* recognizes, Section 5-144 embodies the commonsense realization that before people may be incarcerated for such lengthy times, the State should be required to prove a culpable state of mind. The same point is equally applicable to violations of Section 4-203. This *mens rea* requirement protects the innocent and establishes an appropriate threshold of culpability for prosecutions under Section 4-203(a), no less than for prosecutions under these other statutes. See *Liparota v. United States*, 471 U.S. 419, 426 (1985).

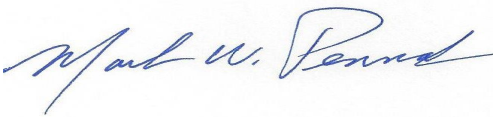
Indeed, subsection 4-203(a)(2) creates the *opposite* presumption, providing that "[t]here is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly." Subsection 4-203(a)(1)(ii) applies to the "wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle." Such a presumption is of dubious constitutionality where (as is often the case) it is applied to justify the arrest of every person in a vehicle upon discovery of a single firearm in the vehicle. 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"). (Emphasis added). Stated simply, it is "not more likely than not" that every person in a vehicle would know that someone else in the vehicle was illegally transporting a handgun. The presumption thus, once again, acts to criminalize the innocent. It has been enforced in an arbitrary and discriminatory manner in the past and will be in the future. This Bill thus appropriately repeals that presumption.

Apart from *Lawrence,* the Supreme Court's decision in *Bruen* requires that the State adjust its *mens rea* approach to the carriage of firearms outside the home in recognition that such carriage involves a constitutional right. In that context, ambiguity is intolerable, especially in a strict liability statute. See *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) ("a criminal law that contains no *mens rea* requirement, * * * and infringes on constitutionally protected rights, * * * is subject to facial attack"). Such vagueness "may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; [and] it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* One needs only review the actions of the Gun Trace Task Force to see such arbitrary and discriminatory enforcement of Section 4-203. See also *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("The Court has made clear that scienter requirements alleviate vagueness concerns.") (collecting case law). This Bill addresses this concern by repealing the "or about" language from Section 4-203(a)(1)(i) and by adding a *mens rea* requirement.

The amendments made by this Bill recognize that obtaining a permit is very expensive and time-consuming in Maryland, especially with the additional restrictions and requirements imposed by the General Assembly after *Bruen*. Specifically, as noted elsewhere, it costs roughly $600 to obtain a permit in Maryland ($400 for the 16 hours of mandatory training, $125 for the application fee, $70 for the live-scan fingerprint and the cost of ammunition for the live-fire training required by the State Police. Under *Bruen*, the State may require people to obtain a permit, but the State lacks a sufficient reason to attach severe penalties and a permanent disqualification for the failure to do so. Under *Bruen*, every law-abiding person, rich and poor alike, has a right to armed self-defense. A $1,000 fine for the first offense will provide a strong incentive to obtain a carry permit and thereby receive all the training mandated by Maryland law, as recently mandated with the enactment of HB824, 2023 Maryland Session Laws Ch. 651. See MD Code, Public Safety, 5-306(a-1).

We urge a favorable report of the Bill.

Sincerely,



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