President
Mark W. Pennak

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SELF DEFENSE IS A CIVIL RIGHT

February 5, 2025

**WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT,
MARYLAND SHALL ISSUE,
AS INFORMATION WITH RESPECT TO HB 336**

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 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 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 muzzle loading. I appear today as President of MSI to provide information with respect to HB 336.

The Bill: The Bill adds Section 5-901 to the Public Safety Article to provide that "A PERSON MAY NOT BE DENIED THE RIGHT TO PURCHASE, OWN, POSSESS, OR CARRY A FIREARM UNDER THIS TITLE SOLELY ON THE BASIS THAT THE PERSON IS AUTHORIZED TO USE MEDICAL CANNABIS UNDER TITLE 36, SUBTITLE 3 OF THE 18 ALCOHOLIC BEVERAGES AND CANNABIS ARTICLE. Like similar bills in the past, MSI takes no position with respect to the merits of the Bill. However, as before, we do wish to point out some legal realities for the purpose of informing the debate on the Bill.

Legal Framework:

With the recent changes in Maryland law concerning medical marijuana, and legalization of the use and possession of marijuana in Maryland, MD Code, Art. 20, § 1, a recurring issue is how such marijuana use and possession would affect Second Amendment rights. The short answer is that while the bill could be read to do away State restrictions for medical marijuana users, the bill would do nothing that would affect federal law under which such use and possession of any marijuana effectively would abrogates those rights by (1) barring a Federal Firearms Licensee ("FFL") from selling a firearm to such a user and (2), by making such a user a prohibited person under federal law.

Federal law: As to FFLs, the pertinent statutory provision under federal law is 18 U.S.C. § 922(d)(3), which provides:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--
* * *
(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802));

The ATF has issued a bulletin to all Federal Firearms Licensees that advises FFLs that "if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have 'reasonable cause to believe' that the person is an unlawful user of a controlled substance." See Open Letter to All Federal Firearms Licensees, Sept. 21, 2011, available at www.atf.gov/file/60211/download. That means that the FFL (or any other person with such knowledge) is prohibited from selling a firearm to such a person with a medical marijuana card. This ATF prohibition has been sustained in federal court. *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016), *cert. denied*, 580 U.S. 1217 (2017).

Moreover, Federal Form 4473 continues to expressly ask if the purchaser is "an unlawful user of . . . any controlled substance" and states in bold type: **"Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside."** A false statement or answer on Form 4473 is federal felony under 18 U.S.C. § 922(a)(6) (barring material misrepresentations "in connection with the acquisition" of a firearm). See *Abramski v. United States*, 573 U.S. 169 (2014). A violation of Section 922(a)(6) is punishable by up to 10 years in prison. See 18 U.S.C. § 924(a)(2).

As to becoming a disqualified person, under federal law, **any user of marijuana is a disqualified person** under 18 U.S.C. § 922(g)(3) which states:

(g) It shall be unlawful for any person--
* * *
(3) who is *an unlawful user* of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." (Emphasis added).

A knowing violation of Section 922(d)(3) or Section 922(g)(3) is a federal felony, punishable with up to 15 years in prison. See 18 U.S.C. § 924(a)(8). Both provisions define the term "unlawful user" by reference to the Controlled Substances Act, a federal law. Marijuana is expressly classified as a Schedule I controlled substance under the Controlled Substances Act, 21 U.S.C. § 812(c). See also ATF regulations 27 C.F.R. § 478.11. **Any** use of marijuana makes a person an "unlawful user" under that federal law. **Period**. Under the Supremacy Clause of the Constitution, Article VI, Clause 2, the federal law provisions cannot be abrogated by State law. And these provisions of federal law cannot be simply ignored, if only because every purchaser

of a firearm from a FFL must fill out ATF Form 4473. See 18 U.S.C. § 922(t). As noted above, a false statement in filling out that form is a 10-year felony.

In *United States v. Parker*, 2021 WL 211304 at *12 (D. Md. Jan. 21, 2021), the Maryland federal district court held that "notwithstanding Maryland's decriminalization of possession of small quantities of marijuana, federal law continues to render it illegal to possess marijuana." The *Parker* court thus held that the odor of marijuana provided a sufficient basis for a search of a person. This line of federal cases makes clear that a medical marijuana user continues to face the risk of a search and possible arrest even though possession of medical marijuana may be perfectly legal under State law. Federal courts are not bound by State court decisions. See also *United States v. Castillo Palacio*, 427 F. Supp. 3d 662, 672 (D. Md. 2019) (upholding vehicle search by local Maryland police officers where the search was based on odor of marijuana, even though personal possession of a small quantity was then a civil offense in Maryland, on grounds that possession of marijuana was still a federal crime). While current Maryland law prevents a State or local law enforcement officer from initiating a stop or a search of a person, a motor vehicle or a vessel "based solely on" the "order of burnt or unburnt cannabis" and impose other marijuana related restrictions on such officers, MD Code, Criminal Procedure, § 1-211, nothing in State law would apply to federal law enforcement officers. Any firearm discovered during an otherwise lawful search may be used as evidence supporting a charge that the medical marijuana user violated federal firearms law.

State law and expungements: Maryland law imposes a firearms disqualifier on a "habitual user" of "a controlled dangerous substance" and bars that person from acquiring a regulated firearm (a handgun). MD Code, Public Safety, § 5-118(b)(3)(vi). Maryland law defines that term to mean any person "who has been found guilty of two controlled dangerous substance crimes, one of which occurred in the past 5 years." MD Code, Public Safety, 5-101(m). Likewise, MD Code, Public Safety, 5-134(b)(7) makes it a criminal offense punishable by 5 years of imprisonment for a dealer or any other person to "sell, rent, loan or transfer" a regulated firearm to any person who is "a habitual user" of "a controlled dangerous substance." A similar disqualification is imposed on an "habitual user of a controlled dangerous substance unless the habitual use of the controlled dangerous substance is under legitimate medical direction" with respect to applicants for wear and carry permits under MD Code, Public Safety, 5-306(a)(5).

The Handgun License Qualification provisions of Maryland law, MD Code, Public Safety, 5-117.1(c)(2), provides that a person "may purchase, rent or receive a handgun only if the person" possesses a valid HQL issued by the State Police and only if that person "is not otherwise prohibited from purchasing or possessing a handgun **under State or federal law**." An HQL thus cannot be issued to a person under this section if possession of a firearm would violate federal law and that would include medical marijuana users. The Maryland Code does not distinguish between federal and state convictions in these provisions.

Wear and carry permit applicants are likewise disqualified if that person has been "convicted of a felony or of a misdemeanor for which a sentence of imprisonment for

more than 1 year has been imposed," *id.* at 5-306(a)(2)(i) or has been "convicted of a crime involving the possession, use, or distribution of a controlled dangerous substance." *Id.* at 5-306(a)(3). The categorical Maryland disqualification for convicted felons was sustained as constitutional in *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir. 2017), *cert. denied*, 583 U.S. 1012 (2017). HB 824, enacted just last Session, see 2023 Maryland Session Laws, Ch. 651, imposes a firearms disqualification for the wear and carry permit if a person has been convicted of improper storage of a firearm under MD Code, Criminal Law, § 4-104. See MD Code, Public Safety, § 5-306(d). Section 4-104(c) provides that "[a] person may not store or leave a loaded firearm in a location where the person knew or should have known that an unsupervised minor has access to the firearm." A violation is misdemeanor punishable with "a fine not exceeding $1,000." *Id.* § 104(d).

This Bill is presumably intended to nullify all these disqualification provisions of State law with **respect to medical marijuana users** (but not with respect to other cannabis users). Again, however, the Bill can do nothing to impair the operation of federal law. Nor would this Bill affect the disqualifications that may still apply to existing cannabis users who were previously convicted for possession of marijuana and who do not possess medical marijuana cards. Habitual users of cannabis under Maryland law may be forced to seek expungements of their prior convictions to overcome the disqualifications imposed by Maryland law. See MD Code, Criminal Procedure, § 10-105(a)(11) (allowing expungements for convictions where "the act on which the conviction was based is no longer a crime"). See also *id.*, at § 10-105(a)(12) (allowing expungements the person was convicted of possession of marijuana under § 5-601 of the Criminal Law Article).

However, even with expungements, if those prior convictions were disqualifiers under federal or State law, then those convictions could continue to act as disqualifiers under federal law, as the FBI does not recognize the validity of Maryland expungements under 18 U.S.C. § 921(a)(20), in administering the federal NICS background check system. That provision of federal law provides that "[a]ny conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." Maryland expungements are disregarded by the FBI because expungement is defined under Maryland law to constitute removal "from public inspection" rather than complete removal. See MD Code, Criminal Procedure, § 10-101(d),(e) (defining "expunge" and "expungement"). The FBI construes the expungement provisions of Section 921(a)(20) to apply only to a total expungement, not merely an expungement from "public inspection." Amendments to the expungement law are thus necessary. The appropriate amendments were addressed in HB 268 and HB 269, sponsored last Session by Del. Grammar. Those Bills never even received a vote in Committee. And of course, continued use of cannabis by any person (including medical marijuana card holders) is still prohibited by federal law and thus those persons would continue to be disqualified by Section 922(g)(3) of Title 18 of the United States Code.

Medical Marijuana and the Rohrabacher–Blumenauer Amendment:

It is important to note that for years Congress has adopted an appropriations rider that prohibits the Department of Justice from spending funds to "prevent" the "implementation" of State medical marijuana laws. See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (also known as the Rohrabacher–Blumenauer amendment). See *McIntosh v. United States*, 833 F.3d 1163 (9th Cir. 2016). That amendment has been continuously reenacted since then as an appropriations rider. The amendment has been recently renewed. As it is only an appropriation provision that prohibits the expenditure of the appropriated funds for these enforcement purposes, the amendment must be continually renewed to remain effective. The underlying conduct (possession of marijuana) remains a federal crime.

The enforcement bar imposed the Rohrabacher–Blumenauer Amendment only extends to the expenditure of funds for prosecutions that "prevent" the "implementation" of medical marijuana laws. See *United States v. Nixon*, 839 F.3d 885 (9th Cir. 2016) (holding that the appropriations rider does not impact the ability of a federal district court to restrict a defendant's use of medical marijuana as a condition of probation). See also *United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022) (holding that the Rohrabacher-Farr amendment did not apply to defendants who sold cannabis to persons who lacked a medical marijuana card). It does not address enforcement of federal **gun** laws, such as 18 U.S.C. § 922, or ATF regulation of FFLs. See *United States v. Bellamy*, 682 Fed. Appx. 447 (6th Cir. 2017) (sustaining a felon-in-possession conviction under 18 U.S.C. § 922(g)(3) for possession of a gun while being a user of medical marijuana); *Parker,* 2021 W. 211304 at *13 (in an unlawful possession of a firearms case, court sustained a search and resulting seizure of a firearm based on the odor of marijuana).

In any event, enforcement of such federal gun laws does not "prevent" the "implementation" of medical marijuana laws; it simply means that medical marijuana users may not possess or purchase firearms. See *McIntosh*, 833 F.3d at 1178 (the rider "prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana"). Congress could restore funding tomorrow (or the appropriation rider could lapse) and the government could then prosecute individuals who committed offenses while the government lacked funding. See *McIntosh*, 833 F.3d at 1179 n.5. The federal government can prosecute such offenses for up to five years after they occur. See 18 U.S.C. § 3282. This Bill does not and cannot protect a medical marijuana user from such outcomes.

***Bruen* and *Rahimi*:**

The constitutionality of the firearms disqualification imposed by Section 922(g)(3) 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 (rather than facial challenges) 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.'").

Maryland has a broad disqualification provision in MD Code, Public Safety, § 5-133(b)(12), and in MD Code, Public Safety, § 5-205(b)(12), both of which impose a firearms disqualification on a person subject to a non *ex parte* civil protective order entered under Section 4-506 of the Family Law Article or is subject to an order for protection under Section 4-508.1 of the Family Law Article. 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 in the manner specified by Section 922(g)(8)(C)(i), the portion of Section 922(g)(8) adjudicated in *Rahimi*. 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*, that broad Maryland disqualification provision is open to an "as applied" challenge.

More generally, *Rahimi* supports an "as applied" challenge to State laws that impose 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)(1). 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. A violation of Section 4-203 imposes a 5-year penalty under current law and thus would impose a life-time disqualification under both federal

and State law. By reducing the penalty for carry by otherwise non-disqualified persons, this Bill would not impose such a disqualification. The Bill leaves unaffected the severe penalties imposed for carry by disqualified persons or for carry in school zones.

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 at some point. 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. 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).

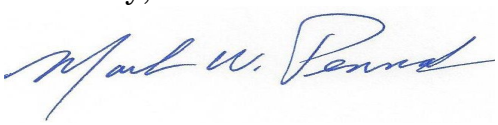
In contrast, in *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024), the Fourth Circuit staunchly adhered to pre-*Rahimi* circuit precedent (*Hamilton*) to hold, post-*Rahimi*, that persons who are disqualified under 18 U.S.C. § 922(g)(1) (convicted felons and persons convicted of a State misdemeanor 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.

Conclusion:

The question the Committee should ask itself is whether passage of this bill might mislead medical marijuana users into thinking that they may use and possess medical marijuana without any fear of losing their Second Amendment rights. Under federal law, that is not an assurance that the State can make. For example, on a practical level, this Bill, if enacted into law, could easily fool someone into expending time and resources to acquire a handgun qualification license only to find

that all that time and money was wasted when the dealer refuses to complete the sale because the person cannot honestly complete ATF Form 4473. Likewise carrying a firearm with a wear and carry permit could subject a medical marijuana user to arrest on federal felony gun charges by federal law enforcement. This Bill could not change that reality.

Sincerely,



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