



March 13, 2026

## WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 1608

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 OPPOSITION to HB 1608

### The Bill:

The Bill abandons the measured approach adopted by the General Assembly in 2023 when it adopted HB 858. It would instead create a new section 4-112 in the Criminal Law Article that would provide that “AN AUTHORIZED USER OF A FIREARM SHALL STORE THE FIREARM IN A LOCKED SECURE STORAGE DEPOSITORY WHEN THE FIREARM IS NOT BEING CARRIED BY OR UNDER THE DIRECT CONTROL OF THE AUTHORIZED USER. The Bill would also amend MD Code Criminal Law § 4-104(c) to provide that “A person may not store or leave a [loaded] firearm in a location where the 26 person [knew] KNOWS or should [have known] KNOW that [an unsupervised minor has 27 access to the firearm] A MINOR IS LIKELY TO GAIN UNSUPERVISED ACCESS TO THE 28 FIREARM. That changes currently law, which is focused on a loaded firearm to impose a storage requirement for any firearm, loaded or unloaded.

### Second Amendment:

**Heller:** The Bill also create massive problems under the Second Amendment. A criminalization of home possession of a firearm is flatly unconstitutional under *District of Columbia v. Heller*, 554 U.S. 570 (2008). Under *Heller*, responsible, law-abiding adults have a constitutional right to keep firearms in the home in order to exercise their right of armed self-defense. The Second Amendment “**elevates above all other interests** the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 635. Thus, in *Heller*, the Supreme Court struck down as unconstitutional DC’s safe storage law that required a firearm to be “disassembled **or bound by a trigger lock** at all times.” (Id. at 628). The Court held this requirement unconstitutionally burdened the right

to self-defense in the home because the requirement prevented residents from rendering their firearms “operable for the purpose of *immediate* self-defense.” *Id.* at 635 (emphasis added).

In *Heller*, the Court ruled that handguns could not be banned as “the American people have considered the handgun to be the quintessential self-defense weapon.” *Heller*, 554 U.S. at 629. While the Bill pertains to storage rather than requiring that the firearms be locked up “at all times,” storage is a practical necessity for possession in the home as it is utterly impossible to wear or carry a firearm on one’s person 24/7. For example, one does not sleep or take a shower while carrying a firearm on one’s person. In *Jackson v. San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*, 576 U.S. 1013 (2015), the Ninth Circuit sustained (using intermediate scrutiny) a San Francisco safe storage law that required that **a handgun** be locked up in a container **or secured with a trigger lock**, but exempted from that requirement a “handgun is carried on the person of an individual over the age of 18.” The Bill would likewise permit a person to carry a firearm on his or her person in the home, a right recognized by other Maryland laws. See, e.g., MD Code, Criminal Law, § 4-203(b)(6). Yet even though the Supreme Court denied review of the Ninth Circuit’s decision, the dissent of Justice Thomas and Justice Scalia from that denial is particularly powerful. That dissent would have taken the case because that San Francisco law “burdens their right to self-defense at the times they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed.” *Jackson v. San Francisco*, 576 U.S. at 1013 (2015) (Thomas, J., dissenting). It is, of course, well established that a denial of certiorari has “no implication whatever regarding the Court’s views on the merits of a case which it has declined to review.” *Reed v. Texas*, 140 S.Ct. 686, 689 (2020) (Sotomayor, statement respecting the denial of certiorari) (citation omitted). The Bill, if enacted, would create an ideal opportunity for litigating the scope of *Heller*’s holding on this issue under the new standard of review established in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022) (discussed below).

In any event, the Bill applies to **all** firearms (other than antiques), not merely handguns, as in *Jackson*, and the storage requirements are more severe than presented in either *Heller* or in *Jackson*. A trigger lock, which DC thought sufficient under the statute **invalidated** in *Heller* as did San Francisco under the ordinance sustained in *Jackson*, is **insufficient** under the Bill. Indeed, these “safe harbor” provisions are likely illusionary. Securing the firearm in this manner is not likely to save the gun owner from prosecution should the minor or prohibited person gain access, through hook or crook, to the firearm or ammunition.

Ironically, a trigger lock is sold as a security device approved by the Maryland Roster Board under MD Code, Public Safety § 5-132(c), but a trigger lock is not a LOCKED SECURE STORAGE DEPOSITORY and is thus insufficient under this Bill. Section 5-132(c) provides that “[a] dealer may not sell, offer for sale, rent, or transfer in the State a handgun manufactured on or before December 31, 2002, unless the handgun is sold, offered for sale, rented, or transferred with an external safety lock. None of the devices on that Roster Board list would be sufficient under the Bill. <https://bit.ly/3Ide9oH>. Such devices approved by the Roster Board also satisfy 18 U.S.C. § 921(a)(34) (defining a “secure gun storage or safety device” to mean “a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device”). Such devices meet the requirement imposed on federal licensees by 18 U.S.C. § 923(d)(1)(G), to have safety storage devices available at dealer locations. We see no possible justification for eliminating such

approved devices. Under the bill, a person purchasing a firearm with such an approved safety device could still become a criminal the moment he or she arrived home and stored the firearm using one of these **approved** devices. That creates a massive trap for the unwary.

**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. The *Bruen* Court ruled that “the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” 142 S.Ct. at 2127.

The relevant time period for that historical analogue inquiry is 1791, when the Bill of Rights was adopted. 142 S.Ct. at 2135. That is because “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *Id.*, quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–635 (2008). As stated in *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 417 (4th Cir.), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021), *cert. denied*, 142 S.Ct. 1447 (2022), “[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.’” 5 F.4th at 419, quoting *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 765 & n.14). The Court stressed that “to the extent later history contradicts what the text says, the text controls.” *Id.* at 2137. Similarly, “because post-Civil War discussions” of the right to keep and bear arms “took place 75 years after the ratification of the Second Amendment, **they do not provide as much insight into its original meaning as earlier sources.**” *Id.*, at 2137, quoting *Heller*, 554 U.S. at 614 (emphasis added).

Under *Bruen*, the historical analogue necessary to justify a regulation must also be “a well-established and representative historical analogue,” not outliers. *Id.* at 2133. Thus, historical “outlier” requirements of a few jurisdictions or of the Territories are to be disregarded. *Id.* at 2133, 2153, 2147 n.22 & 2156. Such outliers do not overcome what the Court called “the overwhelming evidence of an otherwise enduring American tradition permitting public carry.” 142 S.Ct. at 2154. Laws enacted in “the latter half of the 17th century” are “particularly instructive.” *Id.* at 2142. In contrast, the Court considered that laws enacted in the Territories were not “instructive.” *Id.* at 2154. Similarly, the Court disregarded “20th century historical evidence” as coming too late to be useful. *Id.* at 2154 n.28.

Under that standard articulated in *Bruen*, “the government may not simply posit that the regulation promotes an important interest.” 142 S.Ct. at 2126. Likewise, *Bruen* expressly rejected deference “to the determinations of legislatures.” *Id.* at 2131. *Bruen* thus abrogates the two-step, “means-end,” “interest balancing” test that the courts had previously used to sustain gun laws, including the storage law at issue in *Jackson*. 142 S.Ct. at 2126. Those prior decisions are no longer good law. So, the constitutionality of the Bill will turn exclusively on an historical analysis, as *Heller* and *Bruen* make clear that the term “keep and bear arms” in the text of the Second Amendment necessarily includes the right to possess (“keep”) and the right to carry (“bear”).

If the Bill is enacted, the State will find it impossible to carry its burden to justify the storage requirements under the test set out in *Bruen*. The Bill basically criminalizes the right to “keep” firearms unless the owner jumps through various hoops as to storage. We know of no appropriate historical analogue from the Founding era (or any other era) that could justify the requirements imposed by the Bill. In order to be a well-established, representative historical analogue, the historical law must be “relevantly similar” to the modern law (Id. at 2132). *Bruen* makes clear that this analogue inquiry is controlled by two “metrics,” viz., “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.” Id. at 2133. The inquiry is “whether modern and historical regulations impose a *comparable burden* on the right of armed self-defense.” Id. (emphasis added). The Court thus ruled that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is *comparably justified* are ‘central’ considerations when engaging in an analogical inquiry.” (Id.) (emphasis added). As explained above, the Bill can no longer be justified by reference to any means-ends or intermediate scrutiny. Public safety concerns are irrelevant to the test.

**The Bill Is Unnecessary:** These requirements cannot be justified as necessary to bar access to a firearm by a prohibited person. Existing federal and State law already ban possession by a prohibited person and these bans extend not only to actual possession but to constructive possession. “Constructive possession’ of a firearm is established when a person, though lacking physical custody of the firearm, still has the power and intent to exercise control over the firearm.” *Henderson v. United States*, 575 U.S. 622, 626 (2015). Such constructive possession is a violation of federal law, 18 U.S.C. § 922(g)(1), which is punishable by up to 10 years imprisonment under federal law. 18 U.S.C. § 924(a)(2). Such constructive possession by a prohibited person also violates MD Code, Public Safety, § 5-133(b)(1) (regulated firearms), and MD Code, Public Safety, § 5-205(b)(1) (long guns). See, e.g., *Moore v. State*, 2106 WL 103352 (Ct.of.Sp.App. 2016). A violation of MD Code Public Safety, § 5-133(b), is punishable by imprisonment for up to 5 years and/or a fine not exceeding \$10,000. MD Code, Public Safety, § 5-144(b). A violation of MD Code, Public Safety, § 5-205(b), is punishable by up to 3 years of imprisonment and/or a \$1,000 fine. MD Code, Public Safety, § 5-205(d). These punishments are more severe than the punishments imposed by the Bill.

Persons who allow such access may be charged as accessories or as aiders and abettors or as co-conspirators. See 18 U.S.C. §§ 2, 3; MD Code, Criminal Procedure, § 4-204. See *United States v. Olson*, 856 F.3d 1216 (9th Cir. 2017); *Bellamy v. State*, 403 Md. 308, 334, 941 A.2d 1107, 1122 (2008). Allowing such access to a disqualified person is also chargeable under 18 U.S.C. § 922(d), a violation of which is a federal felony punishable by imprisonment for up to 15 years. 18 U.S.C. § 924(a)(8). See *United States v. Stegmeier*, 701 F.3d 574, 580 (8th Cir. 2012). Indeed, a failure to store a firearm properly can be (and has been) charged under Maryland’s reckless endangerment statute. MD Code, Criminal Law, § 3-204. That statute provides that “(a) A person may not recklessly: (1) engage in conduct that creates a substantial risk of death or serious physical injury to another.” A violation is “subject to imprisonment not exceeding 5 years or a fine not exceeding \$5,000 or both.” See <https://www.foxnews.com/us/baltimore-grandmother-indicted-9-year-old-boy-fatally-shot-teen-girl>. The Bill adds little or nothing to these existing severe prohibitions.

**Unloaded Guns:** The Bill would change the focus of existing law on access to a “loaded” gun into a ban on access to either a loaded or an **unloaded** gun and require storage in IN A

LOCKED SECURE STORAGE DEPOSITORY regardless of whether are any unauthorized users in the home. Criminalizing the possibility that a minor (any minor) or any other person (including an adult) might access an **unloaded** gun makes little sense as an unloaded gun cannot cause an accident. And the burdens imposed by the Bill are even more substantial because the Bill effectively requires the owner to store the unloaded firearm IN A LOCKED SECURE STORAGE DEPOSITORY. An unloaded gun is no more dangerous than a brick and far less dangerous than a knife or a baseball bat or many other household items. A firearm without ammunition is useless for armed self-defense.

*Heller* struck down the District of Columbia’s “prohibition against **rendering** any lawful firearm in the home operable for the purpose of **immediate self-defense.**” 554 U.S. at 635 (emphasis added). In *dicta*, the Court stated that “our analysis” did not “suggest the invalidity of laws regulating the storage of firearms to prevent **accidents.**” (554 U.S. at 632). But that *dicta* cannot be read as swallowing the holding in *Heller*. Again, *Heller* held that the Second Amendment “elevates above **all other interests** the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 635. “All” means all. See *Heller*, 554 U.S. at 636 (“the enshrinement of constitutional rights necessarily takes certain policy choices off the table”). Thus, storage laws may not require the owner to “render” any firearm unavailable for the owner to use for “immediate self-defense.” Requiring a stored firearm to be “unloaded” **and** in a “LOCKED SECURE STORAGE DEPOSITORY” violates that principle. Criminalizing such storage of an unloaded gun is thus particularly unjustifiable under *Heller* and is utterly without any appropriate historical analogue as required by *Bruen*. See *Heller*, 554 U.S. at 631-32 (rejecting reliance on gunpowder-storage laws and a 1783 Massachusetts law).

If enacted, the Bill will quite likely prompt a Second Amendment challenge or as a defense to any charges brought under the Bill. Such a challenge will likely not be limited to the changes made by the Bill and thus could well result in the invalidation of the existing requirements *currently* imposed by Section 4-104. Section 4-104 has thus far escaped a constitutional challenge. That is not by accident. If the Bill is enacted, the resulting burdens on Second Amendment rights will be increased past the point of tolerance. The Committee should ask itself whether the alleged benefits provided by the amendments are worth the litigation risk.

**A Final Note On Policy:** We presume that the purpose of the Bill is to encourage safe storage by gun owners. That is a laudable goal and one that MSI fully shares and supports. However, that goal cannot be achieved through unconstitutional means. See, e.g., *South Carolina v. Baker*, 485 U.S. 505, 516 (1988) (“Congress cannot employ unconstitutional means to reach a constitutional end”). The State is simply not free to ignore *Heller* and *Bruen* and enact legislation as if those cases had not been decided. The State may not require any storage that makes the firearm unavailable for “immediate self-defense.”

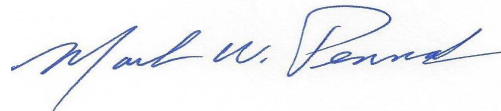
We urge an alternative approach which is to encourage safe storage by subsidizing the purchase of gun safes and storage devices by gun owners. That approach was taken by Senator Carter in Senate Bill 773, as amended and passed in the Senate in 2022. <https://bit.ly/3JXplrU>. SB 773 created an Income Tax - Credit for Firearm Safety Devices and promoted the purchase of gun safes and other devices designed to prevent a firearm from being operated without first deactivating the device. Devices thus obtained are much more likely to be used. Such an approach is not only fully constitutional but is, in our view,

**much more likely** to lead to safe storage than ineffectually threatening law-abiding gun owners with still more prison time. As Johns Hopkins Professor Daniel Webster has told the Senate, the data is clear that harsh penalties do not deter or promote compliance. <http://bit.ly/3E01AOB> (starting at 1:00 hr.). That reality is confirmed by the Department of Justice's National Institute of Justice. See <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>.

The premise of the Bill is that the existing approach is not working when there is little or no evidence that HB 858 is insufficient. If so, then it is time to try something new rather than doubling down on a failed approach. *Heller* and *Bruen* require the State to alter its "ban and imprison" approach to otherwise law-abiding gun owners. Safe storage is a good place to start.

We urge an unfavorable report.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Mark W. Pennak  
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