MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, IN OPPOSITION TO SENATE BILL 8

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is an all-volunteer, non-partisan 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. 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 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 and personal protection in the home and personal protection outside the home and a range safety officer. I appear today as President of MSI in opposition to Senate Bill 8.

Senate Bill 8 would create three new crimes, including two new **possession** criminal offenses into law. It would enact a new subtitle 6 to Title 4 of the Criminal Law Article. Under Section 4-603, the bill would ban a person from using any "computer-aided fabrication device to manufacture a firearm" and punish any violation with a 5 year prison term and/or a $5000 fine. Under Section 4-604, "a person may not **possess**, sell, offer to sell, transfer, purchase, or receive a firearm manufactured using a computer–aided fabrication device" and punish any violation with a 5 year prison term and/or a $5000 fine. Under Section 605:

> A person may not **possess** and intentionally retain, or **distribute**, transmit, **publish**, sell, offer to sell, **transfer, or purchase** computer control **language**, a computer **program**, computer **software**, or a computer database that is:
> (1) capable of being run or executed using a computer or computer system that is connected to or part of one or more computer–aided fabrication devices; and
> (2) designed to cause a computer–aided fabrication device to operate for the purpose of manufacturing or otherwise fabricating a firearm.

A violation of this section is likewise punished with a 5 year prison term and/or a $5000 fine. As detailed below, these provisions are both extreme and unconstitutional in their reach.

A. Homemade Guns Are Not Used In Crime And Existing Owners Are Law-Abiding Hobbyists, Not Criminals

These new provisions, if enacted, would severely criminalize a harmless activity that has been perfectly legal under federal and state law for the entire history of the United States, *viz.*, the manufacture of homemade guns for personal use. Under federal law, a person may

legally manufacture a firearm for his own personal use. See 18 U.S.C. § 922(a). However, "it is illegal to transfer such weapons in any way." *Defense Distributed v. United States,* 838 F.3d 451, 454 (5th Cir. 2016). This manufacture "involves starting with an '80% lower receiver,' which is simply an unfinished piece of metal that looks quite a bit like a lower receiver but is not legally considered one and may therefore be bought and sold freely. It requires additional milling and other work to turn into a functional lower receiver." (Id).

Manufacturing an "80% lower" into a "functional lower receiver" is not a trivial process. It takes machine tools, expertise and hours of time. Miscues are common and, when made, essentially convert the "80% lower" into scrap metal. Individuals who undertake this process are hobbyists, not criminals. Even after the receiver is successfully made, the owner would still have to purchase the additional parts, such as a barrel, the trigger, slide and all the internal parts to complete the assembly. All these additional parts are expensive. With the cost of the tools to mill the receiver, plus the cost of the parts, a final assembled homemade gun costs **roughly twice** as much to make as it would to actually buy an identical gun from a dealer. And that cost estimate does not even take into account the time it takes to mill the receiver, buy the parts and assemble the gun or the cost of any mistakes that occur in the process. Such guns are almost never used in a crime if only because of all the time and expense that is necessary to make such guns. Certainly, it is far easier and far cheaper to buy an illegal gun on the streets than to make a gun. Yet, these bills would ban this hobby and imprison the hobbyist for 5 years for the continued possession of any gun that the hobbyist constructed prior to the enactment of the law. That may well include literally thousands of law-abiding people in Maryland.

These points also apply to the criminalization of possession of any gun made through the use of any "computer –aided fabrication device." All the same steps would be necessary to convert the "80% lower" into a workable firearm. Indeed, it is actually **more** expensive to use the "computer-aided fabrication device" to manufacture a firearm from an "80% lower." Currently, such "fabrication devices" cost roughly $2,000 on up. Manual manipulation is still required. Precision cutting and drilling is still necessary and the chance of errors, while reduced, still abound. Purchase of other parts and assembly is still required. The same federal proscriptions on sale or transfer of such guns still apply. Again, it is far easier and cheaper for the criminals to obtain firearms on the street. Using a computer-aided fabrication device simply makes that process somewhat easier than the existing "non-computer-aided" process that has existed in this country for centuries. There is nothing threatening or dangerous about this process. Using a computer does not produce any firearm that could not be otherwise produced by hand, using manual processes and hand tools. The use of the computer just ameliorates the risk of the possible errors associated with milling the 80% lowers into a functional receiver. **The resulting receiver is the exactly the same, functionally, as a receiver milled by hand.** Any sale of a finished receiver is banned by federal law. That is because a finished receiver is classified as a 'firearm" under federal law, 18 U.S.C. 921(a)(3), just as it is under existing Maryland law, MD Code, Public Safety, § 5-101(h)(1)(ii). Thus, the receiver can only be used in a homemade gun made solely personal use.

B. These Bills Would Do Nothing To Prevent Or Deter Criminals From Acquiring Guns While Criminalizing Existing, Law-Abiding Owners

The bans on manufacturing and possession imposed by the bill would also not stop any person from actually acquiring "80% lowers" or the other parts necessary to manufacture firearms. Such items are not "firearms" under federal law and thus are not regulated by federal law. These "80% lowers" and other parts are available across state lines, over-the-counter, on-line and by mail order and would remain thus available, even if this bill should become law. The bill would simply criminalize the manufacture and possession of an actual firearm created using a "computer-aided fabrication device." Nothing in all the bans imposed by this bill would actually stop any criminal or disqualified person from acquiring, perfectly legally, all the hardware necessary to make his own gun, including the 80% lower. The computer software that this bill would attempt to ban is freely available in multiple places on the Internet. See, e.g., https://www.recoilweb.com/where-to-find-3d-printed-gun-files-140438.html. This bill cannot possibly stop that publication – it is available to every person with a computer and a connection to the Internet. A disqualified person or criminal would not be deterred by the ban on downloading the software or the ban on manufacturing or possession of a completed gun, since such a disqualified person is **already** precluded by federal law from possessing **any** modern firearm or modern ammunition of **any** type. 18 U.S.C. § 922(g). Simple actual or constructive possession of a modern firearm or ammunition by a person subject to this firearms disability is a felony, punishable by up to **10** years imprisonment under federal law. See 18 U.S.C. § 924(a)(2). The same disqualification and similar punishments are also **already** imposed under existing Maryland law. See MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1).

In contrast, if this bill became, few existing, otherwise law-abiding owners of these homemade guns will know or realize that they have become criminals. Actual compliance by existing owners will thus likely be virtually non-existent. Enforcement on this ban on possession of the software and the completed gun will be both very difficult and arbitrary. Any conviction for violating the bans imposed by these bills would convert these persons into disqualified persons for life under both federal and state law, thereby stripping these individuals of all their Second Amendment rights. In short, these bills are utterly **pointless** as a public safety measure. It would succeed only in criminalizing and potentially imprisoning otherwise law-abiding hobbyists. That result is impossible to justify as a matter of sound public policy. Plainly, little thought has gone into this bill.

C. The Bill Violates The First Amendment

The whopper in this bill is that it would ban the possession, the retention, the distribution the publishing, the sale, and any transfer or purchase of "a computer program" or "computer software." These bans would be a gross violation of the First Amendment, exactly like the same bans would grossly violate the First Amendment if they were applied to a book. This bill is the legal equivalent of book bans and book burning.

First, there is no doubt that computer "software" or a "computer program" is fully protected by the First Amendment. See, e.g., *Junger v. Daley*, 209 F.3d 481, 482 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) ("[C]omputer code, and computer programs constructed from code can merit First Amendment protection."). Banning computer is thus akin to banning a book. Requiring the destruction of computer code already in possession is akin to book burning.

Second, even worse, the bans imposed by this bill are a purely "content-based" prior restraint on a First Amendment activities. See *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). Under *Reed*, a facially content-neutral law will still be categorized as content based if it "cannot be "'justified without reference to the content of the regulated speech,'" or ... adopted by the government 'because of disagreement with the message [the speech] conveys.'" Id. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Here, there is nothing facially neutral about the bans imposed by this bill. Rather, the bill is expressly content-based as it bans specifically only software that is " (1) capable of being run or executed using a computer or computer system that is connected to or part of one or more computer–aided fabrication devices; and (2) designed to cause a computer–aided fabrication device to operate for the purpose of manufacturing or otherwise fabricating a firearm." The bans are based on the sponsor's "disagreement with the message."

A "law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal*, 535 U.S. 234, 244 (2002). A content-based regulation of speech is subject to strict scrutiny. *Reed*, 135 S.Ct. at 2231. Under this standard, the government must prove "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Id. (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2817 (2011)). See also *Cahaly v. Larosa*, 796 F.3d (4th Cir. 2015) (applying *Reed* to invalidate a state statute that banned politically-related unsolicited calls made by automatically dialed announcing devices"). There is thus no doubt that the bill is content-based suppression of speech.

Moreover, every American has a First Amendment right to receive information. Although the First Amendment refers only to the right to speak, courts have long recognized that the Amendment also protects the right to receive the speech of others. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (stating that the "First Amendment ... afford[s] the public access to discussion, debate, and the dissemination of information and ideas") *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (ban on advertising of prescription drug prices overturned); *Bigelow v. Virginia*, 421 U.S. 809, (1975) (ban on abortion advertising invalid); *Lamont v. Postmaster General*, 381 U.S. 301, (1965) (a postal regulation limiting the importation of Communist publications overturned); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (ordinance prohibiting door-to-door solicitation invalid as to distribution of leaflets announcing a religious meeting). Thus, every person in Maryland has a constitutional right to receive, purchase or otherwise obtain the very computer software or programs that this bill would ban. The bill is thus blatantly unconstitutional in banning this receipt of protected speech.

Even more fundamentally, the bans imposed by this bill are a form of prior restraint of First Amendment protected material, as the bill bans not only the possession, but also bans the publication or transfer of the computer code. It is well-established that prior restraints to speech are "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Government thus carries "a heavy burden of showing justification for the imposition of such a restraint." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). The case law uniformly holds that in order to justify a prior restraint, the Government must show that the "expression sought to be restrained surely will result in direct, immediate, and irreparable damage." *Bernard v. Gulf*

Oil Co., 619 F.2d 459, 473 (5th Cir. 1980). See also *N.Y. Times*, 403 U.S. at 730. There must be no "alternative measures" available, and the restraint must "effectively ... operate to prevent the threatened danger." *Nebraska Press*, 427 U.S. at 562, 565, 569–70.

Here, using computer code simply helps in the manufacture of a homemade firearm. This computer code is harmless and as far as we know, has not been used to commit any crime at all, nation-wide. As explained, such manufacture of a homemade gun for personal use is and has been **completely legal** since before the Founding of the United States. There is, in short, no threat of a legally cognizable "harm" or "danger" whatsoever. The State of Maryland simply may not ban this speech.

D. The Bills Are Unconstitutional Overkill Under The Second Amendment

The criminalization of existing gun owners who have used "computer-aided fabrication devices" to manufacture a firearm is also vast overkill. That overreach is of constitutional dimension because gun bans implicate the Second Amendment right of owners to possess firearms under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chi.*, 561 U.S. 742, 750 (2010). Even under the least demanding test ("intermediate scrutiny"), if the State can accomplish its legitimate objectives without a ban (a naked desire to criminalize gun owners is not legitimate), then the State must use that alternative. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). Stated differently, under intermediate scrutiny, the State has the burden to demonstrate that its law does not "burden substantially more [protected conduct] than is necessary to further the government's legitimate interest." Id. at 2535 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). See also *NY State Rifle & Pistol Ass'n. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 2486 (2016) (striking down a 7 round load limit in a firearm magazine because the limit was "untethered from the stated rationale"). See also *Reynolds v. Middleton*, 779 F.3d 222, 232 (4th Cir. 2015) (holding that, under the intermediate scrutiny test as construed in *McCullen*, the government must "*prove* that it actually *tried* other methods to address the problem"). (Emphasis in original).

The test for "strict scrutiny" is even more demanding as, under that test, the State must prove both a "compelling need" and that it used the "least" restrictive alternative in addressing that need. See *United States v. Playboy Entm't. Grp., Inc.*, 529 U.S. 803, 813 (2000). And in *NYSRPA v. NYC*, 883 F.3d 45 (2d Cir. 2018), *cert. granted,* 2019 WL 271961 (S.Ct. Jan 22, 2019), now pending before the Supreme Court on the merits, the Court may well reject both immediate and strict scrutiny tests and hold that the constitutionality of gun laws must be analyzed under the "text, history and tradition" test that was actually **used** in *Heller* and *McDonald*. See, e.g., *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). Again, the use of computer software to create a perfectly legal homemade gun does not make that gun illegal in the slightest under long-standing federal law. Banning manufacture or the mere possession of these homemade guns made with a "computer-aided fabrication device" cannot be justified under any of these tests. Indeed, the bill's ban on the use of computers is akin to the argument that the Second Amendment protects only muskets that were used during the Revolutionary War, a contention that the Court in *Heller* rejected as "bordering on the frivolous." *Heller*, 554 U.S. at 582.

E. The Bills Violate The Takings Clause Of The Federal And State Constitutions

Finally, because firearms previously constructed using fabrication devices are existing lawful property, such firearms are protected by the Takings Clause of the Fifth Amendment and Article 40 of the Maryland Constitution, both of which indisputably fully protect personal property. *Horne v. Dep't of Agric.*, 135 S.Ct. 2419 (2015); *Serio v. Baltimore County*, 384 Md. 373 (2004). Maryland's Takings Clause is violated "[w]henever a property owner is deprived of the beneficial use of his property or restraints are imposed that materially affect the property's value, without legal process or compensation." *Serio*, 384 Md. at 399.

The State's "police power" cannot be used to justify such a Taking without compensation. For example, in *Serio,* the Maryland Court of Appeals applied these principles to invalidate as a "Taking" the seizure by the police of all the property rights of a convicted felon in the value of his firearms that he could no longer possess. As stated in *Dua v. Comcast Cable of Maryland, Inc.,* 370 Md. 604, 623 (2002), under the Maryland Constitution, *"[n]o matter how 'rational' under particular circumstances,* the State is constitutionally precluded from abolishing a vested property right or taking one person's property and giving it to someone else." (Emphasis added). The rule is the same under the Fifth Amendment. See, e.g., *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) ("[T]he legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982) (finding a Taking in that case regardless of "the public interests that it may serve"). See also *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), *affirmed*, 742 Fed.Appx. 218 (9th Cir. 2018) (relying on *Horne*, *Lucas* and *Lorretto* to enjoin enforcement of California's ban on continued possession of certain firearm magazines).

Here, the ban on the continued possession of existing firearms made with computer-aided fabrication devices obviously "deprives" the existing lawful owner of any "beneficial use" of his property. *Serio*, 384 Md. at 399. Such owners cannot even recover the value of these guns via an out-of-state sale before the effective date of the bill because such a sale is barred by existing federal law. Accordingly, if the State bans continued possession of existing homemade guns, it will be required to pay just compensation. To avoid that result, these bills must, at the very least, be amended to include a "grandfather clause" to protect the property rights of existing owners. A failure to include such a clause will quite likely result in an injunction. Under Maryland law, it is well established that a court may enjoin a statute that violates Article 40 until compensation is provided. *Department of Natural Resources v. Welsh*, 308 Md. 54, 65 (1986). These bills, if enacted, face the same fate. For all these reasons, the bill should receive an unfavorable report.

Sincerely,

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