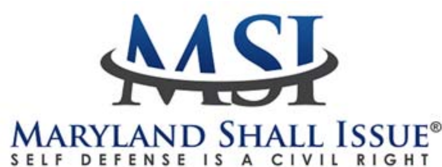


February 25, 2019

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, IN OPPOSITION TO HOUSE BILL 740 AND SENATE BILL 882

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 House Bill 740 and Senate Bill 882.

House Bill 740 and Senate Bill 882 would enact two new **possession** criminal offenses into law. MD Code Criminal Law §4-111 to create a new crime by providing that a person may not "transport" into the State any firearm made after 1968 that does not have a serial number imprinted by federally licensed manufacturer. Section 4-111 would also provide that a person may not "(2) manufacture, **possess**, sell, offer to sell, transfer, purchase, or receive a firearm manufactured after 1968 that is not imprinted with a serial number issued by a federally licensed firearms manufacturer or importer." A violation of this section is punishable by 3 years in prison and/or a $5,000 fine. The bills would also add a new Section 4-603 into the Criminal Code by providing that a person may not use a "computer-aided fabrication device" to manufacture a firearm that is not imprinted by a serial number by a federal licensed manufacturer. Violation of this section would be punished by 5 years in prison and a $5,000 fine. The same punishment is meted out under a newly minted Section 4-604, which provides that "a person may not **possess**, sell, offer to sell, transfer, purchase, or receive a firearm manufactured using a computer–aided fabrication device unless the firearm is imprinted with a serial number issued by a federally licensed firearms manufacturer or importer."

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. 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 "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.

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

The bans on possession imposed by these bills 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 and by mail order and would remain thus available, even if these bills should become law. These bills would simply criminalize the transport into the state of an assembled firearm or the manufacture or possession of such a firearm, after assembly. In short, nothing in these bills could or would actually stop any criminal or disqualified person from acquiring, perfectly legally, everything necessary to make his own gun. A disqualified person or criminal would not be deterred by the ban on 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 these bills becomes law, 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 a completed gun will be both very difficult and arbitrary and discriminatory, when enforcement does occur. 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 thousands of otherwise law-abiding hobbyists. That result is impossible to justify as a matter of sound public policy. Plainly, little thought has gone into these bills.

C. The Bills Are Unconstitutional Overkill Under The Second Amendment

The criminalization of existing gun owners imposed by these bills 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.").

Here, these bills purport to address guns without serial numbers (so-called "ghost guns") because such guns are not "traceable." As explained above, that concern is utterly misplaced as homemade guns are hardly ever used in a crime so there is no need (much less a

"compelling" need) to "trace" such guns. But, **if** the concern is truly that these guns lack a serial number (rather than a desire to criminalize gun owners), then that concern can be addressed without banning homemade guns and severely criminalizing the owners. Thus, the bans on ownership imposed by these bills will not survive any level of scrutiny that could be applied. Given that "the people" have been assembling homemade guns in the United States since before the Founding, these bills would especially not survive any application of the "text, history and tradition" test that *NYSPRA* may require. Rushing these bills through the General Assembly will not save them. But doing so will likely inflict high litigation costs on the State, including paying the attorneys' fees and costs of plaintiffs.

There are alternatives to bans. For example, a new law passed in California (which is ranked by the Giffords Law Center as having **the most restrictive** gun laws in the nation) provides that a new resident to the state shall apply to the Department of Justice for a unique serial number within 60 days of arrival for any firearm the resident wishes to possess in the state that the resident previously self-manufactured or self-assembled or a firearm the resident owns, that does not have a unique serial number or other mark of identification. As of July 1, 2018, prior to manufacturing or assembling a new firearm, a person is required to apply to California for a unique serial number. The gun owner is then simply required to engrave that number onto the receiver and report back to California that he or she has done so. As of January 1, 2019, owners of **existing** guns were required to apply for such serial numbers and perform this engraving. In short, assembly of **new** homemade guns and **existing** possession is permitted as long as this serial number is obtained, engraved and reported. California Penal Code §29180. In this way, the owner is identified and the gun is fully traceable and thus no longer a so-called "ghost gun." As this law indicates, there is no reason to take the extreme step of flatly banning homemade guns or converting existing law-abiding owners into criminals. Under *Heller*, the State may not simply reject this alternative simply because a general ban is more convenient. Gun owners may not be criminalized and their Second Amendment rights forfeited for the sake of convenience. See, e.g, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 702 n.10 (1989); *Heller v. District of Columbia*, 801 F.3d 264, 310 (D.C. Cir. 2015) (Henderson, J., concurring in part and dissent in part).

Indeed, an earlier version of this California law was effectively vetoed in 2014 by Governor Brown. The Governor (hardly a gun-rights activist) stated:

> To the Members of the California State Senate:
>
> I am returning Senate Bill 808 without my signature.
>
> SB 808 would require individuals who build guns at home to first obtain a serial number and register the weapon with the Department of Justice.
>
> **I appreciate the author's concerns about gun violence, but I can't see how adding a serial number to a homemade gun would significantly advance public safety.**

(Emphasis added). Governor Brown's Statement is attached. As explained, the more extreme measures in these bills will not "significantly advance public safety" either.

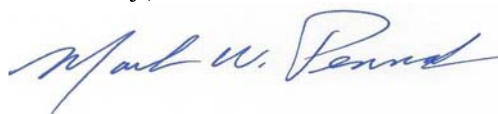
D. The Bills Violate The Takings Clause Of The Federal And State Constitutions

Finally, because firearms previously constructed using "80% lowers" 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 from "80% lowers" 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.

Sincerely,



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OFFICE OF THE GOVERNOR

SEP 30 2014

To the Members of the California State Senate:

I am returning Senate Bill 808 without my signature.

SB 808 would require individuals who build guns at home to first obtain a serial number and register the weapon with the Department of Justice.

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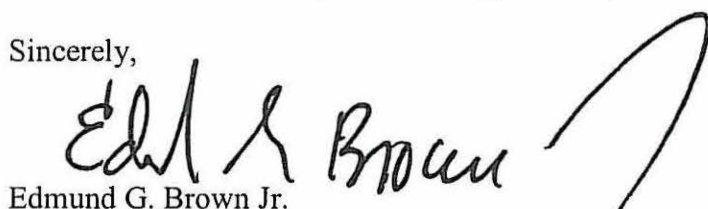

Edmund G. Brown Jr.

GOVERNOR EDMUND G. BROWN JR. • SACRAMENTO, CALIFORNIA 95814 • (916) 445-2841