



January 15, 2020

## **WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB55**

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 Maryland and 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 and personal protection in the home and outside the home and in muzzle loader. I appear today as President of MSI in opposition to SB55.

### **The Bill:**

This bill would create a new “buyback fund” in the Maryland State Police for the purpose of paying persons for the voluntary surrender of what the bill calls “assault weapons.” It first defines “assault weapons” to include “A SELF-LOADING, SEMI-AUTOMATIC OR FULLY AUTOMATIC ACTION FIREARM WITH A DETACHABLE MAGAZINE THAT FIRES AN INTERMEDIATE OR HIGH-POWERED CENTERFIRE CARTRIDGE” and to include “A REGULATED FIREARM, AS DEFINED UNDER § 5-101 OF THIS ARTICLE.” To create the buyback fund, the bill would direct the Comptroller to create a checkoff on the income tax form that allows taxpayers to contribute \$5.00 to the fund, either by reducing the refund or adding to the tax liability of the taxpayer. The State Police are directed to administer the fund by “SETTING THE PRICES OF ASSAULT WEAPONS THAT THE STATE MAY BUY” and further directs the State Police to either destroy or donate any guns turned in to “the Armed Forces of the United States.” The bill compels the Governor to include, starting in FY 2022, an annual budget appropriation of \$50,000 to the Fund.

### **The Bill Conflicts With Existing Maryland Law and Is Grossly Misleading and Misguided:**

First, the bill erroneously defines what constitutes an “assault weapon” under Maryland law. As of enactment of the Firearms Safety Act of 2013, any gun on the list of guns set forth in MD Code Public Safety 5-101(r)(2) was deemed to be an “assault long gun.” MD Code, Criminal Law, § 4-301(b). An “assault long gun” is part of the definition for “assault weapon” under Section 4-301(d) (“Assault weapon” means: (1) an assault long gun; (2) an assault pistol; or (3) a copycat weapon.”). An “assault pistol” is defined in MD Code, Criminal Law, § 4-301, to include a very specific list of pistols. This very specific definition

of “assault weapons” does not include “A SELF–LOADING, SEMI–AUTOMATIC OR FULLY AUTOMATIC ACTION FIREARM WITH A DETACHABLE MAGAZINE THAT FIRES AN INTERMEDIATE OR HIGH–POWERED CENTERFIRE CARTRIDGE.” There are many rifles, for example, that are semi-automatic firearms that do not appear in the list of so-called assault weapons in Maryland. No “fully automatic” firearm is on that list either, as such firearms are heavily regulated by the ATF under the National Firearms Act of 1934 and are separately regulated under Maryland law. Indeed, the bill does not even define the term “intermediate or high-powered” cartridge. That term is hopelessly vague.

The bill further blunders in defining as an assault weapon every “A REGULATED FIREARM, AS DEFINED UNDER § 5–101” of the Public Safety article. Under Section 5–101, a “regulated firearm” is defined to include **not only** the long guns listed in Section 5–101(r)(2), but also “a handgun” under Section 5–101(r)(1). An ordinary handgun is not an “assault weapon” under Maryland law. Thus, calling an ordinary handgun (which includes any single-action, .22 caliber revolver) an “assault weapon” is both massively wrongheaded and legally wrong.

More fundamentally, handguns are fully protected arms under the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and may not be banned. Thus, while the State has (thus far) been successful in banning the firearms listed in Section 5–101(r)(2), *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017),<sup>1</sup> the State may **not** ban handguns under *Heller* and has wisely made no attempt to do so. In short, defining handguns as “assault weapons” is simply an abuse of the term, which is already a made-up term used for purely political purposes. See Kobayashi & Olson et al., *In re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,”* 8 Stan. L. & Pol’y Rev. 41, 43 (1997) (“Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of undefined ‘evil’ appearance.”).

The bill is also a waste of taxpayer funds and utterly misguided in its assumptions. First, the bill directs the State Police to establish, by regulation, the prices at which the State Police would pay out of this fund for all these firearms that the bill now defines as “assault weapons.” That includes a huge universe of literally tens of thousands of different guns made by all manufacturers over many years. Each one of these guns may have a different fair market value. Attempting to establish prices that would attract voluntary surrenders for all of these thousands of guns would require a Herculean expenditure of resources by the State Police. That effort is not only hopelessly complex, it is sure to fail. Either the price will be too low, in which case there will be no surrenders by economically rational gun-owners (making the Fund useless other than for virtue signaling), or the price will be too high, in which case the owners will happily sell their perfectly legal, but worn out, firearms and turn around and use that cash to buy new firearms. This is precisely what happened recently in the Baltimore buyback of guns and magazines. The State Police surely have something better to do with their time.

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<sup>1</sup> The constitutionality of bans on so-called assault weapons is currently pending before the Supreme Court on a petition for certiorari filed in *Worman v. Healey*, No. 19-404, filed September 23, 2019. *Worman* was submitted for Friday Conference on January 10, 2020, but the Supreme Court has not issued an order in the case. That likely means that the Court is holding the case pending a decision in *NYSPPA v. NYC*, No. 18-280, cert granted 139 S.Ct. 939 (2019), argued December 2, 2019, and will GVR the case after a merits decision in *NYSRPA*. Such bans may thus be in great legal peril.

Second, the bill is further misleading in suggesting that the State Police could donate these guns to the military. The bill fails to grasp that the Armed Forces of the United States are not in the slightest bit interested in acquiring these civilian firearms. To even suggest otherwise simply misleads the public into thinking that these guns are actually used by the United States military, when they most certainly are not. See *Kolbe*, 849 F.3d at 158 (Traxler, J., dissenting) (noting that Maryland's so-called assault weapons "are not in regular use by any military force, including the United States Army"). Not even the majority in *Kolbe* disputed this point. *Kolbe*, 849 F.3d at 144.

In sum, the bill is just more misleading anti-gun propaganda dressed up as a voluntary income tax increase. It misuses established statutory legal terms, mandates expensive use of scarce State Police resources and makes promises that the State Police cannot possibly keep. At the very least, it is a waste of \$50,000 a year, money that could be used to hire teachers or address the opiate crisis. For all these reasons, we request 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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