President
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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, IN OPPOSTION TO SB 946

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 ("HQL") and a certified NRA instructor in rifle, pistol and personal protection in the home. I appear today as President of MSI in opposition to SB 946. I also appear as a concerned parent of several college aged children, including two who will likely be attending a Maryland public institution of higher learning this coming Fall semester.

1. SB 946 would create a new Section 4-102.1 of the Criminal Article of the Maryland Code to provide that "A PERSON MAY NOT CARRY OR POSSESS A FIREARM WHILE KNOWINGLY ON THE PROPERTY OF A PUBLIC INSTITUTION OF HIGHER EDUCATION." The penalty for possession is severe. A person who "VIOLATES THIS SECTION IS GUILTY OF A FELONY AND ON CONVICTION IS SUBJECT TO IMPRISONMENT NOT EXCEEDING 3 YEARS OR A FINE NOT EXCEEDING $2,500 OR BOTH." By making the violation a "felony," the bill actually imposes a penalty more serve than that set forth in existing Section 4-102. Under that statute, possession of a firearm on public school property, K-12, is a "misdemeanor" and "subject to imprisonment not exceeding 3 years or a fine not exceeding $1,000 or both." Similarly, possession of a **handgun** on K-12 school property is punishable only as a "misdemeanor" under Section 4-203(c) of the Criminal Article, which provides, on the first offense, that such a person is subject to imprisonment "not less than 90 days" and up to "3 years or a fine of not less than $250 and not exceeding $2,500 or both." The bill applies not only to students, but to any "person" who possesses any firearm "WHILE KNOWINGLY ON THE PROPERTY OF A PUBLIC INSTITUTION OF HIGHER EDUCATION," regardless of where the "property" is found, regardless of the type of "property" and regardless of whether the possession on college property was otherwise completely innocent.

2(a). The bill makes no exceptions for adults with Wear and Carry Permits issued by the State Police for "good and substantial reasons" under State law, MD Code, Public Safety, § 5-306. Nationwide, persons issued such carry permits are the most law-abiding individuals in the country, with a crime rate lower than that of sworn, active duty police officers. See http://crimeresearch.org/2014/07/new-report-from-crime-prevention-research-center-shows-11-1-million-americans-hold-concealed-carry-permits/. For example, researchers found that "concealed carry licensees [in Texas] had arrest rates far lower than the general population for every category of crime." H. Sterling Burnett, Nat'l Ctr. For Policy Analysis, Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors 1 (2000), http://goo.gl/1Ebwpb. Similarly, Florida has issued nearly 3.5 million concealed carry licenses since 1987 and has revoked less than 0.5% of them for any reason, with the vast majority of those revocations having nothing to do with misuse of a firearm. See Florida Dep't Of Agric. & Consumer Servs., Div. Of Licensing, Concealed Weapon Or Firearm License Summary Report, Oct. 1, 1987 – January 31, 2017, http://goo.gl/yFzIwv. That reality is, if anything, even more applicable to Maryland residents with wear and carry permits as Maryland subjects permit applicants to an extremely extensive background investigation, including personal interviews and vetting by the State Police. An applicant for a permit must not only demonstrate a "good and substantial reason" to have a permit, he or she must undergo16 hours of very intensive training, including instruction in the law, and pass a difficult live fire qualification requirement.

(b). For example, an adult woman employee of a college with a carry permit issued because of active threats against her life by an estranged ex-boyfriend is left stripped of her defenses by this bill. See, e.g., *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016) (Alito, J., concurring) ("The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself."). A person legitimately armed with a permit issued by the State Police because he or she is on an ISIS hit list is likewise disarmed. http://www.washingtontimes.com/news/2015/may/6/isis-announces-6-month-terror-campaign-names-5-targets/. Similarly disarmed would be a permit holder who has targeted by gangs or criminals because he or she has come forward as a witness. See Anderson, National Gang Center Bulletin, Gang-Related Witness Intimidation (2007) ("gang members so frequently engage in witness intimidation that it is considered part of normal gang behavioral dynamics"). As in *Caetano*, passage of this bill would essentially mean that the State is "more concerned about disarming the people than about keeping them safe."

3. The ban on possession imposed by the bill would also apply to off-duty State and County police officers, sheriffs, retired officers with carry credentials under the Law Enforcement Officers Safety Act, 18 U.S.C. §§ 926B,C ("LEOSA"), and all off-duty federal law enforcement personnel. Only an off-duty officer who is "a parent, guardian, or visitor of a student attending a school" located "on the property of a public institution of higher education" is allowed to be armed and only then if he wears his credentials or badge on the outside of his clothing. Incredibility, the bill thus bans off-duty FBI agents and other federal agents from college property, even if they are visiting a student. These agents may have good operational security reasons not to publically display their credentials.

Respectfully, such reasons should not be second-guessed by the General Assembly. Broadly excluding possession by off-duty officers is utterly counterproductive to public safety. See https://leb.fbi.gov/2011/january/off-duty-officers-and-firearms (discussing LEOSA and noting that "[t]he U.S. Congress has determined that in a post-9/11 world, the public is better served when off-duty officers are in a position to effectively respond in the face of a threat").

4. In excluding these otherwise lawfully armed persons, the bill effectively creates ill-defined gun free zones (all college "property"). These gun free zones thus created are immense in size. The main campus alone of the University of Maryland in College Park is 1,335 acres and that does not include all the farms and other real estate owned by the University. Such other properties include the Graduate Gardens and Graduate Hills apartments communities used by graduate students attending the University, http://reslife.umd.edu/housing/graduate/ as well as farms all over Maryland. Those farms are in rural areas, such as the Clarksville Facility, https://agresearch.umd.edu/cmrec/clarksville-facility, the "Terp Farm" located 15 miles from the College Park campus in Upper Marlboro, http://terpfarm.umd.edu/, the agricultural extension facilities located all over the State, https://extension.umd.edu/ and the 4-H facilities located in rural parts of Maryland, https://extension.umd.edu/garrett-county/4-h-youth-development/camping. The bill thus treats farms and strip malls and apartment buildings owned by a college the same way it treats dormitories and the central "quad" of a college campus. Respectfully, that is not rational regulation. See, e.g, *Brantley v. Kuntz*, 98 F.Supp.3d 88 (W.D. Texas 2015) (questioning whether "it is rational to treat very different businesses as though they are the same" under the Equal Protection Clause of the 14th Amendment).

5. Fundamentally, such immense and unsecured gun free zones are inherently dangerous. The harsh reality is that making all college property gun free zones actually converts colleges into more inviting targets. The Report from the Crime Prevention Research Center (Oct. 2014) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629704) indicates that "mass public shooters pay attention to whether people with guns will be present to defend themselves." (Id. at 10). Indeed, lawfully armed individuals have actually stopped such mayhem on a college campus, such as at the 2002 shooting at the Appalachian Law School in Virginia. See https://en.wikipedia.org/wiki/Appalachian_School_of_Law_shooting. As the Report states, "[c]oncealed carry permit holders have stopped attacks at schools and other places before police arrived" including shootings in Pearl, Miss., and Edinboro, Pa.," and "in busy downtowns such as Memphis; in churches such as the New Life Church in Colorado Springs; in malls in Portland, Ore., and Salt Lake City; and outside an apartment building in Oklahoma." (Id.). See also Auditing Shooting Rampage Statistics, Davi Barker, July 2012 (finding that armed citizens responding to rampage killers result in 1/8th the number of casualties on average as opposed to situations where the shooter was stopped only by police intervention) (available at http://dailyanarchist.com/2012/07/31/auditing-shooting-rampage-statistics/ .

(b). This bill fails to recognize these realities in barring persons with carry permits, LEOSA retirees and virtually all off-duty law enforcement officers from

carrying or possessing firearms on college property. Yet, if the State is going to mandate a gun free zone, it has the concomitant obligation to secure fully such a zone so as to prevent attacks by criminals, deranged persons or terrorists. The bill makes no such effort. Disarming such permit holders and banning off-duty law enforcement officers might be defensible where effective protection measures are in place, such as controlled access staffed by armed security. But it is quite impossible to control access to thousands of acres encompassed by all the vast "property" of every public institute of higher learning in Maryland. In essence, by banning all otherwise lawful possession of firearms, this bill would actually make the property of these institutions more likely to be attacked by a mass shooter, a criminal or deranged individual, rather than less likely. Everyone on college properties becomes less safe because the active shooter knows that he stands less of a chance of meeting armed resistance. A potential shooter, willing to commit murder or mayhem, will simply not care that this bill would make his possession of a firearm illegal. Disarmament effectively will prevent off-duty law enforcement personnel from protecting college students, faculty and employees from such shooters. That result is senseless.

6. This bill not only fosters these new dangers, it creates and severely punishes a whole new class of potential criminals without any showing of need. Specifically, the issue is not whether firearms should be on campus, as existing policies adopted by institutions of higher learning already bar unauthorized possession. For example, the University of Maryland Code of Student Conduct §10(b) already makes subject to disciplinary action any "[u]nauthorized on campus or illegal off campus use, possession, or storage of any weapon." The Frostburg State University Police Statement takes a slightly different approach. Instead of a flat ban, the Statement provides that "[p]ossession of firearms or potentially dangerous weapons or explosives is not permitted on university property unless they have been properly registered and secured with University Police." (§11). We are aware of no evidence suggesting that these sorts of regulations have not been effective. By severely criminalizing the mere innocent possession of a firearm on any college owned property, the bill eliminates the ability of college administrators to create and enforce their own rules in light of the particular circumstances presented in each case. Every arguably unauthorized but otherwise innocent firearm possession will transmogrify from a possible disciplinary issue into a criminal case with the obvious potential to devastate the future of the person involved. Whatever the merits of this sort of categorical ban on the much more limited property of K-12 public schools, it is senseless to treat law-abiding adults, including students, faculty, employees of colleges and visitors, to these sorts of draconian punishments for the otherwise perfectly lawful and innocent possession of a firearm anywhere on the vast properties of all the public colleges in this State.

7. During testimony this Session in the House on HB 159 (similarly banning possession on college property), there was much discussion at the hearing about the importance of preventing suicides among 18-22 year-old students. MSI fully shares that concern. Yet, keeping guns out of the hands of immature or impulsive students is addressed by existing college policies and those policies have been appropriately and effectively enforced by college authorities who have everyday access to students and campus housing. In addition, existing Maryland law already bans the

unsupervised possession of a handgun by persons under the age of 21. MD Code, Public Safety, § 5-133(d)(1). More generally, suicide is a mental health issue, not a criminal issue. Students with thoughts of suicide need help from college administrators and mental health professionals, not a felony conviction punishable with three years in prison. In any event, disarming off-duty federal and state law enforcement officers and permit holders simply cannot be rationally justified as a means of preventing suicide by students. Those firearms are being carried on the person, not casually left around for students to pick up.

8. Because of the severity of the consequences inflicted by this bill, this new ban is an open invitation to arbitrary and discriminatory enforcement, including against racial minorities. And a conviction under this bill has additional real consequences beyond the sentence. For example, because this crime is "punishable" as a "felony," any conviction (regardless of actual sentence) would attach a permanent, lifelong ban on possession of modern firearms and ammunition under federal law under 18 U.S.C. § 922(g)(1). Subsequent possession of a modern firearm or ammunition by a person subject to this firearms disability is punishable by up to 10 years imprisonment under federal law. See 18 U.S.C. § 924(a)(2). A similar lifetime disability is imposed under Maryland law. See MD Code, Public Safety, § 5-101(g)(2), § 5-133(b)(1), § 5-205(b)(1).

9(a). This bill inappropriately makes the crime a "felony." At common law, "'[o]nly the most serious crimes' were considered to be felonies." *United States v. Booker*, 644 F.3d 12, 24 n.14 (1st Cir. 2011), *cert denied*, 132 S.Ct. 1538 (2012). See also *Baldwin v. New York*, 399 U.S. 66, 70 (1970) (noting that it "may readily be admitted – that a felony conviction is more serious than a misdemeanor conviction"); *United States v. Chovan*, 735 F.3d 1127, 1144 (9th Cir. 2013) (Bea, J., concurring) ("Throughout history, felons have been subject to forfeiture and disqualification, but misdemeanants, in direct contrast to felons, have not."). Felonies often carry more severe collateral consequences, assign individuals to state rather than local prisons, and contemplate more comprehensive preliminary criminal proceedings, either by grand jury indictment or through a probable cause preliminary hearing in circuit court. Felons lose out on fundamental rights such as voting and serving on juries, and face discrimination that need only survive rational basis review.

(b). Maryland has long recognized these realities. For example, in Maryland, **first degree** assault ("intentionally cause or attempt to cause serious physical injury" or assault using a firearm) is punishable as a "felony" with imprisonment for up to 25 years, MD Code, Criminal Law, § 3-202, while **second degree** assault, a still serious crime punishable by up to 10 years imprisonment, is deemed to be only a "misdemeanor." MD Code, Criminal Law, § 3-203. Likewise, carrying or transporting a handgun in violation of MD Code, Criminal Law, § 4-203(c)(1) is a misdemeanor, even for possession on K-12 school property. The mere possession of a firearm anywhere on any property of any public college is hardly as serious as first degree assault and, standing alone, is much less serious than second degree assault. Yet, deeming it a "felony" has huge consequences for what may be an otherwise innocent or mistaken possession. See, e.g., *Binderup v. Attorney General*, 836 F.3d 336, 347-48, 351 (3d Cir. 2016), petition for cert. docketed, sub nom.

Sessions v. Binderup, No. 16-847 (filed Jan. 5, 2017). Such a felony conviction would effectively ruin the lives and futures of students, faculty, employees and visitors, as it would compromise their educational prospects and future job opportunities, including precluding military service or government employment. In particular, we can think of no possible justification for treating possession on college property more severely than possession on K-12 school property.

10. These consequences cannot be shrugged away, as some have suggested, by relying on prosecutors not to prosecute inadvertent violations by law-abiding persons. See *United States v. Andrews*, 633 F.2d 449, 455 (6th Cir. 1980), cert. denied, sub nom. *Brooks v. United States*, 450 U.S. 927 (1981) ("Prosecutors and criminal defendants are adversaries and prosecutors make honest mistakes."). See also *Murphy v. Yates*, 348 A.2d 837, 848 (Md. 1975) (stating that the State's Attorney's "most awesome discretionary power [is] to determine whether or not to prosecute"). That reliance on the prosecutor's discretion also misapprehends the role of the prosecutor in our system of criminal justice. In deciding whether to bring charges, the prosecutor is ethnically required to make a judgment whether the prosecution will result in a conviction, *i.e.,* the prosecutor must merely "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." See ABA, Model Rules of Professional Conduct, Rule 3.8(a). While prosecutors have a "special duty commensurate with [their] unique power, to assure that defendants receive fair trials," *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000), and likewise have a duty "to protect the integrity of the court and the criminal justice system," *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1122 (9th Cir. 2001), a prosecutor's job does not include the power or the right to second-guess the wisdom of applying a criminal law enacted by the General Assembly. The prosecutor's duty to "do justice" means justice *under the law*; it does not include ignoring a law just because it produces a bad result in a particular case. In any event, the reality remains that a mere arrest, regardless of prosecution, will create a criminal record that can follow the individual for a lifetime.

11(a). By its terms, this bill would impose strict criminal liability on the defendant without regard to the *mens rea* of the defendant, with the only exception being that the person must "knowingly" be on college property. The term "knowingly" is not defined, but on its face this bill would convert into a criminal an otherwise law-abiding hunter who "knowingly" but innocently steps onto college farm property to retrieve a deer, as required by hunting regulations. http://dnr.maryland.gov/wildlife/Pages/hunt_trap/deer_otherregs.aspx(a hunter is "required to make a reasonable attempt to retrieve and make use of the deer"). The same result would obtain for a law-abiding person who might aware (in some sense) that he is on college property, but innocently drives through college "property" (including a farm or other rural acreage) with a firearm in the trunk on the way to hunt or shoot at a range, or simply forgets that the goose gun was still in the trunk from a prior outing and parks in a college parking lot on the way to do an errand or attend a lecture or perform a maintenance job at, for example, Garrett County Community College at McHenry in far western Maryland.

(b). Imposing severe criminal liability for such innocent conduct would be unjust by any measure. To avoid precisely these kinds of injustices, strict liability

statutes are heavily disfavored in the law. See *Staples v. United States*, 511 U.S. 600, 605 (1994) (noting that "the requirement of some *mens rea* for a crime is firmly embedded" in common law). Thus, when construing federal statutes, the federal courts will require specific *mens rea* to the extent "necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (citation omitted). The guiding principle is that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952). Implementation of that requirement varies with the context, but it is undeniable that in some instances "***requiring only that the defendant act knowingly 'would fail to protect the innocent actor.***'" *Elonis v. United States*, 135 S.Ct. 2001, 2010 (2015) (citation omitted) (emphasis added). State law also strongly favors an appropriate *mens rea* requirement. See, e.g., *Garnett v. State*, 332 Md. 571, 577-78, 632 A.2d 797, 800 (1993) ("The requirement that an accused have acted with a culpable mental state is an axiom of criminal jurisprudence."); *Lowery v. State*, 430 Md. 477, 498, 61 A.3d 794, 807 (2013) (same).

(c). Thus, at a minimum, the bill should include a broader *mens rea* element that would "separate wrongful conduct from otherwise innocent conduct." *Carter,* 530 U.S. at 269. Specifically, in this context, limiting criminal liability to those with the requisite "culpable mental state" would require a *mens rea* showing that a person "knowingly" carried or possessed a firearm, with the knowledge that he or she was doing so on college property and with the knowledge that such possession or carriage was prohibited. See *Chow v. State*, 393 Md. 431, 471, 903 A.2d 388, 412 (2006) (holding that the "knowingly" element as used in MD Code, Public Safety, § 5-144, "requires that a defendant 'knows' that the sale, rental, transfer, purchase, possession, or receipt of a regulated firearm of which they are a participant in is in a manner that is illegal and not a legal sale"). Any lesser *mens rea* standard would be "inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Elonis*, 135 S.Ct. at 2011, quoting *Staples*, 511 U.S. at 606–607 (emphasis the Court's). The bill should be amended to so provide. Such a requirement would at least recognize the historical reality in Maryland that possession of all types firearms on any college property wherever located has never been regulated by the criminal law.

12. The bill is also facially unconstitutional in imposing a categorical ban on all college property without any attempt to tailor the ban to the governmental interest sought to be served. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the people have a right to possess handguns and other types of operative firearms. This right is so fundamental that it has been incorporated into the Due Process Clause of the 14th Amendment and thus made applicable to the States. See *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) ("citizens must be permitted to use handguns for the core lawful purpose of self defense"). This bill flouts these principles as it would ban any possession of "arms" anywhere on any college "property," including the home of the college President. Whatever its application to dormitories, that constitutional right does not cease to exist for otherwise law-abiding adults in off-campus housing that merely happened to be owned by a college. See *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014) (holding that under the Delaware counterpart to the Second Amendment, the state could not ban the possession of firearms in common areas of public housing

units owned by the state), followed in *Doe v. Wilmington Housing Authority,* 568 Fed.Appx. 128, 129 (3rd Cir. 2014). The Second Amendment applies to all law-abiding adults, including adult students. *DiGiacinto v. Rector and Visitors of George Mason University*, 281 Va. 127, 704 S.E.2d 365 (2011) (sustaining a narrowly tailored regulation of firearms on college campuses that was not a complete ban). Categorical bans applicable to K-12 schools, where minors are present and where the school property is discrete and well-defined, should not be applied wholesale to college property, where children are not typically found. See, e.g., *Regents of University of Colorado v. Students of Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colo., 2012)(applying legislation that distinguished between schools K-12 and colleges with respect to a ban on firearms).

Sincerely,

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