President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 6, 2018

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, IN OPPOSITION TO HB 466

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 and personal protection outside the home and a range safety officer. I appear today as President of MSI in **opposition** to HB 466.

HB 466 would enact Section 5-131 of the Public Safety Article to require a manufacturer that "ships or transports" a handgun in Baltimore to "ensure" that such handgun is capable of microstamping, *viz*, the imprinting of a "microscopic array of characters that identify the make, model, and serial number of a handgun to a shell casing as the handgun is fired" and to certify to firearms licensees that such handguns comply. Firearms licensees in Baltimore are required to "confirm to the Baltimore Police Department" that the manufacturer has complied with this requirement. A violation is made subject to imprisonment for one year and/or a $1,000 fine. The bill would also enact a new Section 5-134.1 of the Public Safety Article to impose a minimum age of 21 on the sale, rent or transfer of ammunition in Baltimore by any "person." A violation is made subject to imprisonment for one year and/or a $1,000 fine. Finally, the bill enacts a new Section 5-134.2 to the Public Safety Article to impose record keeping requirements on Baltimore licensees.

This bill is unconstitutional under the Supreme Court's decisions in *Dist. of Columbia v. Heller,* 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Heller* held that the Second Amendment embodies an individual right to keep and bear arms and struck down as unconstitutional a District of Columbia law that banned the possession of handguns. In *McDonald,* the Supreme Court expressly held that this right to possess handguns and other firearms in common use is so "fundamental to the Nation's scheme of ordered liberty" as to be incorporated into the Due Process Clause of the 14th Amendment and thus applicable to the States — including Maryland. Under *Heller*, it is beyond dispute

that the law-abiding citizens of Baltimore have a constitutional right to purchase handguns.

Indeed, this right to purchase was conceded by the Attorney General in *MSI v. Hogan*, 2017 WL 3891705 (D. Md. 2017), a case in which MSI has challenged the handgun qualification license ("HQL") requirements imposed by MD Code Public Safety 5-117.1. The court noted that "[d]efendants [Maryland State Police] do not deny that the HQL Provision and implementing regulations burden conduct within the scope of the Second Amendment, namely, the ability of a law-abiding citizen **to attain** a handgun for use in the home for self-defense." (Slip op. at 5). The Ninth Circuit, sitting en banc, has likewise very recently recognized a constitutional right to purchase, noting that "the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." *Teixeira v. Co. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc), (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). There is no authority to the contrary.

This bill's imposition of microstamping cannot be reconciled with these cases. Stated simply, there are **no** handguns manufactured in the United States today that incorporate microstamping into their design and none are likely to be manufactured in the foreseeable future. http://www.guns.com/2017/09/05/gun-industry-groups-tell-court-microstamping-goal-impossible-to-meet/ Thus, barring a manufacturer from "ship[ping]" or "transport[ing]" a "handgun" into Baltimore without microstamping effectively bans the sale of **all** handguns in Baltimore as a handgun that cannot be shipped to a FFL cannot be sold to a law-abiding citizen. In this regard, it is simply irrelevant that the bill's ban on non-microstamping handguns is limited to Baltimore. As the Seventh Circuit stated in *Ezell* in striking down the City of Chicago's ban on firing ranges in the City, a muncipality cannot deny a constitutional right "within its borders on the rationale that those rights may be freely enjoyed in the suburbs." *Ezell*, 651 F.3d at 697. See also *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010) (noting that a prohibition of commercial sale "would be untenable under *Heller*"). The infringement on the Second Amendment rights at issue in this bill is even more direct and substantial than the ban on ranges in *Ezell*. See generally *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77 (1981) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (citation omitted).

Nor is this bill even remotely a copy of the law California recently adopted requiring microstamping for all new models of handguns shipped into California. Even under that California law, over 504 older models of semi-automatic pistols without microstamping are still on the California roster of legal handguns and thus are still available for purchase in California. https://www.oag.ca.gov/firearms/certguns. Indeed, this bill goes beyond the California statute as it applies to all handguns, not merely semi-automatic handguns (as in California), and thus includes revolvers and other types of handguns that do not automatically eject a spent casing upon firing. Even as thus limited, and even with more than 500 non-microstamped semi-auto models of handguns available, the California statute is being challenged in federal court on Second Amendment grounds. *Pena v. Lindley*, No. 15-15449 (9th Cir.) (argued March 16, 2017). In that case, there was no question that a ban on the sale

of **all non-microstamping** handguns would be blatantly unconstitutional. California conceded as much in that case in arguing that the microstamping requirement for new models of handguns would still leave handguns "widely available in California." See *Pena v. Lindley*, 2015 WL 854684 at 10 (E.D. Calif. 2015).

This bill will also cause manufacturers to cease doing business in Maryland. For example, we are advised that if this bill becomes law, Glock will cease to ship handguns **anywhere** in Maryland to anyone. Glock pistols are overwhelmingly favored by police departments for use by law enforcement officers, including the Baltimore Police Department, the Capitol Police Department and the Maryland State Police. These agencies will not be able be able to purchase Glocks in Maryland if this bill becomes law, but will have to purchase from an out-of-state FFL (but only to the extent permitted by 18 U.S.C. § 925(a)(1), and 27 C.F.R. § 478.134). Indeed, this bill will likely put out of business the **only** general purpose Federal Firearms Licensee in the City of Baltimore, the Cop Shop. As the name suggests, that FFL caters to law enforcement personnel. http://copshopmd.com/ The Baltimore Police Department officers will thus be deprived doubly: the Department and its officers will not able purchase Glocks in Maryland (or perhaps other models if other manufacturers follow Glock's lead), and will be further deprived of the only convenient FFL for other types of firearms-related materials in the City of Baltimore. All of this is pointless. There are undoubtedly thousands of illegal handguns already on the streets of Baltimore with thousands more that are illegally obtainable by prohibited persons. Not a single one of these many handguns has microstamping. This bill cannot possibly reduce or help solve crime in Baltimore.

The bill's ban on all ammunition sales to persons under the age of 18 is likewise senseless. Federal law, 18 U.S.C. § 922(b)(1), permits persons 18 or older to purchase conventional long guns and there is nothing in Maryland law that restricts such sales. Such long guns may be freely transported by an 18 year-old person anywhere in Maryland. Yet, this bill bans the sale of **all** ammunition in Baltimore to **all** persons under the age of 21, **including** to persons under the age of 21 who may legally purchase a long gun. There is no possible justification for banning the sale of long gun **ammunition** to an 18 year-old who may legally buy the very long gun chambered for this ammunition. Yet, this bill would punish and criminalize a dealer or any other **"person"** who sells or "transfers" such long gun shells to an 18 year-old owner of a long gun with a year in prison and a $1,000 fine. A parent in Baltimore could thus go to jail for a year and pay a $1,000 fine if he or she gives a box of shotgun shells to an 18 year old son or daughter to go hunting or skeet shooting anywhere in the State. We urge an unfavorable report.

Sincerely,

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