



President  
Mark W. Pennak

March 6, 2018

## WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 991

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, 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 as well as a range safety officer. I appear today in **OPPOSITION** to HB 991.

Current law, MD Code, Criminal Law, § 4-305 provides that a person may not “manufacture, sell, offer for sale, purchase, receive or transfer” a magazine with a capacity of more than 10 rounds of ammunition. SB 1062 would add a possessory offense to that list so as to provide that a person may not even **possess** such magazines. Under MD Code, Criminal Law, § 4-306, a violation would be punishable with up to three years in prison and a fine of \$5,000. Presumably, these punishments would be applicable to possession of each such magazine, so that every magazine is a separate offense. SB 1062 would also amend MD Code, Public Safety, § 5-133(c) to provide that a person may not possess a regulated firearm (a handgun) if the person was previously convicted of Section 5-133 subsection (b) (concerning possession by a disqualified person) or subsection (c) (concerning possession by a felon) or was convicted of a violation of Section 4-203 of the Criminal Law Article (concerning transport of a handgun).

The bill’s ban on the mere **possession** of magazines with the capacity to hold more than 10 rounds is rife with the risk of arbitrary and discriminatory enforcement and would convert into criminals many thousands of law-abiding citizens. The ban on the manufacture or sale of 10 round magazines did not become law until passage of the Firearms Safety Act of 2013. Prior to that time, state law banned the manufacture, sale or transfer of any magazine greater than 20 rounds. Most handguns come standard with magazines with a capacity in excess of 10 rounds. Thus, while the actual number is unknowable, there are probably hundreds of thousands if not millions of magazines with capacities in excess of 10 rounds in Maryland. All of these magazines were lawfully purchased under prior state law

that allowed the sale and transfer of magazines up to 20 rounds, or current law that allows the possession of magazines greater than 10 rounds. Yet, this bill would make it a separate crime to possess any one of these magazines. The bill would thus criminalize thousands of law-abiding citizens who purchased firearms any time prior to 2013 if these firearms came with standard magazines holding more than 10 rounds. Many if not most of these newly-minted criminals simply will be unaware of this new restriction on mere possession of a magazine that they have possessed for decades.

The ban on the mere possession of such magazines is also likely unconstitutional. Of course, in *Kolbe v. Hogan*, 849 F.3d 114(4<sup>th</sup> Cir. 2017) (en banc), cert. denied, 138 S.Ct. 469 (2017), the Fourth Circuit sustained the constitutionality of the current law that bans the **manufacture and sale** of such magazines in Maryland, the current law. The court, however, did not have before it any provision that banned the mere **possession** of magazines previously owned and possessed by law-abiding citizens. A ban on **possession** makes all the difference. For example, in *Duncan v. Becerra*, 265 F. Supp.3d 1106 (S.D. Calif. 2017), California had years earlier banned the manufacture and sale of such magazines, but then, recently, sought to ban the mere possession of such magazines, just as this bill would. The federal district court in *Duncan* enjoined the enforcement of this newly enacted ban on possession under both the Second Amendment and the Takings Clause of the Fifth Amendment to the Constitution. Applying the Second Amendment, the court stated that the ban “burdens the core of the Second Amendment by criminalizing the mere possession of these magazines that are commonly held by law-abiding citizens for defense of self, home, and state,” adding further that “[i]f this injunction does not issue, hundreds of thousands, if not millions, of otherwise law-abiding citizens will have an untenable choice: become an outlaw or dispossess one’s self of lawfully acquired property.” 265 F. Supp. 3d at 1139. This bill creates exactly the same “untenable choice” enjoined in *Duncan*.

Addressing next the Takings Clause, the *Duncan* court also ruled that “whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical dispossession of such lawfully-acquired private property without just compensation.” 265 F. Supp. 3d at 1138. That holding is directly applicable to the same takings that would be mandated by SB 1062. For the same reasons, such a seizure of private property is also violative of the Takings Clause of Article III, § 40, of the Maryland Constitution, which provides that “[t]he General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, **being first paid or tendered to the party entitled to such compensation.**” Property under this provision is defined as “every interest or estate which the law regards of sufficient value for judicial recognition.” *Dodds v. Shamer*, 339 Md. 540, 548, 663 A.2d 1318, 1322 (1995). Similarly, the word “property” in the Takings Clause of the federal Constitution means “the group of rights inhering in [a] citizen's relation to [a] ... thing, *as the right to possess, use and dispose of it.*” *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (emphasis added).

The Maryland Court of Appeals has thus held that the State's Taking Clause is violated "[w]henver 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 v. Baltimore County*, 384 Md. 373, 399, 863 A.2d 952, 967 (2004). And the Court has expressly applied this provision to the seizure of firearms. *Id.* at 968 ("the retention of the firearms would appear to be a taking by the County"). This bill, if it became law, would require the State to pay for every magazine that the bill makes illegal to possess. As detailed below, that will cost the State millions of dollars. A statute that "takes" private property without authorizing compensation is likely a violation of the Due Process Clause. See, e.g., *Stop the Beach Renourishment, Inc., v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 737 (2010) (Kennedy, J., concurring). Such a Takings Clause defense may also be raised during an enforcement action. *Horne v. Department of Agriculture*, 569 U.S. 513, 527 (2013) (*Horne* *ŉ*).

Moreover, the State, under Maryland's Constitution, does not have the right take first and pay later. Rather, the Constitution requires that the property be "first paid" or that the compensation be "tendered to the party entitled so such compensation." See, e.g., *Muskin v. State Dept. of Assessments and Taxation*, 422 Md. 544, 556, 30 A.3d 962, 969 (2011) ("Retrospective statutes that abrogate vested rights are unconstitutional generally in Maryland"). In this regard, Maryland's Constitution is stricter than the federal Constitution. *Id.* ("Maryland law may impose greater limitations (or extend greater protection than those prescribed by the United States Constitution's analog provisions."). The bill also contains no such payment authorization or appropriation. It has long been the rule that such takings by the General Assembly are unconstitutional without a "provision" for compensation "being first paid." *Steuart v. City of Baltimore*, 7 Md. 500 (1855). The State may not seize first and pay later.

It also bears emphasis that this newly created possession crime is "punishable" by imprisonment for more than 2 years. Under federal law, 18 U.S.C. § 922(g), and 18 U.S.C. § 921(a)(20), any conviction under Section 4-305, as amended by this bill, would result in a lifetime federal firearms disability, **regardless** of the actual punishment imposed in a particular case. Subsequent possession of a modern firearm or ammunition by a person subject to this firearms disability is a violation of 18 U.S.C. § 922(g), which is punishable by up to 10 years imprisonment under federal law. See 18 U.S.C. § 924(a)(2). A similar disability is imposed under Maryland law. See MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1).

This bill imposes no *mens rea* requirement. It does not matter under this bill that possession of the magazine was "knowing" or intentional. It does not matter that the owner did not know that possession of a magazine that he or she may have possessed for decades was made newly illegal. For example, it would criminalize an active duty serviceman who personally owns such magazines, but who is deployed abroad and simply is unaware of this law until his return home only to discover that handcuffs are waiting for him. Such are the injustices often associated with strict criminal liability laws. And that is why such crimes are highly 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). Compare *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”).

Moreover, since a violation of Section 4-305, as amended by this bill, would be a serious crime, one can reasonably expect that the State Police and local authorities would enforce this law vigorously, perhaps with SWAT raids on owners of pistols purchased in years past with standard capacity magazines in excess of 10 rounds. That is not an idle prospect. For decades, the State Police have kept records of every handgun transfer or purchase in Maryland, as required by law. See MD Code, Public Safety, § 5-123(d)(2), § 5-124. Since 2013, new residents of Maryland are required to register handguns brought into the State within 90 days of establishing residency, including registering the “make and model” of each handgun. MD Code, Public Safety, § 5-143. The State Police and local law enforcement are well aware of which handgun models that have historically come standard with magazines with capacities in excess of 10 rounds. It would be a simple matter to consult these records and investigate every such handgun purchase or registration. Law enforcement authorities could then arrest and prosecute each and every purchaser or registrant who had failed to comply with this new draconian law.

Similarly, it would be a simple matter to post officers at ranges to spy on the magazines being used and arrest gun owners who are unwittingly using such magazines. Given the thousands of gun owners affected by this bill, the State and localities will have to hire many officers and prosecutors for enforcement activities. The State and localities should also be prepared to build new prisons as the bill will criminalize and possibly result in the imprisonment of thousands of previously law-abiding gun owners. Thousands of families could be bankrupted and destroyed by such arrests and prosecutions. Such arrests could mean that security clearances would be revoked and jobs and potential employment opportunities would be lost. In effect, the bill amounts to a legal *jihad* against law-abiding gun owners throughout the State.

The Takings Clause compensation will likely run into to the millions of dollars. For example, the cost of a single 13-round magazine for the Browning Hi Power 9mm handgun is \$64.99. See <http://www.browning.com/products/shooting-accessories/magazines/9mm-hi-power-magazine.html>. That particular type of handgun that has been manufactured since 1925, and the design has been widely adopted and incorporated in other models of handguns produced by other manufacturers over the years. Every such Browning pistol, like most pistols, comes from the manufacturer with two such magazines and owners may and typically do purchase additional magazines over time. Thus, for every 100,000 such magazines, the Takings Clause compensation alone would cost the State of Maryland nearly \$6.5 million. In the *Kolbe* litigation, an expert witness estimated that there were approximately 750,000 such magazines in Maryland. Even at an average fair market value of a mere \$30, the cost to the State for banning all these magazines is \$22.5 million. The State would have to pay for all of them. See also *Fyock v. City of*

*Sunnyvale*, 25 F. Supp. 3d 1267, 1275 (N.D. Cal. 2014) (noting such magazines comprise “approximately 47 percent of all magazines owned” in California and number “in the tens-of-millions, even under the most conservative estimates” (internal quotation marks omitted)), *aff ’d*, 779 F.3d 991, 998 (9th Cir. 2015). Of course, as noted above, there would be additional costs associated with using the criminal justice system to investigate, arrest, prosecute and incarcerate the thousands of otherwise law-abiding citizens who inevitably would be ensnared by the traps set by this law.

The bill is poorly crafted and poorly thought out for still other reasons. For example, the bill adds Criminal Law Section 4-203, the handgun transport law, to Section 5-133(c) of the Public Safety Article, to provide that a person may not possess a regulated firearm after being convicted of a violation of Section 4-203. Section 5-133(c) makes such possession a felony and thus imposes severe criminal penalties of a minimum 5 years and up to 15 years imprisonment for such possession. Yet, Section 4-203(c) of the Criminal Law Article **already** has its own very specific, express penalties for illegal possession of a handgun, **including** enhanced penalties for subsequent violations of the same statute. Specifically, Section 4-203(c) provides that the first violation is a misdemeanor punishable by a fine and imprisonment for not less than 30 days and up to 3 years imprisonment and, upon a second violation, imprisonment for not less than 3 years and up to 10 years. More severe penalties are imposed for initial and repeat illegal possession on public school property or possession with the purpose of injuring another person. So, this bill punishes exactly the same conduct twice: once for repeated offenses under Section 4-203, and once again, even more severely, for repeated violations of Section 4-203 under Section 5-133(c). That makes no sense and will create Double Jeopardy constitutional issues under the Doctrine of Merger. See *Moore v. State*, 198 Md.App. 655, 684, 18 A.3d 981 (2011).

Finally, the bill is also circular, as it amends Section 5-133(c) of the Public Safety Article to make it an additional crime to violate Section 5-133(c) of the Public Safety Article. That is legal nonsense. The point of Section 5-133(c) is to create a possession bar and criminal sanctions for possession after a person has been convicted of **other** crimes. A circular law that creates a possession offense and enhanced penalties for violations of **itself** is so arbitrary and so irrational that it is a violation of the Due Process Clause. See, e.g., *St. Helen v. Senkowski*, 374 F.3d 181, 182 (2d Cir. 2004) (“the due process clause of the Federal Constitution is offended because selective enforcement and arbitrary and irrational jury verdicts result”). We urge an unfavorable report.

Sincerely,



Mark W. Pennak  
President, Maryland Shall Issue, Inc.  
1332 Cape St. Claire Rd #342  
Annapolis, MD 21409  
mpennak@marylandshallissue.org