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MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 25, 2019

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 612

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 in opposition to HB 612.

Current law, the Statutory Scheme and HBARs:

Under current law, MD Code, Public Safety, § 5-101(r)(2) contains a long list of firearms which the statute defines as a "regulated firearm" That list includes, at Section 5-101(r)(2)(xv) a "Colt AR–15, CAR–15, and all imitations **except** Colt AR–15 Sporter H–BAR rifle." (Emphasis added). The term "HBAR" means that the rifle is equipped with a heavy barrel. A heavy barrel adds a lot of weight to the rifle but a rifle thus equipped is more accurate than a rifle with a normal barrel because a heavy barrel heats up much more slowly than a normal barrel. Heat is the number one enemy of accuracy. A heavy barrel is thus significantly more accurate. Such HBAR rifles are typically quite expensive and are used extensively in competitions where high quality, reliability and accuracy are essential. For example, LWRC, a company located in Easton, Maryland, manufactures heavy barrel rifles of this type. Its basic model costs approximately $2,000.00. Similarly, Adcor Defense, a company based in the Highlandtown area of Baltimore, manufactures these sorts of rifles. Their base HBAR model is also $2,000.00. The original exception for HBARs thus recognized that HBARs were a special class of firearm, uniquely necessary for firearms competition. From the beginning, HBAR rifles were exempted from regulation as "regulated firearms" when that category was first established in 1996 with enactment of Maryland Gun Violence Act of 1996 (SB 215). HBARs have thus **always been treated differently under Maryland law and for good reasons.**

In 2013, with the enactment of SB 281, the Firearms Safety Act of 2013, Maryland used the same list of "regulated firearms" established in 1996 and set forth in Section 5-101(r)(2) to define all of the guns there listed as "assault long guns." See MD Code, Criminal Law, § 4-301(b) ("'Assault long gun' means any assault weapon listed under § 5-101(r)(2) of the Public Safety Article"). That definition of "assault long gun" was then referenced in MD Code, Criminal Law, § 4-301(d)(1) to define the term "assault weapon" as including an "an assault

long gun." MD Code, Criminal Law, § 4-303(a) then was amended to impose a complete ban on "assault weapons" (include thus defined assault long guns), providing that a person "may not (1) transport an assault weapon into the State; or (2) possess, sell, offer to sell, transfer, purchase, or receive an assault weapon." However, in recognition of the long-standing unique status of HBARs, SB 281 did not alter the exemption for HBARs and these guns were not banned.

Section 4-303, as amended by SB 281, also contained a "grandfather clause" for **all** assault long guns that were possessed before October 1, 2013 (the effective date of SB 281), providing that "[a] person who lawfully possessed, has a purchase order for, or completed an application to purchase an assault long gun . . . before October 1, 2013, may: (i) possess and transport the assault long gun …." Thus every gun set forth in that long list in Section 5-101(r)(2) remained legal to possess, use and transport if it was possessed before Oct. 1, 2013. HBARs were unaffected by this grandfather clause because they were never "regulated firearms" to begin with as they were expressly omitted from that list because of the exception for the "Colt AR–15 Sporter H–BAR rifle." Thus, before and after the enactment SB 281, HBARs could be legally purchased, subject to a full background check at the time of purchase from an FFL through use of the FBI's NICS instant background check system, just like any other long gun purchase from a dealer.

This Bill:

This bill would abolish HBAR's unique status by flatly banning them simply by amending the Section 5-101(r)(2) list to strike out the exception for HBARs. As a matter of law, that would mean that all HBARs would now be included within Section 5-101(r)(2), for "Colt AR–15, CAR–15, and all imitations." HBARs would suddenly become defined as "assault long guns" under Section 4-301(b) and banned under Section 4-303(a). Any HBAR purchased after the October 1, 2013 effective date of the Firearm Safety Act of 2013, would be banned under Section 4-303. And any person who purchased such a HBAR after October 1, 2013 and continued to possess that lawfully purchased and owned HBAR after the effective date of this bill would violate that ban. The penalty for a violation of Section 4-303 is "imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both" under MD Code, Criminal Law, § 4-306(a). That penalty is sufficient to create a lifetime, permanent firearms disability under federal law, 18 U.S.C. § 922(g), and 18 U.S.C. § 921(a)(20), and under State law, MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1). This bill would thus severely **criminalize** thousands of individuals who relied on existing Maryland law to lawfully purchase HBARs after October 1, 2013. That is utterly unfair.

Indeed, unlike SB 281 in 2013, this bill does **NOT** contain a grandfather clause. As noted, persons who actually did possess "assault long guns" before the Oct. 1, 2013 effective date of SB 281, were permitted to keep them after that date and are allowed to use and transport these guns throughout Maryland to this day. However, in the absence of a grandfather clause in this bill, HBARs which were legally purchased after Oct. 1, 2013, are now completely banned under Section 4-303. In essence, HBARs go from being exempted to being banned without even a grandfather clause.

The Bill Is Grossly Unfair to HBAR Owners As Well As Unconstitutional:

Before and since the "regulated firearms" category was first created in 1996, persons have been freely able to legally purchase and use HBARs as regular long guns. Individuals continued to purchase these HBARs after SB 281 was enacted in 2013, in complete reliance on this long-standing exemption. Again, every such purchase was fully subject to a NICS background check. As noted, these guns are very expensive and are used very heavily in numerous firearms competitions that take place in Maryland and all over the United States. A partial list of such competitions in Maryland is attached. If this bill should become law, those competitions would quite likely cease in Maryland. Maryland residents would be banned from possessing any HBAR and thus could not compete in these sorts of competitions outside of Maryland as well. This bill would thus effectively eliminate these sporting events in Maryland and for Marylanders by criminalizing possession. There is no justification for killing these sports.

The bill would also result in the loss of very valuable personal property, as Maryland residents who own these HBARs would be forced to give up possession. That forced dispossession of valuable property is a Taking under the Fifth Amendment of the Constitution and under Article 40 of the Maryland Constitution. The Supreme Court has definitively held that the Fifth Amendment applies no less to personal property than it does to real property. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015). The Supreme Court has also held that such a regulatory Taking cannot be justified under the State's police power. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) (noting "the 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."). See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982) ("[w]e conclude that a permanent physical occupation authorized by government is a taking *without regard to the public interests* that it may serve."). (Emphasis added). These cases were applied in *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), *affirmed,* 742 Fed.Appx. 218, 222 (9th Cir. 2018), to enjoin a ban on possession of magazines.

Maryland's highest court, the Court of Appeals, has likewise held that personal property is protected under the Maryland Constitution. In *Serio v. Baltimore County*, 384 Md. 373, 399, 863 A.2d 952, 967 (2004), the Court of Appeals ruled that the State'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." Banning possession indisputably deprives the owner of "beneficial use of his property." The property at issue in *Serio* were firearms owned by a convicted felon and the Court held that the State violated the State Takings Clause in depriving him of the value of this personal property. All these issues are currently being briefed before the Fourth Circuit in *MSI v. Hogan*, No. 18-2474 (4th Cir.). If this bill effects a Taking, then the statute may be enjoined until compensation is paid. *Department of Natural Resources v. Welsh*, 308 Md. 54, 65 (1986). Given the number and value of HBARs that have been purchased since 2013, that level of compensation will likely be quite substantial.

These Takings principles and basic fairness strongly counsel this bill should, at the very least, contain a grandfather clause allowing existing owners to retain the right to possess and transport their existing HBARs, just as the grandfather clause in SB 281 allowed for continued possession of existing "assault long guns" newly banned by that legislation. That would, at least, provide some parity with owners of regulated firearms that were banned in

2013. More fundamentally, there no more reason now to ban HBARs than there was in 1996 or in 2013. HBARs are quite unique and expensive. Their owners are typically avid competitors in events in which the need for accuracy is paramount. There is simply no earthly reason to effectively ban these competitions in Maryland or to prohibit Marylanders from competing with their HBARs in other states. Indeed, this ban would likely have adverse effects on at least two Maryland businesses, LWRC and Adcor, which produce these rifles in Maryland. Tellingly, Beretta used to produce regulated firearms in Maryland, but because of the enactment of SB 281 in 2013, it moved its entire manufacturing operations, including all that associated employment, out of Maryland to Tennessee. All those highly paid and skilled jobs were thus lost to Tennessee. See https://money.cnn.com/2015/12/17/news/companies/beretta-guns-factory-tennessee-maryland/index.html. These adverse effects would also be felt by dealers.

HBARs are also not used in crime. According to the latest data from the FBI (attached), in Maryland, there were 475 murders in 2017. Of those 475 murders, **5** (1%) were committed with rifles (of all types) and **3** (0.6%) were committed with shotguns. By way of comparison, knives were used in **44** murders and hands and feet were used in **11** murders. **Fifty** (50) murders were committed in Maryland in 2017 using "other weapons," such as blunt objects. In short, murders using long guns are not only exceedingly rare, they are the **least** used weapon for such crimes. Certainly, the criminals committing the violent crime in Baltimore and elsewhere in Maryland are not using $2,000 HBARs. In fact, we know of no violent crime in Maryland that has ever been committed with an HBAR rifle. This State would arguably save more lives by a ban on knives, which, after all, were used more than 6 times more often than all long guns put together to commit murder in Maryland.

Finally, while the Fourth Circuit might feel differently, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), we firmly remain of the belief that these sorts of rifles are protected by the Second Amendment under the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010), and thus may not be banned. That issue is continuing to be litigated in other cases across the country and may well reach the Supreme Court. Indeed, the scope of the Second Amendment will be addressed in *NYSRPA v. NYC*, No. 18-280, *cert. granted*, 2019 WL 271961 (S.Ct. Jan 22, 2019), a New York City case involving transport outside the home. The Supreme Court **has already agreed to hear that case**. A decision in that case will likely address the appropriate "standard of review" to be utilized in assessing the constitutionality of state gun control laws, including bans such as mandated by this bill. It is widely understood that the Supreme Court took the case in order to reverse the Second Circuit's decision sustaining NYC's law. A Takings claim may also be viable. The State is on notice that we may well chose to pursue such litigation, especially after a decision by the Supreme Court.

Sincerely,

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