President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 441 AND HB 468

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 468 and SB 441.

These bills would amend Md Code Criminal Law § 4-104. Specifically, current law provides that "[a] person may not store or leave a loaded firearm in a location where the person knew or should have known that an unsupervised child would gain access to the firearm" and makes any violation punishable by up to one year in prison and a $1,000 fine. A child is defined for these purposes as a person "under the age of 16 years." This bill would change the definition of a child to a person under the age of **18** years and modifies the prohibition to provide that a "person may not store or leave a loaded **OR UNLOADED** firearm in a location where the person knew or should have known that an unsupervised child **COULD** gain access to the firearm, **UNLESS THE FIREARM IS LOCKED**." It also changes the punishment from 1 year in prison to **2** years in prison.

These bills change Section 4-104 from a reasonable safe storage measure into a truly draconian and vague law that would severely punish otherwise innocent conduct. It now will severely punish any storage that "**could**" result in access to the firearm, not "would." That is a radical change because it would literally require prescience for owner to know what a child, any child, under the age of 18 reasonably "could" do. And it is vastly overbroad. Under this "could" standard, the mere **possibility** of access would be sufficient, as long as it was reasonable to believe **any** child under 18 "could" **ever** gain access. That's absurd. At the very least, the use of "could" makes this bill hopelessly vague and thus a violation of the Due Process Clause. A penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that

does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). These bills fail that test.

Such criminalization of home possession of a firearm is also unconstitutional under in *District of Columbia v. Heller,* 554 U.S. 570 (2008). In that case, the Supreme Court struck down as unconstitutional DC's safe storage law that required a firearm to be "disassembled or bound by a trigger lock at all times." (Id. at 628). The Court held this requirement unconstitutionally burdened the right to self-defense in the home because "[t]his makes it impossible for citizens to use them [firearms] for the core lawful purpose of self-defense." (Id. at 630). These bills suffer from the same flaw in demanding that the firearm be locked up if a child (any child) "could" gain access. For example, in *Jackson v. San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*. 135 S.Ct. 2799 (2015), the Ninth Circuit sustained a safe storage law that exempted from its coverage a "handgun is carried on the person of an individual over the age of 18." These bills make no such exemption. The Supreme Court denied review of the Ninth Circuit's decision over the vigorous dissent of Justice Thomas and Justice Scalia, who opined that even that law was contrary to *Heller*. Id. 135 S.Ct. at 2800-02. The Ninth Circuit's decision is indeed an outlier. No other circuit has allowed such a law and such strict laws are virtually unknown. And yet, these bills would not even pass muster under *Jackson*. In sum, in changing "would" to "could," this bill effectively demands that the firearm be locked up "at all times" and that is blatantly unconstitutional under *Heller*.

Not only that, the bills would change the focus of existing law on a "loaded" gun into a ban on access to **both** a loaded **and an unloaded** gun. A prohibition on access to a loaded gun makes sense, as an untrained child might well accidently discharge a loaded gun. But to authorize a 2 year jail sentence for access to an **unloaded** gun makes no sense at all. An unloaded gun is no more dangerous than a brick and far **less** dangerous than a knife or a baseball bat or dozens of other household items. This is also the constitutional line drawn in *Heller*, where the Court stated that its ruling invalidating the DC law did not suggest "the invalidity of laws regulating the storage of firearms to prevent accidents." (554 U.S. at 632). There is no risk of an "accident" with an unloaded gun. The requirement that an **unloaded** gun be locked up is thus unconstitutional overreach under *Heller*. Indeed, what's next? Bans on unsupervised access to kitchen knives with a 2-year imprisonment? We urge an unfavorable report.

Sincerely,

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