



President  
Mark W. Pennak

February 8, 2022

**WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT,  
MARYLAND SHALL ISSUE,  
AS INFORMATION WITH RESPECT TO SB 286**

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 and the Bar of Maryland. I 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 outside the home and muzzle loading. I appear today as President of MSI to provide information with respect to SB 286.

Senate Bill 286 provides that “a person may not be denied the right to purchase, possess, or carry a firearm under this title solely on the basis that the person” is authorized to use medical cannabis under title 13, subtitle 33 of the Health – General Article of Maryland law. Like similar bills in the past, MSI takes no position with respect to the merits of these bills. However, as before, we do wish to point out some legal realities for purposes of informing the debate on these bills.

With the recent changes in Maryland law concerning medical marijuana, see MD Code, Health - General, § 13-3304 et seq., and the push to legalize the use of marijuana in Maryland, a recurring issue is how such marijuana use would affect Second Amendment rights. The short answer is that such use effectively abrogates those rights by (1) barring a Federal Firearms Licensee (“FFL”) from selling a firearm to such a user and (2), by making such a user a prohibited person under federal law.

1. As to FFLs, the pertinent statutory provision under federal law is 18 U.S.C. 922(d)(3), which provides:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

\* \* \*

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

The ATF has issued a bulletin to all Federal Firearms Licensees that advises FFLs that “if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance.” See Open Letter to All Federal Firearms Licensees, Sept. 21, 2011, available at [www.atf.gov/file/60211/download](http://www.atf.gov/file/60211/download). That means that the FFL (or any other person with such knowledge) is prohibited from selling a firearm to such a person with a medical marijuana card. This ATF prohibition has been sustained in federal court. *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 1396 (2017).

Moreover, the latest version of Federal Form 4473 (attached hereto in relevant part) continues to expressly ask if the purchaser is “an unlawful user of . . . any controlled substance” and states in bold type: **“Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.”** A false statement or answer on Form 4473 is federal felony under 18 U.S.C. 922(a)(6) (barring material misrepresentations “in connection with the acquisition” of a firearm). See *Abramski v. United States*, 134 S.Ct. 2259 (2014). A violation of Section 922(a)(6) is punishable by up to 10 years in prison. See 18 U.S.C. 924(a)(2).

2. As to becoming a disqualified person, under federal law, **a user of marijuana is a disqualified person** under 18 U.S.C. 922(g)(3) which states:

(g) It shall be unlawful for any person--

\* \* \*

(3) who is *an unlawful user* of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” (Emphasis added).

A violation of Section 922(d)(3) or Section 922(g)(3) is a federal felony, punishable with up to 10 years in prison. See 18 U.S.C. 924(a)(2). Both of these provisions define the term “unlawful user” by reference to the Controlled Substances Act, a federal law. A “controlled substance” under federal law specifically includes marijuana as marijuana is expressly classified as a Schedule I controlled substance under the Controlled Substances Act, 21 U.S.C. § 812(c). See also ATF regulations 27 C.F.R. § 478.11. **Any** use of marijuana makes a person an “unlawful user” under that federal law. **Period.** Under the Supremacy Clause of the Constitution, Article VI, Clause 2, the federal law provisions cannot be abrogated by State law. And they cannot be simply ignored, if only because every purchaser of a firearm from a FFL must fill out ATF Form 4473. As noted above, a false statement in filling out that form is a felony.

These realities imposed by federal law are noted by the Maryland Medical Cannabis Commission. In its FAQ on its website, the Commission states:

Federal law bars medical cannabis patients from purchasing or possessing firearms. The Federal Gun Control Act, 18 U.S.C. § 922(g)(3), prohibits any person who is an ‘unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)’ from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law.

Medical cannabis patient information contained in Maryland’s patient registry is considered confidential, protected health information and held in compliance with federal HIPAA regulations by the Maryland Medical Cannabis Commission. However, the Maryland State Police query individuals who seek to purchase a gun about their status as a medical cannabis patient and bar those who disclose that they are medical cannabis patients from making the transaction. Individuals who provide false information by failing to disclose that they are a medical cannabis patient when purchasing a firearm are in violation of federal statute, punishable by up to 10 years in prison and a fine of as much as \$250,000.“

[https://mmcc.maryland.gov/Pages/patients\\_faq.aspx](https://mmcc.maryland.gov/Pages/patients_faq.aspx).

Indeed, while the medical marijuana law of Maryland permits the use of marijuana under the circumstances specified in that law, the mere possession of marijuana in Maryland remains otherwise illegal in any other circumstance under State law. See *Robinson v. State*, 451 Md. 94 (2017). That is so even though possession of small amounts of marijuana has also been decriminalized in Maryland. See *Robinson*, 451 Md. at 98 (sustaining a search of a vehicle based on the odor of marijuana, noting that “decriminalization is not synonymous with legalization, and possession of marijuana remains unlawful.”). The Maryland Court of Appeals has also held that “the mere odor of marijuana emanating from a person, without more, does not provide the police with probable cause to support an arrest.” *Lewis v. State*, 470 Md. 1, 27 (2020). However, in *Pacheco v. State*, 465 Md. 311 (2019), the same court reaffirmed that the odor of marijuana **was** sufficient probable cause to justify a search of **a vehicle**, even though it was **not** probable cause to believe that an individual possessed a criminal amount of marijuana. See also *In re D.D.* 250 Md. App. 284 295 (2021) (“the odor of marijuana, by itself, does not provide reasonable suspicion to conduct an investigatory stop”).

Moreover, in *United States v. Parker*, 2021 WL 211304 at \*12 (D. Md. Jan. 21, 2021), the Maryland federal district court held that “notwithstanding Maryland’s decriminalization of possession of small quantities of marijuana, federal law continues to render it illegal to possess marijuana.” The *Parker* court thus opined that the odor of marijuana was sufficient probable cause or articulable suspicion to support a search of a person. This line of federal cases make clear that a medical marijuana user continues to face the risk of a search and possible arrest even though possession of medical marijuana may be perfectly legal under State law. Federal courts are not bound by State court decisions. See also *United States v. Castillo Palacio*, 427 F. Supp. 3d 662, 672 (D. Md. 2019) (upholding vehicle search

based on odor of marijuana, despite the fact that personal possession of a small quantity is a civil offense in Maryland, because possession of marijuana is still a federal crime). Any firearm discovered during an otherwise lawful search may be used as evidence supporting a charge that medical marijuana user violated federal firearms law.

It is important to note that for years Congress has adopted an appropriations rider that prohibits the Department of Justice from spending funds to “prevent” the “implementation” of State medical marijuana laws. See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (also known as the Rohrabacher–Blumenauer amendment). *McIntosh v. United States*, 833 F.3d 1163 (9<sup>th</sup> Cir. 2016). That amendment has been continuously reenacted since then as an appropriations rider. The amendment has been recently renewed and is effective until February 18, 2022, with the enactment of a stopgap funding bill in December of 2021 by Congress. As it is only an appropriation provision that prohibits the expenditure of the appropriated funds for these enforcement purposes, the prohibition must be renewed to remain effective. The underlying conduct (possession of marijuana) remains a federal crime.

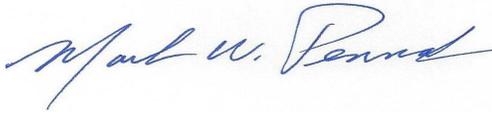
It is important to note that the enforcement bar imposed the Rohrabacher–Blumenauer amendment only extends to the expenditure of funds for prosecutions that “prevent” the “implementation” of medical marijuana laws. See *United States v. Nixon*, 839 F.3d 885 (9<sup>th</sup> Cir. 2016) (holding that the appropriations rider does not impact the ability of a federal district court to restrict a defendant’s use of medical marijuana as a condition of probation). It does not address enforcement of federal **gun** laws, such as 18 U.S.C. §922, or ATF regulation of FFLs. See *United States v. Bellamy*, 682 Fed. Appx. 447 (6<sup>th</sup> Cir. 2017) (sustaining a felon-in-possession conviction under 18 U.S.C. § 922(g)(3) for possession of a gun while being a user of medical marijuana); *Parker*, 2021 W. 211304 at \*13 (in a unlawful possession of a firearms case, court sustained a search and resulting seizure of a firearm based on the order of marijuana); Kenneth Seligson, *A Job for Congress: Medical Marijuana Patients’ Fight for Second Amendment Rights*, 48 Golden Gate U. L. Rev. 63, 77 (2018) (“[U]ntil medical marijuana patients are deemed law-abiding under federal law, or an exception is created, their Second Amendment challenges will always fail. Because the courts cannot provide an appropriate remedy due to the Supremacy Clause, Congress or the executive branch are the proper institutions to protect medical marijuana patients’ Second Amendment rights.”).

Enforcement of such federal gun laws does not “prevent” the “implementation” of medical marijuana laws; it simply means that medical marijuana users may not possess or purchase firearms. See *McIntosh*, 833 F.3d at 1178 (the rider “prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana”). Congress could restore funding tomorrow (or the appropriation rider could lapse) and the government could then prosecute individuals who committed offenses while the government lacked funding. See *McIntosh*, 833 F.3d at 1179 n.5. The federal government can prosecute such offenses

for up to five years after they occur. See 18 U.S.C. § 3282. This bill does not and cannot protect a medical marijuana user from such outcomes.

The question the Committee should ask itself is whether passage of this bill might mislead medical marijuana users into thinking that they may use and possess medical marijuana without any fear of a search or fear of losing their gun rights. Under federal law, that is not an assurance that the State is in a position to accord. For example, on a practical level, this bill, if enacted into law, could easily fool someone into expending time and resources to acquire a handgun qualification license (“HQL”) from the State Police only to find that all that time and money was wasted when the dealer refuses to complete the sale because the person cannot honestly complete ATF Form 4473. That has actually happened. The HQL would be useless to such a person, regardless of the changes that would be made to Maryland law under these bills.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Mark W. Pennak  
President, Maryland Shall Issue, Inc.  
[mpennak@marylandshallissue.org](mailto:mpennak@marylandshallissue.org)

# Firearms Transaction Record

**WARNING:** The information you provide will be used to determine whether you are prohibited by Federal or State law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine. Any person who exports a firearm without a proper authorization from either the Department of Commerce or the Department of State, as applicable, is subject to a fine of not more than \$1,000,000 and up to 20 years imprisonment.

Transferor's/Seller's  
Transaction Serial  
Number (if any)

**Read the Notices, Instructions, and Definitions on this form.** Prepare in original only at the licensed premises (including business temporarily conducted from a qualifying gun show or event in the same State in which the premises is located) unless the transaction qualifies under 18 U.S.C. 922(c). **All entries must be handwritten in ink unless completed under ATF Rul. 2016-2. PLEASE PRINT.**

**Section A - Must Be Completed By Transferor/Seller Before Transferee/Buyer Completes Section B**

1. Manufacturer and Importer (if any) (If the manufacturer and importer are different, include both.)	2. Model (if designated)	3. Serial Number	4. Type	5. Caliber or Gauge
1.				
2.				
3.				

6. Total Number of Firearms to be Transferred (Please spell total number e.g., one, two, etc. Do not use numerals.)

7. Check if any part of this transaction is a pawn redemption.   
Record Line Number(s) From Question 1:

8. Check if this transaction is to facilitate a private party transfer.

**Section B - Must Be Completed Personally By Transferee/Buyer**

9. Transferee's/Buyer's Full Name (If legal name contains an initial only, record the initial followed by "IO" in quotes. If no middle initial or name, record "NMN").

Last Name (including suffix, e.g., Jr, Sr, II, III)      First Name      Middle Name

10. Current State of Residence and Address (U.S. postal abbreviations are acceptable. Cannot be a post office box.)

Number and Street Address      City      State      ZIP Code      County/Parish/Borough

11. Place of Birth

U.S. City and State      -OR-      Foreign Country

12. Height      13. Weight      14. Sex      15. Birth Date

Ft. \_\_\_\_\_      (lbs.)       Male      Month      Day      Year

In. \_\_\_\_\_       Female       Non-Binary

16. Social Security Number (optional, but will help prevent misidentification)

17. Unique Personal Identification Number (UPIN) or Appeals Management Database Identification (AMD ID) (if applicable)

18.a. Ethnicity      18.b. Race (Select one or more race in 18.b. Both 18.a. and 18.b. must be answered.)

Hispanic or Latino       American Indian or Alaska Native       Black or African American       White

Not Hispanic or Latino       Asian       Native Hawaiian or Other Pacific Islander

19. Country of Citizenship: (Check/List more than one, if applicable. Nationals of the United States may check U.S.A.)

United States of America (U.S.A.)       Other Country/Countries (Specify):

20. If you are an alien, record your U.S.-issued alien or admission number (AR#, USCIS#, or I94#):

21. Answer the following questions by checking or marking either the "yes" or "no" box to the right of the questions:

	Yes	No
a. Are you the actual transferee/buyer of the firearm(s) listed on this form and any continuation sheet(s) (ATF Form 5300.9A)? <b>Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you. Exception: If you are only picking up a repaired firearm(s) for another person, you are not required to answer 21.a. and may proceed to question 21.b.</b>	<input type="checkbox"/>	<input type="checkbox"/>
b. Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year, or are you a current member of the military who has been charged with violation(s) of the Uniform Code of Military Justice and whose charge(s) have been referred to a general court-martial?	<input type="checkbox"/>	<input type="checkbox"/>
c. Have you ever been convicted in any court, including a military court, of a felony, or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation?	<input type="checkbox"/>	<input type="checkbox"/>
d. Are you a fugitive from justice?	<input type="checkbox"/>	<input type="checkbox"/>
e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance? <b>Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.</b>	<input type="checkbox"/>	<input type="checkbox"/>