

**2023-02-01 HB 259 (Support).pdf**

Uploaded by: Anthony Brown

Position: FAV

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February 1, 2023

**TO:** The Honorable Luke Clippinger  
Chair, Judiciary Committee

**FROM:** Anthony G. Brown  
Attorney General

**RE:** HB 259 – Civil Actions – Public Nuisances – Firearm Industry Members  
(Gun Industry Accountability Act of 2023) (**Support**)

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I write to express my support for enhanced gun safety and look forward to working with Delegates Atterbeary and Rosenberg to that end.

If enacted, House Bill 259 would permit the Attorney General to bring a public nuisance action against gun manufacturers, distributors, marketers, and retailers who contribute to dangerous conditions by failing to implement reasonable controls in preventing the sale of firearms to straw purchasers, firearm traffickers, individuals prohibited from possessing firearms, or individuals the firearm industry member has reasonable cause to believe intends to use it for a crime or to cause harm to himself or another. The bill would also permit private citizens to bring suits for injury or loss sustained as a result of a failure to implement those reasonable controls. Put simply, HB 259 will allow the Office of the Attorney General to defend against improper practices within the firearms industry that threaten the lives and well-being of Maryland residents.

Maryland has the tenth highest gun homicide and assault rate in the United States.<sup>1</sup> Each year, gun violence in Maryland causes approximately 474 deaths and 551 injuries.<sup>2</sup> This is far too many. To address this issue, the State must target illegal practices within the gun pipeline. For example, under an analog New York statute, New York City has successfully negotiated

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<sup>1</sup> THE JOHNS HOPKINS CENTER FOR GUN VIOLENCE SOLUTIONS, *A Year in Review: 2020 Gun Deaths in the U.S.* (Apr. 28, 2022) (available at <https://publichealth.jhu.edu/sites/default/files/2022-05/2020-gun-deaths-in-the-us-4-28-2022-b.pdf>).

<sup>2</sup> EVERYTOWN FOR GUN SAFETY, *Gun Violence in Maryland* (July 2022) (available at <https://everystat.org/wp-content/uploads/2019/10/Gun-Violence-in-Maryland-1.pdf>).

agreements with four firearm companies, and obtained a preliminary injunction against a fifth, to stop the illegal sale of ghost guns within the city.<sup>3</sup>

A federal district court recently upheld this New York statute under an exception within the Protection or Lawful Commerce in Arms Act,<sup>4</sup> which permits “an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought[.]”<sup>5</sup> The federal district court found that federal law does not preclude the application of state statutes specific to the gun industry.<sup>6</sup> Similarly, HB259 does not interfere with the keeping and bearing of arms by individuals;<sup>7</sup> instead, it follows the historical tradition of allowing civil actions against those who create a public nuisance through the general conduct of their businesses.<sup>8</sup>

In taking office as the Attorney General, I announced public safety as one of my top priorities. Maryland residents deserve to feel safe in their homes, in their places of worship and work, and in their communities. I look forward to working with Delegate Atterbeary, Delegate Rosenberg, and the General Assembly on legislation that furthers this goal.

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<sup>3</sup> CITY OF NEW YORK OFFICE OF THE MAYOR, *New York City Supports New York State in Fight Against Gun Violence* (Jan. 18, 2023), <https://www.nyc.gov/office-of-the-mayor/news/039-23/new-york-city-supports-new-york-state-fight-against-gun-violence>.

<sup>4</sup> 15 U.S.C. §§ 7901-7903

<sup>5</sup> *Id.* § 7903(5)(A)(iii).

<sup>6</sup> *See* National Shooting Sports Found. v. James, 2022 WL 1659192, \*2-5 (N.D.N.Y. May 25, 2022).

<sup>7</sup> *See* District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) (preserving “laws imposing conditions and qualifications on the commercial sale of arms”).

<sup>8</sup> *See* United States v. Tilotta, 2022 WL 3924282, at \*5–6 (S.D. Cal. Aug. 30, 2022) (holding that Second Amendment’s plain text does not protect “commercial sale and transfer of firearms”).

# **HB0259 Gun Industry Accountability Act of 2023.pdf**

Uploaded by: Cecilia Plante

Position: FAV



## TESTIMONY FOR HB0259

### Civil Actions - Public Nuisances - Firearm Industry Members (Gun Industry Accountability Act of 2023)

**Bill Sponsor:** Delegate Atterbeary

**Committee:** Judiciary

**Organization Submitting:** Maryland Legislative Coalition

**Person Submitting:** Cecilia Plante, co-chair

**Position:** FAVORABLE

I am submitting this testimony in favor of HB0259 on behalf of the Maryland Legislative Coalition. The Maryland Legislative Coalition is an association of individuals and grassroots groups with members in every district in the state with well over 30,000 members.

Our members believe firmly in common sense gun legislation, as do most gun owners and the majority of residents in Maryland. We have a lot of solid, common-sense laws on the books, but like many states, continue to see deaths from random shootings by people who should never, ever have been able to purchase a gun.

This legislation should be re-named to the "About Time Gun Owners Were Required to Act Responsibly Act of 2023". This legislation does not make the job of gun owners more difficult. It instead makes them act responsibly, by not putting profits over lives. It allows the Attorney General, or an individual to sue them for negligence under the public nuisance statute.

Our members think this legislation is well overdue and should be passed as quickly as possible. We support this bill and recommend a **FAVORABLE** report in committee.

# **HB 259\_FAV\_Giffords.pdf**

Uploaded by: Elly Cowan

Position: FAV

**To: The House Judiciary Committee**  
**Date: January 30, 2023**  
**Submitted by: David Pucino**  
**Deputy Chief Counsel**  
**Giffords Law Center to Prevent Gun Violence**

## **TESTIMONY IN SUPPORT OF HB 259**

Chair Clippinger, Vice Chair Moon, and Members of the Judiciary Committee: thank you for the opportunity to testify in support of HB 259, the Gun Industry Accountability Act of 2023.

In nearly every industry, civil liability serves as an important check on irresponsible behavior. Companies that manufacture and sell products are held responsible for the consequences that follow from the intended use of their products. But the ordinary principles of civil liability do not apply to the gun industry. For too long, companies that manufacture, import, market, and sell firearms have hidden behind a federal statute that exempts them from normal liability under the common law. Armed with these exceptional protections, the industry has acted with impunity, flooding the streets with weapons secure in the assumption that it will be able to duck any lawsuit brought by the victims of its irresponsible practices. And survivors and the families of the victims of gun violence have been denied their day in court.

The Gun Industry Accountability Act would provide the victims of gun violence with an avenue to seek justice against the gun industry, reopening the courtroom doors for victims who have suffered as a direct result of industry's sale, manufacturing, importing, and marketing practices.

### **Background**

Traditional legal principles provide that the law should compensate injured parties for wrongful conduct, place the burden of that compensation on the responsible party, and serve as a deterrent to prevent future harms. These principles apply generally to the consumer market, compensating those who are hurt, holding accountable those who are responsible, and creating an incentive structure that promotes consumer safety. The possibility of civil liability provides critical monetary incentives for industries to take affirmative steps to ensure the safety and safe use of their products—to internalize the “costs of doing business” so that it is the business, rather than the public, that pays. The law of civil liability thus stands as a pillar of consumer safety and injury prevention.

But these principles do not apply to the gun industry. Faced with a number of victims who came to court demanding that it bear the costs of its deadly business, in 2005 the gun industry successfully lobbied Congress to pass the Protection of Lawful Commerce in Arms Act (“PLCAA”). PLCAA prohibits courts from hearing proceedings for civil claims that “result from the criminal or lawful misuse” of firearms or ammunition. It thus provides the gun industry with

an exemption from the longstanding system of accountability, applicable to any number of other businesses, that stands at the base of our legal system.

PLCAA has been remarkably successful at shielding the gun industry from lawsuits that would otherwise have proceeded, stripping courts of jurisdiction and shutting the door on litigant after litigant in its first decade and a half of existence.

But PLCAA is not absolute: the statutory text includes six limited and enumerated exceptions. One of these exceptions applies to “[a]n action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.” This provision, which is often referred to as the “predicate exception,” keeps the door open to lawsuits that involve violations of statutes that apply to the sale or marketing of firearms.

## **Restoring Accountability**

The Gun Industry Accountability Act would provide a statutory grounding for gun industry accountability, reopening the court doors that the industry has so far kept shut, by prohibiting specific dangerous conduct.

It would prohibit industry actors from endangering public health and safety through unlawful or unreasonable conduct. It would also require industry actors to “establish and implement reasonable controls” with respect to their manufacturing, distribution, and sale practices.

In the event that bad actors in the gun industry fail to take these basic steps, which any responsible actor in any industry would follow, the Act would properly acknowledge that such failures constitute a public nuisance that endangers the public. The law would allow for those who suffer harm as a result—whether that is the individuals who have been the direct victims, or the Attorney General acting on behalf of the People—to have their day in court.

The Gun Industry Accountability Act would thus restore accountability to an industry that has for too long acted with an impunity acquired at the expense of public health and safety. Giffords urges a favorable report on HB 259.

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### **ABOUT GIFFORDS**

Giffords is a nonprofit organization dedicated to saving lives from gun violence. Founded and led by former Congresswoman Gabrielle Giffords, Giffords inspires the courage of people from all walks of life to make America safer.



# **Testimony - Support - HB 259 - Public Nuisance -Ke**

Uploaded by: Karen Clark

Position: FAV



## Unitarian Universalist Legislative Ministry of Maryland

### Testimony in Support of HB 259- Civil Actions - Public Nuisances - Firearm Industry Members (Gun Industry Accountability Act of 2023)

TO: Delegate Luke Clippinger, Chair, and Members of the Judiciary Committee  
FROM: Ken Shilling, UULM-MD Gun Violence Prevention, Lead Advocate  
Unitarian Universalist Legislative Ministry of Maryland.  
DATE: February 1, 2023

Unitarian Universalists are committed to measures that contribute to the public well-being. We must balance rights and responsibilities. We support common-sense regulation of firearms so we may assemble in public without fear of gun violence

One firearms manufacturer recently announced the sale of the JR-15; a smaller, lighter assault weapon for a child. The public harm is a reasonably foreseeable effect of the company's marketing this weapon to children.

We must require that the firearm industries establish and implement reasonable controls regarding firearm-related products. When companies abdicate their responsibility to public safety, we must hold them accountable. The public must be able to bring action for damages against a firearms industry member for injury or loss sustained.

The measure before you today is another tool to protect all of us from gun violence. We ask you to stand on the side of love and justice. We urge you to vote for this bill and others that strengthen Maryland's gun violence prevention laws.

We urge a favorable report.

*Ken Shilling*

Ken Shilling  
Gun Violence Prevention Lead Advocate

**2023 HB259 testimony (PLCAA).pdf**

Uploaded by: Karen Herren

Position: FAV



Testimony in **Support** of  
Civil Actions - Public Nuisances -  
Firearm Industry Members  
(Gun Industry Accountability Act of 2023)

SB113/HB259  
Executive Director Karen Herren  
Marylanders to Prevent Gun Violence

February 1, 2023

Dear Chair Clippinger, Vice-Chair Moon, and distinguished members of the committee,

Marylanders to Prevent Gun Violence (MPGV) is a statewide, grassroots organization dedicated to reducing gun deaths and injuries throughout the state of Maryland. We urge the committee for a **FAVORABLE** report on House Bill 259 to create a State cause of action permissible under the Protection of Lawful Commerce in Arms Act (“PLCAA”)<sup>1</sup>.

## **BACKGROUND**

Civil liability is effectively used in the United States as an important check on irresponsible and harmful industry behaviors. When legislators have been unwilling or unable to enact laws regulating a dangerous industry, the possibility of civil litigation has helped to incentivize industries to take reasonable steps to prevent their products or business practices from causing foreseeable risks to human life and well-being. Traditionally, this means that victims harmed by wrongful conduct, or public officials on the people’s behalf, can seek fair justice and accountability in the courts by filing lawsuits seeking monetary compensation or other court-ordered relief when industries have negligently or recklessly caused harm or failed to take reasonable steps to prevent foreseeable harm. However, in 2005, President Bush signed the Protection of Lawful Commerce in Arms Act (“PLCAA”) which gave the gun industry enormous exemptions from liability and accountability within the justice system. PLCAA has granted the gun industry unprecedented immunity from this system of justice and accountability. In

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<sup>1</sup> 15 U.S.C. § 7901-7903

addition to shielding the gun industry, these legal immunities also provide an unfair business advantage to irresponsible firearm industry members over more responsible competitors who take stronger precautions to protect human life and well-being.

## **PLCAA AND EXCEPTIONS**

PLCAA provides general immunity from lawsuits to federally licensed manufacturers, federally licensed firearm dealers and importers, and entities engaged in the business of selling ammunition at the wholesale or retail level. PLCAA prohibits plaintiffs from bringing “qualified civil liability actions” against these industry defendants. “Qualified civil liability actions” are civil or administrative proceedings for damages or other relief brought by any person including a governmental entity, “resulting from the criminal or unlawful misuse” of firearms, ammunition, or firearm or ammunition component parts by the plaintiff or a third party. There are 6 exceptions to the general industry immunity under 15 U.S.C. § 7903(5)(A):

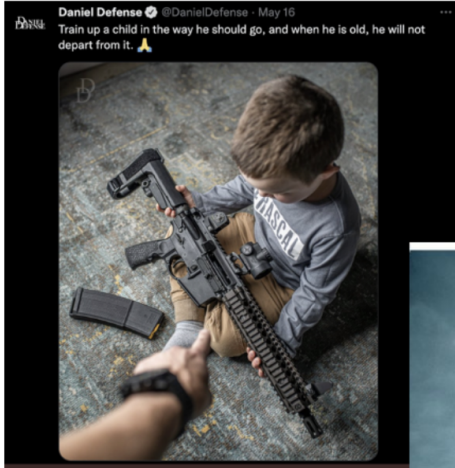
- An action brought against someone convicted of “knowingly transfer[ing] a firearm, knowing that such firearm will be used to commit a crime of violence” by someone directly harmed by such unlawful conduct;
- An action brought against a seller (or importer) for negligent entrustment or negligence per se;
- **An action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, if the violation was a proximate cause of the harm for which relief is sought.**
- An action for breach of contract or warranty in connection with the purchase of the product;
- An action for death, physical injuries, or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or
- An action commenced by the Attorney General to enforce the Gun Control Act or the National Firearms Act.

PLCAA provides firearm industry defendants with broad immunity from many common law tort actions, but also provides exceptions, including what has been called the “predicate exception,” which authorizes plaintiffs to bring civil actions against a firearm industry defendant who has knowingly violated a statute applicable to the sale or marketing of a firearm or other qualified product, if the violation was a proximate cause of the plaintiffs’ harm.

## **CONCLUSION**

House Bill 259 seeks to codify into Maryland law a firearm industry standard of conduct under the predicate exception clarifying the obligations and prohibitions that are unquestionably and specifically applicable to the sale and marketing of firearms and to provide redress to victims when the industry fails to uphold that standard. MPGCV urges a FAVORABLE report on HB 259.

# Gun Industry Marketing has given us a national nightmare.



**JR-15™** GET EM ONE LIKE YOURS  
 .22 Long Rifle

**SMALLER  
 SAFER  
 LIGHTER**  
 PATENTED SAFETY  
 MADE IN USA

Our goal was to develop a shooting platform that was not only sized correctly, and safe, but also looks, feels, and operates just like Mom and Dad's gun. Safety was at the forefront of our thought process that we developed and patented a tamper resistant safety that puts the adult in control of the firearm safety switch. The Weel and School Tool Team brought their collective experience in the firearms business, specifically the AR platform, to the table to launch the JR-15. We are so excited to start capturing the imagination of the next generation to enter the shooting sports.

**SPECIFICATIONS**

SIZE:	30.75"
WEIGHT:	APPROX 2.85
SAFETY:	PATENTED TAMPER RESISTANT
LOWER:	POWNER
UPPER:	POWNER
RAIL:	STANDARD PICATINNY RAIL WITH M-LOK FOR ALL STANDARD ACCESSORIES
TRIGGER:	3000 MIL-SPEC
BARREL:	16"
SIGHT:	NO SIGHT INCLUDED
MAGAZINE:	150, 180, 190, 200, with WEEL'S 60-RND

**WEEL TACTICAL**



**HB0259 Support Letter - PLCAA \_ MD.docx.pdf**

Uploaded by: Tanya Schardt

Position: FAV



Brady  
840 First St. NE Ste. 400  
Washington, DC 20002



Testimony of Ramya Swami, Manager, State Policy, Brady  
**Support for HB 0259 [FAV]**  
Before the Maryland House Judiciary Committee  
February 1, 2023

Chair Clippinger, Vice Chair Moon and distinguished members of the Maryland House Judiciary Committee,

Founded in 1974, Brady works across Congress, courts, and communities, uniting gun owners and non-gun owners alike, to take action, not sides, and end America's gun violence epidemic. Brady today carries the name of Jim Brady, who was shot and severely injured in the assassination attempt on President Ronald Reagan. Jim and his wife, Sarah, led the fight to pass federal legislation requiring background checks for gun sales. Brady continues to uphold Jim and Sarah's legacy by uniting Americans from coast to coast, red and blue, young and old, liberal and conservative, to combat the epidemic of gun violence. **In furtherance of our goal to reduce firearm violence across Maryland, the Brady Campaign to Prevent Gun Violence is proud to support the passage of House Bill 0259.** HB 0259 creates a path for gun industry members to be held accountable for dangerous, unlawful, negligent and unsafe business practices that impact Marylanders and removes barriers that currently prevent victims and survivors from obtaining justice in the courtroom.

### **The Gun Industry has been Afforded Special Protections that Harm Marylanders**

A top priority of the gun industry, the Protection of Lawful Commerce in Arms Act (PLCAA) was signed into law by then-President George W. Bush in 2005.<sup>1</sup> PLCAA provides gun manufacturers, distributors, and gun dealers with special protections from civil liability that no other U.S. industry is currently afforded. Although PLCAA does not provide complete immunity from all civil lawsuits, some courts have interpreted the law to effectively bar victims and survivors of gun violence from holding firearms businesses liable for injuries caused by negligence, defective products, or unreasonably dangerous conduct that would otherwise be actionable under civil justice principles. Enabling the gun industry to evade accountability at the expense of victims of gun violence significantly contributes to the gun violence epidemic by

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<sup>1</sup> 15 U.S.C. § 7901 (2005).

removing key incentives for the gun industry to adopt life-saving business practices.<sup>2</sup> Moreover, PLCAA has had a chilling effect on civil cases against the gun industry and has worked to prevent victims and survivors from recovering damages they are owed after tragic injuries or deaths. HB 0259 would ensure that the gun industry would no longer be shielded from accountability for their dangerous, irresponsible, or illegal practices that endanger the lives of Marylanders.

### **PLCAA Denies Justice to Victims and Survivors**

Victims should have recourse for the gun industry's negligence and dangerous practices, but PLCAA currently protects gun dealers and manufacturers from being held responsible. Gun dealers and manufacturers should be held responsible for negligent and irresponsible sales practices that are the proximate cause of an individual's injuries or death, and for selling to someone who is likely to harm themselves or others. Manufacturers who design firearms without life-saving safety features, such as chamber-loaded indicators and magazine disconnect safeties, or sell to someone who is clearly likely to harm themselves should be held liable for their design failures and malpractice.<sup>3</sup>

### **PLCAA Perpetuates the Flow of Crime Guns into Communities of Color**

The latest available data from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reveals that just 2.7 percent of dealers accounted for over 71 percent of crime gun traces.<sup>4</sup> While this small minority of gun dealers are the sources of crime guns recovered in communities of color, these gun dealers typically sit outside those communities in less diverse and more affluent suburbs.<sup>5</sup> Residents of these communities suffer from the chronic stress of daily interpersonal gun violence and the negative impacts on their community's economic prosperity, without recourse or compensation, while irresponsible gun dealers face no consequences. The implications of this lack of accountability cannot be overstated. While gun violence touches Americans across the country, it disproportionately impacts communities of color. Approximately 80 percent of America's gun deaths occur in urban areas with large minority populations.<sup>6</sup> Black Americans are 11 times more likely than their white peers to be the victim of a firearm homicide, and this problem is exacerbated for Black males, who lose four years in life expectancy on the basis of gun violence alone.<sup>7</sup> Non-Hispanic Black males in Maryland are 27.7 times more likely to be victims of firearm homicide than non-Hispanic white males.<sup>8</sup>

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<sup>2</sup> Brady Campaign & Brady Center, "What is PLCAA?", Brady, available at <https://www.bradyunited.org/fact-sheets/what-is-plcaa>.

<sup>3</sup> Vernick, J., Meisel, Z., Teret, S., Milne, J. and Hargarten, S., 1999. "I Didn't Know the Gun Was Loaded": An Examination of Two Safety Devices That Can Reduce the Risk of Unintentional Firearm Injuries," *Journal of Public Health Policy*, 20(4), pp.427-440, available at <https://www.jstor.org/stable/3343129?seq=1>.

<sup>4</sup> Department of the Treasury, "Commerce in Firearms in the United States," Bureau of ATF (Feb. 2000), available at [http://www.joebrower.com/RKBA/RKBA\\_FILES/GOV\\_DOCS/BATF\\_report\\_020400.pdf](http://www.joebrower.com/RKBA/RKBA_FILES/GOV_DOCS/BATF_report_020400.pdf).

<sup>5</sup> Brady Campaign and Brady Center, "Crime Guns in Impacted Communities," Brady, available at <https://www.bradyunited.org/reports/crime-guns-in-impacted-communities>.

<sup>6</sup> *Id.*

<sup>7</sup> CDC, "Injury Prevention & Control," available at <https://www.cdc.gov/injury/wisqars/fatal.html>; Kalesan, B., Vyliparambil, M., Zuo, Y., Siracuse, J., Fagan, J., Branas, C. and Galea, S., 2018. "Cross-sectional study of loss of life expectancy at different ages related to firearm deaths among black and white Americans," *BMJ Evidence-Based Medicine*, 24(2), pp.55-58, available at <https://ebm.bmj.com/content/24/2/55>.

<sup>8</sup> CDC, "Injury Prevention & Control," available at <https://www.cdc.gov/injury/wisqars/fatal.html>.

## **PLCAA Disincentivizes Responsible Business Practices**

The mere threat of civil liability motivates companies to adopt safe business practices that prevent future injuries and death.<sup>9</sup> For example, car manufacturers made numerous safety improvements that have cut automobile-related deaths by 50 percent since the 1960s, primarily because of technological advancements spurred by fear of liability.<sup>10</sup> PLCAA effectively removed this motivation for the gun industry, disincentivizing gun dealers from adopting safe sales practices and gun manufacturers from incorporating affordable life-saving safety devices into their products and monitoring their distribution practices.<sup>11</sup> While the gun industry claims that mental health and violent video games are to blame for gun violence, it's actually common industry practices that create the conditions that enable most gun violence to occur.<sup>12</sup> The limitations on the ability to hold the industry accountable prevent public awareness and deter regulatory changes, as well as disincentivize independent action by the industry to avoid liability, all of which would reduce gun violence and save lives.

## **Conclusion**

HB 0259 will function as an exception to PLCAA, ensuring that valid civil claims can be brought against the gun industry for their dangerous, negligent, and even unlawful actions. The possibility of civil liability will not only provide civil justice to victims and survivors but also encourage the gun industry to act responsibly to help stem the tide of crime guns that harm Marylanders, particularly in urban areas where communities of color are disproportionately harmed. Having operated with special protections for years, the industry has had no financial incentive to curb irresponsible conduct and instead puts profits over people. The prospect of civil liability can lead to safer products and better conduct that the industry has resisted for years.

HB 0259 must be enacted because no industry should be above the law, especially not one that makes and sells lethal weapons. HB 0259 will make sure that bad actors in the gun industry are held accountable and victims of gun violence are able to get justice through the law. ***For the reasons described above, Brady urges the committee to support the passage of House Bill 0259.***

Sincerely,  
Ramya Swami

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<sup>9</sup> Vernick, J. et al., 2003. "Role of Litigation in Preventing Product-related Injuries," *Epidemiologic Reviews*, 25(1), pp.90-98, available at <https://academic.oup.com/epirev/article/25/1/90/718671>.

<sup>10</sup> LaFrance, Adrienne, "Why Haven't Gunmakers Improved Safety Technology the Way Automakers Did?", *The Atlantic* (Jan. 21, 2016), available at <https://www.theatlantic.com/technology/archive/2016/01/guns-cars/424878/>.

<sup>11</sup> Sampson, Kelly, "Tobacco Kills People. Opioids Kill People. But Guns Don't?", Brady (Sept. 4, 2019), available at <https://bradyunited.medium.com/tobacco-kills-people-opioids-kill-people-but-guns-dont-7852c288d496>.

<sup>12</sup> Zeballos-Roig, Joseph, "The NRA Issued a Statement Supporting Trump's Call to Focus on Mental Illness to Reduce Gun Violence after the Shootings in El Paso and Dayton," *Insider* (Aug. 5, 2019), available at <https://www.businessinsider.com/nra-statement-backing-trump-el-paso-dayton-shootings-mental-illness-2019-8>; Hudson, Laura, "The NRA Solution to Gun Violence: More Guns, Fewer Video Games," *Wired* (Dec. 21, 2012), available at <https://www.wired.com/2012/12/nra-video-games/>; Gluck, A., Nabavi-Noori, A. and Wang, S., 2021. Gun Violence in Court. *The Journal of Law, Medicine & Ethics*, 48(S4), pp.90-97, available at <https://journals.sagepub.com/doi/abs/10.1177/1073110520979406>.

# **2023 - HB 259 - Public Nuisance - NSSF Opposition**

Uploaded by: John Pica

Position: UNF



**TREVOR W. SANTOS**

Director, Government Relations - State Affairs

tsantos@nssf.org | 202-220-1340 x205 | nssf.org

January 30, 2023

The Honorable Luke Clippinger  
Chair, House Judiciary Committee  
101 House Office Building  
6 Bladen Street  
Annapolis, MD 21401

**HOUSE BILL 259  
OPPOSE**

**Re: House Bill 259 - Public Safety – Firearm Industry Members – Public Nuisance**

Dear Chair Clippinger, Vice Chair Moon, and Members of the Judiciary Committee:

On behalf of the National Shooting Sports Foundation (“NSSF”), and our industry members located throughout the state of Maryland, I write today to express our opposition to House Bill 259 (“HB 259”), the so-called “Gun Industry Accountability Act of 2023.” HB 259 seeks to gut the federal Protection of Lawful Commerce in Arms Act (“PLCAA”) and hold firearm industry members liable for the criminal misuse of firearms.

### **BACKGROUND ON NSSF**

As the trade association for America’s firearms, ammunition, hunting, and recreational shooting sports industry, the National Shooting Sports Foundation (“NSSF”) seeks to promote, protect, and preserve hunting and the shooting sports. NSSF represents more than 10,000 members which include federally licensed manufacturers, wholesale distributors and retailers of firearms, ammunition and related goods and accessories, as well as public and private shooting ranges, sportsmen’s clubs, and endemic media, including close to 100 businesses located in Maryland, such as Beretta USA, Benelli USA and its family of brands, and LWRC International. Nationally, our industry contributes close to \$70.5 billion dollars annually to the economy creating over 345,000 good paying jobs and paying over \$7.8 billion dollars in taxes. Our industry has a \$890.70 million dollar impact on the Maryland economy, creating more than 4,200 jobs paying over \$287 million in wages and nearly \$109 million dollars in taxes.

Members of the firearm industry are proud of their longstanding cooperative relationship with law enforcement. For example, on behalf of our industry members, for over two decades NSSF has partnered with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) on an anti-straw purchasing campaign called *Don’t Lie for the Other Guy* ([www.dontlie.org](http://www.dontlie.org)). This joint effort assists ATF in training licensed retailers to be better able to identify potential illegal straw purchases and avoid those transaction. Don’t Lie also provides public service announcements to educate the public that it is a serious crime to illegally straw purchase a firearm for which you can be sentenced to up to ten years in prison and fined of up to \$250,000.

Another example is *Operation Secure Store* ([www.operationsecurestore.org](http://www.operationsecurestore.org)), a joint ATF/NSSF initiative providing licensed retailers with education on solutions and services that enhance operational security and aid in identifying potential risks, protecting interests, and limiting the disruption of operations. The mission is to deter and prevent thefts from retailers and enhance public safety.

NSSF also provides significant compliance resources and educational opportunities to members of the industry. See <https://www.nssf.org/retailers/ffl-compliance/>.

## **OPPOSITION TO HB 259**

NSSF is strongly opposed to HB 259 for several reasons. First and foremost, the bill seeks to subject members of the heavily regulated firearm industry to civil lawsuits for the criminal misuse or unlawful possession of firearms in Maryland. HB 259 is trying to use the threat of crushing liability to coerce out-of-state businesses to adopt sales practices and procedures not required by Congress or the law of the state where they operate. The Constitution reserves the power to regulate interstate commerce solely to Congress. This law interferes with the sovereignty of other states to make policy choices about how firearms should be sold in their state, subject only to the Second Amendment and federal law.

As proposed, HB 259 would permit lawsuits by victims of criminal acts and citizens claiming they have been harmed by an alleged public nuisance in Maryland. It also allows lawsuits by the State and any local government. Cities around the country were part of a wave of similar lawsuits filed over twenty years ago that led to Congress passing the bipartisan PLCAA in 2005.

The PLCAA codified a bedrock legal principle. Manufacturers and retailers are not responsible for the subsequent criminal misuse or illegal possession of their lawfully sold, non-defective products by remote third parties – criminals – over whom they have no control. Firearm industry members are not legally responsible for illegal shootings any more than a cookware manufacturer is responsible if a criminal misuses a sharp kitchen knife to stab someone.

This bill seeks to impose liability on law abiding firearms business for the criminal misuse of firearms. This is contrary to the will of Congress which, in enacting the PLCAA found –

Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully

competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

15 U.S.C. § 790(a)(5),(6).

Congress' purposes in enacting the PLCAA included -

To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful of firearm products or ammunition products by others when the product functioned as designed and intended.

To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

15 U.S.C. § 790(b)(1),(4),(6).

The logic underlying this bill is seriously flawed. It seeks to impose liability on members of the firearm industry for the “lawful design, manufacture, marketing, distribution, importation, [and] sale” of firearms in compliance with all federal, state, and local laws, when those firearms are subsequently obtained by third parties<sup>1</sup> over whom the industry member has no ability to control and later illegally find their way into Maryland and are criminally misused. This is tantamount to declaring drunk driving a public nuisance and then imposing liability on Ford for lawfully designing, make and selling a car later used by a drunk driver who causes an accident. Selling a legal, non-defective product in compliance with all laws and regulations – especially a heavily regulated product – does not “create, maintain or contribute to a condition in the State that endangers the safety or health of the public...” and is not a public nuisance under American jurisprudence. The bill goes further, it declares that the lawful business practices are “constitute a proximate cause of the public nuisance.... notwithstanding any intervening actions, including but not limited to criminal actions by third parties.”

The U.S. Supreme Court held that the Second Amendment protects the right of individuals to keep and bear arms and that the Second Amendment applies to the States. *See e.g., District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010). The courts have since held that the Second Amendment includes the right to acquire firearms *See e.g., Ezell v. City of Chicago*, 651 F.3d 684 (7<sup>th</sup> Cir. 2011), *Jackson v City and County of San Francisco*, 746 F.3d 953, 967 (9<sup>th</sup> Cir. 2011); *Ill. Ass'n of Firearms Retailers v City of Chicago*, 961 F.Supp.2d 928, 930 (N.D. Ill. 2014); *See also, Andrews v State*, 50 Tenn.

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<sup>1</sup> According to the U.S. Department of Justice studies, most (>80%) firearms used in crime are stolen, borrowed from friends and family members, or obtained on the black market.

165, 178 (1871). The Second Amendment protects the lawful commerce in firearms because that “[c]ommerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense...” *Teixeira v. City. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017).

If enacted, businesses in the firearm industry will abandon the Maryland market to avoid a tidal wave of vexatious “regulation through litigation” the bill is intended to bring about. Maryland residents will no longer be able to exercise their Second Amendment right to purchase firearms. The bill will undermine and diminish, if not violate, the Second Amendment rights of Maryland resident.

The bills own findings demonstrate that this legislation will not make Maryland safer. The conduct complained of arises from the actions of criminals who misuse firearms to perpetrate their crimes. It does not arise from lawful, heavily regulated commerce.

## **CONCLUSION**

It is for these reasons, the National Shooting Sports Foundation opposes this ill-advised and ill-considered bill that will not improve public safety but will force result in vexatious litigation and drive business out of Maryland and diminish the ability of law abiding residents of Maryland to acquire firearms for lawful purposes. We would respectfully request an “Unfavorable Report” for House Bill 259 from the House Judiciary Committee.

Sincerely,



Trevor W. Santos



**Katie\_Novotny\_UNF\_HB259.pdf**

Uploaded by: Katie Novotny

Position: UNF

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WRITTEN TESTIMONY OF KATIE NOVOTNY IN OPPOSITION OF  
HB259

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January 30, 2023

I am a member of multiple gun rights organizations. I am a certified Range Safety Officer and an avid firearms collector. I have been before this committee many times advocating for the right to self defense and in defense of an individual's 2<sup>nd</sup> Amendment rights. I oppose this bill.

This bill is a misguided attempt to punish manufacturers for the actions of third parties. We do not sue Ford, Chevy, or Dodge when someone is killed by a drunk driver operating their products. We don't sue Budweiser or Jim Beam for those deaths either. It makes absolutely no sense to sue a manufacturer for something a third party does. Firearms manufacturers do not even sell to the public. They sell to distributors, who sell to retail establishments, who then sell to the public according to federal and state laws. Simply not liking a particular product, or even wishing they did not exist, in this case, firearms, does not mean you may sue that industry out of existence. Particularly when ownership, and therefore acquisition, is protected by the Bill of Rights.

There are a multitude of legal issues with this bill as well, which I am sure others will address much more eloquently than I am able to. The bottom line is we must hold individuals accountable for their actions, not the manufacturer of an item used illegally.

I request an unfavorable report.

Respectfully,

Katie Novotny

District 35B

[Katie.novotny@hotmail.com](mailto:Katie.novotny@hotmail.com)

443-617-7568

# **MSI testimony on SB 113 and HB 259 PCLAA.pdf**

Uploaded by: Mark Pennak

Position: UNF



President  
Mark W. Pennak

February 1, 2023

## WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 113 and HB 259

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan, non-profit 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 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 and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in opposition to SB 113 and its cross-file, HB 259 (collectively referred to herein as “the Bill” or “this Bill”).

**The Bill:** This Bill defines a new offense of “public nuisance” and is designed to negate the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et seq.* (“PLCAA”). It provides a new duty of care on a “firearm industry member” a term that is defined by the bill to include “A PERSON ENGAGED IN THE SALE, MANUFACTURING, DISTRIBUTION, IMPORTING, OR MARKETING” of any “a “firearm-related product,” a term that is defined to include all firearms and ammunition, including mere “COMPONENTS” of firearms and ammunition.

The Bill provides that “A FIREARM INDUSTRY MEMBER MAY NOT KNOWINGLY OR RECKLESSLY CREATE, MAINTAIN, OR CONTRIBUTE TO HARM TO THE PUBLIC THROUGH THE SALE, MANUFACTURE, DISTRIBUTION, IMPORTATION, OR MARKETING OF A FIREARM-RELATED PRODUCT BY ENGAGING IN CONDUCT THAT IS: (1) UNLAWFUL; OR (2) UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.” The bill does not define “components.” Nor does the bill attempt to define “reasonable under the totality of the circumstances.”

The Bill then provides, in a separate provision, that “A FIREARM INDUSTRY MEMBER SHALL ESTABLISH AND IMPLEMENT REASONABLE CONTROLS REGARDING THE SALE, MANUFACTURE, DISTRIBUTION, IMPORTATION, MARKETING, POSSESSION, AND USE OF THE FIREARM INDUSTRY MEMBER’S FIREARM-RELATED PRODUCTS.” A violation of either one of these provisions is declared to be “A PUBLIC NUISANCE.” It further provides that

**“NOTWITHSTANDING ANY INTERVENING ACTIONS, INCLUDING A CRIMINAL ACTION BY A THIRD PARTY, THE CONDUCT OF A FIREARM INDUSTRY MEMBER IS A PROXIMATE CAUSE OF HARM TO THE PUBLIC IF THE HARM IS A REASONABLY FORESEEABLE EFFECT OF THE CONDUCT.”**

In a separate section, the Bill then creates new causes of action, providing that the Attorney General of the State may bring a suit against any such industry member for any violation of the “public nuisance” created by the Bill. Likewise, the Bill provides that a civil suit may be brought against such industry member by “FOR INJURY OR LOSS SUSTAINED AS A RESULT OF A 18 VIOLATION” of the “nuisance” provisions. The Attorney General “may seek (I) INJUNCTIVE RELIEF. (II) RESTITUTION; (III) COMPENSATORY AND PUNITIVE DAMAGES; (IV) REASONABLE ATTORNEY’S FEES AND COSTS; AND (V) ANY OTHER APPROPRIATE RELIEF.” The private plaintiff likewise “may seek and be awarded” the same relief (except for “any other appropriate relief”). Under the Bill, neither the private plaintiff nor the Attorney General need prove that any industry member acted with “any intent to violate” these provisions.

### **The Bill Is Unconstitutionally Vague:**

Article 24 of the Maryland Declaration of Rights prohibits the enactment or enforcement of vague legislation. Under Article 24, “[t]he void-for-vagueness doctrine as applied to the analysis of penal statutes requires that the statute be “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.” *Galloway v. State*, 365 Md. 599, 614, 781 A.2d 851 (2001). A statute must provide “legally fixed standards and adequate guidelines for police ... and others whose obligation it is to enforce, apply, and administer [it]” and “must eschew arbitrary enforcement in addition to being intelligible to the reasonable person.” (Id. at 615). Under this test, a statute must be struck down if it is “so broad as to be susceptible to irrational and selective patterns of enforcement.” (Id. at 616). See also *Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 343-44, 235 A.3d 873 (2020)

The void for vagueness doctrine applies to laws imposing civil penalties as well as to laws imposing criminal penalties. *Madison Park North Apartments, L.P. v. Commissioner of Housing and Community Development*, 211 Md. App. 676, 66 A.3d 93 (2013), appeal dismissed, 439 Md. 327, 96 A.3d 143 (2014). See also *Parker v. State*, 189 Md. App. 474, 985 A.2d 72 (2009) (“the criteria for measuring the validity of a statute under the vagueness doctrine are the same as in a non-First Amendment context: fair warning and adequate guidelines”); *Neutron Products, Inc. v. Department Of The Environment*, 166 Md.App. 549, 609, 890 A.2d 858 (2006) (“Maryland courts have applied the void for vagueness doctrine to civil penalties”) (citing *Finucan v. Md. Bd. of Physician Quality Assurance*, 380 Md. 577, 591, 846 A.2d 377, cert. denied, 543 U.S. 862 (2004) (applying the void for vagueness analysis to regulations imposing sanctions on physicians);

This Bill fails under Article 24 in multiple ways. First, the duty of care created by the bill bars conduct that is not only “unlawful,” but also imposes liability on an industry member who “KNOWINGLY OR RECKLESSLY CREATE, MAINTAIN,

OR CONTRIBUTE TO HARM TO THE PUBLIC THROUGH THE SALE MANUFACTURE, DISTRIBUTION, IMPORTATION, OR MARKETING OF A FIREARM-RELATED PRODUCT BY ENGAGING IN CONDUCT THAT IS: (1) UNLAWFUL; OR (2) UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.” That standard is hopelessly vague as the bill does not define “UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.” There is simply no feasible way for a dealer or other industry member to know, ahead of time, what conduct is “unreasonable” under this standard. Likewise, the Bill allows enforcement for any “harm to the public” but never defines that term. Under this Bill, conduct that is entirely lawful could nonetheless be deemed “unreasonable” and thus constitute a “public nuisance.” The Bill does not even define what constitutes a “firearm-related product.” That term could include paper targets, spotting scopes, hunting clothing, and a whole host of products sold at gun stores. The risk of arbitrary and discriminatory enforcement is apparent, as the bill provides no “guidelines” for enforcement. The potential for unforeseeable liability under this duty is virtually limitless. Such a Bill will not survive judicial review.

The Bill’s requirement that the conduct be “knowingly” or “reckless” is meaningless here. The requirement of “knowingly” means that person knows that the conduct is illegal and does it anyway. See, e.g., *Chow v. State*, 393 Md. 431 (2006) (holding that a knowing violation of a Maryland statute making it unlawful for a person who is not a regulated gun owner to sell, rent, transfer, or purchase any regulated firearm without complying with the application process and seven-day waiting period requires that a defendant knows that the activity they are engaging in is illegal). See also *Rehaif v. United States*, 139 S.Ct. 2191 (2019) (holding that the “knowingly” requirement on the federal ban on possession of a firearm by an illegal alien required proof that the alien actually knew that he was illegally in the United States).

Here, it is virtually impossible to “knowingly” engage in the prohibited conduct where the Bill sanctions not only “unlawful” conduct, but also bans utterly undefined “unreasonable” conduct. The Bill does not even set forth any criteria by which “unreasonable” conduct is measured. For the same reason, it is equally impossible to be “reckless” about such conduct where the Bill establishes no standards by which “recklessness” can be assessed ahead of time. There are also no enforcement “guidelines” as required by Article 24. *Compare* MD Code Criminal Law § 2-210 (punishing “death of another as the result of the person's driving, operating, or controlling a vehicle or vessel in a criminally negligent manner” and defining criminally negligent as occurring where “(1) the person should be aware, but fails to perceive, that the person's conduct creates a substantial and unjustifiable risk that such a result will occur; and (2) the failure to perceive constitutes a gross deviation from the standard of care that would be exercised by a reasonable person”), sustained against a vagueness challenge in *Bettie v. State*, 216 Md. App. 667, 682, 88 A.3d 906 (2014). The dealer is left to guess. The potential liability is limitless and there is simply no way to guard against it.

The same vagueness permeates the Bill’s requirement that an industry member “SHALL ESTABLISH AND IMPLEMENT REASONABLE CONTROLS REGARDING THE SALE, MANUFACTURE, DISTRIBUTION, IMPORTATION,

MARKETING, POSSESSION, AND USE OF THE FIREARM INDUSTRY MEMBER'S FIREARM-RELATED PRODUCTS." The Bill has no definition of what constitutes "reasonable controls." The Bill does not even provide any criteria by which "reasonableness" can be assessed. Nor does the Bill even specify the meaning of "controls." This bill thus does not purport to incorporate specific standards, such as set out in MD Code, Commercial Law, § 13-301, a provision that bans the use of "deceptive trade practices," as specifically defined in that provision. See *American Home Products Corp. v. FTC*, 695 F.2d 681, 710 (3d Cir. 1982) (setting aside a FTC unfair practices order as "excessively vague and overbroad"). The industry member is thus left completely at sea concerning the scope of this provision and its meaning and is thus threatened with potentially enormous litigation burdens. The discretion of the enforcing official is virtually unlimited. Again, there are simply no enforcement "guidelines" required by Article 24. Courts may "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). See also *McDonnell v. United States*, 579 U.S. 550, 576 (2106) (same); *Legend Night Club v. Miller*, 637 F.3d 291, 301 (4th Cir. 2011) (same).

Unlike the New York legislation from which this Bill was obviously copied in part, N.Y. Gen. Bus. Law §§ 898-b, the vagueness of this Bill is not alleviated by any existing Maryland general "public nuisance" statute or other statutes containing the same language. Compare MD Code, Alcoholic Beverages, § 29-2612 and MD Code, Alcoholic Beverages, § 32-2614 and MD Code, Alcoholic Beverages, § 27-2616 (public nuisance associated with the illegal sale of alcohol). See generally *In re Expungement Petition of Meagan H.*, 2022 WL 3153968 (Ct. of Sp. Appeals 2022) (listing public nuisance crimes for discreet and clear misconduct). Indeed, the rule in Maryland is that "[w]hile a private party may seek an injunction against a public nuisance, it must have an interest in property injured by the nuisance and have suffered damage distinct from that experienced by other citizens." *Brady v. Walmart Inc.*, 2022 WL 2987078 at \*17 (D. Md 2022) (applying Maryland law). This Bill would permit a private recovery and injunctive relief for any "harm to the public" and thus dissolves the requirement that the plaintiff must have suffered "damage distinct" from that of other citizens.

Moreover, unlike in New York, where there was long-standing statutory and case law that provided definitions and clarity to the virtually identical language used in the New York gun legislation, there is no comparable body of Maryland law addressing these terms. Compare *NSSF v. James*, 2022 WL 1659192 \*11-\*12 (N.D.N.Y. 2022) (holding that Section 898 was not void for vagueness because it tracked other New York law dating back to 1965 which provided explicit definitions, in the statute or in the case law, for the same terms). Indeed, the New York statute is narrower than this Bill, as it declared to be a nuisance only that conduct that "endangers the safety or health of the public." Here, this Bill bans any conduct that merely contributes "to harm to the public." See N.Y. Gen. Bus. Law §§ 898-c, declaring a violation of N.Y. Gen. Bus. Law §§ 898-b, to be a public nuisance.

Only New Jersey has enacted such an extreme law, N.J.S.A. 2C:58-35, and that law became effective only as of July 5, 2022. The New Jersey Attorney General has not, to our knowledge, attempted to bring suit under this new law and the

constitutionality of the New Jersey statute has not yet been challenged. Maryland is not New Jersey and traditionally has never sought to copy such extreme laws in enacting firearms legislation. And, of course, the constitutionality of any Maryland statute must be assessed under Article 24 of the Maryland Declaration of Rights which, as explained above, imposes very specific standards that statutes must meet to satisfy the Maryland prohibition on the enactment of a vague statute.

Such vagueness is particularly intolerable because this Bill affects the exercise of rights under the Second Amendment to the Constitution. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (striking down a vague ordinance on grounds it affected a liberty interest protected by the Due Process Clause). Specifically, under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742, 750 (2010), the Second Amendment protects the right of a law-abiding citizen to acquire firearms, including handguns. *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). That right to acquire a firearm has already been recognized in Maryland in the HQL litigation. See *MSI v. Hogan*, 566 F.Supp. 3d. 404, 424 (D.Md. 2021), *appeal pending*, *MSI v. Hogan*, No. 21-2107 (4th Cir.) (“The requirements for the purchase of a handgun, as set out in the HQL law, undoubtedly burden this core Second Amendment right because they ‘make it considerably more difficult for a person lawfully to acquire and keep a firearm ... for the purpose of self-defense in the home.’”), quoting *Heller v. District of Columbia*, 670 F.3d 1244,1255 (D.C. Cir. 2011).

Firearm dealers have an ancillary Second Amendment right to sell firearms to law-abiding citizens. See, e.g., *Teixeira v. County of Alameda*, 873 F.3d 670, 676-78 (9th Cir. 2017) (en banc), *cert. denied*, 138 S.Ct. 1988 (2018). Under this precedent, any law that “meaningfully constrain[s]” a customer from having “access” to a dealer is actionable under the Second Amendment. 873 F.3d at 680. See also *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 216 (4th Cir. 2020) (holding that a firearms dealer had Second Amendment standing to challenge Maryland’s HQL statute and may sue on its own behalf and had third party standing to sue on behalf of its “customers and other similarly situated persons”). Regulation of dealer operations and that of other “industry members” is thus imbued with constitutional concerns. Such infringements of this right to access to a dealer are open to challenge under the June 2022 decision of the Supreme Court in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111, 2126-27 (2022), where the Court established a new text, history, and tradition test for assessing Second Amendment challenges. See *Pizza di Joey*, 470 Md. at 904 (“a person may assert a facial vagueness challenge if the challenged statute implicates the First Amendment *or another fundamental right*”) (emphasis added). This Bill will likely drive many if not most dealers out of business. Any intent or desire to thus regulate dealers to the point of near extinction is constitutionally illegitimate. The Bill is, and is obviously designed to be, extremely punitive. If enacted as written, it will undoubtedly be challenged in court.



## The Bill Is Contrary To The PLCAA:

**The PLCAA:** As enacted by Congress, the PLCAA expressly provides that a “qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a). A “qualified liability act” is defined by the PLCAA to mean “a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party....” 15 U.S.C. § 7903(5)(A). This ban on suits expressly covers all “qualified products” which are defined to mean any “firearm” or “ammunition or any “component part of a firearm or ammunition.” 15 U.S.C. § 7903(4). “Congress enacted the PLCAA upon finding that manufacturers and sellers of firearms “are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products ... that function as designed and intended.” *Prescott v. Slide Fire Solutions, LP*, 341 F.Supp.3d 1175, 1187 (D. Nev. 2018), quoting *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009), (quoting 15 U.S.C. § 7901(a)(5)).

Congress intended to ban suits in which liability where harm was caused by “the criminal or unlawful” use of a firearm by another, finding that sellers and manufacturers of firearms “are not and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.” 15 U.S.C. § 7901(a)(5). Congress further found that suits based on harm caused by third parties would represent an improper “expansion of liability” that “would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.” 15 U.S.C. § 7901(a)(7). See generally, *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009), *cert. denied*, 560 U.S. 924 (2010) (discussing the purposes of the PLCAA); *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009) (same).

Congress carved out a few types of suits that are not prohibited by the PLCAA. Such suits include:

[A]n action in which a manufacturer or seller of a qualified product ***knowingly violated*** a State or Federal statute applicable to the sale or marketing of the product, **and the violation was a proximate cause of the harm for which relief is sought**, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the

qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18.

15 U.S.C. § 7903(A)(5)(iii) (emphasis added).

Congress likewise permitted suits for “physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, *except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.*” 15 U.S.C. § 7903(5)(A)(v) (emphasis added). Other types of suits are similarly permitted, such as suits for breach of warranty or contract (§7903(A)(5)(iv)), or where suit is brought against a transferor convicted of illegally selling a qualified product under 18 U.S.C. § 924(h) (punishing a person who “knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)...”). 15 U.S.C. § 7903((5)(A)(i). Congress likewise permitted suits for “negligent entrustment or negligence per se.” (Section 7903((5)(A)(ii).

**The Bill’s “Proximate Cause” Provision Is Preempted by the PLCAA:** As noted, the PLCAA flatly bans any suit where the harm results “from the criminal or unlawful misuse of a qualified product by the person or a third party.” This Bill expressly allows such suits as it allows suits for any violation of the bill’s requirements, providing that “NOTWITHSTANDING ANY INTERVENING ACTIONS, INCLUDING A CRIMINAL ACTION BY A THIRD PARTY, THE CONDUCT OF A FIREARM INDUSTRY MEMBER IS A PROXIMATE CAUSE OF HARM TO THE PUBLIC IF THE HARM IS A REASONABLY FORESEEABLE EFFECT OF THE CONDUCT. This provision of the Bill obviously allows liability to be imposed “notwithstanding” the criminal acts of a third party if the “harm is a reasonable foreseeable effect of the conduct.” The Bill’s proximate cause provision would thus impose liability even though the harm arose from the criminal acts of third parties. That is **precisely** the type of suit banned by the PLCAA in Section 7702 and Section 7903(a)(5)(ii).

As noted above, Congress has also expressly banned suits where the harm results “from the criminal or unlawful misuse of a qualified product by the person or a third party.” On its face, that language precludes the Bill’s attempt to impose liability notwithstanding “THE INTERVENING ACTIONS, INCLUDING CRIMINAL ACTIONS BY THIRD PARTIES.” Nor does the bill fall within any of the exceptions to preemption set out in the PLCAA. The PLCAA’s exceptions to this ban are narrow. Specifically, Section 7903(5)(A)(iii) allows suits for a knowing violation of “a State or Federal statute applicable to the sale or marketing of the product,” but **only** where the violation “**was the proximate cause of the harm for which relief is sought.**” (Emphasis added). This Bill allows the imposition of liability not only for “unlawful” conduct but also for conduct that was “unreasonable under the totality of the circumstances.”

Similarly, in Section 7903(5)(A)(v), the PLCAA allows suits for a “defect in design or manufacture,” but provides that “where the discharge of the product was caused by a volitional act that constituted a criminal offense, **then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.**” (Emphasis added). The Bill allows much broader liability. The concept of “proximate causation” under the common law is at the heart of these exceptions to the ban otherwise imposed by PLCAA. In this state, as in virtually all other states, the common law is that “proximate cause” is a factual question presented to the finder of fact on a case-by-case basis. See, e.g., *Pittway Corp. v. Collins*, 409 Md. 218, 242-46, 973 A.2d 771 (2009) (explaining that “[i]t is a basic principle that [n]egligence is not actionable unless it is a proximate cause of the harm alleged,” citing *Stone v. Chicago Title Ins.*, 330 Md. 329, 337, 624 A.2d 496, 500 (1993)). That point applies equally to questions of superseding or intervening causes as such causes negate the presence of “proximate cause.” (Id. at 252). This Bill takes the proximate cause element away from the trier of fact by providing that intervening causes are irrelevant. That result is contrary to the common law.

Moreover, the Bill would impose legal liability on industry members and thereby creates a duty to the public **notwithstanding** the presence of an intervening cause. Again, as noted, Section 7903(5)(A)(iii) allows suits for a knowing violation of “a State or Federal statute applicable to the sale or marketing of the product,” but only where the violation “was the proximate cause of the harm for which relief is sought.” A violation of the State statute is not enough. Rather, the violation must have been the proximate cause of the harm. Proximate causation is a matter of common law.

The common law rule in Maryland, like other states, is that a criminal act of a third party is an intervening or superseding cause that prevents liability from being assigned to the defendant **as a matter of law**. See generally, W.P. Keeton, Prosser and Keeton on the Law of Torts § 44, at 305 (5th ed. 1984); Restatement (Second) of Torts § 448 (1965). Thus, in *Valentine v. On Target, Inc.*, 353 Md. 544, 727 A.2d 947 (1999), the Maryland Court of Appeals (now renamed as the “Supreme Court of Maryland”) expressly rejected the claim brought against a firearms dealer by the estate and survivors of a victim who was shot and killed by an unknown assailant and who used a gun stolen from the dealer. The court held that it did not “discern in the common law the existence of a third party common law duty that would apply to these facts.” 353 Md. at 553. As stated in *Valentine*, “[o]ne cannot be expected to owe a duty to the world at large to protect it against the actions of third parties, which is why the common law distinguishes different types of relationships when determining if a duty exists.” *Valentine*, 353 Md. at 553, 727 A.2d at 951. The Court of Appeals reached the same result in *Warr v. JMGM Group, LLC* 433 Md. 170, 71 A.3d 347 (2013), where the court applied *Valentine* to hold that a bar owner owed no duty to third parties or to the public when an intoxicated bar patron caused an accident after leaving the bar.

Both *Valentine* and *Warr* apply the general common law that establishes a bright line rule that this lack of a duty obtains **regardless** of whether the harm was “foreseeable.” *Valentine*, 353 Md. at 556 (“although the inherent nature of guns suggests that their use may likely result in serious personal injury or death to another this does not create a duty of gun dealers to all persons who may be subject

of the harm”); *Warr*, 433 Md. at 183 (“When the harm is caused by a third party, rather than the first person, as is the case here, our inquiry **is not whether the harm was foreseeable**, but, rather, whether the person or entity sued had control over the conduct of the third party who caused the harm by virtue of some special relationship”). (Emphasis added). In short, *Valentine* and *Warr* applied the common law, and the common law plainly rejects the Bill’s reliance on mere foreseeability as sufficient, alone, to establish proximate causation. See also *Ford v. Edmondson Village Shopping Center Holdings, LLC*, 251 Md.App. 335, 254 A.3d 138 (2021) (discussing *Valentine*). The Bill’s attempt to impose a legal duty on industry members to the public at large without regard to intervening causes is directly contrary to the common law, as these cases make plain.

Congress relied expressly upon this general common law in enacting the PLCAA. For example, under Section 7901, Congress declared that “[t]he liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law.” See *Ileto*, 565 F.3d at 1135. Thus, by requiring proximate cause in crafting the limited exceptions to the ban, Congress made clear its intent to ban a suit where the harm is **not** the proximate cause of the injury or harm **under the common law**, as construed throughout the United States. See, e.g., *District of Columbia v. Beretta USA, Corp.*, 940 A.2d 163, 171 (2008) (noting that “the predicate exception requires proof that, despite the misuse of the firearm by a third person, ‘the [statutory] violation was a proximate cause of the harm for which relief is sought’”), quoting § 7903(5)(A)(iii); *Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53, 98, 202 A.3d 262 (2019), *cert. denied*, 140 S.Ct. 513 (2019) (noting that “[p]roving such a causal link at trial may prove to be a Herculean task”).

Because the PLCAA is a federal preemption statute, the State is not free to redefine what constitutes “proximate cause” for purposes of the preemption imposed by the PLCAA. As explained above, the Bill’s proximate causation provision eliminates any “intervening” criminal act as a proximate cause and thus is, and was intended to be, **an abrogation** of the common law for suits brought under this Bill. The State is not free to abrogate part of a federal statute that otherwise expressly preempts State law. As the Supreme Court recently noted, “[t]he Supremacy Clause provides that ‘the Judges in every State shall be bound’ by the Federal Constitution, ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” *Espinoza v. Montana Depart. of Revenue*, 140 S.Ct. 2246, 2262 (2020). Thus, the Supremacy Clause “creates a rule of decision’ directing state courts that they ‘must not give effect to state laws that conflict with federal law[.]’” *Id.*, quoting *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015). The Bill’s “proximate causation” provision is contrary to the common law *as that term is used in the PLCAA*. It is thus preempted.

**The Bill Likewise Is Preempted By The PLCAA In Other Ways:** The bill conflicts with the PLCAA in other ways. First, this bill provides that an industry member is subject to liability if the industry member knowingly or recklessly engages in the MANUFACTURE, DISTRIBUTION, IMPORTATION, OR MARKETING of

firearm-related products and that conduct that is “unlawful” or merely “unreasonable.” That broad liability is inconsistent with the PLCAA, which allows liability if the “manufacturer or seller” (and only these members of the industry) knowingly violated “a State or Federal statute **applicable to the sale or marketing of the product.**” (Emphasis added). This Bill is broader as it imposes liability not only on the “manufacturer or seller” it also imposes liability on any “firearm industry member” who is defined to include any “PERSON ENGAGED IN THE SALE, MANUFACTURE, DISTRIBUTION, IMPORTATION, OR MARKETING OF A FIREARM-RELATED PRODUCT.” The PLCAA preempts the Bill’s attempt to regulate more broadly the MARKETING, DISTRIBUTION, IMPORTATION of these products.

The Bill impermissibly allows liability for “reckless” conduct. The narrow exceptions carved out by Section 7903(5)(A)(iii) require a “knowing” violation of a record keeping requirement or a “knowing” violation of a State or Federal statute “applicable to the sale or marketing of the product.” The Supreme Court has held that “in order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant **acted with knowledge that his conduct was unlawful.**’” *Bryan v. United States*, 524 U.S. 814, 191-92 (1998), quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (emphasis added). The same point applies to “knowing.” See *Rehaif v. United States*, 139 S.Ct. 2191 (2019) (holding that the “knowingly” requirement on the federal ban on possession of a firearm by an illegal alien required proof that the alien actually knew that he was illegally in the United States). In contrast, this bill imposes liability where the industry member “recklessly” engaged in conduct. Nothing in these provisions of the PLCAA permit liability for “reckless” conduct. “Recklessness” is a deliberate indifference to the risk of harm, while “knowingly” requires that the actor actually know that the conduct is illegal. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850-51 (1998). Any liability under the bill for “reckless” conduct is thus preempted.

Third, as noted above, this bill also imposes liability for conduct that is merely “UNREASONABLE.” Because this element is undefined and incredibly vague, it is impossible to “know” whether a particular conduct is illegal under this amorphous standard and thus “knowingly” violate it. In any event, the PLCAA also sharply limits a State’s authority to impose liability for third party conduct for “unreasonable” conduct. Section 7903(5)(A)(iii)(II), allows suits where the “the manufacturer or seller” knew or had “reasonable cause to believe that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition **under subsection (g) or (n) of section 922 of Title 18.**” (Emphasis added). Subsection (g) bans possession of a modern firearm or modern ammunition by a prohibited person and subsection (n) bans such possession by a person under indictment for a crime punishable by more than one year.

This provision of the PLCAA requires that the violation involve these two sections of the U.S. Code. This exception to preemption in the PLCAA is thus far narrower in scope than the potentially massive liabilities for “UNREASONABLE” conduct or conduct that is unlawful in **other** ways. The liability imposed by this Bill goes far beyond any such sales, as it imposes liability for any “unlawful” conduct and any “unreasonable” conduct. That provision of the Bill and the Bill’s application to all

firearms industry members are thus preempted. Another exception to the preemption ban involving “reasonableness” is set out in Section 7903(5)(A)(v), which allows suits where the harm “resulting directly from a defect in **design or manufacture of the product**, when used as intended or in a **reasonably foreseeable manner.**” (Emphasis added). The liability allowed by this Bill is not limited to harm caused by a defect in design or manufacture. Rather it sanctions “unreasonable” conduct and is thus preempted.

Fourth, Section 7903(5)(A)(ii) allows actions against “a seller” (and only a “seller”) for “negligent entrustment or negligence per se.” Since this provision is limited to a “seller” it does not authorize any suit against any other “industry member.” Moreover, the term “negligent entrustment” is defined by Section 79003(5)(B) as meaning “the supplying of a qualified product by a seller for use by another person when the seller **knows, or reasonably should know**, the person to whom the product is supplied **is likely to, and does, use the product** in a manner involving unreasonable risk of physical injury to the person or others.” This definition is a limitation on the exception and the exception thus reaches only conduct where the product is both “likely” to be used and **is in fact** used in a manner involving an “unreasonable risk of physical injury.” It does not allow suits for any “UNREASONABLE” conduct as this bill does. This additional liability imposed by the bill goes beyond that allowed by the PLCAA and is thus preempted.

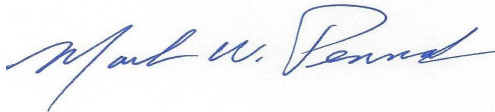
Indeed, Maryland’s law of negligent entrustment is still narrower as, under Maryland law, “the doctrine of negligent entrustment is generally limited to those situations in which the chattel is under the control of the supplier at the time of the accident” and that “without the right to permit or prohibit use of the chattel at the time of the accident, an individual cannot be liable for negligent entrustment.” *Broadwater v. Dorsey*, 344 Md. 548, 558, 688 A.2d 436 (1997). That is the common law and thus, as explained above, Maryland is not free to abrogate the common law to expand liability to escape preemption under the PLCAA. In this regard, the PLCAA does not create any cause of action and incorporates the common law on what constitutes “negligent entrustment,” as limited by the PLCAA. See Section 7903(5)(C) (providing “no provision of this [statute] shall be construed to create a public or private cause of action”). That means no suit for negligent entrustment would be available under Maryland common law unless the “industry member” had the right to control the use of the “qualified product” **at the time of the incident** that caused the harm of which the plaintiff complains. Even then, under the PLCAA, the use must cause a cognizable **harm** to a person, not merely be “unlawful” or “unreasonable” and cause “harm to the public” (whatever that means). Suits, such as those by the Attorney General authorized in the Bill, are not permissible under this section of the PLCAA in the absence of any harm to an individual. This Bill allows such suits for “harm to the public,” a term that is wholly nebulous and undefined.

Fifth, the PLCAA’s carve out for suits alleging “negligence per se” is even narrower. It is well established at common law that such negligence requires a violation of a specific statute, that the person alleging the negligence is within the class of persons sought to be protected, and that the harm suffered is of a kind which the statute was intended, in general, to prevent. *Polakoff v. Turner*, 385 Md. 467, 479, 869 A.2d

837 (2005). Thus, “a violation of a statute or regulation would, at most, establish evidence of ordinary negligence, not gross negligence or negligence per se.” *Johnson v. Lee*, 2019 WL 3283301 at \*6 (Md Ct.Sp.App. 2019). Nothing in this bill would satisfy the “negligence per se” exception to the preemption imposed by the PLCAA.

If this Bill becomes law, Maryland dealers will either go out of business or move across State laws and service Maryland customers from such locations. Such dealers would then be beyond the ability of Maryland to regulate at all. The only dealers left in Maryland would those few who would be willing to do transfers from such out of state dealers, as permitted by federal law. Such in-state dealers would be entirely unnecessary for long guns. Federal law allows dealers to sell long guns to out of state residents if such sales are conducted face-to-face at the dealer’s shop. See 18 U.S.C. § 922(b)(3). Maryland residents will simply buy firearms in Virginia, West Virginia and Pennsylvania. For all the foregoing reasons, we urge an unfavorable report.

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

# **HB 259 MLFDA Testimony .pdf**

Uploaded by: Mark Schneider

Position: UNF



## **HB 259 Testimony**

**My name is Mark Schneider, Vice President of the Maryland Licensed Firearms Dealers Association.**

**I oppose HB 259 as it threatens our ability to stay in business.**

**There are many problems with this Bill. Data does not support the claim that Maryland Licensed Firearms Dealers are the source of the reckless, illegal actions of criminals.**

**We are a highly regulated industry abiding by both federal and state statutes governing the sale of our products. No licensed dealer knowingly sells to the criminal market as Federal and state law already prohibits this with severe civil and criminal penalties.**

**Vague Terms such as “reasonable controls”, or “unreasonable under the totality of the circumstances”, are not defined and thus unacceptable. There also needs clarification on what is meant by reckless or unlawful marketing.**

**This Bill would open every licensed dealer to frivolous, punitive litigation and if enacted into law would make it impossible to obtain insurance. Without insurance no dealer could stay in business.**

**Dealers should not be held liable for the legal and lawful sale of firearms. Those who commit illegal acts with firearms should. And we support stricter penalties for those who illegally use firearms.**

**I Request an Unfavorable Report**