President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 488 and HB 947

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 488 and its cross-file HB 947 (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." The Bill also imposes an additional requirement 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."

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 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.

The Vagueness Standard:

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). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)). 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.'" *Galloway*, 365 Md. at 616, quoting *Bowers v. State*, 283 Md. 115, 122, 389 A.2d 341 (1978). See also *Ashton v. Brown*, 339 Md. 70, 89, 660 A.2d 447 (1995); *In Re Leroy T.*, 285 Md. 508, 403 A.2d 1226 (1979).

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).

Federal constitutional law is in accord. See, e.g.,*Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006) (recognizing that "[a] statute is impermissibly vague if it either (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or (2) authorizes or even encourages arbitrary and discriminatory enforcement" (internal quotations omitted)). Such a statute need not be vague in all possible applications in order to be void for vagueness under the Due Process Clause. *Johnson v. United States*, 576 U.S. 591, 602 (2015) ("our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp"). And the rule is well established that the government "cannot find clarity in a wholly ambiguous statute simply by relying on the benevolence or good faith of those enforcing it." *Wollschlaeger v. Governor, Fla.,* 848 F.3d 1293, 1322 (11th Cir. 2017) (en banc). Such statutes are facially invalid.

The Ban On "Unreasonable" Conduct Is Vague.

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. To pass muster under the Due Process Clause, a statute banning "unreasonable" conduct must provide an "objective" and "quantifiable" standard by which reasonableness is measured. See, e.g., *Munn v. City of Ocean Springs, Miss.*, 763 F.3d 437, 440-41 (5th Cir. 2014), citing *Coates v. City of Cincinnati*, 402 U.S. 611, (1971) (explaining that statute criminalizing "annoying" others was "vague" because "no standard of conduct is specified at all"). See also *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 736 (D.C. Cir. 2016) (holding that a prohibition on "unreasonable" conduct gave "sufficient notice to affected entities of the prohibited conduct going forward" **where the regulation "set forth the factors" for enforcement and "included a description of how each factor will be interpreted and applied**.") (emphasis supplied). This Bill does not even approach affording such notice. If there is no standard, there is no

notice to the "industry member" as to what circumstances may "contribute to harm to the public." Indeed, in allowing the Bill never even defines that what qualifies as "harm to the public." The Attorney General and private plaintiffs may not make up unreasonable conduct through ad hoc litigation. Prior notice is required. Under this Bill, conduct that is entirely lawful could nonetheless be deemed "unreasonable" and thus constitute a "public nuisance." Arbitrary and discriminatory enforcement is virtually guaranteed.

The Term "Reasonable Controls" Is Vague.

The additional requirement that the "industry member" "establish and implement reasonable controls" is likewise vague. The term "reasonable controls" is defined as "policies" that are "designed to (1) TO PREVENT THE SALE OR DISTRIBUTION OF A FIREARM–RELATED PRODUCT TO: (I) A STRAW PURCHASER; (II) A FIREARM TRAFFICKER; III) A PERSON PROHIBITED FROM POSSESSING A FIREARM 1 UNDER STATE OR FEDERAL LAW; AND (IV) A PERSON WHO THE FIREARM INDUSTRY MEMBER HAS REASONABLE CAUSE TO BELIEVE INTENDS TO USE THE FIREARM–RELATED PRODUCT: 1. TO COMMIT A CRIME; OR 2. TO CAUSE HARM TO THE PERSON OR ANOTHER PERSON." As thus defined every one of these acts are already barred by federal and/or State law. See, e.g., 18 U.S.C. §§ 922(b), (d), (h), (n).). Maryland law goes well beyond federal law, imposing, for example, security requirements on licensed dealers. House Bill 1021, 2022 Session Laws, Ch. 55.

Persons who knowingly participate in in criminal activities may also be charged as aiders and abettors under federal law, 18 U.S.C. § 2, or as accessories under State law. *State v. Hawkins*, 326 Md. 270604 A.2d 489 (1992). If the Bill is intended to provide that industry members need only comply with existing law, then the Bill is ridiculous. One hardly needs a law that commands someone to obey the law. The Bill must thus be intended to impose additional requirements, none of which are specified. There is no standard by which these additional requirements are to be determined. Beyond these pre-existing provisions, there is simply no way for an "industry members" to know what a "reasonable control" would constitute. What additional steps or "controls" must the industry member impose other than those already required by law? The Bill is silent.

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 an 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 and liability. The discretion of the enforcing official or plaintiff is virtually unlimited. Again, there are simply no enforcement "guidelines" as 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 *Dubin v. United States,* 599 U.S. 110, 132 (2023) (same); *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 New York legislation from which this Bill was apparently copied (at least 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); MD Code, Criminal Procedure, § 10-105(a) (allowing expungement of "public nuisance" crimes). 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) (emphasis added). 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. The Bill thus improperly authorizes suits by persons **who may not sue under controlling "public nuisance" case law.**

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*, 604 F.Supp.3d 48, 65-66 (N.D.N.Y. 2022), *appeal pending*, No. 22-1374 (2d Cir.) (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). The district court in *James* declined to enjoin the New York statute under PLCAA, holding that it was enough under PLCAA predicate statute if the statute "expressly regulates firearms." (604 F.Supp. at 59-61). The NSSF took an appeal to the United States Court of Appeals for the Second Circuit which heard oral argument on November 3, 2023. While the Second Circuit's decision has yet to be issued, that argument did not go well for New York. Indeed, this Bill is even more extreme than the New York statute, which declared to be a nuisance only that conduct that "endangers the safety or health of the public," not merely conduct that "harms the public" in some undefined way. See N.Y. Gen. Bus. Law §§ 898-c, declaring a violation of N.Y. Gen. Bus. Law §§ 898-b.

The Bill's use of "knowingly or reckless conduct" is not a limit on liability.

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 prohibited conduct where the Bill sanctions **not only** "unlawful" conduct, but also bans utterly undefined "unreasonable" conduct. Again, the Bill does not even set forth any criteria by which "unreasonable" conduct is measured and thus invites arbitrary or discriminatory enforcement. 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 simply 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 industry member is left to guess. The potential liability is limitless and there is simply no way to guard against it as no industry member will have prior notice.

The Effect On Maryland Industry Members.

As should be apparent from the foregoing discussion, this Bill creates an impossible business environment for "industry members" in Maryland. Industry members simply have no possible way to anticipate what conduct will cross the line and subject them to ruinous litigation costs and potentially huge judgments. Because of the vagueness of this Bill, there are no steps that the industry members can take to minimize the risk of liability. If the purpose of the bill is to change or cabin industry behavior, then notice must be provided. Otherwise, the bill is just punitive and can only be viewed as designed to put industry members out of business with crippling litigation costs and damage awards, including punitive damages. Because the standard for liability is potentially limitless, there is no way "industry members" will be able to obtain liability insurance to protect themselves.

Smart dealers and other industry members will seek to minimize exposure by moving their operations out of Maryland. That may well be the intent behind this Bill in the demonstratively false belief that such a result will result in fewer guns in Maryland. But that will not happen because Marylanders will merely purchase firearms and ammunition from out-of-State sources. Dealers in neighboring States are just a relatively short drive away. The supply of firearms will not diminish; the location of the sources will simply change, and Maryland will lose tax revenue and jobs. That happened in 2013 when Maryland passed the Firearms Safety Act of 2013. A major Maryland firearms manufacturer, Beretta, moved out of Maryland to Tennessee. See https://www.nbcwashington.com/news/local/beretta-moves-all-manufacturing-out-of-md-after-state-passes-new-gun-bill/2071229/.

SECOND AMENDMENT CONCERNS.

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), *McDonald v. Chicago*, 561 U.S. 742, 750 (2010), and *NYSRPA v. Bruen*, 142 S.Ct. 2111 (2022), the Second Amendment protects the right of a law-abiding citizen to acquire firearms, including handguns. See *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) ("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). See also *MSI v. Moore*, 86 F.4th 1038, 1043 (4th Cir. 2023), *rehearing granted*, 2024 WL 124290 (4th Cir. Jan. 11, 2024) (holding that the right to acquire firearms was implicit in the right to "keep and bear arms"). Under federal and State law, firearms are principally "acquired" from or through "industry members." Regulations, like this Bill, that impose potentially huge liability on "industry members" necessarily affect the exercise of Second Amendment rights of Marylanders to acquire firearms for their own self-defense.

Firearm dealers also 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. There is no historical tradition that would support the State-wide imposition of ruinous liability potential on sellers of firearms. 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). Enforcement prosecutions under 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.

THE BILL IS CONTRARY TO THE PLCAA.

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)).

PLCAA creates a "predicate exception" to preemption, providing that "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." 15 U.S.C. § 7903(5)(A)(iii). This reference to "proximate cause" makes clear that Congress intended to ban suits in which harm was caused by "the criminal or unlawful" use of a firearm by another. Congress thus declared 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 did create the "predicate exception" to preemption. Such suits are strictly defined to 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(5)(A)(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)). 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).

Proximate causation is central to the preemption posed by PLCAA. 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)(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").

The Bill Illegally Imposes Liability For Undefined "Unreasonable" Conduct:

This Bill does not satisfy the "predicate exception" requirements of 15 U.S.C. § 7903(5)(A)(iii). Again, that provision allows suits for only "knowing" violations of law. 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, *a fortiori*, to the even more demanding requirement of a "knowing violation" For a violation be "knowing" the defendant must "know the facts that make his conduct illegal," *Staples v. United States*, 511 U.S. 600, 606 (1994). 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 knew that he was illegally in the United States); *Liparota v. United States*, 471 U.S. 419, 426 & n.9 (1985) (a "knowingly" requirement "requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations"); *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287–88 (D.C. Cir. 2015) ("Consistent with the need for a knowing violation, the FCA [False Claims Act] does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation.").

This Bill does not satisfy the predicate exception because it is impossible to have a "knowing violation" where the Bill punishes merely "unreasonable" conduct without creating a specific standard for measuring reasonable. Again, as the Supreme Court stated in *Staples*, a violation cannot be "knowing" unless the defendant "know[s] the facts that make his conduct illegal." 511 U.S. at 606. The knowing violation requirement has thus led a federal district court to invalidate, under PLCAA, a virtually identical New Jersey statute, N.J.S.A. 2C:58-35. See *NSSF v. Platkin*, 2023 WL 1380388 (D.N.J. Jan. 31, 2023). Specifically, the court held:

> The knowingly requirement of the predicate exception necessitates the actor **to have a sufficiently concrete duty to have knowingly violated a relevant statute**. It is contrary to the PLCAA to hold an industry member liable who complies with all laws but did not know that it failed to employ 'reasonable procedures, safeguards, and business practices,' or has conducted its lawful business in a manner so 'unreasonable under all the circumstances' that it can be said to have "contribute[d] to" "a condition which ... contributes to the injury or endangerment of the health, safety, peace, comfort, or convenience of others.

Slip op. at *6 (emphasis added). As this holding makes clear, only those statutes that impose obligations that an industry member can know ahead of time that its conduct would violate can be predicate statutes. Full stop. This Bill is virtually identical to that part of the New Jersey statute and will fail for the same reason.

This Bill imposes no standard for assessing reasonableness and thus effectively imposes a regime **of after-the-fact, regulation by litigation**. Such legislation defeats the preemption envisioned by Congress because it invites the same abusive litigation that led to the enactment of PLCAA. That provision provides that "civil

liability actions" may not be brought in any State or Federal court, 15 U.S.C. § 7902(a), and requires the immediate dismissal of any such suit that had been brought. Id. § 7902(b). The preemption thus runs to the **suit**, not merely to liability because Congress understood that it was the **litigation itself** that was "an abuse of the legal system" and thus a threat to "lawful commerce" in firearms. See 15 U.S.C. § 7901(a)(6) ("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."); id., § 7901(a)(8) ("The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States."), id., § 7901(b)(6) (among the purposes of PLCAA is "[t]o preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States"). Indeed, much of the abusive litigation that gave rise to the enactment of PLCAA was the misuse of a state's "public nuisance" laws. See, e.g., *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1130-31 (9th Cir. 2009).

These underlying purposes were recently stressed in *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.,* 91 F.4th 511, 2024 WL 227773 at *15 (1st Cir. 2024). There, the First Circuit rejected the plaintiff's (Mexico) claim that PLCAA did not apply to a suit by a foreign sovereign as well as the plaintiff's claim that the defendant "knowingly violated" the Federal ban on the sale of machineguns by allowing the sale of semi-automatic firearms (such as an AR-15), which could be converted to fully automatic firearms. The court held that the "knowing possession of a readily convertible semiautomatic weapon does not constitute de facto knowing possession of a 'machinegun'" and thus the sale of a semi-automatic firearm could not be a "knowing" violation of federal law. Id. at *16. The court stressed that semi-automatic firearms are perfectly legal under federal law. Id. at *15-*16. The court did allow the claim to go forward that the defendants sold firearms to dealers who the defendants allegedly **knew** were **illegally** selling firearms to members of Mexican drug cartels, holding that such sales would satisfy the predicate exception's requirement for a "knowing violation" of federal law. Id. at *14. It remanded the case, stressing that Mexico still had to prove that claim.

As this decision makes clear, PLCAA bars suits against industry members for sales that are otherwise legal under State and federal law. Yet, this Bill impermissibly imposes liability for "unreasonable" conduct and for failing to impose "reasonable controls and procedures" **in addition** to liability for illegal conduct. It is nonsense to say that an industry member who complies with all the many laws that explicitly state what it may and may not do can nonetheless "know" in real time that its actions were "unreasonable" or that it failed to employ "reasonable controls and

procedures" that "contributed" to a "public harm." That is especially so where "contributed" and "public harm" are not even defined. Indeed, as discussed below, it is highly doubtful that liability for "contributing" to a harm can satisfy PLCAA's proximate causation requirement. The suits authorized by undefined "unreasonable" conduct in this Bill are thus flatly preempted by PLCAA.

The Bill Illegally Allows Liability Without Regard to Proximate Causation:

The predicate statute requirement of Section 7903(5)(iii) makes clear that suits are allowed only if and when "the knowing" violation of a State or federal statute "was a proximate cause of the harm for which relief is sought." As very recently stated by the Supreme Court of New Hampshire, "[o]ne of the PLCAA's purposes is to shield firearms manufacturers and sellers from liability for injuries 'solely caused' by the misuse of firearms by third parties." *Hardy v. Chester Arms, LLC*, --- A.3d ---, 2024 WL 332134 at *5 (N.H. Jan. 30, 2024), citing 15 U.S.C. § 7901(b)(1), and 15 U.S.C. § 7901(a)(6)-(7). See also *Estados Unidos Mexicanos*, 2024 WL 227773 at *19 (under PLCCA, the plaintiff must show that "its alleged harms are proximately caused by defendants' actions, and not merely derivative of harms to its citizens"). As discussed below, Maryland has abundant case law on this proximate causation requirement. This Bill ignores the proximate causation requirement in imposing liability for mere "harm to the public."

In *NSSF,* the district court relied on this point in finding that the PLCAA proximate causation requirement was violated by a New Jersey statute that is virtually identical to this Bill. The court ruled that the New Jersey law "would subject manufacturers, distributors, dealers, and importers of firearms or ammunition products and their trade associations to civil liability for the harm *solely caused by the criminal or unlawful misuse of firearm* or ammunition products by others." Slip op. at *7 (emphasis added). The court in *NSSF* thus awarded preliminary injunctive relief, finding that the plaintiffs and its members would suffer immediate irreparable injury. As explained above, suits for harm caused by criminal misuse of firearms are flatly barred by PLCAA. And as stressed by the First Circuit in *Estados Unidos Mexicanos*, an actual knowing violation of an existing known requirement is still required under the predicate exception.

We acknowledge of course that the district court decision in *NSSF* was recently vacated on appeal by the Third Circuit, but that court merely held that the particular plaintiffs in that case lacked Article III standing to bring a pre-enforcement challenge. *NSSF v. Platkin*, 80 F.4th 215 (3d Cir. 2023). The Third Circuit did not reach the merits and did not suggest that the district court was incorrect on the merits. Thus, the merits of the New Jersey statute may still be challenged in any enforcement action when the statute is enforced on the same grounds on which the district court ruled. Even assuming *arguendo* that the Third Circuit's Article III standing decision is correct, this Bill suffers from the same flaws as the New Jersey statute and will likewise fail on the first enforcement attempt. It should also be noted that the Third Circuit's standing decision is based on Article III considerations in federal court. The standard for standing to bring a pre-enforcement suit in the Maryland courts simply requires that plaintiff be affected or aggrieved in a way different than the general public. That standard for suits in

State courts is much less demanding than Article III requirements, particularly where (as here) the regulation at issue "implicates" the regulated entity's constitutional rights. See *Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 362-64, 235 A.3d 873 (2020) (collecting case law).

Finally, the Bill fails PLCAA's ban on suits in any court on a cause of action that would impose liability stemming from the misuse of a firearm. Specifically, 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." While this Bill does not expressly allow such recovery, the Bill does allow liability to be imposed for any "harm to the public" through any sale or practice that is, though perfectly legal, is found to be nonetheless "unreasonable." "Harm to the public" is utterly undefined but it goes without saying that criminal misuse of a firearm is harmful to the public at large. The obvious intent of the Bill is thus to reach *any* "harm to the public" that may remotely be said to flow from any industry practice, including harm resulting from criminal misuse of firearms. Liability for criminal or third-party misuse violates PLCAA's proximate causation. In allowing recovery for harm to the public flowing from criminal misuse of a firearm, the Bill violates PLCAA.

Maryland Law Of Proximate Causation Does Not Permit The Imposition Of Liability For The Criminal Misuse Of A Product:

Stated simply, "industry members" do not owe a "duty of care" to the "public" to prevent "harms" that arise from the acts of third parties who may use firearms illegally or improperly. And that is true regardless of whether the conduct resulting in the harm is "unreasonable under the totality of the circumstances." The common law proximate causation 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). That sort of liability is exactly what PLCAA forbids.

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 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, in some sense, "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 in Maryland plainly rejects the Bill's imposition of liability merely because a lawful (but "unreasonable") practice resulted in "harm to the public." 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. Indeed, imposing liability for the acts of third parties that result in harm to the public is **precisely** the type of suit banned by the PLCAA in Section 7902 and Section 7903(5)(ii).

Because the PLCAA expressly bars actions in any "court," the State is not free to authorize suits that ignore proximate causation requirements in enacting a "public nuisance" statute directed at the entire firearms industry. 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 authorization of suits for "harm to the public" without regard to proximate causation and the other provisions of the PLCAA is preempted.

The Bill Is Preempted By 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 predicate exception in 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 PCLAA preempts the Bill's attempt to regulate more broadly the MARKETING,

DISTRIBUTION, IMPORTATION of these products and by persons who are not a "manufacturer or seller."

The Bill also 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 of Federal statute "applicable to the sale or marketing of the product." As explained, that means that the actor must engage in conduct that the actor knew was illegal. In contrast, this bill imposes liability where the industry member "recklessly" engaged in conduct. Nothing in these provisions of the PLCAA permits liability for "reckless" conduct. "Recklessness" is a deliberate indifference to the risk of harm, while "knowingly" requires that the actor knows that the conduct is illegal. See *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 58-60 (2007) (noting that "knowing violations are sensibly understood as a more serious subcategory of willful ones" and that "action falling within the knowing subcategory **does not** simultaneously fall within the reckless alternative") (emphasis added).

In the predicate exception, Congress required a "knowing" violation of a specific kind of statute (*viz.*, a statute "applicable to the sale or marketing of the product"), not merely a "reckless" violation of such a statute. Any liability under the bill for "reckless" conduct is thus preempted. "Reckless" behavior and "knowing" behavior are simply not the same. See also *United States ex rel. Schutte v. SuperValu Inc.*, 3598 U.S. 739, 749-55 (2022) (distinguishing "willfully" and "knowingly" as different statutory terms and noting that a requirement of "knowingly" focuses "on what the defendant knew" subjectively "not to what an objectively reasonable person may have known or believed").

Third, as noted above, this Bill also imposes liability for conduct that is merely "UNREASONABLE." As explained above, 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. Only this subsection of PLCAA allows "a reasonable cause to believe" standard. Otherwise, a "knowing violation" is required by the predicate exception of PLCAA. This exception to preemption in the PLCAA is thus far narrower in scope than the potentially massive liabilities for "UNREASONABLE" conduct. The liability imposed by this Bill goes far beyond any such sales in violation of subsection (g) and (n), as it imposes liability for **any** knowingly "unreasonable" conduct. As the district court's decision in *NSSF* makes clear, it is quite impossible to be "knowingly" "unreasonable" where "unreasonable" is never defined by

reference to any standard, either objective or subjective. 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."

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 type of "industry member," like this Bill does. 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, as explained above, Maryland is not free to abrogate the common law to expand liability to escape preemption under the PCLAA. 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 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, again, wholly nebulous, and undefined.

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). See also *Absolon v. Dollohite*, 376 Md. 547, 557, 831 A.2d 6 (2003). Nothing in this Bill would satisfy the "negligence per se" exception to the preemption imposed by the PLCAA.

THE BILL'S ATTEMPT TO REGULATE INTERSTATE COMMERCE VIOLATES THE COMMERCE CLAUSE AND DUE PROCESS CLAUSE.

Last, but hardly least, this Bill violates the Commerce Clause **and** the Due Process Clause. The Constitution vests in Congress the "Power" to "regulate Commerce … among the several States." U.S. Const. art. I, §8, cl. 3. "Although the [Commerce] Clause is framed as a positive grant of power to Congress," the Supreme Court has "long held that this Clause also prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2459 (2019).

By its terms, the Bill applies to "firearm related product," regardless of where the product is made or distributed. It likewise applies to any "industry member" without regard to where that industry member is located. The Bill thus indisputably applies to conduct taking place in other States. On its face, that is a violation of the Commerce Clause. See, e.g., *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (A state may not enact or enforce legislation that "directly controls commerce occurring wholly outside the boundaries of a State"). As stated in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986), "[w]hen a state statute directly regulates or discriminates against interstate commerce ... [courts] generally [strike] down the statute without further inquiry." See also *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935).

While a State may generally enact local legislation that does not discriminate against interstate commerce, *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (plurality opinion), six members of the Supreme Court continue to agree that the Commerce Clause does not allow a State to disproportionately burden interstate commerce under the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). See *National Pork Producers,* 598 U.S. at 391-92 (Sotomayor, J., and Kagan, J., concurring), id., 598 U.S. at 394-95 (Roberts, C.J., Alito, J., Kavanaugh, J., and Jackson, J., concurring in part and dissenting in part), id., 598 U.S. at 407 n.3 (Kavanaugh, J., concurring in part dissenting in part) (noting a split on this point). *Pike* holds that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits*." 397 U.S. at 142 (emphasis added). Application of that test, in turn, will depend on "whether it [the State interest] could be promoted as well with a lesser impact on interstate activities." Id. *Pike* remains good law.

National Pork Producers illustrates the proper analysis. The Court held in that case that California may enact legislation that banned the sale of pork in the State if the pigs were raised in the humane conditions specified the statute as long as the

statute did not facially or in fact discriminate against interstate commerce. However, the Court stressed that its decision was limited to circumstances where the out-of-state company "choose" to sell within the state. 598 U.S. at 376 n.1 (plurality opinion). The California statute at issue in *National Pork Producers* only purported to regulate sales taking place *in California*, not conduct occurring elsewhere. The prohibited conduct, the sale, was expressly tied to California and the ban on sales did not discriminate against out of state producers.

In *NSSF v. Bonta*, --- F.Supp.3d ----, 2024 WL 710892 at *6 (S.D. Calif. Feb. 21, 2024), the district court applied these dormant Commerce Clause principles to strike down California's attempt to ban the sale, manufacture, importing or marketing supposedly "abnormally dangerous firearms," because the bans directly regulated conduct taking place wholly outside of California. The court found it insufficient that the statute required a likelihood of an "unreasonable risk of harm . . . in California or "it was reasonably foreseeable that" such an item would be possessed in California. Id. at *7. In so holding, the court rejected the State's reliance on *National Pork Producers*, holding that *National Pork Producers* "did not disturb the constitutional bar on state laws that 'directly regulate[ ] out-of-state transactions by those with no connection to the State.'" (Quoting *National Pork Producers*, 598 U.S. at 376 n.1).

Under this Bill, a manufacturer or dealer, or distributor that does not engage in any commerce in Maryland still could be sued in Maryland by the Attorney General or private party for manufacturing, selling, or marketing products in other states in an "unreasonable" way (whatever that means) or for failing to impose "reasonable controls" (whatever that means) if the conduct merely "contribute[s]" "to harm to the public" (whatever that means). Indeed, nothing in the Bill requires that the "harm to the public" even occur **in Maryland**. Rather, this Bill purports to reach nationwide to every seller, manufacturer, distributor, importer, or marketer of a "firearm related product" merely if it was "reasonably foreseeable that **possession** would occur in the State." Such "possession" need not be even linked to the "harm to the public." As *NSSF v. Bonta* correctly holds, a mere "foreseeable possession" link is insufficient under *National Pork Producers*.

The Commerce Clause does not permit a single State to regulate an entire industry, nationwide, just because it is "foreseeable" that a person in Maryland may come into possession of an item after the item is placed into the stream of commerce elsewhere. Here, the Bill expressly states that the regulation allowed by this Bill would be available if mere possession was "reasonably foreseeable," the very term found insufficient in California's statute at issue in *NSSF v. Bonta*. This Bill will fail for the same reasons that California's law failed in *NSSF v. Bonta*. Here, whatever legitimate interest this State has in preventing "harm to the public" in Maryland can be accomplished by expressly regulating specific conduct *taking place in Maryland* in such a way that a potential defendant has full notice of what is prohibited. This Bill is not even remotely so limited.

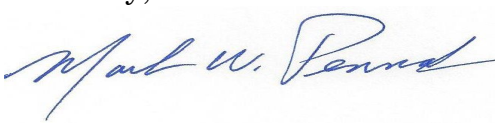
Indeed, mere foreseeability of possession is not even sufficient under the Due Process Clause for a State to exercise "long arm jurisdiction" over an out of state corporation or person. See, e.g., *Asahi Metal Industry Co., Ltd. v. Superior Court of*

California, Solano County, 480 U.S. 102 110 (1987) ("The 'substantial connection,' * * *, between the defendant and the forum State necessary for a finding of minimum contacts **must** come about by an action of the defendant **purposefully directed toward the forum State**."). (Emphasis added). See also *Daimler AG v. Bauman*, 571 U.S. 117, 132-33 (2014). This Bill thus vastly exceeds the State's authority under the Due Process Clause as well as under the Commerce Clause.

CONCLUSION:

By any measure this Bill vastly overreaches. It impermissibly directly regulates conduct wholly taking place outside of Maryland as well as disproportionately burdens interstate commerce under *Pike*. The Bill impermissibly exceeds the limits on the State's long- arm statute under the Due Process Clause by allowing enforcement proceedings against out of state actors who do not engage in conduct directed at Maryland. It creates vague standards that provide no notice and that fail to provide enforcement guidelines, thus inviting abusive, arbitrary, and discriminatory enforcement proceedings in violation of the Maryland and federal constitutions. And, as explained above, it does all these things in flagrant disregard of the text and purposes of PLCAA which was enacted for the very purpose of protecting the firearms industry from the very type of abusive suits authorized by this Bill. This Bill will not survive judicial review. Respectfully, enacting a Bill suffering from so many flaws is senseless. We urge an unfavorable report.

Sincerely,



Mark W. Pennak
President, Maryland Shall Issue, Inc.
mpennak@marylandshallissue.org