President
Mark W. Pennak

February 7, 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. This law was immediately successfully challenged by the National Shooting Sports Foundation ("NSSF") in *NSSF v.*

Platkin, No. 22-6646, 2023 WL 1380388 (D.N.J. Jan. 31, 2023). The federal district court held that the New Jersey statute violated PLCAA. 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 13. The court concluded that that result was "in direct conflict with the PLCAA's purpose" and thus preempted by PLCAA. Slip op. at 13-14. These Bills suffer from exactly the same flaw and will likewise not survive judicial review. The court in *NSSF* awarded preliminary injunctive relief, finding that the plaintiffs and its members would suffer immediate irreparable injury. PLCAA is discussed in detailed below. Suffice it to say at this point that this Bill suffers from the same vagueness concerns that lead to the preliminary injunction in *NSSF v. Platkin*. See *NSSF* at 14, 17.

Moreover, Maryland is not New Jersey and Maryland 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 sough**t, 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.
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> 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 PCLAA*. 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 PCLAA 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 of 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.

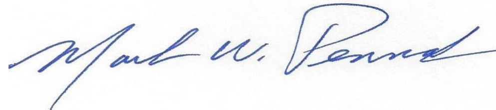
Indeed, Maryland's law of negligent entrustment is still narrower as, under Maryland law, "the doctrine of negligent entrustment is generally limited to those situations in which the chattel is under the control of the supplier at the time of the accident" and that "without the right to permit or prohibit 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 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 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,



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