WRITTEN TESTIMONY OF MICHAEL F. BURKE, IN OPPOSITION TO HB 947/SB 488

I am – a Veteran with 21 years of military service; I am also an experienced law enforcement officer with more than 30 years of experience at the County, State and Federal levels. I am an expert in Maryland Firearms Law, Federal Firearms law and the law of self-defense; a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License ("HQL"); and a certified NRA instructor and Chief Range Safety Officer. Also – I am a Certified Protection Professional (CPP) and subject matter expert in Physical Security and other security disciplines, a locksmith, and a Computer Security and electronics expert. **I write today in opposition to HB 947/SB 488.**

The Bill:

Civil Actions - Public Nuisances - Firearm Industry Members (Gun Industry Accountability Act of 2024)- This unconstitutional bill is intended to circumvent federal protections for the lawful commerce of firearms and open the floodgates to a barrage of frivolous lawsuits seeking the force firearms manufacturers and dealers out of business by holding the innocent citizens of Maryland responsible for the unlawful acts of criminals.

TO WIT:

3-2303 (C) A PARTY SEEKING RELIEF UNDER THIS SECTION IS NOT REQUIRED TO PROVE THAT A FIREARM INDUSTRY MEMBER ACTED WITH THE INTENT TO VIOLATE THIS SUBTITLE

Like so many other laws proposed or passed by the Maryland General Assembly, this harsh BILL will unfairly punish and impede the poorest third of the Citizens of this state. Most specifically, this TAX punishes the majority of the residents- the VOTERS- of Baltimore City, Baltimore County, Prince Georges County, as well as the Eastern Shore Counties (Caroline, Cecil, Dorchester, Kent, Queen Anne's, Somerset, Talbot, Wicomico, and Worcester), Southern (Calvert, Charles, and St. Mary's counties) and Western Maryland (Washington, Allegany, and Garrett counties.)

First: this is a futile effort to achieve an impossible goal. (Recall that Beretta moved their billion-dollar manufacturing facilities to Tennessee in 2016 because of Maryland laws and taxes.) Prime military firearms contractors today- SIG-Sauer- build their firearms in New Hampshire, while Glock builds their firearms in Georgia.

Second: many firearms and ammunition sales are handled by the Black-Market dealers across Maryland. They will not comply with any State of Federal firearms laws or regulations as they are criminal organizations engaged in for-profit distribution of prohibited products (guns, drugs, sex slaves, stolen property, etc). They won't be sued under this statute- they possess no

licenses, no sales permits, no real estate, no payroll employees, no fixed assets or traceable income.

Third: the legitimate individuals who are Federal Firearms License holders (like myself) will immediately be AT RISK should 'anyone' be offended by anything we do – or fail to do. Countless law-abiding residents of Maryland will be at risk of ruinous civil litigation without regard to our basic Constitutional rights under the 4th, 5th, 6th, and 14th Amendments of the United States Constitution.

The Bill Violates the Second Amendment: This Bill affects the exercise of Second Amendment rights. Under the Supreme Court's recent decision in New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S.Ct. 2111 (2022), law-abiding gun owners with carry permits have a Second Amendment right to carry in public. 142 S.Ct. at 2135. There is also a well-recognized right to acquire a firearm in this State under the Second Amendment. See Maryland Shall Issue v. Hogan, 566 F.Supp. 3d 404, (D. MD 2021). With that right comes the ancillary right to sell firearms, as without dealers, there can be no acquisition. See, e.g., Andrews v. State, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair."); Teixeira v. City of Alameda, 873 F.3d 670, 677 (9th Cir. 2017) (en banc), cert. denied, 138 S.Ct. 1988 (2018) ("the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms"). This Bill would certainly impede the ability of purchasers to acquire firearms BY ATTACKING THE RIGHT OF LICENSED INDIVIDUALS and BUSINESSES TO CONDUCT LEGALLY PERMITTED TRANSACTIONS.

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Even more fundamentally, the State may not condition these Second Amendment rights by subjecting such dealers and customers to unfair LITIGATION on 2A protected items. Under the "unconstitutional conditions doctrine," the State may not condition the exercise of a constitutional right by demanding that a person give up another constitutional right. See, e.g., Simmons v. United States, 390 U.S. 377, 393-394 (1968) (it is "intolerable that one constitutional right should have to be surrendered in order to assert another"). Cf. Perry v. Sindermann, 408 U.S. 593, 597 (1972) (a government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech"); Elrod v. Burns, 427 U.S. 347, 359 (1976) (same). That would be true even if there was no Second Amendment right involved at all. See United States v. American Library Assn., Inc., 539 U.S. 194, 210 (2003) ("the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit"). See also United States v. Scott, 450 F.3d 863, 868 (9th Cir. 2006) (applying the doctrine to the Fourth Amendment context). It is no answer to these points to assert that the government

would not abuse this technology to conduct warrantless surveillance. This "just trust us" approach does not pass constitutional muster. 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).

In the 1966 case of Harper v. Virginia State Board of Elections, the Supreme Court reversed its decision in Breedlove v. Suttles to also include the imposition of poll taxes in state elections as violating the Equal Protection Clause of the 14th Amendment to the United States Constitution.

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 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.

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."

This Bill, if enacted, will not survive judicial review. I urge an unfavorable report.