IN CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARYLAND SHALL ISSUE, INC., et al., *Plaintiffs,* vs. **MONTGOMERY COUNTY, MARYLAND**, *Defendant*.	**Case No.: 485899-V**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PARTIAL SUMMARY JUDGMENT – EXPEDITED HEARING REQUESTED

MARK W. PENNAK
Maryland Shall Issue, Inc.
9613 Harford Rd
Ste C #1015
Baltimore, MD 21234-21502
mpennak@marylandshallissue.org
Phone: (301) 873-3671
MD Atty No. 1905150005

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Constitutions:

Other Authorities:

Regulations:

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Pursuant to Rule 2-311, plaintiffs respectfully submit this memorandum in support of plaintiffs' emergency motion for partial summary judgment on Counts I, II and IV of the Complaint. Plaintiffs request that this Court grant declaratory and equitable relief on these Counts, enjoining defendant, Montgomery County ("County"), from enforcing Bill 4-21, the legality of which is challenged in the Verified Complaint filed by plaintiffs on May 28, 2021. For the reasons set forth below, plaintiffs' motion should be granted.

STATEMENT OF THE CASE

I. INTRODUCTION.

On April 16, 2021, the County signed into law Bill 4-21, a copy of which is attached to the Verified Complaint as Exhibit A. Bill 4-21 becomes effective on July 16, 2021. Count I of the Verified Complaint alleges that through the enactment of County ordinance 4-21, the County has exceeded its powers and jurisdiction to criminally regulate the possession and transfer of lawfully owned firearms in a way that is in direct conflict with Article XI–E, § 3 of the Maryland Constitution. Count II of the Verified Complaint alleges that Bill 4-21 is inconsistent with multiple existing Maryland statutes, in violation of Maryland's Express Powers Act, MD Code, Local

Government, §10-206(a),(b). Count III of the Verified Complaint alleges that the restrictions enacted by Bill 4-21 violate the Maryland Takings Clause, Article III § 40, and the Due Process Clause of Article 24 of the Maryland Declaration of Rights by depriving plaintiffs of their vested property rights in the personal property regulated by Bill 4-21. Count IV alleges that the hopelessly vague language adopted by Bill 4-21 violates the Due Process Clause of the Fourteenth Amendment and the Due Process Clause of Article 24 of the Maryland Declaration of Rights. Plaintiffs seek declaratory and injunctive relief on their State Constitutional and statutory law claims. Plaintiffs seek declaratory and equitable relief as well as compensatory damages, nominal damages, and punitive damages under 42 U.S.C. 1983, under Count IV, their federal constitutional claim. In this motion, plaintiffs seek summary judgment awarding declaratory and injunctive relief on Counts I, II, and IV, leaving the Takings Claims of Count III, damages under Count IV and the award of attorney's fees under 42 U.S.C. §1983, to further proceedings in this Court. See Part VI, *infra.*

II. STATEMENT OF FACTS.

The plaintiffs in this matter are Maryland Shall Issue, Inc. ("MSI"), two Montgomery County businesses, ENGAGE ARMAMENT LLC ("Engage") and I.C.E. FIREARMS & DEFENSIVE TRAINING, LLC ("ICE Firearms"). Engage is a Type I, Type VII, and Type X Federal Firearms Licensee ("FFL") and is thus a federally licensed seller and manufacturer of firearms and explosive devices. See Complaint ¶ 26; https://www.atf.gov/resource-center/types-federal-firearms-licenses-ffls (listing the types of FFLs). Engage is also a registered Maryland Firearms Dealer. (Id.). ICE Firearms provides firearm training to individuals with handguns, rifles and shotguns. (Id. ¶ 32). The named plaintiffs also include the respective owners of these

businesses, two supervisory employees of Engage, a contractor at Engage, and the spouse of the owner of ICE Firearms. With the exception of plaintiff Carlos Rabanales, who lives in Frederick Maryland and commutes to work at Engage, all the individual plaintiffs are residents of Montgomery County. These businesses and individuals are directly regulated by Bill 4-21 and are all aggrieved by the enactment of Bill 4-21. Complaint ¶¶ 24-34. Attached to the Verified Complaint are the sworn verification statements of each of the individual plaintiffs and the authorized representatives of the corporate plaintiffs. The supplemental declarations of each of the plaintiffs are attached to the Motion. The factual allegations concerning each of these plaintiffs may thus be taken as evidence for purposes of this Motion for Summary Judgment.

All the individual plaintiffs are also members of MSI. MSI is a Section 501(c)(4), all-volunteer, non-partisan, voluntary membership organization with approximately 2000 members state-wide. Complaint ¶¶ 24-25. MSI is 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. MSI has one or more members who live outside of Montgomery County, but who travel to and/or work within Montgomery County. (Id.). One such member is plaintiff Carlos Rabanales, who lives in Frederick County, Maryland. Complaint ¶ 28. Among the membership of MSI are "qualified instructors" who engage in firearms training, including firearms instruction of minors. Plaintiffs Ronald and Nancy David are such qualified instructors. Complaint ¶¶ 33, 34. MSI filed comments in opposition to Bill 4-21, when it was initially proposed in February of 2021 and MSI and its members are aggrieved by the enactment of Bill 4-21 into law. Complaint ¶ 25 and Exh.B to the Complaint.

III. BILL 4-21.

Bill 4-21 embodies Montgomery County's latest attempt to regulate firearms. As detailed in Complaint (¶¶ 4-7), Bill 4-21 extensively amends the County's "Weapons" ordinance County Code Section 57, to regulate the possession, sale, transfer and transport of firearms, including, but not limited to, so-called "ghost guns." The manner in which Bill 4-21 does so is detailed in the Complaint. Id. ¶¶ 4-7. The legal framework of federal and State statutory law in which Bill 4-21 was enacted is likewise detailed in the Complaint. Id. ¶¶ 8-19. The Maryland Constitutional provisions and State statutory and preemption provisions of Maryland law are set forth in the Complaint. Id. ¶¶ 20-23. These provisions of the Complaint are incorporated herein by reference.

ARGUMENT

Plaintiffs are entitled to partial summary judgment on Counts I, II and IV of the Verified Complaint. The material facts are established by the declarations of each of the plaintiffs and are attached to the Complaint and those basic facts cannot be reasonably disputed. On those facts, plaintiffs are entitled to summary judgment as a matter of law on each of these Counts, as the illegality of the County's actions on each Count appear on the face of the Complaint.

I. SUMMARY JUDGMENT STANDARDS.

Plaintiffs seek partial summary judgment under Rule 2-501 on Counts I, II and IV. The relevant material facts are established by the declaration of each of the plaintiffs attached to the Verified Complaint and cannot be reasonably disputed. Plaintiffs are entitled to summary judgment on each of these Counts as a matter of law. See, e.g., *Okwa v. Harper*, 360 Md. 161, 178, 757 A.2d 118 (2000) (summary judgment "is used to dispose of cases when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law").

II. SO CALLED "GHOST GUNS," A PRIMER.

Bill 4-21 purports to address so-called "ghost guns," which are defined by Bill 4-21 as a "a firearm, including an unfinished frame or receiver, that lacks a unique serial number engraved or cased in metal alloy on the frame or receiver by a licensed manufacturer, maker or importer under federal law or markings in accordance with 27 C.F.R. § 479.102." In other words, the term "ghost gun" is merely a pejorative, scary name for firearms that are lawfully manufactured by an individual for personal use and thus lack a serial number on the receiver that federally licensed and regulated manufacturers would otherwise engrave pursuant to 18 U.S.C. § 923(i). Such firearms built for personal use have been perfectly legal under federal and Maryland law for the entire history of the United States and remain lawful to this day.

Under Federal law, a "firearm" is defined by 18 U.S.C. § 921(a)(3), to include not only a weapon that will, is designed to, or may readily be converted to expel a projectile, but also the "frame or receiver" of any such weapon. Complaint, ¶9.[1] Essentially the same definition is in MD Code, Public Safety, § 5-101(h)(1). Complaint ¶10. As detailed in the Complaint (¶11), since 1968, the Federal Bureau of Alcohol, Tobacco and Firearms ("ATF") has defined a "receiver" as "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." See 27 C.F.R. § 478.11; 33 Fed. Reg. 18558 (1968). Under ATF Guidance, an unfinished receiver that

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[1] Through inadvertence, the paragraphs *numbers* 9, 10 and 11 on pages 7 and 8 of the Complaint were duplicated on pages 9 and 10 in the final Compliant filed on May 28. For clarity, the second set of numbers 9, 10 and 11 will be referred to henceforth as paragraphs 9**a**, 10**a** and 11**a**, as necessary.

has not yet had "machining of any kind performed in the area of the trigger/hammer (fire-control) recess (or cavity)," is not considered to be a receiver and is thus not considered to be a firearm. ATF Firearms Technology Branch Technical Bulletin 14-01.ra[2] Neither Maryland law nor Bill 4-21 define a "receiver," much less purports an "unfinished receiver," as that term is used in Bill 4-21. Under Federal and Maryland law, if the receiver is insufficiently "finished" it is simply not a receiver at all and thus not a firearm, much less a firearm component. Complaint ¶¶ 8-11.

The Department of Justice and the ATF recently published a proposed rule in the Federal Register that further defines a "receiver." See Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27720-01, 27730, 2021 WL 2012830 (May 21, 2021) (refining the definition of "receiver" by reference to a list of factors to be considered in determining whether an object can be "readily converted" to a firearm within the meaning of Section 921(a)(3)). Nothing in these proposed rules would regulate the possession or manufacture of privately manufactured firearms for personal use. 86 Fed. Reg. at 27725 ("nothing in this rule would restrict persons not otherwise prohibited from possessing firearms from making their own firearms at home without markings solely for personal use (not for sale or distribution) in accordance with Federal, State,

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[2] Technical Bulletin 14-01 is publically available at https://bit.ly/3vF5qE7. The brief of the ATF in the referenced California litigation is publically available through the federal PACER system and the relevant portion of the ATF's brief is attached to this memorandum for the purpose of advising the Court of the position of an expert agency (the ATF) on matters relevant to this case. That California litigation has been held in abeyance pending the rulemaking proceedings, Complaint ¶ 19, recently instigated by the ATF and the Department of Justice. See Order of May 26, 2021 (granting joint stipulation staying the case until ATF issues a final rule). This Court may take judicial notice of these official federal documents and court records pursuant to MD Rule 5-201and plaintiffs specifically request that this Court do so.

and local law"). The proposed Rule thus would regulate FFLs, but not regulate private individuals who make their own firearms. See 86 Fed. Reg. at 27732.

Manufacturing an unfinished receiver into a "functional lower receiver" is not a trivial process, as pointed out in court filings submitted by the ATF and the Department of Justice. For example, in *State of California v. BATF*, No. 20-cv-6761 (N.D. Cal.), the Department of Justice and the ATF explained:

> An unfinished receiver that has not yet had "machining of any kind performed in the area of the trigger/hammer (fire-control) recess (or cavity)," see ATF Firearms Technology Branch Technical Bulletin 14-01 ("Bulletin 14-01"), filed in Calif. Rifle and Pistol Ass'n v. ATF, Case No. 1:14-cv-01211, ECF No. 24 at 285 (E.D. Cal. Jan. 9, 2015), requires that numerous steps be performed simply to yield a receiver, that then in turn must be assembled with other parts into a device that can expel a projectile by the action of an explosive. These milling and metalworking steps—each of which require skills, tools, and time—include: 1) "milling out of fire-control cavity"; 2) "drilling of selector-lever hole"; 3) "cutting of trigger slot"; 4) "drilling of trigger pin hole; and 5) "drilling of hammer pin hole." Compl. Ex. 9.
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> The need to conduct these machining steps from scratch, without indexing, and "carefully" means a working gun cannot be produced "without difficulty." Id. And the work to excavate the cavities and drill holes in a solid, unmachined substrate requires care rather than speed to avoid doing so raggedly or in the wrong area. See id. Therefore, the receiver cannot be completed "without delay," even leaving aside the further assembly with many other parts needed to have a weapon that can expel a bullet by explosive action. A receiver blank therefore may not "readily be converted" into a firearm.

Federal Defendants' Notice Of Motion And Motion To Dismiss Plaintiffs' Complaint For Declaratory And Injunctive Relief, at 16-17 (filed Nov. 30, 2020) (attached to Motion).

III. BILL 4-21 IS CONTRARY TO THE EXPRESS POWERS ACT

Summary judgment is appropriate on Count II of the Complaint. Complaint ¶¶ 40-50. Under the Express Powers Act, MD Code, Local Government, §10-206, Montgomery County laws must be "not inconsistent with State law" and the County is barred from enacting laws that are

"preempted by or in conflict with public general law." As detailed in the Complaint and explained further below, Bill 4-21 is in violation of these limitations for multiple reasons and thus must be struck down. See *Boulden v. Mayor and Com'rs of Town of Elkton*, 311 Md. 411, 415, 535 A.2d 477 (1988) ("ordinances which assume directly or indirectly to permit acts or occupations which the State statutes prohibit, or to prohibit acts permitted by statute or Constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void"); *Talbot Cty. v. Skipper*, 329 Md. 481, 487 n.4, 620 A.2d 880 (1993) (preemption by conflict exists if a local ordinance "prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law"); *City of Baltimore v. Sitnick*, 254 Md. 303, 317, 255 A.2d 376 (1969) ("a political subdivision may not prohibit what the State by general public law has permitted"). See also *Wheelabrator Baltimore, L.P. v. Mayor and City Council of Baltimore*, 449 F.Supp.3d 549, 560 (D. Md. 2020) (summarizing Maryland preemption law).

In this respect, the County cannot rely on the limited exceptions to preemption specified in MD Code, Criminal Law, § 4-209(b), to override these provisions of the Express Powers Act. Section 4-209(b) creates exceptions from the broad preemption imposed **by Section 4-209(a)**; nothing in Section 4-209(b) purports to create an exception from limitations on localities imposed by Section 10-206 of the Express Powers Act. Section 10-206 bars any local law that is inconsistent, preempted by or in conflict with some other provision of State law. A locality may regulate under the Section 4-209(b) exception **only** (at most**)** to the extent that the regulation is not "inconsistent with" or "in conflict" or preempted by some other provisions of existing state law.

In enacting Bill 4-21, the County here failed to grasp that Section 4-209(b) is not a "get out jail free" card; Section 4-209(b) does not give the County a free pass for the County to regulate in

any way it wants. The County still must comply with the Express Powers Act. Here, as the United States District Court for the District of Maryland has recognized, Maryland law, discussed below, makes clear that "the Legislature" has "occup[ied] virtually the entire field of weapons and ammunition regulation," holding further that there can be no doubt that "the exceptions to otherwise blanket preemption [in Section 4-209] are narrow and strictly construable." *Mora v. City of Gaithersburg*, 462 F.Supp.2d 675, 689 (2006), *modified on other grounds,* 519 F.3d 216 (4th Cir. 2008). See also 76 Op. Md. Atty Gen. 240, 244-46 (December 17, 1991) (discussing the history of Section 4-209).

A. Bill 4-21 Is Expressly Preempted By Section 4-209(a).

The provisions of MD Code, Criminal Law, § 4-209, were originally enacted in 1985 by the General Assembly. See 1985 Laws of Maryland, ch. 724. Section 4-209(a) broadly and expressly "preempts the right of a county, municipal corporation, or special taxing district to regulate the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of: (1) a handgun, rifle, or shotgun; and (2) ammunition for and components of a handgun, rifle, or shotgun." Section 4-209(b) then provides a limited list of exceptions to that facially all-encompassing preemption, stating that "[a] county, municipal corporation, or special taxing district may regulate the purchase, sale, transfer, ownership, possession, and transportation of the items listed in subsection (a) of this section: (i) with respect to minors; (ii) with respect to law enforcement officials of the subdivision; and (iii) except as provided in paragraph (2) of this subsection, within 100 yards of or in a park, church, school, public building, and other place of public assembly. See Complaint ¶20 d. As explained below, the County has, by *ipse dixit*, sought to expand its powers far beyond that even remotely permitted by Section 4-209(b).

Bill 4-21 has effectively rewritten Section 4-209(b) to vastly expand its limited exceptions to the broad preemptions otherwise imposed by Section 4-209(a). Under Bill 4-21:

> A "place of public assembly" is *a place where the public may assemble, whether the place is publicly or privately owned, including* a [government owned] park [identified by the Maryland-National Capital Park and Planning Commission]; place of worship; [elementary or secondary] school; [public] library; [government-owned or -operated] recreational facility; *hospital; community health center; long-term facility;* or multipurpose exhibition facility, such as fairgrounds or a conference center. A place of public assembly includes all property associated with the place, such as a parking lot or grounds of a building.

(Brackets indicate those portions of existing Section 57 of the County Code that were deleted by Bill 4-21. Italicized portions are those parts that were added to Section 57 by Bill 4-21). These amendments to Section 57 of the County Code are breathtaking and leave no doubt that the County has vastly overreached. See Complaint ¶¶ 59-61. Through the artifice of broadly defining the statutory terms set out in Section 4-209(b), the County has effectively amended Section 4-209(b). The County has no power to rewrite State law in this matter.

As is apparent, prior to the enactment of Bill 4-21, the scope of Section 57 of the County Code was restricted to regulating firearms in a short list of very specific locations. Under Bill 4-21, that list is gone and has been replaced with any location where people "may assemble" regardless of "whether the place is publicly or privately owned." Such a place could include every public or private sidewalk in the County. Under Bill 4-21, these locations where people may assemble "includ[e]"[3] (but are not limited to) a vastly redefined and altered list of places. For

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[3] See *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 162 (2012) (concluding that use of the word "includes" in a definition "is significant because it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive"); *Samantar v. Yousuf*, 560

example, Section 57 formerly listed as a location a "public library." Bill 4-21 strikes out "public" and thus the Bill includes any "library," even a private home library. Similarly, Bill 4-21 now regulates any "recreational facility;" it struck out Section 57's language that limited that reach to a "government-owned or operated" recreational facility and thus Section 57 now arguably regulates a private playground. Bill 4-21 covers any "park;" it deleted Section 57's prior limit on that term as including only "government owned" park that was "identified by the Maryland-National Capital Park and Planning Commission." Bill 4-21 covers a "school;" it deleted Section 57's former limitation to "elementary or secondary" school, thereby arguably regulating within 100 yards of any "school" of any type, private or public, where any sort of instruction may be given, including instruction to adults. Bill 4-21 newly adds to the Section 57 list a "community health center" and "long-term facility," but provides no definition for either type of facility. It is difficult to imagine a broader sweep of a "place of public assembly" than that enacted by Bill 4-21.

This structure of Section 57, as amended by Bill 4-21, is radically different than that present in prior Section 57 and, obviously, vastly different than the language employed in Section 4-209(b). The Bill's definition of a "place of public assembly" must be seen for what it is: an impermissible attempt to evade the preemption provisions of Section 4-209(a) by defining the scope of the exception so as to regulate County-wide. Bill 4-21's definition of a "place of public assembly" as meaning any place where the public "may assemble" whether that be on private or public land,

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U.S. 305, 317 n.10 (2010) ("The word 'includes' is usually a term of enlargement, and not of limitation.").

literally encompasses every sidewalk, every street, every restaurant, every coffee shop, and every private business in the entire County as all such locales may be places where the public "may" assemble either in the present or in the future. The term "may assemble" certainly includes all public forums, as the term is used in the First Amendment context. See, e.g., *United States v. Grace*, 461 U.S. 171, 176 (1983) (noting that "streets, sidewalks, and parks" are traditional public forums). The term even includes private homes in so far as such homes "may" be used by two or more of the public from time to time in the present or in the future to "assemble." In stretching its reach to every "place" within 100 yards of its vastly expanded "place of public assembly," Bill 4-21 literally regulates the totality of Montgomery County, including untold tens of thousands of homes and businesses throughout the County. Indeed, it is difficult to think of any location within the County that is **not** within 100 yards of a sidewalk or street, or other location where people "may assemble."

The County's attempt to evade the Section 4-209(a) preemption provisions must be rejected. The limited exceptions to the preemption provisions of Section 4-209(b) must be construed narrowly in light of the underlying broad preemption otherwise imposed by Section 4-209(a). As implemented by the County in Bill 4-21, the exceptions of Section 4-209(b) literally reach County-wide and thus swallow the broad preemption provisions of Section 4-209(a). That result is contrary to general principles of statutory construction. See, e.g., *Grosvenor v. Supervisor of Assessments of Montgomery Co*., 271 Md. 232, 242, 315 A.2d 758 (1974) ("A construction of a statute which produces an unreasonable or illogical result should be avoided wherever it is possible to do so consistent with the statutory language."); *Perdue, Inc. v. State Dept. of Assessments and Taxation*, 264 Md. 228, 286 A.2d 165 (1972) ("A court cannot extend the scope

of an exemption by giving to the language creating it a forced, strained, and unnatural construction.").

Nothing in the actual language of Section 4-209 can be read to allow a County to expand and redefine the exception provisions in the manner it has done here. The proviso in Section 4-209(b) that allows the County to regulate firearms in within a 100 yards of "another place of public assembly" must be read in context. See, e.g., *Berry v. Queen*, 469 Md. 674, 690, 233 A.3d 42 (2020) ("In order to interpret a word's specific meaning in a particular statute we look to the context in which the word is used.") (citation omitted); *Blue v. Prince George's County*, 434 Md. 681, 689, 76 A.3d 1129 (2013) (same). By its very reference to "100 yards," Section 4-209(b) demonstrates a legislative intent to limit the geographic reach of Section 4-209(b). In context, the exceptions are limited; they do not allow the County to regulate places where people "may" assemble, County-wide. Rather, Section 4-209(b) allows regulation "within 100 yards of or in a park, church, school, public building, and other place of public assembly," thus covering 100 yards of specific, existing locations where people **typically already** assemble in a manner akin to an assembly at a park, church, school or public building. Similarly, Section 4-209's reference to a "public" building strongly indicates that Section 4-209(b) does not allow the County to regulate all property, "whether the place is publicly or privately owned." Nothing in Section 4-209(b) suggests that it authorizes County-wide regulations over public and private property in the manner imposed by Bill 4-21.

The rule is that "'when general words in a statute follow the designation of particular things or classes of subjects or persons, the general words will usually be construed to include only those things or persons of the same class or general nature as those specifically mentioned.'" *In re*

Wallace W., 333 Md. 186, 190, 634 A.2d 53 (1993), quoting *Giant of Md. v. State's Attorney*, 274 Md. 158, 167, 334 A.2d 107 (1975). This is simply an application of the canon of *ejusdem generis* which is based on "the supposition that if the legislature had intended the general words to be construed in an unrestricted sense, it would not have enumerated the specific things." *State v. 158 Gaming Devices*, 304 Md. 404, 429 n.12, 499 A.2d 940 (1985). See also *State v. Sinclair*, 274 Md. 646, 650, 659, 337 A.2d 703 (1975). The canon of *ejusdem generis* "limits general terms [that] follow specific ones to matters similar to those specified." *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 294 (2011). See also *Welsh v. Boy Scouts of America,* 993 F.2d 1267, 1269 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) ("The statute in listing several specific physical facilities, sheds light on the meaning of 'other place of exhibition or entertainment.'"). By using the term "and other place of public assembly," Section 4-209 was obviously intended to include "other" places which are akin or similar to the places expressly mentioned in the same statutory sentence, *viz.* a public "park," a "church," a public "school" or a "public building." That understanding of Section 4-209(b) was incorporated in Section 57 of the County Code prior to the enactment of Bill 4-21. The vast reach of Bill 4-21 to all places where the public "may" assemble and the Bill's new, vastly expanded, laundry list of such places are obviously incompatible with these principles.

B. Bill 4-21 Is Expressly And Impliedly Preempted Under Other Law.

1. Express preemption

Under Maryland law, in cases where two statutes arguably conflict in coverage, the more specific statute controls. See, e.g., *Harvey v. Marshall*, 158 Md.App. 355, 365, 857 A.2d 529 (2004) ("'where two enactments—one general, the other specific—appear to cover the same

subject, the specific enactment applies'"), quoting *Department of Public Safety and Correctional Services v. Beard*, 142 Md.App. 283, 302, 790 A.2d 57 (2002). See also *Department of Natural Resources v. France*, 277 Md. 432, 461, 357 A.2d 78 (1976) (the "general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment"); *Cremins v. County Com'rs of Washington County*, 164 Md.App. 426, 448, 883 A.2d 966 (2005) (same).

Such circumstances are present here. Section 4-209(a) broadly preempts county regulation of the "purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of: (1) a handgun, rifle, or shotgun; and (2) ammunition for and components of a handgun, rifle, or shotgun," but then, in Section 4-209(b), allows the counties to regulate all these items in narrow circumstances. Yet, allowing the counties to broadly regulate all firearms under Section 4-209(b) would conflict with numerous other, very specific preemption statutes regulating firearms, all of which have been utterly ignored by the County in enacting Bill 4-21.

For example, Bill 4-21 purports to ban the possession or transfer or sale of any firearm within 100 yards of its illegally redefined "place of public assembly." Yet, MD Code, Public Safety, § 5-133(a) expressly preempts the County from regulating "the possession of a regulated firearm." Similarly, MD Code, Public Safety, § 5-134(a), preempts a County from regulating "the transfer of a regulated firearm," and MD Code, Public Safety, § 5-104, preempts the County from regulating the "sale of a regulated firearm." There are no exceptions to these specific preemption provisions which, on their face, would preempt county regulation of any "regulated firearm." The term "regulated firearm" is broadly defined in State law, MD Code, Public Safety, § 5-101(r), to include *any* "handgun" as well as other types of weapons.

The County also bans the "transport" of any firearm or a "major component" of a firearm, within 100 yards of its illegally redefined place of public assembly. A "major component" is defined by Bill 4-21 as "the slide or cylinder or the frame or receiver," a definition that obviously includes parts of handguns. Yet, Section 6 of Chapter 13, of the 1972 Sessions Laws of Maryland, preempts County regulation of "wearing, carrying, or transporting of handguns."[4] That preemption includes the "the slide or cylinder or the frame or receiver" of a handgun as they are parts of handguns. Indeed, a "receiver" is considered to be a "firearm" under both Federal and State law and thus Section 6 preempts County regulation of "receivers" as well. This preemption provision is more specific than Section 4-209 as it addresses a very specific type of regulation, *viz.,* the "wearing, carrying, or transporting of handguns."

The Court of Appeals broadly enforced those 1972 preemption provisions in *Montgomery County v. Atlantic Guns, Inc*., 302 Md. 540, 489 A.2d 1114 (1985). There, the Court struck down Montgomery County's attempt to regulate the sale of ammunition. Relying on an opinion by the Maryland Attorney General, the Court of Appeals had no difficulty in ruling that "'[i]t is obvious that the local legislative proposals in question would be preempted if they directly restricted possession or sale of handguns. In our view, State law mandates the same result with respect to

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[4] Section 6 provides:

> *Be it further enacted,* That all restrictions imposed by the law, ordinances, or regulations of the political subdivisions on the wearing, carrying, or transporting of handguns are superseded by this Act, and the State of Maryland hereby preempts the right of the political subdivisions to regulate said matters."

The text is available at the Maryland State Archives, https://bit.ly/3ix81MV.

restrictions on handgun ammunition.'" (302 Md. at 548-49, quoting 67 Op.Att'y.Gen. 316, 319-20 (1982)).

The same logic applies here with respect to Bill 4-21's ban on possession, sale and transport of handguns within 100 yards of a "place of public assembly," as illegally defined by Bill 4-21. Bill 4-21 expressly and directly regulates the possession, sale and transport of handguns, the very subject matter specifically addressed in the 1972 preemption provisions, as construed in *Atlantic Guns*. Bill 4-21 broadly abrogates that specific preemption provision throughout the County by expansively defining the "place of public assembly" to include any location in which people "may assemble" and including within that definition vastly expanded locations that are deemed, *ipse dixit*, to be places of "public assembly," including places located on private property. In effect, Bill 4-21 is no less County-wide than the ammunition regulation at issue in *Atlantic Guns* and it is no less preempted by the 1972 preemption statute.

Express preemption is also not limited to regulated firearms. In 2021, the General Assembly enacted, over the Governor's veto, MD Code, Public Safety, § 5-207(a), which preempts county regulation of "the transfer of a rifle or shotgun," a category that covers **non**-regulated firearms. Again, that preemption is more specific as it is directed to a particular type of regulation over a particular type of firearm, *viz.,* the "transfer" of a "rifle or shotgun." Taken together, these statutes comprehensively regulate virtually all firearms in Maryland. For example, by preempting regulation of "transfers" of ordinary long guns, Section 5-207(a) necessarily preempts regulation of the sale of long guns, as a "sale" is a type of "transfer."

With enactment of Bill 4-21, the County has effectively nullified the operation of all these preemption provisions throughout the entirety of Montgomery County. At a minimum, the

presence of these other preemption provisions strongly indicates that the exception to preemption contained in Section 4-209(b) must be very narrowly construed. Otherwise, a county could effectively override all these preemption provisions by expansively defining its powers under the exceptions provisions of Section 4-209(b). That is, of course, precisely what the County has done in this case with its enactment of Bill 4-21. The Express Powers Act bars such conduct.

Maryland law also makes clear that the courts are to presume that the General Assembly is aware of existing Maryland statutes when it enacts or amends legislation. Thus, "[i]t is an established canon of statutory construction that where the legislature enacts a specific provision subsequent to a general provision, the former controls." *Prince George's County v. Fitzhugh*, 308 Md. 384, 390 n.4, 519 A.2d 1285 (1987) (collecting cases). See also *Government Employees Ins. Co. and GEICO v. Insurance Com'r.,* 332 Md. 124, 133, 630 A.2d 713 (1993). Here, Section 4-209 was originally enacted in 1985 and amended, in pertinent part, in 2002. MD Acts of 2002 ch.26 §2. In contrast, the preemption provisions concerning rifles and shotguns in MD Code, Public Safety, § 5-207(a), were enacted in 2021. The preemption provisions of MD Code, Public Safety, § 5-133(a) (preempting regulation of "the possession of a regulated firearm"), were amended and reenacted in 2003. See 2003 Maryland Laws, ch. 5 §2. MD Code, Public Safety, § 5-104 (preempting regulation of a sale of a regulated firearm), and MD Code, Public Safety, § 5-134 (preempting regulation of a transfer of a regulated firearm) were likewise amended and reenacted in 2003 in the same legislation. (Id.). These later amended, specific preemption laws limit the scope of the exception provisions of Section 4-209(b) and are controlling.

2. Implied preemption

Bill 4-21's bans on sale, transfer, transport and mere possession within 100 yards of the County's vastly expanded definition of a "place of public assembly" are also impliedly preempted because it interferes with the comprehensive regulation of firearms otherwise imposed by State law. These comprehensive state law provisions impliedly "occupy the field" and thus preempt County regulation that has the effect of regulating the sale, possession, transfer and transport of firearms, County-wide. See, e.g,, *Altadis U.S.A., Inc. v. Prince George's County*, 431 Md. 307, 311-12, 65 A.3d 118 (2013) (collecting cases) (holding that county regulation of the sale of cigars was impliedly preempted by state statutory provisions that regulated the sale of tobacco); *Allied Vending v. Bowie*, 332 Md. 279, 631 A.2d 77 (1993) (holding that local ordinances regulating cigarette vending machines were preempted by a state licensing system for such machines).

First, Bill 4-21's regulations would effectively regulate the operation of many if not all FFLs and licensed Maryland firearms dealers, such as plaintiff Engage. Complaint ¶ 26 ("The business location of Engage is arguably within 100 yards of a 'place of public assembly' as defined by Bill 4-21"). Such regulation is both expressly and impliedly preempted. As noted, MD Code, Public Safety, § 5-104, expressly preempts the right of any local jurisdiction to regulate the sale of a regulated firearm. Dealers are also comprehensively regulated by Federal and State law. See 18 U.S.C. § 923 (establishing a comprehensive regulatory and licensing system for FFLs); MD Code, Public Safety, § 5-106 (requiring a dealer's license issued by the State Police before a person may engage "in the business of selling, renting, or transferring regulated firearms"); MD Code, Public Safety, § 5-107 (specifying the contents of an application for a dealer's license); MD Code, Public Safety, § 5-108 (requiring a background check for a dealer's license); MD Code, Public

Safety, § 5-111 (establishing the terms of a dealer's license). Dealers were further extensively regulated in 2013 with the enactment of the Firearms Safety Act of 2013, 2013 Maryland Laws ch. 427 (amending MD Code, Public Safety, §§ 5-110, 5-114, 5-115, 5-146). Dealers are also subject to extensive regulation by the Maryland State Police, including regulations controlling what firearms dealers may sell and where dealers may conduct business. See COMAR, §§ 29.03.01.42-.57.

Second, sales and purchases of firearms by individuals are also heavily regulated. Persons seeking to purchase a regulated firearm must submit an application. MD Code, Public Safety, § 5-117. The contents of that application are controlled by State law. MD Code, Public Safety, § 5-118. State law controls the fees and retention of for such sales, MD Code, Public Safety, § 5-120, and specifies the times and manner in which such sales are completed. MD Code, Public Safety, § 5-123. Secondary transactions are heavily regulated, MD Code, Public Safety, § 5-124, as is the identity of the firearm being sold. MD Code, Public Safety, § 5-125. Maryland law controls when the purchase may take place, MD Code, Public Safety, § 5-128, and the number of firearms that may be purchased. MD Code, Public Safety, § 5-129. State law controls the types of weapons that an individual may purchase, possess, transport, transfer or sell. MD Code, Criminal Law, § 4-303. And Maryland law tightly regulates the types of handguns that may be sold by subjecting such sales to regulations published by the Maryland Handgun Roster Board. 1988 Maryland Laws, ch. 533, MD Code, Public Safety, § 5-404. See *Halliday v. Sturm, Ruger & Co., Inc.*, 368 Md. 186, 204, 792 A.2d 1145 (2002); *Moore v. State*, 84 Md.App. 165, 174, 578 A.2d 304 (1990).

Most recently, with the enactment of House Bill 4 over the Governor veto, the General Assembly has also strictly regulated the sales, rentals and transfers of ordinary long guns. See 2021

Maryland Laws, ch. 35. As noted, that 2021 legislation enacted MD Code, Public Safety, § 5-207(a), which "preempts the right of any local jurisdiction to regulate the transfer of a rifle or shotgun." That legislation established extensive regulation over the private sales, rentals and transfers of long guns, including amendments to MD Code, Public Safety, §§ 5-201, 204.1, and 5-207. It also enacted a provision, in Section 2, that made clear that the regulation of transfers imposed by the legislation "does not include the temporary gratuitous exchange of a rifle or shotgun," and expressly exempted sales, rentals, or transfers between "immediate family members" and any sale, rental or transfer involving a FFL or a Maryland firearms dealer.[5] MD Code, Public Safety, § 5-204.1(a)(1)(i),(ii). These express exclusions were for the purpose of leaving such transactions unregulated. In short, the County's attempt to impose County-wide regulation over the sale, transfer, possession and transport of all firearms has been impliedly preempted by this complex and comprehensive system of State law.

C. Bill 4-21 Is "Inconsistent" With Other Maryland Statutes.

Even apart from express and implied preemption, the Complaint (¶40) details the multitude of ways in which Bill 4-21 is inconsistent or in conflict with general law. That discussion is incorporated herein by reference. Perhaps the most egregious conflict is the Bill's attempt to ban the mere possession of unserialized firearms manufactured for personal use and otherwise lawfully

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[5] "Immediate family members is broadly defined to include "a spouse, a parent, a stepparent, a grandparent, a stepgrandparent, an aunt, an uncle, a sibling, a stepsibling, a child, a stepchild, a grandchild, a stepgrandchild, a niece, or a nephew, as related by blood or marriage" and "licensee" is defined to mean "a person who holds a dealer's license." MD Code, Public Safety, § 5-201(c), (d).

possessed **in the home**. As noted, Bill 4-21 bans possession of a firearm (any firearm) within 100 yards of the County's illegally expanded "place of public assembly." As thus defined, this ban literally extends to literally tens of thousands of homes within 100 yards of Bill 4-21's newly defined and illegally expanded "place of public assembly."

That broad coverage of the home was specifically intended by the County. Bill 4-21 retains the prior law's exception from this ban for "possession of a firearm or ammunition" in the home, but then **amends** that prior law to specifically ban possession of "a ghost gun" in the home. This ban on otherwise lawfully possessed firearms in the home is "inconsistent with" MD Code, Criminal Law, § 4-203(b)(6), which expressly permits "the wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides…." See Complaint ¶40 j. That provision in Section 4-203(b)(6) is not in any way limited and thus includes unserialized firearms otherwise lawfully possessed by the homeowner. Quite intentionally, State law likewise does not regulate the possession of long guns in the home.

The County's ban on the possession of a type of otherwise lawful firearm in the home also raises profound Second Amendment questions under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742, 750 (2010). The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. See also *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (summarily reversing Massachusetts' highest court for failing to follow the reasoning of *Heller* in sustaining a state ban on stun guns); *Ramirez v. Commonwealth*, 479 Mass. 331, 332, 352 (2017) (on remand from *Caetano*, holding that "the absolute prohibition against civilian possession of stun guns under § 131J is in violation of the Second Amendment" and declaring the

State's absolute ban to be "facially invalid"); *Defense Distributed v. Dept. of State*, 121 F.Supp.3d 680, 699 (W.D. Tex. 2015), *aff'd.,* 838 F.3d 451 (5th Cir. 2016), *cert. denied,* 138 S.Ct. 638 (2018) (sustaining a regulation of 3-D printed guns under the Second Amendment because plaintiffs were "not prohibited from manufacturing their own firearms"). Nothing in the Section 4-209(b) exception provisions permits County regulation of firearm possession in the home. The exception provisions of Section 4-209(b) should be construed narrowly so to avoid these constitutional issues. See, e.g., *Koshko v. Haining*, 398 Md. 404, 425-27, 921 A.2d 171 (2007) (a statute is construed to avoid conflict with the Constitution wherever it is possible to do so, even to the extent of applying a judicial gloss to interpretation that skirts a constitutional confrontation).

Another egregious example of overreach is the Bill's regulation of businesses, such as operated by plaintiffs Engage and ICE Firearms. As with homes, the vastly redefined "place of public assembly" extends the County's regulation to literally most, if not all, businesses through the entire County, *viz.,* either they **are** such places or they are **within** 100 yards of such places. Bill 4-21 provides that the bans it otherwise imposes do not "apply to the possession of one firearm, and ammunition for the firearm, at a business by either the owner who has a permit to carry the firearm, or one authorized employee of the business who has a permit to carry the firearm." This exception would permit the business owner to possess of **one** firearm, but **only if** the owner has a carry permit. Yet, Bill 4-21's requirement that the owner must have "a permit to carry the firearm" is inconsistent with MD Code, Criminal Law, § 4-203(b)(6), which expressly allows "the wearing, carrying, or transporting of a handgun by a person . . . within the confines of a business establishment that the person owns or leases." Such persons are **not** required to possess or obtain a Maryland carry permit. Bill 4-21's limitation to possession of "one" firearm by the owner is

likewise inconsistent with Section 4-203(b)(6), as that section imposes no limitation on the number of handguns that may be possessed, worn, carried or transported under this provision of Section 4-203(b)(6). See Complaint ¶40 k.

Similarly, Bill 4-21 imposes the same, "one gun" and carry permit requirements on authorized employees of a business, providing that the bans it otherwise imposes do not "apply to the possession of one firearm, and ammunition for the firearm, at a business by … one authorized employee of the business who has a permit to carry the firearm." Yet, MD Code, Criminal Law, § 4-203(b)(7), expressly permits "the wearing, carrying, or transporting of a handgun by a supervisory employee: (i) in the course of employment; (ii) within the confines of the business establishment in which the supervisory employee is employed; and (iii) when so authorized by the owner or manager of the business establishment." Such authorized employees covered by Section 4-203(b)(7) are **not** required to possess or obtain a Maryland carry permit to carry within the business confines of the employer's business. Bill 4-21's limitation to possession of "one" firearm by "one" authorized employee is likewise inconsistent with Section 4-203(b)(7), as that section imposes no limitation on the number of employees or on the number of handguns or ammunition that may be possessed, worn, carried or transported.

Bill 4-21's total ban on the "transport" of a "ghost gun" is also inconsistent with MD Code, Criminal Law, § 4-203(b)(5), which expressly permits "the moving by a bona fide gun collector of part or all of the collector's gun collection from place to place for public or private exhibition if each handgun is unloaded and carried in an enclosed case or an enclosed holster." Such transport and carriage of unloaded rifles and shotguns, including unserialized rifles and shotguns, are permitted under Maryland law without restriction. Not by coincidence, all these provisions of

Section 4-203 were enacted in 1972 as part of the legislation that included the preemption provisions applied in *Atlantic Guns*. See *Atlantic Guns*, 302 Md. at 544-45 (discussing these provisions).

Indeed, because Bill 4-21 effectively bans (through its vast definition of a "place of public assembly") the sale, transfer, possession or transport of any and all firearms and major components throughout the entire County, the only place that a resident of the County could even possess firearms (any firearm) would be in the home or in one of the other very limited places or circumstances that fall within the other exceptions set forth in Section 57-11(b) of the County Code. One such exception allows the possession of "separate ammunition or an unloaded firearm," but the list of exceptions does not mention or allow the possession of a loaded firearm outside the home, including such possession at a range or while engaging in otherwise lawful hunting. Such a broad ban on loaded firearms is flatly contrary to Section 4-209(d)(2), which provides that "[a] county, municipal corporation, or special taxing district may not prohibit the discharge of firearms at established ranges." Montgomery County has several such ranges, including the Gilbert Indoor Range in Rockville, Maryland, https://bit.ly/3zqfqn1, and the Izaak Walton League-Rockville Chapter range in Germantown, Maryland. https://bit.ly/2Sokwjg. Another such range can be found at the Bethesda-Chevy Chase Chapter of the Izaak Walton League in Poolesville, Maryland. http://bcciwla.org/. And nothing in the text or structure of Section 4-209 suggests that Section 4-209(b) was intended to allow the County to ban hunting with firearms, County-wide.

D. Bill 4-21's Regulation Of Minors Conflicts With State Law And Is Unconstitutionally Overbroad.

The State also closely regulates the access to firearms by minors in ways that are inconsistent with Bill 4-21. Specifically, Bill 4-21 provides that a person "must not give, sell, rent, lend or otherwise transfer to a minor" (defined as a person under the age of 18), "a ghost gun or a major component of a ghost gun," providing further that a person may not even "purchase, sell, transfer, possess, or transfer[6] a ghost gun . . . **in the presence of a minor**." (Emphasis added). These matters are regulated by State law. Under MD Code, Public Safety, § 5-133(d)(2)(i), a person under the age of 21 may possess and transfer a regulated firearm if he or she is under the supervision of a parent, or another person at least 21 years old, or if participating in marksmanship training under the supervision of a qualified instructors. Such qualified instructors would include plaintiffs Ronald and Nancy David, Complaint ¶¶ 33, 34, and many MSI members, Complaint ¶ 24. Bill 4-21 also extends its bans to a "slide" or "cylinder" or "barrel" of an unserialized firearm. Under Bill 4-21, parents, instructors and others are criminalized if they give instruction using an unserialized firearm, or merely possess, sell, purchase or transfer such a firearm, or the components of such a firearm, in the mere "presence" of the person under the age of 18. These provisions of

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[6] As it apparent, the language of Bill 4-21 bans "transfer" twice over. Perhaps the County meant to ban "transport" as well as "transfer," but such a ban on "transport" is not found in this section of Bill 4-21. Even assuming that this dual reference to "transfer" is a "scrivener's error," basic principles of notice and due process mean that such an error in a *criminal statute* can only be corrected by the legislature itself, and not by a reviewing court. See, e.g, *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 82 (1994) (Scalia, J., concurring). In any event, the error makes no difference to the result sought here.

Bill 4-21 are "inconsistent" with Section 5-133(d)(2)(i) within the meaning of the Express Powers Act, as they prohibit conduct that is expressly permitted by State law.

Similarly, MD Code, Criminal Law, § 4-104(b)(1), expressly permits a minor child under the age of 16 to have access to any firearm if that access "is supervised by an individual at least 18 years old" or if the minor child under the age of 16 has a certificate of firearm and hunter safety issued under § 10-301.1 of the Natural Resources Article. See Complaint ¶ 17. In conflict with these provisions, County law, as amended by Bill 4-21, provides that a person must not store or leave "a ghost gun . . . or a major component of a ghost gun in a location that the person knows or should know is accessible to a minor." No exception is made for access supervised by a parent or for access by a minor who possesses a hunter safety certificate. Indeed, under the County's law, no person under the age of 18 may have **any** access to **any** firearm, or a "major component" of a firearm, unless it is under the supervision of a parent, guardian or an instructor over 18. Such a ban effectively kills youth hunting expressly promoted by State law. Maryland law accords "a 1-year gratis hunting license to a Maryland resident under the age of 16 years who has successfully completed a hunter safety course," MD Code Nat. Resources §10-301.l(f)(l). Once again, County law prohibits conduct expressly permitted by State law.

The County's ban on the "purchase, sell, transfer, possess, or transfer a ghost gun . . . in the presence of a minor" also goes too far under the text of Section 4-209. Subsection 4-209(b) allows a locality to "regulate the purchase, sale, transfer, ownership, possession, and transportation of the items listed in subsection (a) of this section: (i) with respect to minors." That language cannot be reasonably read to permit the County to regulate activities **of adults** (including parents) in the mere "**presence**" of a minor. Rather, these "minor" provisions of Section 4-209(b) are best

understood to allow localities regulate **unsupervised** access **by minors.** The Attorney General has construed Section 4-209(b) in precisely this manner. See 76 Op. Att'y 240, 247 (1991) (opining that Section 4-209(b) allows local regulation "dealing with minors' *access* to firearms"). (Emphasis added). As the Attorney General also notes, the legislative history of Section 4-209(b) is consistent with that limited reading. See id. at 245 (noting that the Governor Hughes wanted to preserve local regulations that made it unlawful for "a person under 21 *to* purchase, trade, acquire or possess certain weapons except under certain circumstances," as well as a county law that related to "the *transfer* of weapons *to* minors"). (Emphasis added). In regulating adult activities in the mere **presence** of minors, Bill 4-21 once again goes too far and is thus contrary to the preemption provisions of Section 4-209(a).

Indeed, by regulating what an adult parent may do in the "presence" of his or her child, Bill 4-21 imposes an unconstitutional restraint on the rights of parents to parent their children. In *Troxel v. Granville*, 530 U.S. 57, 64 (2000), Justice O'Connor, speaking for a plurality of the Supreme Court, summarized a long line of holdings, stating that parents have fundamental liberty interest protected by the Constitution "in the care, custody, and control of their children." In *Frase v. Barnhart*, 379 Md. 100, 124, 840 A.2d 114 (2003), the Court of Appeals applied *Toxel* broadly, stating "[a]lthough *Troxel* happened to involve a visitation dispute, there is nothing in any of the Opinions announcing or concurring in the judgment to suggest that the Constitutional proscription against State interference with a fit parent's right to make basic decisions for his/her child is limited to issues of visitation, and, indeed, the cases relied on by the various Justices involved other areas of interference as well." In *Koshko v. Haining*, 398 Md. 404, 422-27, 921 A.2d 171 (2007), the Court of Appeals applied *Troxel* and construed a Maryland statute in such a way as "to save the

statute from invalidation" facially, but then invalidated the statute on an as-applied basis on the particular facts presented in that case. As *Koshko* states, parents "are invested with the fundamental right . . . to direct and control the upbringing of their children." *Koshko*, 398 Md. at 422-23.

These constitutional considerations apply here. Parents of minor children, such a plaintiffs Raymond and Weaver (Complaint ¶¶ 27, 30), have a constitutional right, recognized in *Troxel*, *Frase* and *Koshko*, to direct and control the upbringing of their children. That right includes the right to teach their children about firearms, including the right to instruct in the assembly of firearm components and otherwise possess firearms in the presence of their children. Under *Troxel*, *Frase* and *Koshko*, the County simply may not constitutionally bar a minor's access to firearms or to "major components" of firearms when such access is supervised by a parent or by another person authorized by a parent. Parents have every right, recognized by MD Code, Criminal Law, § 4-104(b)(1), to give their children access if "the child's access to a firearm is supervised by an individual at least 18 years old." Similarly, parents have every right, recognized by MD Code, Public Safety, § 5-133(d)(2)(i), to allow instructors, such as plaintiffs Edgar, ICE Firearms, and Ronald and Nancy David (Complaint ¶¶ 30-34), to instruct children in the use of firearms. The constitutional rights of parents "to direct and control the upbringing of their children," *Koshko*, 398 Md. at 422-23, mandate a narrow interpretation of the County's authority to enact ordinances under Section 4-209(b). As in *Koshko*, this Court should construe the scope of Section 4-209(b) to save it from facial invalidity and invalidate its application in Bill 4-21.

The County's unconstitutional overreach is especially evident with respect to "major components," which Bill 4-21 defines to include a slide, a cylinder or a barrel of ordinary firearms. Bill 4-21 provides that a "person must not give, sell, rent, lend, or otherwise transfer to a minor" a

"major component of a ghost gun." Yet, the slide, cylinder and a barrel are not firearms and are not required to be serialized under Federal law. Such components are also common both to unserialized "ghost guns" and ordinary serialized guns, including firearms legally manufactured by federally licensed manufacturer and lawfully purchased from a FFL and a licensed Maryland firearms dealer. For these specific items, the Bill's special treatment of ghost gun "components" is nonsensical, as it wrongly assumes that "ghost gun" components are somehow different than **non**-ghost gun components. That is only true with respect to actual **receivers,** as only receivers are firearms under Federal and State law, Complaint ¶¶ 9, 10, and only receivers are required to be serialized under Federal and State law. Complaint ¶ 11.

Similarly nonsensical and unconstitutional is Bill 4-21's regulation of "unfinished receivers," which Bill 4-21 includes within its definition of a "ghost gun." While Section 4-209(b) allows the County to regulate "components" of firearms with respect to minors, it does not allow the County to regulate **non**-components of firearms, such as "unfinished receivers." Certainly, nothing in Section 4-209(b) allows the County to regulate access to components when access is supervised by a parent. As explained, to the extent that an "unfinished receiver" is not yet an actual "receiver," is not a firearm or even a "component" of a firearm. It is simply a chunk of metal or plastic. Bill 4-21 would thus criminalize adult possession of, and minor access to, pieces of metal or plastic. The total bans imposed by Bill 4-21 on such "unfinished receivers" with respect to minors thus is both legal nonsense and unconstitutional under *Troxel*. As discussed *infra*, for these same reasons, Bill 4-21's ban on "unfinished receivers" is also both an oxymoron and hopelessly vague.

IV. BILL 4-21 IS NOT A "LOCAL LAW" AND THUS VIOLATES ARTICLE XI-A OF THE MARYLAND CONSTITUTION.

Summary judgment is also appropriate under Count I of the Complaint. Complaint ¶¶ 36-39. Montgomery County has chartered home rule under Article XI-A of the Maryland Constitution and, under that provision, the County is only empowered to enact "local laws." Section 4 of Article XI-A of the Maryland Constitution states that "[a]ny law so drawn as to apply to two or more of the geographical subdivisions of this State shall not be deemed a Local Law, within the meaning of this Act." See also Article XI–E, § 6, of the Maryland Constitution provides that "[a]ll charter provisions, or amendments thereto, adopted under the provisions of this Article, shall be subject to all applicable laws enacted by the General Assembly."

Under Maryland law, a general law "deals with the general public welfare, a subject which is of significant interest not just to any one county, but rather to more than one geographical subdivision, or even to the entire state." *Steimel v. Board*, 278 Md. 1, 5, 357 A.2d 386 (1976). Thus, "some statutes, local in form, have been held to be general laws, since they affect the interest of the whole state." *Cole v. Secretary of State*, 249 Md. 425, 434, 240 A.2d 272 (1968). Similarly, "[a] law may be local in the sense that it operates only within a limited area, but general in so far as it affects the rights of persons without the area to carry on a business or to do the work incident to a trade, profession, or other calling within the area." *Dasch v. Jackson*, 170 Md. 251, 261, 183 A. 534 (1936).

Bill 4-21 is not a "local law" under these principles. Bill 4-21 was touted as a "ghost gun" bill, but this Bill obviously regulates **all firearms** with its requirement that "a person must not sell, transfer, possess, or transport a ghost gun, undetectable gun, handgun, rifle, or shotgun, or ammunition or major component for these firearms" anywhere within 100 yards of the Bill's vast

and unlawful definition of a "place of public assembly." As the discussion above demonstrates, the reach of this Bill is breathtakingly broad for all these firearms, not just for so-called "ghost guns."

It is equally beyond obvious that the regulation of firearms in Maryland is a matter of "significant interest . . . to more than one geographical subdivision, or even to the entire state." *Steimel*, 278 Md. at 5. The numerous preemption provisions and comprehensive State regulatory schemes detailed above cannot be read in any way other than as an embodiment of the General Assembly's recognition that localities should not be enacting regulations that broadly affect the possession, sale, transport or transfer of firearms. As the federal district court in *Mora* stated, "there can be no doubt that the exceptions to otherwise blanket preemption [in Section 4-209] are narrow and strictly construable" and that "State law has so thoroughly and pervasively covered the subject of firearms regulation and the subject so demands uniform state treatment, that any non-specified regulation by local governments is clearly preempted." *Mora*, 462 F. Supp.2d at 690. Stated simply, firearm regulations "affect the interest of the whole state." *Cole*, 249 Md. at 434.

A simple example suffices to illustrate the point. As noted, Bill 4-21 bans the "transport," the sale, the possession and the "transfer" of a "major component" of **any** firearm and defines "major component" to mean "(1) the slide or cylinder or the frame or receiver; and (2) in the case of a rifle or shotgun, the barrel." However, as discussed above, both federal law and Maryland law regulate as firearms only the "receiver" of a firearm. Complaint ¶¶ 9, 10. The other "components" banned by Bill 4-21 are not required to be serialized under either State or Federal law and are not "firearms." Complaint ¶11. The "slide" or "cylinder" or "barrel" of a firearm are unregulated and thus may be (and currently are) possessed, transported, transferred and sold freely within all parts

of Maryland, including Montgomery County, in interstate and intrastate commerce. Yet, Bill 4-21 would criminalize all this interstate and intrastate commerce in these items. The only persons who would be allowed even to **possess** these components in Montgomery County would be those few individuals who are excepted under Section 57-11(b) of the County Code, as amended by Bill 4-21, *viz.,* police, security guards and carry permit holders. Under Bill 4-21, not even Federal Firearms Licensees and State firearms dealers (such as Engage) are allowed to possess these components. A typical resident of Montgomery County would be prohibited from purchasing a new or replacement "slide," "cylinder" or "barrel" outside the County and transporting or possessing any of these components in the County.

Bill 4-21 also bans the mere possession **in the home** of these otherwise non-regulated components. Section 57-11 of the County Code generally exempts from its regulatory reach the mere possession of an actual "firearm" in "the person's own home." But, as explained, the "slide" or "cylinder" or "barrel" are not "firearms" under State and Federal law. Accordingly, if the homeowner were to disassemble his or her firearm into these "components" or obtain replacement "components" for his firearm, that homeowner would then be guilty of a crime under Bill 4-21 by virtue of the mere possession of these components. Such disassembly is exceedingly common as it is necessary in order to clean an ordinary, lawfully owned pistol that every otherwise qualified American has a Second Amendment right to possess in the home under *Heller* and *McDonald*. Replacement or substitution of parts, including barrels and slides, is likewise common. Criminalizing possession of components is thus legally indefensible, but that result is compelled by the literal language of Bill 4-21. This example demonstrates why the General Assembly is correct in preempting counties from regulating firearms: Localities, perhaps acting out of

misplaced zeal or ideology, simply lack the detailed knowledge of firearms and the understanding of complex Federal and State firearms law necessary to regulate intelligently.

Even if Bill 4-21 could somehow be viewed as limited to "ghost guns," it still would not be a "local law" under the Maryland Constitution. As the foregoing discussion demonstrates, this subject matter is rife with complexity and competing values. Law-abiding citizens have been building their own firearms for personal use for centuries and doing so completely lawfully. Complaint ¶¶ 8, 11**a**.[7] The Maryland General Assembly has thus struggled repeatedly with competing considerations over the last three legislative sessions, seeking to formulate a state-wide approach to "ghost guns." See Complaint ¶18.

There is no doubt that these efforts by the General Assembly will continue and may well change in light of the rulemaking proceedings currently underway by the Department of Justice and the ATF. Id. ¶19. That DOJ/ATF proposal would define "receivers" differently and regulate manufacturers and FFLs, but it also recognizes the right of individuals to build home-made guns

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[7] See Mark A. Tallman, GHOST GUNS, Hobbyists, Hackers, and the Homemade Weapons Revolution, chapter 2 (2020). As historian Charles Winthrop Sawyer explained, "in the smaller shops which formed the great majority—mere cabins on the outskirts of the wilderness—one man with or without an apprentice did every part of the work." 1 Charles Winthrop Sawyer, FIREARMS IN AMERICAN HISTORY 145 (1910). Moreover, many gunsmiths worked primarily in other trades and built or repaired firearms as a hobby. See James Whisker, THE GUNSMITH'S TRADE 145–63 (1992). During the Revolutionary War, many colonies relied on and incentivized people outside of the firearms industry to produce firearms. For example, on August 2, 1775, a Committee appointed by Maryland's Provincial Convention "to enquire into the practicability of establishing a manufactory of Arms within this Province" determined that "Arms may be furnished sooner, and at less expense by engaging immediately all Gun Smiths, and others concerned in carrying on that business." Journal of the Maryland Convention July 26 – August 14, 1775, at 64–65 (William Hand Browne ed. 1892).

and thus does not seek to regulate individuals in their possession or manufacture of firearms for personal use. The DOJ/ATF proposal does not ban or regulate the continued possession by individuals of previously lawfully constructed firearms in any way. (Id.). If, as seems likely, some version of the DOJ/ATF proposed rule goes into effect, that rule could dramatically affect the availability of "ghost guns" in the marketplace. Such a rule could easily affect the regulatory approaches that the General Assembly might take. Bill 4-21 will undoubtedly conflict with such State-wide legislative approaches.

In particular, the Maryland legislature has looked to California, which has developed a system allowing owners to engrave serial numbers on their firearms made for personal use without banning possession or criminalizing owners. See California Penal Code §§ 29180-29184. In 2019, the Maryland House of Delegates ordered research on this approach in a bill (House Bill 740) that passed the House of Delegates. See Complaint ¶¶ 18, 37. Similarly, and most recently, in the 2021 legislative session, the House Judiciary Committee reported a bill to the floor that would have accorded existing owners of unserialized firearms a path to retention of these firearms in a manner akin to that adopted by California. Complaint ¶ 18. In stark contrast, Bill 4-21 attempts to broadly criminalize everything about "ghost guns," including their owners. If Montgomery County is allowed to enact Bill 4-21 with impunity, then other counties and other localities may well follow suit, with still different approaches. The result will be a conflicting hodgepodge of local regulations that would ensnare otherwise law-abiding citizens traveling through the State. See *Dasch*, 170 Md. at 261. In light of this history and these practical realities, there can be no doubt that "ghost guns" are a matter of state-wide and national interest. No more is required to invalidate Bill 4-21. *Steimel*, 278 Md. at 5; *Cole*, 249 Md. at 434.

V. BILL 4-21 IS SO VAGUE THAT IT VIOLATES DUE PROCESS.

Partial summary judgment as to liability is also appropriate on Count IV of the Complaint. See Complaint ¶¶ 51-66. As Count IV details, Bill 4-21 is so impossibly vague in imposing criminal penalties that it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. While plaintiffs also seek compensatory, nominal and punitive damages and attorney's fees under Count IV, declaratory and injunctive relief is appropriate now. Such relief will likely limit the amount of damages that plaintiffs will otherwise suffer if Bill 4-21 goes into effect.

A. The Due Process Clause of the Fourteenth Amendment And Article 24 Of the Maryland Declaration of Rights Preclude Enactment Or Enforcement Of Vague Penal Statutes.

The Due Process Clause of the Fourteenth Amendment prohibits the enactment or enforcement of vague legislation. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018) ("the prohibition of vagueness in criminal statutes…is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law"). A penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "[A] vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). See also *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis"): *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"). "*Johnson* made clear that our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Dimaya*, 138 S.Ct. at 1214 n.3. A court also "cannot construe a criminal statute on the assumption that the Government will use it responsibly," *United States v. Stevens*, 559 U.S. 460, 480 (2010), and "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).

Article 24 of the Maryland Declaration of Rights likewise prohibits the enactment or enforcement of vague legislation. *Galloway v. State*, 365 Md. 599, 614, 781 A.2d 851 (2001) ("The 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.'") (citation omitted). Under Article 24, 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, 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).

Bill 4-21 is a penal statute. A violation of Bill 4-21 is a Class A violation that can result in a criminal fine and up to six months imprisonment for each day in which the violation continues. Complaint ¶7. Bill 4-21 contains no *mens rea* requirement of any type and thus these punishments may be imposed without regard to a defendant's intent or knowledge. Such a law is particularly open to facial attack. For example, in the *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999), the Supreme Court invalidated on vagueness grounds a Chicago ordinance that banned loitering, noting that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause." *Morales*, 527 U.S. at 53. The Court found highly significant that the ordinance was a "criminal law that contains no *mens rea* requirement" and concluded "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." Id. at 55.

B. Bill 4-21 Is Unconstitutionally Vague.

Bill 4-21's vague, strict liability provisions are facially invalid for the same reasons Chicago's law was found facially invalid in *Morales.* As explained above, Bill 4-21 affects and chills plaintiffs' Second Amendment right to possess firearms in the home. Under *McDonald*, that Second Amendment right is "fundamental" and thus incorporated against the State under the Due Process Clause of the Fourteenth Amendment. *McDonald*, 561 U.S. at 778 ("the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty"). See *Galloway*, 365 Md. at 616 ("If the challenged statute . . . encroaches upon fundamental constitutional rights . . . then the

statute should be scrutinized for vagueness on its face.").[8] Bill 4-21 also is contrary to plaintiffs' fundamental Maryland constitutional right to be free of general laws enacted by the County. The Bill encroaches on plaintiffs' right to control the upbringing of their minor children, a fundamental right protected by the Due Process Clause. In a multitude of ways, Bill 4-21 also chills plaintiffs' ability to otherwise enjoy their statutory rights to lawfully possess, transfer, sell and transport firearms in a manner expressly preserved and protected by State law. See also *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) (noting that "the Court has allowed such [facial] challenges to proceed under a diverse array of constitutional provisions," including the Due Process Clause, the First Amendment and the Second Amendment and, in *Patel,* allowing a facial challenge to be brought under the Fourth Amendment). At minimum, Bill 4-21 must be struck down as applied to these plaintiffs.

As *Morales* stresses, a *mens rea* requirement is especially critical to the question of facial validity under the Due Process Clause. See also *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (stressing the importance of "a scienter requirement" in a vagueness challenge). The Supreme Court has repeatedly stressed the importance of *mens rea* in addressing federal firearms law. See, e.g*., Rehaif v. United States*, 139 S.Ct. 2191, 2196 (2019) (noting "a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called 'a vicious will'"); *Staples v. United States*, 511 U.S. 600, 610-11 (1994) (imposing a *mens rea* requirement for the

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[8] The Supreme Court recently agreed to decide whether the Second Amendment right to keep and bear arms extends outside the home. See *NYSRPA v. Corlett*, --- S.Ct. ----, 2021 WL 1602643 (April 26, 2021). Numerous aspects of Bill 4-21 apply outside the home.

illegal possession of a machine gun, noting that "there is a long tradition of widespread lawful gun ownership by private individuals in this country," and explaining that "despite their potential for harm, guns generally can be owned in perfect innocence"). Bill 4-21 has no such *mens rea* or scienter requirement and thus criminalizes conduct and activities regardless of intent or knowledge of a person. Bill 4-21's vagueness, coupled with the total absence of any *mens rea* requirement, renders Bill 4-21 facially invalid.

Vagueness permeates nearly all aspects of Bill 4-21. Again, the Bill criminally punishes conduct that takes place within 100 yards of "a place of public assembly," which is defined as "a place where the public may assemble, whether the place is publicly or privately owned." Such places include, but are not limited to, "a park; place of worship; school; library; recreational facility; hospital; community health center; long-term facility; or multipurpose exhibition facility, such as a fairgrounds or conference center." Bill 4-21 includes within these places "all property associated with the place, such as a parking lot or grounds of a building." Virtually all of these provisions are fatally vague.

Bill 4-21 does not define "public," and that term could be read to include any person who may be present in Montgomery County for any reason. See https://bit.ly/3iuzjDD (defining "public" to mean "of or relating to people in general"). Most critically, Bill 4-21 does not define "may assemble," but the text of Bill 4-21 makes clear that the term broadly extends to places regardless of "whether the place is publicly or privately owned." The dictionary definition for "assemble" includes "to bring together (as in a particular place or for a particular purpose)" and simply "to meet together." https://bit.ly/3pFvFbm. The primary dictionary definition of "may" is that the term is "used to indicate possibility or probability." https://bit.ly/3iBwyjF. Thus, the term "may

assemble" could be read to include the mere possibility of a meeting of two or more people in any place for any reason, presently or in the future, including for every-day activities such as lunch. By enlarging the ordinance to reach into places where the public "may assemble" and reaching into private property, Bill 4-21 could be read to encompass every public sidewalk, street, Starbucks, restaurant and virtually any private building open to the public in any way in the entire County. Bill 4-21 fails to provide any notice of the actual location of such places and it is impossible to predict or know where two or more members of the "public" "may" possibly meet. These locations could even change in their application from day to day. Plaintiffs are thus left to guess at where two or more members of the "public" "may assemble" on any given day. Fundamentally, the term "may assemble" is "so broad as to be susceptible to irrational and selective patterns of enforcement." *Galloway*, 365 Md. at 616.

Other locales specified in Bill 4-21 are likewise hopelessly vague. Bill 4-21 bans conduct taking place at or within 100 yards of a "library," but includes no definition of "library." Instead, Bill 4-21 made "library" extremely broad by deleting the statute's former definition of "library" as limited to a "public" library and then extending the reach of "library" even further so as to encompass places regardless of "whether the place is publicly or privately owned." The dictionary definition for a "library" includes not only "a place in which literary, musical, artistic, or reference materials (such as books, manuscripts, recordings, or films) are kept for use but not for sale." but also includes "a collection resembling or suggesting a library" and "a series of related books issued by a publisher" and "a collection of publications on the same subject." https://bit.ly/2U1Z6cd. The term could thus be arguably read to include any collections of publications of any type or size regardless of whether the collection is in the home or private building. Plaintiffs are left to guess

as to meaning of "library" and to further guess at present or future locations of any such "libraries." Again, the term "'library" is "so broad as to be susceptible to irrational and selective patterns of enforcement.'" *Galloway*, 365 Md. at 616.

Bill 4-21 bans conduct at or within 100 yards of a "recreational facility" but does not define the term. The bill does, however, make the term extremely broad by deleting the statute's former limitation to a "government-owned or operated" recreational facility and then extending that reach even further to encompass private property. The term "recreational facility" is not found in commonly used dictionaries, see, e.g., https://bit.ly/3vbR90W, and thus it could be arguably read to include a backyard swing set or private playground or other "facility" where "recreation" may take place. In this respect, "facility" simply could mean "something that makes an action, operation, or course of conduct easier" or "something . . . that is built, installed, or established to serve a particular purpose." https://bit.ly/2Telezw. Similarly, Bill 4-21 adds to the statute's preexisting scope to include a "community health center" and "long-term facility," but provides no definition for either type of facility and there are no dictionary definitions for these terms. The term "community health center" might be understood to include a hospital or clinic, but it could just as well might include a private doctor's office. The term "long-term facility" is even vaguer as it does not even inform the reader of nature of the "long-term facility," *viz.,* long-term for what? It could include, for example, a "long term" storage facility. Plaintiffs can only guess as to meaning of these terms and their locations. Again, all these terms are "so broad as to be susceptible to irrational and selective patterns of enforcement.'" *Galloway*, 365 Md. at 616.

Bill 4-21 includes within its bans conduct and possession within 100 yards of a "school." Bill 4-21 does not define "school" but it does delete the statute's former limitation to "elementary

or secondary" school and then extends this term's reach even further to encompass public and private property. The dictionary definition of a "school" includes "an establishment offering specialized instruction" such as "a secretarial school" or "driving schools." https://bit.ly/3ziLj12. As thus redefined, Bill 4-21 arguably regulates at or within 100 yards of any "school" of any size and of any type, private or public, including locations where any organization, of any type, may present instruction of any kind, including instruction to adults. The term "school" could even extend to the specialized firearms instruction offered by plaintiffs ICE Firearms and Ronald and Nancy David, Complaint ¶¶ 32-34, as well as to any instruction offered by plaintiff Engage (Complaint ¶ 26), or by plaintiff Weaver (Complaint ¶ 30), or by MSI instructors (Complaint ¶ 24). Plaintiffs are left to guess as to the meaning of the term and further guess at the locations encompassed by the term. Once again, the term is "so broad as to be susceptible to irrational and selective patterns of enforcement.'" *Galloway*, 365 Md. at 616.

Bill 4-21 bans conduct at and within 100 yards of a "park," but the Bill does not define "park." Bill 4-21 deliberately deleted the ordinance's former definition of "park" as including only a "government owned" park that was "identified by the Maryland-National Capital Park and Planning Commission." The Bill extends this term's reach even further to encompass public and private property. The dictionary definition for "park" includes a wide variety of areas, including "a tract of land that often includes lawns, woodland, and pasture attached to a country house and is used as a game preserve and for recreation" or "a space occupied by military vehicles, materials, or animals." https://bit.ly/355pBQa. Plaintiffs are left to guess as to the meaning and locations encompassed within the Bill's new and vague use of "park." Once again, the term is "so broad as to be susceptible to irrational and selective patterns of enforcement.'" *Galloway*, 365 Md. at 616.

The actual items subject to regulation under Bill 4-21 are likewise hopelessly vague. Bill 4-21 defines "ghost gun" to include "an unfinished receiver." Bill 4-21 then purports to ban the sale, rental, lending or the giving of a ghost gun (defined to include an "unfinished receiver") to a minor or affording access to an "unfinished receiver" to a minor. Bill 4-21 also bans the sale, transfer, manufacture, assembly, possession or transport of a ghost gun (again, defined to include an "unfinished receiver"), including banning the mere possession of an unfinished receiver in the home. Yet, Bill 4-21 does not define "unfinished receiver." As noted above, under Federal and Maryland firearms law, an object is either a receiver or not a receiver – there is no such thing in the law as an "unfinished receiver." See ATF Firearms Technology Branch Technical Bulletin 14-01.[9] The term is an oxymoron. Unsurprisingly, there is no dictionary definition for the term. Conceivably, an "unfinished receiver" could even include a "zero percent" receiver, which is just a solid block of aluminum, steel or polymer. Nothing in Federal law, even as proposed in the recently published Department of Justice and ATF rulemaking proceeding, remotely goes that far. Complaint ¶ 19. Plaintiffs can only guess as to the meaning of "unfinished receiver" as used in Bill 4-21.

Bill 4-21 broadly bans a "major component" of a firearm and defines the term "major component" to include "the slide or cylinder" and, in the case of a rifle or shotgun, the "barrel." As explained above, none of these "major components" of a firearm (other than a receiver) is actually a "firearm" under Federal or Maryland law. A "slide or cylinder" of a handgun and the

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[9] See note 2, *supra*.

"barrel" of a "rifle or shotgun" are lawfully obtained, possessed, transferred and transported in interstate and intrastate commerce without restrictions under Federal and Maryland law. Such "major components," as thus defined by Bill 4-21, can be lawfully used to build a fully serialized firearm for personal use, as only the receiver is required to be serialized under Federal and Maryland law. Complaint ¶ 11. Thus, in defining a "ghost gun" to include these defined "components" and then banning "ghost guns," Bill 4-21 could be applied to criminalize mere possession of a fully serialized firearm because banned "components" were used to build it. Again, Bill 4-21 contains no *mens rea* requirement. Plaintiffs are left to guess as to whether law enforcement would consider such firearms to be illegal under Bill 4-21. Arbitrary or discriminatory selective enforcement is virtually guaranteed.

In sum, Bill 4-21 is so vague that it fails "to inform those who are subject to it what conduct on their part will render them liable to its penalties" and "is so broad as to be susceptible to irrational and selective patterns of enforcement." *Galloway*, 356 Md. at 614-16. Bill 4-21 "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned,* 408 U.S. at 108-109. See also *Ashton*, 339 Md. at 89 (striking down a city ordinance that failed to define "bona fide"); *In Re Leroy T.*, 285 Md. at 512-13 (striking down a city ordinance that failed to define "commonly used"). Faced with such vagueness "the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite [the legislature] to try again." *Davis*, 139 S.Ct. at 2323. Bill 4-21 must be struck down for vagueness.

VI. PLAINTIFFS HAVE STANDING TO OBTAIN THE RELIEF REQUESTED.

There can be no doubt that plaintiffs have standing to bring this suit. Under Maryland law, standing to seek a declaratory judgment requires only that the plaintiffs satisfy the elements of MD Code, Courts and Judicial Proceedings, § 3-409(a): "(1) An actual controversy exists between contending parties; (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; *or* (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it." (Emphasis added). Any one of these three categories of harm are sufficient. The Court of Appeals has thus interpreted this language to mean that a plaintiff need only establish that he or she has suffered "some kind of special damage from such wrong differing in character and kind from that suffered by the general public." *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Bd*., 451 Md. 377, 396, 152 A.3d 827 (2017). See also *Fraternal Order of Police v. Montgomery Cty.,* 446 Md. 490, 506-07, 132 A.3d 311 (2016) (holding that a police union had standing to challenge the County's use of public funds to defeat a referendum concerning statute on collective bargaining because statute affected the scope of bargaining by the union on behalf of its members).

All those elements are easily satisfied here. As detailed in the Complaint (¶¶ 24-34), each of the individual plaintiffs and businesses face "a realistic danger of sustaining a direct injury as a result of the [law's] operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 747-48 (9th Cir. 2020). Each of the individual plaintiffs, including the two businesses, has engaged and intends to engage in conduct arguably regulated by the provisions of Bill 4-21,

including the actual or constructive possession of firearms, major components and "unfinished receivers." At least one of the plaintiffs has a minor child in the household, engages in conduct arguably prohibited by Bill 4-21 in the presence of minors, or may engage in firearm instruction of minors. Complaint ¶¶ 24, 26, 27, 30, 31. MSI in particular is harmed by Bill 4-21 in a way different from the general public as it submitted comments in opposition to Bill 4-21 and those comments were ignored by the County. Indeed, the County even went so far as to exclude those comments a part of the legislative packet made public by the County. Complaint ¶ 25 and Exh. B to the Complaint. That conduct is suggestive of bad faith on the part of the County.

Each of the individual plaintiffs and businesses is and will be chilled in the actions they may take by the prospect of enforcement of Bill 4-21's provisions. Each of the individual plaintiffs is hindered or chilled in his or her right to live or work in Montgomery County or to otherwise travel through Montgomery County by the threat of enforcement of the provisions of Bill 4-21. Each of the plaintiffs' businesses likewise is and will be adversely affected in the manner in which they conduct their businesses. Each of the individual plaintiffs and businesses has been harmed and is imminently threatened with future harm by the prospect of enforcement of the unconstitutionally vague provisions of Bill 4-21. Complaint ¶ 65. A declaratory judgment is appropriate if even "one plaintiff" has standing. *Voters Organized for the Integrity of City Elections*, 451 Md. at 398.

It is also clear that plaintiffs may bring a pre-enforcement action challenging Bill 4-21 as they are not required "to risk criminal prosecution to determine the proper scope of regulation." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). See also *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) (standing does "not require a plaintiff to expose himself to liability

before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced"). Maryland law is in full accord. *Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 343-44, 235 A.3d 873 (2020) (collecting cases). As Justice Marshall once explained, the inchoate threat of prosecution is like the sword of Damocles in that the value of such a threat "is that it hangs -- not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). See *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (same).

The purpose of Maryland's Declaratory Judgment Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." MD Code, Courts and Judicial Proceedings, § 3-402. That purpose fits this case perfectly. As a general rule, a declaratory judgment is mandatory, when otherwise properly requested. See, e.g., *Post v. Bregman*, 349 Md. 142, 159-60, 707 A.2d 806 (1998) ("when an action for declaratory judgment does clearly lie, as it did in this case, it is ordinarily not permissible for a court to avoid declaring the rights of the parties by entering judgment on another pending count" and "[t]he existence of another remedy, at law or in equity, does not ordinarily defeat a party's right to seek and obtain a declaratory judgment"); *Christ by Christ v. Md. Dept. of Nat. Res*., 335 Md. 427, 435, 644 A.2d 34 (1994) ("Where a controversy is appropriate for resolution by declaratory judgment, however, the trial court must render a declaratory judgment."); *Lovell Land, Inc. v. State Highway Admin*, 408 Md. 242, 256, 969 A.2d 284 (2009) (same).

Permanent injunctive relief is also appropriate as plaintiffs are substantially and irreparably harmed by Bill 4-21 in ways that at not compensable through an award of damages. *El Bey v. Moorish Science Temple of America, Inc*., 362 Md. 333, 355, 765 A.2d 132 (2001). As explained above, the prospect of enforcement of the penal provisions of Bill 4-21, with its extremely vague

and otherwise illegal provisions, will chill the lawful activities of plaintiffs, impair their constitutional right to control the upbringing of their children, and to travel and conduct business in Montgomery County. *Maryland–Nat'l Capital Park and Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 615, 386 A.2d 1216 (1978) ("irreparable injury is suffered whenever monetary damages are difficult to ascertain or are otherwise inadequate"). See also *Ademiluyi v. Egbuonu*, 466 Md. 80, 133-34, 215 A.3d 329 (2019). The public interest is served, as a matter of law, by enjoining the unconstitutional and *ultra vires* actions of the County. See, e.g., *Legend Night Club v. Miller,* 637 F.3d 291, 303 (4th Cir. 2011) ("upholding constitutional rights is in the public interest").

Plaintiffs expressly reserve the right to seek compensatory damages and equitable relief under Count III (Takings claim). Pursuant to 42 U.S.C. § 1983, plaintiffs likewise reserve the right to seek compensatory, nominal and punitive damages under Count IV, in addition to the declaratory and equitable relief sought in this motion. However, it is unnecessary for this Court to reach damages claims at this juncture. Since Bill 4-21 will not take effect until July 16, 2021, declaratory and equitable relief on Counts I, II, and IV will bear directly on the amount and nature of the damages available under Counts III and IV. If Bill 4-21 is enjoined prior to its effective date, or promptly thereafter, the amount of damages under these Counts will likely be lessened. Swift resolution of this motion thus serves the interests of plaintiffs and the County alike. Plaintiffs have pled a jury and plaintiffs' entitlement to damages under these claims are jury questions that can be resolved at trial, should trial be necessary. As stated in *Smith v. Wade*, 461 U.S. 30, 56 (1983), "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, o*r when it involves reckless or callous*

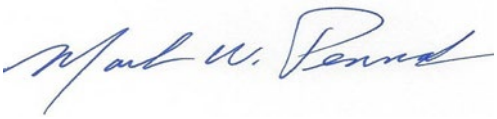
indifference to the federally protected rights of others." (Emphasis added). See also *Beardsley v. Webb,* 30 F.3d 524, 531 (4th Cir. 1994) (same). The County has been recklessly and callously indifferent to the Due Process rights of plaintiffs, including the constitutional right of plaintiffs to parent their children. At the least, plaintiffs are entitled to nominal damages on a successful Section 1983 claim. *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021). Complaint ¶ 66.

Finally, the availability and amount of attorney's fees under 42 U.S.C. § 1988, are collateral matters that likewise can be addressed at a later stage. See, e.g., *Maher v. Gagne,* 448 U.S. 122, 132 (1980) (an award of Section 1988 fees is permitted where "the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim"); *Osterweil v. Bartlett*, 92 F.Supp 3d 14, 23 (N.D.N.Y. 2015) (awarding Section 1988 fees even though the plaintiff prevailed only on question of state statutory interpretation); *Maryland Green Party v. State Board of Elections*, 165 Md.App. 113, 125-26, 884 A.2d 789 (2005) (awarding Section 1988 fees); *Johnson v. Wright*, 92 Md.App. 179, 181, 607 A.2d 103 (1992) (holding that fees are collateral). Given the potentially dispositive nature of the declaratory and equitable relief sought under Counts I, II and IV, the Court should apply MD Rule 2-602 and hold that there is no just reason for delay and enter final judgment granting declaratory and injunctive relief on Counts I, II and IV. See *Waters v. U.S. Fidelity & Guar. Co.* 328 Md. 700, 616 A.2d 884 (1992).

CONCLUSION

For the foregoing reasons, the motion for partial summary judgment should be granted. Plaintiffs respectfully request an emergency hearing and a decision on this motion prior to July 16, 2021, the effective date of Bill 4-21.

Respectfully submitted,



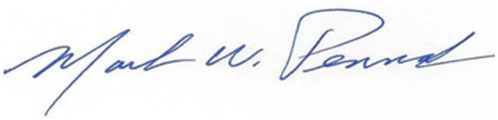
MARK W. PENNAK
Maryland Shall Issue, Inc.
9613 Harford Rd
Ste C #1015
Baltimore, MD 21234-21502
mpennak@marylandshallissue.org
Phone: (301) 873-3671
MD Atty No. 1905150005

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2021, the foregoing **PLAINTIFFS' EMERGENCY MOTION FOR PARTIAL SUMMARY JUDGMENT – EXPEDITED HEARING REQUESTED** and **MEMORANDUM IN SUPPORT** of that motion, was served by hand on defendant Montgomery County by delivering a copy of these filings by hand to:

Marc P. Hansen, Esq.
County Attorney,
Montgomery County, MD
101 Monroe Street, 3rd floor
Rockville, Maryland 20850



MARK W. PENNAK
Maryland Shall Issue, Inc.
9613 Harford Rd, Ste, C #1015
Baltimore, MD 21234-21502
mpennak@marylandshallissue.org
Phone: (301) 873-3671

MD Atty No. 1905150005

Dated: June 16, 2021