IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS
EXPEDITED HEARING REQUESTED

INTRODUCTION

On May 28, 2021, plaintiffs filed the Complaint in this matter, challenging Montgomery County Bill 4-21. On June 16, 2021, plaintiffs filed an emergency motion for partial summary judgment and supporting memorandum ("P. Mem."), seeking declaratory and equitable relief on Counts I, II and IV of the Complaint. Plaintiffs at that time did not seek relief under Count III of the Complaint.

On June 16, 2021, plaintiffs filed an emergency motion for partial summary judgment, seeking declaratory and equitable relief on Counts I, II and IV of the Complaint. Plaintiffs at that time did not seek relief under Count III of the Complaint. This Court set a hearing date for July 15, 2021, the day before the County ordinance would have become effective. On July 12, 2021, the day defendant's answer or responsive pleading would have been due, defendant removed the entire case to federal district court under 28 U.S.C. § 1441. The July 15, 2021 hearing was cancelled.

On February 7, 2022, acting on plaintiffs' motion for a remand, the federal district court remanded Counts I, II and III to this Court. *Maryland Shall Issue, Inc. v. Montgomery County*, No. TDC-21-1736, 2022 WL 375461 (D. Md. Feb. 7, 2022). A copy of the remand order and the district court's slip opinion are attached as Exhibits A and B, respectively. The district court retained jurisdiction and held in abeyance Count IV of the Complaint, which alleged Bill 4-21 was fatally vague under the Due Process Clause of the Fourteenth Amendment and under Article 24 of the Maryland Declaration of Rights. Count IV is thus no longer before this Court.

On February 22, 2022, defendant filed a motion to dismiss and alternative motion for summary judgment on all counts of the Complaint before this Court, as well as its opposition to plaintiffs' motion for partial summary judgment. Pursuant to Rule 2-311, and Rule 2-501, plaintiffs respectfully submit this memorandum in opposition to the defendant's motion and in further support of plaintiffs' emergency motion for partial summary judgment on Counts I and II of the Complaint. For the reasons set forth in plaintiffs' June 16, 2021 motion and supporting memorandum and in this Opposition, defendant's motion should be denied and plaintiffs' motion for declaratory and equitable relief on Counts I and II should be granted, enjoining defendant, Montgomery County ("County"), from enforcing Bill 4-21. While plaintiffs did not originally seek summary judgment on Count III, the issues presented are purely questions of law and can be decided on the defendant's motion for summary judgment. Plaintiffs, no less than defendant, are entitled to a declaration of the parties' rights on defendant's motion. See P. Mem. at 48.

ARGUMENT

I. AT LEAST ONE PLAINTIFF HAS STANDING ON EACH COUNT

Defendant argues first that the Complaint should be dismissed because the plaintiffs lack standing. (Def. Mem. at 11). That assertion is not remotely serious. To have standing to seek declaratory relief under MD Code, Courts and Judicial Proceedings, § 3-409(a), a plaintiff need only allege 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). A declaratory judgment is appropriate if even "one plaintiff" has standing. (451 Md. at 398). The County does not dispute that pre-enforcement review is fully available under this test. *Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 343-44, 235 A.3d 873 (2020) (collecting cases). The authority on which the County relies is not to the contrary. The County simply ignores the test established by this body of recent case law.

At least one plaintiff has standing to bring each count of this Verified Complaint. All of the individual and corporate plaintiffs (save Carlos Rabanales and Maryland Shall Issue, Inc. ("MSI")) are residents of Montgomery County, and either do business in Montgomery County (plaintiffs Engage Armament and I.C.E. Firearms & Defensive Training, LLC.), or are employees or owners of these two corporate entities. Plaintiff Engage Armament alleges it possesses, sells and acts a dealer for "ghost guns" and components banned by Bill 4-21, and transfers such items to lawful purchasers "in the presence" of minors when accompanied by a parent. (Complaint ¶ 26). Plaintiffs Andrew Raymond, Brandon Ferrell and Deryck Weaver all specifically allege they possess one or more "ghost guns" regulated by Bill 4-21. Complaint ¶¶ 26, 27, 29, 30. Plaintiff I.C.E. Firearms and its owner, Ronald David, likewise allege they possess parts, including

unfinished receivers banned by Bill 4-21. Such allegations easily distinguish these plaintiffs from the "general public," as these individuals and companies are directly regulated by Bill 4-21. Each of the plaintiffs alleges their locations (homes or businesses) are arguably within the scope of those locations newly regulated by Bill 4-21. The County does not contest any of these allegations and each are supported by sworn declarations.

Similarly, the supervisory employees of Engage Armament, Brandon Ferrell and Deryck Weaver, are directly impacted by Bill 4-21's regulation of possession of firearms by such employees, as is their employer, Engage Armament. (Complaint, ¶¶ 29, 30). Plaintiff, Andrew Raymond is directly affected as an owner of Engage Armament (Complaint ¶ 27), and thus has standing to challenge Bill 4-21's regulation of firearms possessed by business owners as does plaintiff Ronald David, the owner of I.C.E. Firearms. (Complaint, ¶33). Andrew Raymond also has standing to challenge Bill 4-21's regulation of possession of "ghost guns" with respect to minors, as he has two minor children who reside with him at his residence in Montgomery County. (Complaint ¶ 27). Plaintiff Deryck Weaver likewise has one minor child residing at his residence in Montgomery County. (Complaint ¶ 30).

Plaintiff Carlos Rabanales, a co-owner of Engage Armament, is a resident of Frederick County, and he is individually affected by Bill 4-21's criminalization of his activities at Engage Armament and his ability to travel into Montgomery County with parts and materials from Frederick County to make a living in Montgomery County. (Complaint ¶ 28). The County disputes **none** of these allegations. Each of the foregoing verified allegations is specific, supported by sworn declarations and make clear each of the individual plaintiffs could be sent to prison by Bill 4-21. If these persons do not have standing, then no one does. *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 561-62 (1992) (Where "the plaintiff is himself an object of the action ... there is ordinarily little question that the action or inaction has caused him injury.").

MSI alleges its membership includes persons who likewise own or possess "ghost guns" and components regulated by Bill 4-21 in Montgomery County, that it participated in the regulatory consideration of Bill 4-21 by filing comments and objections, and that the Bill, as enacted, burdens the ability of MSI members to keep and bear arms within Montgomery County, including firearms that are otherwise lawful in Maryland. (Complaint ¶¶ 24, 25). These verified allegations are sufficient to establish MSI's standing. See *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 a statute on collective bargaining because statute affected the scope of bargaining by the union on behalf of its members).

But this Court need not address MSI's standing, as at least "one" of the other plaintiffs has standing to seek declaratory relief, and all it takes is "one" plaintiff. *Voters Organized for the Integrity of City Elections*, 451 Md. at 398. The rule in the federal courts is the same. For example, in *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199 (4th Cir. 2020), the Fourth Circuit relied on well-established case law to hold that the federal and State licensed firearms dealer plaintiff in that case (Atlantic Guns) had Article III standing to sue on its own behalf **and** had third-party standing to sue on behalf of customers and "other similarly situated persons" in a constitutional challenge to MD Code, Public Safety, § 5-117.1. (971 F.3d at 216). The Fourth Circuit concluded that it was therefore unnecessary to reach the standing of other plaintiffs, including MSI. (971 F.3d at 214 & n.5). Plaintiff Engage Armament is likewise a federal and State licensed firearms dealer (Complaint ¶ 26), and has the same standing here as Atlantic Guns had in *MSI*. See, e.g., *Saint*

Luke Institute, Inc. v. Jones, 471 Md. 312, 350, 241 A.3d 886 (2020) (relying on federal standing law in holding plaintiff had third party standing). Defendant's motion to dismiss should be denied.

I. BILL 4-21 IS CONTRARY TO THE EXPRESS POWERS ACT (COUNT II).

A. Bill 4-21 Exceeds the Scope of Regulatory Power Authorized by the General Assembly in Enacting Section 4-209(b).

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." The County does not deny it is bound by the Express Powers Act, but asserts that Bill 4-21 is authorized by MD Code, Criminal Law, 4-209(b)(1), and that the County is thus compliant with the Express Powers Act. Section 4-209(b)(1) does not save Bill 4-21.

As the federal district court noted in remanding this case, there is no case law or other binding authority on the scope of Section 4-209(b)(1). Slip op. at 8. Indeed, as that court also noted (id.), the only decision to address the scope of authority bestowed by Section 4-209(b) is *Mora v. City of Gaithersburg,* 462 F.Supp.2d 675, 689 (D.Md. 2006), *modified on other grounds*, 519 F.3d 216 (4th Cir. 2008). *Mora* held that "the Legislature" has "occup[ied] virtually the entire field of weapons and ammunition regulation," holding further there can be no doubt that "the exceptions [in Section 4-209(b)] to otherwise blanket preemption [in Section 4-209(a)] are narrow and strictly construable." (Id.). *Mora* was discussed in plaintiffs' supporting memorandum (at 9, 32) and yet, remarkably, the County ignores *Mora*. This Court should follow *Mora* and strictly construe Section 4-209(b)(1).

In any event, Bill 4-21 goes far beyond what is authorized by Section 4-209(b). The controlling aspect of the Section 4-209(b)(1) exceptions is that the County's authority to regulate

is restricted to within **100 yards** of places of "public assembly." Bill 4-21 flouts that restriction and effectively amends Section 4-209(b)(1) by broadly defining "place of public assembly" to include every location, public **or private** "where the public may assemble." County Code, § 57-1. Bill 4-21 then amends existing County law to greatly expand the specific locations that are "included" within this definition. See *Tribbitt v. State,* 403 Md. 638 943 A.2d 1260 (2008) ("when the drafters use the term 'includes,' it is generally intended to be used as 'illustration and not ... limitation'") (citation omitted). See P. Mem. at 40-45.

As explained in plaintiffs' opening memorandum (P. Mem. at 10-11), the County is not at liberty to expand the exceptions set out in Section 4-209(b)(1), by broadly defining the meaning of these statutory terms. Even the County admits the list of locations in Bill 4-21 is "somewhat larger" (Def. Mem. at 31) than that set forth in Section 4-209(b)(1). That admission is both a gross understatement and fatal to the Bill, as the County has no authority to enlarge the list set out in Section 4-209(b)(1) **at all**. The County is restricted to what the legislature has authorized. Whether a particular location is a place of public assembly requires a case-by-case determination, not an *a priori* redefinition by the County.

The County argues (Opp. Mem. at 31-32) that the "plain language" of Section 4-209(b)(1) leaves it free to define a "place of public assembly" to include places where people "may assemble." Yet, nothing in the language of Section 4-209(b)(1) speaks in terms of "may assemble," much less purports to authorize the County to define the term so as to expand the regulatory reach of Section 4-209(b)(). Rather, it authorizes regulation within 100 yards of specific places and "other places **of** public assembly," a term which denotes, in the present tense, **public** places that **are** typically used to assemble by the public, not places that "may" be used in the future. Plaintiffs' homes and business are not places where the public normally "assembles."

The County endorses (Def. Mem. at 30) plaintiffs' reliance (P.Mem. at 14) on the *ejusdem generis* canon of construction, but fails to grasp that this canon **restricts** the scope of the term "place of public assembly" to those **public** places that are **similar** to the **public** places listed in Section 4-209(b)(1), *i.e.,* similar to "a park, church, school, public building." (Id.). Again, plaintiffs' private homes and businesses are not such places. It is facially absurd to argue, as the County does (Def. Mem. at 30), that defining a "place of public assembly" to include all places, "whether the place is publicly or privately owned," where people "may assemble" is "co-extensive" with "a park, church, school or public building." Rather, the County's redefinition of "place of public assembly," was intended to be and is a dramatic expansion far beyond those locations specified in Section 4-209(b)(1). The County's expanded list of specific locations to include "privately owned" places lefts no doubt on that score.

Of course, whether a given location is a "place of public assembly" may not be clear in every case. What should be clear, however, is that the County may not redefine terms enacted by the General Assembly to mean whatever the County would like them to mean and thus broaden the scope of the exception and expand its regulatory power. By limiting the geographic scope of Section 4-209(b) to locations within 100 yards of specified places, the General Assembly obviously intended to **limit** the scope of County authority. While the County derides plaintiffs' suggestion that the term "may assemble" could include virtually every sidewalk and street where two or more persons "may" meet (Def. Mem. at 31), the County never even attempts to proffer a different, more limited definition consistent with the language of Bill 4-21. Plaintiff's interpretation is both facially reasonable (P. Mem. at 40) and consistent with the County's avowed purpose of expanding its regulatory reach.

B. Bill 4-21 Is Expressly Preempted By Other Maryland Statutes

Defendant does not deny Bill 4-21 conflicts with no fewer than five express firearms preemption statutes, one of which was enacted into law as recently as March of 2021 by the Maryland General Assembly. See MD Code, Public Safety, § 5-207(a) (enacted in 2021 and expressly preempting a County from regulating "the transfer of a rifle or shotgun"); MD Code, Public Safety, § 5-133(a) (amended in 2003 and expressly preempting a County from regulating "the possession of a regulated firearm"); MD Code, Public Safety, § 5-134(a) (amended in 2003 and expressly preempting a County from regulating "the transfer of a regulated firearm"); MD Code, Public Safety, § 5-104 (amended in 2003 and expressly preempting a County from regulating the "sale of a regulated firearm"); 1972 Session Laws of Maryland, Ch. 13, § 6 (expressly preempting "the right of political subdivisions" to regulate "the wearing, carrying, or transporting of handguns"). See P. Mem. at 14 *et seq*.

Rather, the County asserts the Court should reconcile these provisions so as to give effect to all of these provisions. (Def. Mem. at 32-33). We agree. See *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183, 909 A.2d 694 (2006). Such reconciliation is easily achieved here. As outlined above and as *Mora* held, the Section 4-209(b)(1) exceptions are to be narrowly construed precisely to avoid conflicts. The 100-yard limitation imposed by Section 4-209(b)(1) should be strictly enforced to prohibit the County from extending that limitation through the artifice of defining statutory terms selected by the General Assembly. Under that approach, Bill 4-21 fails, as the Bill impermissibly reaches into any place where people "may assemble," which is literally everywhere in the County, far beyond the 100-yard distance specified in Section 4-209(b)(1). Such reach effectively nullifies all these other preemption provisions in Montgomery County. Manifestly, that result is contrary to any reasonable construction of legislative intent. See *Kushell v. Dep't of Natural Res*., 385 Md. 563, 576, 870 A.2d 186 (2005)

("The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature.").

The County also contends Section 4-209(b)(1) trumps all these statutes because four of these five statutes were originally enacted prior to the 1985 enactment of Section 4-209. (Def. Mem. at 34). In particular, the County places heavy reliance on a 1991 Attorney General Opinion that purports to apply the general canon of construction that a later enacted law controls over an earlier enacted law. Yet, the County largely ignores plaintiffs' point (P. Mem. at 18), that all these preemption provisions were repealed and reenacted in 2003 by the General Assembly, **after** the 2002 recodification of Section 4-209. See 2003 Maryland Laws Ch. 5. The canon that later enacted statutes control over earlier statutes is based on the notion that such legislative action is an indication of legislative intent. Here, the 2003 legislation expressly **repealed** earlier versions of these preemption provisions and enacted **new** versions with **new** language. (Id.). That legislative action post-dates the 1985 enactment of Section 4-209.

In so doing, the General Assembly was obviously fully aware of the provisions of Section 4-209, which had been recodified without change a year earlier in 2002. While the Revisor's notes suggest that parts of these 2003 statutes were intended to be enacted without substantive change from earlier versions, that point merely means the preemption provisions were not intended to be substantively limited in their reach by any prior legislation. What controls is that these preemption provisions were repealed and reenacted in 2003 with new language, **after** the 2002 recodification of Section 4-209, and that reality necessarily embodies a legislative intention to give these preemption provisions full effect, notwithstanding the 2002 recodification of Section 4-209.

Significantly, each of these newly enacted preemption provisions in 2003 preempt County regulation of "regulated firearms." The term "regulated firearms" did not exist in 1985, when

Section 4-209 was enacted. Rather, that term was first used in 1996. See 1996 Session Laws, Ch. 562. The 2003 repeal and enactment of these preemption provisions shows that the General Assembly adopted a comprehensive approach to preemption of local regulation of "regulated firearms." Again, that 2003 legislation is later than the General Assembly's earlier codification of Section 4-209 in 2002.

The weakness of defendant's argument is starkly demonstrated by how defendant attempts, but fails, to deal with the preemption provisions of MD Code, Public Safety, § 5-207(a), a new provision enacted in 2021. Ignoring its now inconvenient argument that the later enactment governs, defendant contends that Section 5-207(a) should not be read to be an "implied repeal" of Section 4-209(b). (Def. Mem. at 35). That contention is makeweight. At the least, Section 5-207 superseded Section 4-209 by virtue of being enacted after Section 4-209. More fundamentally, this 2021 enactment of Section 5-207(a) shows the General Assembly's renewed commitment to preemption in general, as that preemption provision is plainly modeled after the other preemption provisions, discussed above, which were repealed and reenacted in 2003. That suggests, once again, that state-wide preemption provisions should be given preference and the exception provisions of Section 4-209(b) should be narrowly construed, as *Mora* held.

The County also argues (Def. Mem. at 33) in cases of conflict, the more specific statute controls over the more general statute. Again, we agree. See P. Mem. at 14-15. But the County errs in asserting Section 4-209(b) is more specific and thus controlling. Each of the preemption statutes, listed above, addresses a very specific subject matter, and purports to impose an absolute preemption as to that specific subject matter and activity. For example, three of the five provisions address preemption of a particular type of activity (possession or transfer or sale) with respect to a "regulated firearm." The fourth provision preempts local regulation with respect to "the wearing,

carrying, or transporting of handguns" which are also "regulated firearms" under Section 5-101(r)(1) of the Public Safety Article.

The fifth provision, Section 5-207(a), preempts County regulation of the "transfer of a rifle or shotgun," which is also very specific, both as to the subject matter (rifle or shotgun) and the activity (transfer). In contrast, Section 4-209(b)(1) grants limited exceptions from the otherwise broad preemption provisions of Section 4-209(a), which address **all types** of firearms and **all types** of activities, *viz,* "the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation" of "a handgun, rifle, or shotgun" and "ammunition" for these types of firearms. By any measure, the specialized preemption provisions are more specific than Section 4-209.

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

1. Bill 4-21's reach into private homes and businesses.

As explained in plaintiffs' opening brief (P. Mem. at 22*, et seq*.), Bill 4-21 prohibits activities that are expressly permitted by MD Code, Criminal Law, 4-203(b). See Section 4-203(b)(6) (allowing the wear, carry, and transport of handguns "on real estate that the person owns or leases or where the person resides" without a permit and by an owner of a business without a permit "within the confines of a business establishment that the person owns or leases"); Section 4-203(b)(7) (allowing wear and carry and transport of a handgun without a permit by authorized supervisory employees of a business "within the confines" of a business). Bill 4-21 bans the possession of a "ghost gun" and the "major components" of all types of firearms on private property, in the home, and it requires a business owner and "one" supervisory employee of the business to obtain a carry permit for possession of "one" firearm at the business. It also reaches and regulations mere possession of all firearms on private property. All of this is inconsistent with State law.

Indeed, Section 4-203(b)(6), exempts wear, carry and transport of a handgun on any "real estate that the person owns or leases or where the person resides," while County Code, § 5-11(b)(3) exempts only the possession of a "firearm" or ammunition "in the person's own home," and thus is far narrower than the possession, wear, carry or transport of a *handgun* authorized by Section 4-203(b)(6). Indeed, in limiting the exemption for possession of all "firearms" to the interior of one's "own home," Section 5-11(b) allows Section 5-11(a) to reach possession of a *long gun* anywhere on any private property, including private property owned or leased by the home owner. As noted, Bill 4-21 amends Section 5-11(a) to reach such private property as it redefines a "place of public assembly" to include places where the public "may assemble," **regardless** of "whether the place is publicly or privately owned." Yet, as explained *infra* (at 18-20), nothing in the comprehensive regulatory scheme for firearms enacted by the General Assembly regulates (much less bans) the otherwise lawful possession of a long gun on any private property, much less on private property a person "owns or leases" or where the person "resides."

Similarly, the exemption in County Code, § 5-11(b)(4), not only requires the business owner and the supervisory employee to obtain a carry permit, it limits the business owner to "one" firearm and ammunition for that "one" firearm, and further limits the exemption to "one" supervisory employee. Yet, nothing in Section 4-203(b)(6) limits the owner to "one" firearm, much less ammunition for that "one" firearm. Nothing in Section 4-203(b)(7) limits the owner to "one" authorized supervisory employee. As noted, State law does not regulate the possession of a loaded or unloaded long gun on private property. Yet, Section 5-11(b)(4) would ban "possession" of any "firearm," including a *long gun*, by a business owner or an authorized supervisory employee unless these persons had a State Police-issued permit to wear, carry or transport *a handgun*. The State Police do not issue handgun carry permits for such purposes under MD Code, Public Safety, §5-

306. Such regulatory provisions are inconsistent with the foregoing provisions of Section 4-203(b) and State law in general, and thus violate the Express Powers Act. See P. Mem. at 8.

The County wrongly argues these conflicts do not exist because they are supposedly based on plaintiffs' "overbroad reading" of the Bill's definition of "place of public assembly" as encompassing most if not all of Montgomery County. In essence, the County is contending its definition of "place of public assembly" does not reach into homes and businesses. (Def. Mem. at 39). Yet, the ban on "ghost guns" in the home is **expressly** stated in County Code, Section § 57-11(b)(3), and thus necessarily embodies the County's intent to reach into the home. The ban on possession of "ghost guns" in the mere "presence" of a minor likewise easily reaches into the home. County Code, § 57-7(d). The County does not deny that it amended Section 57-11(a) to reach and regulate possession of all firearms (including long guns) on "privately owned" property. These express bans make clear the County fully intended to reach into the sanctity of the home, including all property owned or leased by a person or where a person resides. The same point is equally true for the Bill's **express** regulation of business owners and supervisory employees in County Code, § 57-11(b)(4). The County has not disputed the Verified Complaint's factual allegations that each of the individual plaintiffs' homes (save that of plaintiff Carlos Rabanales) and business locations are "arguably within 100 yards of a place of public assembly" as defined by Bill 4-21. Each of these plaintiffs is thus regulated by Bill 4-21 in a manner inconsistent with State law.

Home possession of firearms is also constitutionally protected by *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), which struck down DC's ban on handguns and held that the Second Amendment "*elevates above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." (Emphasis added). Plaintiffs thus argued that this Court should interpret Section 4-209(b) narrowly so as to avoid that constitutional issue. See

P. Mem. at 33. Section 4-209(b)(1) is thus best read, consistent with its text and purposes, to govern **public** areas within 100 yards of "a place of public assembly," not private homes and businesses or private land not normally open to "public assembly." Such private homes, businesses and land are not akin to a "park, church, school, public building" specified in Section 4-209(b)(1)(iii). The rule is "[c]ommon sense must guide us in our interpretation of statutes, and 'we seek to avoid constructions that are illogical, unreasonable, or inconsistent with common sense.'" *Marriott Employees Federal Credit Union v. Motor Vehicle Administration*, 346 Md. 437, 445, 697 A.2d 455 (1997) (quoting *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106 (1994). Defendant's response (Def. Mem. at 31) that a "church" is private and thus Section 4-209(b)(1) allows it to reach into all **other** types of private property is utterly untenable under this principle.

The County concedes any reach into the home would raise the constitutional issue, but asserts the right does not obtain because plaintiffs could protect themselves with other types of firearms. (Def. Mem. at 38 n.21). That "use other guns" argument was expressly rejected in *Heller*, 554 U.S. at 629, with respect to handguns, and has yet to be accepted by the Supreme Court or by **any** lower court with respect to "ghost guns" or "major components of all types of firearm banned by Bill 4-21 in the home.[1] Defendant's argument is also not responsive to plaintiffs' point that Section 4-209 should be interpreted narrowly to **avoid** this serious constitutional issue. Maryland

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[1] The District of Columbia recently settled a federal lawsuit, *Heller v. District of Columbia*, No. 21-02376 (D.D.C., filed Sept. 08, 2021), in which the DC ban on "ghost guns" was challenged under the Second Amendment, by enacting new legislation that protected both the right of possession and the Second Amendment right to build firearms for personal use. See Ghost Gun Clarification Emergency Amendment Act of 2021, subsection (b), amending D.C. Official Code § 7-2502.02 (December 13, 2021).

law requires no less. See, e.g., *Schochet v. State*, 320 Md. 714, 730, 580 A.2d 176 (1990) ("a statute will be construed so as to avoid a serious constitutional question").

Also flawed is the County's contention that Section 4-203(b) is irrelevant because it was enacted in 1972, before the enactment of Section 4-209. First, the Court has a duty to reconcile these statutes, rather hold that one statute or the other is completely ousted. Second, in any event, the General Assembly revisited and revised Section 4-203 with the enactment of the Firearms Safety Act of 2013, 2013 Maryland Laws, Ch. 427, and elected not to change any of the specific provisions on which plaintiffs rely here. The general rule is that "[w]here sections of a statute have been amended but certain provisions have been left unchanged, we must generally assume that the legislature intended to leave the untouched provisions' original meaning intact." *American Case. Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 732 n.7 (2d Cir. 1994). In cases of conflict, that intent should be controlling over a statute, such as Section 4-209, that was last amended in 2010, in a revision that **further restricted** the County's authority under Section 4-209(b) by adding new subsection (b)(3). See 2010 Session Laws, Ch 712. That 2010 legislation, cited by defendant (Def. Mem. at 35 n.18), thus hardly supports a broad reading of Section 4-209(b)(1).

2. Bill 4-21's provisions with respect to minors

As set out in plaintiffs' opening brief (P. Mem. at 26, *et seq*.), the Bill's provisions with respect to minors are also inconsistent with MD Code, Public Safety, § 5-133(d)(2)(i), and MD Code, Criminal Law, § 4-104(b)(1). Particularly egregious is the Bill's provision that "a person may not even "purchase, sell, transfer, possess, or transfer a ghost gun . . . *in the presence of a minor*." That ban on activities of an adult in the mere "presence" of a minor is not authorized by Section 4-209(b). As the Attorney General's Opinion referenced by the County makes clear, the exception for local regulation of minors was intended to allow a County to regulate minor **access**

to firearm, not adult activities in the mere "presence" of a minor. See P. Mem. at 28. The County never responds to that point.

Indeed, interpreting this minors provision of Section 4-209(b) broadly would raise profound constitutional problems concerning the constitutional rights of parents to raise their children, a right recognized in *Frase v. Barnhart*, 379 Md. 100, 124, 840 A.2d 114 (2003); and *Koshko v. Haining*, 398 Md. 404, 422-27, 921 A.2d 171 (2007). The Court of Appeals thus narrowly construes State regulations and statutes to avoid such issues. *Koshko*, 398 Md. at 422-27. The County contends this right is limited to "the custody of children" (Def. Mem. at 41 n.22), but that contention was expressly rejected in *Frase*, 379 Md. at 124, which held parental rights were not limited to "visitation disputes," but applied broadly to "other areas of [State] interference" as well. Plaintiffs relied on these holdings in *Frase* and *Koshko* (P. Mem. at 28), but defendant ignores these decisions completely.

3. Implied Preemption

As set forth in plaintiffs' opening brief (P. Mem. at 19, *et seq*.), Bill 4-21 is impliedly preempted by a comprehensive scheme of regulation of the sale, possession, transfer and transport by the State law. Specifically, Bill 4-21 "deals with an area in which the General Assembly has acted with such force that an intent to occupy the entire field must be implied." *Howard County v. Potomac Electric Power Co*., 319 Md. 511, 522, 573 A.2d 821 (1990). Here, as stated in *Mora*, "the Legislature" has "occup[ied] virtually the entire field of weapons and ammunition regulation." *Mora*, 462 F.Supp.2d at 689.

Virtually all the factors that should be considered in making that implied preemption determination are present here. See *Board of County Commissioners v. Perennial Solar, LLC,* 464 Md. 610, 619-20, 212 A.3d 868 (2019) (collecting the case law). No municipality or county has

ever attempted to enact legislation remotely similar to Bill 4-21. As *Mora* indicates, the State also enacted a comprehensive system regulating firearms. The State Police have exclusive control over the availability of carry permits under MD Code, Public Safety, § 5-306, and the State has established a comprehensive system of regulation of State licensed dealers, such as plaintiff Engage Armament.[2] Regulated firearms, which are handguns under MD Code, Public Safety, § 5-101(r)(1), are extensively regulated by State law, which requires a prospective purchaser to complete an "application," MD Code, Public Safety, §§ 5-117, 5-118, and the application be approved by the Maryland State Police, MD Code, Public Safety, § 5-120, which must conduct its own background investigation of the applicant, MD Code, Public Safety, § 5-121. A purchaser must wait at least 7 days, but not more than 90 days, before completing the purchase of a regulated firearm, MD Code, Public Safety, § 5-123, and may only purchase one regulated firearm every 30 days, MD Code, Public Safety, § 5-128. No person (with few exceptions) is permitted to purchase or sell a handgun unless the purchaser has a Handgun Qualification License issued by the State

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[2] See 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, § 5-109 (requiring an investigation to determine the truth or falsity of the information supplied and the statements made in an application 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 Session 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. This is as comprehensive as it gets.

Police under MD Code, Public Safety, § 5-117.1. Private sales of regulated firearms must go through the same process as dealer sales. MD Code, Public Safety, § 5-124.

In contrast, while the State requires that a private sale of a long gun to non-family members be accomplished through a NICS background check as facilitated by a licensed dealer (not the State Police), MD Code, Public Safety, § 5-204.1, the State has otherwise elected to leave the sale of long guns to federal regulation without imposing the complex overlay of State regulation applicable to regulated firearms. Similarly, the State has enacted special rules for the wear, carry and transport of handguns, MD Code, Criminal Law, § 4-203, but not for long guns. Long guns, unlike handguns, may thus be carried and transported outside the home without a carry permit issued by the State Police and may even be possessed and carried fully loaded, except in or on a vehicle. MD Code, Natural Resources, § 10-410(c)(1).

Moreover, any otherwise qualified person may purchase as many long guns as he or she likes, without being restricted to one purchase every 30-days, and without any waiting period. A minor may freely possess a long gun under State law, but a person under the age of 21 may not possess a handgun, except under limited circumstances. MD Code, Public Safety, §5-133(d). A new resident of Maryland must register a regulated firearm within 90 days, MD Code, Public Safety, § 5-143, but need not register a long gun. A federally licensed dealer need only become a State licensed dealer to sell regulated firearms, not long guns. See MD Code, Public Safety, § 5-101(e) (defining "dealer's license"). A person who inherits a regulated firearm must complete the entire application process outlined above, MD Code, Public Safety, § 5-102, but no such requirement is imposed for long guns. The State severely punishes knowing non-compliance with laws governing regulated firearms with five years of imprisonment, MD Code, Public Safety, § 5-144, but such punishments are not applicable to long guns.

By any measure, the General Assembly has "enacted extensive and comprehensive legislation in the field" of firearms regulation. *Potomac Elec. Power Co. v. Montgomery County*, 80 Md.App. 107, 110, 560 A.2d 50 (1989). Such a system of comprehensive legislation is "the primary indicia" for determining the question of implied preemption. *Perennial Solar*, 464 Md. at 620. As noted, this comprehensive system includes multiple express preemption provisions, including Section 4-209(a), that necessarily embody the legislature's desire to exercise control over this field. This whole system of carefully calibrated regulation is contradicted by Bill 4-21's undifferentiated, County-wide regulation of the sale, transfer, possession or transport of a "handgun, rifle, or shotgun." County Code, 57-11(a). For example, it is apparent that State law sharply distinguishes between "regulated firearms" and long guns. It is equally apparent that Bill 4-21 treats all firearms the same. The resulting dual regulatory system virtually ensures "confusion" among ordinary, law-abiding persons who live in or travel through Montgomery County. *Potomac Electric*, 80 Md. App. at 110.

Defendant does not deny the comprehensive nature of State regulation, but justifies Bill 4-21 by asserting the General Assembly has authorized local regulation in Section 4-209(b). (Def. Mem. at 37). That assertion misses that point. The State has occupied the field and thus preempted regulation of firearm possession, sale, transfer, and transport except in the very narrow areas permitted by Section 4-209(b). As explained above, there can be little doubt that Bill 4-21 reaches far beyond these very limited exceptions to achieve near County-wide, across-the-board regulation of firearms of all types. See P. Mem. at 31. In an Attorney General Opinion not cited by the County, the Attorney General "cautioned" against county regulations like Bill 4-21, stating that Section 4-209(b)'s "authorization for local regulation 'with respect to minors' cannot be a pretext for regulation of adults' access to handguns." 82 Op. Att'y. 84, 86 (1997). As the Attorney General

stated, "[t]he Legislature could not have intended to authorize localities to achieve indirectly what they may not achieve directly: across-the-board regulation of firearms." (Id.). Here, Bill 4-21 does precisely that.

State v. Phillips, 210 Md. App. 239, 63 A.3d 51 (2013), on which defendant also relies (Def. Mem. at 37), is not to the contrary. In *Phillips*, the issue was whether Baltimore City's ordinance requiring gun offenders to register with the Police Commissioner was impliedly preempted. The court cited the preemption provisions of Section 4-209, but noted the complainant in that case "does not contend, nor could he that the Act is expressly preempted by conflict," because the Act at issue "does not regulate the possession or sale of a firearm." (210 Md.App. at 280). Here, of course, Bill 4-21 does "regulate the possession or sale of a firearm." *Phillips* provides no guidance on whether such a county law is preempted.

II. BILL 4-21 IS NOT A LOCAL LAW (COUNT I)

As detailed in plaintiffs' opening brief (P. Mem. at 31), Bill 4-21 is not a "local law" within the meaning of Article XI, § 3. It should be obvious the regulation of firearms in the manner attempted by Bill 4-21 "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). We stress again that Bill 4-21 is not limited to "ghost guns," but rather broadly regulates all firearms and "major components" throughout the County. See County Code, § 57-11(a). Such regulations "affect the interest of the whole state."

The result is the same even if Bill 4-21 is viewed as a "ghost gun" ordinance. As noted in plaintiffs' opening brief (P. Mem. at 34), the General Assembly has considered State-wide regulation of "ghost guns" in the last three legislative Sessions. By the end of this legislative Session, the General Assembly will likely have enacted a "ghost gun" law. See Senate Bill 387, https://bit.ly/3HsrZBj, and the cross-filed House Bill 425. https://bit.ly/3C7rgEE. HB 425 has just received a favorable report from House Judiciary Committee and soon will be voted on in the House of Delegates. https://bit.ly/3C7rgEE. The Attorney General and legislative leaders have called for the enactment of this legislation, and action by the General Assembly on these bills is considered quite likely. See https://bit.ly/3psu2z8. These bills seek to incorporate the approach taken by the ATF in its proposed rule that will be issued, in final form, not later than June of 2022. See 87 Fed. Reg. at 5111 (January 31, 2022), an approach not followed by Bill 4-21. These bills also create a pathway for continued possession of homemade firearms by current owners, a provision in direct conflict with the approach followed by Bill 4-21. Contrary to Bill 4-21, these bills do not regulate "component" parts of firearms. These bills embody a recognition that "ghost guns" are a matter of State-wide concern and enactment of these bills will bring Bill 4-21 into direct conflict with State law in violation of the Express Powers Act.

Defendant does not address plaintiffs' reliance on the test articulated in *Steimel* and *Cole*. Defendant ignores *Cole* entirely and cites *Steimel* only for a different proposition, *viz*., that a local law may not be "drawn" to apply to two more geographical subdivisions of the State. (Def. Mem. at 17). As noted, *Steimel also* states a law is a prohibited "general law" if it "*deals with* the . . . 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*, 278 Md. 5 (emphasis added). *Cole* referenced this test and expressly endorsed *Norris v. Mayor & City Council of Baltimore*, 172 Md.

667, 192 A. 531, 538 (1937); *Bradshaw v. Lankford*, 73 Md. 428, 21 A. 66 (1891); *Gaither v. Jackson*, 147 Md. 655, 128 A. 769 (1925); and *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936). In each of those cases, the Court struck down an ordinance because it was not a "local law." *Cole* explained that the controlling "rationale" of these cases was "that while the immediate objective sought to be achieved was local in character, the statutes *indirectly affected* matters of significant interest to the entire state." *Cole*, 249 Md. at 434-35 (emphasis added). By ignoring this point, defendant effectively concedes that Bill 4-21 "indirectly affect[s] matters of significant interest to the entire state" under *Cole*.

Defendant tries to argue that Bill 4-21 does not sweep broadly, but that effort fails. As noted, Bill 4-21expressly bans, in County Code, § 57-11(a), the sale, transfer, possession or transport of **all** firearms within 100 yards of the Bill's vastly expanded "places of public assembly," subject only to a limited list of exceptions set out in County Code, Section 57-11(b). For example, Section 57-11(b)(6) exempts "an unloaded firearm" from the bans imposed by Section 57-11(a). Yet, even as thus limited, that ban is exceedingly broad, as Section 57-11(a) could be applied to ban hunting with a loaded firearm or mere possession of any loaded firearm anywhere in the County, including on "privately owned" land or even at a firing range of which the County has several. See P. Mem. at 25. Under Bill 4-21, "ghost guns" (or a frame or receiver of a "ghost gun") may not be possessed by an adult in the mere "presence" of a minor or by an adult in the home. The County has no response and thus concedes these points.

Such regulation of all firearms in Montgomery County "indirectly affect[s] matters of significant interest to the entire State," *Cole*, 249 Md. at 434-35, because Maryland residents throughout the State, as well as non-residents, may travel through Montgomery County and may purchase, possess or transfer firearms and components in the County under State and federal law.

Bill 4-21 certainly directly and adversely affects plaintiff Carlos Rabanales, who lives in Frederick County, but travels to, and works at, Engage Armament in Montgomery County. (Complaint ¶ 28). State-wide protection for such commerce lies at heart of the rationale for the express preemption provisions discussed above. Uniform state-wide treatment of this subject matter ensures that innocent persons are not criminally ensnared by local firearms regulations that could otherwise differ from county to county, city to city, town to town. For example, a person from Garrett County traveling in Montgomery County cannot be expected to be aware of or comply with the manifestly odd provision of Bill 4-21 that regulates all firearms at all publicly or privately owned locations within 100 yards of where the public "may assemble." Again, no other jurisdiction has such a law. If the County may legally enact legislation such as Bill 4-21, then other jurisdictions will likewise feel free to do so with still different requirements. The potential for massive confusion and discriminatory arrests and prosecutions is apparent.

Ignoring these considerations, the County focuses on Bill 4-21's **separate** prohibition on "undetectable" guns, arguing "major components" of an undetectable gun "would be easily identified as part of an "undetectable gun" and thus there is no "genuine possibility" a law enforcement officer could "confuse" "ghost gun" components with the components "of an ordinary firearm." (Def. Mem. at 20). Yet, the Bill, in County Code, § 57-11(a), **also** bans "ghost guns" and major components of **all** firearms, not merely those which are "undetectable." A "ghost gun" is defined in County Code, § 57-1, as any firearm (including an "unfinished" receiver) that lacks a serial number. The term "major component" is defined in County Code, § 57-1 to include a "slide or cylinder or the frame or receiver" and "in the case of a rifle or shotgun, the barrel."

Nothing in these definitions is limited to undetectable parts. Slides or cylinders are seldom "undetectable" as they are typically made of or contain metal. The "barrel" of a shotgun or rifle is

made entirely of metal. A completely metal "ordinary firearm" may be disassembled into these parts and, once disassembled (or sold separately), those parts are indistinguishable from a "ghost gun" major component. Under County Code, § 57-11(a), any transport, transfer or possession of any of these "components" for any "handgun, rifle or shotgun" could subject a person to arrest and prosecution. A shipment or sale of such a component to or by any person, **including a licensed dealer,** would be banned as well. None of the exceptions to Section 57-11(a) set out in Section 57-11(b) even mentions "components" so the sweep of Section 57-11(a) is completely unhindered as to components. Thus, contrary to the County's assertion (Def. Mem. at 19), mere possession of a "component" is banned in the home no less than anywhere else by County Code, § 57-11(a), as the Section 57-11(b) exemption for the home is limited to "a firearm" and "ammunition" and the "major components" banned by Bill 4-21 (other than a frame or receiver) are simply not "firearms" under State and federal law. See P. Mem. at 5, 45.

These "major components" of an "ordinary firearm" are not serialized, and a slide, barrel, or a cylinder can be used to build a completely legal firearm that is not a "ghost gun." The builder need only use serialized receivers, which are sold at Federal Firearms Licensees in Maryland and throughout the United States. See P. Mem. at 45. Bill 4-21 thus criminalizes a hobbyist whose possession of these components is completely innocent and lawful. See Maryland State Police Advisory LD-FRS-14-003 (May 16, 2014) (available at https://bit.ly/35wbl6M). It also criminalizes the business operations of all Class 07 federally licensed manufacturers in the County, including plaintiff Engage Armament, which are authorized and directed by federal law, 18 U.S.C. § 923(i), to engrave serial numbers on the receivers they manufacture. (Complaint ¶ 26). All such persons and manufacturers possess and use "major components" to legally build firearms. Plainly,

the County lacks the detailed understanding of firearms, the firearms industry and of federal and State firearms law necessary to regulate intelligently.

The County likewise ignores that Bill 4-21 never defines what constitutes an "unfinished frame or receiver," which Bill 4-21 includes in its definition of a "ghost gun" and thus bans everywhere in the County, including in the home and in the "presence" of a minor. The lack of a definition makes this ban both hopelessly vague and unknowably broad as it could include a solid block of aluminum or polymer from which an actual receiver could be milled or crafted. See P. Mem. at 44. Bill 4-21 would even ban Class 07 federally licensed manufacturers, like Engage Armament, from making or possessing "unfinished" receivers during the manufacturing business, as Bill 4-21 makes no exception for licensed dealers. See *Polymer80, Inc. v. Sisolak*, No. 21-CV-00690 (3d Jud. District for Co. of Lyon, December 10, 2021), *appeal dismissed sub nom., Sisolak v. Polymer80, Inc*., 502 P.3d 184 (Nev. 2022) (invalidating Nevada's "ghost gun" law because it failed to define "unfinished" frame or receiver) (opinion attached as Exhibit C). While plaintiffs' vagueness claims in Count IV have been retained by the federal district court, the *scope* of Bill 4-21 is before this Court on the other Counts of the Complaint. These matters are all "of State-wide concern" for the reasons set forth above.

III. BILL 4-21 IS A *PER SE* TAKING UNDER THE MARYLAND CONSTITUTION (COUNT III)

Count III of the complaint alleges that the County's ban on the mere possession of a "ghost gun" and/or of "major components" is a Taking under the Maryland Takings Clause, Article III, § 40 of the Maryland Constitution, and a deprivation of property without due process under the Due Process Clause of Article 24 of the Maryland Declaration of Rights. According to the County, Bill 4-21 is an exercise of its "police powers" and therefore not a Taking. See Def. Mem. at 4, 42. That

contention is wrong as a matter of law.

These provisions of the Maryland Constitution are interpreted in *pari materia* with the Fifth Amendment. The Court of Appeals' decision in *Dua v. Comcast Cable*, 370 Md. 604, 805 A.2d 1061, 1070-72 (2002), so holds and makes clear that "[n]o matter how 'rational' under particular circumstances, the State is constitutionally precluded from abolishing a vested property right." The County's "rational" reasons for Bill 4-21 are thus irrelevant. If Bill 4-21 abolishes a vested property right, then it is a Taking*, quod erat demonstrandum*. Bill 4-21 does precisely that.

In *Muskin v. State Dept. of Assessments and Taxation*, 422 Md. 544, 30 A.3d 962, 968 (2011), the Court of Appeals explained that the "vested right" analysis is controlled by whether the statute in question is retroactive, explaining that "[r]etrospective statutes are those 'acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act.'" (30 A.3d at 969) (citation omitted). Federal law under the Fifth Amendment is in accord. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (to escape the Takings Clause, the government must show "that the proscribed use interests were not part of [the owner's] title to begin with"). Here, the County does not dispute that plaintiffs possessed "ghost guns" and components through "transactions" that occurred prior to the enactment of Bill 4-21. The Bill is thus unquestionably "retroactive" under *Muskin* to the extent it operates on this previously acquired property.

Likewise, there can be no dispute that the Maryland Takings Clause fully protects personal property, including firearms. A "vested" right is simply a "property right under Maryland property law." *Muskin*, 422 Md. at 560. In *Serio v. Baltimore County*, 384 Md. 373, 863 A.2d 952, 967 (2004), the Court of Appeals held Maryland's Taking Clause and Due Process Clause are violated "[w]henever a property owner is deprived of the beneficial use of his property or restraints are

imposed that materially affect the property's value, without legal process or compensation." *Serio* applied that rule to hold that the refusal of a county police department to relinquish a firearm so that a convicted felon could exercise his remaining "ownership" interest violated these provisions of the Maryland Constitution. (863 A.2d at 966, 968). See also *Pitsenberger v. Pitsenberger*, 287 Md. 20, 410 A.2d 1052, 1057-1060 & n.5 (1980). The Fifth Amendment's Taking Clause likewise fully protects personal property. See *Horne v. Dep't. of Agric*., 576 U.S. 350, 358 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

In Maryland, "property is a term that has broad and comprehensive significance; it embraces '*everything which has exchangeable value* or goes to make up a man's wealth….'" *Dodds v. Shamer*, 339 Md. 540, 663 A.2d 1318, 1322 (1995) (citation omitted) (emphasis added). See *Serio*, 863 A.2d at 965 (relying on *Dodds*). The rule is the same under the Fifth Amendment. *United States v. General Motors*, 323 U.S. 373, 378 (1945) ("[t]he constitutional provision is addressed to every sort of interest the citizen may possess"). It is beyond obvious that "ghost guns" are "property" under *Dodds* and *Serio* and that Bill 4-21 completely deprives the plaintiffs of "the beneficial use" of their property. Bill 4-21 not only bans "possession" of "ghost guns" and components, it bans the sale, transfer and transport as well. County Code, § 57-11(a). These property interests abolished by Bill 4-21 far exceed the "ownership" interest that *Serio* held to be protected.

Such regulation "goes too far" and is thus a *per se* Taking. A *per se* Taking is present where the regulation is so complete "that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 538 (2005). The "ouster" referenced in *Lingle* is the ouster of *possession*. Id., at 539; *Lucas*, 505 U.S. at 1014 (noting that the "practical ouster of

possession" is the "functional equivalent of" a "direct appropriation"); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (same). *Accord Steel v. Cape Corp*., 111 Md. App. 1, 23-24, 677 A.2d 634 (1996) (following *Lucas*); *Offen v. County Council*, 96 Md.App. 526, 552, 625 A.2d 424 (1993), r*ev'd in part on other grounds*, 334 Md. 499, 639 A.2d 1070 (1994) (relying on *Lucas,* noting that "'total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation'") (quoting *Lucas* 505 U.S. at 1017). Bill 4-21 "ousts" plaintiffs here of their right of possession and destroys every *other* stick in the proverbial bundle of sticks that comprise property. *Compare Andrus v. Allard*, 444 U.S. 51, 65 (1979) (holding there was no Taking of personal property where the law at issue allowed the owners to retain the rights to possess, donate, and devise their property), *with Horne*, 576 U.S. at 364 (finding a Taking of personal property where there was a loss of possession and distinguishing *Andrus* on that basis).

Contrary to the County's contention, these principles are not trumped by the County's "police powers." In *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 425 (1982), the Supreme Court specifically noted that the lower court had determined that the alleged Taking there involved a "legitimate public purpose" and thus was "within the State's police power." The Court stated that it had "no reason to question that determination," but nonetheless expressly held that *"[i]t is a separate question . . .* whether an otherwise valid regulation so frustrates property rights that compensation must be paid." (Id). (Emphasis added). *Lucas* made the same point, holding that "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. *If it were, departure would virtually always be allowed." Lucas*, 505 U.S. at 1027. (Emphasis added).

If "police powers" were all that mattered, then "just compensation" under the Takings Clause would hardly **ever** be available as the power to conduct **any** Taking for a "public use" is

"coterminous" with a jurisdiction's "police power." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). See also *Kelo v. City of New London,* 545 U.S. 469, 480 (2005) (same). The County's "police power" argument thus proves too much, a point that *Loretto* and *Lucas* recognize. As the Fourth Circuit recently concluded in *Yawn v. Dorchester County*, 1 F.4th 191, 195 (4th Cir. 2021), "[t]hat Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court's jurisprudence." Maryland case law is in full accord. See *Muskin*, 422 Md. at 565 ("When a statute enacted under the police power, purporting to regulate private property, takes private property completely from an individual for a public purpose, the doctrine of eminent domain is invoked, and the State must provide just compensation for the taking."); *City of Annapolis v. Waterman*, 357 Md. 484, 509, 745 A.2d 1000 (2000) (following *Lucas* and holding "even if there is a valid, connected public purpose, i.e., an essential nexus, there still must be compensation for the taking"); *Steel*, 111 Md.App. at 17 (finding the regulation to be "a reasonable application of the police power" and then moving on to the "second step of the takings analysis" under *Lucas*).

The foregoing Takings analysis assumes that Bill 4-21 is an authorized and lawful exercise of the County's police power. If, as argued above, Bill 4-21 is not a "local law" under the Maryland Constitution, or is otherwise contrary to the Express Powers Act, then the deprivation of property rights by Bill 4-21 would not be a "reasonable application of the police power" and would thus fail at the first "step" of the Takings analysis. *Steel*, 111 Md.App. at 17. The owner is still entitled to "just compensation" for such any Taking that arose from such unlawful acts. (Id.). See *Lingle*, 544 U.S. at 543 ("if a government action is found to be impermissible . . . that is the end of the inquiry"); *Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358, 1362-63 (Fed. Cir. 1998) (unlawful government action may still be a Taking).

The County likewise errs in relying on (Def. Mem. at 46) the Fourth Circuit's split decision in *Maryland Shall Issue v. Hogan,* 963 F.3d 356 (4th Cir. 2020), *cert. denied,* 141 S.Ct. 2595 (2021) ("*MSI*"). There, the majority refused to accept the State's argument, likewise presented by the County here, that "police powers" were sufficient. Rather, the majority held that the Takings Clause was not violated where the State law did not require that the property in question be "turned over" to the State or a third party. (963 F.3d at 366). Contrary to the County's belief, nothing in that majority opinion holds that the State's police power obviates a Taking, without more. Indeed, the Fourth Circuit's recent ruling in *Yawn*, noted above, makes clear that is not so. Under *Serio*, a Taking under the Maryland Constitution is presented where the statute deprives the owner of the "beneficial use" of the owner's property right. No change of possession is required.

Ignoring *Serio* and *Dodds*, the *MSI* majority also held that the statute there was not a Taking under the Maryland Constitution, because it was not "retroactive" under *Muskin*. According to the court, that was so because the plaintiffs there had "fair notice of the change in the law." (963 F.3d at 367). The *MSI* majority reasoned that Article III, § 40, turned on whether the statute "'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" (Id.), quoting *John Deere Const. & Forestry Co. v. Reliable Tractor, Inc*., 406 Md. 139, 957 A.2d 595, 599 (2008).

That analysis is misguided. First, the *John Deere* decision, cited by the *MSI* majority, is not a Takings case, it was a due process case. More importantly, "retroactivity" as applied to a Takings challenge means the same thing it meant in *Lucas*, *viz.,* that the statute "operates" on "rights . . . which existed before passage of the act." *Muskin*, 422 Md. at 555. While *Muskin* used due process principles set out in *John Deere* to help define the "unique property interest" adversely affected by the statute there at issue (422 Md. at 559), the Court went on to find a Taking of this

"unique" interest even though the Court *also* found that plaintiffs there had "fair notice." (422 Md. at 558). That holding contradicts the *MSI* majority's holding that "fair notice" is enough. *Muskin* applied traditional Takings principles to hold that there was a Taking, and that analysis did not include the due process test applied by the *MSI* majority. (422 Md. at 563-68).

Under *Muskin*, due process principles may help define a "unique" property interest, but nothing in *Muskin* purported to overrule the *Dodds* definition of "property" applied in *Serio* and at issue here. See *McCree v. State*, 441 Md. 4, 16, 105 A.3d 456 (2014) (applying *Dodds* in a decision that post-dates *Muskin* by three years). Under *Dodds*, there is nothing "unique" about plaintiffs' property rights at issue here. Thus, unlike in *Muskin*, there is no need to resort to due process nuances to define "property." It is enough that plaintiffs legally possessed their personal property before Bill 4-21 was enacted. As the Court of Appeals stated in *Pitsenberger*, "possessory interests in property are within the protection of the Fourteenth Amendment" (287 Md. at 29), noting further that "Article III, § 40 and the Fourteenth Amendment have the same meaning in reference to a 'taking' of property." (287 Md. at 33 n.5), citing *Bureau of Mines v. George's Creek*, 272 Md. 143, 156, 321 A.2d 748 (1974) ("The constitutional provision is addressed to every sort of interest the citizen may possess.").

For the reasons set out in the dissenting opinion, the *MSI* majority's ruling that there is no Taking unless the State (or third party) assumes possession of the property is also dead wrong under the Takings Clause of the Fifth Amendment. See 963 F.3d at 377 (Richardson, J., dissenting). The majority's analysis is incompatible with the Supreme Court's decision in *General Motors*, where the Court held that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." (323 U.S. at 377). The majority in *MSI* did not even cite, much less discuss, *General Motors*. The majority likewise took no notice of the

statement in *Lucas* that the effect is to be determined "from the landowner's point of view." (505 U.S. at 1017). In short, from the owner's "point of view," a criminal law that bans possession deprives the owner of his or her property regardless of whether there has been an "accretion of the right" of possession to the State. See *MSI*, 963 F.3d at 375-76 (Richardson, J., dissenting). The dissent would have sustained the Maryland Takings claim for the same reasons the dissent would have sustained the Fifth Amendment claim. (963 F.3d at 376 n.12). The dissent was correct.

Defendant also relies on *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007), as somehow creating a "police power" exception to the Takings Clause. (Def. Mem. at 45). That reliance is misplaced, again for the reasons set forth by the dissent in *MSI*. See 963 F.3d at 377-78 (Richardson, J., dissenting). Any such interpretation of *Holliday* is likewise precluded by the Fourth Circuit's recent and subsequent ruling in *Yawn*, noted above, which dismissed as contrary to Supreme Court jurisprudence the notion that "police power" is a complete defense to a Takings claim. *Yawn*, 1 F.4th at195. This Court should follow the dissent's Takings analysis and the *Yawn* ruling, not the majority's flawed approach.

In any event, this Court is not bound by lower federal court decisions and thus must address this question *de novo. Pope v. State*, 284 Md. 309, 320 n.10 396 A.2d 1054 (1979) (holding that unlike the decisions of the Supreme Court of the United States, decisions of federal courts of appeal are not binding on Maryland courts); *Henry v. Gateway, Inc*., 187 Md. App. 647, 666, 979 A.2d 287 (2009) (same); *Whalen v. HPRB,* 2020 WL 2501446 at *5 (Md. App. 2020) (same). In so doing, the Court should look to the recent decision by the Federal Circuit in which the court declined to follow the *MSI* majority's approach to property. *McCutchen v. United States*, 14 F.4th 1355, 1366 n.6 (Fed. Cir. 2021). While the Federal Circuit also declined to accept the government's reliance on its "police power," it held that the plaintiffs' challenge to a federal rule that banned

continued possession of specific personal property failed because plaintiffs did not have a sufficient *pre-existing* property interest that *pre-dated* the regulation in question. *McCutchen*, 14 F.4th at 1363-65.

That particular result in *McCutchen* is, of course, inapposite, as the plaintiffs here have fully protected, vested property rights under *Dodds* in the property acquired prior to Bill 4-21's enactment, as discussed above. However, the Federal Circuit's analysis of general Takings principles is consistent with the approach taken by the dissent in *MSI* and by *Dua*, *Muskin*, *Serio, Steel, Waterman* and *Offen*, discussed above. The *McCutchen* court's refusal to accept the government's "police power" argument is likewise persuasive authority on that point as is the Fourth Circuit's recent ruling in *Yawn*, noted above. These decisions and opinions should guide this Court's analysis, not the *MSI* majority's misguided approach. To date, we have found no other appellate court of any jurisdiction that has followed the *MSI* majority's outlier analysis.

In sum, this Court should declare that Bill 4-21 is a Taking under Article III, § 40 of the Maryland Constitution, and a deprivation of property without due process in violation of Article 24 of the Declaration of Rights. The appropriate relief is an injunction barring enforcement until just compensation is accorded. *Department of Natural Resources v. Welsh*, 308 Md. 54, 65, 521 A.2d 313 (1986). Indeed, such relief is required by the text of Article III, § 40, which provides that "[t]he General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, *being first paid or tendered* to the party entitled to such compensation." (Emphasis added). The County has yet to pay or tender payment to plaintiffs.

Plaintiffs are entitled to just compensation under Count III for the Takings and deprivation of private property that occurred after Bill 4-21 became effective on July 16, 2021. The controlling

rule is set forth in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 320 (1987), where the Supreme Court held that the government has a "duty to provide compensation for the period during which the taking was effective." See *Steel*, 111 Md.App. at 21 (applying *First English*). The Court should apply MD Rule 2-602, find there is no just reason for delay, order the entry of final judgment granting plaintiffs declaratory and injunctive relief on Counts I, II and III, and thereafter schedule further proceedings for the determination of just compensation under *First English*.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for partial summary judgment should be granted and defendant's motion to dismiss and for summary judgment should be denied. The Court should issue declaratory and injunctive relief as to Count III in addition to Counts I and II. Plaintiffs respectfully request an expedited hearing and a decision on these motions at the earliest practicable date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on March 7, 2022, a copy of the foregoing Plaintiffs' Opposition To Defendant's Motion For Summary Judgment And Motion To Dismiss Expedited Hearing Requested was served on the following counsel for defendant Montgomery County via the MDEC e-filing system:

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