IN THE
APPELLATE COURT OF MARYLAND

September Term, 2023

No. ACM-REG-2319-2023

MONTGOMERY COUNTY, MARYLAND,
Appellant,

vs.

ENGAGE ARMAMENT LLC, et al.,
Appellees.

Appeal from the Circuit Court for Montgomery County
(The Honorable Ronald B. Rubin)

REPLY OF APPELLEES TO AMICUS

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Pursuant to Maryland Rule 8-511(g), Plaintiffs-Appellees respectfully submit this Reply to the amicus brief of the State of Maryland ("the State") filed in support of Appellant, Montgomery County ("the County"). For the reasons set forth below, the State's arguments should be rejected.

ARGUMENT

I. CHAPTER 57 IS PREEMPTED

A. Controlling Principles

The State does not dispute that local laws are invalid if they conflict with State law. (StateBr.11). Rather, purporting to rely on *Coalition For Open Doors v. Annapolis Lodge, No. 622*, 333 Md. 359, 380, 635 A.2d 412 (1994), the State argues Chapter 57 does not create such a conflict because Chapter 57 simply "does not prohibit" anything permitted by State law. *Id.* That argument is not advanced by the County[1] and is without merit.

First, the Court of Appeals (now Supreme Court) has long made clear that "[n]ot all conflicts . . . fit squarely within the 'prohibit-permit' category" and "'[a] local law may conflict with a state public general law in other respects and will, therefore, be preempted.'" *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 513-14, 850 A.2d 1169 (2004), quoting *Montgomery Cty. Bd. Of Realtors v. Montgomery Cty.*, 287 Md. 101, 110, 411 A.2d 97 (1980). Thus, "[a]lthough the local statute did not specifically permit or prohibit an act permitted or prohibited by the State," it would still be invalid if it is "in direct conflict with a State statute regulating the same matter." *Worton*, 381 Md. at 514. See also *Angel*

[1] See *Poku v. Friedman*, 403 Md. 47, 54 n.8, 939 A.2d 185 (2008).

Enterprises Limited Partnership v. Talbot County, 474 Md. 237, 269, 254 A.3d 446 (2021) (a local law is invalid if is "inconsistent with the applicable provisions of State law" even where the locality otherwise has authority to act in the subject matter area); *K. Hovnanian Homes of Maryland, LLC v. Mayor of Havre de Grace*, 472 Md. 267, 297-98, 244 A.3d 1174 (2021) (same).

Second, the preemption-by-conflict inquiry identified in *Coalition For Open Doors* has no application to preemption in other ways, such as by express preemption, *Montgomery Cty. v. Atlantic Guns, Inc.*, 302 Md. 540, 489 A.2d 1114 (1985), or by implied preemption flowing from the presence of a comprehensive State regulatory scheme. *Board of County Commissioners v. Perennial Solar, LLC*, 464 Md. 610, 619-20, 212 A.3d 868 (2019). See Br. of Appellees at 12-13. These additional limitations are made clear by *National Asphalt v. Prince Geo's Cty*., 292 Md. 75, 79, 437 A.2d 651 (1981), a decision ignored by the State but which the Court in *Coalition For Open Doors* found "[v]ery much in point." 333 Md. at 381-82.

In *National Asphalt,* the Court held that a county regulation of employment discrimination by employers with less than 15 employees was not preempted by State discrimination law that merely did not cover such small employers. In so holding, the Court first noted that the General Assembly "has not expressly preempted the area of employment discrimination." 292 Md. at 78. In addition, the Court affirmed that "this Court has held that county laws were impliedly preempted by the extensive state legislation in the fields involved," such as for elections, the field of primary and secondary school education, and the taxation of real estate. *Id.* The Court found that "state legislation relating to employment

discrimination" was "entirely different" from those cases because State law on such discrimination was limited to "five relatively brief sections" of one statute which, the Court ruled, "do not comprehensively cover the entire field." *Id.* at 79.

Coalition For Open Doors presented a similar situation. There, the Court held that a county ordinance prohibiting membership discrimination by private clubs was not preempted by State public accommodations law, which excluded regulation of private clubs. 333 Md. at 379-80. The Court found that this exclusion was "similar" to the mere non-regulation at issue in *National Asphalt* and did not constitute "an affirmative authorization to discriminate." *Id.* at 383. That holding is hardly surprising.

The limits are also evident from *City of Baltimore v. Sitnick & Firey*, 254 Md. 303, 255 A.2d 376 (1969), a case on which *Coalition For Open Doors* also relied. 333 Md. at 380-81. In *Sitnick,* the Court sustained a local minimum wage requirement that was higher than that set by State law, reasoning that there was no conflict preemption where "*the only difference* between [the State law and the ordinance] is that the ordinance goes further in its prohibition" *and* "the municipality does not attempt to . . . forbid what the legislature *has expressly licensed, authorized, or required*." 254 Md. at 317. (Emphasis added). Thus, a locality may not prohibit what the State has "*expressly* permitted." *Coalition For Open Doors,* 333 Md. at 381, quoting *Sitnick*, 254 Md. at 317 (emphasis the Court's).

This case is different in every way from *Coalition For Open Doors*, *National Asphalt* and *Sitnick*. Here, the Circuit Court held that Chapter 57 not only "swallowed" the broad express preemption imposed by MD Code, Criminal Law, 4-209(a) (E.890) but was also in "direct conflict" with five other separate express preemption laws "regarding the

sale, possession and transfer of regulated firearms, over the transfer of long guns (rifles and shotguns), and over the wear and carry of handguns." E.892. See also Declaratory Judgment at E.896-898; Brief of Appellees at 14. The Circuit Court also found that "Chapter 57 is clearly targeted at who may own a firearm, where it may be possessed, and what one may do with it in Montgomery County" and that "[e]ach of these areas are already the subject of comprehensive State regulation." E.889. The court ruled that Chapter 57 is "irreconcilably inconsistent with State law and in conflict with the scheme of firearms regulation enacted by the General Assembly" (E.891), including "the comprehensive and intertwined scheme of existing State regulation" concerning "wear and carry permit holders, State licensed firearms dealers and privately made firearms." E.892. The State does not question these holdings.

B. Chapter 57 Bans Conduct Expressly Permitted By State Law

Chapter 57 not only conflicts with express preemption statutes and "eviscerates" (E.892) multiple State comprehensive regulatory schemes, but it also bans conduct that State law expressly permits. To illustrate: As enacted by the 2023 General Assembly, Senate Bill 1, 2023 Maryland Session Laws, Chapter 680, and House Bill 824, 2023 Maryland Session Laws, Ch. 651, comprehensively regulate carry permit holders and where individuals may possess a loaded firearm. See Br. of Appellees at 5-6. This legislation was part of the State's response to *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), where the Court recognized a broad constitutional right of law-abiding citizens to be armed in public and abrogated "good cause" limits on that right, such as Maryland's then-existing "good and substantial reason" requirement. See Br.

of Appellees at 2. *Bruen* held that the States may regulate firearm possession in certain "sensitive" places like "legislative assemblies, polling places, and courthouses," but rejected New York's argument that "the government may lawfully disarm law-abiding citizens" in "'places where people typically congregate and where law enforcement professionals . . . are presumptively available.'" 597 U.S. at 30-31.

Chapter 57 is obviously "inconsistent" with the comprehensive system established by SB 1. *Angel Enterprises*, 474 Md. at 269. In its effort to comply with *Bruen*, the General Assembly did **not** establish buffer zones (unlike the 100-yards exclusionary zones imposed by the County) and SB 1 affirmatively regulates firearms in far fewer locations than the County.[2] See Br. of Appellees at 14-20. But Chapter 57 also directly conflicts with some of the exceptions the General Assembly enacted with respect to the bans otherwise imposed in these areas. One such exception affirmatively authorizes owners and lessees to go armed in privately owned sensitive areas. MD Code, Criminal Law, § 4-111(b)(9); Br. of Appellees at 15-16. That exception also authorizes a private owner or lessee to have an "express agreement" with permit holders for carry in these locations, and affirmatively authorizes these owners, lessees and permit holders to "protect[] any individual or property at the location." *Id*. § 4-111(b)(9)(ii). In another exception, SB 1 expressly allows all permit holders to carry concealed in vehicles in these privately owned sensitive areas, such as

[2] The General Assembly understood that SB 1 would face Second Amendment challenges. See written testimony of undersigned counsel on SB 1 at https://bit.ly/3Lrg4IJ and on HB 824 at https://bit.ly/3L3Xbeb. In fact, parts of SB 1 have already been preliminarily enjoined. See Br. of Appellees at 15 n.3. Similarly, Appellees' Second Amendment challenge to Chapter 57 (E.98) is pending in the Fourth Circuit where proceedings are stayed pending a decision on this appeal. *MSI v. Montgomery Cty.,* No. 23-1719, ECF # 77 (4th Cir. Feb. 22, 2024).

around private schools and private institutions of higher education. *Id.*, at § 4-111(b)(11). In still other exceptions, private owners or agents may by signage or permission, allow carry on private property otherwise open to the public, or by permission, inside a private dwelling. *Id.,* at § 6-411(c), (d). All such carry is banned by Chapter 57. As the Circuit Court held, the County "wanted, among other things, to largely eliminate the State granted right to wear and carry a firearm in the Montgomery County, even when the individual held a State issued concealed carry permit." E.889.

Chapter 57's broad prohibition of privately made firearms ("PMFs") likewise prohibits conduct expressly permitted by Senate Bill 387, 2022 Maryland Session Laws, Ch. 19. See Br. of Appellees at 22-24. As alleged in Count VIII of the Second Amended Complaint (E.108-113), PMFs are "bearable arms" and thus are presumptively protected by the Second Amendment,[3] a point the General Assembly understood when it regulated PMFs in SB 387.[4] This legislation was thus carefully crafted so as to affirmatively provide that PMFs may be possessed if they are serialized by a federal firearms licensee ("FFL") on or before March 1, 2023. See Br. of Appellees at 23-25. To that end, SB 387 also specifically authorizes possession of PMFs by FFLs. *Id.* at 23-24. The State also affirmatively authorized persons to make their own PMFs and to inherit PMFs if such persons use an FFL to serialize the PMF within 30 days. *Id.* at 24. Here, unlike in *Sitnick*, *National Asphalt* and *Coalition For Open Doors*, the General Assembly has "expressly

[3] See *United States v. Rahimi,* 602 U.S. --- , 2024 WL 3074728 at *6 (June 21, 2024).

[4] See written testimony of undersigned counsel on SB 387 at https://bit.ly/3W3VeF6.

permitted" or "authorized" PMFs owners and FFLs to take these measures. *Sitnick*, 254 Md. at 317. Chapter 57 blocks these deliberate policy choices.

The same point applies to the safe storage law enacted by the 2023 General Assembly in Senate Bill 858, 2023 Maryland Laws, Ch. 622. See Br. of Appellees at 25. In *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008), the Supreme Court struck down as unconstitutional a District of Columbia safe storage law that required a firearm to be disassembled or bound by a trigger lock, holding that this requirement unconstitutionally burdened the right to self-defense in the home. In so holding, the Supreme Court suggested in *dicta* that restrictions designed "to prevent accidents" would be constitutionally permissible. *Id.*

In enacting SB 858, the General Assembly was keenly aware of these constitutional bounds established by *Heller*.[5] The Legislature thus ensured that the ban on minor access applied only to "loaded" firearms (the kind of access most likely to result in accidents). Even that limitation is expressly subject to the right of persons under 21 to access weapons "for self-defense or the defense of others against a trespasser into the residence of the person in possession or into a residence in which the person in possession is an invited guest." MD Code, Public Safety, § 5-133(d)(2)(iv). Recognizing that State law actively seeks to encourage youth hunting, MD Code, Nat. Resources, § 10-301.l(f)(l), and that *Heller* identified "hunting" among the interests protected by the Second Amendment (554 U.S. at 599, 604), SB 858 likewise expressly authorizes a minor to have *unsupervised* access to long guns if the minor possesses the hunter safety certificate issued by the State

[5] See written testimony of undersigned counsel on SB 858 at https://bit.ly/3zlTRsv.

Department of Natural Resources. See Br. of Appellees at 25. The County bans all such access. These differences between SB 858 and Chapter 57 are not merely an absence of regulation as in *Coalition For Open Doors* and *National Asphalt.* Rather, SB 858 (like SB 1 and HB 824) sought to strike a balance, and that balance is destroyed by the restrictions imposed by the County.

The County trashes a similar balance struck by the General Assembly in enacting MD Code, Criminal Law, § 4-203, by banning or limiting the wear, carry and transport of handguns by persons without a carry permit where such possession is expressly authorized by Section 4-203(b). See Br. of Appellees at 20-22. As noted, Section 4-203 dates to the enactment of 1972 Maryland Session Laws, Ch.13 (E.646-47), and thus these provisions of Section 4-203 are controlled by the express preemption and uniformity imposed by Section 6 and Section 8 of that legislation. E.658. See *Atlantic Guns, Inc*., 302 Md. at 543. As the Circuit Court held, "[a] political subdivision in Maryland simply cannot prohibit (save for a very narrow band of activity not challenged here) what is expressly permitted by state law." E.892. "To hold otherwise would allow a municipality to substitute its will for that of the General Assembly." *Id.* The State does not question that holding.

C. Section 4-209(b) Does Not Authorize Chapter 57

The State relies on two Attorney General Opinions from 1991 and 1997 with respect to the scope of MD Code, Criminal Law, §4-209(b)(1). StateBr.8-9. Both of those Opinions were restricted to local ordinances that sought to regulate firearms access by minors. But the State's brief omits any mention of the Attorney General's 2008 Opinion at 93 Md. Op. Att'y Gen. 126 (2008), the very Opinion the Circuit Court found "instructive" in this case.

E.887. That 2008 Opinion relies on *Mora v. City of Gaithersburg*, 462 F.Supp.2d 675 (D.Md. 2006), *modified on other grounds*, 519 F.3d 216 (4th Cir. 2008), a case also relied on by the Circuit Court (E.886), and states that Section 4-209 "broadly preempts local regulations within its scope, and the exceptions are to be narrowly construed." 93 Md. Op. Att'y Gen. at 129, citing *Mora*, 462 F.Supp.2d at 690. *Mora* is ignored by the State.

Other than the Circuit Court's decision below, *Mora* is the only case that has, to date, directly addressed the scope of subsection 4-209(b)(1). It held that "the exceptions [in Section 4-209(b)] to otherwise blanket preemption [in Section 4-209(a)] are narrow and strictly construable" and that "the Legislature" has "occup[ied] virtually the entire field of weapons and ammunition regulation." *Mora*, 462 F.Supp.2d at 690. The Attorney General's 2008 Opinion took that holding as guidance and then applied preemption principles concerning the scope of a locality's power to enact legislation under Section 4-209(b)(1). The 2008 Opinion establishes an analytical road map for the application of preemption principles to local ordinances and is precisely the approach advocated by Appellees here. See Br. of Appellees at 28.

Relying on the 1991 Attorney General Opinion concerning minor access, the State argues that Section 4-209(b) should be given priority because it is "both specific in substance and later in time." St.Br. 11. That argument is wrong twice over. While four of the six express preemption statutes on which the Circuit Court relied were enacted before the 1985 enactment of Section 4-209, three of these statutes (governing preemption for regulated firearms) were repealed and then reenacted with new language in 2003 and a fourth express preemption statute (for long guns) was enacted in 2021. See Br. of Appellees

at 5. The General Assembly is presumed to be aware of Section 4-209 when it enacted these provisions. Such later enacted laws control the scope of Section 4-209(b)(1). *Harvey v. Marshall,* 389 Md. 243, 271, 884 A.2d 1171 (2005).

The same is true for the fifth preemption statute, Sections 6 and 8 of 1972 Maryland Session Laws, Ch. 13, enacted in 1972 as part of the comprehensive regulatory scheme for handguns and carry permits. That regulatory scheme has been repeatedly updated over time, most recently by SB 1 and HB 824. 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 Cas. Co. v. Nordic Leasing, Inc*., 42 F.3d 725, 732 n.7 (2d Cir. 1994). As the 2008 Opinion notes, there is a need "to ensure some uniformity in statewide regulation of firearms." 93 Md. Op. Att'y Gen at 133. That need has not changed. *Mora*, 462 F.Supp.2d at 690 ("the subject . . . demands uniform state treatment").

SB 858, controlling access by minors, was likewise enacted in 2023. SB 387's regulatory scheme for PMFs was enacted in 2022, as was House Bill 1021, 2022 Maryland Session Laws, Ch. 55, regulating dealer security measures. See Br. of Appellees at 3-10. These statutory provisions all post-date the 1985 enactment of Section 4-209 as well as the 1991 and 1997 Attorney General Opinions on which the State relies. All these legislative enactments are also far more specific in regulating the type of firearm and an activity than the ordinances authorized by subsection 4-209(b)(1). These express preemption statutes and comprehensive regulatory systems are thus controlling over the authority accorded

localities by Section 4-209(b)(1). See, e.g., *Harvey*, 389 Md. at 270; *State v. Ghajari*, 346 Md. 101, 115-16, 695 A.2d 143 (1997).

Finally, and more fundamentally, there is no reason to "harmonize" these other State laws with Section 4-209(b)(1). First, as noted by the 2008 Attorney General Opinion, subsection (b) is merely an "exception" to the broad preemption otherwise imposed by subsection (a) and thus does not even textually apply to **other** express preemption statutes, much less to comprehensive regulatory systems established by **other** State laws. Second, such exception provisions are, in any event, narrowly construed to avoid allowing the exception to swallow the general rule to which the exception applies. See Br. of Appellees at 27. As the Circuit Court held, Chapter 57 not only "swallows" the broad preemption established by Section 4-209(a), it also "swallows . . . other State laws expressly regulating handguns and the right to possess or carry a handgun in this State." E.889-90. Third, a very narrow construction of Section 4-209(b) is also required by Section 4-209(c), which limits the authority accorded localities by subsection (b) to amendments of a local law existing as of December 31, 1984, and **only then** if the amendment does not "expand existing regulatory control." See *Lyles v. Santander Consumer USA Inc*., 478 Md. 588, 602, 275 A.3d 390 (2022) ("[w]e read the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory"); Br. of Appellees at 27-28.[6]

[6] Section 4-209 was recodified without change by 2002 Maryland Laws Ch. 26, and the County's authority was further limited by the addition of subsection 4-209(b)(3) in 2010 Maryland Session Laws, Ch. 712. That 2010 enactment left unchanged (and thus reaffirmed) the limits imposed by Section 4-209(c). See *American Cas*., 42 F.3d at 732 n.7.

II. CHAPTER 57 IS NOT A LOCAL LAW

The State claims that Chapter 57 is a local law but ignores much of the controlling case law. See Brief of Appellees at 29-31. Quoting *Assanah-Carroll v. Law Offices of Edward J. Maher, PC.*, 480 Md. 394, 424-25, 281 A.3d 72 (2022), the State nonetheless argues that Chapter 57 is a local law because it is "'confined in [their] operation to prescribed territorial limits.'" StateBr.7, quoting *Assanah-Carroll*, 480 Md. at 425. But *Assanah-Carroll* is not so limited. In a passage omitted by the State, the Court made clear that "some statutes, local in form, are general laws, since they affect the interest of the whole state." *Assanah-Carroll*, 480 Md. at 425. The *Assanah-Carroll* Court then applied *that* principle to strike down a local law that provided expanded remedies for a violation of a State-wide statute because the local law "'affect[s] matters of significant interest to the entire State.'" *Id*. at 426, quoting *McCrory Corp. v. Fowler*, 319 Md. 12, 20, 570 A.2d 834 (1990). As the Court explained, localities do not have "the authority to modify or circumvent" a statute that "uniformly" applies State-wide. *Id*.

Assanah-Carroll and *McCrory* direct the courts to look to the "subject matter" and the "substance" of the local law. *Assanah-Carroll*, 480 Md. at 425. Thus, "[w]here a charter county attempts to enact an ordinance on 'matters of significant interest to the entire state,' we have determined that it is not, in fact, 'a local law' under Article XI-A." *Id.* Indeed, *McCrory* rejected the State's argument, holding that "[t]he Court [has] emphasized that 'a law is not necessarily a local law merely because its operation is confined to Baltimore

City or to a single county, if it affects the interests of the people of the whole state.'" 319 Md. at 18, quoting *Gaither v. Jackson*, 147 Md. 655, 667, 128 A. 769 (1925).

Like the law in *Assanah-Carroll*, Chapter 57 effectively "modifies" and "circumvents" State-wide statutes that "affect the interests of the people of the whole state." To address these State-wide interests, the State has created comprehensive systems of firearm regulation through six express preemption statutes and the enactment of SB 1, HB 824, SB 858, SB 387, HB 1021, 1972 Maryland Session Laws, Ch.13, and other statutes. See Br. of Appellees at 3-9. As the Circuit Court noted (E.898), this "comprehensive and intertwined system of State regulation" controls the possession, transfer, transport and sale of firearms, including PMFs, as well as access to firearms by minors. That "subject matter" undeniably "affects the interests of the people of the whole state." *Assanah-Carroll*, 480 Md. at 425. See Br. of Appellees at 30-31. See also *Montgomery Cty. Bd. Of Realtors,* 287 Md. at 110 (invalidating a county ordinance where its "effect" was to "second guess" uniform tax assessment procedures established by State law); 2008 Opinion, 93 Op. Att'y. Gen. at 133.

Finally, the State expresses alarm about "gun violence" in Maryland, relying on State-wide and national crime statistics to argue that "[l]ike all other counties in Maryland, gun violence strikes in Montgomery County." StateBr.5. Appellees certainly share that concern, but all the State's argument does is confirm the obvious, *viz*., that "gun violence" is a subject matter that "affects the interests of the people of the whole state." *McCrory*, 319 Md. at 18. Uniform State-wide laws are designed to respond to this State-wide interest within the constitutional bounds established by the Supreme Court in *Heller* and *Bruen*.

Montgomery County is just "like all other counties in Maryland" with respect to that State-wide interest and thus has no authority to impose its own response. As the Circuit Court held, laws addressing such State-wide interests are "for the General Assembly of Maryland, not a local county council." E.889.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Pursuant to Maryland Rule 8-504(a)(8), Plaintiffs-Appellees respectfully request oral argument in this appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8-504(a)(9) of the Maryland Rules, the undersigned counsel certifies:

1. The body of Reply of Appellees to Amicus contains 3,886 words, not counting those items which may be excluded under Maryland Rule 8-503, as determined by Microsoft Word, and

2. The Reply of Appellees to Amicus uses a 13 point, Times New Roman proportional font and otherwise complies with the requirements imposed by Maryland Rule 8-112.

/s/ Mark W. Pennak

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Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 8, 2024, an electronic copy of the Reply of Appellees to Amicus was served on the following counsel for defendant Montgomery County and any other counsel of record via the MDEC e-filing system and two printed copies were served via Federal Express courier service to:

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/s/ *Mark W. Pennak*

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