IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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

PLAINTIFFS' SUBMISSION OF SUPPLEMENTAL AUTHORITIES

Plaintiffs respectfully submit this memorandum for the purpose of bringing to the Court's attention the Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen,* --- S.Ct. ---, 2022 WL 2022 WL 2251305 (U.S. June 23, 2022). A copy of the Court's opinion is attached for the convenience of the Court as Exhibit A. As explained in plaintiffs' motion for summary judgment and in their opposition to the County's motions, Bill 4-21 is based on the authority granted by MD Code, Criminal Law, 4-209(b)(1), which is but a narrow exception to the broad preemption of County firearms regulation set forth in subsection 4-209(a) of that statute. As detailed in plaintiffs' prior pleadings, there are multiple reasons to narrowly construe the authority to regulate allowed by subsection 4-209(b)(l), but an important reason is that the broad construction of subsection 4-209(b)(1), brings Bill 4-21 into conflict not only with multiple provisions of State law, but also with the Second Amendment to the Constitution. See Plaintiffs' Opp. to Def's Motion for Summary Judgment at 15-16 (arguing that subsection 4-209(b)(1) must be construed narrowly to avoid constitutional questions). The Supreme Court's recent decision in

Bruen makes that conflict even larger and more stark.

Accordingly, as detailed below, subsection 4-209(b)(1)(iii) must be very narrowly construed to save it from being unconstitutional under *Bruen*. See *Galloway v. State*, 365 Md. 599, 625, 781 A.2d 851 (2001) ("we narrow the construction of the statute . . . to save it from possible unconstitutional vagueness"); See also *Skilling v. United States*, 561 U.S. 358, 406 (2010) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (citation omitted). As thus narrowly construed, Montgomery County Bill 4-21, at issue here, plainly is unauthorized and thus preempted by the broad preemption provisions of subsection 4-209(a). This Court should so hold. Such a holding would leave to another day the question of whether subsection 4-209(b)(1)(iii) is, itself, unconstitutional under *Bruen* in so far as it permits local regulation "within 100 yards of or in a park, church, school, public building, and other place of public assembly." On the other hand, if the Court should hold that Bill 4-21 is authorized by subsection 4-209(b)(1), then the constitutionality of subsection 4-209(b)(1) is squarely presented and should be decided. Any County regulation that relies on the authority granted by an unconstitutional statute is, by necessity, also *ultra vires* and unconstitutional.

We acknowledge, of course, that plaintiffs did not bring a separate Count in the Complaint under the Second Amendment. At the time the Complaint was filed in this case, the Maryland Court of Appeals had squarely held, in *Williams v. State*, 417 Md. 479, 496, 10 A.3d 1167 (2011), that the Second Amendment did not apply outside the home at all, stating that "[i]f the Supreme

Court…meant its holding [in *Heller* and *McDonald*][1] to extend beyond home possession, it will need to say so more plainly." *Bruen* plainly abrogates that ruling in *Williams*. And, as noted above, plaintiffs have consistently argued that Section 4-209(b) must be construed narrowly in light of the Second Amendment. See Mem. In Support of Summary Judgment at 22-23, 33; Opp. to Defs' Motion for Summary Judgment at 14-15. The Second Amendment was also raised in the Complaint (at ¶11) and presented in written objections to Bill 4-21 filed with the Montgomery County Council filed by plaintiff Maryland Shall Issue. See WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO BILL 4-21 (Corrected) (Feb. 9, 2021), attached to the Complaint as Exh. B. See Complaint at ¶25.

Indeed, in the comments submitted to County Council (as attached to the Complaint), plaintiff Maryland Shall Issue argued that the constitutionality of laws must be "analyzed under the 'text, history and tradition' test that was actually used in *Heller* and *McDonald*" and "[t]here is no 'text, history or tradition' that could possibly support the types of bans imposed by this bill." Comments at 9. That is, of course, the very test adopted by the Supreme court in *Bruen*. See *Bruen*, slip op. at 8. See also *Bruen*, (Kavanaugh, J., concurring, slip op. at 1). The scope of the Second Amendment has thus been part of this case from the beginning. That the Second Amendment was not raised as a separate claim is of no moment. See Rule 2-303(e) ("All pleadings shall be so construed as to do substantial justice."). See *Hays v. State,* 240 Md. 482, 486, 214 A.2d 573 (1965) (holding no waiver of an existing right where the law had changed because of an intervening

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[1] *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago,* 561 U.S. 742 (2010).

decision of the Supreme Court).

However, should there be any doubt on that score and should the Court deem it necessary to reach the issue of whether Bill 4-21 is unconstitutional under the Second Amendment, then the Court should, at minimum, allow plaintiffs to amend the complaint under Rule 2-341(b) of the Maryland Rules. See, e.g., *RRC Ne., LLC v. BAA*, 413 Md. 638, 673-74, 994 A.2d 430 (2010) ("[L]eave to amend complaints should be granted freely to serve the ends of justice and ... it is the rare situation in which a court should not grant leave to amend."); *Hartford Accident & Indem. Co. v. Scarlett Harbor Ass'n Ltd. P'ship*, 109 Md.App. 217, 248, 674 A.2d 106 (1996) ("Amendments are allowed so that cases will be tried on their merits rather than upon the niceties of pleading and to prevent the substantial injustice of a cause ... being defeated by formal slips or slight variances.") (internal quotations and citations omitted).

In *Bruen*, the Supreme Court held that the Second Amendment right to bear arms means "a State may not prevent law-abiding citizens from publicly carrying handguns because they have not demonstrated a special need for self-defense." Slip op. at 24-25 n.8. Specifically, the Court struck down as unconstitutional New York's "proper cause" requirement for issuance of a permit to carry a handgun in public. The Court went on to reject the "means-end," two step, intermediate scrutiny analysis used by the lower courts to sustain gun regulations, holding that "[d]espite the popularity of this two-step approach, it is one step too many." The Court ruled that "the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."

Under this test, "the government must affirmatively prove that its firearms regulation is

part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." Id. at 15. Applying that test in *Bruen*, the Court rejected New York's "attempt to characterize New York's proper-cause requirement as a 'sensitive-place' law," ruling that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly." Slip op. at 22. Such a definition, the Court explained, "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense." (Id.). As the Court explained, "[p]ut simply, there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department." (Id.).

Bruen is, of course, controlling authority. See, e.g., *State v. Madison*, 240 Md. 265, 275, 213 A.2d 880 (1965) ("Under our governmental system, the decisions of the Supreme Court must be controlling even when, as here, the decision makes invalid a long-established provision of the Maryland Constitution, previously held valid by this Court."). Indeed, it provides precisely the guidance that the Maryland Court of Appeals sought in *Williams*. The teachings of *Bruen* were thus recognized and applied in *Fooks v. State,* --- A.3d ---, 2022 WL 2339412 (Ct. of Sp. Appeals, June 29, 2022). There, the Court of Special Appeals sustained the conviction of the defendant for illegal possession of a firearm by a disqualified person as consistent with *Bruen*, but recognized that in *Bruen* "the Supreme Court declined to adopt both prongs of the two-prong test" for assessing Second Amendment challenges, and had thus rejected "means-ends scrutiny in the Second Amendment context." Slip op. at 11. The Court of Special Appeals also recognized that *Bruen* "defines the boundaries of firearms regulation *solely* in historical terms." (Id. at 12)(emphasis supplied). A copy of *Fooks* is attached as Exhibit B.

Stated simply, *Bruen* makes clear that Bill 4-21 is flatly unconstitutional and Section 4-209(b)(1)(iii) must itself be narrowly construed in order to save it from being struck down as unconstitutional as well. As previously detailed, Section 4-209(a) broadly preempts County regulation of anything having to do with firearms, providing that "the State preempts the right of a county, municipal corporation, or special taxing district to regulate the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of: (1) a handgun, rifle, or shotgun; and (2) ammunition for and components of a handgun, rifle, or shotgun." Subsection (b)(1) then purports to provide exceptions to this broad preemption provision, stating that county, municipal corporation, or special taxing district may regulate the purchase, sale, transfer, ownership, possession, and transportation of the items listed in subsection (a) of this section: (i) with respect to minors; *** (iii) except as provided in paragraph (2) of this subsection, within 100 yards of or in a park, church, school, public building, and other place of public assembly."

The County here relies exclusively on subsection 4-209(b)(1)(iii), as giving it the authority to broadly define "place of public assembly" to include, as defined in Bill 4-21, *"a place where the public may assemble, whether the place is publicly or privately owned.*" This definition includes, but is not limited to any "park; place of worship; school; library; recreational facility; hospital; community health center; long-term facility; or multipurpose exhibition facility, such as fairgrounds or a conference center. A place of public assembly includes all property associated with the place, such as a parking lot or grounds of a building." Bill 4-21, amending County Code § 57-1. Bill 4-21 then amends County Code §57-11(a) to provide: "In or within 100 yards of a place of public assembly, a person must not: (1) sell, transfer, possess, or transport a ghost gun, undetectable gun, handgun, rifle, or shotgun, or ammunition or major component for these firearms; or (2) sell, transfer, possess, or transport a firearm created through a 3D printing process."

As is apparent, these amendments to Section 57.1 combined with the amendments to Section 57.11(a), broadly prohibit the mere sale, transfer, possession, or transport of **any** firearm or ammunition within 100 yards of any location "where the public may assemble," **regardless** of whether such place is "publicly or privately owned." The only exception, remotely applicable here, is for possession by a person "in the person's own home," and the possession of "one" firearm and ammunition for that "one" firearm at a business by the owner or by "one" authorized employee. See Section 57-11(b)(3),(4). Possession by the business owner and the employee are permitted **only** if these individuals also have a wear and carry permit issued by the Maryland State Police under MD Code, Public Safety, § 5-306. See Section 57-11(b)(4). The Bill's sweep outside the home is otherwise all-encompassing and covers every type of firearm and all types of ammunition.

As should be apparent, the bans and regulations imposed by Bill 4-21 are plainly unconstitutional under *Bruen*. While the *Bruen* Court indicated that a State may utilize a "shall issue" licensing system to regulate the right to carry a handgun outside the home, *Bruen*, slip op. at 30 n.9, the Court stressed that such licensing system must be based on objective criteria, and not be dependent on any discretionary decision-making by the licensing official. See *Bruen*, slip op. 4-5. Indeed, the *Bruen* Court expressly identified Maryland's carry permit law, requiring a "good and substantial reason" for a permit, as example of the type of "may issue" law that is, like New York's, invalid under this analysis. See slip op. at 6 n. 2. The Maryland Attorney General has thus advised the Maryland State Police that the "good and substantial reason" requirement "is now clearly unconstitutional" and that the State Police "is not required to continue enforcing—and, in fact, may not continue to enforce—the 'good and substantial reason' requirement in processing public-carry permit applications." AG Opinion Letter at 1 (July 6, 2022) (attached as Exhibit C). Here, the County does not purport to create any such "shall issue" licensing system for the bans

and limitations imposed by Section 57.11, as amended by Bill 4-21. Nor could it under any rational reading of the limited authority granted by subsection 4-209(b)(1) or under the multiple preemption provisions of State law. The bans and limitations imposed by Bill 4-21 simply do not survive scrutiny under the text, history and tradition test applied in *Bruen*.

As noted, the Court of Special Appeals has already held that *Bruen* "defines the boundaries of firearms regulation solely in historical terms." *Fooks*, slip op at 12. There is simply no historical analogue that could justify the bans or limitations imposed by Section 57-11, as amended by Bill 4-21. The County bears the burden of proof to show the historical presence of such analogous regulations. See *Bruen*. at 52 ("we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden."). Under *Bruen*, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." Slip op. at 8. Here, the text of the Second Amendment indisputably covers the "possession, sale, transport, and transfer" of firearms and ammunition and thus such matters easily fall within the text of the Second Amendment. In such cases, "the government may not simply posit that the regulation promotes an important interest," but rather "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* The County has not and cannot make any such showing.

Bruen holds that governments may regulate firearms at "legislative assemblies, polling places, and courthouses" (*Bruen*, slip op. at 21), and states that "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." (Id.). But nothing in *Bruen* can be read to allow a State (or a municipality) to regulate every location where the "public may assemble" regardless of whether the place is "publicly or privately owned."

Quite to the contrary, the Court in *Bruen* expressly rejected New York's attempt to regulate "all places of public congregation," holding that such a regulation "would eviscerate the general right to publicly carry arms for self-defense." (Slip op. at 22). The County's attempt to regulate every place where the public "may assemble" plainly fails under this holding in *Bruen*. Such places in the County (including everywhere there is a sidewalk) are no more "sensitive" than "places of public congregation" in Manhattan or elsewhere in New York.

Indeed, as previously explained, the County's attempt to regulate every handgun, shotgun, and rifle in public is at odds with State law, which leaves the regulation of long guns to federal law. Nothing in State law, for example, purports to ban or even regulate the mere sale, possession or transport of long guns by otherwise law-abiding adult citizens. See Plaintiffs' Opp. to Def. Motion for Summary Judgment at 18-19. Indeed, the State has expressly preempted local regulation of the transfer of long guns. MD Code, Public Safety, § 5-207(a). While the possession, sale, transfer, and transport of handguns ("regulated firearms" under State law) are tightly regulated by the **State**, *Bruen* likewise makes clear that not even the State may regulate handguns in such a way as to flatly deny a law-abiding citizen access to handguns for armed self-defense outside the home or otherwise make such access subject to discretionary decision-making by government officials. The same is obviously true, *a fortiori*, for long guns. And even prior to *Bruen*, the State reserved regulation of handguns to itself by specifically preempting local regulation of the possession, sale or transfer of regulated firearms. See Plaintiffs' Opp. to Def. Motion for Summary Judgment at 9-10. The County plainly enacted Bill 4-21 so as to expand its power to severely regulate all aspects of the sale, transfer, transport and possession of all firearms throughout the County, including in homes and businesses. That effort is unconstitutional under

Bruen and in direct conflict with the comprehensive system of regulation of firearms under State law. It cannot be sustained.

CONCLUSION

For all 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 10, 2022, a copy of the foregoing PLAINTIFFS' SUBMISSION OF SUPPLEMENTAL AUTHORITES was served on the following counsel for defendant Montgomery County via the MDEC e-filing system:

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