MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

President
Mark W. Pennak

October 10, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO BILL 36-23

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia and the Bar of Maryland. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. This letter is submitted in opposition to Bill 36-23 on behalf of MSI as well as on behalf of MSI members, many of whom live and/or work in Montgomery County.

Bill 36-23 would amend Chapter 57 of the County Code to add a new Section 57-11A. That new section that would direct the County Department of Health and Human Services to prepare and distribute to each gun shop in the County literature regarding "(1) gun and firearm safety; (2) gun and firearm training; (3) suicide prevention; (4) mental health; and (5) conflict resolution" The Bill further provides that "[a] gun shop must make visible and available at a point of sale, and must provide to each customer upon a sale of a gun, firearm, or fixed ammunition, the literature prepared under subsection (a)."

The Bill imposes potentially severe penalties, providing that "[a] failure to display or distribute literature under subsection (b) is a Class A violation under Section 1-19," that "[e]ach failure to distribute literature under subsection (b) is a separate violation" and that "[e]ach day of a failure to display literature under subsection (b) is a separate violation." Subsection (b) of Section 1-19 punishes a criminal violation with a $200 fine **and 30 days in jail** and a civil violation with a $100 fine, with each repeat offense punishable by $150 fine. Under Section 1-19:

> Any violation of County law that is identified as a Class A, B, or C violation may be punished as a misdemeanor by a fine of not more than the amount shown below, or by confinement in the County jail for not longer than the time shown below, or by both the fine and confinement, in the discretion of the court, in which the violator is convicted. Any violation may, in the

alternative and at the discretion of the enforcing agency, be punishable as a civil violation under Section 1-18.

This Bill thus authorizes prison time for a violation, not to mention fines that could quickly accumulate and thus put small gun shops out of business.

FIRST AMENDMENT

The Bill is content-based compelled speech and is thus presumptively unconstitutional under the First Amendment. See *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). As the Supreme Court recently stated, "our 'leading First Amendment precedents…have established the principle that freedom of speech prohibits the government from telling people what they must say.'" *303 Creative LLC v. Elenis*, 143 S.Ct. 2298, 2317 (2023), quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 61-62 (2006). Forced display and distribution of government literature is "compelled speech" under controlling precedent. See *NIFLA*, 138 S.Ct. at 2369-72; *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council Of Baltimore*, 879 F.3d 101, 111 (4th Cir.), *cert. denied*, 138 S.Ct. 2710 (2018). The Bill is thus facially violative of the First Amendment.

The compelled speech imposed by this Bill is not constitutional under *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 628 (1985). *NIFLA* holds that *Zauderer* is "limited to 'purely factual and uncontroversial information about the terms under which ... services will be available.'" *NIFLA,* 138 S.Ct. at 2372, quoting *Zauderer*, 471 U.S. at 651 (emphasis added). In the very next sentence, the Court relied on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995), as "explaining that *Zauderer* **does not apply outside of these circumstances**." Id. (Emphasis added). Those twin statements could hardly be clearer. The literature addressed in this Bill does not remotely purport to regulate "the terms under which services will be available" by gun shops. Nor is the County's literature likely to be "purely factual and uncontroversial." If enacted, the Bill will be challenged under the First Amendment.

The Staff Report attached to the Bill suggests that the Bill is inspired by a similar ordinance enacted by Anne Arundel County. While a federal district court sustained that ordinance under an unprecedented reading and application of *Zauderer*, that holding is currently on appeal in *Maryland Shall Issue, Inc. v. Anne Arundel County,* No. 23-1351 (4th Cir.). That appeal has been fully briefed and is currently set for oral argument before the United States Court of Appeals for the Fourth Circuit on December 8, 2023, in Richmond, Virginia.

There is no urgency to this Bill. The County should thus wait until the Fourth Circuit decides the appeal concerning the Anne Arundel County ordinance prior to acting. Otherwise, enacting the Bill now will ensure that it will be challenged. When Anne Arundel County loses on appeal, as it likely will, Anne Arundel County will be on the hook for many tens of thousands of dollars in fees and costs under federal law, 42 U.S.C. § 1988, as well as damages under 42 U.S.C. § 1983. A successful suit on this Bill will likewise make Montgomery County liable for Section 1988 fees,

costs, and damages. The path of wisdom is to wait until the outcome of the appeal before enacting Bill 36-23. The residents of this County, including the undersigned, are better served by putting these funds to other uses.

STATE LAW PREEMPTION

The ordinance is open to attack on preemption grounds as well. State law, MD Code, Public Safety, § 5-104 provides: "This subtitle supersedes **any restriction** that a local jurisdiction in the State imposes on a sale of a regulated firearm, **and the State preempts the right of any local jurisdiction to regulate the sale of a regulated firearm."** (Emphasis added). The "gun shops" subject to this bill are licensed by the Maryland State Police under MD Code, Public Safety, subtitle 1 of Title 5, and sell "regulated firearm," which State law defines to include ordinary handguns. See MD Code, Public Safety, § 5-101(r)(1). This bill would condition the right of the gun shop to sell regulated firearms under State law and thus impose a "restriction" on such sales within the meaning of Section 5-104. The Bill is thus expressly preempted. The Bill is also implied preempted by the State's comprehensive regulatory scheme for the regulation of firearm sales. See *Board of County Commissioners v. Perennial Solar, LLC*, 464 Md. 610, 619-20, 212 A.3d 868 (2019).

The Maryland Constitution, Article XI-A, § 3, commands that all local laws enacted by a charter county or the City of Baltimore "shall be subject to the same rules of interpretation as those now applicable to the Public Local Laws of this State, **except that in case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall contro**l." (Emphasis added). Similarly, the Maryland Express Powers Act, MD Code, Local Government, MD Code, Local Government, §10-206(a), provides that a charter county may pass an ordinance, resolution, or bylaw only if such laws are "not inconsistent with State law." Similarly, MD Code, Local Government, §10-206(b), provides that "[a] county may exercise the powers provided under this title only to the extent that the powers are not preempted by or in conflict with public general law."

Thus, in all cases, where there is a conflict or inconsistency between a State law and a county law, the county law must yield. See *Boulden v. Mayor and Com'rs of Town of Elkton*, 311 Md. 411, 415, 535 A.2d 477 (1988) ("In cases of conflict, however, the public general law must prevail"). Such conflict is present here as the Bill would impose restrictions on the sale of a firearm otherwise permitted by State law by a State licensed dealer. See *City of Baltimore v. Sitnick*, 254 Md. 303, 317, 255 A.2d 376, 382 (1969) ("a political subdivision may not prohibit what the State by general public law has permitted"); *Rossberg v. State*, 111 Md. 394, 74 A. 581, 584 (1909) ("ordinances which assume directly or indirectly to permit acts or occupations which the state statutes prohibit, or to prohibit acts permitted by statute or constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void").

Such a restriction is also expressly preempted by MD Code, Criminal Law, § 4-209(a), which provides that "[e]xcept as otherwise provided in this section, 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." It is beyond obvious that this Bill would "regulate" the "sale" and "purchase" of firearms and ammunition by requiring the display and the distribution of the County's literature. After all, a failure to display and distribute the County's literature is punishable by jail time and fines. The Bill is thus preempted by subsection 4-209(a).

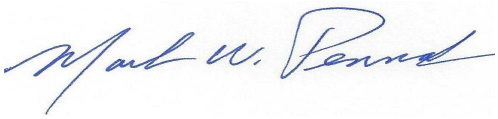
Section 4-209(b) contains exceptions to this general preemption, one of which is that a "county, municipal corporation, or special taxing district may regulate the purchase, sale, transfer, ownership, possession, and transportation of the items listed in subsection (a) of this section: *** (iii) * * * within 100 yards of or in a park, church, school, public building, and other place of public assembly." MD Code, Criminal Law, 4-209(b)(1)(iii). However, the provisions of subsection 4-209(b)(1) are narrowly construed because they are mere exceptions to the otherwise broad preemption imposed by subsection 4-209(a). See, e.g., *Blue v. Prince George's County*, 434 Md. 681 76 A.3d 1129 (2013) ("Under the canons of statutory construction, '[w]hen a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.'") (quoting Norman J. Singer and J.D. Shambie, Sutherland Statutes and Statutory Construction (2013), § 47:11).

Thus, in *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), a federal district court here in Maryland 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." Certainly, nothing in subsection 4-209(b)(1) purports to authorize a municipality to enact an ordinance that is preempted by other state law, such as Section 5-104, or barred by Article XI-A of the Maryland Constitution. Under that provision of the Maryland Constitution, the General Assembly has no power to authorize a county to enact a local ordinance that is otherwise preempted by or in conflict with State law.

The scope of the County's authority accorded by subsection 4-209(b)(1) is currently in active litigation in Montgomery County Circuit Court in *Maryland Shall Issue, Inc. v. Montgomery County,* No. Case No.: 485899V. Oral argument on cross motions for summary judgment in that case is currently scheduled for October 10, 2023, the same day as the hearing on this Bill. That litigation also involves Article XI-A, § 3 of the Maryland Constitution and preemption provisions of State law, including Section 5-104. If plaintiffs prevail in that litigation, this Bill will also fail for the same reason, *viz.,* because it is expressly preempted by and in conflict with State law. If the County loses in that suit, such a decision would mean that the County likewise lacks the authority to enact Bill 36-23 as well. Again, there is nothing urgent about this Bill. The County would be well-advised to await a decision before doubling down on its misguided reliance on Section 4-209(b)(1)(iii).

The County cannot say it was not put on notice.

Respectfully,



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