IN THE
SUPREME COURT OF MARYLAND

September Term, 2024

No. SCM-PET-0472-2024

ENGAGE ARMAMENT LLC, et al.,
Petitioners,

vs.

MONTGOMERY COUNTY, MARYLAND,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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Pursuant to Maryland Rule 8-303(e), Petitioners respectfully submit this Opposition to the Cross Petition for Certiorari filed by the Respondent, Montgomery County, Maryland ("the County") in the above-captioned matter. For the reasons below, the County's Cross Petition should be denied.

QUESTIONS PRESENTED FOR REVIEW

The questions presented by the County, as Cross Petitioner, are:

I. Does Criminal Law § 4-209(b)(1) authorize the County Firearms Law, and did the Appellate Court of Maryland err in remanding that issue of statutory construction to the Circuit Court as a question of fact?

II. Where the County Firearms Law regulates activity within the County and does not intrude upon an interest of statewide concern, did the Circuit Court err in finding that the County Firearms Law is not a "local law" under Md. Const. Art. XI-A?

III. Where Criminal Law § 4-209(b)(1) expressly invites local firearm regulation with respect to minors and near places of public assembly, did the Circuit Court err in finding that the County Firearms Law is preempted by and in conflict with State law?

IV. As the County Firearms Law dispossesses no one of any personal property, did the Circuit Court err in finding the County Firearms Law effected a taking under Article III § 40 of the Maryland Constitution and Article 24 of the Declaration of Rights?

V. Did the Circuit Court err in invalidating and prohibiting enforcement of portions of the County Code that were not referenced in the operative complaint and that Plaintiffs placed at issue for the first time in their motion for summary judgment?

ARGUMENT

I. THE PARTIES ARE AGREED THAT THE PETITION PRESENTS IMPORTANT LEGAL ISSUES WARRANTING RESOLUTION BY THIS COURT

The County argues that that "the ability of localities to regulate firearms" under MD Code, Criminal Law § 4-209(b)(1) is an important question warranting certiorari. For the reasons set forth in the Petition, Petitioners agree. Petitioners likewise agree with the

County that the Appellate Court erred in remanding that question to the Circuit Court for "factual findings" on the scope of Section 4-209(b)(1).

The parties are also in agreement that review is warranted on the merits of the ultimate issues presented by the Petition, *viz.,* whether Chapter 57 of the County Code is (1) preempted, or (2) is an impermissible "general law" barred by Article XI-A, § 3 of the Maryland Constitution, or (3) constituted a Taking under Article III § 40 of the Maryland Constitution and Article 24 of the Declaration of Rights. Those issues are encompassed by Questions 1-3 of the Petition and Questions I-IV of the Cross-Petition. There is simply no reason to grant review of the Cross-Petition to reach these issues. The County's arguments on each of these issues, as presented in the Cross Petition, can be raised in briefing on each of the three questions presented in the Petition. Granting certiorari on the Cross-Petition thus would unnecessarily complicate the briefing of these issues. The Cross-Petition should thus be construed as consent to certiorari on Petitioners' Petition.

The County also seeks review of one additional issue, *viz.,* whether the Circuit Court erred in invalidating and prohibiting enforcement of portions of Chapter 57 of the County Code that "were not referenced in the operative complaint and that Plaintiffs placed at issue for the first time in their motion for summary judgment." The County's contends that the Second Amended Complaint did not specifically cite Section 57-10 and subsection 57-11(d) of Chapter 57. Cross Petition at 14. The County's argument on that issue lacks merit. Each Count of the Second Amended Complaint challenges "Chapter 57, as amended by Bill 4-21 and Bill 21-22E" and the same language is in the prayer for relief. See Cross-Petition Exh. 10. These allegations provided notice to the County that "Chapter 57" was at

issue and that obviously includes Section 57-10 and subsection 57-11(d). The reference to the two Bills merely identified the version of "Chapter 57" challenged. These allegations easily meet the notice pleading requirements of Rule 8(a), Fed.R.Civ.P., and of Maryland Rule 2-303(b).

Moreover, the validity of Section 57-10 and subsection 57-11(d) of Chapter 57 **was raised and fully litigated** in the cross-motions for summary judgment. See, e.g., P.Mem. at 34-35,38-39,52,60-61,69-70,73-74,77 (filed 07/25/2023). The orders of the Circuit Court are limited to the issues raised in those motions. See ADD 055, 058. Having fully litigated the issue and lost, the County may not now be heard to complain about the complaint. See *Tshiani v. Tshiani*, 436 Md. 255, 270 (2013) (rejecting the same argument where the party was not "surprised unfairly or otherwise prejudiced"). Cf. Rule 15(b)(2), FRCP ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."). The Circuit Court did not err in entering relief on the issues thus litigated and presented. See, e.g., *Dart Drug Corp. v. Hechinger Co., Inc*., 272 Md. 15, 29 (1974) (a declaratory judgment "must pass upon and adjudicate the issues raised in the proceeding"). The County is, of course, free to advance merits arguments concerning Section 57-10 and 57-11(d), just as it did below.

II. THE COUNTY'S OTHER ARGUMENTS ARE MERITLESS

A. The Section 4-209(b)(1) Exceptions Must Be Narrowly Construed

The County essentially asserts MD Code, Criminal Law, § 4-209(b)(1)(iii) authorizes it to define "place of public assembly" any way it wants.[1] The County's Cross-Petition does not dispute (and thus concedes) that the County adopted its definition of "place of place of public assembly" **solely** in order to negate the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). See Petition at 3. The County Council's Public Safety Committee's recommendation to the full Council concerning the adoption of Bill 21-22E makes this point expressly, stating: "In order to make this definition more closely aligned with *Bruen*'s approach to 'sensitive places" (as discussed above) – and in order to include places that *Bruen* has specifically said to qualify as 'sensitive places' – the Committee voted to adopt the following amendment." E.146.

As the Petition makes clear, the County's enactment of Bill 21-22E and its attempt to negate *Bruen* placed Chapter 57 in direct conflict with multiple provisions of State law, including five other express preemption statutes and other legislation enacted as recently as 2021, 2022 and 2023. The County does not deny that reality. Rather, it asserts that these conflicts do not matter because, it contends, four of the five express preemption statutes

[1] Subsection 4-209(b)(1)(iii), creates any exception to the broad express preemption otherwise imposed by Section 4-209(a), providing that a locality may regulate "the purchase, sale, transfer, ownership, possession and transportation" of firearms "within 100 yards of or in a park, church, school, public building, and other place of public assembly."

were enacted prior to and thus were superseded by the 1985 enactment of Section 4-209. Cross-Petition at 6-7. But that argument is wrong for at least two reasons.

First, The County does not deny that the term "place of public assembly" is not defined in Section 4-209 and thus takes its ordinary meaning. See, e.g., *Chow v. State,* 393 Md. 431, 445-46 (2006). Bill 21-22E was enacted for no reason other than to negate *Bruen* and, given that singular focus, it is not surprising that no dictionary supports the County's boundless definition. (ADD 105-06). See *Roman Catholic Archbishop of Washington v. Doe,* --- Md ----, 2025 WL 375996 at *20 (Feb. 3, 2025) (referring to dictionaries). Black's Law Dictionary, for example, defines "assembly" as "[a] group of persons who are united and who meet for some common purpose." Black's Law Dictionary, 11th Ed. (2019). People do not "unite" to "meet" for a "common purpose" at all the private or public locations included in the County's definition, much less at the grounds and parking lots at these locations.

The Appellate Court sought to address the "problematic" overreach of the County's definition by applying the interpretative canon of *ejusdem generis* (ADD 073) but then erroneously remanded that legal inquiry for "factual findings." (ADD 77). The parties agree the Appellate Court erred in ruling that this legal question requires Circuit Court "factual findings." But the Appellate Court's approach also fails because, among other flaws (Petition at 8-9), it leads to absurd results, *viz.,* it allows the County to negate comprehensive firearms regulations created by other State law, such as **other** express preemption statutes and **other** related statutory schemes. The Appellate Court thus erred by interpreting Section 4-209(b)(1)(iii) in a vacuum rather than in context of these other

statutory provisions. See, e.g., *SM Landover, LLC v. Sanders,* --- Md. ----, 2025 WL 379862 at *9 (Feb. 4, 2025) ("We do not 'read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone.'"), quoting *Lockshin v. Semsker*, 412 Md. 257, 275 (2010). Accord *FDA v. Brown & Williamson Tobacco Corp*., 529 U. S. 120, 133 (2000) (noting that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). This Court should hold that Section 4-209(b)(1) cannot be construed to allow a locality to enact legislation that is barred by **other** express preemption statutes or conflicts with or is in conflict with or preempted by **other** State laws. See Petition at 8-9. The Circuit Court rightly held that Section 4-209(b)(1) does not give the County the authority to negate all these State laws. ADD 050-51.

Second, and in any event, the County's argument that subsection 4-209(b)(1) is controlling because it is more "specific" (Cross-Petition at 7) and more recently enacted is factually and legally wrong twice over. As explained in the Petition, the three express preemption statutes for the "sale," "possession" and "transfer" of "regulated firearms" were enacted in 2003 in legislation that **repealed** the prior versions of these statutes and enacted new express preemption statutes that included all "regulated firearms." Pet. at 10 n.10. Similarly, the 1972 legislation that expressly preempted local legislation concerning the "wear, carry and transport" of "handguns"[2] has been repeatedly amended, including as

[2] 1972 Session Laws, Ch. 13, §§ 6, 8.

recently as 2023 with the enactment of Senate Bill 1, 2023 Maryland Session Laws, Ch. 680, and House Bill 824, 2023 Maryland Session Laws, Ch. 651. This Court relied on this 1972 legislation to invalidate a County ordinance in *Montgomery County v. Atlantic Guns, Inc.*, 302 Md. 540 (1985). The County does not dispute (nor could it) that this 1972 legislation created a comprehensive legislative scheme governing the wear, carry and transport of handguns that exists to this day. Yet, according to the County, the exception provisions of Section 4-209(b)(1) supersede **all** this legislation **and** abrogates *Atlantic Guns*. That is an absurd result.

The County relies on 76 Op. Att'y Gen. 240, 241-42 (1991), but that 1991 Opinion was limited to a local ordinance regarding "the specific regulatory authority given local governments" over access to firearms by minors, not the across-the-board regulation of all firearms by adults and permit holders, such as imposed by Chapter 57. See 76 Op. Att'y at 242. That Opinion also predates the 2003 enactment of the three express preemption statutes governing "possession," "sale" and "transfer" of "regulated firearms." And the Opinion was rendered before the 2021 enactment of the express preemption imposed by MD Code, Public Safety, 5-207(a),[3] as well as the more recent amendments in 2023 to the 1972 legislation, at issue in *Atlantic Guns*. Indeed, a 1997 Opinion of the Attorney General effectively limits the 1991 Opinion to regulations regarding access by minors, stating that "[t]he Legislature could not have intended [though subsection 4-209(b)(1)] to authorize localities to achieve indirectly what they may not achieve directly: across-the-board

[3] See 2021 Maryland Session Laws, Ch. 35.

regulation of firearms." 82 Op. Att'y. 84, 86 (1997). See Petition at 12. The County does not dispute that Chapter 57 is precisely such an "across-the-board regulation of firearms." That same concern for State-wide uniformity is also reflected in the even more recent 2008 Attorney General Opinion, 93 Op. Att'y 133 (2008), on which the Circuit Court relied. (ADD 046).

The County dismisses *Mora v. City of Gaithersburg,* 462 F.Supp.2d 675, 689-90 (D. Md. 2006), *modified on other grounds*, 519 F.3d 216 (4th Cir. 2008) (Cross-Petition at 11-12), but ignores *Mora*'s well-supported holding that "the exceptions to otherwise blanket preemption [of Section 4-209(a)] are narrow and strictly construable" because of "contemporaneous efforts in the Legislature to occupy virtually the entire field of weapons and ammunition regulation." See e.g., *Blue v. Prince George's County*, 434 Md. 681, 695 (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 2A Sutherland Statutory Construction, § 47:11. The County likewise ignores the Attorney General's express reliance on *Mora*'s analysis in the 2008 Attorney General Opinion. See Petition at 11-12. The Circuit Court held that the County's application of Section 4-209(b)(1) is so broad that it allows Chapter 57 to "swallow[] the preemption provisions of Section 4-209(a), as well as other State laws expressly regulating handguns and the right to possess, or to carry a handgun in this State." ADD 045-46. The County does not deny that effect; it argues that General Assembly

intended to give localities all this power through Section 4-209(b)(1). Cross Petition at 8. That has to be wrong.

The County acknowledges that the 2021 enactment of the express preemption imposed by MD Code, Public Safety, § 5-207(a), was enacted after Section 4-209, but argues that Section 5-207(a) was not intended to "modify, amend, or repeal" Section 4-209(b)(1). Cross-Petition at 7. Section 5-207(a) provides, *inter alia*, that "the State **preempts** the right of any local jurisdiction to regulate the transfer of a rifle or shotgun." (Emphasis added). The County does not dispute that Section 57-11(a) expressly "regulates" the "transfer" of a "rifle or shotgun" and thus is preempted by the plain language of Section 5-207(a). That Section 5-207(a) did not "modify, amend or repeal" Section 4-209(b)(1) is irrelevant to the express preemption imposed by that Section.

The County likewise errs in asserting that Section 4-209(b)(1) is "more specific" than Section 5-207(a). Cross Petition at 7. Section 5-207(a) is limited to "a rifle or shotgun" which is "more specific" than Section 4-209(b)(1), which covers **all** types of firearms. Section 5-207(a) is also "more specific" because it is limited to a "transfer" of a rifle or shotgun rather than "the purchase, sale, transfer, ownership, possession and transportation" of all firearms, activities covered by Section 4-209(b)(1). For the same reasons, the other express preemption statutes, concerning the "possession," "sale" or "transfer" of "regulated firearms" or the "wear, carry, or transport" of a "handgun" are likewise more specific than Section 4-209(b)(1). See Petition at 10-11.

The County does not deny that Chapter 57 conflicts with these express preemption statutes. And it ignores the very specific conflicts identified in the Petition, including

conflicts with State laws governing privately made firearms, 2022 Maryland Session Laws, Ch. 19, or access by minors, 2023 Maryland Session Laws, Ch. 622. The County does not dispute that Chapter 57's restrictions effectively make it impossible for a permit holder to carry in the County as expressly permitted by Senate Bill 1, 2023 Maryland Session Laws, Ch. 680. Petition at 12-13.

B. Chapter 57 Is An Impermissible "General Law"

As the Circuit Court recognized (ADD 053), State laws concerning firearms constitute a complex web of intertwined regulatory approaches and reflect "matters of significant interest to the entire State" within the meaning of Article XI-A § 3 of the State Constitution. *Assanah-Carroll v. Law Offices of Edward J. Maher, PC*, 480 Md. 394, 426 (2022). The County cannot reasonably deny that Chapter 57 extensively regulates these "matters of significant interest." That means Chapter 57 constitutes a "general law." *Id.* See MD Code, Criminal Law, § 4-209(c) (only authorizing localities to enact a "local law").

The County also does not dispute that the General Assembly has no power under Article XI-E, § 6, to endow localities with authority to enact a "general law" within the meaning of Article XI-A, § 3. See *Dzurec v. Board of County Commissioners of Calvert County, Maryland*, 482 Md. 544, 568 n.15 (2023) (noting that the General Assembly may authorize a locality to enact "'a local law on a matter of purely local concern'") (citation omitted). The scope of Section 4-209(b)(1)(iii) is thus irrelevant. Again, the proper approach is to strictly and narrowly construe the exception provisions of Section 4-209(b)(1) in such a way that these provisions do not "swallow" the broad preemption

imposed by Section 4-209(a) or the specific **other** express preemption statutes or bring Section 4-209(b)(1) into conflict with **other** State laws, or with the Maryland Constitution. See Petition at 9.

C. Chapter 57 Is A Taking

The County argues that Chapter 57 "does not dispossess anyone of firearms" and is thus not a Taking. Cross Petition at 12. But that is transparently wrong. Bill 4-21 (ADD 096) amended Section 57-11(a) of the County Code to provide that a person may not "sell, transfer, possess or transport" any firearms, "major components" of a firearm or PMFs within 100 yards of any "place of public assembly" (ADD 100), regardless of whether that place was "privately or publicly owned." (ADD 088-89). These 100-yard zones are measured from the outer edge of "all property associated with the place, such as a parking lot or grounds of a building." (ADD 099, 106). That is a textual ban on "possession."

The exceptions do not help the County. Subsection 57-11(b)(3) makes an exception for "a firearm" "in the person's own home" but that exception expressly does not apply to PMFs. (ADD 092, 100). Nor does the exception apply to components because while a "firearm" includes a "frame or receiver," MD Code, Public Safety, § 5-101(h)(1), the term does not encompass other "major components" as that term is defined by the County. (ADD 98). Similarly, Section 57-11(b)(5)'s exception for transport of unloaded firearms expressly excludes PMFs and is likewise limited to "firearms" (and ammunition). (ADD 092, 099). A business owner is allowed under Section 57-11(b)(4) to possess only "one"

"firearm" but **only** if the owner **also** has a carry permit. *Id*.[4] There is no exception in Section 57-11 for possession of components at a business or for more than "one" firearm, much less for a PMF.

These provisions destroy Petitioners' preexisting property rights in PMFs and components possessed prior to the enactment of Bill 4-21. For example, Engage had many PMFs and components for its business and yet it is a prohibited location because it has a privately owned "library," which is a banned location identified in Bill 4-21. (ADD 098). See Second Amended Complaint at ¶ 56. (Exh. 10 to Cross Petition). Engage is also located within 100 yards of the outer edge of an undeveloped, wooded area of County-owned land,[5] the type of place that arguably falls within the Bill 4-21's vastly broadened definition of a "park." (ADD 098). Other Petitioners likewise possessed PMFs and components in their homes or businesses prior to the enactment of Bill 4-21 and those locations fall within 100 yards of a park or other banned location. See Second Amended Complaint ¶¶ 63-64 (Brandon Ferrell), ¶¶ 66-67 (Deryck Weaver), ¶ 69 (Joshua Edgar), ¶¶ 70-71 (ICE Firearms). See Exh. 10 to Cross Petition.

These Petitioners were effectively dispossessed of their rights to possess, transfer, transport and sell their lawfully owned property. As a practical matter, these Petitioners

[4] These limitations imposed on business owners directly conflict with Md Code, Criminal Law, 4-203(b)(6),(7), which allow possession of handguns at a business by an owner or supervisory employee **without** a permit and **without limit**.

[5] Engage's location at 701 E. Gude Dr., Ste 101, Rockville, Maryland 20850, is within 100 yards of this wooded area as determined by the "measure distance" tool of Google Maps. https://bit.ly/4kivoHn.

cannot even transport these items out of the County without coming within one or more of the thousands of the 100 yards zones established by Bill 21-22E. See Petition at 12. Bill 4-21 (the ordinance that imposed the Taking) is **much** broader. That ordinance calculated the 100-yard zones to include any location where the public "**may assemble**," regardless of whether that place was "privately or publicly owned." (ADD 098). That incredibly broad ban on possession would encompass every place within 100 yards of any location open to the public, including all sidewalks. That is a Taking. See *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 538 (2005) (holding that per se Taking is present where the regulation is so complete "that its effect is tantamount to a direct appropriation or ouster" of possession). That the County did not assume physical possession of the PMFs and components is irrelevant. See *United States v. General Motors Corp*., 323 U.S. 373, 378 (1945) ("the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking").

The County is also wrong in asserting that the Maryland Constitution does not protect "tangible personal property." Cross Petition at 13. Interests in lawfully owned PMFs and components are "property" protected by the Maryland Constitution. See *Serio v. Baltimore County*, 384 Md. 373, 396 (2004) (Maryland's Takings Clause protected an "ownership property interest" in firearms); *Dodds v. Shamer*, 339 Md. 540, 548 (1995) ("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….'"); *Pitsenberger v. Pitsenber*ger, 287 Md. 20, 29 (1980) ("possessory interests in property are within the protection of the Fourteenth Amendment").

Federal case law is in accord. Compare *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (no Taking where the law allowed the unfettered right to possess, donate, and devise the regulated personal property), with *Horne v. Dep't. of Agric*., 576 U.S. 350, 364 (2015) (holding that the regulatory loss of the right to possess personal property constituted a per se Taking and distinguishing *Andrus* on that basis). As stated in *Horne*, "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." 576 U.S. at 358. See also *Fein v. Pennsylvania State Police*, 47 F.4th 247, 251-53 (3d Cir. 2022) (taking of firearms).

"States 'may not sidestep the Takings Clause by disavowing traditional property interests.'" *Moore v. Harper*, 600 U.S. 1, 34-35 (2023) (citation omitted). There is no more basic "traditional property interest" than the right to possess, sell, transfer and transport personal property. That this Taking was limited to a defined period does not make it any less of a Taking. See *First English Evangelical Lutheran Church v. Los Angeles Co*., 482 U.S. 304, 320 (1987) (finding a "duty to provide compensation for the period during which the taking was effective"); *Steel v. Cape Corp*., 111 Md. App. 1, 18-21 (1996) (same).

CONCLUSION

The petition for certiorari should be granted and the cross-petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on March 4, 2025, an electronic copy of the foregoing Opposition to the Cross Petition for Certiorari was served on the following counsel of record via MDEC service and via email.

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/s/ *Mark W. Pennak*

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CERTIFICATE OF COMPLIANCE

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

1. The body of the foregoing Opposition contains 3,866 words, not counting those items which may be excluded under Maryland Rule 8-503, as determined by Microsoft Word, and

2. The Petition 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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