

CANDACE McLAREN LANHAM
Chief Deputy Attorney General

CAROLYN A. QUATTROCKI
Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

PETER V. BERNS
General Counsel



ANTHONY G. BROWN
Attorney General

SANDRA BENSON BRANTLEY
Counsel to the General Assembly

DAVID W. STAMPER
Deputy Counsel

JEREMY M. MCCOY
Assistant Attorney General

SHAUNEE L. HARRISON
Assistant Attorney General

NATALIE R. BILBROUGH
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 10, 2024

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: House Bill 947, “Civil Actions – Public Nuisances – Firearm Industry Members (Gun Industry Accountability Act of 2024)”

Dear Governor Moore:

It is our view that House Bill 947 is legally sufficient and is not clearly unconstitutional.¹

House Bill 947 authorizes the Attorney General, a county attorney, or the Baltimore City Solicitor to bring a public nuisance action caused by a violation of the bill’s provisions by a firearm industry member. The bill prohibits a firearm industry member from knowingly creating, maintaining, or contributing to harm to the public through the sale, manufacture, distribution, importation, or marketing of a firearm-related product by engaging in conduct that is unlawful or unreasonable under the totality of the circumstances. In addition, the bill requires a firearm industry member to establish and

¹ We apply a “not clearly unconstitutional” standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

implement defined reasonable controls regarding the sale, manufacture, distribution, importation, marketing, possession, and use of the firearm industry member's firearm-related products.

We considered whether the bill is preempted by federal law and conclude it is not. The Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901-7903, prohibits a court from hearing any "qualified civil liability action." *Id.* § 7902. A "qualified civil liability action" means a civil action against a firearm manufacturer or seller "resulting from the criminal or unlawful misuse" of a firearm. *Id.* § 7903(5)(A). On the other hand, the statute does not prohibit "an action in which a manufacturer or seller of a [firearm, ammunition, etc.] knowingly violated a state or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." *Id.* § (5)(A)(iii). Courts have indicated that the purpose of the PLCAA was to preclude general common-law claims against gun manufacturers and sellers, not to preempt state statutes regulating the firearm industry. *See, e.g., Iletto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008); *National Shooting Sports Found. v. James*, 604 F. Supp. 3d 48, 59-61 (N.D.N.Y. 2022); *Minnesota v. Fleet Farm LLC*, 679 F. Supp. 3d 825 (D. Minn. 2023). The PLCAA requires that the violation of the state statute be "knowing[.]" 15 U.S.C. § 7903(5)(a)(iii), but this standard requires only "knowledge of facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal." *New York v. Arm or Ally, LLC*, 2024 WL 756474, at *11 (S.D.N.Y. Feb. 23, 2024).

Because House Bill 947 would specifically and exclusively regulate the firearms industry, the PLCAA would not preempt it. *See James*, 604 F. Supp. 3d at 59-61. A civil action brought based on the provisions of House Bill 947, involving the "knowing[]" creation of a public nuisance proximately causing harm to the State, would be permissible under that statute. *See Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511 (1st Cir. 2024) (holding that Mexican government could bring tort claims against gun manufacturer for harm to Mexico, as a country, from gun trafficking to cartels, consistent with PLCAA). *Accord Estados Unidos Mexicanos v. Diamondback Shooting Sports Inc.*, 2024 WL 1256038 (D. Ariz. March 25, 2024).

In addition, House Bill 947 is not unconstitutionally vague. The Maryland Supreme Court declared that "a 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Bowers v. State*, 283 Md. 115, 120 (1978) (citation omitted). The Court went on to explain that "[a] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning." *Id.* at 125.

New York has enacted a similar law to the one proposed by House Bill 947. *See* N.Y. Gen. Bus. Law § 898-b. New York’s law was challenged in federal court on several grounds, including that it violates due process because it is unconstitutionally vague. The federal district court hearing the case dismissed the void-for-vagueness claim. *See National Shooting Sports Found. v. James*, 604 F. Supp. 3d at 67-68.² The court concluded that New York’s law “gives ‘the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’ ... Here, there are clear ‘common understanding and practices’ of what type of conduct § 898-b(1) prohibits.” *Id.* (citation omitted). The court found that it “constitutionally applies to a wide range [of] conduct, so it cannot be said that ‘no set of circumstances exists under which the [law] would be valid.’ It expressly applies to certain business practices, ‘intelligibly forbids a definite course of conduct,’ and is therefore ill-suited for a facial challenge.” *Id.* at 69 (citations omitted).

House Bill 947 likewise incorporates public nuisance legal concepts and is specific in proscribing categories of conduct. The bill also provides examples of conduct that is unlawful or unreasonable that would endanger the public. Courts have rejected vagueness challenges to public nuisance laws that are similar in language in other contexts. *See ChemSol, LLC v. City of Sibley*, 386 F. Supp. 3d 1000, 1009, 1019-23 (N.D. Iowa 2019) (upholding provision prohibiting “unreasonably noxious exhalations, unreasonably offensive smells[,] or other unreasonable annoyances”); *City of Lincoln Center v. Farmway Co-Op, Inc.*, 316 P.3d 707, 714-16 (Kan. 2013) (upholding statute prohibiting “by act, or by failure to perform a legal duty, intentionally causing or permitting a condition to exist which injures or endangers the public health, safety or welfare”); *City of Columbus v. Kim*, 886 N.E.2d 217, 218-19 (Ohio 2008) (upholding ordinance prohibiting the harboring of “unreasonably loud or disturbing” animals).

Finally, it is our view that House Bill 947 does not violate the Second Amendment. The Supreme Court has announced that when a regulation applies to conduct falling within the Second Amendment’s “plain text,” the government has the burden to justify the firearm regulation by showing the regulation is consistent with the Nation’s historical tradition of firearm regulation. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).³ Thus, the applicable test is “whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.” *Id.* at 2131. Determination of whether a modern regulation is consistent with a historical one requires “analogical reasoning”; that is, “a determination of whether the two regulations are ‘relevantly similar.’” *Id.* at 2132 (citation omitted). This determination involves “at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”

² *National Shooting Sports Foundation, Inc.* is currently on appeal in the Second Circuit.

³ The law challenged in *Bruen* was New York’s requirement that individuals applying for a permit to carry a handgun outside the home show a special need for self-defense. The legal issue raised was the extent to which the government could regulate an individual’s Second Amendment right to keep and bear arms for self-defense, including outside the home.

Id. at 2133. “[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are ‘central’ considerations when engaging in an analogical inquiry.” *Id.* (emphasis in original).

House Bill 947 is not unconstitutional under *Bruen*. First, it is unlikely that House Bill 947 applies to conduct covered by the Second Amendment’s plain text. *See Rocky Mtn. Gun Owners v. Polis*, 2023 WL 8446495 at *8 (D. Colo. November 13, 2023) (“[T]he purchase and delivery of an object (here, a firearm) is not an integral element of keeping (i.e., having) or bearing (i.e., carrying) that object. Rather, purchase and delivery are one means of creating the opportunity to ‘have weapons.’ The relevant question is whether the plain text covers that specific means. It does not.”). Even if it did, there are historical analogues to public nuisance law such as House Bill 947. *See, e.g.*, Act of May 29, 1771, 1771 Mass. Acts 597; Act of Nov. 23, 1715, no. 234, 1715 Mass. Acts 311; Act of Feb. 28, 1786, 1786 N.H. Laws 383. Trenton, N.J., Ordinance Concerning Nuisances § 1 (1842), reprinted in Charter and Ordinances of the City of Trenton, New Jersey, with Legislative Acts Relating to the City 185 (Naar, Day & Naar, 1875) (imposing fines on merchants and storekeepers for storing excessive quantity of gunpowder in “thickly built and inhabited parts of the city); Paterson, N.J., Ordinance Concerning Police § 8 (T. Warren, 1851), reproduced in The Charter and Ordinances of the City of Paterson (1851) (imposing fines for any person to store excessive amounts of gunpowder in any house, store or building within city limits).

For the foregoing reasons, it is our view that House Bill 947 is legally sufficient and is not clearly unconstitutional.

Sincerely,

A handwritten signature in black ink, appearing to read "AGB", followed by a stylized signature that appears to be "Anthony G. Brown".

Anthony G. Brown

AGB/SBB/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber