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**MEMORANDUM ON SB 163 AS VIOLATIVE OF THE SECOND AMENDMENT, DUE PROCESS AND EQUAL PROTECTION, AND CONGRESS' POWER TO REGULATE COMMERCE**

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Argued *Printz v. United States*, 521 U.S. 898 (1997), and other Supreme Court cases, and represented a majority of members of the U.S. Senate and the U.S. House of Representatives as *amici curiae* in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Has testified in numerous Congressional hearings.

Books include *The Founders' Second Amendment*; *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms* (reissued as *Securing Civil Rights*); *Firearms Law Deskbook*; *That Every Man be Armed*; and *Gun Control in the Third Reich: Disarming the Jews and "Enemies of the State"*. These books have been cited in decisions of the Supreme Court and other courts. Selected law review articles:

"New York's Not So 'SAFE' Act: The Second Amendment in an Alice-in-Wonderland World Where Words Have No Meaning," 78 *Albany Law Review*, No. 2, 789-817 (2014/2015).

"Reality Check: The 'Assault Weapon' Fantasy and Second Amendment Jurisprudence," 14 *Georgetown Journal of Law & Public Policy* 47-76 (2016).

"A Revolution in Second Amendment Law," *Delaware Lawyer* 12-16 (Winter 2011/2012) (with Dan Peterson). Cited as authority in *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 663 n.32-34 (Del. 2014).

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## Summary

SB 163 would ban countless rifles and other firearms that are commonly possessed by law-abiding citizens for lawful purposes. As such, it would infringe on and violate the right of the people to keep and bear arms as guaranteed by the Second Amendment to the U.S. Constitution.

Like the handgun ban invalidated by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008), this firearm ban "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" for lawful purposes, even in one's home. The subject firearms require a separate pull of the trigger to fire each shot and are used for target shooting and self-defense. Following *Heller*, the U.S. Court of Appeals for the Third Circuit distinguished such firearms from fully automatic machineguns that fire continuously with a single pull of the trigger, which it held may be banned.

SB 163 purports to rely on the badly-split majority decision in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), which rejected *Heller*'s common-use test and invented a military-use test regarding rifles not used by any military force in the world. The majority made the absurd claim that no significant difference exists between firearms requiring a separate pull of the trigger for each shot and a fully-automatic machinegun. While the Maryland law at issue did not ban semiautomatic firearms per se, it banned a list of named firearms and also firearms with certain features. Yet the majority made no effort to justify why those firearms and features were banned.

The dissenting opinion in *Kolbe* explains, point-by-point, why and how the majority got it drastically wrong. The Supreme Court denied a petition to review the decision, but such denial means nothing on the merits.

SB 163 would ban some 95 named firearms, any "copy" of such firearms, and firearms with certain features that have no necessary relation to the named firearms that are banned. In addition to "copy" being unconstitutionally vague, the listed firearms are arbitrary and without any grounding in the generic features, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

SB 163 would exempt retired law enforcement officers from the gun ban for no rational purpose. This discrimination in favor of retired officers deprives ordinary citizens of the equal protection of the laws. Since it is not severable, it would invalidate the entire law.

SB 163 would ban the transport into and through the state and possession of the subject firearms by importers, exporters, and other federal firearm licensees as well as by travelers who are simply passing through Delaware. Firearms could not even be imported or exported through the Port of Wilmington or even on the Delaware River to the Port of Philadelphia.

This would violate the exclusive power of Congress "[t]o regulate commerce with foreign

nations, and among the several states," as provided in the U.S. Constitution, Art. I, § 8. As the Supreme Court has long held, no state has the power to burden the interstate and foreign flow of articles of commerce in a manner that essentially bans them. Moreover, Congress explicitly preempted such schemes in 18 U.S.C. § 926A, which provides that, notwithstanding any state law, a person may transport a firearm for any lawful purpose to and from any place where such person may lawfully possess the firearm.

**SB 163: Text and Synopsis**

SB 163 would make it unlawful to: "(1) Transport an assault weapon into this State. (2) Manufacture, sell, offer to sell, transfer, purchase, receive, or possess an assault weapon." § 1462(c) (proposed). Violation is a class F felony (up to 3 years imprisonment) for a first offense and a class E felony (up to 5 years) for a subsequent offense within 10 years of a prior offense. § 1462(e).[1]

"Assault weapon" includes an "assault long gun," "assault pistol," or "copycat weapon." § 1462(a)(3). "Assault long gun" is defined as a list of 68 names such as the "Colt AR-15" or "a copy" of any of the listed names. § 1462(a)(1). "Assault pistol" is defined as a list of 27 names or "a copy." § 1462(a)(2).

"Copycat weapon" includes "a semiautomatic centerfire rifle that can accept a detachable magazine and has any 2 of the following: A. A folding stock. B. A grenade launcher or flare launcher. C. A flash suppressor." § 1462(a)(4)a(1). It further includes a semiautomatic centerfire rifle either with a fixed magazine that accepts over 10 rounds, or with an overall length of less than 29 inches. § 1462(a)(4)a(2) & (3).

"Copycat weapon" also includes a semiautomatic pistol with a fixed magazine that holds more than 10 rounds, a semiautomatic shotgun with a folding stock, and a shotgun with a revolving cylinder. § 1462(a)(4)a(4)-(6).

A person who "lawfully possessed, had a purchase order for, or completed an application to purchase an assault weapon" before the effective date, may possess and transport it only at his or her residence, place of business, or certain other property, at a shooting range, at certain gun shows, and at a dealer for repair. § 1462(d)(3). The firearm may be inherited, but may not otherwise be transferred. § 1462(b)(5).

A qualified retired law-enforcement officer may possess an assault weapon that was transferred to the officer by the law-enforcement agency on retirement, or that was obtained by the officer for official use with the agency before retirement. § 1462(b)(7). This is not limited to weapons obtained by the effective date.

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[1]See 11 Del. C. § 4205(b)(5), (6).

Exemptions exist for licensed firearm dealers to provide assault weapons to law enforcement, repair weapons, and transfer weapons out-of-state. § 1462(b)(3).

The Synopsis to SB 163 states that it was copied from a Maryland ban that was upheld by a divided court in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017). However, as the dissenting judges in *Kolbe* explained, the banned firearms are in common use by law-abiding citizens nationwide and are protected by the Second Amendment under the reasoning set forth by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

*Heller* stated that "weapons that are most useful in military service" such as the M-16 are not protected by the Second Amendment. That referred to fully-automatic machine guns that fire continuously as long as the trigger is pulled. By contrast, the banned firearms, which are mostly rifles, require that the trigger be pulled for each shot. They are not used by any military force in the world. The assertion in *Kolbe* that this is only a "slight" difference flies in the face of the fundamental legal difference between firearms that fire fully automatic and those that fire only once per trigger pull.

The majority on the Fourth Circuit got each of the following six points wrong.

(1) It is false that the banned firearms are "like" full automatics designed "to shoot a large number of rounds across a battlefield at a high rate of speed." Like all civilian firearms, they are designed to be aimed to fire single shots.

(2) Some six million AR-15 type rifles have been sold to Americans who passed the background check. They have not been "used disproportionately to their ownership" in mass shootings and murders of law-enforcement officers.

(3) The banned rifles typically use a .223 caliber round, which does not more "easily penetrate" walls or car doors, much less soft body armor at great distances. Cartridges used in deer hunting rifles have far greater penetration.

(4) Many citizens rely on rifles, such as those to be banned, rather than handguns for home defense.

(5) The ban harms law-abiding citizens, not criminals.

(6) *Any* rifle requiring a trigger pull for each aimed shot is "more accurate" than a machine gun, but is far less lethal than the indiscriminate spray fire of a full automatic.

## I. SB 163 WOULD VIOLATE THE SECOND AMENDMENT

### A. The Supreme Court Held in *Heller* that the Second Amendment Protects

**Common Firearms Typically Possessed by Law-Abiding Citizens**

In *District of Columbia v. Heller,* 554 U.S. 570 (2008), the Supreme Court decided that the Second Amendment protects individual rights and that a ban on handguns infringes on the right. The Court's analysis generally applies to long guns as well as handguns, both of which are "arms." "The term ['Arms'] was applied, then [18th Century] as now, to weapons that were not specifically designed for military use and were not employed in a military capacity." *Id*. at 581. Further, the technology of protected arms is not frozen in time: "Just as the First Amendment protects modern forms of communications, . . . and the Fourth Amendment applies to modern forms of search, . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582.

*Heller* looked back to the Court's 1939 opinion in *United States v. Miller*, which held that judicial notice could not be taken that a short-barreled shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense," precluding it from deciding "that the Second Amendment guarantees the right to keep and bear such an instrument." *United States v. Miller*, 307 U.S. 174, 178 (1939) (quoted in *Heller* at 622). *Heller* explained:

> We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[2] . . . The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.

*Heller,* 554 U.S. at 624-25.

*Heller* adds that "the sorts of weapons protected were those 'in common use at the time.' . . . We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*. at 627. Under this test, the Court suggested that full automatics like the M-16 machinegun may be restricted as may "sophisticated arms that are highly unusual in society at large." *Id*. at 627. Elsewhere, *Heller* referred to certain longstanding restrictions as presumptively valid, but none involve a prohibition on possession of a type of firearm by law-abiding persons. *Id*. at 626-27.

*Heller* took a categorical approach and, without any consideration of a committee report which sought to justify the handgun ban or various empirical studies, held:

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[2]Quoting *Miller*, 307 U.S. at 179.

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . ., would fail constitutional muster.

*Heller,* 554 U.S. at 628-29 (citation omitted).

Again, the test is what arms are chosen by the public for self-defense and other lawful purposes, not what arms the government chooses for the public. Responding to the District's argument that rifles and shotguns are good, handguns are bad, the Court stated:

> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

*Id*. at 629.

Other reasons could be listed for why many Americans also prefer long guns for self-defense. A rifle or shotgun may also be easy to store; it would be even harder than a handgun to be redirected or wrestled away by an attacker; it has less recoil and may be aimed more accurately than a handgun; many can hold it with one hand and dial 911 with the other.

*Heller* rejected rational basis analysis (*id*. at 629 n.27) as well as Justice Breyer's proposed "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id*. at 634. *Heller* rejected reliance on committee reports, empirical studies, and policy arguments as follows:

> After an exhaustive discussion of the arguments for and against gun control, Justice BREYER arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false

> proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.
>
> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.

*Id*. at 634.

In sum, *Heller* held as a categorical matter that handguns are commonly possessed by law-abiding persons for lawful purposes and may not be prohibited. While the subject was handguns, the same approach would be equally applicable to long guns, including those pejoratively called "assault weapons."

To put that term in historical context: "Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance." *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (citation omitted).

The Supreme Court next decided *McDonald v. Chicago* 561 U.S. 742, 767 (2010), which held that the Second Amendment is a fundamental right applicable to the states through the Fourteenth Amendment. *McDonald* rejected the view "that the Second Amendment should be singled out for special – and specially unfavorable – treatment," to be treated as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . . ." *Id*. at 780. It invalidated Chicago's handgun ban.

In dissent, Justice Breyer objected that the decision would require courts to make all kinds of empirical decisions such as: "What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons?" *Id*. at 923 (Breyer, J., dissenting). The Court responded that it "is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *Id*. at 789. *Heller* had rejected an "interest-balancing" test and held that "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id*. at 791 (citation omitted).

### B. Third Circuit Precedents Reinforce *Heller*'s Common-Use Test

While the Third Circuit has not analyzed an "assault weapon" ban under the Second Amendment, it has decided two cases that reaffirm *Heller*'s common-use test. These decisions are instructive in that they uphold bans on firearms with obliterated serial numbers and on

machineguns respectively under reasoning that is adverse to the singling out of categories of firearms to ban that are typically possessed by law-abiding citizens.

First, *United States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010), upheld a ban on possession of a firearm with an obliterated serial number on the basis that it did not ban any type of firearm. The court reiterated *Heller*'s holding that the Second Amendment protects weapons "typically possessed by law-abiding citizens for lawful purposes," *id*. at 91, but noted that "unmarked firearms are functionally no different from marked firearms. The mere fact that some firearms possess a nonfunctional characteristic should not create a categorically protected class of firearms on the basis of that characteristic." *Id*. at 94.

Since "the presence of a serial number does not impair the use or functioning of a weapon in any way, . . . a person is just as capable of defending himself with a marked firearm as with an unmarked firearm. With or without a serial number, a pistol is still a pistol." *Id*. The serial-number requirement "was neither designed to nor has the effect of prohibiting the possession of any class of firearms," *id*. at 97, nor does it "limit the possession of any otherwise lawful firearm . . . ." *Id*. at 98. Given the need of serial numbers for law enforcement purposes and the lack of any lawful need for a firearm with an obliterated serial number, the court thus upheld the requirement under both intermediate and strict scrutiny. *Id*. at 98-100.

By contrast, SB 163 would ban commonly-possessed classes of firearms based on their purported functional characteristics. It finds no support in *Marzzarella*, which upheld the ban on firearms with obliterated serial numbers under the Second Amendment precisely because it did *not* ban any class or type of firearm.

Second, *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136, 141 (3rd Cir. 2016) (hereafter "*One (1) Palmetto*"), upheld the federal ban on possession of machineguns based on *Heller*'s recognition of Second Amendment protection for "those weapons 'in common use' and not 'those weapons not typically possessed by law-abiding citizens for lawful purposes . . . .'" (Citation omitted.) The court noted that *Heller* "discusses machine guns on several occasions, and each time suggests that these weapons may be banned without burdening Second Amendment rights." *Id.* at 141.

The court held that "the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes." *Id*. at 142. The court reiterated *Heller*'s suggestion that "M-16 rifles and the like" may be banned, but that handguns could not be banned because they "are the most popular weapon chosen by Americans for self-defense in the home." *Id*. at 143-44.

SB 163 would be violative of the Second Amendment under the Third Circuit's reasoning in *One (1) Palmetto.* The court based its decision solidly on *Heller*'s common-use test. No dispute exists that AR-15 rifles and the like are commonly-possessed by law-abiding citizens for lawful purposes. When every firearm is first sold at retail, federal law requires that the purchaser

pass a background check.[3] Delaware law also requires a background check for every private sale.[4] No basis exists to deny that the firearms that SB 163 would ban are purchased and possessed by law-abiding persons for lawful purposes.

### C. *Kolbe* Rejected *Heller*'s "Common Use" Test and Invented a "Military-Use" Test Regarding Rifles Not Used by Any Military Force in the World

SB 163 is copied from a Maryland law that was initially held to be constitutionally questionable. The panel decision in *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016), found that "law-abiding citizens commonly possess semi-automatic rifles such as the AR-15." Holding that the banned rifles are protected by the Second Amendment, the court remanded the case for further consideration under the exacting strict scrutiny standard. *Id*. at 182-84.

However, in an *en banc* rehearing before the full court, a majority claimed that the banned firearms are not protected by the Second Amendment because they are "exceptionally lethal weapons of war" and that the AR-15 and other listed firearms "are unquestionably most useful in military service." *Kolbe*, 849 F.3d 114, 124, 137 (4th Cir. 2017) (*en banc*). To the contrary, as pointed out in the dissenting opinion by Judge Traxler, joined by three other judges, *Heller* approved no such "test", and instead held that firearms in common use are protected by the Amendment. *Id*. at 155 (Traxler, J., dissenting).

The banned semiautomatic rifles overwhelmingly meet the common-use test, as over 8 million were made in or imported into the U.S. during 1990-2012, and accounted for 20% of retail firearm sales in 2012. *Id*. at 153 (Traxler, J., dissenting). Moreover, as a factual matter, these semiautomatic rifles "are not in regular use by any military force, including the United States Army, whose standard-issue weapon has been the fully automatic M16- and M4-series rifles." *Id*. at 158.

### D. The Difference Between Semiautomatic and Full Automatic is Basic

The *Kolbe* majority further claimed: "The difference between the fully automatic and semiautomatic versions of those firearms is slight." *Id*. at 125. That simply is not true. As stated in a U.S. Army manual, M4 and M16 rifles fire only 45 to 65 rounds per minute in semiautomatic, but fire 150 to 200 rounds per minute in full automatic. *Id*. at 158 (Traxler, J., dissenting).[5]

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[3] 18 U.S.C. § 922(t).

[4] 11 Del. C. § 1448B.

[5] Citing U.S. Dep't of Army, Field Manual 3-22.9, Rifle Marksmanship, M16-/M4-Series Weapons, Table 2-1 (2008).

Legally, the differences could not be more stark. Federal law, which dates to the National Firearms Act (NFA) of 1934, strictly regulates machineguns, which are defined in part as "any weapon which *shoots . . . automatically more than one shot*, without manual reloading, *by a single function of the trigger*." 26 U.S.C. § 5845(b) (emphasis added). By contrast: "The term 'semiautomatic rifle' means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which *requires a separate pull of the trigger to fire each cartridge*." 18 U.S.C. § 921(a)(28) (emphasis added).

*Staples v. United States*, 511 U.S. 600, 603 (1994), stated that "the AR-15 is the civilian version of the military's M-16 rifle," but the difference is fundamental: the M-16 is a machinegun that "will automatically continue to fire until its trigger is released or the ammunition is exhausted," while the semiautomatic AR-15 "fires only one shot with each pull of the trigger." *Id*. at 602 n.1. Acknowledging "a long tradition of widespread lawful gun ownership by private individuals in this country," *Staples* added that guns like the AR-15 "traditionally have been widely accepted as lawful possessions . . . ." *Id*. at 610-11, 612.

Delaware makes it a class E felony to possess a machine gun unless it is registered under the NFA or possessed under certain other exceptions. 11 Del. C. § 1444.

Under both federal and Delaware law, a machine gun is strictly regulated, but a semiautomatic firearm is treated no different than any other firearm that only discharges one shot with a single pull of the trigger. That is the case in almost all other states.

*Kolbe*'s assertion that there is only a "slight" difference between a weapon that keeps firing automatically with a single trigger pull until all of the ammunition is gone, and a weapon that requires a separate trigger pull for each and every shot, blatantly ignores both factual and legal reality.

*Kolbe*'s focus on semiautomatic feature being so dangerous and unusual actually is a non-sequitur, because Maryland does not ban any firearm just for being semiautomatic. While one can only guess at what features bring the 68 "assault long guns" together, the generic definitions of "copycat weapon" do not include only "a semiautomatic centerfire rifle that can accept a detachable magazine" without more, but require at least two other features. Compare § 1462(a)(1) (name listings) with § 1462(a)(4)(a)(1) (generic features). Such semiautomatic rifles are not restricted at all. So nothing *Kolbe* says about the rate of fire of a semiautomatic is even relevant.

### E. *Kolbe* is Silent on the Actual Banned Features

To be a "copycat weapon," a semiautomatic centerfire rifle that can accept a detachable magazine must also have "any 2 of the following: A. A folding stock. B. A grenade launcher or

flare launcher. C. A flash suppressor."[6] § 1462(a)(4)(a)(1). Yet *Kolbe* says not a word about these features or why they justify banning the rifles. And it just as well not say a word, since – despite the term "copycat weapon" – *none* of the 68 listed rifles are necessarily equipped with these features.

Nor is there any evidence that any of these features has played a role in any crime. Given that flares are distress signals for emergencies, it is unclear why this feature is included. A folding stock does not make a rifle concealable as long as the overall length meets the 26" minimum when folded.[7] A flash suppressor reduces blinding flash when firing in low light conditions, which could occur in home defense or hunting coyote.[8] A grenade launcher means nothing without a grenade, and both grenades and grenade launchers are so strictly regulated by the NFA as to be virtually banned. 26 U.S.C. § 5845(f). No evidence exists that these features have ever played *any* role to facilitate a crime anywhere.

The *Kolbe* majority barely mentions in passing other features of the banned rifles without any comment of why they are supposedly so dangerous. *Id*. at 125, 137. As the dissent explains, these features "increase accuracy and improve ergonomics." *Id*. at 158-59. In particular:

> A telescoping stock, for example, permits the operator to adjust the length of the stock according to his or her physical size so that the rifle can be held comfortably. . . . Likewise, a pistol grip provides comfort, stability, and accuracy, . . . and barrel shrouds keep the operator from burning himself or herself upon contact with the barrel. And although flash suppressors can indeed conceal a shooter's position—which is also an advantage for someone defending his or her home at night—they serve the primary function of preventing the shooter from being blinded in low-lighting conditions.

*Id*. at 159.

Exactly the same pistol grip design is found on single-shot rifles, and even air guns, used

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[6]SB 163 provides: "'Flash suppressor' means a device that functions, or is intended to function, to perceptibly reduce or redirect muzzle flash from the shooter's field of vision." § 1462(a)(6). While the average person would have no idea of whether a device would so function, that would not be a bad feature when defending one's home or hunting wild hogs at night.

[7]The National Firearms Act restricts a weapon made from a rifle with overall length less than 26". 26 U.S.C. § 5845(a)(4).

[8]SB 163 provides: "'Flash suppressor' means a device that functions, or is intended to function, to perceptibly reduce or redirect muzzle flash from the shooter's field of vision." § 1462(a)(4)(a)(1)(C). The average person may have no idea of whether a device would so function.

in Olympic competition.[9] Further, telescoping stocks do not make a rifle concealable, and in any event the legislature is free to set a minimum overall length for rifles regardless of whether they have adjustable stocks.[10] There is nothing uniquely "military" about these features, which millions of Americans choose to use for lawful purposes.

The majority's slipshod opinion would never be made regarding any other constitutional right. The banned rifles are commonly-possessed arms protected by the Second Amendment. As the dissent states: "Once it is determined that a given weapon is covered by the Second Amendment, then obviously the in-home possession of that weapon for self-defense is core Second Amendment conduct and strict scrutiny must apply to a law that prohibits it." *Id*. at 160. The dissent puts the majority opinion in perspective as follows:

> Today the majority holds that the Government can take semiautomatic rifles away from law-abiding American citizens. . . . [T]he Government can now tell you that you cannot hunt with these rifles. The Government can tell you that you cannot shoot at targets with them. And, most importantly, the Government can tell you that you cannot use them to defend yourself and your family in your home. In concluding that the Second Amendment does not even apply, the majority has gone to greater lengths than any other court to eviscerate the constitutionally guaranteed right to keep and bear arms.

*Id*. at 151.

**Denial of Certiorari by the Supreme Court Means Nothing on the Merits**

The Supreme Court denied the petition for a writ of certiorari in *Kolbe*. *Kolbe v. Hogan*, 138 S. Ct. 469 (2017). That said nothing about the Supreme Court's view of the merits of the case. "Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner." *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). "[A] denial of certiorari is not a ruling on the merits of any issue raised by the petition." *Evans v. Stephens*, 544 U.S. 942 (2005) (Stevens, J.).

The Supreme Court also denied certiorari in a 2-to-1 decision in *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir. 2015), which upheld a local ban with very

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[9]E.g., see single-shot air rifle with protruding pistol grip at http://www.topairgun.com/177-feinwerkbau-800-evolution-air-rifle.

[10]Maryland has done just that elsewhere in restricting a "short-barreled rifle," which includes "a weapon that has an overall length of less than 26 inches and that was made from a rifle, whether by alteration, modification, or otherwise." Md. Code, Criminal Law, § 4-201(f), & Public Safety, § 5-203.

different definitions of "assault weapon" than that of Maryland[11] in part on the basis that: "If it has no other effect, Highland Park's ordinance may increase the public's sense of safety." The dissenting judge commented: "The court is not empowered to uphold a regulation as constitutional based solely on its ability to divine public sentiment about the matter." *Id*. at 420 (Manion, J., dissenting).

Justice Thomas, joined by Justice Scalia, thought the above ban to be suspect based on the following: "Roughly five million Americans own AR-style semiautomatic rifles. . . . The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting." *Friedman*, 136 S. Ct. 447, 2015 WL 4555141, *1 (2015) (Thomas, J., dissenting from denial of cert.).

Again, the denial of certiorari, even if it includes a dissent, says nothing about the Court's view of the merits. "That one of us undertook to write a dissent, even a 'pointed dissent,' from the denial of certiorari should suggest, again, nothing at all about the views of any other Members of the Court on the merits of the petition." *United States v. Kras*, 409 U.S. 434, 461 n.3 (1973) (Marshall, J., dissenting).

## II. SB 163 IS VAGUE AND VIOLATES DUE PROCESS AND EQUAL PROTECTION

### A. In Addition to "Copy" Being Vague, the Listed Firearms Are Arbitrary and Without Any Grounding in the "Copycat" Features, In Violation of the Due Process and Equal Protection Clauses

There is nothing in the record as to why each and every listed firearm is so exceptionally dangerous that it must be banned, nor is there any nexus between the generic definitions of "assault long guns" and the listed firearms. Exactly *none* of the 68 listed rifles are in and of themselves equipped with a folding stock, grenade or flare launcher, or flash suppressor. One might be able to add these features to a given long gun, but these features are not generic to any of the listed guns.

Regarding the 27 listed "assault pistols," one can only guess at what generic features tie them together. The only pistol identified as a "copycat weapon" is a semiautomatic pistol with a fixed magazine that holds more than 10 rounds.

The randomly-chosen named firearms, totaling 95 long guns and pistols, have no common denominator that ties them together. What is a "copy" of each is anyone's guess. The definitions are thus vague and arbitrary, in violation of the Due Process and Equal Protection

[11]Demonstrating the arbitrariness of the definitions, the ordinance bans the feature of "a pistol grip without a stock" on a rifle, *id*. at 407, about which the Maryland law is silent.

Clauses of the Fourteenth Amendment.[12]

*Springfield Armory, Inc. v. City of Columbus,* 29 F.3d 250, 251 (6th Cir. 1994), invalidated an ordinance defining "assault weapon" as a list of 46 named firearms together with "other models by the same manufacturer with the same action design that have slight modifications or enhancements." The court found: "The ordinance purports to ban 'assault weapons' but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selections." *Id*. at 252. That is exactly the case here.

Similar to the use of the term "copy" here, the law in *Springfield* used the vague terms "slight modifications or enhancements." As the court noted: "A copy-cat weapon is only outlawed if it is developed from a listed weapon by a listed manufacturer. . . . [O]rdinary consumers cannot be expected to know the developmental history of a particular weapon . . . ." *Id*. at 253. Here, the vagueness is worse, as the "copy" need not be by the same manufacturer. The court's further comments apply equally to the term "copy" here:

> Nothing in the ordinance provides sufficient information to enable a person of average intelligence to determine whether a weapon they wish to purchase has a design history of the sort which would bring it within this ordinance's coverage. . . . The record indicates that the average gun owner knows very little about how his gun operates or its design features.

*Id*. at 253, citing *Robertson v. Denver*, 874 P.2d 325, 335 (Colo. 1994) ("ascertaining the design history . . . of a pistol is not something that can be expected of a person of common intelligence").

Nor is it reasonable to suggest that gun owners can conduct research and tests to determine whether a specific gun is somehow a "copy" of some other gun: "Whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law." *Robertson*, 874 P.2d at 334-35.

The Sixth Circuit also invalidated a subsequent "assault weapon" ban based in part on the average person's inability to know whether one firearm was a "modification" of another firearm. *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 537 (6th Cir. 1998).

It is particularly pernicious to ban something, and then expect a person to know what is a "copy" of that something. Expecting a person to know that something is a copy of something else assumes that (a) both items are available for comparison and (b) that the person is qualified

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[12]"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV.

to determine if one item is a copy of the other. And even if "copy" may be clear in some instances, "our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015) (giving examples and adding that "the dissent's supposed requirement of vagueness in all applications is not a requirement at all").

In sum, SB 163 violates the Equal Protection Clause because the listings of 68 names under "Assault Long Guns" is arbitrary and without any grounding or common denominator in the generic definitions of a "Copycat Weapon." The 27 listings under "Assault Pistol" are equally arbitrary and have no nexus to the single generic definition of a pistol as a "Copycat Weapon." The term "copy" is vague in violation of the Due Process Clause because the average gun owner has no way of knowing the developmental history of firearms.

### B. Discrimination in Favor of Retired Officers Deprives Ordinary Citizens of the Equal Protection of the Laws

As noted, a qualified retired law-enforcement officer may possess an assault weapon that was transferred to the officer by the law-enforcement agency on retirement, or that was obtained by the officer for official use with the agency before retirement. § 1462(b)(7). This is not limited to weapons obtained by the effective date of the enactment. When they retire, such officers have no further law enforcement duties and become private citizens. Yet other private citizens at large would be committing a felony by obtaining the banned firearms. The law thus discriminates in favor of retired officers and against other citizens, who are thus denied the equal protection of the laws in violation of the Fourteenth Amendment.

*Silveira v. Lockyer*, 312 F.3d 1052, 1090-91 (9th Cir. 2002), invalidated a similar discrimination under California law allowing retired officers to obtain "assault weapons." There, as here, law-enforcement agencies "may sell or transfer assault weapons to a sworn peace officer upon the retirement of that officer. . . . The exception does not require that the transfer be for law enforcement purposes, and the possession and use of the weapons is not so limited." *Id*. at 1090.

*Silveira* rejected four purported reasons for the discrimination. First, while a similar exemption existed in a (now expired) federal law, "[a]n unconstitutional statute adopted by a dozen jurisdictions is no less unconstitutional by virtue of its popularity." *Id*. at 1090-91.

Second, it was irrelevant that some officers received more extensive training with the forbidden arms, because "[t]he object of the statute is not to ensure that assault weapons are owned by those most skilled in their use; rather, it is to eliminate the availability of the weapons generally." *Id*. at 1091.

Third, while some officers purchased the weapons with their own funds, "the retired officer provision contains no such limitation; indeed, on its face the statute would permit the transfer of any number of assault weapons to any peace officer, regardless of whether that officer

had ever come into contact with the weapons being acquired." *Id*. at 1091. Indeed, "the retiree may possess and use assault weapons for any purpose whatsoever." *Id*.

Fourth, no requirement existed that retired officers participate as reserves in an emergency. Even then, permitting retired officers "to obtain assault weapons and use them for unlimited purposes, and in an unregulated manner, would not reasonably advance the objective of establishing a reserve force of retired officers prepared to act in emergencies." *Id*. at 1091.

Based on the above, *Silveira* held that "the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others," and "is wholly unconnected to any legitimate state interest. A statutory exemption that bears no logical relationship to a valid state interest fails constitutional scrutiny." *Id*.

*Kolbe* upheld Maryland's identical provision on the unconvincing basis that law enforcement officers have had "extensive training" with the banned firearms and are thus not similarly situated as other citizens. *Kolbe*, 849 F.3d at 147. Besides overrating how "extensive" such training for the average officer is, the court does not suggest why the law could not provide the same exemption for other citizens who have also had extensive training with such firearms. *Kolbe* rejected *Silveira* without responding to or even mentioning *Silveira*'s multi-point analysis. *Id*. at 147 n.18.

While SB 163 has a severability clause,[13] it will not save the rest of the statute. The unconstitutional provision discriminating in favor of a selected class may not simply be excised from the law, because the law does not make it a crime for the favored retired officer class to possess the subject firearms. A law from which a portion is stricken remains fully operative only if "its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." *United States v. Jackson*, 390 U.S. 570, 586 (1968).

Declaring only the discrimination in favor of a selected class void would criminalize that which the law does not criminalize. "To limit this statute in the manner now asked for would be be make a new law, not to enforce an old one. This is no part of our duty." *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968), quoting *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1875) (both cases holding provisions not severable). "Long established principles of federal law also dictate against courts inserting limitations in order to rescue otherwise invalid statutes." *Roe v. Casey*, 623 F.2d 829, 837 (3rd Cir. 1980).

In short, SB 163 would not make it a felony for retired officers to possess "assault weapons" that were obtained before or at retirement. If the exemption for retired officers is striken, such possession would become a felony. That would create a new crime that the

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[13]"If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application . . . ." § 3, SB 163.

legislature did not pass. That is why SB 163 would be void in its entirety. In other words, since the discriminatory provision in favor of retired officers may not be severed from the prohibitions applicable to ordinary citizens, the entire law would be unconstitutional.

## III. SB 163 WOULD VIOLATE CONGRESSIONAL POWER TO REGULATE INTERSTATE AND FOREIGN COMMERCE, INCLUDING EXPLICIT PREEMPTION UNDER 18 U.S.C. § 926A

### A. SB 163 Would Ban the Transport Into and Through the State and Possession of the Subject Firearms by Importers, Exporters, and Other Licensees as well as by Travelers

SB 163 would make it unlawful to: "Transport an assault weapon into this State." It would also be unlawful to "possess an assault weapon." § 1462(c). No exemption would exist for the transport of such firearms being shipped into, through, and then outside of Delaware (and possessed during such transportation) pursuant to federal law. This violates the power of Congress "[t]o regulate commerce with foreign nations, and among the several states . . . ." U.S. Const., Art. I, § 8. It also violates the entitlement of persons to transport firearms interstate under 18 U.S.C. § 926A.

Federally-licensed firearm importers have firearms transported from foreign nations into U.S. ports where they clear Customs and are then transported to the premises of importers throughout the United States. The Port of Wilmington is a favorable destination for such purposes, but will be prohibited if SB 163 passes. Firearms are also shipped through the Delaware River, which is within the boundaries of the State,[14] to the Port of Philadelphia. SB 163 would purport to criminalize the transport of firearms to and through the Port of Wilmington and even, while in the Delaware River, to the Port of Philadelphia.

Importers may also import firearms into Delaware airports or in out-of-state airports and then have them shipped through Delaware to other states. In addition, private citizens may lawfully bring back firearms that they took abroad, and may enter Delaware seaports or airports in doing so.

In addition, federally-licensed manufacturers, importers, and dealers ship firearms into and through Delaware for ultimate receipt in other states, or for export to foreign countries under license from the U.S. Department of State. Countless private citizens transport firearms into and through Delaware by motor vehicle with other states as their destinations.

None of the exemptions to the transport and possession prohibitions accommodate the above interests. Each such act would be a felony. Moreover, the exemptions are irrational and

[14]See 29 Del. C. § 201 (boundaries).

discriminatory.

The ban does not apply to "transport to or by a licensed firearms dealer or manufacturer who does any of the following: . . . b. Acts to sell or transfer an assault weapon to a licensed firearm dealer in another state . . . ." § 1462(b)(3). "'Licensed firearms dealer' means any person licensed as a deadly weapons dealer under Chapter 9 of Title 24[15] and 18 U.S.C. § 921 *et seq*." § 1462(a)(7). A "licensed firearm dealer *in another state*" is a non-existent oxymoron because "licensed firearms dealer" means a deadly weapons dealer licensed in Delaware. Thus, this exemption applies to no one.

Moreover, no exemption from the transport ban exists for a federally-licensed firearms importer, which is a separate licensee category under 18 U.S.C. § 921 *et seq*. "The term 'importer' means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution . . . ." § 921(a)(7). Cf. §§ 921(a)(10) ("manufacturer"), (11) ("dealer"). An importer's license is required to engage in the business of importing firearms. 18 U.S.C. § 922(a)(1)(A).

SB 163 thus would ban the transport into and through Delaware of firearms by a federally-licensed importer, contrary to the power of Congress to regulate commerce with foreign nations. Such transport would be by sea through the port of Wilmington or through Delaware waters to another port, by air through a Delaware airport, or by land. SB 163 would also have the same adverse impact on firearm exporters.

By banning transport into the state, SB 163 would also attempt to regulate interstate commerce in firearms. It would criminalize the shipment of the banned firearms by federally-licensed firearms importers, manufacturers, and dealers through Delaware. It would also ban the transport of such firearms through Delaware by individuals traveling to and from states where it is lawful to possess such firearms. SB 163 includes certain narrow, limited exemptions for certain licensed firearms dealers and residents. § 1462(d)(1), (3), (4). None of these exemptions apply to federal firearms licensees or individuals from other states transporting firearms into and out of Delaware by land, air, and sea. This is an attempt to usurp the power of Congress to regulate commerce among the several states.

### B. Violation of Congressional Power to Regulate Foreign and Interstate Commerce

Congress has exclusive power "[t]o regulate commerce with foreign nations, and among the several states . . . ." U.S. Const., Art. I, § 8. SB 163 would violate the power of Congress to regulate both foreign and domestic commerce.

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[15]24 Del. C. § 901 provides: "No person shall engage in the business of selling any pistol or revolver, or stiletto, steel or brass knuckles, or other deadly weapon made especially for the defense of one's person without first having obtained a license therefor, which license shall be known as 'special license to sell deadly weapons.'"

Long ago, the Supreme Court in *Welton v. Missouri*, 91 U.S. 275, 280 (1876), explained that Congress' power to regulate foreign and interstate commerce "embraces all the instruments by which such commerce may be conducted. . . . [W]here the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority." That power protects "the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country," meaning that it cannot "be subjected to any restrictions by State legislation" until no longer in commerce. *Id*. at 281.

If a state could impose a tax of any amount on goods in foreign or interstate commerce, the Court added, "[i]mposts operating as an absolute exclusion of the goods would be possible . . . ." *Id*. at 281. That is exactly what SB 163 proposes, albeit by an outright ban rather than imposts.

*Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 435-36 (1979), concerned "whether a State, consistently with the Commerce Clause of the Constitution, may impose a nondiscriminatory ad valorem property tax on foreign-owned instrumentalities (cargo containers) of international commerce." The Court held that it could not. Here, SB 163 proposes a ban, not just a tax, on transport into the state. In *Japan Line*, the containers passed through California intermittently, and such movement was "essential to, and inseparable from, the containers' efficient use as instrumentalities of foreign commerce." *Id*. at 437.

The containers were found to be "instrumentalities of foreign commerce," *id*. at 445-46, foreign commerce is "pre-eminently a matter of national concern," *id*. at 448, and the need for federal uniformity is "paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause." *Id*. at 449. The tax was thus held to be unconstitutional. *Id*. at 453-54. The same reasoning applies here.

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or *burden the interstate flow of articles of commerce*." *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98 (1994) (emphasis added). The Framers intended to prevent "economic Balkanization" and to recognize that "our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy," and that "the states are not separable economic units." *Id*. at 98-99.

The Court added: "If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Id*. at 99. SB 163 would do just that by grandfathering possession of the banned firearms on behalf of Delaware residents, and allowing them to transport such firearms back into the state after taking them out of state, and to possess them at various places, but not grandfathering possession of the banned firearms by non-residents in identical circumstances

who are passing through Delaware.[16]

Moreover, SB 163 would unduly burden the interstate flow of articles of commerce even without the discrimination. *Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 521-22 (1959), invalidated an Illinois requirement that trucks and trailers, regardless of state of residence, use a certain type of mudguard that differed from those required by other states. "This is one of those cases . . . where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce." *Id*. at 529. While the Illinois state law placed "a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory," *id*. at 529-30, SB 163 purports to ban commerce in the affected firearms altogether.

In sum, the Court's dormant Commerce Clause jurisprudence "significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." *McBurney v. Young*, 569 U.S. 221, 235 (2013). "The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *Id*. (citation omitted). SB 163 would violate these fundamental principles.

### C. 18 U.S.C. § 926A Preempts SB 163

SB 163's ban on transport into and through the state, and on possession in the course of such transport, is explicitly preempted by 18 U.S.C. § 926A, which was enacted as part of the Firearms Owners' Protection Act of 1986. Section 926A provides in part:

> *Notwithstanding any other provision of any law or any rule or regulation of a State* or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm *shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm* if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of

[16]As § 1462(d)(3) provides: "A person who lawfully possessed, had a purchase order for, or completed an application to purchase an assault weapon before [the effective date of this Act], may possess and transport the assault weapon on or after [the effective date of this Act] only under the following circumstances . . . ." Those circumstances include transport to and from and possession at various places without regard to the state, including various properties (residence, business, owned by the person or another with consent), a shooting range, an exhibition or display (i.e., gun show), or a licensed firearm dealer. *Id*. These places are not limited to Delaware. Delaware residents are exempt from the transport and possession bans, but non-residents in identical circumstances are not.

such transporting vehicle . . . . (Emphasis added.)

The Senate Judiciary Committee explained about § 926A: "This is intended to prevent local laws, which may ban or restrict firearm ownership, possession or transportation, from being used to harass interstate commerce and travelers." Report 98-583, 98th Cong., 2d Sess., 27-28 (1984).

"§ 926A specifically 'entitles' a person 'not otherwise prohibited . . . from transporting, shipping, or receiving a firearm' to 'transport a firearm . . . from any place where he may lawfully possess and carry' it to 'any other place' where he may do so." *Muscarello v. United States*, 524 U.S. 125, 134 (1998). Section 926A "describ[es] when and how a person may travel in a vehicle that contains his firearm *without violating the law* . . . ." *Id.* at 146-47 (Ginsburg, J., dissenting) (emphasis added).

"Section 926A, both textually and in the words of its sponsor, 'confers upon all law-abiding citizens a right to transport their firearms in a safe manner in interstate commerce.' " *City of Camden v. Beretta U.S.A. Corp*., 81 F. Supp.2d 541, 549 (D. N.J. 2000) (quoting 131 Cong. Rec. S9101–05 (July 9, 1985) (statement of Sen. Orrin Hatch)). See *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163, 165 & n.2 (1993) ("the ordinance, in prohibiting the transportation of certain weapons through the city by virtue of prohibiting possession of those weapons, conflicted with Section 926A, Title 18, U.S. Code and, therefore, violated the Supremacy Clause").

In sum, SB 163's ban on import into the state and possession of the prohibited firearms would violate and be preempted by § 926A as applied to any person transporting such firearms between any places where such person may lawfully possess and carry such firearms.