IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ASSOCIATION OF AMERICAN PUBLISHERS,	*	
Plaintiff,	*	
v.	*	Civil Action No.: 1:21-cv-03133-DLB
BRIAN E. FROSH, Attorney General of Maryland,	*	
Defendant.	*	

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DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

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The courts and Congress, in creating the "first sale" doctrine that has long governed the distribution of print materials, effectively protected libraries against unfair trade practices including price gouging and embargoes. ECF 10 at 5. The Maryland Act protects libraries from the same unfair trade practices by publishers relating to electronic literary products. The first sale principle is not a creature of federal copyright law; it was developed by courts applying the common law and was only later codified into the Copyright Act. But when faced with the rise of digital media, Congress consciously *declined* to make a digital first sale doctrine part of the Copyright Act's preemptive federal regime. Instead, it left it to "the marketplace [to] respond to the various concerns of customers in the library community," recognizing that the marketplace was in its "early stages" and expecting that "business models" would adjust in response to developing "market forces." United States

Copyright Office, DMCA Section 104 Report, at xxi (Aug. 2001) https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf (last accessed Jan. 14, 2022).

The Maryland Act regulates that marketplace, exercising police powers that states have long exercised to address discriminatory and unfair trade practices. It does not invade the exclusive rights of copyright holders; it leaves to them whether to offer copyrighted content to the public. All the law does is regulate the publishers' business model *after* the publisher has decided to offer its material for licensing, left the world of copyright, and entered the marketplace for such transactions. At that point, the Maryland Act simply requires that publishers not unfairly discriminate against Maryland public libraries and offer them licenses on reasonable terms—concepts that one would think the publishing industry would embrace as part of its "responsive relationships" with "their library partners." ECF 1 at 20 (¶ 65), 4 (¶ 9). Although that regulation may well "interfere with the free market," ECF 12 at 26, it clears no new legal ground, as states have for decades regulated commercial markets to combat the forms of discriminatory business practices that some publishers have followed. For the reasons set forth in the State's motion and memorandum, and as set forth below, the complaint should be dismissed.

ARGUMENT

I. THE MARYLAND ACT IS NOT PREEMPTED BY CONFLICT OR EXPRESSLY.

By focusing their response almost entirely on copyright law, the Association is "seeking out conflicts between state and federal regulation where none clearly exists." *Allied Artists Pictures Corp. v. Rhodes* ("*Allied Artists I*"), 496 F. Supp. 408, 443 (S.D.

Ohio 1980), *aff'd in part, remanded in part sub nom. Allied Artists Picture Corp. v. Rhodes* ("*Allied Artists II*"), 679 F.2d 656 (6th Cir. 1982). Courts do not presume preemption "unless that was the clear and manifest purpose of Congress." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 Fn. 11 (1987). Accordingly, unless this Court finds that Congress clearly and manifestly intended to preempt the Maryland Act, the Association's preemption claim must be dismissed.

A. The Maryland Act Aligns with the Copyright Act and Therefore Is Not Conflict Preempted.

The Association argues that the Maryland Act "restricts publishers from exercising their federally protected right to decide whether to license or refrain from licensing their copyrighted works," ECF 12 at 11, and cites commonplace exclusive licensing arrangements as examples of that right, *id*. at 11. But the Maryland Act does not restrict either the decision *whether* to license a work or to issue an *exclusive* license, whether at a "higher price point" or not. ECF 12 at 11. The Act's provisions apply only when the publisher has made the decision to license a work and to make such licenses available to the Maryland public. When that occurs, the Act prohibits the publisher from discriminating against public libraries or charging them unreasonably high prices. It regulates trade, not copyright. Contrary to the Association's rhetorical question, public libraries do not seek to be their own version of Netflix. ECF No. 12 at 6. Rather, they seek to be what they have been for centuries: providers of information resources to patrons, particularly those who cannot afford to purchase literary works.

Nor does *Stewart v. Abend*, 495 U.S. 207, 229 (1990), support the Association's

argument. The Association quotes the portion of the decision noting that publishers can "arbitrarily . . . refuse to license to one who seeks to exploit the work," *Abend*, 495 U.S. at 229 (1990); *see* ECF 12 at 7, 9, but leaves out the immediately preceding sentence which clarifies that "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of copyright." *Abend*, 495 U.S. at 229. The point of this aspect of both *Abend* and *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932)—upon which *Abend* builds—is that "[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." *Fox Film Corp. v. Doval,* 286 U.S.at 127. The Maryland Act, however, does not apply to copyright holders who choose to hoard their works; it applies only to those who have made their works available to the public.

Further, the sentence immediately *following* the passage that the Association quotes from *Abend* explains that neither case authorizes publishers to charge exorbitant prices, to public libraries or anyone else. Instead, "[t]he limited monopoly grant to the artist is intended to provide the necessary bargaining capital to garner a *fair* price for the value of the works passing into public use." *Abend*, 495 U.S. at 229 (emphasis added). In this way "the [Copyright] Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works." *Id*. at 228. Neither case stands for the proposition that publishers can arbitrarily refuse to license e-books to Maryland public libraries or do so only on demonstrably *un*fair terms. The Maryland Act does exactly what Congress intended in passing the Copyright Act: ensure that the copyright owners receive a fair price for the

works they choose to license, and that the artist's right to control his or her work is balanced with the public's need for access to creative works.

Nor does *Storer Cable Communications*—the thirty-year-old Alabama district court case on which the Association repeatedly relies—stand for the proposition that state statutes regulating trade violate the exclusive rights under the Copyright Act. *See Storer Cable Comm'ns. v. City of Montgomery, Ala.*, 806 F. Supp. 1518, 1536 (M.D. Ala. 1992); ECF 12 at 13. Again, the Association leaves out important language expressly stating that states in fact *do* have that authority:

> The teaching of these cases is that state anti-competition laws which may have an incidental effect on the unfettered exercise of one of the exclusive rights embodied in the copyright grant *are valid if their target is anti-competitive conduct beyond the scope of copyright protection*.

Storer, 806 F. Supp. at 1536 (emphasis added). That is exactly what the Maryland Act does—it seeks to restore the historical balance between creator, publisher, and the public that underlies all copyright law by targeting the unfair trade practices of publishers in the marketplace, beyond the scope of the federal Copyright Act. *Abend*, 495 U.S. at 228.

As it did in its motion for preliminary relief, the Association's response relies most heavily on the Third Circuit's decision in *Orson*—a decision that the federal Patent Office cautioned was distinguishable. *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999). But *Orson* involved commercial actors seeking to exploit an artist's copyrighted material for profit; it says nothing about public libraries and their special role in the way knowledge is disseminated throughout the Nation. Nor does it speak to a digital revolution that could not have been even remotely contemplated in 1999.

While the Association, in this portion of its argument, views public libraries as just another commercial customer, "[r]egardless of whether [they] are non-profits or serve a purportedly 'non-commercial function,'" ECF 12 at 11, libraries are a public institution pre-dating copyright and critical to fostering democratic values in the citizenry. Maryland's public libraries' mission to provide free access to literary works to members of the public presents a compelling state interest that is directly aligned with the properly balanced interests of the Copyright Act and that is not shared by the commercial movie theater in *Orson*. 189 F.3d 377 (3d Cir. 1999)

When passing the Copyright Act of 1976, Congress intended for "authors and publishers [to assure] that licensing arrangements for readings from their books, poems, and other works . . . for reasonable compensation and under reasonable safeguards for authors' rights [are] worked out in private negotiation." Notes of the Committee on the Judiciary, House Report No. 94-1476, 94th Cong., 2d Sess., at 119 (1976). The Maryland Act does just that. "Far from frustrating the objectives of Congress in enacting the Copyright Act," the Maryland Act, "further[s] the wide dissemination of copyrighted works and thereby its primary object to advance the public welfare through the talents of authors." *Allied Artists I*, 496 F. Supp. at 447-48 (internal quotation omitted). The two laws work in harmony, not in conflict.

B. The Maryland Act Is Not Expressly Preempted.

The Association continues to argue that the Maryland Act is expressly preempted, to the point of taking issue with the "extra element" test that the Fourth Circuit applies in determining express preemption claims. *See* ECF 12 22, n.11 (describing the test as

"circular and unhelpful"). Whatever the Association's concerns about the helpfulness of that test, it is satisfied here.

In *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, the Fourth Circuit held that the second prong of the express preemption test—whether the state law concerns equivalent rights—is not satisfied where "there is an 'extra element' that changes the nature of the state law action so that it is "qualitatively different from a copyright infringement claim." 104 F.3d 1453, 1463 (4th Cir. 1997). Congress' rationale for enacting the express preemption provision in 17 U.S.C. § 301 (a) and substituting a single federal copyright system by no means erases states' authority to protect "rights and remedies that are different in nature from the rights comprised in a copyright." House Report No. 94-1476, at 132 (discussing legislative history of 17 U.S.C. § 301 (b)).

The Maryland Act provides that "extra element" because it is qualitatively different from a copyright infringement claim. Unlike copyright law, the Act addresses the unfair and discriminatory commercial practices pursued by some publishers in their dealings (or lack thereof) with Maryland public libraries. In seeking to deny e-book licenses to libraries on reasonable terms when they are offered to the public generally, the Association pursues a remedy not only not afforded by the Copyright Act, but one that Congress expressly concluded was best pursued in the marketplace itself, and not through the Copyright Act. *See* United States Copyright Office, DMCA Section 104 Report, at xxi (Aug. 2001). And that marketplace remains subject to state regulation, as has been the

case since the end of the *Lochner* era.[1] *Lochner v. New York*, 198 U.S. 45 (1905).

The Association, as it does throughout its opposition, tries again here to fit its claims within federal copyright protection, arguing that, under the Maryland Act, "[p]ublishers lose the ability to control to whom they license their works to and on what terms, eviscerating their rights under 17 U.S.C. § 106." ECF 12 at 16. But "the Supreme Court has rejected claims that the exclusive right granted by Congress to distribute copyrighted material included the exclusive right to distribute it in the manner deemed most desirable by the copyright holder." *Allied Artists I*, 496 F. Supp. at 446. And here, where the "ability to control" licensing decisions means the ability to discriminate against public libraries, the Maryland Act rightfully regulates that control, consistent with copyright.

Simply put, Congress did not clearly and manifestly express an intent to preempt Maryland from regulating unfair market practices with respect to public libraries. The Association has not stated a claim for relief as to express preemption, and this aspect of its claim should likewise be dismissed.

II. THE MARYLAND ACT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The first prong of a dormant Commerce Clause inquiry is whether the challenged law discriminates against interstate commerce. *Just Puppies, Inc. v. Frosh*, 2021 WL

[1] In the *Lochner* era, roughly from 1905–1937, the Supreme Court invalidated a series of federal and state economic regulations on the theory that they interfered with private economic liberty and contract rights. *Pizza di Joey, LLC v. Mayor & City Council of Baltimore*, 241 Md. App. 139, 168 (2019), aff'd sub nom. *Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 235 A.3d 873 (2020) (internal citations omitted).

4594630 at 29 (D. Md. 2021). The Association makes no argument on that point, as the Maryland Act even handedly addresses licensing of e-books from both in-state and out-of-state publishers.

The second prong of a dormant Commerce Clause inquiry employs *Pike* balancing in cases where the law does not discriminate against interstate commerce, but still places incidental burdens on interstate commerce. *Id*. at 38. Under the *Pike* balancing test, a State law will be upheld if it "'regulates even-handedly to effectuate a legitimate local public interest . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 31 (quoting *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970). The Association makes hardly any argument on this aspect of the analysis either, instead contending that "there is no need for the Court to apply the *Pike* balancing test," ECF 12 at 25, because the Maryland Act violates the Commerce Clause by acting extraterritorially.

The principle against extraterritoriality as it relates to the dormant Commerce Clause is derived from the notion that "a State may not regulate commerce occurring wholly outside of its borders." *Association for Accessible Medicines v. Frosh*, 887 F.3d 664, 667 (4th Cir. 2018). A state law violates the extraterritoriality principle if it either expressly applies to out-of-state commerce, or has that "practical effect," regardless of the legislature's intent. *Id*. at 668. For several reasons, the Maryland Act does not have extraterritorial effect.

First and foremost, the law expressly affects only transactions between publishers and "public libraries in the State." Md. Code Ann., Educ. § 24-702(a). However its

provisions are triggered, the law only affects the terms on which publishers offer licenses to *Maryland* public libraries. It has no effect whatsoever on libraries elsewhere. That is clear from the statute's plain and unambiguous language.

In an effort to get around that, the Association seeks to redirect the focus of the analysis from what is *actually* regulated to the action that *triggers* that regulation, namely, the publisher's initial decision to license its material to the public. Because the Maryland Act is triggered when a publisher offers a license "to the public," the argument goes, the statute reaches licensing decisions made "wholly outside of the State of Maryland," because "the public" can be anywhere. ECF 12 at 24. For several additional reasons, the Association has that wrong too.

Principles of statutory construction compel the conclusion that the statutory phrase "to the public" means "to the *Maryland* public." The goal of statutory construction is to "discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny." *Anne Arundel Cty. v. Reeves*, 474 Md. 46, 60 (2021) (internal quotations and citations omitted). As is plain from both the language of the Maryland Act and its legislative history, the purpose of the law is to forbid publishers from discriminating against Maryland public libraries. If a publisher does not offer an e-book in Maryland, it is not discriminating against Maryland public libraries by not offering the e-book to them.

Third, "[i]n Maryland, regulatory statutes are 'generally construed as not having extra-territorial effect unless a contrary legislative intent is expressly stated.'" *Elyazidi v. SunTrust Bank*, 780 F.3d 227, 237 (4th Cir. 2015) (quoting *Consumer Prot. Div. v. Outdoor*

World Corp., 91 Md. App. 275, 287 (1992)). Here there is no indication that the General Assembly intended to reach offers to license e-books other than in Maryland.

Finally, even if the statute could reasonably be read to encompass licensing decisions made anywhere in the world, the doctrine of constitutional avoidance would require the Court to limit its reach to licensing offers made to the *Maryland* public. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Kiviti v. Pompeo*, 467 F. Supp.3d 293, 312-13 (D. Md. 2020) (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 836, (2018)). Thus, even if the plain language of the statute, read in context, suggested that the Act applied outside of Maryland, and even if there were no presumption against extraterritoriality, the Court would still interpret the Maryland Act as applying only when works are offered to the public *in Maryland* if otherwise a constitutional problem would arise.

The cases that the Association cites to the contrary do not compel a different conclusion. In *Accessible Medicines*, it was conceded that the drug price-gouging statute applied to transactions that occurred wholly outside of Maryland. *Accessible Medicines*, 887 F.3d at 671. The law in *Accessible Medicines* authorized the Attorney General of Maryland to enforce the statute with respect to sales that took place far upstream from consumer retail sales in Maryland and that did not result in a single medication being shipped to Maryland. *Id.* The Fourth Circuit invalidated the statute, but in doing so noted that it "in no way mean[s] to suggest that Maryland and other states cannot enact legislation

meant to secure lower prescription drug prices for their citizens." *Id.* at 674. Here, the Maryland Act does not concern itself with business transactions occurring wholly outside of Maryland, only unfair and discriminatory practices against Maryland public libraries. The Maryland Act is only triggered when a publisher offers to license to the public in *Maryland* and then only affects publishers' dealings with *Maryland* public libraries. It has no extraterritorial effect.

American Booksellers Foundation v. Dean, 342 F.3d 96, 104 (2d Cir. 2003), is no more apposite. That case involved a Vermont statute that prohibited the posting of sexually themed material on the internet in a way that could be accessed by minors. The Vermont law was deemed to have extraterritorial effect because "[a] person outside Vermont who posts information on a website or on an electronic discussion group cannot prevent people in Vermont from accessing the material." *Id.* at 103. Here, the conduct that the Maryland law regulates is only in Maryland, because publishers decide whether to offer licenses to the public in Maryland and the terms—if any—on which they offer those licenses to Maryland public libraries.

Nor does the fact that other states may be considering "similar" legislation make the Maryland Act unconstitutional. ECF 12 at 30. Even if other states ultimately decide to enact such legislation, that legislation would apply only to each state's own public libraries. That a national publisher has to account for individual state laws in conducting its business is nothing new or remarkable.

In the absence of any indication that the Maryland Act discriminates against interstate commerce or regulates extraterritorially, the *Pike* balancing test controls, and on

that pivotal point, the Association has little to say. Ultimately, it makes the remarkable assertion that Maryland has no legitimate interest in protecting publicly funded libraries—and the State residents who use them—from the discriminatory practices of some e-book publishers. ECF 12 at 31. Those practices prevent Maryland residents—particularly those of limited means—from gaining access to information, literature, and other digital content, and stands as a direct obstacle to the libraries' goal of facilitating that access. *See* ECF 10-7, ECF 10-8).[2]

In conclusion, to satisfy Rule 12(b)(6), the Association must "plead specific facts" that the challenged law burdens commerce and that those burdens outweigh the law's benefits. *Just Puppies* 2021 WL 4594630 at 31 (citing *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 503 (7th Cir. 2017)). Here, the Association has not pled any specific facts to support their argument that the Maryland Act burdens commerce and that those burdens outweigh the law's benefits. The Association's Commerce Clause claim should be dismissed.

III. THE MARYLAND ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

The Association's Opposition argues that the Maryland Act is unconstitutionally vague because it "leaves far too much room for speculation." (ECF No. 12 at 28). The Due Process guarantee of the Fourteenth Amendment prohibits state statutes and

[2] None of the three cases the Association cites for that proposition supports their argument, as all challenged state statutes on First Amendment grounds that are not applicable here, and none includes a Commerce Clause analysis. *See* ECF 12 at 27 n.17 (citing *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1 (1st Cir. 2007), *Dana's R.R. Supply v. Attorney General, Florida*, 807 F. 3d 1235 (11th Cir. 2015), *Italian Colors Restaurant v. Harris*, 99 F. Supp.3d 1199 (E.D. Cal. 2015)).

regulations that are "so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Smith v. Goguen*, 415 U.S. 566, 572 n. 8, (1974). Further, such statutes and regulations may not be so vague that they invite arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, (1983). See also, *Martin v. Lloyd*, 700 F.3d 132 (4th Cir. 2012).

The Maryland Act is not unconstitutionally vague and does not leave too much room for speculation. It is not unusual for laws that have a reasonableness standard to be held constitutionally valid. In *Jim Crockett Promotion, Inc. v. City of Charlotte,* 706 F.2d 486 (4th Cir. 1983) a municipality regulating reasonable limits of speech or sound did not violate First Amendment protections. In *Galloway v. State,* 365 Md. 599 (2001) cert. denied 535 U.S. 990 (2002) the Maryland criminal harassment statute that required "a reasonable warning to desist" harassing conduct was constitutionally sufficient. Maryland's child neglect law setting out a reasonable person standard of conduct was not unconstitutionally vague. *Hall v. State,* 448 Md. 318 (2016). The Maryland trespass on public buildings and grounds statute mandates a reasonable person know they have no apparent lawful business on the property was not unconstitutionally vague. *Dean v. State,* 13 Md. App. 654 (1971). Numerous other Maryland State laws require reasonable conduct.

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), is distinguishable from the Maryland Act's requirement. It is well established that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Powell*, 423 U.S. 87, 92-93 (1975) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)). The facts at issue in *Cohen Grocery*

are very different from those at issue here; it involved a World War I-era statute that prohibited any person from willfully making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." *United States v. L. Cohen Grocery Co.*,255 U.S. at 86. It forbade "no specific or definite act" and left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id*. The sugar dealer in *Cohen Grocery* could have had no idea in advance what an "unreasonable rate" would be because that would have been determined by the vagaries of supply and demand, factors over which he had no control. *United States v. Powell*, 423 U.S. at 92-93.

The language of the Maryland Act is very different. Far from subjecting publishers to an unknowable standard, like in *International Harvester Co. of America v. Commonwealth of Kentucky*, 234 U.S. 216 (1914), the Maryland Act, does not seek an "imaginary ideal" but requires the publishers to "offer to license" their electronic media products on "reasonable terms" consistent with their real value. ECF 10-8. It requires that publishers *negotiate* with libraries over reasonable pricing; what is "reasonable" under the circumstances thus will be worked out within the context of each specific license. But the Maryland Act provides publishers with additional guidance as to what constitutes reasonable terms. It allows publishers to limit the number of users that may access an e-book at the same time, Educ. § 23-702(b)(1); limit the number of days a user may have access to the e-book, *Id*. at (b)(2); and require the use of measures to prevent a user from using the e-book beyond the loan period or from allowing others to use the e-book, *Id.* at (b)(3). Conversely, publishers may not limit the number of licenses a public

library may purchase on the date of the e-book's first public release. *Id*. at (c). Publishers may not like these specific provisions, but it cannot be said that they are vague.

Doubts about how the statutory language might apply in marginal cases does not make the Maryland Act vague, for the Supreme Court has "several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness." *Jordan v. De George*, 341 U.S. 223, 231 n. 15 (1951). (noting cases upholding standards such as "restraint of trade" as construed to mean "unreasonable or undue restraint of trade," citing *Nash v. United States*, 229 U.S. 373 (1913), "reasonable variations," citing *United States v. Shreveport Grain and Elevator Co*., 287 U.S. 77 (1932), and "unreasonable waste of natural gas," citing *Bandini Petroleum Co. v. Superior Court of State of Cal.,* 284 U.S. 8 (1931)). These cases show that "[t]he mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *United States v. Ragen,* 314 U.S. 513, 523 (1942) (distinguishing *Cohen Grocery* and *International Harvester Co. of America v. Com. of Kentucky*, and upholding federal tax provision that prohibited the claiming of "unreasonable" allowances). The Maryland Act is unlike the unfair trade practices law in *International Harvester.* It does not seek an "imaginary ideal" but requires the publishers to "offer to license" their electronic media products on "reasonable terms" consistent with their real value. (ECF No. 10-8). An economic regulation, like the Maryland Act, which "is subject to a less strict vagueness test because its subject matter is often more narrow, and because

businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 498 (1982).

Other cases the Association cites do not support its position that the Maryland Act is unconstitutionally vague. In *Manning v. Caldwell for City of Roanoke,* the Fourth Circuit invalidated a criminal statute that adjudicated a "habitual drunkard" with enhanced penalty for public intoxication. 930 F.3d 264, 273 (4th Cir. 2019). The court concluded that the statute was vague because it included no guidelines or standards regarding who qualified as a "habitual drunkard." *Id.* at 274. *Florida Action Comm., Inc. v. Seminole County*, 212 F. Supp.3d 1213 (M.D. Fla. 2016), also does not support the Association's claim. There, the court invalidated a county ordinance that prohibited sexual predators from traveling through or remaining in a 1,000-foot "exclusion zone" around every school, daycare center, park, and playground within the county. The court found the statute vague because "exclusion zone" was poorly defined, such that a person could not know when he was entering one, and because the law failed to adequately define what justifications would suffice for a sex offender to be present within the exclusion zone. *Id.* at 1225. Unlike these statutes, the Maryland Act provides reasonable publishers with guidance as to what constitutes reasonable terms for an e-book license.

The Association also claims not to know what "public libraries in the State" means, contending that the phrase leaves a "litany of unanswered questions." ECF 12 at 30. It is hard to imagine what those "unanswered questions" might be, when the public libraries of Maryland are described and regulated within Title 23 of the Education Article and are listed

at https://directory.sailor.lib.md.us/ (last viewed January 30, 2022). They consist of the public libraries in Maryland's 23 counties and Baltimore City. Unlike the unidentified schools, day care centers, playgrounds and parks in the ordinance at issue in *Seminole County*—which the Association also cites here—there is not an unknown number of public libraries of the State within Maryland's counties. There is no mystery here.

Accordingly, because the Maryland Act is not unconstitutionally vague and the Maryland public libraries are known, the Association's due process claim should be dismissed.

CONCLUSION

For the reasons set forth herein and in the State's Motion to Dismiss, the Association's complaint should be dismissed.

Respectfully submitted,

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February 3, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 2022, a copy of the foregoing Defendant's Reply in Support of Motion to Dismiss, was served via CM/ECF on:

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