President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 14, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 784 and HB 935

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan, non-profit organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia and the Bar of Maryland. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in opposition to SB 784 and HB 935 (collectively referred to herein as "the Bill" or "this Bill").

The Bill:

This Bill would create new provisions in the Tax-General Article of the Maryland Code to impose a new 11% FIREARM, FIREARM ACCESSORY, AND AMMUNITION EXCISE TAX on gross receipts. See Section 7.7-103. This tax would be levied on all federally licensed firearms dealers ("FFLs") in the State and would be payable monthly. See Section 7-7-201. A failure to pay would result in personal liability for the tax on "any officer of the corporation who exercises direct control over its fiscal management." Section 7.7-301. Proceeds of the tax would be distributed, after deducting administrative costs, in specified percentage amounts, to the Maryland Trauma Physician Services Fund (44%), the R Adams Cowley Shock Trauma Center At The University Of Maryland Medical System (29%), the Violence Intervention And Prevention Program Fund (23%) and in lesser amounts (2%) to two other State offices. Section 2-4B-02

THE BILL IS UNCONSTITUTIONAL

The 11% exercise tax imposed by this Bill would be levied solely on FFLs. The Bill would be on top of the existing 6% Maryland sales tax and on top of Maryland's 8.25% general corporate income tax. This additional excise tax on FFLs is unconstitutional because the sale of firearms and ammunition is inextricably bound up with the exercise of Second Amendment rights and the tax threatens the vital

role FFLs play in the exercise of the Second Amendment right to acquire firearms for lawful purposes.

Supreme Court precedent makes clear that a State may not single out persons and businesses for special taxes where such taxes could create even the possibility of unjustified burdens on the exercise of a constitutional right. In *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575 (1983), the Court invalidated a special use tax levied by a state on the cost of paper and ink products consumed in production of newspapers and other periodical publishers because such a special tax threatened the First Amendment. In so holding, the Court reasoned that the state had "singled out the press for special treatment" and thus "burden[ed] rights protected by the First Amendment." 460 U.S at 582. Such a tax, the Court ruled, "cannot stand unless the burden is necessary to achieve an overriding governmental interest." Id.

The State in *Minneapolis Star* failed to provide any such justification. As the Court stated, *"[w]hatever the motive of the legislature* . . . recognizing a power in the State not only to single out the press but also to tailor the [law] so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." 460 U.S. at 591-92 (emphasis added). The Court reasoned that the "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." Id. at 585. But the Court also made clear that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." Id. at 592.

The holding in *Minneapolis Star* is clear: "[W]e cannot countenance such treatment unless the State asserts a counterbalancing interest **of compelling importance that it cannot achieve without differential taxation**." Id. (emphasis added). In so holding, the Court specifically rejected the state's professed need to raise revenue, noting that the State could raise the revenue by "taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." Id. at 586. Rather, the constitutional flaw was "the very selection of the press for special treatment [because that] threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially *more burdensome treatment*." Id. at 588. See also *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987) (holding that taxing general interest magazines but exempting newspapers and religious, professional, trade and sports journals violated the First Amendment); *Simon & Schuster, Inc. v. Members of New York State Crime Victims*, 502 U.S. 105, 117 (1991) (holding that New York's "Son of Sam" tax on sales of books authored by criminals was unconstitutional and rejecting the argument "that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas").

The principles enunciated in *Minneapolis Star* apply to Second Amendment rights. The Supreme Court has repeatedly held that Second Amendment rights are not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *NYSRPA v. Bruen*, 597 U.S. 1, 70 (2022), quoting *McDonald v. City of Chicago*, 742, 780 (2010) (plurality opinion). Thus, the State may no more

burden Second Amendment rights with special taxes than it may burden First Amendment rights with the special tax at issue in *Minneapolis Star*. There is nothing special about the Trauma Physician Fund or the University of Maryland Trauma Center that would justify a special tax on firearms and ammunition sales under the test used in Minneapolis Star. The fiscal needs of such locations are no doubt important, but those needs can be met by general taxes.

Here, as in *Minneapolis Star*, the Bill would impose a special tax, ostensibly to raise funds for government offices and governmental functions specified in the Bill. That need for money is no different than the need for revenue rejected in *Minneapolis Star*. As the Court explained, "the very selection of the press for special treatment" is what "threatens the press" unconstitutionally. *Minneapolis Star*, 460 U.S. at 588 (emphasis the Court's). Indeed, the Court rejected the State's argument that the special tax did not really burden newspapers, stressing that the differential treatment was **alone** enough to invalidate the tax without any inquiry into actual burden. The Court explained that "courts have little familiarity with the process of evaluating the relative economic burden of taxes" and thus "the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment." Id. at 590. Here, this special tax on dealers does not merely threaten "more burdensome treatment" as in *Minneapolis Star,* Id., at 588, it **actually** inflicts more burdensome treatment as only dealers are liable for an 11% tax. Indeed, "subsequent" legislation could easily increase the 11% rate on gross receipts to ever higher rates over time. The Bill "singles out" dealers for special treatment and that is enough to make it inherently suspect. See *Leathers v. Medlock*, 499 U.S. 439, 446-47 (1991) (discussing *Minneapolis Star*).

There is no doubt that FFLs are essential to rights protected by the Second Amendment. Federal and Maryland State law tightly constrain where and by whom firearms may be acquired in Maryland. Nearly all firearms are acquired by law-abiding persons through sales conducted by FFLs. Those sales are constitutionally protected because the right to "keep and bear Arms" implies the right to acquire arms for those purposes. That point has never been disputed by the State in litigation. See *MSI v. Moore*, 86 F.4th 1038, 1043 (4th Cir. 2023), *rehearing granted*, 2024 WL 124290 (4th Cir. Jan. 11, 2024). Specifically, under *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald* and *Bruen*, the Second Amendment protects the right of a law-abiding citizen to acquire firearms. See *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). That right to acquire a firearm has already been recognized in Maryland in the HQL litigation. See *MSI v. Hogan*, 566 F.Supp. 3d. 404, 424 (D.Md. 2021) ("The requirements for the purchase of a handgun, as set out in the HQL law, undoubtedly burden this core Second Amendment right because they 'make it considerably more difficult for a person lawfully to acquire and keep a firearm ... for the purpose of self-defense in the home.'"), quoting *Heller v. District of Columbia*, 670 F.3d 1244,1255 (D.C. Cir. 2011).

Firearm dealers also have an "ancillary" Second Amendment right to sell firearms to law-abiding citizens. See, e.g., *Teixeira v. County of Alameda*, 873 F.3d 670, 676-78 (9th Cir. 2017) (en banc), *cert. denied*, 138 S.Ct. 1988 (2018). Under this precedent, any law that "meaningfully constrain[s]" a customer from having

"access" to a dealer is actionable under the Second Amendment. Id., 873 F.3d at 680. See also *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 216 (4th Cir. 2020) (holding that a firearms dealer had Second Amendment standing to challenge Maryland's HQL statute and may sue on its own behalf and had third party standing to sue on behalf of its "customers and other similarly situated persons"). Regulation of dealer operations is thus imbued with constitutional concerns. Under *Bruen*, such a law is unconstitutional unless the State can demonstrate a well-established, and representative historical tradition of imposing analogous taxation or burdens on the right to acquire a firearm. See *Bruen*, 597 U.S. at 30. We have found no such historical tradition; it does not exist.

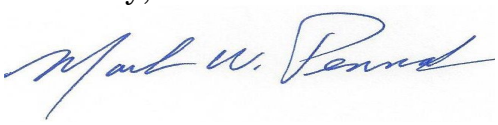
The tax imposed by this Bill threatens the economic viability of all FFLs across the State and thus necessarily burdens the exercise of Second Amendment rights of Marylanders to acquire firearms for their own self-defense. Specifically, the retail sale of firearms and ammunition by FFLs is highly competitive and FFLs work on small margins. An 11% tax on **gross receipts** (the total cost of the product) could easily wipe out the profit margin on any given sale. Maryland already imposes high costs on dealers. This additional 11% tax is a backbreaker. Dealers in Maryland must compete not only with other Maryland dealers but must compete as well with dealers in neighboring state and nation-wide. A special, additional 11% tax on their sales will create a Hopson's Choice for dealers: Either the absorb the tax and become so unprofitable that they would be forced to close, or pass the tax along to the consumer, and become uncompetitive on price with non-Maryland dealers and be driven out of business for that reason. Either option will result in bankruptcy. The latter option will merely take a little longer.

It bears emphasis that firearms are expensive. An 11% tax on gross receipts could easily drive customers to out-of-State dealers. The likely result is that all but the largest dealers, like WalMart or Bass Pro Shops, will be forced out of business. The overwhelming majority of dealers in this State are small businessmen and businesswomen who lack the resources of such a national retailer. To survive, dealers will be forced to move their operations out of Maryland. Even national chains will take this new tax into account in deciding whether to open new stores or retain existing locations. Driving FFLs out of business may well be the intent behind this Bill, but that "illicit intent" is no more necessary to a finding of unconstitutionality here than it was in *Minneapolis Star*. It is worth noting that in 2013, when Maryland passed the Firearms Safety Act of 2013, a major Maryland firearms manufacturer, Beretta, moved out of Maryland to Tennessee. See https://www.nbcwashington.com/news/local/beretta-moves-all-manufacturing-out-of-md-after-state-passes-new-gun-bill/2071229/. Such economically rational decisions by FFLs are to be expected.

Once dealers move, they would then be beyond the ability of Maryland to regulate at all. All the restrictions and security mandates placed on Maryland dealers by Maryland law, see, e.g., 2022 Session Laws, Ch. 55, would not operate on these dealers located just across State lines. Federal law allows dealers to sell long guns to out of state residents if such sales are conducted face-to-face at the dealer's shop. See 18 U.S.C. § 922(b)(3). Those sales of long guns are cash and carry with nothing more than a NICS background check. Federal law likewise allows out-of-state

dealers to sell handguns to Marylanders. The out-of-state dealer arranges for delivery to the purchaser by shipping the handgun to a Maryland dealer who completes the paperwork (Form 77R) for a small fee (typically around $25). See *Mance v. Sessions*, 896 F.3d 699, 709 (5th Cir. 2018) (describing the process). This Bill does not tax that transfer fee, but even if it did such a tax would hardly raise much money. The few dealers left in Maryland would still do transfers from such out-of-state dealers. With fewer and fewer Maryland dealers over time, Maryland residents will increasingly purchase firearms, ammunition and accessories in Virginia, West Virginia, Delaware, Pennsylvania, or other locations. Maryland would lose not only revenue from this tax on such sales but would lose revenue from sales taxes and income taxes on the dealers. Everyone loses except neighboring States. These bordering States do not share Maryland's overt hostility toward firearms and gun owners. The tax will not likely generate the amount of revenue envisioned by its sponsors because there will be fewer and fewer sales to tax. For all the foregoing reasons, the Bill will have vast, unintended consequences and will not likely survive court challenges. We urge an unfavorable report.

Sincerely,



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