President
Mark W. Pennak

February 21, 2023

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

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 that is imposed on top of existing taxes. 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.

While the First Amendment law is clear, as yet there is very little case law on this issue in the Second Amendment context. An Illinois intermediate appellate court sustained a local tax of $25.00 per firearm and $.05 per round. *Guns Save Life, Inc. v. Ali,* 2020 IL App (1st) 181846, 173 N.E.3d 212, 447 Ill.Dec. 201 (2020). In so holding, the court acknowledged that the tax burden rights protected by the Second Amendment but held that the tax was not "substantial" enough to violate the Second Amendment. That decision was **reversed on appeal** by the Illinois Supreme Court. See *Guns Save Life, Inc. v. Ali*, 2021 IL 126014, 190 N.E.3d 139, 454 Ill.Dec. 539 (2021), which held that "the relationship between the tax classification and the use of the tax proceeds is not sufficiently tied to the stated objective of ameliorating the costs that gun violence imposes on society". ¶37. That holding applies here because the tax will not address trauma inflicted committed by persons (criminals) who will never be subject to the tax.

Purchases by law-abiding citizens, who are subject to an exhaustive background check on every purchase of a firearm under existing law, are not the cause of "gun violence" or the use of trauma centers. That violence is committed by criminals who most certainly are already prohibited persons and thus cannot purchase firearms at federally licensed dealers. **A tax on lawful purchases is thus enormously unfair because it imposes costs solely on lawful gun owners for social harms for which they are not responsible.** Trauma centers and physicians are enormously beneficial to all Marylanders because such centers are open to all who may suffer trauma **for a multitude of reasons** having nothing to do with firearms. The cost of trauma centers should, accordingly, be shared by all Marylanders rather than inflicted disproportionably on lawful purchasers of firearms, ammunition, and accessories. These law-abiding purchasers are no more responsible for trauma center use than any other law-abiding Maryland resident.

The concurring opinion in *Guns Save Lives, Inc.*, would have invalidated the tax on the additional ground that the locality had had "no authority to single out the exercise of that [constitutional] right for taxation." ¶46. That reasoning echoes the reasoning employed by the United States Supreme Court in *Minneapolis Star*, discussed above. The "substantial burden" test employed by the intermediate court has been since abrogated by the Supreme Court in *NYSRPA v. Bruen*, 597 U.S. 1, 19 (2022). Under *Bruen*, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct"; thus, to justify a firearm regulation burdening that conduct, "the government must

demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 17. Stated simply, there is no "historical tradition" from the Founding Era when the Bill of Rights were ratified (1791), that would allow a special tax to be levied on firearms, much less on ammunition, and accessories. It bears emphasis that ammunition and accessories may be purchased from non-FFLs, including from on-line sellers. The Bill thus punishes FFLs and only FFLs in selling these items that can be and are widely sold by other types of establishments, including on-line.

The Tax Will Put Maryland FFLs Out of Business

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) would easily wipe out the profit margin on any given sale. Nor can this tax on FFLs be justified by the Federal tax imposed by 26 U.S.C. § 4181. First, because this federal tax is earmarked and takes place outside the normal Congressional appropriations process, it may not be constitutional for that reason alone, an issue currently before the Supreme Court in a case involving the CFPB. See *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.*, No. 22-448 (argued Oct. 3, 2023). Second, because the federal tax dates only back to 1919 in any form, the tax will not likely survive scrutiny under the text, history and tradition test articulated in *Bruen*, should the tax ever be challenged in court. See *Bruen*, 597 U.S. at 66 n.28 (ruling that "the 20th-century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence").

Third, and in any event, the Section 4181 tax is much different than the tax imposed by this Bill in both reach and affect. Section 4181 imposes a nationwide tax of 10% on the sale of pistols and a 11% tax on the sale of other firearms and on ammunition by "manufacturers, producers and importers." Unlike this Bill Section 4181 does not tax "accessories" and does not apply to or impose burdens on other types of federally licensed firearms dealers, such a retail dealer. And because the tax is imposed nationwide, the tax affects all "manufacturers, producers, and importers" equally. The proceeds of this federal tax are then distributed to the States under Robinson-Pitman Act, 50 Stat. 917 (1937), and used for wildlife conservation. That Act provides that a State may receive these funds only it has "passed laws for the conservation of wildlife which shall include a prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said State fish and game department." Preamble, id. See, e.g., MD Code, Natural Resources, § 10-102. Unlike this Bill, the federal tax may not be used by a State for non-conservation related purposes.

Again, Section 4181 taxes are not imposed on **all** FFLs, but rather only on "manufacturers, producers or importers." In contrast, this Bill imposes the tax "ON THE GROSS RECEIPTS OF A FEDERALLY LICENSED FIREARMS DEALER DERIVED FROM THE SALES OF FIREARMS, FIREARM ACCESSORIES, AND

AMMUNITION IN THE STATE." A "federally licensed firearms dealer" is defined this Bill to mean (in a circular fashion) "A PERSON LICENSED BY THE FEDERAL BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES TO DEAL IN FIREARM." As thus defined, the Bill taxes **10 (ten)** types of businesses, including not only "manufacturers, producers, and importers" but also collectors of curios and relics, pawnbrokers as well as retail dealers. See https://bit.ly/3LqqSH1. All these types of FFLs are subject to the record keeping, reporting and other burdens imposed by this Bill for "THE TOTAL AMOUNT OF THE SALE OR LEASE OR RENTAL PRICE OF THE RETAIL SALE BY A PERSON, VALUED IN MONEY, WHETHER RECEIVED IN MONEY OR OTHERWISE." The Bill creates a complex, bureaucratic tax reporting and collection system (a nightmare for small businesses) enforced by **criminal** penalties of up to 5 years imprisonment and/or a $5000 fine, all of which will drive up dealers' costs and provide an **additional** strong incentive for FFLs to leave Maryland.

This Bill applies only to Maryland FFLs and thus destroys the nationwide level playing field on which the federal tax applies. **Only** California has enacted such a tax (AB 28) and, unlike this Bill, that California tax applies only to firearms and ammunition and not to other items like accessories. https://legiscan.com/CA/text/AB28/id/2842856. That tax was enacted only very recently (September 2023) and it does not go into effect until July of 2024. It will no doubt be challenged in court in due course. **No other State** has a similar tax. Put simply, an additional 11% tax on Maryland FFLs is a competitive backbreaker. FFLs in Maryland must compete not only with other Maryland FFLs but also with FFLs in neighboring states and nationwide as well as with **non**-FFLs that freely sell ammunition and the accessories taxed by this Bill (**but who are not taxed by the Bill**). A special, additional 11% tax on sales will create a Hopson's Choice for Maryland FFLs: Either the FFLs absorb the tax and become so unprofitable that they will be forced to close, or they will pass the tax along to the consumer, and become uncompetitive on price with non-Maryland FFLs (and other retail and on-line outlets selling ammunition and accessories) and be driven out of business for that reason. Either option will result in bankruptcy. The latter option will merely take a little longer.

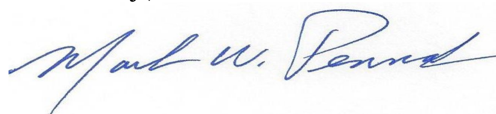
It bears emphasis that firearms and ammunition and some accessories are quite expensive. Many firearms and some accessories, such as scopes, cost thousands of dollars. An 11% tax on gross receipts could easily drive customers to out-of-state dealers for all these items. The likely result will be that all but the largest national dealers, like WalMart or Bass Pro Shops, will be forced out of business. The overwhelming majority of FFLs 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 or expand existing locations. Driving FFLs out of business may well be the intent behind this Bill, but that "illicit intent" is fatal under the Second Amendment, and, in any event, such 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 its manufacturing out of Prince Georges

County to Tennessee. See https://www.nbcwashington.com/news/local/beretta-moves-all-manufacturing-out-of-md-after-state-passes-new-gun-bill/2071229/. Beretta left its headquarters in Maryland, but passage of this Bill will likely result in the loss of that facility as well. Such economically rational decisions by FFLs are to be expected. And those decisions will cost Maryland millions of dollars that these corporations now pay in taxes not to mention the taxes paid by hundreds of employees of these companies.

Once FFLs move, they are beyond the regulatory and tax reach of Maryland. 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 (it is not a sale), 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 that are paid the dealers and customers. Everyone loses except neighboring States. Those States do not share Maryland's overt hostility toward firearms and gun owners and are quite unlikely to enact such taxes. The tax thus will not generate the amount of revenue envisioned by its sponsors (or the fiscal note) because there will be fewer and fewer sales to tax. In Seattle, for example, the city imposed a $25 tax on the sale of a firearm and a $0.05 per round tax on ammunition, taxes **less onerous** than the excise tax imposed by this Bill. But the Seattle taxes generated less than a quarter of the revenue expected simply because customers took their business elsewhere. See https://bit.ly/3T4kPfn. The same will happen, State-wide, as a result of the **more onerous** tax imposed by this Bill. 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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