February 13, 2025

WRITTEN TESTIMONY OF MICHAEL BURKE, IN OPPOSITION TO HB 387 AND HB 937

I am a member of numerous non-profit and public safety organizations across Maryland. Like others here, I seek 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 a veteran, retired federal law enforcement officer, firefighter and a parent. As others here, 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, as well as a Chief Range Safety Officer. I appear today IN OPPOSITION to HB 387 AND HB 937.

The Bills:

Bill 387 imposes a new 11% EXCISE TAX on gross receipts of firearm retail sales made by Maryland federal firearms licensees ("FFLs") and on retail sales of firearms made by a selected group of out-of-state FFLs. The proceeds from this tax are to be distributed, in equal shares, to:

1) The Coordinated Community Supports Partnership Fund,
2) The Adams Cowley Shock Trauma Center,
3) The Maryland Violence Intervention and Prevention Program Fund,
4) The Survivors Of Homicide Victims Grant Program,
5) The Center For Firearm Violence Prevention And Intervention.

This excise tax is on top of and in addition to the generally applicable Maryland 6% sales tax. **The resulting total tax rate for sales covered by this Bill is 17%.**

HB 937 takes a different track. The exercise tax of HB 387 is solely on the sales of firearms. Instead of that approach, HB 937 just doubles the sales and use tax at a rate from 6% to 12% on the sales of firearms, ammunition, and firearm accessories, a term defined to include:
"**A magazine or magazine loader;**
A firearm Scope or Optic;
A Stock,
A grip;
A handguard; or
Body armor."

Both Bills raise many of the same concerns and thus this testimony is addressed to both.

We know the State budget is in disarray. These bills do not "save" the budget and cannot succeed in their stated goals. It would make more sense to tax the following-

Double the tax on **Marijuana** sales;
Double the tax on **private aircraft** sales;
Double the tax on **Gasoline and Diesel** fuels;
Double the tax on **Sporting equipment** sales;
Double the tax on **professional sports fan gear**.

None of those taxes would be unconstitutional and could not be challenged in federal courts.

THESE BILLS ARE UNCONSTITUTIONAL UNDER THE SECOND AMENDMENT

The 11% excise tax imposed by HB 387 on top of the existing sales tax and the special sales tax on guns, ammunition and accessories of 12% imposed by HB 937 are both unconstitutional under the Second Amendment. Both would effectively tax the exercise of the Second Amendment right to acquire a firearm or ammunition. The excise tax imposed by Bill 387 would be on top of the existing 6% Maryland sales tax and on top of Maryland's 8.25% general corporate income tax. These taxes are unconstitutional because the sale of these items is inextricably bound up with the exercise of Second Amendment rights to acquire firearms or ammunition 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. See also *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943) (striking down tax on religious activities under the First Amendment's Free Exercise Clause); *Harper v. Va. Bd. of Elections,* 383 U.S. 663, 668 (1966) (striking down $1.50 poll tax under the Fourteenth Amendment's Equal Protection Clause).

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.* at 592 (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").

Indeed, the excise tax imposed by HB 387 is especially pernicious because most of the funds are earmarked for distribution to favored private groups via grants administered by government offices, thus essentially mandating a transfer of wealth from one *disfavored* private group (gun purchasers) who exercise a constitutional right to *favored* private groups who are selected by the government for the receipt of these facts for content-based reasons. That amounts to content-based discriminatory taxation which is a gross violation of the First Amendment. See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (noting that it would likely be unconstitutional if the government agency "were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 834 (1995) ("the University may not discriminate based on the viewpoint of private persons whose speech it subsidizes").

These First Amendment principles 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 on ink at issue in *Minneapolis Star*. There is nothing special about the recipients of these funds that would justify a special tax on firearms sales under the test used in *Minneapolis Star*.

Here, as in *Minneapolis Star*, the Bills would impose a special tax on the exercise of the right. Any need for 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 firearms does not merely threaten "more burdensome treatment" as in *Minneapolis Star,* Id., at 588, it **actually** inflicts more burdensome treatment. Firearms may be purchased only from dealers (with the minor exception for private sales of used firearms). Here, as in *Minneapolis Star*, "subsequent" legislation could easily increase the 11% excise rate on gross receipts or the 12% special sales tax to ever higher rates over time. The Bill "singles out" these constitutionally protected products 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. 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. 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 *Reese v. BATF*, ---- F.4th ----2025 WL 340799 at *4 (5th Cir. Jan. 30, 2025) ("Of course, the words 'purchase,' 'sale,' or similar terms describing a transaction do not appear in the Second Amendment. But the right to 'keep and bear arms' surely implies the right to purchase them."); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (same); *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). The same is true for ammunition purchases. See, e.g., *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("Thus 'the right to

possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them.").

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*, 584 U.S. 977 (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. 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 from the Founding that imposed 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, there is also case law on this issue in the Second Amendment context. A federal district court invalidated a $1,000 exercise tax on firearms in *Murphy v. Guerrero*, 2016 WL 5508998 at *24 (D.Northern Mariana Isl. 2016), holding that the tax "imposes a tremendous burden on the rights of responsible law-abiding citizens." More recently, 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. But, 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). See *Vandermyde v. Cook County*, IL App (1st) 230413-U, 2024 WL 685617 (Appellate Court of Ill. 2024) (reversing a lower court dismissal of challenge to a gun tax, noting that "our supreme court ruled that the firearm tax does, in fact, burden Second Amendment rights"), citing *Guns Save Life*, 2021 IL 126014, ¶¶ 27-29. That decision also 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." *Guns Save Life*, 2021 IL 126014, ¶37. That holding applies here because the tax imposed by these Bills is not "tied" to the actual use of trauma services by firearm purchasers or in the activities of the designated beneficiaries of the tax.

Trauma is suffered for a multitude of reasons having nothing to do with firearm purchases. 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 legally purchase firearms at federally licensed dealers. **A tax on lawful purchases is thus enormously unfair because it imposes costs solely on lawful gun purchasers for social harm for which they are not responsible.** Trauma centers are 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. These law-abiding purchasers are no more responsible for trauma center use than any other law-abiding Maryland

resident. Nor are law-abiding purchasers and gun owners responsible for the other social ills addressed by the targeted beneficiaries.

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 for the purpose of transferring wealth from gun owners to targeted favored private groups. Late 19th century statutes have little or no bearing on this inquiry into tradition and history. See *United States v. Rahimi*, 602 U.S. 680, 692 (2024) ("A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'"), quoting *Bruen*, 597 U.S. at 29. See also *Reese,* 2025 WL 340799 at *12-*13; *Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122, 134 (3d Cir. 2024), *vacated and remanded sub nom. Paris v. Lara*, 2024 WL 486348 (U.S. Oct. 15, 2024), *holding reaffirmed on remand*, --- F.4th ----2025 WL 86539 (3d Cir. Jan. 13, 2025) ("Accordingly, to maintain consistency in our interpretation of constitutional provisions, we hold that the Second Amendment should be understood according to its public meaning in 1791."). No special gun taxes were in existence at the time of the Founding.

The Taxes Will Put Maryland FFLs and Retail Outlets Out of Business

The 11% excise tax and the 12% sales tax imposed by these Bills will effectively destroy the economic viability of FFLs and other retail outlets across the State and thus necessarily burden the exercise of Second Amendment rights of Marylanders to acquire firearms for their own self-defense. The retail sale of firearms by FFLs is highly competitive and FFLs work on small margins. These taxes gut the profit margin on any given sale. Nor can these taxes be justified by the Federal excise tax imposed by 26 U.S.C. § 4181. The federal tax dates only back to 1919 and thus cannot provide requisite historical analogue under the text, history and tradition test articulated in *Bruen*. 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").

The Section 4181 federal tax is also much different than the taxes imposed by these Bills in both reach and affect. Section 4181 imposes a nationwide excise 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 apply to or impose burdens on other types of federally licensed firearms dealers, such as a retail dealer. And because the tax is imposed nationwide, the federal tax affects all "manufacturers, producers and importers" equally. The proceeds of this federal tax are then distributed to the States under Pittman-Robertson Wildlife Restoration Act, 50 Stat. 917 (1937), and is tied to 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.

These Bills destroy the nationwide level playing field on which the federal tax applies. California has enacted a similar 11% excise tax (AB 28). https://legiscan.com/CA/text/AB28/id/2842856. That tax was enacted only very recently (September 2023) and it did not go into effect until July of 2024. It has already been challenged in court. See *Jaymes v. Maduros*, Case No. 37-2024-00031147-CU-MC-CTL (Superior Ct. Cal. July 2, 2024). Certainly, **no neighboring State** has a similar tax or is even likely to enact such a tax. Nor does any neighboring state impose a sales tax of 12%, much less just on firearms, ammunition and accessories. Put simply, an additional 11% excise tax on Maryland FFLs **on top of** existing sales taxes is a competitive backbreaker. The same is true for a 12% sales tax. FFLs and other sellers in Maryland must compete not only with other Maryland FFLs and sellers but also with FFLs in neighboring states and nationwide and persons and dealers across the United States that sell online. Again, the sales tax in Delaware is zero. This creates an impossible competitive situation 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 be driven out of business for that reason. Either option will result in bankruptcy. The latter option will merely take a little longer. Enactment of these Bills will result in an immediate challenge.[1]

The sales tax in Delaware is **zero**. In West Virginia and Pennsylvania the sales tax is 6% and the sales tax in Virginia is 5.3%, but sellers in these neighboring states do not pay any State sales taxes on products shipped out of state. See, e.g, Viriginia https://bit.ly/3WG4LCa ("Items that you ship outside of Virginia, that will be used or consumed outside of Virginia, are not subject to Virginia sales tax."); Pennsylvania, 61 PA ADC § 32.5(b) (same). See also https://bit.ly/40Eg5Qe ("If the seller ships items into a state where it doesn't have nexus, no tax should be charged by the seller."). Thus, for sales made in neighboring states in which the firearm is shipped into Maryland, the sales tax on that sale is **zero, just like all sales consummated in Delaware**.

It bears emphasis that firearms are quite expensive. Many firearms, especially long guns, cost thousands of dollars. These taxes could easily drive customers to out-of-state dealers for these items. The likely result will be that all but the largest national FFL 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 FFL 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 these Bills, 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/. Large retailer FFLs will simply close or not open new stores in Maryland. That will cost Maryland millions of dollars that these corporations pay or would pay in taxes not to mention the taxes would be paid by the many employees of these companies.

While the sales and use tax rate of 12% imposed by HB 937 is less severe than the excise tax imposed by HB 387, the sales and use tax imposed by HB 937 will have the same effect and is flawed for the same reasons. Indeed, HB 937 is worse than HB 387 in some ways as the 12% tax imposed by Bill 937 is not limited to firearms but is also applicable to accessories and ammunition. Some accessories, such as scopes and optics are very expensive, with many costing far more than $2,000. See e.g., https://vortexoptics.com/optics/riflescopes.html. Ammunition can also be expensive, especially when purchased in bulk for use in competitions or by instructors. https://www.luckygunner.com/9mm-nato-124-grain-fmj-winchester-1000-rounds. A use tax is, of course, levied on the purchaser, not the seller. But there is no effective way to police or enforce the use tax on consumers, as every consumer fully understands when they shop in Delaware where the sales tax is zero. No rational purchaser will pay hundreds of dollars in extra taxes on purchases if he or she can help it. And such a Delaware store need not be an FFL. Under federal law, any store may sell ammunition and accessories.

Indeed, all these items, including firearms, may be purchased from out-of-State dealers and other types of sellers **online**. Under federal law, only out-of-sales of **handguns** to Maryland residents must be shipped to Maryland for delivery to the consumer. See 18 U.S.C. § 922(a)(3),(5). See also *Mance v. Sessions*, 896 F.3d 699, 709 (5th Cir. 2018) (describing the process). Rifles or shotguns can be purchased over the counter by Maryland residents at out-of-State dealers and need not be shipped into Maryland. See 18 U.S.C. § 922(b)(3); MD Code, Public Safety, § 5-204(a). Out-of-State sales of ammunition and accessories to Maryland residents is entirely unregulated by federal law and such sales are likewise cash and carry. Of course, firearms purchased **online** are required by federal law, 18 U.S.C. § 922(a)(3),(5), to be shipped to a Maryland FFL, who fills out the paperwork and who charges a nominal transfer fee (around $25). Accessories and ammunition may be shipped directly to the purchaser. Such online sellers are often small dealers or individuals, and such sellers will not pay or collect sales taxes. While such a sale is subject to a use tax, there is, again, no practical way to enforce a use tax on such sales to consumers.

A Maryland FFL is, of course, free to charge a transfer fee on sales of firearms shipped to the Maryland FFL for delivery to a Maryland resident. But "[g]un prices can range from $300 for a low-cost handgun to over $2000 for a high caliber rifle." https://survivalstoic.com/how-much-does-a-gun-cost/ (listing sales prices for some

popular handguns). The transfer fee is thus quite likely to be significantly less than the tax that would be imposed by this Bill, especially for expensive firearms such as Custom Shop Kimber handguns which run around $2,400 or more. See, e.g., https://bit.ly/40V9QZT. And this Bill would certainly put an end to any sales to persons from out-of-State. With an 11% excise tax, plus a 6% sales tax, or even a 12% sales tax, no rational purchaser from out-of-State will buy any firearms in Maryland.

In short, the imposition of these extraordinary taxes will do nothing but inflict harm on Maryland FFLs and other stores that sell firearms, ammunition and accessories. Such harm includes effectively eliminating sales to hunters who visit Maryland to hunt geese or deer or person who may come to Maryland for competitions. See MD Code, Public Safety, § 5-204(b) (allowing non-residents to purchase "a rifle or shotgun" in Maryland). With fewer and fewer Maryland dealers and/or stores that sell ammunition or accessories over time, Maryland residents will increasingly purchase firearms and ammunition and accessories from dealers and stores in Virginia, West Virginia, Delaware, Pennsylvania, or online. As Maryland stores go out of business or leave Maryland, the State will lose increasing amounts of revenue from lost sales taxes and income taxes that are currently being paid by these retail outlets and their employees.

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 increased special taxes on firearms, ammunition or accessories. These taxes thus will not generate anywhere near the amount of revenue envisioned by its sponsors because there will be fewer and fewer sales that Maryland could tax. In Seattle, for example, the city imposed a $25 tax on the sale of firearms and a $0.05 per round tax on ammunition. 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, if these taxes are imposed. For all the foregoing reasons, these Bills will have vast, unintended consequences, generate far less revenue than anticipated and will not likely survive court challenges that are sure to result.

HB 387's Tax On Out-of-State FFLs Is Flawed

Once FFLs or other retail outlets move, they are beyond the tax reach of Maryland. See *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 176 (2018) (allowing a State to tax out of state sellers where "'the sale is consummated'" in the taxing jurisdiction), quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, (1995) (noting that the sale of goods or services must have "a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State"). 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* and thus are "consummated" totally outside of Maryland. Out-of-State sales of ammunition and accessories is likewise cash and carry and are not shipped into Maryland. *Wayfair* does not permit Maryland to tax those sales because the retailer does not ship any of these firearms into Maryland.

HB 387 violates *Wayfair* in its attempt to regulate out-of-State retail dealers. The Bill purports to impose the tax on out-of-dealers that "(1) derives gross revenue from the sale of firearms to residents of the state that exceeds $100,000; or (2) sells firearms to residents of the state for delivery into the state in 200 or more separate transactions." These numbers are no doubt taken from *Wayfair* in attempt to establish the "substantial nexus" required by Due Process Clause of the Fourteenth Amendment. See *Wayfair*, 585 U.S. at 174. But sales of $100,000 to Maryland residents is insufficient by itself as a State may tax retailers outside its borders only if the out-of-state business **ship** products into the State. Maryland thus may not tax dealers who make sales of $100,000 or more to Maryland residents unless those out-of-State dealers *also* ship those firearms into Maryland. See Comptroller's website, https://bit.ly/3CI8oAK ("When you purchase goods from out-of-state businesses, they are not required to collect Maryland's sales and use tax unless they have a physical location, or deliver services, in Maryland."). See, e.g., *Quad Graphics, Inc. v. N.C. Department of Revenue*, 383 N.C. 356, 375, 881 S.E.2d 810, 824 (2022) (noting that *Wayfair* sustained a tax on out-of-state business where the tax "only applied to sellers *delivering* more than $100,000 worth of goods or services *into the state* or making 200 or more separate transactions *for the delivery of goods or services into the state* on an annual basis"). (Emphasis added). As noted, dealers are free under federal law to make over-the-counter sales of long guns to Maryland residents in face-to-face transactions. Those firearms are carried back into Maryland by the *purchaser*, not shipped by the dealer. Such sales escape the 11% excise tax and the 12% sales tax entirely. And again, sales of ammunition and accessories need not be shipped into Maryland at all. While such purchasers may be subject to the use tax, enforcement will be an impossible task.

The limits established by *Wayfair* mean that the tax imposed on out-of-State retailers cannot level the playing field for Maryland dealers and retailers. There are just too many out-of-state dealers who are easily available to Maryland residents.[2] The number of retail outlets that sell ammunition or accessories is unknowable. Nor is it likely that the State will be able to identify such out-of-state dealers or retailers who ship into Maryland, much less secure their cooperation in administering the tax. Maryland tax collectors will likely be shown the door by out-of-State dealers.[3] In any event, as sales for delivery into Maryland approach 200,

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[2] According to the ATF, there are 3,302 FFLs in Pennsylvania alone of which the overwhelming majority are Type I retailers. See https://www.atf.gov/firearms/docs/undefined/0125-ffl-list-pennsylvaniatxt/download. The same ATF database shows that there are 2,014 dealers in Viriginia and 137 FFLs in Delaware.

[3] Suing out-of-State dealers in Maryland for tax collection is unlikely to be successful. The Supreme Court made clear in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, Solano Co., 480 U.S. 102, 110 (1987), that a State must show a "substantial connection" with the forum state and "[t]he 'substantial connection,' . . . must come about by an action of the defendant purposefully directed toward the forum State." "A defendant's 'awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of

savvy dealers will simply stop shipping into Maryland for the remainder of the year. The customer will then just purchase from another dealer or retailer who has made fewer than 200 sales into Maryland that year. The costs of securing any compliance at all will likely far outstrip the revenue generated.

We urge an unfavorable report.

Sincerely,

MICHAEL BURKE

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placing the product into the stream into an act purposefully directed toward the forum State.'" *B.D. by and through Myer v. Samsung SDI Co., Ltd.*, 91 F.4th 856, 861 (7th Cir. 2024), quoting *Asahi Metal*, 480 U.S. at 112. Mere "foreseeability" that product might end up in Maryland is thus insufficient. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).