No. ____

In the
Supreme Court of the United States

MARYLAND SHALL ISSUE, INC., *et al.*,
Petitioners,

v.

WES MOORE, in his official capacity as Governor of Maryland, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Maryland's Handgun Qualification License Requirement violates the Second Amendment.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners Atlantic Guns, Inc., Maryland Shall Issue, Inc., Deborah Kay Miller, and Susan Brancato Vizas were appellants in the court of appeals and plaintiffs in the district court.

Plaintiff-Respondents

Ana Sliveira and Christine Bunch were plaintiffs below.

Defendant-Respondents

Respondents are Wes Moore, in his official capacity as Governor of Maryland, and Colonel Roland L. Butler, in his official capacity as Secretary and Superintendent of Maryland State Police.

The court of appeals substituted Moore as a defendant after his election as Governor of Maryland. *Maryland Shall Issue, Inc. v. Moore*, No. 21-2017, Doc. 54 (4th Cir. Mar. 6, 2023). The original defendant sued in his official capacity as Governor of Maryland was Lawrence Hogan.

The district court substituted Colonel Woodrow W. Jones, III, as a defendant when he became the head of Maryland State Police. *Maryland Shall Issue, Inc. v. Hogan*, No. 1:16-cv-3311-ELH, Doc. 159 (D. Md. Aug. 12, 2021). The original defendant sued in his official capacity as Secretary and Superintendent of Maryland State Police was Colonel William M. Pallozzi. Butler is now substituted for Jones pursuant to Federal Rule of Appellate Procedure 43.

CORPORATE DISCLOSURE STATEMENT

Atlantic Guns, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Maryland Shall Issue, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

The remaining petitioners are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Maryland Shall Issue, Inc., et al. v. Moore, et al., Nos. 21-2017, 21-2053 (4th Cir.) (en banc opinion, issued August 23, 2024).

Maryland Shall Issue, Inc., et al. v. Moore, et al., Nos. 21-2017, 21-2053 (4th Cir.) (panel opinion, issued November 21, 2023).

Maryland Shall Issue, Inc., et al. v. Hogan, et al., No. 1:16-cv-3311-ELH (D. Md.) (memorandum opinion and order granting summary judgment to defendants, entered August 12, 2021; publicly available, redacted opinion was entered August 23, 2021).

Maryland Shall Issue, Inc., et al. v. Hogan, et al., No. 19-1469 (4th Cir.) (panel opinion, reversing district court's grant of summary judgment to defendants on Article III grounds, as amended, issued August 31, 2020).

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Just two years ago, this Court rejected the interest-balancing approach adopted by nearly every lower court, and emphatically held that the Second Amendment "demands a test rooted in the Second Amendment's text, as informed by history." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 19 (2022). Under that straightforward standard, laws that hinder or obstruct conduct protected by the Second Amendment are unconstitutional unless the government "affirmatively proves that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.*; *see United States v. Rahimi*, 602 U.S. ----, 144 S. Ct. 1889, 1898 (2024) (similar). But certain lower courts—determined to avoid applying *Bruen*'s holding—are disregarding this Court's precedents and straining the constitutional text to fit desired policy ends. That is exactly what the en banc Fourth Circuit did in this case to uphold Maryland's ahistorical and burdensome two-step licensing and registration scheme for acquisition and possession of a handgun for self-defense.

Maryland prohibits ordinary citizens from possessing a handgun by prohibiting acquisition of a handgun without first obtaining a "handgun qualification license" ("HQL"), which requires a trip to an electronic fingerprinting vendor, attendance at a half-day training course, and a trip to a range for live-fire of a handgun— all at their own expense—followed by a background check, all of which can take a month or longer. Md. Code, Pub. Safety § 5-117.1 ("HQL Requirement"). Even once armed with an HQL, however, one cannot acquire a handgun without first

satisfying Maryland's 77R Handgun Registration Requirement ("77R Registration"), which imposes another, redundant background check and yet another seven-day wait. Md. Code, Pub. Safety § 5-117, 5-118, 5-120 through 5-123. Compliance with the HQL Requirement places significant burdens on possession and acquisition of a handgun unknown at the Founding and is an outlier even in modern times. Failure to comply may result in fines, imprisonment, and the permanent loss of firearm rights. *Id.* §§ 5-101(g)(3), 5-144.

The Fourth Circuit upheld the HQL Requirement by misconstruing footnote 9 from *Bruen* about shall-issue carry license regimes and other dicta from *Heller* about presumptively lawful regulations, as well as drawing incorrect inferences from this Court's precedents. Effectively immunizing any shall-issue licensing regimes—whether for public carry, acquisition, or even mere possession—from *Bruen*'s historical-tradition analysis, the court declared that such regimes presumptively do not "infringe" conduct protected by the Second Amendment's plain text and trigger the Second Amendment's textual protections only if they are so abusive as to "effectively den[y]" a person the right to keep and bear arms.

The lower court first construed the HQL Requirement to be a shall-issue licensing regime, notwithstanding the redundant 77R Registration. Then, without any analysis of historical tradition, the court held that all shall-issue licensing regimes are presumptively constitutional and that the HQL Requirement is constitutional because it does not totally deny the right and is not abusive. Applying its new test, the court held that Maryland's HQL

Requirement "survive[d]" at "step one of the *Bruen* analysis" because Petitioners did not adequately show an "infringe[ment]" as a matter of plain text. It declined to apply the ordinary meaning of "infringe," which as a matter of text covers any regulation that hinders or obstructs protected conduct. It made no effort to ground the HQL Requirement in historical tradition. And it entirely ignored that Maryland conditions acquisition and possession of a handgun on the satisfaction of a burdensome two-step regime that conditions lawful possession as well as acquisition on completion of a six-to-eight-week process.

The Fourth Circuit's decision cannot be reconciled with this Court's precedents, and it deepens two circuit splits. As a matter of the Second Amendment's plain text, the term "infringe" presumptively prohibits any firearm restriction that "regulates [protected] conduct." *Rahimi*, 144 S. Ct. at 1897. That textual protection precludes any law that hinders or obstructs protected conduct—even if only temporarily—under the original public meaning of "infringe." Any limitation on the scope of that protection must come from "historical justification" rather than from the text. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The court below critically erred by misconstruing the text to require a total deprivation, distorting language in *Bruen* and *Heller* about restrictions not before this Court in either case and drawing incorrect inferences from those cases. Its decision sharply curtails the text-and-history standard and risks eviscerating Second Amendment rights.

The HQL Requirement is an unconstitutional outlier that the Founders never would have tolerated.

Petitioners have shown that Maryland's novel and extreme acquisition-and-possession licensing regime burdens protected conduct. And Maryland has not met its burden to prove that the HQL Requirement—step one of its two-step licensing scheme—is consistent with historical tradition.

Intervention is necessary to correct the Fourth Circuit's refusal to apply the Second Amendment's "text-and-history standard." *Bruen*, 597 U.S. at 39. It also is necessary to resolve deepening circuit splits regarding: (1) the plain-text meaning of "infringe"; and (2) whether unrelated language from this Court's Second Amendment cases permits lower courts to uphold firearm restrictions that fail to meet *Bruen*'s historical tradition standard.

OPINIONS BELOW

The Fourth Circuit's en banc opinion affirming the district court's judgment is not yet reported but is available at 2024 WL 3908548 and reproduced at App.1a. The Fourth Circuit's panel opinion reversing the district court's judgment is reported at 86 F.4th 1038 and reproduced at App.84a. The district court's publicly available, redacted opinion is reproduced at App.131a, and an amended version is published at 556 F. Supp. 3d 404.[1]

JURISDICTION

The en banc Fourth Circuit issued its opinion and judgment on August 23, 2024. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] The district court redacted only certain confidential, proprietary information not germane to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The relevant Maryland statutory provisions are reproduced at App.241a.

STATEMENT OF THE CASE

I. Legal Background

Since 1966, Maryland has successfully ensured that prohibited persons cannot acquire a handgun through administration of the 77R Registration. Md. Code Ann., Pub. Safety § 5-117. This acquisition-and-possession licensing regime is administered at the point of purchase or transfer, applies to all handgun transfers, and requires any Maryland citizen seeking to acquire a handgun to submit a 77R Registration application and wait seven days while Maryland State Police conducts an exhaustive background check across federal and state databases. *Id.* §§ 5-117, 5-118 through 5-123. While the 77R Registration itself has no historical analogue, it is not challenged here.

Maryland then layered the Handgun Qualification License Requirement on top of 77R Registration in 2013. Md. Code Ann., Pub. Safety § 5-117.1. With some exceptions not relevant here,[2]

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[2] An HQL is not required for law enforcement or the military; if the handgun is a bona fide loan; or to possess a handgun that was lawfully obtained prior to the law's 2013 enactment. Md. Code Ann., Pub. Safety § 5-117.1(a)–(c).

ordinary citizens seeking to purchase, rent, or receive—and possess—a handgun must obtain an HQL before even beginning 77R Registration. *Id.* § 5-117(b)(4). To obtain an HQL, a person must obtain at her own expense and submit: (1) an online application; (2) proof of completion of a four-hour qualifying safety course, which exacts a fee; (3) proof of completion of live-fire on one of Maryland's few firearm ranges for another fee; (4) a complete set of electronic fingerprints from a State-approved live-scan private vendor for yet another fee; and (5) an application fee. *Id.* § 5-117.1(d), (f), (g). After taking the time to attend a safety course, conduct live-fire at a range, obtain fingerprints, and then submit an online application, the person must then wait up to 30 days while Maryland State Police conducts a background check across federal and state databases. *Id.* § 5-117.1(d)(4). And once an HQL is obtained, the person must then undergo 77R Registration and wait another seven days while another, redundant background check is performed by the State Police using the same database before acquiring and possessing a handgun for self-defense or any other lawful purpose.

Neither acquiring an HQL nor completing 77R Registration entitles a Marylander to carry a handgun outside her home. The State has another set of laws regulating public carry, and anyone seeking to carry a handgun outside the home must separately obtain a "wear and carry permit," requiring among other things additional training and another background check. Md. Code Ann., Pub. Safety § 5-301 *et seq.* Maryland's carry-licensing laws are not challenged here.

II. Proceedings Below

A. Petitioners brought this suit challenging the HQL Requirement in 2016. The district court initially granted summary judgment to the State after finding that no plaintiff had Article III standing, but the Fourth Circuit reversed in relevant part. 971 F.3d 199 (4th Cir. 2020). The Fourth Circuit held that plaintiff Atlantic Guns, Inc. (a federal firearms licensee) demonstrated standing to seek redress of its economic injuries and to assert the Second Amendment rights of its customers to acquire and possess a handgun. *Id.* at 209–10. That panel declined to reach whether any other plaintiffs had standing to pursue a Second Amendment challenge, *id.* at 210, but it affirmed the district court's dismissal of the individual plaintiffs' and organizational-plaintiff Maryland Shall Issue, Inc.'s other claims, *id.* at 216–20. The court remanded for a decision on the merits of the Second Amendment facial challenge. *Id.* at 206.

The district court held on remand that the HQL Requirement "undoubtedly burden[s]" the right to bear arms because it "'make[s] it considerably more difficult for a person lawfully to acquire and keep a firearm . . . for the purpose of self-defense in the home.'" App.166a. But it then upheld that law under means-end scrutiny then mandated by the Fourth Circuit and later abrogated by *Bruen*. App.201a. The district court granted summary judgment to the State. App.204a.

B. The Fourth Circuit stayed appellate briefing while this Court considered *Bruen*, and the parties' post-*Bruen* panel briefing focused on the text-and-history standard reiterated in *Bruen*. A divided panel,

in an opinion authored by Judge Richardson, held that the HQL Requirement is facially unconstitutional. App.86a–87a.

The panel first held that the HQL Requirement burdens protected conduct—and triggers the State's historical-tradition burden—because it deprives citizens of the ability to acquire and possess a handgun unless and until they acquire an HQL. App.92a–99a. Explaining that the Second Amendment's text covers "burdens that fall short of total deprivations" and that nothing limits its reach to "laws that *permanently* deprive people of the ability to keep and bear arms," the panel concluded that Petitioner's "temporary deprivation" satisfies "*Bruen*'s first step." App.95a–97a.

Before turning to historical tradition, the panel gave four reasons why footnote 9 in *Bruen* about shall-issue carry license regimes did not bear on the textual inquiry or dispose of the historical analysis. App.97a–99a n.9 (discussing *Bruen*, 597 U.S. at 38 n.9). First, that *Bruen* listed some preconditions unlikely to survive review—*e.g.*, lengthy wait times, exorbitant fees, and other abusive practices—does not suggest that those are the only characteristics of unconstitutional licensing regimes. Second, *Bruen*'s text-and-history standard "wins every time" over dicta that might allow a court to evade the governing standard. Third, all footnote 9 suggests is that shall-issue carry license regimes might survive the historical scrutiny even though New York's may-issue carry permit regime did not. And fourth, even if footnote 9 were "stretch[ed]" to "bless most shall-issue *public* carry regimes, that says little about shall-issue regimes that limit *handgun possession altogether*."

App.98a. In other words, "even if *Bruen* green-lighted similar but *less burdensome restrictions*, like some shall-issue *carry* regimes, we are still obligated to independently compare *more burdensome* restrictions, like shall-issue *possession* regimes, against the historical record." App.98–99a.

After disposing of the State's and the dissent's pleas to elevate *Bruen*'s footnote 9 over its holding, the panel held that Maryland failed to show that the HQL Requirement is justified by historical tradition. App.99a. First, the panel observed that the State had conceded at panel argument that it had not identified a single Founding Era law that "required advance permission" before a citizen could purchase a firearm. App.99a (quoting oral argument). Then the panel rejected the State's historical arguments relying on modern laws prohibiting "dangerous" people from owning firearms and Founding Era militia training laws, because neither evidenced a relevantly similar tradition of regulation. App.100a–106a.

Senior Judge Keenan dissented and, relying on *Bruen*'s footnote 9, opined that the HQL Requirement does not "rise to the level of 'infringement' of the plaintiffs' Second Amendment rights" that would trigger the State's historical-tradition burden. App.126a.

C. The Fourth Circuit ordered rehearing en banc, supplemental briefing, and additional argument. On August 23, 2024, the en banc court affirmed the district court and upheld the HQL Requirement. The en banc majority held that Petitioners' challenge failed "at step one of the *Bruen* framework" because the Handgun Qualification

License does not "infringe" protected conduct. App.32a. The majority never analyzed historical tradition. App.32a.

The en banc majority opinion—written by Senior Judge Keenan, joined by nine others, and largely paralleling her panel dissent—held that Petitioners' challenge failed because the HQL Requirement does not implicate the Second Amendment's plain text. Purporting merely to interpret the Second Amendment's use of "infringe" within *Bruen*'s first step, the majority failed to address or apply the original public meaning of that plain text.

Elevating *Bruen*'s dicta above all other considerations, including *Bruen*'s holding, the majority held "that non-discretionary 'shall-issue' licensing laws are presumptively constitutional and generally do not 'infringe' the Second Amendment right to keep and bear arms under step one of the *Bruen* framework" unless they are particularly abusive. App.18a. It sought to support its novel reading of "infringe" through two rationales applying gloss to contradict the text's plain meaning. The court held that only total deprivations are protected by the text because it erroneously concluded that each of this Court's Second Amendment cases concerned laws that completely "banned or effectively banned the possession or carry of arms." App.14a. It compounded its misreading of "infringe" by misconstruing footnote 9 as "introduc[ing] a more nuanced consideration of the concept of 'infringement'" and rendering any and all shall-issue regimes generally immune from constitutional challenge. App.15a. And it sought further support in *Heller*'s dicta suggesting that other,

unrelated restrictions may be presumptively constitutional. App.17a.

The en banc majority grafted dicta from *Bruen* and *Heller* onto the textual analysis to create a novel barrier to relief from constitutional infringement. The court held that all shall-issue license regimes are constitutional as a matter of the Second Amendment's plain text unless "a plaintiff rebuts this presumption of constitutionality by showing that a 'shall-issue' licensing law effectively 'den[ies]' the right to keep and bear arms." App.18a. It then held that Petitioners failed to rebut the HQL Requirement's presumptive constitutionality. App.19a–32a. To reach that conclusion, the court held that temporary deprivations do not, without a showing of abuse, qualify as infringement. App.4a–5a, 18a. It found that Petitioners failed to make an adequate showing of "lengthy" wait times (failing to address the four-to-six-week delay for obtaining an HQL). And it rejected that the HQL Requirement was otherwise "abusive," ignoring the multiple inconvenient qualifying activities, multiple commercial fees, and other burdens of the HQL Requirement (which significantly reduced handgun purchases after enactment), as well as the additional unnecessary delays resulting from Maryland's redundant 77R Registration process. App.24a–32a.

In holding that infringement requires more than a "temporary deprivation," the en banc majority expressly declined to address the "historical sources" that inform the plain-text meaning of "infringe" because, in the majority's view, it was more prudent to give determinative weight to *Bruen*'s footnote 9 dicta. App.27a. It did not acknowledge the dissent's

admonition that the majority's unsupported reading of the Second Amendment's plain text will have rights-foreclosing impacts on all Second Amendment challenges—not just those at issue here. Six judges—concurring, dissenting, or both—disagreed with the majority's infringement holding.

Three judges concurred only in judgment. App.34a. They agreed with the dissent that the HQL Requirement triggers the Second Amendment's textual protections because "Maryland's law regulates acquiring a handgun, and the Second Amendment's text encompasses that conduct." App.34a. But those judges would have upheld the law as consistent with historical tradition. They misread footnote 9 as providing "insight into the degree of fit necessary for a shall-issue licensing regime to be relevantly similar to historical analogues," App.39a, and suggesting that "some shall-issue licensing regimes" are consistent with historical tradition, App.45a. Based on those faulty premises, those judges concluded that the HQL Requirement is relevantly similar to the historical tradition of prohibiting "certain dangerous individuals" from acquiring firearms. App.41a–45a.

Judge Niemeyer concurred in part, dissented in part, and concurred in the judgment. App.49a. He concluded that the HQL Requirement is constitutional solely "by virtue of the Supreme Court's explanation in footnote 9 of *Bruen*." App.55a. But he disagreed with the majority's "new 'infringement' analysis," which he observed "appears nowhere in *Bruen*." App.55a.

Judge Richardson dissented, joined by Judge Agee. He first explained that the HQL Requirement

triggers the Second Amendment's textual protections because it regulates the keeping and bearing of arms by the people, which is all that is needed to "establish[] a prima facie Second Amendment claim." App.58a. Judge Richardson then demonstrated that *Bruen*'s carry-license dicta cannot be elevated "over the mandatory text-and-history test" and, in any event, stands only for the proposition that "the Court did not decide the unpresented question of the constitutionality of shall-issue licensing regimes, suggesting only that the answer to that open matter may not look the same as the conclusion just reached." App.59a–65a. He explained—as a matter of original public meaning and precedent—that the Second Amendment's plain text covers "burdens that fell short of total deprivations," including those imposed by the HQL Requirement. App.65a–69a.

Turning to history, Judge Richardson explained why the State's historical arguments could not justify its licensing scheme. App.70a. Dangerous-persons prohibitions were not relevantly similar because they "targeted only people determined to be dangerous" or who were thought to lack Second Amendment rights, while Maryland's law "bars *everyone* from acquiring handguns until they can prove that they are *not* dangerous." App.73a–74a. The judges who concurred in the judgment erred by misreading *Bruen*'s dicta as pertaining to historical tradition and using that misreading to support an "assum[ption] that we must ignore the undeniable difference between the burdens on the right imposed by *ex ante* disarmament of all citizens and *ex post* punishment of a dangerous individual who poses a threat." App.75a–76a. And militia-training laws did not impose any burden on

acquisition or possession by militiamen or non-militia, and could not justify the HQL Requirement. App.81a. The HQL Requirement, Judge Richardson concluded, is unconstitutional.

Judge Richardson closed his dissent by observing that the Fourth Circuit has taken three post-*Bruen* cases en banc (*Bianchi*, *Price*, and this case) and, each time, created "a different threshold limit unsupported by the plain text and appearing nowhere in the Supreme Court's precedents" so as to "dispose[] of these challenges at the plain-text stage." App.82a. He then expressed his hope that the Fourth Circuit would "reverse course and assess firearm regulations against history and tradition," instead of "go[ing] out of its way to avoid applying the framework announced in *Bruen*." App.83a.

REASONS FOR GRANTING THE PETITION

Review by this Court is necessary to preserve the right to acquire and possess a handgun and rein in the Fourth Circuit's divergence from this Court's precedents and those of other circuits. The lower court did not follow "the standard for applying the Second Amendment" declared by this Court: "text, as informed by history." *Bruen*, 597 U.S. at 19, 24. It instead relied on dicta and an unsupported reading of the plain text to avoid analyzing the historical justifications for Maryland's HQL Requirement. Disturbingly, the court's creation of freestanding textual limitations to defeat Second Amendment challenges is not an exception here but its new normal—it did this three times in three en banc decisions in three weeks. *Bianchi v. Brown*, 111 F.4th 438, 453 (4th Cir. 2024) (en banc) (holding that semi-

automatic rifles are too militaristic to constitute bearable arms), *cert. pet. docketed sub nom. Snope v. Brown*, No. 24-203 (Aug. 23, 2024); *United States v. Price*, 111 F.4th 392, 397 (4th Cir. 2024) (en banc) (holding that a handgun ceases being a protected arm if its serial number has been removed, obliterated, or altered).

The decision below cannot be reconciled with this Court's Second Amendment standard and it deepens at least two circuit splits. Intervention is necessary to ensure that lower courts hold the government to its burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition." *Bruen*, 597 U.S. at 17.

I. The Decision Below Conflicts With This Court's Second Amendment Precedents.

The Fourth Circuit's decision that the HQL Requirement—the burdensome and time-consuming step one of its two-step licensing and registration scheme— does not even implicate the Second Amendment's protections is profoundly wrong, and its underlying rationales are dangerously misleading. The court below misconstrued the plain textual meaning of "infringe," drew unsupported negative inferences from this Court's precedents, and elevated dicta over the "straightforward" text-and-history standard. Neither the decision of the court below, nor its rationales, can be reconciled with this Court's jurisprudence.

A. The Fourth Circuit misconstrued "infringe" to constrict the Second Amendment's textual protections.

Because Maryland's HQL Requirement plainly hinders acquisition and possession of handguns—that is, keeping and bearing them—the Second Amendment's plain text presumptively prohibits it. The court below misconstrued the plain-text meaning of "infringe" to require a total deprivation of the right. That indefensible reading departs from the original public meaning of the Second Amendment's text and this Court's precedents applying both the Second Amendment and other constitutional rights. And it has no limiting principle: if "infringement" does not cover less-than-total deprivations in this context, then it never does.

This Court has repeatedly observed that the Second Amendment's text provides a clear command: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment "presumptively protects" any conduct that the "plain text covers," *Bruen*, 597 U.S. at 24, and any limitation on its protective scope must come from "historical justification," *Heller*, 554 U.S. at 635.

Bruen's textual analysis is not a demanding exercise, contrary to the Fourth Circuit's novel approach. This Court made quick work of the inquiry in *Bruen* through just a few paragraphs analyzing the "definition[s]" of the Second Amendment's terms. 597 U.S. at 32–33. This Court has made clear that the plain text incorporates the "normal and ordinary"

meaning of its terms as they would have been "known to ordinary citizens in the founding generation." *Heller*, 554 U.S. 576–77; *Bruen*, 597 U.S. at 20.

The textual inquiry turns here on the original public meaning of "infringe." Stated differently, it asks what degree of regulation is necessary to trigger the plain-text's presumptive protections. Under this Court's precedents, the Second Amendment's plain text presumptively bars any firearm law that hinders or obstructs the exercise of protected conduct, even if only temporarily.

Early American dictionaries and treatises demonstrate that the original public meaning of "infringe" includes even temporary denial of protected conduct. One need not look further than the same dictionaries that this Court used in *Heller*. 1 Samuel Johnson, Dictionary of the English Language 1101 (4th ed. 1773) (defining "infringe" as "[t]o destroy; to hinder"); *id.* at 1107 (defining "hinder" as "to impede"); 1 Noah Webster, American Dictionary of the English Language 110 (1828) (defining "infringe" as "[t]o destroy or hinder"); *id.* at 106–07 (defining "hinder" as "to obstruct" or "[t]o interpose obstacles or impediments").

Other historical sources cited with approval in *Heller*, 554 U.S. at 594–95, 612–13, confirm that less-than-total impediments trigger the Second Amendment's textual protections. 2 St. George Tucker, Blackstone's Commentaries 143 n.40 (1803) ("The right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree . . . ."); *Nunn v. State*, 1 Ga. 243, 251 (1846) ("The right of the whole people . .

. to keep and bear *arms* . . . shall not be *infringed*, curtailed, or broken in upon, in the smallest degree.").

This Court's Second Amendment cases provide further support. *Heller* rejected the argument that banning handguns was constitutional merely because "the possession of other firearms (*i.e.*, long guns) is allowed." 554 U.S. at 629. *Caetano* held that a ban on certain kinds of arms (*i.e.*, stun guns) could violate the Second Amendment even though other arms were available. *Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016). *Bruen* cast aside the interest-balancing notion—implicitly resurrected by the Fourth Circuit in this case—that the Second Amendment's protections depend upon "the severity of the law's burden on that right," 597 U.S. at 18–19 (citation omitted). *Bruen* itself involved a less-than-total ban on public carry: New York's licensing scheme allowed the plaintiff to "carry to and from work." *Id.* at 16. And *Bruen* observed that some "sensitive place" restrictions might be unconstitutional, even though those laws do not completely foreclose armed self-defense in public. *Id.* at 30–31. Most recently, this Court in *Rahimi* made clear that if the government "regulates arms-bearing conduct," then it "bears the burden to justify its regulation." *Rahimi*, 144 S. Ct. at 1897; *id.* at 1907 (Gorsuch, J., concurring) (asking whether the law "addresses individual conduct covered by the text"); *id.* at 1932 (Thomas, J., dissenting) (asking whether the law "target[s]" protected conduct). And *Rahimi* upheld a federal law that "temporarily disarmed" citizens based on historical tradition, which presupposes that the plain text prohibited that less-than-permanent deprivation. 144 S. Ct. at 1903.

The text of the Second Amendment makes no distinction between regulations totally and permanently forbidding protected conduct or laws imposing less-than-total or temporary hindrances. The acquisition and possession of a handgun is presumptively protected, and restriction of that conduct, whether temporary or permanent, can only be justified by historical tradition.

This textual construction is not unique to the Second Amendment. It proves true across many constitutional contexts. In the free speech context, "[i]t is of no moment that the [challenged] statute does not impose a complete prohibition"—both "burdens" on and "bans" of protected speech "must satisfy the same rigorous scrutiny." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000). Any regulation that "affect[s] speech" implicates the First Amendment and is "valid if [it] would have been permissible at the time of the founding." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223–24 (2021) (Thomas, J., concurring in the denial of certiorari). Similarly, "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just on outright prohibitions.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017). And a pat down is a "search" under the Fourth Amendment's text but is permissible because it is "reasonable." *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

As in these other contexts, laws that hinder the keeping or bearing of arms trigger the Second Amendment's textual protections, subject only to "historical justifications." *Heller*, 554 U.S. at 635. Concluding otherwise—as the Fourth Circuit did—

impermissibly relegates the Second Amendment to a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (citation omitted).

The Fourth Circuit made no effort to explain how its cramped reading of "infringe" comports with the term's historical meaning, expressly declining to consider "historical sources related to the . . . interpretation of the term 'infringe.'" App.27a. Nor did it explain how its construction of "infringe" applies only to so-called "shall-issue" licensing regimes without impacting all Second Amendment challenges.

On one hand, the decision could be read as misconstruing the plain text with the effect of eviscerating the amendment's protection in all contexts—for, as a matter of plain text, the term must always have "the same meaning." *Torres v. Madrid*, 592 U.S. 306, 332 (2021) (Gorsuch, J., dissenting). But that cramped interpretation of "infringe" is wrong as a matter of original public meaning. On the other hand, the decision could be read as giving an inconsistent meaning to "infringe" depending on the kind of law being challenged. That is equally wrong because assigning a single term within a constitutional amendment "two different meanings at the same time" is an "innovation [that] is no virtue." *Id.* Either way, the Fourth Circuit's interpretation must be rejected.

The Fourth Circuit's reading of "infringe" cannot be squared with either original public meaning, or this Court's precedents. As explained below, neither can its rationales for adopting such a narrow reading.

B. The Fourth Circuit relied on a mistaken negative inference.

The Fourth Circuit tried to support its incorrect reading of "infringe" by drawing a mistaken negative inference from this Court's Second Amendment cases. App.117a. The court below read *Heller*, *McDonald*, *Caetano*, *Bruen*, and *Rahimi* collectively as involving laws that "banned or effectively banned the possession or carry of arms," and then used that broad reading to draw a negative inference that only total bans are textually protected. App.14a. As explained above, the Fourth Circuit erred by reading those cases as involving total deprivations of the right to keep and bear arms. *Supra* at 18. *Heller's* handgun ban allowed long guns; *Caetano*'s stun gun ban allowed other arms; *Bruen*'s carry ban allowed carry to and from work; and *Rahimi* involved a temporary dispossession. But each of those laws "infringe[d]" exercise of the right as a matter of plain text.

The Fourth Circuit's rationale also suffers from the same flaw as the federal government's "responsible" person argument rejected in *Rahimi*. The mere fact that *Heller* and *Bruen* "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right" does not mean that only responsible citizens have the right to keep and bear arms. *Rahimi*, 144 S. Ct. at 1903; *id.* at 1944 (Thomas, J., dissenting). Similarly, just because the Court spoke of bans and prohibitions does not mean it construed them as total deprivations. This Court should reject the Fourth Circuit's strained effort to alter the original public meaning of the constitutional text based on an erroneous negative

inference about the laws assessed on discretionary review in other cases.

C. The Fourth Circuit misread *Bruen*'s footnote 9 to justify upholding the HQL Requirement under step one.

The Fourth Circuit's only other rationale for misreading "infringe"—and declaring all shall-issue licensing regimes presumptively constitutional—was its misreading of dicta from *Bruen* about shall-issue carry licenses and dicta from *Heller* about other presumptively lawful measures. It is true, of course, that this Court in *Bruen* made the modest and unremarkable observation that shall-issue carry license regimes are not necessarily unconstitutional merely because New York's may-issue regime was unconstitutional, 597 U.S. at 38 n.9, similar to its asides in *Heller* about regulations not addressed in that case, 554 U.S. at 625–27. But the Fourth Circuit's decision to uphold Maryland's HQL Requirement improperly elevated footnote 9 over *Bruen*'s holdings and the constitutional text.

1. The Fourth Circuit's reading of *Bruen*'s dicta ignores *Bruen*'s holding. The entire point of *Bruen* was that the Second Amendment "demands a test rooted in the [constitutional] text, as informed by history." 597 U.S. at 19. This Court has cautioned against taking "stray comments and stretch[ing] them beyond their context—all to justify an outcome inconsistent with this Court's reasoning and judgment," *Brown v. Davenport*, 596 U.S. 118, 141 (2022), and against "read[ing] a footnote" as "establish[ing] the general rule" for a case. *United States ex rel. Schutte v. SuperValu, Inc.*, 598 U.S. 739, 755 n.6 (2023). *Bruen*'s

text-and-history standard "wins every time" over dicta that could be read to support a different outcome. App.98a.

The court below erred by seizing upon *Bruen*'s dicta. Such dicta might provide "thoughtful advice," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2277 (2024) (Gorsuch, J., concurring), but it does not justify evading the standard set forth in *Bruen*, or radically curtailing the textual command of the Constitution itself.

Bruen held that when "later history contradicts what the text says, the text controls"; thus, the text controls *a fortiori* when it conflicts with dicta about issues not even before the Court. 597 U.S. at 36. This Court should reinforce *Bruen*'s holding and the plain text by rejecting the Fourth Circuit's patent misreading and misapplication of *Bruen*'s dicta.

2. In addition to improperly relying on footnote 9, the court below fundamentally misconstrued that dicta. Its reading of footnote 9 (as well as dicta from *Heller*) is wrong several times over.

First, read in its proper context, footnote 9 merely observes that shall-issue carry licensing regimes are not necessarily unconstitutional just because New York's may-issue regime violated the Second Amendment. Shall-issue carry regimes were not before the Court. *Bruen* itself clarified that it did not "undertake an exhaustive historical analysis." *Id.* at 31 (quoting *Heller*, 554 U.S. at 626). Further consideration of the "historical justification" for other firearm regulations was again reserved for later cases. *Heller*, 554 U.S. at 635.

Fairly read, *Bruen*'s dicta just "invited courts to independently assess the pedigree of shall-issue licensing regimes against the historical record." App.62a. And that reflected the time-honored need for courts to have an "open mind to the possibility that different facts and different legal arguments might dictate different outcomes in later disputes." *Loper Bright*, 144 S. Ct. at 2277 (Gorsuch, J., concurring). It did not create a new and different framework of scrutiny for any and all shall-issue licensing regimes that conflicts with the text-and-history standard that the Second Amendment demands. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (explaining that a court's views "beyond the case . . . may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision"). By construing *Bruen*'s dicta as presumptively foreclosing Petitioners' challenge, the court below impermissibly "stretch[ed] dicta beyond their context—all to justify an outcome inconsistent with this Court's reasoning and judgment." *Brown*, 596 U.S. at 141.

Second, nothing in *Bruen*'s dicta can fairly be read as suggesting that any and all shall-issue licensing regimes are presumptively constitutional and almost never implicate the Second Amendment's plain text. That footnote made no mention of the textual inquiry or the word "infringe." *Bruen*, 597 U.S. at 38 n.9. Rather, it came after this Court had "turn[ed] to [the] historical evidence," was itself appended to a sentence about historical tradition, and analyzed differences in burdens imposed by shall-issue and may-issue carry-licensing regimes—a quintessential historical inquiry. The Fourth Circuit shoehorned dicta that, at best, concerned a specific

historical inquiry, irrelevant here, into the historical prong of *Bruen*'s standard. That subversion allowed the court below to sidestep the undisputed absence of historical justifications for the HQL Requirement.

Third, footnote 9 cannot be read as rubber-stamping shall-issue licensing for possession, whatever its relevance to public carry. As Judge Richardson put it, "even if *Bruen* green-lighted similar but *less burdensome restrictions*, like some shall-issue *carry* regimes, we are still obligated to independently compare *more* burdensome restrictions, like shall-issue *possession* regimes, against the historical record." App.98a–99a. The Fourth Circuit rejected this argument by misapplying *Bruen*'s statement that "[n]othing in the Second Amendment's text draws a home/public distinction." App.19a. But that is a distinction relevant only to the text, not history.

For historical tradition, there is a clear difference between possession in the home and carry in public. For example, unlike possession, public carry "has traditionally been subject to well-defined restrictions." *Bruen*, 597 U.S. at 38. That difference is precisely why *Heller* (possession) and *Bruen* (public carry) analyzed different sets of history. The Fourth Circuit's failure to respect the critical historical differences between the possession prohibited by the HQL Requirement and the carry involved in *Bruen's* dicta should not go uncorrected.

And fourth, the Fourth Circuit's misreading and misapplication of dicta from *Bruen* and *Heller* reflects a disturbing lower-court trend of grafting atextual and ahistorical presumptions onto the governing legal standard to avoid applying *Bruen*'s

historical tradition standard, just as these same courts had grafted interest balancing onto *Heller*'s standard, which practice this Court corrected in *Bruen*. The Fourth Circuit principally relied on *Bruen*'s dicta to exempt shall-issue licensing regimes from the text-and-history standard—and, indeed, to alter the meaning of the constitutional text itself. App.13a–19a. And it justified doing so because it (along with other courts) has relied on dicta from *Heller* about "presumptively lawful" measures to reject "myriad constitutional challenges." App.17a.

But there is no support in this Court's cases for displacing text-and-history scrutiny with mere presumptions cobbled together from disparate dicta. *Heller* expressly reserved "expound[ing] upon the historical justifications" of any exceptions to the right for future cases. 554 U.S. at 635; *see also United States v. Williams*, 113 F.4th 637, 648 (6th Cir. 2024) (Thapar, J.) ("applying *Heller*'s dicta uncritically would be at odds with *Heller* itself, which stated courts would need to 'expound upon the historical justifications' for firearm-possession restrictions when the need arose."). *Bruen* made clear that text and history govern all Second Amendment challenges, 597 U.S. at 24, and relied on "the historical record" even when discussing sensitive places, *id.* at 30. And *Rahimi* doubled down on text and history, not presumptions to avoid that standard. 144 S. Ct. at 1898–99.

This Court should intervene to prevent lower courts from again "replac[ing] the Constitution's text with a new set of judge-made rules," *NLRB v. Noel Canning*, 573 U.S. 513, 614 (2014) (Scalia, J., concurring in the judgment), as they did in the post-

Heller, pre-*Bruen* period. As this Court observed in *Rahimi* when rejecting that a person "may be disarmed simply because he is not 'responsible,'" 144 S. Ct. at 1903, the lower courts are misusing language from *Heller* and *Bruen* to swallow the Second Amendment standard prescribed in those cases. That trend must be stopped to prevent relegation of the Second Amendment to a permanent "second-class right." *Bruen*, 597 U.S. at 70 (citation omitted).

II. The Decision Below Deepens At Least Two Circuit Splits.

The Fourth Circuit's decision deepens at least two circuit splits on: (1) when a challenged law "infringe[s]" protected conduct under the Second Amendment's plain text; and (2) whether dicta from this Court's Second Amendment cases permit lower courts to uphold firearm laws without regard to text and history.

A. Lower courts are divided as to the meaning of "infringe" for purposes of the textual inquiry.

Even after *Bruen* declared that the Second Amendment's protections do not depend on "the severity of the law's burden on that right," 597 U.S. at 18 (citation omitted), lower courts surprisingly still struggle to discern when a law sufficiently "infringe[s]" protected conduct within the textual analysis.

The Third Circuit has followed *Bruen* and concluded that, in addition to laws "banning gun ownership," the Second Amendment "also forbids lesser violations that hinder a person's ability to hold

on to his guns." *Frein v. Penn. State Police*, 47 F.4th 247, 254 (3d Cir. 2022) (citations, alteration, and quotation marks omitted). *Frein* involved a challenge to officials seizing firearms belonging to the parents of a man charged with several murders. *Id.* at 250. *Frein* correctly held that "the government 'infringed' on the parents' right to 'keep' their arms when it began holding on to the guns indefinitely," even though they could acquire and keep other firearms. *Id.* at 254. It reached that conclusion by faithfully applying the original public meaning of "infringe" and this Court's textual analysis in the First Amendment context. *Id.*

But other lower courts, including the court below, have created exceptions to the plain-text meaning of "infringe." In *McRorey v. Garland*, 99 F.4th 831 (5th Cir. 2024), the Fifth Circuit upheld a federal law that imposed an expanded background check for 18-to-20-year-olds and mandated a three-to-ten-day waiting period. *McRorey* held that under *Bruen*'s footnote 9, the challenged laws "are presumptively lawful" and do not burden conduct "covered by the plain text of the amendment" absent an additional abuse. *Id.* at 838–39. *McRorey* made no mention of the original public understanding of "infringe," and even suggested that the Second Amendment's text does not protect "purchase—let alone without a background check." *See id.* at 838. As with the decision below, the Fifth Circuit's decision in *McRorey* cannot be reconciled with the plain text of the Second Amendment, this Court's Second Amendment precedents generally, or a fair reading of footnote 9.

B. Lower courts are divided as to whether this Court's dicta render some restrictions presumptively lawful.

Lower courts are also divided on whether this Court's dicta render some restrictions presumptively lawful and generally immune from text-and-history scrutiny.

Some lower courts have correctly held that the mode of analysis set forth in *Bruen* prohibits treating any firearm restrictions as presumptively constitutional. Most recently, the Sixth Circuit explained that *Bruen*'s command to apply the text-and-history standard forbids "applying *Heller*'s dicta uncritically," *Williams*, 113 F.4th at 648 (Thapar, J.), which applies equally to footnote 9's discussion of shall-issue carry license regimes. The Seventh Circuit has likewise rejected the government's attempt to misapply dicta from *Heller* and *Bruen* to "sidestep" text-and-history scrutiny. *Atkinson v. Garland*, 70 F.4th 1018, 1023 (7th Cir. 2023). And a Ninth Circuit panel—before the court vacated that decision and granted rehearing en banc—announced that "[s]imply repeating *Heller*'s language about the presumptive lawfulness of felon firearm bans will no longer do after *Bruen*." *United States v. Duarte*, 101 F.4th 657, 668 (9th Cir. 2024) (cleaned up), *vacated, reh'g en banc granted*, 108 F.4th 786 (9th Cir. 2024) (mem.).

Other lower courts continue to rely on dicta from *Bruen* or *Heller* to create exceptions to the text-and-history standard. The court below relied on dicta from *Bruen* and *Heller* to hold that shall-issue licensing regimes are presumptively constitutional.

App.15a–18a. The Fifth Circuit in *McRorey* read *Bruen*'s dicta as similarly foreclosing review of most shall-issue licensing regimes. 99 F.4th at 838–39. The Second Circuit construed *Bruen* as "approv[ing] of shall-issue licensing regimes." *Antonyuk v. Chiumento*, 89 F.4th 271, 314–15 & n.24 (2d Cir. 2023), *vacated sub nom. Antonyuk v. James*, 144 S. Ct. 2709 (2024). The Tenth Circuit stated that "*Bruen* apparently approved the constitutionality of regulations requiring criminal background checks" and "preserve[d] 'shall-issue' regimes." *Vincent v. Garland*, 80 F.4th 1197, 1201–02 (10th Cir. 2023), *vacated*, 144 S. Ct. 2708 (2024). And still others continue to rely on *Heller*'s dicta when analyzing the lawfulness of statutes like the felon-in-possession ban. *See, e.g.*, *United States v. Gay*, 98 F.4th 843, 846–47 (9th Cir. 2024); *United States v. Dubois*, 94 F.4th 1284, 1292–93 (11th Cir. 2024) (rejecting that *Bruen* abrogated caselaw upholding felon-in-possession ban as "presumptively constitutional").

By relying on dicta to create presumptions of constitutionality exempt from faithful text-and-history scrutiny, lower courts defy what the Constitution "demands": "a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 597 U.S. at 19. This Court should grant certiorari to forestall further deviation from *Bruen*'s straightforward standard.

III. Maryland's HQL Requirement Violates The Second Amendment.

Properly applying *Bruen*'s governing text-and-history standard demonstrates that Maryland's HQL Requirement is facially unconstitutional. As the

district court held, the HQL Requirement "undoubtedly burden[s]" the right to bear arms because it "'make[s] it considerably more difficult for a person lawfully to acquire and keep a firearm . . . for the purpose of self-defense in the home.'" *Supra* at 7. The State conceded at panel argument that it had not identified a single Founding Era law that "required advance permission" before a citizen could purchase a firearm. *Supra* at 9. In the absence of historical precedent, a law burdening the right to acquire and possess a handgun cannot stand.

A. The plain text covers Petitioners' proposed conduct.

Maryland's HQL Requirement "infringes" textually protected conduct because it prohibits all Maryland citizens (the people) from acquiring or possessing (keeping and bearing) handguns (arms) without first obtaining an HQL.

The State has not disputed that the HQL Requirement applies to "the people." *Bruen*, 597 U.S. at 70 ("all Americans"); *Heller*, 554 U.S. at 580 ("national community"). Nor has it disputed that handguns are covered "Arms," *Bruen*, 597 U.S. at 37, or that the Second Amendment guarantees a "right to acquire" arms for self-defense, *see Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment) (explaining that constitutional guarantees "implicitly protect those closely related acts necessary to their exercise"); *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting) (similar). The only textual element Maryland

contested was infringement. But the HQL Requirement infringes conduct within the scope of the text because it "make[s] it considerably more difficult for a person lawfully to acquire and keep a firearm" *Supra* at 7.

The Second Amendment's text presumptively protects the right to acquire and possess a handgun without enduring Maryland's burdensome and time-consuming HQL Requirement. The HQL Requirement is unconstitutional unless Maryland "demonstrates that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. It has not.

B. Maryland has not demonstrated a justifying historical tradition.

The HQL Requirement suffers a historical flaw from the starting line: Maryland conceded that it has not found any Founding Era evidence of a generally applicable licensing scheme requiring everyone to obtain a license (or permission) before purchasing a firearm. App.99a. Because early American governments knew how to—and did—enact licensing requirements for some groups for other purposes, and firearm violence has existed since the Founding, the lack of any similar firearm licensing scheme "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26. Maryland's historical evidence cannot overcome this absence of comparable early American regulation.

Prior to its fatal concession, Maryland offered two historical analogues to defend the HQL Requirement: (1) laws prohibiting dangerous persons

and groups from possessing weapons; and (2) militia-training laws. Neither demonstrates a relevantly similar tradition of regulation. Maryland's reliance on laws individually disarming "dangerous" persons—such as going-armed laws and surety regimes—fails under a straightforward application of *Bruen* and *Rahimi*. *Bruen* rejected reliance on both analogues for broad, categorical restrictions on public carry, 597 U.S. at 55–60 (surety); *id.* at 50 (going-armed laws), and *Rahimi* made clear that such laws cannot justify modern laws that "broadly restrict arms use by the public generally," 144 S. Ct. at 1901.

The HQL Requirement resembles the categorical prohibition struck down in *Bruen*, not the individualized and temporary disqualification upheld in *Rahimi*. None of these individualized historical laws justifies the HQL Requirement because none imposed a comparable categorical burden of *ex ante* disarmament on all "the people," without a prior individualized determination of dangerousness. *See id.* at 1898 (explaining that a law "may not be compatible with the right if it does so to an extent beyond what was done at the founding"); *see also Bruen*, 597 U.S. at 29 (explaining the "central" requirements that analogues evidence "a comparable burden on the right of armed self-defense" that is "comparably justified").

Nor do laws disarming certain disfavored groups justify Maryland's generally applicable licensing regime. Class-based bans disarmed certain groups based on race, religion, or political affiliation. App.76a–80a. These restrictions would be unconstitutional today. *Bruen*, 597 U.S. at 58 (warning against reliance on statutes where

prosecutions involved only "black defendants who may have been targeted for selective or pretextual enforcement"). They were enacted with noncomparable justifications: they disarmed classes of person who were considered categorically dangerous and then-understood to lack constitutional rights. And they do not impose a burden comparable to the HQL Requirement, which preemptively disarms "the public generally." *Rahimi*, 144 S. Ct. at 1901.

Finally, early American militia-training laws cannot support the HQL Requirement because none imposed any burden on acquisition or possession by militiamen, much less on non-militia. App.80a–82a. To the contrary, Founding Era militia laws required militiamen regardless of age to acquire and possess firearms. *Id.*

The HQL Requirement is fatally unsupported by historical tradition. It is even an outlier by modern standards.[3] And obtaining an HQL does nothing more than allow the citizen to begin the 77R Registration process. There is no relevantly historical tradition of requiring all citizens to undergo one licensing process to obtain nothing but permission to undergo still

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[3] As far as Petitioners are aware, only 14 states have a permit-to-purchase regime. Only three of these (Oregon, Hawaii, and Delaware) require a background check, fingerprinting, classroom and shooting training, and live-fire on a range in order to exercise the right to possess a handgun. Del. Code Ann. § 1448D (effective May 16, 2024); Haw. Rev. Stat. Ann. § 134-2; Oregon Ballot Measure 114 (approved by voters in November 2022). Oregon's measure was permanently enjoined by an Oregon state court as violating the state's constitutional right to keep and bear arms and is on appeal. *Arnold, et al. v. Kotek*, CA A183242 (Or. Ct. App.).

another registration process imposing still more delay before acquiring and possessing a handgun.

Even if *Bruen*'s footnote 9 had some application to acquisition and possession for self-defense inside the home (which it does not), the HQL Requirement is still unconstitutional. Unnecessary restrictions on the exercise of Second Amendment rights (such as lengthy wait times, exorbitant fees, and other abusive practices) are unconstitutional. *Bruen*, 597 U.S. at 38 n.9; *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943) (holding fee "for the enjoyment of a right" unconstitutional unless limited "to defray[ing] the expenses of policing the activities").

The HQL Requirement's burdens are abusive and unnecessary—it imposes inconvenient and expensive classroom training, live-fire on a range, fingerprinting, multiple commercial and governmental fees, and a month or more delay for a background check, followed by another seven-day delay for another, nearly identical background check for 77R Registration, which since 1966 has ensured that prohibited persons cannot obtain handguns.

The Court should grant certiorari and hold that Maryland's HQL Requirement is unconstitutional.

IV. This Case Is Exceptionally Important.

Rather than respecting this Court's decisions in *Heller* and *Bruen*, many states have opted instead for defiance. Some like Maryland and New York have taken *Bruen*'s dicta about "sensitive places" and enacted legislation that deems scores of locations "sensitive" to prohibit armed self-defense as widely as possible. *See, e.g.*, *Kipke v. Moore*, Nos. 1:23-cv-1293,

1:23-cv-1295, 2024 WL 3638025 (D. Md. Aug. 2, 2024) (Maryland), *appeals filed*, Nos. 24-1799, 24-1827, 24-1834 (4th Cir.); *Wolford v. Lopez*, --- F.4th ----, 2024 WL 4097462 (9th Cir. Sept. 6, 2024) (California and Hawaii); *Antonyuk*, 89 F.4th at 290–91 (New York). Others have responded by banning hundreds or thousands of different kinds of firearms. *See, e.g.*, *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 2491 (2024) (mem.). And some, like Maryland with its HQL Requirement, have enacted elaborate schemes to discourage citizens from acquiring handguns to possess in the home. *Supra* note 3.

Meanwhile, some lower courts appear all too ready to concoct convoluted, rights-eviscerating evasions of *Bruen*'s standard to uphold wayward state laws. The Fourth Circuit leads that charge, contorting this Court's dicta and reading restrictions into the Second Amendment's text to avoid conducting the rigorous scrutiny of historical tradition. Judge Richardson captured this issue in his en banc dissent: "Three times, our en banc Court has considered Second Amendment challenges in *Bruen*'s aftermath. And three times, our Court has disposed of these challenges at the plain-text stage, each time relying on a different threshold limit unsupported by the plain text and appearing nowhere in the Supreme Court's precedent." App.82a–83a. As for this case, the Fourth Circuit's indefensible reading of "infringe" undoubtedly will taint not just shall-issue challenges but Second Amendment challenges in the Fourth Circuit and elsewhere.

This Court should grant certiorari to prevent lower courts from reading exception-upon-exception

into *Bruen*'s standard—before that standard exists no more. The constitution "demands a test rooted in the Second Amendment's text, as informed by history," *Bruen*, 597 U.S. at 19, not tests rooted in dicta and whatever constructions of text best fit lower courts' desired policy ends. This Court should once again say so.

CONCLUSION

Petitioners respectfully request this Court grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

ON REHEARING EN BANC

United States Court of Appeals
for the Fourth Circuit

21-2017

MARYLAND SHALL ISSUE, INC., for itself and its members; ATLANTIC GUNS, INC.; DEBORAH KAY MILLER; SUSAN BRANCATO VIZAS,

Plaintiffs–Appellants,

and

ANA SLIVEIRA; CHRISTINE BUNCH,

Plaintiffs,

v.

WES MOORE, in his capacity as Governor of Maryland; WOODROW W. JONES, III, Colonel,

Defendants–Appellees.

FIREARMS POLICY COALITION, INC.; FPC ACTION FOUNDATION; INDEPENDENCE INSTITUTE; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; GUN OWNERS OF CALIFORNIA; HELLER FOUNDATION; VIRGINIA CITIZENS DEFENSE LEAGUE; GRASS ROOTS NORTH CAROLINA; RIGHTS WATCH INTERNATIONAL; TENNESSEE FIREARMS ASSOCIATION; TENNESSEE FIREARMS FOUNDATION; AMERICA S FUTURE; U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE

FUND; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND,

Amici Supporting Appellant.

BRADY CENTER TO PREVENT GUN VIOLENCE; GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE; MARCH FOR OUR LIVES; MARYLANDERS TO PREVENT GUN VIOLENCE, INC.; EVERYTOWN FOR GUN SAFETY,

Amici Supporting Appellee.

21-2053

MARYLAND SHALL ISSUE, INC.; ATLANTIC GUNS, INC.; DEBORAH KAY MILLER; SUSAN BRANCATO VIZAS,

Plaintiffs - Appellees,

and

ANA SLIVEIRA; CHRISTINE BUNCH,

Plaintiffs,

v.

WES MOORE, in his capacity as Governor of Maryland; WOODROW W. JONES, III, Colonel,

Defendants–Appellants.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Ellen Lipton Hollander, Senior District Judge. (1:16-cv-03311-ELH)

Argued: March 21, 2024
Decided: August 23, 2024

Before DIAZ, Chief Judge, and WILKINSON, NIEMEYER, KING, GREGORY, AGEE, WYNN, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, RUSHING, HEYTENS, BENJAMIN, and BERNER, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Keenan wrote the opinion, in which Chief Judge Diaz and Judges Wilkinson, King, Wynn, Thacker, Harris, Heytens, Benjamin, and Berner joined. Judge Rushing wrote an opinion concurring in the judgment, in which Judge Gregory and Judge Quattlebaum joined. Judge Niemeyer wrote an opinion concurring in part, dissenting in part, and concurring in the judgment. Judge Richardson wrote a dissenting opinion, in which Judge Agee joined.

BARBARA MILANO KEENAN, Senior Circuit Judge:

In the aftermath of mass shootings across the country, the Maryland General Assembly passed the Firearm Safety Act of 2013 (FSA). Among other

measures,[1] the FSA contains a statutory licensing regime for handgun purchasers to ensure comprehensive background checks, to prevent straw purchases, and to aid in the safe and legal use of firearms (the handgun qualification statute, or the HQL statute). Under this law, the state of Maryland does not retain any discretion to deny a "handgun qualification license" to applicants who meet the statutory requirements. This type of law is commonly referred to as a "shall-issue" licensing law, as opposed to a "may-issue" licensing law in which the state retains some discretion in deciding whether to issue a firearm license to an applicant. The plaintiffs in this appeal assert a facial challenge to the constitutionality of the "shall-issue" HQL statute, chiefly contending that any "temporary deprivation" of the ability to purchase a handgun violates the Second Amendment right to keep and bear arms.[2]

This case requires us to apply the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). We conclude that the Supreme Court in Bruen foreclosed the plaintiffs' "temporary deprivation" argument by stating that, despite some delay occasioned by "shall-issue" permit processes, this type of licensing law is presumptively

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[1] We have rejected constitutional challenges to the FSA's assault weapons ban in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), and, more recently, in *Bianchi v. Brown*, No. 21-1255, 2024 WL 3666180 (4th Cir. Aug. 6, 2024) (en banc).

[2] The Second Amendment is made applicable to the states through the Fourteenth Amendment. *See McDonald v. Chicago*, 561 U.S. 742, 791 (2010). For simplicity, this opinion refers only to the Second Amendment.

constitutional because it operates merely to ensure that individuals seeking to exercise their Second Amendment rights are "law-abiding" persons. *Bruen*, 597 U.S. at 38 n.9. We hold that the plaintiffs have failed to rebut this presumption of constitutionality afforded to "shall-issue" licensing laws like the handgun qualification statute. So the plaintiffs' challenge to the HQL statute fails, and we affirm the district court's award of summary judgment to the state of Maryland.

I.

A.

Under the HQL statute, most Maryland residents must obtain a handgun qualification license before purchasing a handgun.[3] *See* Md. Code Pub. Safety § 5-117.1. To obtain this license, an individual must be at least 21 years old, be a Maryland resident, complete a firearms safety training course, and not be barred by federal or state law from purchasing or possessing a handgun. *Id*. § 5-117.1(d).

The firearms safety training course must include at least four hours of instruction and be approved by the Secretary of the Maryland State Police (the Secretary). *Id*. § 5-117.1(d)(3). The training course has two parts: (1) classroom instruction on "[s]tate firearm law,"

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[3] Certain categories of persons are exempt from the HQL statute. These categories include licensed firearms manufacturers, current or retired law enforcement officers in good standing, current or retired members of the United States armed forces or the National Guard, and people buying, renting, or receiving certain types of antique firearms. Md. Code Pub. Safety § 5-117.1(a).

"home firearm safety," and "handgun mechanisms and operation"; and (2) a "firearms orientation" that "demonstrates" the applicant's "safe operation and handling of a firearm."[4] *Id*.

The statute requires that individuals applying for a handgun qualification license submit (1) a set of their fingerprints, (2) proof that they have satisfied the training requirement, (3) a statement that they are not prohibited by law from possessing a handgun, and (4) a $50 application fee to cover the costs of administering the program. *Id*. §§ 5-117.1(f), (g). The Secretary reviews each application and submits the applicant's fingerprints for a state and national background check. *Id*. § 5-117.1(f). Within 30 days of receiving a properly completed application, the Secretary "shall issue" a handgun qualification license to any applicant who has satisfied the statutory requirements. *Id*. §§ 5-117.1(d), (h). After the Secretary issues the applicant a handgun qualification license, that individual may select and apply to purchase a handgun. *See infra* Part II.B.ii.3 (discussing the "77R process" for handgun purchases).

Handgun qualification licenses remain valid for 10 years, and individuals may renew their licenses for additional 10-year periods as long as they retain the qualifications for issuance of the license and pay a $20

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[4] The training requirement does not apply to qualified handgun instructors, honorably discharged members of the United States armed forces or National Guard, armored-car-company employees holding a different handgun permit, individuals who have completed certain other firearms training courses, and individuals who lawfully own a regulated firearm. *Id*. § 5-117.1(e).

fee to cover program administration costs. Md. Code Pub. Safety §§ 5-117.1(i), (j)(1). Applicants seeking renewal of their handgun qualification licenses are not required to satisfy more training requirements or to submit another set of their fingerprints. *Id.* § 5-117.1(j)(2).

B.

In 2016, Maryland Shall Issue, Inc., Atlantic Guns, Inc., Deborah Kay Miller, and Susan Brancato Vizas (the plaintiffs)[5] sued the Governor of Maryland and the Secretary and Superintendent of the Maryland State Police (the state, or Maryland), alleging that the HQL statute violates their Second Amendment rights.[6] The parties filed cross-motions for summary judgment and, in August 2021, the district court issued a decision analyzing the constitutionality of the HQL statute. *Maryland Shall Issue, Inc. v. Hogan*, 566 F. Supp. 3d 404 (D. Md. 2021). At that time, our two-step, means-end framework for Second Amendment challenges required courts first to evaluate whether the challenged regulation imposed a burden "on conduct falling within the scope of the Second Amendment's guarantee." *See Bianchi v. Brown*, No.

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[5] Two other individual plaintiffs brought claims that were dismissed with prejudice.

[6] The district court initially dismissed the plaintiffs' claims for lack of Article III standing. *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 209 (4th Cir. 2020), as amended (Aug. 31, 2020). On appeal, we affirmed the dismissal of the plaintiffs' claims under Maryland law and the Fourteenth Amendment. *Id.* at 218–19. For the plaintiffs' Second Amendment claim, however, we held that Atlantic Guns had standing and remanded that claim for a decision on the merits. *Id.* at 216.

21-1255, 2024 WL 3666180, at *4 (4th Cir. Aug. 6, 2024) (en banc) (quoting *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (en banc)). If the challenged law imposed such a burden, the reviewing court then was required to apply either intermediate or strict scrutiny, "depend[ing] on the nature of the conduct being regulated and the degree to which the challenged law burden[ed] the right." *Id.* (quoting *Kolbe*, 849 F.3d at 133).

Applying this framework, the district court held that the HQL statute was subject to intermediate scrutiny, and that the government had shown that the HQL statute was "reasonably adapted to a substantial governmental interest." *Maryland Shall Issue*, 566 F. Supp. 3d at 421, 422, 426, 440. The district court awarded summary judgment to Maryland, *id.* at 440, and the plaintiffs later filed the present appeal, which we held in abeyance pending the Supreme Court's June 2022 decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

C.

In *Bruen*, the Supreme Court addressed a Second Amendment challenge to a New York state statute known as the "Sullivan Law." 597 U.S. at 11. Under that "public carry" law, any person who sought a license to carry a firearm for self-defense outside that person's home or place of business had to prove first that "proper cause exist[ed]" to issue the license (the proper-cause requirement). *Id.* at 12. Although "proper cause" was not defined by the statute, New York courts had interpreted the phrase as requiring "a special need for self-protection distinguishable from that of the general community." *Id.* (citation omitted). The

Supreme Court explained that under this type of "may-issue" licensing regime, "authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." *Id*. at 14. Each of the petitioners in *Bruen* had applied for and had been denied an unrestricted license to carry a handgun in public for general self-defense. *Id*. at 15–16.

In assessing whether New York's proper-cause requirement violated the Second Amendment, the Supreme Court rejected the means-based analysis previously applied by our court and around which many Courts of Appeals "ha[d] coalesced." *Id*. at 17. Instead, the Court established a new, two-step framework for evaluating Second Amendment challenges. At the first step of this framework, courts look to "the text of the Second Amendment to see if it encompasses the desired conduct at issue" (step one). *See Bianchi*, 2024 WL 3666180, at *5 (citing *Bruen*, 597 U.S. at 24); *United States v. Price*, No. 22-4609, 2024 WL 3665400, at *5 (4th Cir. Aug. 6, 2024) (en banc) (identifying several textual limitations on the scope of the Second Amendment right (citing *Bruen*, 597 U.S. at 31–32)). "If the text does not extend to the desired conduct, that conduct falls outside the ambit of the Second Amendment, and the government may regulate it." *Bianchi*, 2024 WL 3666180, at *5.

If the text does cover the conduct at issue, "the burden shifts to the government to 'justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation'" (step two). *Id*. (quoting *Bruen*, 597 U.S. at 24). At this

second step, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024); *see Bianchi*, 2024 WL 3666180, at *18 ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" (quoting *Rahimi*, 144 S. Ct. at 1898)). If the government satisfies its burden at this step, then the regulation may be enforced consistent with the Second Amendment. *See Rahimi*, 144 S. Ct. at 1902–03. But if the government does not, then the regulation is not constitutionally permissible. *See Bruen*, 597 U.S. at 34.

Applying this framework to New York's proper-cause requirement, the Supreme Court held that the plain text of the Second Amendment covered the plaintiffs' desired conduct, and that the government had not satisfied its burden under step two. *Bruen*, 597 U.S. at 33, 38–39. The Court thus held that the "proper-cause" requirement of the New York law was unconstitutional. *Id*. at 71.

But the Court did not limit its discussion in Bruen to the proper-cause requirement challenged by the petitioners or to other "may-issue" licensing regimes. Instead, the Court discussed in dicta the presumptive lawfulness of what the Court referred to as "shall-issue" licensing laws. *Id*. at 38 n.9. The Court explained:

> To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue" licensing regimes, under which "a general desire for self-defense is

> sufficient to obtain a [permit].” Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent “law-abiding, responsible citizens” from exercising their Second Amendment right to public carry. Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, “law-abiding, responsible citizens.” And they likewise appear to contain only “narrow, objective, and definite standards” guiding licensing officials, rather than requiring the “appraisal of facts, the exercise of judgment, and the formation of an opinion”—features that typify proper-cause standards like New York’s. That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.

Id. (citations omitted) (hereafter referred to as the Supreme Court’s “shall-issue” discussion).

* * *

Following the Supreme Court’s issuance of its decision in *Bruen*, a panel of this Court held that the HQL statute was unconstitutional under the Second Amendment. *Maryland Shall Issue, Inc. v. Moore*, 86 F.4th 1038 (4th Cir. 2023), *reh’g en banc granted*, No. 21-2017(L), 2024 WL 124290 (4th Cir. Jan. 11, 2024).

That decision was vacated by a vote of the full court, and we now consider this appeal en banc.

II.

We review de novo the district court's decision on the parties' cross-motions for summary judgment.[7] *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 312–13 (4th Cir. 2013). Summary judgment may be granted only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

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[7] We observe that the district court did not have the benefit of the Supreme Court's analysis in *Bruen* when the court issued its summary judgment decision. Often, in such a situation we will remand for the district court to consider the Supreme Court's newly articulated framework in the first instance. *See, e.g., Firewalker-Fields v. Lee*, 58 F.4th 104, 111, 121–23 (4th Cir. 2023). Indeed, the *Bruen* framework raises questions that in many cases will require additional factual development before the district court. *See, e.g., Atkinson v. Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023) (remanding for district court to apply Bruen in the first instance because "[t]he parties' briefing on appeal only scratche[d] the surface of the historical analysis"). But as explained in the following sections, the Supreme Court's clear guidance on "shall-issue" licensing laws and the nature of the plaintiffs' constitutional challenge render additional factual development unnecessary in this case. *See Bruen*, 597 U.S. at 38 n.9; *see also United States v. Moore*, 666 F.3d 313, 318–19 (4th Cir. 2012) (describing standard for facial constitutional challenges). So we decide the constitutionality of the HQL statute without remand to the district court. *See United States v. Williams*, 56 F.4th 366, 371 n.4 (4th Cir. 2023) (explaining that we may affirm the district court "on any ground supported by the record").

A.

i.

Because this case presents our first opportunity after *Bruen* to evaluate the constitutionality of a "shall-issue" licensing law, we begin by examining how the Supreme Court's "shall-issue" discussion bears on our analysis. Under the first step of the *Bruen* framework, a court must consider the text of the Second Amendment:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II. Among other plain-text requirements,[8] a regulation falls within the ambit of the Second Amendment only if the regulation "infringes" the Second Amendment right to keep and bear arms. *Cf. Price*, 2024 WL 3665400, at *3 (explaining that the Second Amendment "does not apply" if the plain text does not cover the conduct at issue); *United States v. Scheidt*, 103 F.4th 1281, 1284 (7th Cir. 2024) (declining to undertake the *Bruen* historical analysis when the statute at issue did not "infringe" the right to keep and bear arms).

In its seminal Second Amendment decisions, the Supreme Court has not conducted an exhaustive evaluation of the term "infringe," most likely because the Court has not been required to do so. In *Bruen*, for

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[8] We assume without deciding that the Second Amendment's other textual requirements have been satisfied in this case. See Price, 2024 WL 3665400, at *5 (describing other textual components of step one (citing Bruen, 597 U.S. at 31–32)).

example, the state of New York had denied the petitioners' applications for unrestricted public carry licenses, thereby prohibiting them from carrying handguns in public for self-defense. 597 U.S. at 70–71. The proper-cause requirement thus "operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose" and plainly "infringed" the right to keep and bear arms. *See id*. at 60, 70. Because each textual requirement was satisfied under step one, the burden shifted to the government to justify the regulation under step two. *Id*. at 24.

The laws challenged in the Supreme Court's other Second Amendment decisions similarly banned or effectively banned the possession or carry of arms. In *District of Columbia v. Heller*, the Court addressed the constitutionality of a District of Columbia statutory scheme that banned handgun possession in the home. 554 U.S. 570, 628 (2008) ("The handgun ban amounts to a prohibition of an entire class of 'arms'" and "extends . . . to the home."). In *McDonald v. Chicago*, the Court addressed the constitutionality of Chicago laws that "effectively bann[ed] handgun possession by almost all private citizens who reside in the City." 561 U.S. 742, 750 (2010). In *Caetano v. Massachusetts*, the Court assessed the constitutionality of a Massachusetts law prohibiting the possession of stun guns. 577 U.S. 411, 411 (2016). And in *United States v. Rahimi*, the Court considered the constitutionality of a federal statute prohibiting the possession of a firearm by an individual subject to a domestic violence restraining order. 144 S. Ct. at 1894. So in these cases, there was no question that the laws "infringed" the right to keep or bear arms because the government,

either by law, regulation, or means of a discretionary governmental determination, prevented individuals from exercising these rights.

But *Bruen*, in explicitly distinguishing "shall-issue" licensing laws, also introduced a more nuanced consideration of the concept of "infringement." The Court emphasized that "shall-issue" licensing laws "*do not necessarily prevent* law-abiding, responsible citizens from exercising their Second Amendment right[s]" and require a more refined analysis. 597 U.S. at 38 n.9 (emphasis added) (internal quotation marks and citation omitted). In the "shall-issue" discussion, the Court established guideposts that reviewing courts may use to determine whether a "shall-issue" licensing law "infringes" the right to keep and bear arms. The Court explained that "shall-issue" licensing laws, which employ "narrow, objective, and definite standards" and do not give authorities discretion with regard to issuing a license, ordinarily do not prevent law-abiding individuals from exercising their Second Amendment rights. *See id*. (citation omitted). Thus, such laws generally do not "infringe" the right to keep and bear arms. But the Court further stated that it did not "rule out constitutional challenges" to "shall-issue" licensing laws that "deny ordinary citizens their right to public carry." *Id*. And the Court provided as examples challenges to "shall-issue" licensing laws "put toward abusive ends," such as those imposing "lengthy" wait times or "exorbitant" fees. *Id*.

We are not free to ignore the Supreme Court's substantive dictum on "shall-issue" licensing laws. *See McRorey v. Garland,* 99 F.4th 831, 837 (5th Cir. 2024) (explaining that dicta "doesn't get more recent or

detailed than [the 'shall-issue' discussion in] *Bruen*"). And we observe that *Bruen* is not the first case in which the Supreme Court has discussed in dicta types of regulations not before the Court when announcing limits on the Second Amendment right. In the course of striking down the District of Columbia's ban on handgun possession in the home in *Heller*, the Court emphasized:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.

554 U.S. at 626. Continuing, the Court in *Heller* described as "presumptively lawful" certain "longstanding prohibitions," such as prohibitions on the possession of firearms by felons. *Id*. at 626–27 & n.26 (also describing as "presumptively lawful" "prohibitions on the possession of firearms by . . . the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms"). The Court reiterated this "assurance[]" two years later in *McDonald*, and the Court again cited this language in its recent decision in *Rahimi*. *McDonald*, 561 U.S. at 786; *Rahimi*, 144 S. Ct. at 1902; *see also Bruen*, 597 U.S. at 72 (Alito, J., concurring) ("Nor have we disturbed anything that we said in *Heller* or [*McDonald*] about restrictions that may be imposed on

the possession or carrying of guns."); *id.* at 81 (Kavanaugh, J., concurring).

In the years following *Heller* and *McDonald*, we and our sister circuits have relied on this dictum from *Heller* in rejecting myriad constitutional challenges to laws prohibiting the possession of firearms by felons. Indeed, when we considered a defendant's challenge to the federal felon-in-possession statute in *United States v. Moore,* we began our analysis "by noting the unanimous result reached by every court of appeals that [18 U.S.C.] § 922(g)(1) is constitutional, . . . usually based at least in part on the 'presumptively lawful' language from *Heller*." 666 F.3d 313, 316–17, 319–20 (4th Cir. 2012); id. at 318 ("[T]he clear declaration in *Heller* that such felon in possession laws are a presumptively lawful regulatory measure resolves [a facial constitutional] challenge fairly quickly."). And following *Bruen*, in *United States v. Canada* we again rejected a facial constitutional challenge to § 922(g)(1). 103 F.4th 257, 258–59 (4th Cir. 2024). We explained that "[w]hether the proper analysis focuses on the definition of the 'people,' the history of disarming those who threaten the public safety, *Heller*'s and *Bruen*'s assurances about 'longstanding prohibitions,' or circuit precedent, the answer remains the same: the government may constitutionally forbid people who have been found guilty of such acts from continuing to possess firearms." *Id.*

Consistent with our treatment of this dictum from *Heller* and our practice to "routinely afford substantial, if not controlling deference to dicta from the Supreme Court," we apply *Bruen*'s clear guidance on

"shall-issue" licensing laws to our analysis of the constitutionality of the HQL statute. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 281–82 (4th Cir. 2019) (en banc); *see also Bianchi*, 2024 WL 3666180, at *26 (explaining that "we are bound to respect" both the "language of entitlement" and the "language of limitation" from *Heller* and *Bruen*). So, in accord with the Supreme Court's "shall-issue" discussion, we hold that non-discretionary "shall-issue" licensing laws are presumptively constitutional and generally do not "infringe" the Second Amendment right to keep and bear arms under step one of the *Bruen* framework. *See McRorey*, 99 F.4th at 837, 840 (holding that the challenged federal background check requirement was not "abusive" or "subject to Bruen's historical framework as a *de facto* prohibition on possession"). And if a plaintiff fails to rebut this presumption of constitutionality, the plaintiff's challenge to the "shall-issue" licensing law fails at step one, with no requirement to conduct a historical analysis under step two. *See Scheidt*, 103 F.4th at 1284.

If, however, a plaintiff rebuts this presumption of constitutionality by showing that a "shall-issue" licensing law effectively "den[ies]" the right to keep and bear arms, the burden shifts to the government to demonstrate that the regulation "is consistent with this Nation's historical tradition of firearm regulation."[9] *Bruen*, 597 U.S. at 17, 38 n.9. If the

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[9] In view of the Supreme Court's guidance on the presumptive constitutionality of "shall-issue" licensing regimes, we need not define the outer contours of the term "infringe" in determining the principles applicable to "shall-issue" licensing

government satisfies its burden under step two, then even a "shall-issue" licensing law that effectively denies the Second Amendment right can be enforced consistent with the Second Amendment. *Cf. Rahimi*, 144 S. Ct. at 1902 (holding that the tradition of firearm regulation justified the challenged firearm prohibition). But if the government does not satisfy its burden in such cases, then the "shall-issue" licensing law violates the Second Amendment. *Cf. Bruen*, 597 U.S. at 38, 71 (holding that the government had not identified a tradition justifying the challenged "may-issue" licensing law).

ii.

Before turning to apply these legal principles to the HQL statute, we address the plaintiffs' and the dissent's preliminary arguments that the "shall-issue" discussion is inapplicable to the present case or to the step one inquiry. The plaintiffs initially assert that because the "shall-issue" discussion addresses only public carry laws, that discussion is irrelevant to a "shall-issue" licensing law regulating the possession of firearms. We reject this contention because the distinction advanced by the plaintiffs rests on a false premise, namely, that the Supreme Court has recognized different levels of constitutional protection for the Second Amendment right to "keep" arms and the Second Amendment right to "bear" arms.

As the Supreme Court explained in *Bruen*, "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to

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laws and the facial validity of the HQL statute. *See Bruen*, 597 U.S. at 38 n.9.

keep and bear arms." 597 U.S. at 32, 70. Moreover, the rationale supporting the Supreme Court's "shall-issue" discussion applies with equal force to "shall-issue" licensing laws governing the possession of firearms, and nothing in that discussion signals a contrary intent. So we decline the plaintiffs' request to bypass the Supreme Court's "shall-issue" discussion on the basis that the Court cited only "shall-issue" public carry laws.[10]

The plaintiffs separately contend that under *Bruen*, the "shall-issue" discussion pertains to a step two historical analysis, rather than to a step one plain text inquiry, because the Supreme Court appended the footnote containing the "shall-issue" discussion to the Court's analysis regarding historical regulations relating to public carry. We find no merit in this argument.

We first observe that the "shall-issue" discussion appears in tandem with the Court's ultimate holding invalidating the New York law based on the absence of a historical tradition limiting public carry to law-abiding individuals who demonstrate a special need for self-defense. *Id*. at 38–39 & 38 n.9. So in the process of stating what the Court was *holding*, the "shall-issue" discussion served to alert the reader to the *limits* of that holding.

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[10] In analyzing a "shall-issue" licensing law, a court reaches the second step of the Bruen framework only when in step one the plaintiff rebuts the presumptive constitutionality of the regulatory regime. Accordingly, we need not address whether the step two analysis would differ for "may-issue" and "shall-issue" licensing laws.

Moreover, in the "shall-issue" discussion the Court did not refer to any of the hallmarks of a step two historical inquiry, such as the historical tradition of "shall-issue" licensing laws or, conversely, the lack of a historical tradition for "shall-issue" licensing laws that may be subject to constitutional challenge. *Id*. at 38 n.9. Instead, without explicitly referencing the plain text of the Second Amendment, the Court grounded the "shall-issue" discussion in step one by explaining that even a presumptively constitutional "shall-issue" licensing law may go too far if it imposes conditions that effectively deny an individual the right to keep and bear arms.

The dissent attempts to circumvent the "shall-issue" discussion and move directly to step two by relying on *Rahimi*'s language that "when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" 144 S. Ct. at 1897 (citation omitted); Dissenting Op., at 61–62. But the parties in *Rahimi* did not place in issue whether the challenged ban on the possession of firearms was covered by the plain text of the Second Amendment. So the Supreme Court was not required in *Rahimi* to conduct a plain text inquiry and moved directly to its step two analysis of the challenged firearms prohibition. *Rahimi*, 144 S. Ct. at 1899. When viewed in this context, the dissent's leap to step two is not supported by the holding in *Rahimi* and effectively would collapse *Bruen*'s two-part framework into merely one step, improperly treating the plain text

inquiry as a meaningless check-the-box exercise.[11] *See Bruen*, 597 U.S. at 31–32. We therefore remain guided by Bruen and its "shall-issue" discussion in our consideration of the HQL statute.

B.

Turning to apply the "shall-issue" discussion to the present case, we examine in our step one analysis (1) whether the HQL statute qualifies as a presumptively constitutional "shall-issue" licensing law and, if so, (2) whether the plaintiffs have rebutted that presumption by demonstrating that the law "infringes," or effectively denies, the right to keep and bear arms. *See Bruen*, 597 U.S. at 38 n.9.

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[11] We also reject as frivolous the plaintiffs' suggestion that we should dismiss the Supreme Court's statements about "shall-issue" licensing laws as mere "stray comments." The "shall-issue" discussion reflects a carefully crafted limitation on the Court's holding regarding New York's proper-cause requirement, and undoubtedly was considered by the Supreme Court justices who comprised the *Bruen* majority. Indeed, in a concurring opinion, Justice Kavanaugh, joined by Chief Justice Roberts, specifically referred to "shall-issue" licensing laws and underscored the limitations set forth in *Heller* and *McDonald*, explaining that the Second Amendment "allows a 'variety' of gun regulations." 597 U.S. at 80–81 (Kavanaugh, J., concurring) (citing *Heller*, 554 U.S. at 636). Contrasting "shall-issue" licensing laws with the "unusual" discretionary licensing regime struck down by the Bruen majority, which "in effect den[ied]" individuals "the right to carry handguns for self-defense," Justice Kavanaugh reiterated the core of the "shall-issue" discussion, namely, that "shall-issue" licensing laws "are constitutionally permissible, subject . . . to an as-applied challenge." *Id.* at 79, 80 (citing as examples of constitutional components of a licensing law fingerprinting, background checks, and training requirements).

i.

We need address only briefly our conclusion that the HQL statute qualifies as a presumptively constitutional "shall-issue" licensing law. The HQL statute allows any law-abiding person who seeks to obtain a handgun qualification license to do so by completing the objective criteria outlined in the statute. The state may not deny an individual a license once the statutory requirements have been satisfied. Moreover, the very requirements on which the plaintiffs focus their constitutional attack are the same requirements the Supreme Court cited as presumptively constitutional components of a "shall-issue" licensing law, namely, background checks and firearms safety courses. *Id.*

The HQL statute thus falls easily within the scope of "shall-issue" licensing laws that the Supreme Court has indicated are presumptively constitutional.[12] *See id.* Accordingly, the plaintiffs' constitutional challenge to the HQL statute can survive step one of the *Bruen* analysis only if they can demonstrate that the law

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[12] The plaintiffs attempt to draw a distinction between the HQL statute and certain other "shall-issue" licensing laws, arguing that the HQL statute does not qualify as a "shall-issue" law because before a law-abiding individual may acquire a handgun, that individual also must complete other objective, nondiscretionary criteria set out in a different Maryland firearm law. But the plaintiffs do not dispute the constitutionality of this other law, referred to as the 77R process and described in Part II.B.ii.3 below, and a "shall-issue" licensing law is characterized not by its relationship to other, non-challenged legal requirements that may affect the same individual or subject matter, but by the challenged law's nondiscretionary nature. See Bruen, 597 U.S. at 38 n.9.

"infringes," or effectively "den[ies]," the Second Amendment right. *Id*.

ii.

The plaintiffs raise three arguments to rebut the presumptive constitutionality of the "shall-issue" HQL statute. They contend that the HQL statute "has been put toward abusive ends" because (1) any "temporary deprivation" of the Second Amendment right constitutes "infringement," (2) the HQL statute imposes "lengthy" wait times, and (3) Maryland's separate 77R firearm application (the 77R process) renders redundant the background check required under the HQL statute.[13]

Before addressing these arguments, we emphasize the difficulty of challenging the facial constitutionality of a statute. Plaintiffs contesting the validity of a firearms law under the Second Amendment may bring either an "as-applied" or a "facial" challenge to the law. *Moore*, 666 F.3d at 317–20. In an as-applied challenge, the court focuses on the circumstances of the

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[13] In their opening brief, the plaintiffs explained that the "costs" of completing the HQL statute "dissuaded" plaintiff Susan Brancato Vizas from acquiring a handgun qualification license, and that plaintiff Deborah Kay Miller could not complete the required training because of a physical disability that "makes it very difficult for her to sit for extended periods of time." But the plaintiffs have not advanced any argument that the cost of obtaining a handgun qualification license constitutes an "exorbitant" fee, or that the substantive components of the training requirement have been put toward abusive ends effectively "deny[ing]" applicants their Second Amendment rights. *Bruen*, 597 U.S. at 38 n.9. The plaintiffs thus have forfeited any facial constitutional challenge on these grounds. We express no view on the merits of any as-applied challenge on these bases.

particular plaintiffs and whether, in light of those circumstances, the challenged law was unconstitutionally applied to *those* plaintiffs. *Id.* at 319.

By contrast, in a facial constitutional challenge a plaintiff asks the court to declare that the statute is invalid. As the Supreme Court has explained, "facial challenges are 'disfavored' because they 'often rest on speculation,' 'short circuit the democratic process,' and 'run contrary to the fundamental principle of judicial restraint.'" *Bianchi*, 2024 WL 3666180, at *10 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). So to succeed in a facial constitutional challenge, a plaintiff confronts a much more difficult task, namely, to establish that there is "no set of circumstances" under which the law would be valid. *Rahimi*, 144 S. Ct. at 1898 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Moore*, 666 F.3d at 318–19 ("[T]he Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application."). "The stakes are higher in a facial challenge, so the bar goes up as well." *United States v. Veasley*, 98 F.4th 906, 909 (8th Cir. 2024).

1.

With these principles in mind, we consider the merits of the plaintiffs' arguments. First, we reject the plaintiffs' argument that any delay resulting from compliance with the HQL statute qualifies as "infringement." The plaintiffs center this argument on language in *Heller* and maintain that the Court "declared" that Second Amendment rights "shall not be *infringed*, curtailed, or broken in upon, in the smallest

degree." But the Court did not make such a declaration. Rather, the language cited by the plaintiffs appears in a longer passage the Court quoted from *Nunn v. State*, a decision by the Georgia Supreme Court in 1846:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.

Heller, 554 U.S. at 612–13 (quoting *Nunn*, 1 Ga. 243, 251 (1846)). When the Court introduced this passage, it explained that the state court in Nunn "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause." *Id.* at 612. In other words, the Court relied on *Nunn* to explain its conclusion that the Second Amendment right "was an individual right unconnected to militia service," not to explain when a

law "infringes" the Second Amendment right.[14] *Heller*, 554 U.S. at 612.

The Supreme Court no doubt was aware of its prior statements in *Heller* and this passage from *Nunn* when it indicated in the "shall-issue" discussion that "shall-issue" licensing laws are presumptively constitutional even though such laws require compliance *before* individuals may exercise their Second Amendment rights. By equating "infringement" with any temporary delay, the plaintiffs improperly discount the Supreme Court's guidance that requirements such as background checks and training instruction, which necessarily occasion some delay, ordinarily will pass constitutional muster without requiring the government to justify the regulation at step two. *Bruen*, 597 U.S. at 38 n.9; *McRorey*, 99 F.4th at 839 ("Our law is plain as can be that some amount of time for background checks is permissible.").

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[14] Moreover, in the present challenge to the HQL statute we need not address the other historical sources related to the dissent's interpretation of the term "infringe." Dissenting Op., at 58-60. Although the historical scope of the Second Amendment right typically informs a step one analysis, *Bianchi*, 2024 WL 3666180, at *6, *Price*, 2024 WL 3665400, at *5, in considering a "shall-issue" licensing law we apply the Supreme Court's clear direction in the "shall-issue" discussion that such laws may be subject to constitutional challenge when "put toward abusive ends" by imposing, "for example, lengthy wait times in processing license applications or exorbitant fees deny[ing] ordinary citizens" their Second Amendment rights. *Bruen*, 597 U.S. at 38 n.9; *see also supra* note 9 (explaining that we need not define the outer contours of the term "infringe" in this case).

2.

The plaintiffs alternatively contend that compliance with the HQL statute results in the type of "lengthy" wait time that would qualify under the "shall-issue" discussion as a "denial" of an applicant's Second Amendment rights. Without identifying any support for their argument in the record, the plaintiffs maintain that the actual time involved to obtain a handgun qualification license "self-evidently takes longer than 30 days."

At the outset, this argument is flawed because it would require us to assume that the state takes the entire permissible 30-day period to process each application. The record before us squarely refutes such an assumption: "Through the first quarter of calendar year 2018, there were no completed HQL applications pending disposition for longer than 15 days." And of particular relevance to this facial challenge in which we consider whether the HQL statute "may constitutionally be applied in at least *some* 'set of circumstances,'" *Canada*, 103 F.4th at 258 (citation omitted), the record reflects that completed applications "can be and have been" processed within 24 hours of submission to the Maryland State Police.

The record therefore reveals that, in some cases, the process for obtaining a handgun qualification license can take only a few days. This time period is far shorter than many of the permissible processing periods cited by the Supreme Court in *Bruen*. *See, e.g.*, 597 U.S. at 13 n.1. We decline to construe the Supreme Court's reference to "lengthy" processing periods as including within its scope the relatively brief application, review, and approval process of the HQL

statute.[15] *See also McRorey*, 99 F.4th at 836, 840 (rejecting constitutional challenge to federal background check requirement because "a period of 10 days does not qualify" as "lengthy" under *Bruen*).

3.

In their final argument, the plaintiffs contend that the HQL statute is "abusive" because a separate Maryland law, the 77R process, requires another background check for purchases of regulated firearms. *See* Md. Code Pub. Safety § 5-117. The plaintiffs do not challenge the constitutionality of background investigations generally, but they contend that Maryland "does not need two background checks." In making this argument, however, the plaintiffs ignore key differences between these two processes.

Unlike the HQL statute, which directs that each *individual* obtain a license before purchasing, renting, or receiving a handgun, the 77R process applies to the purchase, rental, or transfer of every regulated

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[15] The plaintiffs also emphasize that after obtaining a handgun qualification license, an individual must complete a separate firearm application not challenged in the present case, namely, the 77R process, before buying a handgun. *See infra* Part II.B.ii.3 (describing the 77R process). Even if we were to consider the plaintiffs' argument that this additional, unchallenged law renders the "entire" process so lengthy as to deny individuals their Second Amendment rights, we would reject the argument on the merits. Taken together, an individual can complete the HQL statute and the 77R process in well under two weeks. We find no merit in any contention that the time required to comply with this separate law renders the HQL statute presumptively unconstitutional.

firearm.[16] Md. Code Pub. Safety § 5-117. Under the 77R process, an individual seeking to purchase a handgun in Maryland must submit to a firearms dealer a $10 fee and an application that contains, among other things, information regarding the handgun the individual seeks to purchase and the individual's personal identification information. *Id.* §§ 5-118(a), (b). The 77R application also must contain the individual's handgun qualification license number. *Id.* § 5-118(b)(4).

Once the 77R application is completed, the Secretary conducts a background investigation. *Id.* § 5-121.[17] Significantly, the background check under the 77R process does not involve the submission of fingerprints. So when the Maryland General Assembly passed the HQL statute, the legislature included a fingerprinting requirement after considering expert testimony explaining that Maryland's then-existing laws were vulnerable to illegal "straw" purchases.[18] One expert illustrated the gravity of this issue by

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16 The phrase "regulated firearm" includes both handguns and certain assault weapons. Md. Code Pub. Safety §§ 5-101(n)(1)–(2), (r). *But see* Md. Code Crim. Law §§ 4-301(b), (d), -303(a)(2) (prohibiting the purchase of assault weapons); *Bianchi*, 2024 WL 3666180, at *1 (rejecting facial constitutional challenge to § 4-303).

17 The dealer may not sell, rent, or transfer the handgun to the applicant until seven days after the dealer forwards the application to the Secretary. Id. § 5-123(a).

18 A "straw" purchaser is legally eligible to buy a firearm and represents themselves to the seller as the purchaser of the firearm, but in fact is purchasing the firearm on behalf of a third party.

citing a U.S. Government Accountability Office study in which undercover agents successfully used counterfeit driver's licenses to purchase firearms from licensed dealers in five states that did not require fingerprinting. Thus, while both the 77R process and the HQL statute help ensure that an applicant is not prohibited from possessing a handgun, the HQL statute specifically aims to prevent individuals from using false identification to verify their eligibility to purchase a handgun.

In addition to this substantive difference between the background checks required by each law, these investigations also may take place at different points in time. As noted above, the initial background check under the HQL statute occurs when applicants submit their fingerprints with their application for a handgun qualification license. After this initial investigation, the law requires that the Maryland Department of Public Safety and Correctional Services provide the State Police with updated criminal history information for handgun qualification license holders. *Id.* § 5-117.1(f)(7). The State Police "regularly receives" such reports. In contrast, individuals complete the 77R process each time they purchase any regulated firearm. *See id.* § 5-117. So the background check required by the 77R process fills any gap that might result between the HQL criminal history reports and ensures that *at the time* an individual applies to purchase a handgun, the background check information reflects the individual's current criminal history record.

In sum, background checks under the 77R process and the HQL statute differ because only the HQL

statute involves the submission of fingerprints, and the background checks for each process may occur at different points in time. In light of these distinctions, and because the HQL statute effectively strengthens the 77R process, we reject the plaintiffs' argument that the HQL statute's background check is wholly redundant and so abusive as to "infringe" the Second Amendment right under step one of the *Bruen* framework.[19]

* * *

The plaintiffs have not met their burden to show that the HQL statute "infringes" the Second Amendment right to keep and bear arms and, thus, they have failed to rebut the presumption of constitutionality afforded to the HQL statute. We therefore reject their facial constitutional challenge at step one of the *Bruen* framework, and do not reach their argument under step two that the HQL statute lacks a historical analogue.

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[19] The plaintiffs also argue that the HQL statute has been put toward abusive ends "by deterring tens of thousands of law-abiding, responsible citizens from acquiring handguns." In support of this argument, the plaintiffs state that every year thousands of HQL applications are initiated but not submitted. This information is insufficient to show that the HQL statute is facially invalid. The data cited by the plaintiffs does not indicate why any application was initiated but not submitted and, thus, such data is of limited utility. For example, individuals may begin an application but not complete it because of ineligibility, because of a change in their decision to pursue a handgun qualification license, or because they ultimately complete a different type of application, such as a "permit-exempt" application.

III.

Since the Supreme Court issued Bruen, courts across the country have struggled to answer the many questions resulting from the Court's new analytical framework. But this uncertainty does not extend to "shall-issue" licensing laws, which the Supreme Court has indicated should not be cast aside in rote fashion by relying on *Bruen*'s invalidation of "may-issue" licensing laws. We are not free to ignore the Supreme Court's clear guidance on the presumptive constitutionality of "shall-issue" licensing regimes, nor to unduly constrain legislatures seeking to employ such measures to prevent handgun misuse and violent criminal activity. So, in line with the Court's "shall-issue" discussion, governments may continue to enforce "shall-issue" firearms licensing regulations that impose non-abusive, objective requirements like background checks and firearm safety training. And because the plaintiffs in this case have failed to rebut the presumptive constitutionality of the "shall-issue" HQL statute, we reject their facial constitutional challenge. We affirm the district court's judgment.

AFFIRMED

RUSHING, Circuit Judge, with whom Judges GREGORY and QUATTLEBAUM join, concurring in the judgment:

In Maryland, most people who wish to acquire a handgun must first obtain a "handgun qualification license." Md. Code Ann., Pub. Safety § 5-117.1(c). To obtain a license, a person must be at least 21 years old and a resident of Maryland, complete a firearms safety training course, submit a set of fingerprints to facilitate a background check, pay a $50 application fee, and aver that he is not prohibited under federal or state law from possessing a handgun. *Id*. § 5-117.1(d), (f), (g). Within 30 days of receiving a complete and accurate application, the Secretary of State Police issues the applicant a license. *Id*. § 5-117.1(h)(1).

A majority of this Court concludes that Maryland's handgun license requirement doesn't implicate the plain text of the Second Amendment, which preserves "the right of the people to keep and bear Arms." U.S. Const. amend. II. That is wrong. Maryland's law regulates acquiring a handgun, and the Second Amendment's text encompasses that conduct.

The handgun license requirement is nevertheless constitutional because it is consistent with the principles underlying our Nation's historical tradition of firearm regulation. In *New York State Rifle and Pistol Association v. Bruen*, the Supreme Court signaled that shall-issue licensing regimes designed to ensure that individuals bearing arms are "law-abiding, responsible citizens," and which do so through "narrow, objective, and definite standards," are relevantly similar to laws our regulatory tradition permits. 142 S. Ct. 2111, 2138 n.9 (2022) (internal

quotation marks omitted). Maryland's handgun license requirement fits that paradigm. Following the Supreme Court's guidance, I would conclude that Maryland's handgun license requirement is consistent with the Second Amendment. I therefore concur only in the judgment.

I.

All Second Amendment claims must be assessed within the text-and-history framework the Supreme Court established in *Bruen*. Under that rubric, we first ask if the challenged law addresses conduct covered by the "plain text" of the Second Amendment. *Id*. at 2129–2130. If so, then the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*. at 2130.

Maryland's handgun license requirement obviously regulates conduct covered by the text of the Second Amendment. As Judge Richardson explains in his dissenting opinion, Maryland's law applies to "the people," handguns are "Arms," and the law regulates acquisition, which is a prerequisite to "keep[ing] and bear[ing]" those arms. U.S. Const. amend. II; *see also District of Columbia v. Heller*, 554 U.S. 570, 579–592 (2008) (explicating these terms). I agree with his textual analysis. *See* Diss. Op. 51–52.

The majority concludes that the conduct addressed by Maryland's law—acquiring a handgun—is not covered by the text of the Second Amendment. That is "an implausible reading" of the constitutional text, not to mention the Court's opinion in *Bruen*. Diss. Op. 58. Here again, I agree with the dissent. *See* Diss. Op.

58–61. Because Maryland's handgun license requirement "regulates [protected] conduct, . . . [Maryland] bears the burden to justify its regulation." *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (internal quotation marks omitted).

II.

When, as here, the government places conditions on conduct covered by the plain text of the Second Amendment, it must show that those conditions are "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2135. This inquiry is necessarily an exercise in analogical reasoning, because "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Rahimi*, 144 S. Ct. at 1897–1898; *see also Bruen*, 142 S. Ct. at 2132. "[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. A court "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit." *Id.* (quoting *Bruen*, 142 S. Ct. at 2132). Central to this inquiry is "[w]hy and how the regulation burdens the right." *Id.*; *see also Bruen*, 142 S. Ct. at 2133. In this respect, the law "must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 142 S. Ct. at 2133).

Bruen's Footnote Nine gives us significant direction in evaluating a shall-issue licensing requirement under this standard. Recall that in *Bruen* the Supreme Court considered the constitutionality of New York's

public-carry licensing regime, which required an individual to demonstrate "a special need for self-protection distinguishable from that of the general community" in order to receive a license to carry a firearm outside his home or place of business for self-defense. *Bruen*, 142 S. Ct. at 2123 (internal quotation marks omitted). Because licensing officials retained discretion "to deny licenses based on a perceived lack of need or suitability," the Court dubbed New York's law a "may issue" licensing regime, as distinguished from the "shall issue" licensing laws in "the vast majority of States," pursuant to which "authorities must issue concealed-carry licenses" whenever applicants satisfy non-discretionary threshold criteria. *Id.* at 2123–2124; *see also id.* at 2123 n.1. After a comprehensive historical review, the Court held New York's licensing law unconstitutional because it prevented "law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose." *Id.* at 2150; *see also id.* at 2156.

The Court was quick to distinguish "shall-issue licensing regimes, under which a general desire for self-defense is sufficient to obtain a permit." *Id.* at 2138 n.9 (internal quotation marks and brackets omitted). "[N]othing" in the Court's historical analysis, it warned, "should be interpreted to suggest the unconstitutionality of the 43 States' shall-issue licensing regimes." *Id.* "Because these [shall-issue] licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry." *Id.* (quoting *Heller*, 554 U.S. at 635).

"Rather," the Court reasoned, "it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.' And they likewise appear to contain only 'narrow, objective, and definite standards' guiding licensing officials," unlike New York's proper-cause standard. *Id.* (first quoting *Heller*, 554 U.S. at 635, and then quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)). That said, the Court "d[id] not rule out constitutional challenges to shall-issue regimes" that are "put toward abusive ends"—for example, where "lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry." *Id.* In other words, "shall-issue licensing regimes are constitutionally permissible, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice." *Id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring).

The Supreme Court's discussion of shall-issue licensing regimes in Bruen, while not strictly necessary to the Court's holding about New York's law, is welcome guidance to "lower courts grappling with complex legal questions of first impression" in an area of the law that remains relatively undeveloped. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 282 (4th Cir. 2019) (en banc). That discussion cannot be dismissed as a "passing" aside on a "tangential issue" that we are free to ignore. *Id.* Rather, from the very beginning of its opinion in Bruen, the Court contrasted New York's may-issue law with the

shall-issue laws in other States as a way to explain the rationale and limits of its holding. See 142 S. Ct. at 2122–2124, 2123 n.1, 2138 n.9. Accordingly, I would "give due weight" to this considered and reasoned guidance from the Supreme Court. *Manning*, 930 F.3d at 282.

Of course, the Court's analysis of shall-issue licensing regimes must be read in harmony with the rest of the *Bruen* opinion. Footnote Nine is not, as the State urges here, "a different analysis" separate from or in addition to the history-and-tradition framework the Court instructed us to employ in *Bruen*. Appellees' Supp. Br. 11. There is no indication that Footnote Nine is an exception from or contrary to the Second Amendment doctrine the Court articulated just a few pages earlier in its opinion. Indeed, it would be bizarre for the Court to double down on the interpretive standard from *Heller*, which "centered on constitutional text and history," *Bruen*, 142 S. Ct. at 2128–2129, and then, in a footnote, introduce an entirely distinct standard for only a small subset of regulations. Commonsensically, Footnote Nine's assessment of shall-issue licensing regimes must be understood within the analytical framework the Court described and followed elsewhere in *Bruen*.

Viewed through that lens, Footnote Nine gives lower courts insight into the degree of fit necessary for a shall-issue licensing regime to be relevantly similar to historical analogues and thus consistent with the Nation's historical tradition of firearm regulation. The Supreme Court has instructed that "how and why" modern and historical regulations burden Second Amendment rights are "'*central*' considerations when

engaging in [this] analogical inquiry," so we should begin there. *Id*. at 2133 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

First is the *justification* for shall-issue licensing laws, or the "why." *Id*. By requiring applicants "to undergo a background check or pass a firearms safety course," shall-issue licensing laws "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id*. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). In other words, the shall-issue licensing laws considered in *Bruen* burdened Second Amendment rights in order to keep firearms out of the hands of individuals who were not "law-abiding, responsible citizens" but whose public carry of firearms instead threatened public safety. That justification is comparable to historical regulations restricting certain persons' ability to possess and publicly carry weapons because of the danger they posed. *See, e.g., id*. at 2148–2150 (discussing historical surety statutes); *Heller*, 554 U.S. at 626 (noting "longstanding prohibitions on the possession of firearms by felons and the mentally ill").

Similarly here, the State relies on the tradition of regulating firearm possession by dangerous individuals, a historical justification that precedent well supports. What *Heller* and *Bruen* presumed, courts have confirmed through more exhaustive analysis of the historical record: "the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting); *see Rahimi*, 144 S. Ct. at 1901 ("When an individual poses

a clear threat of physical violence to another, the threatening individual may be disarmed."); *see also United States v. Carpio-Leon*, 701 F.3d 974, 980 (4th Cir. 2012) (upholding 18 U.S.C. § 922(g)(5), which prohibits possession of a firearm by an illegal alien, based on "historical evidence" that "the government could disarm individuals who are not law-abiding members of the political community"); *Folajtar v. Att'y Gen.*, 980 F.3d 897, 913 (3d Cir. 2020) (Bibas, J., dissenting) ("Historically, limitations on the right were tied to dangerousness. . . . Violence was one ground for fearing danger, as were disloyalty and rebellion."); *Binderup v. Att'y Gen.*, 836 F.3d 336, 369 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments) ("[T]he historical record leads us to conclude that the public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed."). As these decisions explain, history demonstrates the principle that certain dangerous individuals may be prohibited from possessing firearms at all, not just from carrying them publicly. *Cf. Rahimi*, 144 S. Ct. at 1899–1902 (analogizing dangerousness justification underlying "surety and going armed laws" to dangerousness justification underlying possession prohibition).

The justification for Maryland's handgun license requirement is relevantly similar to this historical tradition. Like the shall-issue licensing laws considered in *Bruen*, Maryland's law "require[s] a license applicant to undergo fingerprinting" for "a background check" and "a mental health records

check," *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring), and to "pass a firearms safety course," id. at 2138 n.9 (majority opinion). *See* Md. Code Ann., Pub. Safety § 5-117.1(d)(4) (investigation to determine whether person is "prohibited by federal or State law from purchasing or possessing a handgun"); *id.* § 5-133 (listing prohibited persons, including felons, fugitives, drug addicts, and the mentally ill).[1] Because those requirements are "designed to ensure only that those [keeping] arms in the jurisdiction are, in fact, law-abiding, responsible citizens" whose possession of handguns does not pose a danger to others, they are supported by a historically defensible justification

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[1] Plaintiffs do not challenge the constitutionality of any part of Section 5-133.

according to *Bruen*.[2] 142 S. Ct. at 2138 n.9 (internal

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[2] Historical laws did not restrict firearm ownership or public carry based on a person's ability to use the weapon safely, although some laws apparently did require forfeiture of a firearm or ammunition that was not safely stored. *See, e.g.*, Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218, 218–219 (prohibiting loaded firearms in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building, within the Town of Boston" and authorizing seizure of such arms and a fine); Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627, 627–629 (prohibiting "any quantity of gun powder exceeding twenty-eight pounds weight, in any one place" in New York City "except in the public magazine" and requiring gunpowder to be "seperated into four stone jugs or tin cannisters, which shall not contain more than seven pounds each, on pain of forfeiting all such gun powder" and paying a fine); Act of Feb. 28, 1786, § I, 1786 N.H. Laws 383, 383–384 (prohibiting "more than ten pounds of gun-powder" in "any dwelling-house, store or other building, on land, within the limits of said Portsmouth" and requiring gunpowder to "be kept in a tin cannister properly secured for that purpose" or else "forfeit the powder" illegally kept and pay a fine); Act of Mar. 28, 1787, ch. 328, § II, 1786 Pa. Laws 502, 502–503 (prohibiting "any house, store, shop, cellar or other place, within the city of Philadelphia" from storing "any greater quantity of gunpowder, at one time, than thirty pounds . . . under the penalty of forfeiture of the whole quantity so over and above stored or kept, together with the sum of twenty pounds for every such offence"); Act of June 19, 1801, ch. 20, § 1, 1801 Mass. Acts 507, 507–508 (prohibiting storage of gunpowder in any "house or shop for sale, by retail" exceeding "twenty-five pounds" and requiring gunpowder to be "kept in brass, copper or tin Tunnels" subject to "forfeiting all such Gun Powder"). The Supreme Court in *Bruen* nevertheless treated modern training requirements as covered by the historically justifiable purpose of ensuring that "those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens." 142 S. Ct. at 2138 n.9 (internal quotation marks omitted). Plaintiffs have not identified any basis to depart from that reasoning in the context of restrictions on possession, so I follow *Bruen*'s lead and conclude that the justification underlying

quotation marks omitted).

Second, in addition to comparing "why" historical regulations and their modern counterparts burden Second Amendment rights, courts should compare "how" they do so, that is, "whether modern and historical regulations impose a comparable burden on the right." *Id.* at 2133. In Footnote Nine, the *Bruen* Court identified how shall-issue licensing regimes burden the right to keep and bear arms: using "narrow, objective, and definite standards" to identify persons rightfully prohibited from possessing or carrying a firearm, licensing officials deny those individuals a license, while issuing licenses to all other applicants. *Id.* at 2138 n.9 (internal quotation marks omitted). The Court acknowledged that even those individuals who ultimately receive a license must pay a fee and wait some amount of time while their application is processed, but it indicated that successful constitutional challenges to the burden on that group would likely be limited to cases of abuse, like when "lengthy wait times" or "exorbitant fees" de facto deny those individuals their right to keep or carry firearms. *Id.*; *see also id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring).

As Plaintiffs point out, a permitting scheme is undeniably different from historical laws that prohibited dangerous persons from keeping or carrying weapons and penalized them when they did so. By subjecting *everyone* to a licensing requirement, the

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the training component of Maryland's handgun license requirement is sufficiently comparable to historical precursors prohibiting firearm possession on dangerousness grounds.

government temporarily prevents a much wider swath of people from possessing or carrying firearms than the narrower category of dangerous persons who can be disarmed long term. Plaintiffs argue that, for this reason, a permitting scheme that licenses lawful gun owners in advance cannot be considered relevantly similar to historical laws that retrospectively punished unlawful gun owners.

That argument cannot be squared with *Bruen*'s Footnote Nine. There, the Supreme Court acknowledged that some shall-issue licensing regimes are constitutional. Yet *all* licensing schemes share the feature that Plaintiffs claim is unconstitutional—whether the delay is one day or thirty, a person entitled to a license will temporarily be prevented from exercising his rights while he awaits government approval. Despite this fact, the Supreme Court was untroubled by a licensing regime requiring advance permission to carry a gun, at least when the criteria for receiving permission from the government are objective and tied to historically defensible justifications.[3] *See id.* at 2123 & n.1, 2138 n.9 (majority opinion). We know from *Bruen*, then, that some firearm licensing regimes are constitutional, even though, unlike their historical analogues, they

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[3] Plaintiffs and amici suggest that because various historical licensing laws were imposed exclusively against "slaves, freedmen, and Indians," there can be no historical tradition justifying a licensing requirement for rights-holding citizens. Brief for Firearms Policy Coalition et al. as Amici Curiae Supporting Appellants 8. On their face, none of these laws constrained the licensing official's discretion, so they do little to prove that our historical tradition doesn't countenance applying a shall-issue licensing requirement to rights-bearing citizens.

briefly burden the rights of "law-abiding, responsible citizens." *Id.* at 2138 n.9 (internal quotation marks omitted). An analogical assessment that finds this difference disqualifying, therefore, is requiring an erroneously stringent fit between the modern and historical regulations. *See Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring) ("Historical regulations reveal a principle, not a mold.").

The Court's recent *Rahimi* decision is illustrative. There, the Court considered the constitutionality of 18 U.S.C. § 922(g)(8), which prohibits a person from possessing a firearm while subject to a domestic violence restraining order. The Court found two types of historical laws analogous: surety laws and affray or "going armed" laws. Surety laws "authorized magistrates to require individuals suspected of future misbehavior to post a bond," which "would be forfeit" if the individual subsequently broke the peace by, for example, "go[ing] armed offensively." *Rahimi*, 144 S. Ct. at 1900 (majority opinion) (internal quotation marks omitted). Going armed laws prohibited "riding or going armed, with dangerous or unusual weapons, to terrify" the people, which was punished by "forfeiture of the arms and imprisonment." *Id.* at 1901 (internal quotation marks, brackets, and ellipsis omitted).

The enforcement mechanisms of those historical laws were materially different from that of Section 922(g)(8), yet the Court concluded that provision "is 'relevantly similar' to those founding era regimes in both why and how it burdens the Second Amendment right." *Id.* (quoting *Bruen*, 142 S. Ct. at 2132). Unlike Section 922(g)(8), neither surety laws nor going armed

laws categorically disarmed a threatening person. And going armed laws solely punished past misbehavior; they did not impose a restraint to prevent future behavior. Despite these differences, the Court concluded that Section 922(g)(8) fit "within the tradition the surety and going armed laws represent" because it "restricts gun use to mitigate demonstrated threats of physical violence." *Id*. at 1901–1902.

Similarly here, although a shall-issue licensing regime designed to prevent dangerous individuals from obtaining firearms "does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'" *Id*. at 1898 (quoting *Bruen*, 142 S. Ct. at 2133). The theory underlying Plaintiffs' argument—that the Second Amendment prohibits any advance permission regulatory scheme—is inconsistent with the Supreme Court's reasoning in Footnote Nine. Despite the different enforcement mechanism, a shall-issue licensing regime *can* be consistent with the historical tradition of disarming those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten public safety. In *Bruen*, the Court indicated that a shall-issue licensing scheme consistent with historical principles would use "only narrow, objective, and definite standards" to guide licensing officials in identifying persons prohibited from carrying firearms and would not, through abuses like "lengthy wait times" or "exorbitant fees," de facto "deny ordinary citizens their right to public carry." 142 S. Ct. at 2138 n.9 (internal quotation marks omitted).

Applying these criteria to Maryland's handgun license requirement, no one disputes that the law

contains only "narrow, objective, and definite standards" for distinguishing between individuals prohibited from receiving a handgun and everyone else. *Id*. (internal quotation marks omitted). Plaintiffs contend that the licensing process results in a lengthy wait time, but the majority correctly rejects that argument on the facts and the law. *See* Maj. Op. 24–25. Plaintiffs also argue that the handgun license requirement is redundant of a separate Maryland permit requirement and therefore abusive. However, as the majority correctly explains, differences between the two requirements disprove Plaintiffs' premise. *See* Maj. Op. 26–28. Accordingly, Maryland's handgun license requirement fits comfortably within Bruen's criteria for a constitutional shall-issue licensing regime.

* * *

In conclusion, I would affirm the district court's award of summary judgment to the State of Maryland. Its handgun license law regulates conduct covered by the Second Amendment. But, following the Supreme Court's guidance in *Bruen*, I would conclude that Maryland's licensing requirement is consistent with our Nation's historical tradition of firearm regulation.

NIEMEYER, Circuit Judge, concurring in part, dissenting in part, and concurring in the judgment:

Before us is the question of whether a portion of Maryland's handgun licensing regime is unconstitutional under the Second Amendment. The law at issue requires a would-be purchaser of a handgun first to obtain a "handgun qualification license," Md. Code Ann., Pub. Safety § 5-117.1, and then, in connection with the actual purchase of a handgun, a related law requires the purchaser to submit a "firearm application," *id.* § 5-118. If the statutory requirements are satisfied, the State is required to grant the handgun qualification license within 30 days. *Id.* § 5-117.1(h)(1). And the State has 7 days to decide whether to deny the firearm application. *Id.* § 5-122(b). In short, the Maryland licensing regime at issue is understood to be a "shall-issue" one under which the State *must* issue the licenses needed to purchase a handgun if specified, objective requirements are satisfied.

In addition to Maryland, over 40 other States have shall-issue licensing regimes.

The majority opinion finds Maryland's regime constitutional, relying on footnote 9 in the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 38 n.9 (2022). In *Bruen*, the Court held that a New York law governing the process to obtain a license to carry a handgun in public was unconstitutional because the law conditioned the license's issuance on the applicant's demonstrating that he or she had some "special need" that justified carrying a handgun beyond a general interest in self-defense. *Id.* at 11–13, 38. Without

demonstrating that special need, a citizen in New York could not carry a handgun in public for self-defense.

In holding New York's law unconstitutional, the Bruen Court began by articulating the applicable test for analyzing a government regulation under the Second Amendment. It stated:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Bruen, 597 U.S. at 24 (emphasis added) (cleaned up). The Court thus adopted a two-step text-and-history test for determining whether a regulation violates the Second Amendment. *See also United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).

Explaining the test, the *Bruen* Court noted that at the first step, a court must focus on the plaintiff's *conduct* and determine whether it is covered by the text of the Amendment — "the right of the people to keep and bear Arms." 597 U.S. at 32 (quoting U.S. Const. amend. II). As to the plain meaning of that text, the Court stated that the right to "bear arms" describes "the right to wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready . . . in . . . case of conflict with another person." *Id.* (cleaned up). And it stated that "arms" refers to "all instruments that constitute

bearable arms, even those that were not in existence at the time of the founding." *Id*. at 28 (cleaned up). Thus, a plaintiff's *conduct* in carrying a bearable firearm is presumptively protected by the Second Amendment. That is only the first part of the analysis, however, because, as the Court stressed, the scope of the right protected by the Amendment is "not unlimited." *I*d. at 21 (cleaned up). Yet, when the plaintiff's proposed course of conduct is protected by the Amendment's plain text, the burden shifts to the government to justify its regulation of that conduct by showing the regulation's consistency with historical tradition. Thus, it is "the historical tradition that delimits the outer bounds of the right." *Id*. at 19; *see also Rahimi*, 144 S. Ct. at 1897.

After the Court established and explained the two-step analysis for application of the Second Amendment, it then turned to the New York law and, focusing on the conduct regulated, it readily concluded that the "textual" step of its test was satisfied, stating, "The Second Amendment's plain text thus presumptively guarantees petitioners Koch and Nash a right to 'bear' arms in public for self-defense." *Bruen*, 597 U.S. at 33. But that was just the first step in determining the scope of the "right" protected. The second step required New York to demonstrate that there was a historical tradition that justified its requiring a license applicant to demonstrate a special need to carry a handgun beyond the needs of ordinary self-defense. On that step, the Court concluded that New York had shown no "historical tradition limiting public carry only to those . . . who demonstrate a special need." *Id*. at 38. Accordingly, the Court held,

after completing the second step, that the New York licensing law was unconstitutional.

While rendering that holding, Court distinguished the New York law from the shall-issue licensing laws that, it noted, were in force in 43 other States. *Bruen*, 597 U.S. at 38 n.9. The Court explained, in footnote 9, that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which a general desire for self-defense is sufficient to obtain a permit." *Id*. (cleaned up). But the Court cautioned that "because any permitting scheme can be put toward abusive ends," it was not "rul[ing] out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry." *Id*.

The majority opinion relies on *Bruen* footnote 9 to uphold the constitutionality of Maryland's licensing regime, and I concur in its doing so. The Maryland law is a "shall-issue" licensing regime, and facially, it has not been "put toward abusive ends," insofar as it does not impose unreasonably lengthy wait times or exorbitant fees. *Bruen*, 597 U.S. at 38 n.9.

The majority opinion should have ended with that analysis. Instead, for a reason I have difficulty fathoming, the majority opinion launches into illogical dicta to alter *Bruen*'s clear test for applying the Second Amendment by requiring a plaintiff, *as part of step one*, to demonstrate that the regulation "infringes" the Second Amendment right. Specifically, the opinion states that, "[u]nder the first step of the *Bruen* framework, a court must consider the text of the

Second Amendment" and that, "[a]mong other plain-text requirements [of the first step], a regulation falls within the ambit of the Second Amendment only if the regulation '*infringes*' the Second Amendment right to keep and bear arms." *Ante* at 12 (emphasis added). Gratuitously applying that test to the Maryland licensing regime, the opinion then concludes:

> The plaintiffs have not met their burden to show that the [Maryland licensing law] "infringes" the Second Amendment right to keep and bear arms . . . . We therefore reject their facial constitutional challenge at step one of the Bruen framework, and do not reach their argument under step two that the [Maryland licensing law] lacks a historical analogue.

Ante at 28–29 (emphasis added).

Thus, the majority now makes infringement part of the showing that must be made at step one. Doing so, however, sets the *Bruen* test on its head. Rather than requiring the plaintiff to prove infringement at step one, as the majority does, *Bruen* requires the plaintiff to show only that his or her *conduct* is covered by the Amendment's plain text. 597 U.S. at 17, 24; *see also Rahimi*, 144 S. Ct. at 1897. Moreover, in addition to flipping the burden of the *Bruen* test on its head, the majority's newly created test is also circular and begs the question. Under it, the plaintiff must prove that the regulation "infringes" before the government is required to demonstrate the permissibility of the regulation by reference to historical tradition. Yet, *Bruen* makes clear that it is *only* after *both* steps are

taken that infringement can be found. This new test is plainly wrong.

Under the actual *Bruen* framework, as noted, the first question is simply whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 24; *see also Rahimi*, 144 S. Ct. at 1897. And if *the conduct* being regulated involves keeping or bearing a firearm, then it is *presumptively protected*. But that, of course, does not end the analysis, because the right may nonetheless be regulated in accordance with historical tradition, which must be demonstrated by the State. If a court finds that the government regulation "is consistent with the Nation's historical tradition of firearm regulation," only then may it "conclude that the individual's conduct falls outside the Second Amendment's unqualified command" — i.e., that the regulation does not "infringe" the right. *Bruen*, 597 U.S. at 24 (cleaned up). In other words, the scope of the Second Amendment right depends on what the government can demonstrate regarding "the Nation's historical tradition of firearm regulation" and, consequently, both steps must be conducted before "infringement" can be found. *Id*.

Were this not clear enough, the Supreme Court again in *Rahimi* reiterated its text-history two-step analysis, distinguishing between *conduct*, which the text addresses, and the *regulation*, which history must justify and on which the government has the burden. Explaining *Bruen*, the *Rahimi* Court stated, "We also clarified that when the Government regulates arms-bearing *conduct*, . . . it bears the burden to 'justify its *regulatio*n.'" 144 S. Ct. at 1897 (emphasis

added) (quoting *Bruen*, 597 U.S. at 24). And, as *Rahimi* repeated, the way the government carries this burden is by showing that the "challenged regulation fits within" "our 'historical tradition of firearm regulation.'" *Id*. (quoting Bruen, 597 U.S. at 17).

By instead requiring plaintiffs bringing a Second Amendment claim to demonstrate, at step one, the ultimate issue of whether the challenged law infringes the Second Amendment right, the majority fails to recognize that such a conclusion can only be reached after step two. The majority's new test is thus illogical, requiring plaintiffs to establish infringement before infringement can logically be determined. Not only does this analysis beg the ultimate question, it fails to recognize that *the scope of the Second Amendment right* — an antecedent to a finding of infringement —can only be determined by considering *both* the constitutional text *an*d the historical tradition.

I quickly add that the majority's new "infringement" analysis — which appears nowhere in *Bruen* — is also completely unnecessary to the majority's analysis of the Maryland licensing regime. The majority opinion fairly explains why footnote 9 is dispositive.

Thus, I concur in the court's holding that the Maryland licensing regime is constitutional by virtue of the Supreme Court's explanation in footnote 9 of Bruen, but I dissent from the "infringement" analysis and the adoption of the new "infringement" test, as described herein. Finally, I concur in the judgment.

RICHARDSON, Circuit Judge, with whom Judge AGEE joins, dissenting:

Maryland law prohibits anyone from acquiring a handgun without a "handgun qualification license." Md. Code, Pub. Safety § 5-117.1(c). To obtain a license, an applicant must, among other things, submit fingerprints for a background check and take a four-hour-long "firearms safety training course," all at the applicant's expense. See § 5-117.1(d). If an applicant completes these requirements, fills out an application, and pays the required $50 fee, then the Secretary of State Police "shall issue" her a license within thirty days. § 5-117.1(d), (g)–(h).

Deterred by these requirements, Plaintiffs challenged this regime as violating their Second Amendment rights. Maryland eventually defended its law before a panel of our Court. But rather than identifying any relevant historical support for its regulation, Maryland rested its case on a footnote in a Supreme Court opinion. The panel, unmoved by this effort to bypass controlling principles, held that Maryland's law violates the Second Amendment.

Now, our en banc Court carries Maryland's defense across the finish line. Yet to do so, the majority stretches implications from Supreme Court dicta to establish a carveout from Supreme Court doctrine. It then defends this result by grounding it in a contrived reading of the Second Amendment's plain text, for which the majority offers no support beyond negative inference.

I cannot assent to this transparent workaround of governing doctrine. The Supreme Court established a two-step, text-and-history framework for assessing all

Second Amendment claims. I would treat Maryland's law like any other and analyze it under this framework. Because Maryland's law regulates protected conduct under the amendment's text, and because Maryland has identified no historical basis for its law, I would hold that it violates the Second Amendment. I thus respectfully dissent.

I. Maryland's handgun licensing requirement regulates conduct that falls within the plain text of the Second Amendment.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. When considering a facial challenge to a firearm regulation, we first ask whether the challenged law regulates conduct that falls within the Second Amendment's plain text. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). This means that Plaintiffs must show three things: (1) Maryland's law applies to "the people"; (2) it covers "Arms"; and (3) it regulates the "keep[ing]" or "bear[ing]" of those arms. *Id*. at 31–33; *Bianchi v. Brown*, No. 21-1255, 2024 WL 3666180, at *48 (4th Cir. Aug. 6, 2024) (en banc) (Richardson, J., dissenting).

Plaintiffs easily make this threshold showing. Maryland does not contest that its law applies to "the people." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008); § 5-117.1(b)–(c) (applying to all "person[s]"). Furthermore, Maryland's law targets handguns, which are "Arms" within the plain text of the Amendment. *Heller*, 554 U.S. at 628. Finally, Maryland's law regulates conduct protected by the

Second Amendment's plain text. True, the law only restricts someone's ability to "purchase, rent, or receive a handgun"—it does not directly prohibit anyone from keeping or bearing arms. § 5-117.1(c). But if someone does not already own a handgun, she can only keep or carry one if she first acquires it. And Maryland's law cuts off all avenues of doing so unless she complies with its terms. Thus, the law necessarily regulates conduct protected by the Second Amendment's plain text. *Andrews v. State*, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them . . . and to purchase and provide ammunition suitable for such arms."); *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("[T]he core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms.'" (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011))).

Plaintiffs have thus established a prima facie Second Amendment claim. Yet to the majority, none of this matters. According to the majority, *Bruen*'s Footnote Nine blessed licensing schemes like Maryland's unless they are particularly abusive. And since Plaintiffs have not alleged that Maryland's scheme is particularly abusive, the majority finds that they cannot even establish a prima facie case for Second Amendment protection.

But the majority errs in reading Footnote Nine to control this case. Contrary to the majority's claims, Footnote Nine did not presumptively immunize Maryland's licensing regime—nor any others—from constitutional challenge absent special circumstances.

It rather limited the Court's holding to the particular kind of licensing regime at issue in *Bruen* while leaving open constitutional challenges to other kinds of licensing regimes. Reading Footnote Nine to establish anything more would elevate implications from dicta over the mandatory text-and-history test established in *Bruen*.

Like any written or spoken language, Footnote Nine's meaning stems from its context. *Bruen* involved a constitutional challenge to New York's requirement that applicants demonstrate a special need for self-protection in order to obtain a license for public carry. *Id*. at 12–13. New York's regime was a type of "may-issue" licensing law, which grant public authorities discretion to deny licenses even if applicants satisfy the statutory criteria for obtaining them. *Id*. at 13–15. May-issue licensing regimes are distinct from "shall-issue" licensing regimes, like Maryland's, which require authorities to issue a license upon an applicant's showing that she meets established statutory criteria. *Id*. at 13.

The Supreme Court began its analysis of New York's law by determining whether the plaintiffs—who had unsuccessfully applied for a license—sought to engage in conduct that fell within the plain text of the Second Amendment. To that end, the Court considered three things: (1) whether the plaintiffs were part of "the people"; (2) whether their desired weapons—handguns—were "Arms"; and (3) whether their proposed course of conduct—"carrying handguns publicly for self-defense"—constituted "bear[ing]" arms. *Id*. at 31–32. The Court found that the plaintiffs satisfied all three textual requirements. *Id*. at 31–33.

At no point did the Court consider the degree of burden imposed by the regulation at the plain-text stage. Rather, it was enough that New York regulated protected conduct to entitle the plaintiffs to prima facie protection. *Id*. at 17 (explaining that, when the plain text covers individual conduct, the Government must "justify its regulation" (emphasis added)); *see also id*. at 24 (analogizing to First Amendment doctrine in which the government bears the burden of proving constitutionality any time it "restricts speech" (citation omitted)).

The Court then considered whether New York's law was consistent with history and tradition. Earlier in its opinion, the Court had established that the Government must justify a firearm regulation that falls under the Second Amendment's plain text (step one) by analogizing it to its historical forebears, which partly requires assessing "whether modern and historical regulations impose a *comparable burden* on the right of armed self-defense." *Id*. at 29 (emphasis added). At this second step of analysis, the Court therefore measured the burden imposed by New York's law and determined that it "prevent[ed] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id*. at 71; *see also id*. at 38 ("broadly prohibit[ed] the public carry of commonly used firearms for self-defense"); *id*. at 60 ("prevent[ed] law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose"). The Court then compared this burden to those imposed by historical regulations, along with the comparable justifications for those laws, and found that no historical tradition justified the onerous burden New York imposed on the right to bear arms.

See, e.g., id. at 38 ("Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense."); *id.* at 55 (contrasting the burden imposed by New York's law with historical surety laws). So the Court concluded that New York's regime was inconsistent with historical regulations and violated the Second Amendment.

Along the way, the Court clarified the limits of its holding. A careless reader might have interpreted the Court's analysis to suggest that all licensing regimes fail Second Amendment scrutiny. So immediately after stating that New York's law flunked the history-and-tradition test, the Court added Footnote Nine and explained that its analysis should not "be interpreted to suggest the unconstitutionality of" shall-issue licensing regimes. *Id.* at 38 n.9. Unlike may-issue regimes, the Court explained, shall-issue regimes "do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry." *Id.* (quoting *Heller*, 554 U.S. at 635). Such regimes are, in the main, guided by "narrow, objective, and definite standards" and do not require the "appraisal of facts, the exercise of judgment, and the formation of an opinion," so they do not necessarily impose the same burden on public

carry as did New York's law. *Id*. (first quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); and then quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)). At the same time, however, the Court clarified that some shall-issue regimes might operate to "deny ordinary citizens their right to public carry," such as those featuring "lengthy wait times" or "exorbitant fees," and therefore might resemble may-issue regimes like New York's in practice. *Id*.

The majority reads Footnote Nine to establish the presumptive constitutionality of all shall-issue licensing regimes, including Maryland's. But read in context, Footnote Nine's role was much more modest. Footnote Nine merely clarified that shall-issue licensing regimes are not necessarily unconstitutional just because may-issue regimes are. Unlike may-issue regimes, shall-issue regimes generally impose a lesser burden on the right to keep and bear arms, since they do not require heightened showings or grant significant discretion to state officials. So it is possible that the burden they impose is akin to those imposed by historical regulations, in contrast with may-issue regimes. Footnote Nine thus invited courts to independently assess the pedigree of shall-issue licensing regimes against the historical record. Only when a shall-issue regime effectively operates like a may-issue regime is such an inquiry unnecessary, for then it is unconstitutional for the reasons announced in *Bruen*.

Reading Footnote Nine to accomplish anything more risks elevating perceived implications from dicta over doctrine. *Bruen* mandated that whenever a law regulates protected conduct, the Government must

prove that the regulation is consistent with history and tradition. *Id*. at 19; *see also Rahimi*, 144 S. Ct. at 1896 ("In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" (quoting *Bruen*, 597 U.S. at 24)). But the constitutionality of shall-issue licensing regimes was not before the Court in *Bruen*, so it had no opportunity to consider their historical pedigree. And though we sometimes afford substantial weight to Supreme Court dicta, the Supreme Court has expressly cautioned against "read[ing] a footnote" in an opinion to "establish the general rule" for a class of cases. *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 755 n.6 (2023). Without such caution, we risk cherry-picking "stray comments and stretch[ing] them beyond their context—all to justify an outcome inconsistent with th[e] Court's reasoning and judgments." *Brown v. Davenport*, 596 U.S. 118, 141 (2022).

The Court's decision in *Rahimi* illustrates the peril of stretching perceived implications from dicta. In both *Heller* and *Bruen*, the Court arguably suggested that the Second Amendment only protects the rights of "responsible citizens." *Heller*, 554 U.S. at 635; *Bruen*, 597 U.S. at 70. Emboldened by these statements, the Government in *Rahimi* argued that individuals subject to domestic-violence restraining orders are not protected by the Second Amendment, since they are not "responsible." *Rahimi*, 144 S. Ct. at 1903. Yet the Court in *Rahimi* renounced having ever adopted such a limit, questioning whether the term "responsible" could provide meaningful guidance and emphasizing

that "such a line [did not] derive from our case law," since "[t]he question was simply not presented" in prior cases. *Id.* The Court instead conducted afresh a text-history-and-tradition analysis of the constitutionality of the restriction. *Id.* at 1898–903. *Rahimi* is a warning that courts must not rely on suggestions drawn from dicta to establish exceptions outside the mandated *Bruen* framework.

Rather than heeding this warning, however, the majority circumvents it by contriving a creative way to ground its reading of Footnote Nine in the Second Amendment's plain text. The majority observes that a law only violates the Second Amendment if it "infringes" the right to keep or bear arms. Majority Op. at 12. It adds that each of the Supreme Court's recent Second Amendment cases involved laws that "banned or effectively banned the possession or carry of arms." *Id.* at 13. From this, the majority concludes that Footnote Nine must reflect the Supreme Court's finding that shall-issue regimes do not infringe the Second Amendment right, absent particularly abusive circumstances, since they do not ban or effectively ban the possession or carry of arms. *Id.* at 14.

This is an implausible reading of *Bruen*. Nowhere in Footnote Nine did the Supreme Court tie shall-issue licensing to the plain meaning of "infringe." Indeed, the Court never mentioned this word at all in its plain-text inquiry or in Footnote Nine. The Court rather appended Footnote Nine to a sentence explaining why there was no historical support for New York's may-issue regime. In contrasting the burden imposed by shall-issue regimes to may-issue regimes, the Court merely clarified that its historical

analysis of the latter's constitutionality did not determine the constitutionality or unconstitutionality of the former. Nothing about this discussion had any bearing on how we analyze the Second Amendment's plain text.[1]

Nor is there any basis for limiting the term "infringe" to total or effectively total deprivations of the right to keep or bear arms. To the contrary, the evidence overwhelmingly points in the opposite direction. Early American dictionaries defined "infringe" to include burdens that fell short of total deprivations. *Compare* 1 Samuel Johnson, *Dictionary of the English Language* (4th ed. 1775) (defining "infringe" as "[t]o destroy; to *hinder*" (emphasis added)), *and* 1 Noah Webster, *American Dictionary of the English Language* (1828) (defining "infringe" as

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[1] My good friends in the majority and those concurring in the judgment all strain to find how their preferred reading of Footnote Nine fits into *Bruen*'s stated framework. The majority finds that the supposed blessing of shall-issue licensing regimes can be found in *Bruen*'s step-one, plain-text inquiry. Judge Rushing finds that blessing a home in step two's historical analysis. And Judge Niemeyer seemingly believes the blessing resides outside Bruen's framework, requiring no consideration of its two steps. But reading Footnote Nine to find that shall-issue regimes are presumptively constitutional clashes with the rest of *Bruen*. There is, however, a reading of this precautionary footnote that makes Bruen internally consistent: In Footnote Nine, the Court did not decide the unpresented question of the constitutionality of shall-issue licensing regimes, suggesting only that the answer to that open matter may not look the same as the conclusion just reached. *See Bruen*, 597 U.S. at 38 n.9 ("nothing in our analysis should be interpreted to suggest the unconstitutionality" of shall-issue licensing regimes); *cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821).

"[t]o destroy or *hinder*" (emphasis added)), *with* 1 Johnson, *supra* (defining "hinder" as "to cause impediment"), *and* 1 Webster, *supra* (defining "hinder" as "[t]o stop; to *interrupt*; to obstruct; to *impede or prevent from moving forward by any means*" (emphasis added)).[2] Other early sources similarly confirm that even the smallest burden, if unjustified, could violate the Second Amendment right. *See* 2 George Tucker, *Blackstone's Commentaries* 143 n.40 (1803) ("The right of the people to keep and bear arms shall not be infringed . . . *and this without any qualification as to their condition or degree* . . . ." (emphasis added)); *Nunn v. State*, 1 Ga. 243, 251 (1846) ("The right of the whole people . . . to keep and bear *arms* . . . shall not be *infringed*, curtailed, or broken in upon, *in the smallest degree*." (third emphasis added)). And nineteenth-century courts often entertained challenges to laws that merely regulated the right to carry arms, without prohibiting it, and decided these cases using analogical reasoning—not by holding that these laws didn't sufficiently burden the right in the first place. *See, e.g., State v. Jumel*, 13 La. Ann. 399, 399–400 (1858) (holding that a concealed carry ban did not "infringe" the Second Amendment right because it was consistent with historical police powers); *Commonwealth v. Murphy*, 166 Mass. 171, 172–73 (1896) (upholding a law prohibiting the parading of firearms because it was analogous to prohibitions on concealed carry). Finally, lest there be any doubt, the Court in Bruen contemplated challenges to laws that

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[2] Modern dictionaries define "infringe" similarly. *See, e.g., Infringement, Black's Law Dictionary* (12th ed. 2024) (defining "infringement" as "[a]n encroachment or trespass on []a right").

impose burdens short of total prohibitions on the right, such as sensitive-place restrictions.[3] 597 U.S. at 30 (discussing how to analogize modern sensitive-place restrictions to historical ones); *cf. United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) (finding a rule "impairing the effect of" a pardon to "infring[e] the constitutional power of the Executive"). These sources show that any regulation of the Second Amendment right, absent constitutional justification, is an infringement of the right.[4]

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[3] It is thus immaterial that *Heller*, *McDonald v. Chicago*, 561 U.S. 742 (2010), and *Bruen* all involved laws that prohibited or effectively prohibited the right to have or carry arms. Nothing in those cases limited Second Amendment challenges to laws of those kinds. To the contrary, the framework those cases adopted contemplated challenges to less burdensome laws that still regulate the right to keep or bear arms. It is baffling that the majority chooses to rest its argument on this negative inference alone without even mentioning the overwhelming evidence to the contrary.

[4] Though this is not dispositive, it is noteworthy that the majority's threshold inquiry was not part of the first step of the two-step analysis that prevailed in the Courts of Appeals, including our own, before *Bruen*. At the first step of this inquiry, courts simply asked whether "the challenged regulation i conduct that was within the scope of the Second Amendment as historically understood," without considering the magnitude of the burden imposed. *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (emphasis added); *see also United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (same); *Ezell*, 651 F.3d at 702–03 (considering whether the "challenged firearms law *regulates* activity falling outside the scope of the Second Amendment right" (emphasis added)). It was only at the second step of this inquiry—when determining which level of scrutiny to apply—that courts considered "the degree to which the challenged law burdens the right." *Chester*, 628 F.3d at 682. Importantly, *Bruen* called the first step of this approach "broadly consistent

If there were any doubt on this front, the Court foreclosed it in *Rahimi*. There, the Court clarified that "when the Government *regulates* arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" *Rahimi*, 144 S. Ct. at 1897 (quoting *Bruen*, 597 U.S. at 24 (emphasis added)). Two other Justices, writing separately, similarly explained that the mere targeting of protected conduct triggers Second Amendment scrutiny. *See id*. at 1907 (Gorsuch, J., concurring) ("In this case, no one questions that the law Mr. Rahimi challenges addresses individual conduct covered by the text of the Second Amendment."); *see also id.* at 1932 (Thomas, J., dissenting) (asking whether a regulation "*target[s]* conduct protected by the Second Amendment's plain text" (emphasis added)). *Rahimi* establishes what was already apparent: A law need only regulate protected conduct to trigger Second Amendment scrutiny, and any regulation unjustified by our historical tradition "infringe[s]" the right.[5]

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with *Heller*" but abrogated the second step. 597 U.S. at 19.

[5] This mirrors how the Supreme Court considers challenges brought under other constitutional rights. Under the First Amendment's free speech clause, for instance, "'[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'" *Bruen*, 597 U.S. at 24 (quoting *United States v. Playboy Ent. Grp*., Inc., 529 U.S. 803, 816 (2000)). And the Court has explained that "[i]t is of no moment that the [challenged] statute does not impose a complete prohibition," for both "burdens" on and "bans" of protected speech face "the same rigorous scrutiny." *Playboy Ent. Grp*., 529 U.S. at 812. So just as an unjustified regulation of protected speech "abridge[s]" the First Amendment right, an unjustified regulation

Thus, the majority's construction of the Second Amendment's plain text is baseless. *Bruen* did not instruct courts to consider how significantly a regulation burdens protected conduct at the plain-text stage. And it certainly did not tie Footnote Nine to the plain-text meaning of "infringe." Rather, text, history, and Supreme Court precedent establish that any regulation of protected conduct, if unjustified, infringes the Second Amendment right. Because shall-issue licensing regimes like Maryland's regulate protected conduct under the amendment's plain text, they must be justified according to history and tradition.

II. Maryland has not shown that history and tradition justify its handgun licensing requirement.

Because the challenged law regulates conduct protected by the Second Amendment's plain text, Maryland must show under *Bruen*'s second step that it is consistent with our Nation's historical tradition of firearms regulation. *Bruen*, 597 U.S. at 17.[6] Maryland

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of the keeping or bearing of arms "infringe[s]" the Second Amendment right. U.S. Const. amends. I, II.

[6] Maryland argues that its licensing law need not face historical scrutiny at all since it is not a "substantive limitation[]" but rather an "administrative regime that implements [substantive] limitations," which Maryland contends must be assessed according to a separate, non-historical analysis. Appellees' Suppl. Br. at 11. But the cases Maryland cites for this proposition applied interest-balancing to determine whether other constitutional rights were violated, an approach which *Bruen* explicitly rejected in the Second Amendment context. *See Rosario v. Rockefeller*, 410 U.S. 752, 761–62 (1973) (upholding voter registration because it advanced a "particularized legitimate

offers two potential historical analogues for its regulation. First, Maryland argues that its law is analogous to the historical tradition of prohibiting dangerous people from possessing weapons. Second, Maryland argues that its law is analogous to militia-training laws from the Founding. But neither tradition is relevantly similar to Maryland's licensing scheme. So the challenged law is unconstitutional.

1. The historical tradition of prohibiting "dangerous" people from owning firearms does not justify Maryland's law.

Maryland first argues that its licensing scheme is analogous to historical limitations on the ability of "dangerous" people to own firearms. Appellees' Br. at 32–33. Outside of several modern U.S. code provisions,[7] Maryland does not cite any historical

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purpose" and was "in no sense invidious or arbitrary"); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (considering whether a permitting requirement for parades was "exerted so as not to deny or unwarrantly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places"); *but see Bruen*, 597 U.S. at 22–23 (rejecting "judge-empowering 'interest-balancing'" (quoting *Heller*, 554, U.S. at 634)). For the Second Amendment, "when the Government regulates arms-bearing conduct, . . . it bears the burden to 'justify its regulation'" based on text and history. *Rahimi*, 144 S. Ct. at 1897 (quoting *Bruen*, 597 U.S. at 24). Here, Maryland's administrative scheme burdens protected conduct, so Maryland must put forth evidence that establishes its scheme is consistent with our historical tradition of firearm regulation.

[7] *See* 18 U.S.C. § 922(g)(1) (prohibiting felons from possessing firearms); § 922(g)(3) (same for persons addicted to a

regulations to support its position. *See Bruen*, 597 U.S. at 66 n.28 ("20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."). But Maryland does point to several court decisions that have held, to varying degrees, that dangerous people may be disarmed. In *Rahimi*, for example, the Supreme Court held that history and tradition support the temporary disarmament of an "individual [who] poses a clear threat of physical violence to another." 144 S. Ct. at 1901. Some judges have gone further and argued that history and tradition permit legislatures to permanently disarm categories of people considered dangerous to public peace and safety. *See Kanter v. Barr*, 919 F.3d 437, 451–64 (7th Cir. 2019) (Barrett, J., dissenting); *Folajtar v. Att'y Gen.*, 980 F.3d 897, 912–20 (3d Cir. 2020) (Bibas, J., dissenting); *Antonyuk v. Chiumento*, 89 F.4th 271, 314 (2d Cir. 2023), *cert. granted, judgment vacated sub. nom. Antonyuk v. James*, No. 23-910 (U.S. July 2, 2024) ("There is widespread agreement among both courts of appeals and scholars that restrictions forbidding dangerous individuals from carrying guns comport with this Nation's historical tradition of firearm regulation . . . ." (internal quotation marks and citation omitted)).[8]

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controlled substance); § 922(g)(9) (same for persons who have been convicted of a domestic-violence misdemeanor).

[8] After *Bruen*, courts are split over how such a principle justifies, if at all, the modern U.S. code provisions Maryland cites. *Compare Range v. Att'y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023), *cert. granted, judgment vacated*, No. 23-374 (U.S. July 2, 2024) (holding that § 922(g)(1) violates the Second Amendment, as applied to a particular nonviolent felon); *United States v. Duarte*,

Maryland argues that its licensing regime fits within this tradition because it ensures that dangerous people prohibited from owning handguns cannot acquire them.[9]

I need not decide how far history and tradition support the disarming of a dangerous person. For regardless of how far it does, Maryland's law is not "relevantly similar" to historical laws within this tradition. *Bruen*, 597 U.S. at 29. *Bruen* identified two metrics for determining whether modern and historical laws are analogous: "how" and "why" the regulations burden a citizen's Second Amendment right. *Id.* Put differently, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." *Id.* (quoting

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101 F.4th 657, 691 (9th Cir. 2024), *vacated*, No. 22-50049 (9th Cir. July 14, 2024) (same); *and United States v. Daniels*, 77 F.4th 337, 341–55 (5th Cir. 2023), *cert. granted, judgment vacated*, No. 23-376 (U.S. July 2, 2024) (concluding that § 922(g)(3) is unconstitutional); *with United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023), *cert. granted, judgment vacated*, No. 23-610 (U.S. July 2, 2024) (upholding § 922(g)(1) and concluding "that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)"); *and Vincent v. Garland*, 80 F.4th 1197, 1199–1202 (10th Cir. 2023), *cert. granted, judgment vacated*, No. 23-683 (U.S. July 2, 2024) (same).

[9] *See* § 5-117.1(c)(2) (requiring a determination that an applicant "is not otherwise prohibited by federal or State law from purchasing or possessing a handgun"); § 5-133(b) (prohibiting felons, fugitives, individuals addicted to drugs, the mentally ill, individuals subject to protective orders, and other categories of persons from possessing firearms).

McDonald, 561 U.S. at 767 (cleaned up)); *see also Rahimi*, 144 S. Ct. at 1898 (reaffirming this approach). Maryland's licensing law might share an analogous "why" with historical restrictions on dangerous people. But it does not share a relevantly similar "how" because it imposes a burden that is materially different from the one imposed by every other restriction within this tradition.

Every historical law limiting the ability of dangerous people to keep or bear arms targeted those found dangerous by the government—either individually or as a class—and penalized them for having or carrying firearms. For example, the Militia Act of 1662 authorized royal officers to disarm persons that they determined were "dangerous to the Peace of the Kingdom." *Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting) (quoting 13 & 14 Car. 2, c. 3, § 13). Some American colonies, meanwhile, disarmed Catholics and loyalists unless they swore an oath of loyalty to the sovereign, since it was feared that they owed fealty to a foreign higher power. *Kanter*, 919 F.3d at 457 (Barrett, J., dissenting); *Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting). Many states also enacted surety laws, which required individuals found to give another person "reasonable cause to fear" violence to post a bond before going armed. *Rahimi*, 144 S. Ct. at 1900. And "going armed" laws, enacted in several colonies and states, penalized anyone who went armed with dangerous and unusual weapons to terrify the people with forfeiture of arms and imprisonment. *Id.* at 1900–01. As these examples demonstrate, each law within this tradition targeted only people determined to be dangerous and subjected them to various penalties.

Maryland's law operates through an entirely different mechanism. It does not identify dangerous people and then target them with restrictions and sanctions. Rather, Maryland's law bars *everyone* from acquiring handguns until they can prove that they are *not* dangerous. By preemptively depriving all citizens of firearms to keep them out of dangerous hands, Maryland's law utilizes a meaningfully different mechanism and thereby goes far beyond historical dangerousness regulations. So these regulations cannot justify Maryland's law. *See id*. at 1898 ("Even when a law regulates arms-bearing for a permissible reason, . . . it may not be compatible with the right if it does so to an extent beyond what was done at the founding.").

This is not some trivial difference. The contrast in mechanism between past and present laws is precisely how the Supreme Court has assessed potential analogues *within this exact tradition*. In *Bruen*, the Court concluded that New York's may-issue licensing regime was not analogous to historical surety laws because the two sets of laws employed meaningfully different mechanisms. "While New York presumes that individuals have no public carry right without a showing of heightened need," the Court explained, "the surety statutes *presumed* that individuals had a right to public carry that could be burdened only if another could make out a specific showing of 'reasonable cause to fear an injury, or breach of the peace.'" *Bruen*, 597 U.S. at 56 (quoting Mass. Rev. Stat., ch. 134, § 16 (1836)). In *Rahimi*, by contrast, the Court concluded that 18 U.S.C. § 922(g)(8) and surety laws were relevantly similar because both laws presumed "that the Second Amendment right may only be burdened

once a defendant has been found to pose a credible threat to the physical safety of others." 144 S. Ct. at 1902. In both *Bruen* and *Rahimi*, then, the Court found dispositive the fact that surety laws targeted only those who were already deemed dangerous and used this mechanism as the basis for analogizing to present-day restrictions. Yet Maryland's law operates in the exact opposite manner—it treats everyone as presumptively dangerous until they can show that they are safe and responsible. Maryland's law therefore is not relevantly similar to historical laws targeting dangerous persons. *See Bruen*, 597 U.S. at 26 ("[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century[,] . . . [and] earlier generations addressed the societal problem . . . through materially different means, that . . . could be evidence that a modern regulation is unconstitutional.").[10]

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[10] Judge Rushing thoughtfully suggests that Maryland's licensing regime is supported—at step two—by the historical tradition of "regulating firearm possession by dangerous individuals." Rushing Concurring Op. at 36. With great respect, Judge Rushing commits two errors. First, she overreads *Bruen*'s Footnote Nine. The Supreme Court did not, as Judge Rushing suggests, find that some shall-issue licensing regimes not before the Court were "relevantly similar" to this regulatory tradition. *Id*. at 30, 37–40. Rather than address how this regulatory tradition might be analogous to a shall-issue licensing regime, Footnote Nine merely suggested that the constitutionality of a shall-issue regime did not necessarily fall prey to the same concerns as New York's may-issue regime. The second error flows from the first. Having decided that the Supreme Court blessed at least some shall-issue regimes, she then assumes that we must ignore the undeniable difference between the burdens on the right imposed by *ex ante* disarmament of all citizens and *ex post* punishment of a dangerous individual who poses a threat. *See*

This contrast is especially stark given that licensing laws have been around since the Founding, yet before the late nineteenth century, they were only used to target allegedly dangerous persons who did not enjoy constitutional rights. Conventional accounts typically explain that firearm licensing for American citizens did not begin until the late 1800s or early 1900s. *See* Adam M. Samaha, *Is* Bruen *Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. Rev. 1928, 1933 (2023); Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. Davis L. Rev. 2545, 2596, 2599–600 (2022). But long before then, colonies and states used licensing to stifle the keeping and bearing of arms by racial minorities. Prior to the American Revolution, at least three colonies prohibited slaves, free blacks, or Native Americans from having or carrying firearms in most or all circumstances without first obtaining a license.[11] Many more states

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Rushing Concurring Op. at 39–41. The surety and going-armed laws *Rahimi* discussed as part of this historical tradition punished dangerous individuals based on their conduct. 144 S.Ct. at 1900–01. But these after-the-fact punishments burden the right of "an individual" who "poses a clear threat of violence." *Id*. at 1901. Faithfully applying the Second Amendment demands that we actually consider "how" the historical tradition of punishing such a dangerous individual burdened Second Amendment rights compared with the burden imposed by Maryland's preemptive, if only temporary, ban on all citizens possessing handguns.

[11] An Act Directing the Trial of Slaves . . ., ch. IV, §§ XIV–XV (1723), *in* 4 William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619*, at 126, 131 (1820) (prohibiting any "negro, mulatto, or Indian" from keeping or

enacted similar requirements after the Revolution and until the enactment of the Fourteenth Amendment.[12]

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carrying a gun unless they were a "house-keeper, or listed in the militia," but permitting any such person, "bond or free," who lived "at any frontier plantation" to "keep and use guns" if they "first obtained a licence for the same, from some justice of the peace"); An Act for the Better Order and Governing Negroes and Other Slaves in this Province § XXIII (1740), *in 7 Statutes at Large of South Carolina* 397, 404 (David J. McCord ed., 1840) (prohibiting any slave from "carry[ing] or mak[ing] use of fire arms" outside "the presence of some white person" unless he acquired a "ticket or license, in writing, from his master, mistress or overseer"); An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province (1755), *in* 18 *Colonial Records of the State of Georgia* 102, 117–18 (Allen D. Candler ed., 1910) (copying South Carolina's law).

[12] Act of Dec. 17, 1792, ch. CIII, §§ 8–9, in A Collection of All Such Acts of the General Assembly of Virginia, of a Public & Permanent Nature, As Are Now in Force 186, 187 (1803) (prohibiting any "negro or mulatto" from "keep[ing] or carry[ing] any gun" unless they were a housekeeper, but permitting any such person, "bond or free," who lived "at any frontier plantation" to "keep and use guns" upon obtaining a license from a justice of the peace); Act of Feb. 8, 1798, ch. CLXXIV, §§ 5–6, in 2 A Digest of the Statute Law of Kentucky: Being a Collection of All the Acts of the General Assembly, of a Public and Permanent Nature, from the Commencement of the Government to May Session 1822, at 1149, 1150 (William Littell & Jacob Swigert eds., 1822) (any "negro, mulatto, or Indian"); Slaves, and Free Persons of Color § 7 (1805), in A Digest of the Laws of the State of Alabama: Containing All the Statutes of a Public and General Nature, in Force at the Close of the Session of the General Assembly, in January 1833, at 391, 391–92 (John G. Aikin ed., 1833) (slaves); Slaves §§ 3–4 (1818) in A Digest of the Laws of Missouri Territory 373, 374 (Henry S. Geyer ed., 1818) (any "negro or mulatto"); Free Negroes and Mulattoes, ch. 76, §§ 21–23 (1830), in A Digest of the Statutes of Arkansas; Embracing All Laws of a General and Permanent Character in Force at the Close of the Session of the

Indeed, it appears that licensing requirements for racial minorities were widespread by the mid-nineteenth century, particularly in the South. *See* Firearms Policy Coalition Amicus Br. at 6–17 (collecting sources).

These early licensing laws were treated as constitutional on the ground that people of color—who were considered categorically dangerous at that time—were not entitled to the full enjoyment of constitutional rights. *See* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 Ind. L.J. 1587, 1611 (2014). For example, when upholding a licensing requirement for free blacks, the North Carolina Supreme Court explained that "free people of color have been among us, as a separate and distinct class,

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General Assembly of 1856, at 552, 557 (Josiah Gould ed., 1858) (any "free negro or mulatto"); Crimes and Punishments, ch. 30 (1841), in A Digested Manual of the Acts of the General Assembly of North Carolina, From the Year 1838 to the Year 1846, at 72, 73 (James Iredell ed., 1847) (any "free negro, mulatto, or free person of color"); An Act to Amend the Criminal Law, No. 4731, § XIII (1865), in Acts of the General Assembly of the State of South Carolina, Passed at the Sessions of 1864–65, at 271, 275 (1866) (all "[p]ersons of color"); An Act Prescribing Additional Penalties for the Commission of Offences Against the State, and for Other Purposes § 12 (1866), in The Acts and Resolutions Adopted by the General Assembly of Florida, at its Fourteenth Session 23, 25 (1866) ("any negro, mulatto, or other person of color"); Certain Offenses of Freedmen, 1865 Miss. Laws, p. 165 § 1, in 1 Walter L. Fleming, Documentary History of Reconstruction 289 (1906) (any "freedman, free negro or mulatto"). Delaware also enacted a licensing scheme for "free negroes or free mulattoes" in 1832. Act of Feb. 10, 1832, ch. CLXXVI, § 1, in 8 Laws of the State of Delaware 208, 208 (1841). But it later repealed this law in 1843. Act of Feb. 28, 1843, ch. DI, § 1, in 9 Laws of the State of Delaware 552, 552 (1843).

requiring, from necessity, in many cases, separate and distinct legislation." *State v. Newsom*, 27 N.C. (5 Ired.) 250, 252 (1844). Similarly, the Virginia Supreme Court explained that firearm restrictions that would otherwise be "inconsistent with the letter and spirit of the Constitution . . . as respects the free whites" were constitutional when applied to racial minorities. *Aldridge v. Commonwealth*, 2 Va. 447, 449 (1824); *see also Waters v. State*, 1 Gill. 302, 309 (Md. 1843) (describing free blacks as "a vicious and dangerous population," which is why laws "make it unlawful for them to bear arms"); *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856) (explaining that states could disarm people of color under the police power). And the Supreme Court in *Dred Scott v. Sandford* made clear that if blacks were ever recognized as citizens, "it would give them the full liberty . . . to keep and carry arms wherever they went." 60 U.S. (919 How.) 393, 417 (1857); *Cooper v. Savannah*, 4 Ga. 72, 72 (1848) ("Free persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . .").[13]

I do not cite these examples because I believe they stand for some constitutional principle. Far from it—these laws were based on the ill-founded belief that their targets were not entitled to constitutional protection, and they were eventually overruled by legislative and constitutional reforms that guaranteed the blessings of liberty to all Americans. *See*

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[13] Native Americans likewise were not considered part of "the people" entitled to constitutional protection. *See United States v. Price*, No. 22-4609, 2024 WL 3665400, at *33 n.19 (4th Cir. Aug. 6, 2024) (en banc) (Richardson, J., dissenting). USCA4 Appeal: 21-2017 Doc: 104 Filed: 08/23/2024 Pg: 70 of 73

McDonald, 561 U.S. at 770–78. Instead, I see these laws as further evidence that licensing schemes like Maryland's lack a historical basis. The problem of dangerous persons having and carrying firearms has been around since the Founding. And as these examples show, colonies and states were capable of imposing licensing requirements for the keeping or bearing of arms. Yet there is no evidence that any jurisdiction, before the late nineteenth century, required all members of "the people" to obtain a license, or anything like it, before keeping or carrying firearms. The only evidence of licensing we do have was for persons who were thought *not* to enjoy constitutional liberties. This is probative evidence that Maryland's licensing requirement is an unprecedented aberration in our historical tradition.

Some undoubtedly think that Maryland's licensing requirement strikes a beneficial balance between individual liberty and public safety. But it is not the role of judges to balance these two competing interests. Our job is to enforce the Second Amendment, which "is the very *product* of an interest balancing by the people." *Heller*, 554 U.S. 635. By adopting a mechanism inconsistent with "the traditions of the American people," Maryland's law transgresses that original balance. *Bruen*, 597 U.S. at 26.

2. Maryland's law is not analogous to militia training laws.

Maryland further argues that its law is analogous to historical laws requiring training for members of the militia. Before and after the Founding, many colonies and states required most able-bodied men of a certain age to participate in the militia. *See*

Hirschfeld v. ATF, 5 F.4th 407, 428–30 (4th Cir.), *vacated as moot*, 14 F.4th 332 (4th Cir. 2021). They likewise required members of the militia to arrive with their own weapons and report for regular training. *Id.* at 428–32. Maryland argues that its licensing law is analogous to these historical regulations because it ensures "that individuals who may use a handgun have some knowledge and training to do so safely." Appellees' Br. at 34.

Contrary to Maryland's claims, however, these militia laws were not part of our Nation's historical tradition of firearms regulation. In reality, they did not regulate the right to keep or bear arms in any way but rather imposed service obligations, unconnected with the ownership of firearms, on all members of the militia. So they cannot serve as relevant analogues for Maryland's licensing regime.

Consider two examples. In 1778, New Jersey enacted a law requiring militiamen to "assemble, properly armed and accoutered, twice in the Year, at such Times and Place or Places as the Field-Officers, or a Majority of them, shall direct for the Purpose of Training and Exercise." 1778 N.J. Sess. Laws 42, 46 § 15. "[I]n case of Absence" from training, the law imposed a monetary sanction based on the absentee's rank. *Id.* The law also sanctioned any militia member who failed to acquire the proper arms and ammunition. *See id.* at 45 §§ 11–12.

Delaware enacted a similar law in 1782. It required the militia to "be duly exercised and instructed once in every Month," 1782 Del. Sess. Laws 1, 3 § 5, and penalized all who "shall neglect or refuse to appear on the Parade . . . not having reasonable Excuse," *id.* at 4

§ 7. It also required militia members to acquire and bring their own firearms, and sanctioned any member for failing to keep his arms "by him at all Times, ready and fit for Service." *Id*. at 3 § 6

These examples illustrate why historical militia laws are not relevant analogues for Maryland's licensing law. Early militia laws imposed training requirements based on a person's membership in the militia, not their ownership of firearms. A militia member could not dodge a training obligation by trashing his gun—indeed, he would be sanctioned if he did so. And the mere fact of owning a gun did not obligate anyone to train with the militia. Women and elderly persons, for instance, could own firearms without being required to train. So historical militia training laws did not regulate the keeping or bearing of arms and were not part of our Nation's historical tradition of firearms regulation. As a result, they cannot buttress the constitutionality of Maryland's training requirement, which, unlike these laws, does regulate Second Amendment freedoms.[14]

* * *

Three times, our en banc Court has considered Second Amendment challenges in *Bruen*'s aftermath. And three times, our Court has disposed of these challenges at the plain-text stage, each time relying on

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[14] Maryland insists that its law ensures that those who own handguns are "responsible." But the Supreme Court in *Rahimi* rejected reliance on general notions of responsibility when assessing firearm regulations. *See* 144 S. Ct. at 1903 (explaining that any such limit is "vague," "unclear," and "does [not] derive from [the Court's] case law").

a different threshold limit unsupported by the plain text and appearing nowhere in the Supreme Court's precedent. *See Bianchi*, No. 21-1255, 2024 WL 3666180, at *17; *Price*, No. 22-4609, 2024 WL 3665400, at *4–5; Majority Op. at 12–17. It is disheartening that our Court has gone out of its way to avoid applying the framework announced in *Bruen*. I can only hope that in future cases we will reverse course and assess firearm regulations against history and tradition.

I thus respectfully dissent.

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2017

MARYLAND SHALL ISSUE, INC.,
for itself and its members;
ATLANTIC GUNS. INC.;
DEBORAH KAY MILLER;
SUSAN BRANCATO VIZAS,

Plaintiffs-Appellants,

and

ANA SLIVEIRA; CHRISTINE BUNCH,

Plaintiffs,

v.

WES MOORE, in his capacity as Governor
of Maryland; WOODROW W. JONES, III, Colonel,

Defendants-Appellees.

FIREARMS POLICY COALITION, INC.;
FPC ACTION FOUNDATION;
INDEPENDENCE INSTITUTE,

Amici Supporting Appellant.

No. 21-2053

MARYLAND SHALL ISSUE, INC.,
for itself and its members;
ATLANTIC GUNS. INC.;
DEBORAH KAY MILLER;
SUSAN BRANCATO VIZAS,

Plaintiffs-Appellees,

and

ANA SLIVEIRA; CHRISTINE BUNCH,

Plaintiffs,

v.

WES MOORE, in his capacity as Governor
of Maryland; WOODROW W. JONES, III, Colonel,

Defendants-Appellants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Ellen Lipton Hollander, Senior District Judge.
(1:6-cv-03311-ELH)

Argued: March 10, 2023
Decided: November 21, 2023

Before AGEE and RICHARDSON. Circuit Judges,
and KEENAN, Senior Circuit Judge.

Reversed by published opinion. Judge Richardson wrote the opinion, in which Judge Agee joined. Senior Judge Keenan wrote a dissenting opinion.

RICHARDSON, Circuit Judge:

If you live in Maryland and you want a handgun, you must follow a long and winding path to get one. Like with any firearms transfer—whether a purchase from a licensed dealer, gun show, or private person, or even a gift from a family member or friend—you must comply with Maryland's 77R registration process, which requires you to fill out an application with certain identifying information and then wait seven days while the state performs a background check. *See* Md. Code, Pub. Safety §§ 5-117, 118–130. And if you want to carry your handgun, you need to get a separate carry permit too. *See* §§ 5-301–314.

But—for handguns specifically—before you do any of that, there is an additional, preliminary step: You must also obtain a "handgun qualification license." *See* § 5-117.1. Getting that license requires, among other things, submitting fingerprints to undergo a background "investigation" and taking a four-hour-long "firearms safety training course" in which you must fire at least one live round. Then, after submitting your application for this extra license, you must wait up to thirty days for approval before you can start the rest of the process.

Plaintiffs seek to enjoin the state from enforcing only this additional, preliminary handgun-licensure requirement. And Plaintiffs' challenge must succeed. The challenged law restricts the ability of law-abiding adult citizens to possess handguns, and the state has

not presented a historical analogue that justifies its restriction; indeed, it has seemingly admitted that it couldn't find one. Under the Supreme Court's new burden-shifting test for these claims, Maryland's law thus fails, and we must enjoin its enforcement. So we reverse the district court's contrary decision.

I. Background

Plaintiffs first brought their Second Amendment challenge to Maryland's handgun-licensure law in 2016.[1] [J.A. 1.] The district court originally dismissed that challenge for lack of Article III standing, but we reversed and remanded for a decision on the merits. *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 210 (4th Cir. 2020). On remand, the district court again rejected Plaintiffs' claims, this time holding that Maryland's handgun-licensure law did not violate the Second Amendment.[2] So Plaintiffs appealed once more,

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[1] There are three groups of plaintiffs: Maryland Shall Issue, Inc., a nonprofit-gun-rights membership organization; two individual plaintiffs, Ana Sliveira and Christine Bunch, each of whom claims that she would like to own a handgun but has been deterred from doing so by Maryland's law; and Atlantic Guns, Inc., a gun store alleging that its customers have been similarly deterred and that it thus has been unable to sell as many guns. The suit also originally included two other individual plaintiffs, Deborah Kay Miller and Susan Brancato Vizas, who are not parties to this appeal. We will refer to the remaining individual plaintiffs collectively as "Plaintiffs."

[2] Through all these decisions, the Governor of Maryland—one of the parties whom Plaintiffs sought to enjoin from enforcing the challenged law—was Lawrence ("Larry") Hogan. Now, Maryland's governor is Wes Moore. Plaintiffs also sued to enjoin the Secretary and Superintendent of the Maryland State Police, who was then William M. Pallozzi, but is now

finally presenting us with the merits of their constitutional claims.

The law at issue—which the parties call the handgun-qualification-license requirement—originated as one component of Maryland's Firearm Safety Act of 2013 and is now found at § 5-117.1 of the Maryland Public Safety Code. Section 117.1(b) says that no one may "sell, rent, or transfer a handgun" unless the recipient "presents . . . a valid handgun qualification license." And § 117.1(c) likewise says that "[a] person may purchase, rent, or receive a handgun only if the person . . . possesses a valid handgun qualification license." So, in simple terms, the challenged law imposes criminal liability on *both parties* to a handgun transaction (sale, rental, or gift), unless the recipient has the required license. *See* § 5-117.1(b), (c); *see also* § 5-144(a)(1) (criminalizing knowing participation in the receipt of a regulated firearm in violation of § 5-117.1).

The law then defines how someone gets such a handgun-qualification license. There are four requirements: The applicant must be "at least 21 years old," he must be "a resident of the State," he must complete a "firearms safety training course,"[3] and he

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Woodrow W. Jones, III. For simplicity, we refer to defendants as "the state" or "Maryland."

[3] The course must be taught by a "qualified handgun instructor" and be at least four hours long. § 5-117.1(d)(3)(i). It must involve "classroom instruction" on firearms laws and firearm safety, § 5-117.1(d)(3)(ii), and "a firearms orientation component that demonstrates the person's safe operation and handling of a firearm," § 5-117.1(d)(3)(iii). Regulations further require the

must undergo an "investigation"—*i.e.*, a background check—to show that he "is not prohibited by federal or State law from purchasing or possessing a handgun."[4] § 5-117.1(d). If an applicant meets these four requirements, properly fills out an application, and pays the required $50 fee, then the Secretary of State Police "shall issue" him a handgun-qualification license within thirty days. § 5-117.1(d), (g), (h).

Plaintiffs argue that this scheme violates the Second Amendment. The district court disagreed, holding that it passed intermediate scrutiny. But, after the district court's decision, the Supreme Court

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orientation to include "a practice component in which the applicant safely fires at least one round of live ammunition." Md. Code Regs. 29.03.01.29(C)(4). The applicant bears the cost of the firearms safety training course as well as any range fees for the live-fire requirement. Notably, these costs are not established by statute or regulation but by the private entities that administer the firearms safety training and, according to the record, can range "anywhere from $50 to in the several hundred dollars." J.A. 973; *see also* J.A. 961–62.

Certain people, including former members of the military and armored-car company employees, are exempt from the training-course requirement. § 5-117.1(e). And current and retired law enforcement officers are exempt from the entire statute. § 5-117.1(a)(2).

[4] To complete the background check, the state police submit to the Department of Public Safety and Correctional Services "a complete set of the applicant's legible fingerprints." § 5-117.1(f)(3)(i). The state police require applicants to submit their fingerprints with their application. Md. Code Regs. 29.03.01.28(B)(3). As with the firearms-safety-training course, the applicant bears the cost and burden of obtaining the fingerprints, which, according to the record, can cost $50 or more. *See* J.A. 967–70.

decided *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

Bruen effected a sea change in Second Amendment law. Before *Bruen*, the Courts of Appeals—including our own—used a two-step interest-balancing framework in analyzing firearm regulations. *See Bruen*, 142 S. Ct. at 2125–26; *United States v. Chester*, 628 F.3d 673, 680–83 (4th Cir. 2010). We first asked whether a challenged regulation burdened conduct protected by the Second Amendment. *Bruen*, 142 S. Ct. at 2126; *Chester*, 628 F.3d at 680. If it did, then we would assess the regulation's constitutionality using means-end scrutiny. *Bruen*, 142 S. Ct. at 2126; *Chester*, 628 F.3d at 680.

Yet the Supreme Court held in *Bruen* that this approach was "one step too many." 142 S. Ct. at 2127. In its place, the Court supplied an analysis centered on the Second Amendment's text and history. *Id.* at 2126–30. The Court explained that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. At that point, the challenged regulation is unconstitutional unless the government can show that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* Only then "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Bruen applied this framework to invalidate New York's "may issue" licensing scheme for the concealed carry of handguns. *Id.* at 2122, 2134–56. It concluded

that the proposed conduct at issue there, carrying handguns in public for self-defense, was presumptively protected by the Second Amendment because the petitioners were "law-abiding, adult citizens" and handguns are "weapons 'in common use' today for self-defense." *Id.* at 2134 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). The Court then examined the historical record assembled by the government and concluded that it had not met its burden to establish a historical tradition "of broadly prohibiting the public carry of commonly used firearms for self-defense." *Id.* at 2138.

Thus, Plaintiffs' suit requires us to answer: Does Maryland's law satisfy *Bruen*'s two-part test?

II. Discussion

Maryland's law fails the new *Bruen* test. As we will explain, Plaintiffs have shown that Maryland's handgun-licensure law regulates a course of conduct protected by the Second Amendment, and Maryland has not established that the law is consistent with our Nation's historical tradition.

A. Maryland's law restricts Second Amendment conduct

The first question *Bruen* asks is whether Plaintiffs' proposed course of conduct is protected by the Second Amendment's plain text. *See* 142 S. Ct. at 2126. The text's "operative clause," *see Heller*, 554 U.S. at 577–95, provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. To meet their burden at this stage, Plaintiffs must prove two things: (1) that "they are among 'the people' entitled to the right," and (2) that their proposed "course of conduct" is covered by the Second Amendment's plain text, namely "keeping and bearing arms." *Bruen*, 142 S. Ct. at 2134.

At first blush, the answer to this initial question seems obvious. Here, Plaintiffs alleged that they are adult citizens who are legally eligible to own firearms. *See* J.A. 22–24 (noting that the plaintiffs "could lawfully purchase and own a handgun" absent the challenged law). So they fall within the Amendment's definition of "the people." *See Bruen*, 142 S. Ct. at 2134 (noting that "'the people' whom the Second Amendment protects" includes, at a minimum, "ordinary, law-abiding, adult citizens").[5] And Plaintiffs

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[5] This is not necessarily to say that "the people" is limited to "ordinary, law-abiding, adult citizens." Post-*Bruen*, several courts have held that "the people" refers to all Americans, and is not limited to ordinary, law-abiding adult citizens. *See, e.g., United States v. Silvers*, No. 5:18-cr-50-BJB, 2023 WL 3232605, at *5–6 (W.D. Ky. May 3, 2023). We need not decide the precise scope of "the people" to resolve this case, for Maryland does not dispute that Plaintiffs are part of "the people."

here say that they seek to own firearms for "lawful purposes," J.A. 22–24, a point that Maryland does not contest. Indeed, though the Amendment's plain text "extends, prima facie, to all instruments that constitute bearable arms," *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016), the Supreme Court has held that the specific weapons here–handguns–are protected "arms." *See Heller*, 554 U.S. at 629. So there appears to be little room for debate on this score.

Yet there are a few wrinkles to iron out. To start, you might note that the Amendment's text protects only the right to "keep and bear" arms. U.S. Const. amend. II. But, on its face, the challenged law says nothing about whether Plaintiffs may "keep" or "bear" handguns. It only restricts Plaintiffs' ability to "purchase, rent, or receive" them. § 5-117.1(c). How, then, does the law regulate the right to keep and bear arms?

The answer is not complicated. If you do not *already* own a handgun, then the only way to "keep" or "bear" one is to get one, either through sale, rental, or gift. And the challenged law cuts off all three avenues—at least, for those who do not comply with its terms.

That brings us to the next wrinkle: The challenged law does not *permanently* prohibit Plaintiffs from acquiring or carrying handguns. *Contra Heller*, 554 U.S. at 573–75; *Bruen*, 142 S. Ct. at 2122–24. Instead, it imposes certain requirements that they must meet before they can obtain a handgun. And those requirements rely on "objective" criteria, *see*

Bruen, 142 S. Ct. at 2138 n.9, which Plaintiffs admit that they can satisfy. Once they do so, the law commands that the state "shall issue" them handgun-qualification licenses. § 5-117.1(d).[6]

But even though Maryland's law does not prohibit Plaintiffs from owning handguns at some time in the future, it still prohibits them from owning handguns *now*. In order to get a handgun, Plaintiffs still have to follow all of the law's steps. And, although they will be able to complete each one, it is impossible to do so right away. Plaintiffs can't receive a license to legally acquire a handgun until the state reviews their applications, which can take up to thirty days.[7] *See*

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[6] As a shall-issue law, Maryland's handgun-qualification license is unlike the "may issue" licensure regime in *Bruen*, which afforded government officials substantial "discretion to deny licenses" if the applicant had not shown a "special need" for them. 142 S. Ct. at 2122–24. Maryland did impose a may-issue regime for its handgun-*carry* license. *See* § 5-306(a)(6)(ii). But this type of law is precisely what *Bruen* rejected. *See* 142 S. Ct. at 2124 n.2. So, after *Bruen*, Maryland courts have declined to enforce the carry-licensure law's discretionary component as unconstitutional. *See In re Rounds*, 279 A.3d 1048, 1052 (Md. Ct. Spec. App. 2022).

[7] That thirty days doesn't count the time needed to obtain and complete the application, to complete the instructional course and live-fire requirement, and to obtain the approved set of fingerprints that the handgun-qualification-license law requires. Nor does it count the time that it would take to comply with Maryland's separate 77R registration process, which is required before every firearms transfer. *See* § 5-117. That separate registration process demands that Plaintiffs submit certain identifying information to the state and then wait up to an additional seven days while the state conducts a background check before they can finally purchase a handgun. *See* §§

§117.1(g), (h)(1). So, no matter what Plaintiffs do, there will be a period of up to thirty days where their ability to get a handgun is completely out of their control. In other words, though it does not permanently bar Plaintiffs from owning handguns, the challenged law deprives them of that ability until their application is approved, no matter what they do.

Our question at *Bruen*'s first step is simply whether Plaintiffs have made a prima facie case that the challenged law violates the Second Amendment. So they just need to show that the law regulates a course of conduct that falls within the Amendment's plain text, *i.e.*, their ability "to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. Nothing in the Amendment's text or *Bruen* says that it protects only against laws that *permanently* deprive people of the ability to keep and bear arms.[8] *Cf. Bruen*, 142 S. Ct.

5-118–130.

[8] The dissent thinks differently. According to the dissent, "a regulation is covered" by the Second Amendment "only if an individual can show that the regulation has 'infringed'" his "Second Amendment right to keep or right to bear arms." Diss. Op. at 30. And that right is only infringed, on the dissent's view, if the government wholly or effectively bans that individual from possessing or carrying firearms. *See* Diss. Op. at 30, 36 n.9. So at *Bruen*'s first step, the dissent would have us (or, more particularly, the district court) engage in a "fact-intensive" inquiry to determine whether a regulation sufficiently burdens Plaintiffs' right to keep and bear arms. Diss. Op. at 34-38. If it does not, then the government need not justify its regulation based on history and tradition.

But this stilted construction of the word "infringed" lacks grounding in original meaning, history, and *Bruen* itself. The

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dissent cherry-picks dictionary definitions, yet those same dictionaries define "infringe" to contemplate burdens that fall short of total deprivations. *Compare* Samuel Johnson, 1 Dictionary of the English Language 1101 (4th ed. 1773) ("Johnson") (defining "infringe" as "[t]o destroy; to *hinder*" (emphasis added)), and Noah Webster, American Dictionary of the English Language (1828) ("Webster") (defining "infringe" as "[t]o destroy or *hinder*" (emphasis added)), *with* Johnson at 1007 (defining "to hinder" as "to cause impediment"), *and* Webster (defining "hinder" as "to obstruct for a time" and "[t]o interpose obstacles or impediments"). So too do other sources that the Supreme Court has used to interpret the right. *See* 1 St. George Tucker, Blackstone's Commentaries 143 n.40 (1803) ("The right of the people to keep and bear arms shall not be infringed . . . *and this without any qualification as to their condition or degree . . .* ." (emphasis added))*; Nunn v. State, 1 Ga.* 243, 251 (1846) ("The right of the whole people . . . to keep and bear *arms* . . . shall not be *infringed*, curtailed, or broken in upon, *in the smallest degree*." (third emphasis added)); s*ee also Heller*, 554 U.S. at 594–95, 612 (relying on Tucker and *Nunn* to interpret the Second Amendment). Moreover, nineteenth century state courts traditionally entertained Second Amendment challenges even to laws that merely regulated, rather than completely destroyed, the right. *See, e.g*., *State v. Reid*, 1 Ala. 612, 616 (1840) (upholding a law prohibiting bodies of men from parading with firearms because it was a reasonable regulation and analogous to laws prohibiting the carrying of concealed weapons); see also William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 Notre Dame L. Rev. (forthcoming 2024) (manuscript at 18) (explaining that state courts considered challenges to laws regulating the right, even when those laws did not totally abridge the right). Finally, *Bruen* itself contemplated suits over laws that impose burdens that fall short of total bans. 142 S. Ct. at 2133 (explaining how courts should approach challenges to designated sensitive places).

None of this means that we require no nexus between a law and a proposed course of conduct. *Bruen* seems to require that a law is a "regulation" of protected conduct, which entails some burden on or hindrance to its exercise. *See* 142 S. Ct. at 2126. We

at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms."). Yet, under the challenged scheme, an applicant without a firearm cannot possess or carry one until they are approved—a process that can take thirty days. And the law's waiting period could well be the critical time in which the applicant expects to face danger. So the temporary deprivation that Plaintiffs allege is a facially plausible Second Amendment violation.[9]

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need not and do not now decide where to draw this line. All we need to decide today is that Second Amendment scrutiny is not exclusively reserved for laws that wholly or effectively prohibit firearm possession. If a law regulates an individual's conduct, and his conduct falls within the scope of the Second Amendment, then that law must be justified by resort to history and tradition. And in this case, Maryland's law clearly regulates Plaintiffs' right to keep and bear arms.

[9] Maryland and the dissent make much of *Bruen*'s Footnote Nine. But that footnote does not bless Maryland's law. While the footnote preemptively threw cold water on any "shall issue" regimes "put towards abusive ends" such as those that result in "lengthy wait times" or "exorbitant fees," it did not say those were the *only* types of unconstitutional "shall issue" regimes. In other words, the Court suggested that the Second Amendment barred—at a minimum—certain "shall issue" schemes; but it did not say whether that floor was also a ceiling.

Plaintiffs now ask us to answer that open question. In doing so, it would be poor judicial practice to "read a footnote" in a Supreme Court case to "establish the general rule" for that case. *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391, 1403 n.6 (2023). *Bruen* was not shy about telling lower courts how to handle Second Amendment challenges: We turn to the Amendment's "text," "informed by history," and by "the historical tradition that delimits the outer bounds of the right." *Bruen*, 142 S. Ct. at 2127. So if we have to choose between the outcome

dictated by text, history, and tradition and the outcome hinted at in dicta, it is no contest: Text, history, and tradition wins every time.

And even if we were to piece together a directive, it would have little bearing on the regulation before us. As an initial matter, the dissent mistakenly reads this footnote as pertaining to *Bruen*'s first, rather than its second, step. *See* Diss. Op. at 34–38. This is not the case. Footnote Nine is appended to a sentence explaining that there is no historical support for preventing law-abiding citizens from publicly carrying weapons simply because they cannot show a special need—a step two inquiry. *Bruen*, 142 S. Ct. at 2138. The footnote then explains that shall-issue regimes are different because, unlike may-issue regimes, they do not "necessarily prevent" law-abiding citizens from exercising Second Amendment rights. *Id.* at 2138 n.9. So the Court here was comparing the burdens may- and shall-issue regimes impose for purposes of identifying historical analogues to justify them, *not* to explain when the Second Amendment is triggered in the first place. *See id*. at 2133 ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." (emphasis in original) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010))). In other words, the Court was simply clarifying that the mere fact that may-issue regimes fail the history test does not mean that most shall-issue regimes automatically fail that test too. This is but an invitation for courts to examine these laws against the historical record at step two, which is precisely what we do here.

And even if we stretch the Court's language to actually bless most shall-issue *public* carry regimes, this says little about shall-issue regimes that limit *handgun possession altogether*. A restriction on whether someone can even possess a firearm in or out of the home is more burdensome than one that only limits his right to carry that firearm publicly. *See Heller*, 554 U.S. at 628 ("the home" is "where the need for defense of self, family, and property is most acute"). *Bruen* tells us that the relative burden a law imposes is "central" to step two's analogical reasoning. *See* 142 S. Ct. at 2133 (quoting *McDonald*, 561 U.S. at 767). So even

Accordingly, Maryland's law regulates conduct that falls within the Second Amendment's plain text. Plaintiffs' challenge thus satisfies the first step of *Bruen*'s test, and we must proceed to the second step: Has Maryland shown that its law is justified by history and tradition?

B. Maryland has not shown that "history and tradition" justify such a restriction

Maryland has not met its burden. At *Bruen*'s second step, Maryland must provide historical evidence that justifies its law. To do this, it may identify a "historical analogue" demonstrating that its law falls within a historically recognized exception to the right to keep and bear arms. *See Bruen*, 142 S. Ct. at 2132–33. But the two historical examples that Maryland cites are not "relevantly similar" to the challenged law. *Id.* at 2132. And it has offered no other historical evidence to justify its law. Indeed, Maryland admitted at oral argument that it had not presented a proper historical analogue for the challenged law, noting that it had identified no Founding-era laws that "required advance permission" before a citizen could purchase a firearm. Oral Arg. at 23:05 – 23:29; *see also* Oral Arg. at 31:22 – 31:35.

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if *Bruen* green-lighted similar but *less burdensome restrictions*, like some shall-issue *carry* regimes, we are still obligated to independently compare more burdensome restrictions, like shall-issue *possession* regimes, against the historical record.

1. A historical tradition of prohibiting "dangerous" people from owning firearms does not justify Maryland's law

Maryland's historical evidence is scant at best. It first asserts that its law is justified by the "historical limitations" on the ability of "dangerous" people to own firearms. *See* Appellee's Br. at 32–33. But Maryland points to no historical laws for support. Instead, it cites various provisions of the modern U.S. Code that prohibit certain categories of people—including felons, *see* 18 U.S.C. § 922(g)(1), those addicted to a controlled substance, *see* § 922(g)(3), and those convicted of a domestic violence misdemeanor, *see* § 922(g)(9)—from owning firearms. *See* Appellee's Br. at 32–33. Maryland simply assumes that those federal prohibitions are justified by a historical "dangerousness" exception; and because, Maryland says, the challenged law is ostensibly designed to prevent those same groups of people from acquiring handguns, it also falls within the same "dangerousness" exception.

Though Maryland has not mustered independent historical support for a "dangerousness" exception, other judges have thoroughly canvassed the historical record. *See, e.g.*, *Kanter v. Barr*, 919 F.3d 437, 453–64 (7th Cir. 2019) (Barrett, J., dissenting); *Folajtar v. Att'y Gen.*, 980 F.3d 897, 913–20 (3d Cir. 2020) (Bibas, J., dissenting). And they tend to agree that history and tradition support an exception affording legislatures "the power to prohibit dangerous people from

possessing guns." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting); *see also Foljatar*, 980 F.3d at 912 (Bibas, J., dissenting). But even if the modern federal prohibitions that Maryland cites are all constitutional—because they fit within a historical tradition allowing states to prohibit "dangerous" people from owning firearms[10] – that says nothing about Maryland's law. That is because its law is not "relevantly similar" to the laws allegedly comprising that tradition.

Bruen is clear that a historical analogue only justifies a modern law if the two are "relevantly similar." 142 S. Ct. at 2132. The "metrics" that we use to decide whether two laws are "relevantly similar" are (1) "how" and (2) "why the regulations burden a law-abiding citizen's right." *Id.* at 2133. In other words, we ask (1) "whether modern and historical regulations impose a comparable burden on the right," and (2) "whether that burden is comparably justified." *Id.*

Here, Maryland suggests that the justification may well be the same: prevent dangerous people from getting weapons. But the burden is markedly different. The historical "dangerousness" laws targeted people

[10] Even among judges who accept a historically grounded "dangerousness" exception, there is less agreement that these modern U.S. Code provisions fit within it. *Compare, e.g., Range v. Att'y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (holding that § 922(g)(1) violates the Second Amendment, as applied to a particular nonviolent felon), with *United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023) (concluding "that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)" under the Second Amendment).

already deemed dangerous by the state and subjected them to penalties if they possessed firearms. *See Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting). Maryland's law operates through an entirely different mechanism. It does not merely identify a dangerous group of people and prohibit them from acquiring handguns; other statutes already occupy that field. *See, e.g.*, Md. Code, Pub. Safety § 5-133. Instead, it prohibits all people from acquiring handguns until they can *prove* that they are not dangerous. So Maryland's law burdens all people—even if only temporarily—rather than just a class of people whom the state has already deemed presumptively dangerous.

The point is that different mechanisms often impose different burdens. And courts must consider the mechanism that the challenged law chooses to carry out its goal when evaluating whether it is "relevantly similar" to a historical law. *Cf. United States v. Silvers*, No. 5:18-cr-50-BJB, 2023 WL 3232605, at *14 (W.D. Ky. May 3, 2023) (noting that the asserted historical analogues "acted through similar mechanisms" as the challenged law); *Bruen*, 142 S. Ct. at 2131 ("[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century. . . [and] earlier generations addressed the societal problem . . . through materially different means, that [ ] could be evidence that a modern regulation is unconstitutional.").

The modern federal laws that Maryland has cited, and the historical laws allegedly supporting a

tradition of prohibiting dangerous people from owning firearms, all acted through one mechanism: punishing certain classes of supposedly "dangerous" people if they don't give up their arms or prove they are not dangerous. *See Silvers*, 2023 WL 3232605, at *11–12 (discussing historical laws). But that is a different mechanism than making every person seek the government's permission *before* they can even acquire arms. Preemptively disarming every person until they can each prove that they are not dangerous burdens a far broader swath of people.

It is not our place, as a court, to judge a law's wisdom or weigh competing policy values. After all, "[t]he Second Amendment is the very *product* of an interest balancing by the people." *Bruen*, 142 S. Ct. at 2131 (cleaned up). If they disapprove, then the people can draw a different balance using Article V's amendment process. But, under the Second Amendment's current balance, Maryland's law cannot survive. Even assuming a historical tradition of prohibiting "dangerous" people from owning firearms, Maryland chose a different mechanism, and thus imposed different burdens, from the historical analogues that it asserts.

2. A historical tradition of requiring militia training does not justify Maryland's law

Maryland's second argument is that its law is justified by a historical tradition of laws requiring training for members of the militia. For support, Maryland cites Founding-era state and federal militia laws. *See* Appellee's Br. at 34–37. But its argument is without merit, as these Founding-era laws placed no restrictions on acquiring or owning firearms. Militia-training laws did not burden a Second Amendment right at all, and so they cannot be "relevantly similar" to Maryland's law.

Many colonies and early states required—with some exceptions—that all able-bodied men of a certain age participate in the militia. *See Hirschfeld v. ATF*, 5 F.4th 407, 428–30 (4th Cir. 2021) (discussing these militia laws), *vacated as moot* by 14 F.4th 322 (4th Cir. 2021). And they generally required members of the militia to provide their own weapons and show up for regular training. *See Hirschfeld*, 5 F.4th at 428–29 n.28. But these militia laws *never* conditioned keeping or bearing arms on participation in militia training.

Accordingly, these militia-training laws imposed no burden on the right of keeping and bearing arms. Instead, the service burden that these laws imposed was divorced from gun ownership. You could not get out of training just by ditching your weapon. (Indeed, that would open you up to even more sanctions.) And just because you owned a weapon did not mean that you had to train. If you were a woman or older man

who owned arms, for instance, there was no need to appear on the parade grounds. You only had to train if you were in the militia. In other words: These laws imposed a service obligation on militiamen, not gun owners. That obligation applied regardless of whether you owned a weapon. So *none* of these militia laws placed *any* restriction on gun ownership.

Consider, for example, New Jersey, which in 1778 passed a law requiring members of the militia to "assemble, properly armed and accoutred, twice in the Year, at such Times and Place or Places as the Field-Officers, or a Majority of them, shall direct for the Purpose of Training and Exercise." 1778 N.J. Sess. Laws 42, 46 § 15. And "in case of Absence" from the training, the law imposed a monetary penalty based on rank. *Id.* New Jersey's law likewise imposed a monetary penalty on militia members who failed to acquire the proper arms and ammunition. *See id.* at 45 §§ 11 & 12.

Another example is Delaware, which passed a similar militia-training law in 1782. That law provided that the militia "shall be duly exercised and instructed once in every Month," 1782 Del. Sess. Laws 1, 3 § 5, and required its members to bring their own firearms. *Id.* § 6. Like New Jersey, Delaware imposed monetary penalties on any militiaman failing to keep his arms "by him at all Times, ready and fit for Service," *id.*, and who "shall neglect or refuse to appear on the Parade . . . not having reasonable excuse." *Id.* at 4 § 7. In summary, these laws sanctioned militia members both for failing to show up for training and for failing to bring their own arms. You could not evade those

sanctions if you didn't have a weapon. And just because you had one didn't necessarily subject you to them.

Thus, these militia-training laws are not a valid historical analogue justifying Maryland's law. Militia-training laws imposed no burden on the right to keep and bear arms. They did not condition possessing and carrying arms on attending militia training. Nor did they limit in any way an individual's ability to acquire a firearm. These laws placed service burdens on being in the militia, not on being a gun owner. And, because they imposed a different burden, the militia-training laws are not "relevantly similar" to Maryland's law. *See Bruen*, 142 S. Ct. at 2133.

Maryland has identified no other traditions that could serve as a historical analogue, nor has it presented any other evidence that the challenged law "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. So it has not met its burden under *Bruen*, and its law cannot survive Plaintiffs' Second Amendment Challenge.[11]

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[11] The dissent chastises us for declining to remand this case to the district court to reconsider its decision in light of *Bruen*. But there is no reason to do so here. To start, Maryland did not ask for a remand, and did not even address the possibility until specifically asked about it at oral argument. *See* Oral Arg. at 17:49 – 18:42. While remand often makes sense when additional facts are needed, *cf. Humphrey v. Humphrey*, 434 F.3d 243, 248 (4th Cir. 2006) (noting that remand is appropriate when the record permits more than one resolution of a factual issue), those kinds of factual questions are not at issue here. *See* Oral Arg. at 19:06 – 19:30 & 37:30 – 38:23. Similarly, though a remand might

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In Maryland, if you are a law-abiding person who wants a handgun, you must wait up to thirty days for the state to give you its blessing. Until then, there is nothing you can do; the issue is out of your control. Maryland has not shown that this regime is consistent with our Nation's historical tradition of firearm regulation. There might well be a tradition of prohibiting dangerous people from owning firearms. But, under the Second Amendment, mechanism matters. And Maryland has not pointed to any historical laws that operated by preemptively depriving *all* citizens of firearms to keep them out of dangerous hands. Plaintiffs' challenge thus must succeed, and the district court's contrary decision must be

REVERSED.

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be appropriate to determine whether a statute were severable, Maryland disavowed a severability argument. *See* Oral Arg. at 25:13 – 25:27 & 26:52–27:00. The dissent claims that Maryland only did so because it thought the law was completely constitutional, but this is just another way of saying that the state put all its eggs in one basket—and lost. Whether by disavowal or failure to argue, the government abandons an argument by failing to raise it on appeal. And we will not give the state yet another chance to identify more historical analogues, especially when it has explicitly declined to ask us for it. "Courts are [ ] entitled to decide a case based on the historical record compiled by the parties." *Bruen*, 142 S. Ct. at 2130 n.6. The parties fully briefed the issue of historical analogues. We will not return the parties to the district court just to push more paper around. *Cf. id.* at 2135 n.8.

BARBARA MILANO KEENAN, Senior Circuit Judge, dissenting:

In this facial constitutional challenge to a non-discretionary handgun permitting law, the majority fundamentally misapplies *Bruen*.[1] The majority bases its holding on the premise that if a law affects a prospective handgun purchaser's ability to obtain a handgun "now," the law is presumptively unconstitutional. This sweeping rule flies directly in the face of *Bruen*'s discussion of non-discretionary "shall-issue" laws and is not supported by any Supreme Court precedent. Simply stated, the majority's hyperaggressive view of the Second Amendment would render presumptively unconstitutional most non-discretionary laws in this country requiring a permit to purchase a handgun (permitting laws).

In defending this result, the majority attempts to pound a square peg into a round hole by treating the non-discretionary "shall-issue" law before us no differently than a discretionary "may-issue" law. This pounding maneuver fails to account for the material differences between "may-issue" and "shall-issue" laws, distinctions that the Supreme Court warned in *Bruen* would require additional consideration in determining the constitutionality of shall-issue regimes. By failing to incorporate into the *Bruen* framework these analytical distinctions, my colleagues reach the very result the Supreme Court cautioned against in *Bruen*, namely, casting aside a shall-issue permitting law

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[1] *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

because the statute results in some delay to a prospective buyer who wishes to purchase a handgun.

In reaching its conclusion, the majority also rushes to final judgment, bypassing the district court's fundamental role of weighing the evidence in this mixed question of law and fact. And, doubling down on this lack of judicial restraint, the majority strikes down an entire statute without even a passing reference to the *presumption* of severability afforded to the statute under Maryland law. I respectfully dissent.

I.

There are at least two reasons to remand this case to the district court for application of *Bruen*. First, *Bruen* was decided in 2022, almost one year after the district court's decision. Lacking the benefit of this decision, the district court used the then-applicable analytical framework ultimately rejected in *Bruen*. Moreover, in *Bruen*, the Supreme Court cautioned that shall-issue laws like the one before us fall within a category of laws analytically and factually distinct from the may-issue New York law reviewed there. 142 S. Ct. at 2138 n.9. As a result, the district court should be required to conduct a newly tailored evidentiary inquiry and an analysis extending well beyond the bare-bones framework used by the majority.

Second, Maryland law instructs that the statute requiring the handgun qualification license (the HQL requirement) enjoys a presumption of severability, so any unconstitutional provision in one part of that statute would not necessarily affect the validity of its remaining portions. Md. Code, Gen. Prov. § 1-210. The district court is better situated than this Court to

undertake the severability analysis in the first instance.

A.

At issue here is the facial constitutionality of a Maryland law, duly enacted by the Maryland General Assembly, that allows any law-abiding, responsible person to obtain the handgun qualification license required by the state Md. Code, Pub. Safety § 5-117.1[2] In the district court, the plaintiffs argued that the HQL requirement violates the Second Amendment.[3] Faithfully applying our then-binding precedent in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), the district court (1) considered whether HQL requirement imposed a burden on conduct falling within the scope of the Second Amendment and, after concluding that it did, (2) analyzed whether the government had shown that the HQL requirement was "reasonably adapted to a substantial governmental interest," as required to satisfy the intermediate scrutiny standard of review. *See Kolbe*, 849 F.3d at 133 (citation omitted). In a thorough and well-reasoned opinion in August 2021 applying this standard to the parties' cross-motions for summary judgment, the district court held that the HQL requirement was

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[2] This provision was not affected by the Maryland General Assembly's recent amendments to other firearms laws. *See* 2023 Md. Laws Ch. 651 (H.B. No. 824) (effective Oct. 1, 2023

[3] The Second Amendment is made applicable to the states through the Fourteenth Amendment. *See McDonald v. Chicago*, 561 U.S. 742, 791 (2010). For consistency with the district court opinion and the majority opinion, I refer only to the Second Amendment in this dissenting opinion.

constitutional.

In June 2022, however, the Supreme Court in *Bruen* articulated a new analytical framework for consideration of Second Amendment challenges. There, the Court addressed a Second Amendment challenge to a century-old New York state statute known as the "Sullivan Law." 142 S. Ct. at 2122. Under that "public carry" law, any law-abiding, responsible person who sought a license to carry a firearm outside of his home or place of business for self-defense had to prove first that "proper cause exist[ed]" to issue the license. *Id.* at 2122–23. Although "proper cause" was not defined by the statute, New York courts had interpreted the phrase as requiring "a special need for self-protection distinguishable from that of the general community." *Id.* at 2123 (quoting *In re Klenosky*, 75 A.D.2d 793, 793 (N.Y. App. Div. 1980)). The Supreme Court referred to this New York law, and laws in other states with similar proper-cause standards, as "may-issue" laws. *Id.* at 2123–24.

In assessing whether New York's may-issue public carry law violated the Second Amendment, the Court rejected the two-step, means-based framework that we had applied in *Kolbe*. Although the Supreme Court acknowledged that Courts of Appeals "had coalesced" around this means-based framework, the Court instead developed a new framework based on its interpretation of *Heller*. *Id.* at 2125–26. Under this new framework, a law is unconstitutional under the Second Amendment only if: (1) the plaintiff shows that the plain text of the Second Amendment protects an individual's course of conduct (step one), and (2) the government fails to show that the challenged

regulation is "consistent with this Nation's historical tradition of firearm regulation" (step two). *Id.* at 2129–30.

Although the plaintiffs in the present case broadly had asked the district court to consider the Second Amendment's "text, history, and tradition," the plaintiffs did not present to the court the information required under the nuanced framework outlined in *Bruen*, or the evidence that would have been necessary to apply *Bruen* to a shall-issue law. Typically, when a district court applies an analytical framework that later has been abrogated by the Supreme Court, our practice is to remand the case for the district court to consider the newly articulated framework in the first instance. *See*, *e.g.*, *Firewalker-Fields v. Lee*, 58 F.4th 104, 111, 121–23 (4th Cir. 2023) (remanding Establishment Clause challenge "to allow the district court to grapple with the history-and-tradition test in the first instance" under the Supreme Court's new framework); *see also Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020) ("As we have said many times before, we are a court of review, not of first view." (*quoting PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019))).

Here, however, my colleagues have decided not to allow this process to run its natural course. Instead, the majority applies the new *Bruen* framework in the first instance, short-circuiting a process designed to prevent the exact type of rushed decision-making implemented here. The majority characterizes its refusal to allow the district court to consider these issues in the first instance as an exercise in judicial

efficiency. Maj. Op., at 20 n.11 ("We will not return the parties to the district court just to push more paper around."). But it is dangerous, not efficient, to establish precedent based on a record lacking the information necessary to answer the many questions that a district court must address under the Supreme Court's new framework.

B.

Critically, the majority fails to grapple substantively with the implications of the Supreme Court's discussion in *Bruen* of shall-issue regimes. In *Bruen*, the Court first compared New York's may-issue public carry law to the public carry laws in other states, noting that only six other jurisdictions had may-issue regimes similar to New York's, "under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." 142 S. Ct. at 2123–24. The Court then elaborated on the distinct character of shall-issue regimes, explaining that "the vast majority of states," forty-three, are "shall[-]issue" jurisdictions in which "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." *Id.* at 2123. The Court continued:

> To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue" licensing regimes, under which "a general desire for self-defense is sufficient to obtain a [permit]."

> Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry. Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." And they likewise appear to contain only "narrow, objective, and definite standards" guiding licensing officials, rather than requiring the "appraisal of facts, the exercise of judgment, and the formation of an opinion"—features that typify proper-cause standards like New York's. That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.

Id. at 2138 n.9 (citations omitted). For ease, I refer to this passage as the "shall-issue discussion."

In the shall-issue discussion, the Court made explicit what any reader already would have discerned, namely, that the plaintiffs in *Bruen* had not challenged the constitutionality of a shall-issue law and, accordingly, that such laws would not necessarily be invalidated by the Court's holdings regarding New York state's may-issue public carry law. Moreover, the

Court provided explicit cautionary language, warning that the Court's opinion about may-issue regimes should not be interpreted as "suggest[ing] the unconstitutionality of . . . 'shall-issue' licensing regimes," and adding that such regimes do not "necessarily prevent 'law-abiding' responsible citizens'" from exercising their Second Amendment rights.[4] *Id*. at 2138 n. 9.

Like the shall-issue regimes contemplated by the Supreme Court in *Bruen*, the HQL requirement allows any law-abiding, responsible person who seeks to obtain a handgun qualification license to do so by completing the objective criteria outlined in the statute. The state does not retain any governmental discretion or ability to exercise judgment with regard to an individual's application for a handgun qualification license, and the state may not deny an individual a license once the statutory requirements have been satisfied.

Naturally, because of the time required to

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[4] In discussing the purpose and character of the shall-issue laws that predominate the public carry landscape in the United States, the majority in *Bruen* identified as typical components background checks and firearms safety courses. *Id.* In his concurring opinion, Justice Kavanaugh, joined by Chief Justice Roberts, provided additional examples of other components of generally "constitutionally permissible" shall-issue laws, including fingerprinting, mental health records checks, and training in laws regarding the use of force. *Id.* at 2162 (Kavanaugh, J., concurring). After he underscored the distinction drawn by the majority between shall-issue and may-issue laws, Justice Kavanaugh unequivocally stated that "the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so." *Id.*

complete this application process, individuals who decide today that they want to purchase their first handgun likely will not be able to leave the store with one in hand. Those applicants must first pay a fee, submit a set of their fingerprints, and complete certain firearm safety training requirements. Md. Code, Pub. Safety, § 5-117.1. But as the shall-issue discussion makes clear, these objective, non-discretionary components of a standard regulatory scheme generally are constitutionally permissible.

Indeed, in *Bruen* the Supreme Court observed that shall-issue laws "often" require that applicants complete a background check or a firearms safety course. 142 S. Ct. at 2138 n.9. And even though compliance with these objective, non-discretionary conditions necessarily results in some delay, the Court stated that it was not "suggest[ing] the unconstitutionality of" such requirements. *Id.*

Offering a contrasting example, the Court cautioned that it did not "rule out constitutional challenges to shall-issue regimes" for which "*lengthy* wait times . . . or *exorbitant* fees deny ordinary citizens their right to public carry." *Id.* (emphasis added). The difference between a facially *permissible* shall-issue regime and a facially *impermissible* shall-issue regime thus is not whether *any* burden is imposed or *any* delay results from the regulatory measures, but whether any requirements imposed by the regime are so onerous that they operate to "deny" law-abiding, responsible individuals their Second Amendment rights.

Here, the question whether the burden imposed by the HQL requirement "infringes" the rights of

law-abiding, responsible individuals requires a distinct analysis as part of *Bruen*'s step-one "plain text" inquiry. The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, *shall not be infringed.*

U.S. Const. amend. II (emphasis added). Consistent with the Supreme Court's guidance on the scope of the Second Amendment as it applies to shall-issue schemes, under the plain text of the Second Amendment a regulation is covered only if an individual can show that the regulation has "infringed" the individual's exercise of his Second Amendment right to keep or right to bear arms.

What does the word "infringed" mean in the context of the Second Amendment? The Supreme Court has not directly answered this question because the Court has never been required to do so. In the Court's seminal Second Amendment decisions, the Court has considered only laws that banned or effectively banned individuals from possessing or carrying firearms. In *District of Columbia v. Heller*, the Court addressed the constitutionality of a District of Columbia statutory scheme that banned handgun possession in the home. 554 U.S. 570, 628 (2008) ("The handgun ban amounts to a prohibition of an entire class of 'arms'" and "extends . . . to the home."). In *McDonald v. Chicago*, the Court addressed the constitutionality of Chicago laws that "effectively bann[ed] handgun possession by almost all private citizens who reside in the City." 561 U.S. 742, 750 (2010). And in *Bruen*, the Court addressed a New York

law under which the state had denied the petitioners' applications for unrestricted public carry licenses, thus prohibiting the petitioners from carrying handguns in public for self-defense because they had failed to persuade a governmental official that they had a special need to do so. 142 S. Ct. at 2156. The bans in *Heller*, *McDonald*, and *Bruen* thus did not compel a separate inquiry regarding whether a law "infringes" a law-abiding, responsible person's right to keep and bear arms.[5]

The majority acknowledges that, under the "operative clause" of the Second Amendment, the right to keep and the right to bear arms "shall not be infringed." Maj. Op., at 8. But the majority wholly avoids the type of textual analysis previously used by the Supreme Court to determine the meaning of terms and phrases appearing in the Second Amendment. *See, e.g., Heller*, 554 U.S. at 579, 581, 595, 597.

In its truncated step-one inquiry, the majority fails to define the term "infringe" or otherwise to address its scope. Instead, the majority merely asks whether the law "regulates" an individual's course of conduct. Maj. Op., at 11. Unsurprisingly, the answer to this question will almost always be "yes." But the majority has not identified any basis for employing the term "regulates," which notably does not appear in the Supreme Court's *Bruen* framework, in place of the Second Amendment's term "infringe." Nevertheless,

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[5] Nor did the Supreme Court's decision in *Caetano v. Massachusetts*, require an evaluation of this separate issue. 577 U.S. 411, 411 (2016) (assessing the constitutionality of a Massachusetts law prohibiting the possession of stun guns).

the majority invokes this substitute terminology, summarily concluding that the government must justify the "temporary deprivation" occasioned by the HQL requirement under step two of the *Bruen* inquiry because the law prevents the plaintiff "from owning handguns now." Maj. Op. at 10 (emphasis in original) & 12.

Put differently, under the majority's step-one view, the plaintiffs allege a "facially plausible Second Amendment violation" simply because compliance with the law's requirements renders it "impossible" for the plaintiffs to own a handgun right away." Maj. Op., at 10. Accordingly, the majority has created a constitutional test that wold render presumptively unconstitutional most, if not all, shall-issue permitting laws.[6]

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[6] I observe that many of the shall-issue public carry laws cited by the Supreme Court in *Bruen* set forth permissible processing periods either comparable to or longer than the 30-day processing period provided in the HQL requirement. *See* Ala. Code § 13A–11–75 (Cum. Supp. 2021) (30 days); Alaska Stat. § 18.65.700 (2020) (30 days); Ariz. Rev. Stat. Ann. § 13–3112 (Cum. Supp. 2021) (75 days); Colo. Rev. Stat. § 18–12–206 (2021) (90 days); Fla. Stat. § 790.06 (2021) (90 days); Idaho Code Ann. § 18–3302K (Cum. Supp. 2021) (90 days); Ill. Comp. Stat., ch. 430, § 66/10 (West Cum. Supp. 2021) (90 days); Ky. Rev. Stat. Ann. § 237.110 (Cum. Supp. 2021) (60 days for paper application, 15 days for electronic application); Me. Rev. Stat. Ann., tit. 25, § 2003 (Cum. Supp. 2022) (30 days for resident of five years or more, 60 days for other residents and nonresidents); Mich. Comp. Laws § 28.425b (2020) (45 days); Miss. Code Ann. § 45–9–101 (2022) (45 days); Mo. Rev. Stat. § 571.101 (2016) (45 days); Mont. Code Ann. § 45–8–321 (2021) (60 days); Neb. Rev. Stat. § 69–2430 (2019) (45 days); N.D. Cent. Code Ann. § 62.1–04–03 (Supp. 2021) (60 days); Ohio Rev. Code Ann. § 2923.125 (2020) (45 days); Okla. Stat., tit.

In addition to its failure to analyze the plain text of the Second Amendment, the majority seeks to minimize the effect of the Supreme Court's shall-issue discussion. First, the majority relies on a footnote in a different Supreme Court case to argue that "it would be poor judicial practice to 'read a footnote' in a Supreme Court case to 'establish the general rule' for that case." Maj. Op., at 12 n.9 (*quoting United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391, 1403 n.6 (2023)). But the Court's inclusion of text in a footnote makes it no less a part of the Court's opinion. And even without adopting the precise text of the Court's shall-issue discussion as a "general rule," it is sound practice for us to examine and refer to the Court's discussion of shall-issue regimes when analyzing the *Bruen* framework in the context of the HQL requirement, because the Supreme Court has provided this substantive guidance for consideration of future challenges to shall-issue statutes.[7]

21, § 1290.12 (2021) (60 days, if background check does not reveal any relevant records); 18 Pa. Cons. Stat. § 6109 (Cum. Supp. 2016) (45 days); S.C. Code Ann. § 23–31–215(A) (Cum. Supp. 2021) (90 days); Tex. Govt. Code Ann. § 411.177 (West Cum. Supp. 2021) (60 days); Utah Code § 53–5–704.5 (2022) (60 days); Va. Code Ann. § 18.2–308.04 (2021) (45 days); Wash. Rev. Code § 9.41.070 (2021) (30 days); W. Va. Code Ann. § 61–7–4 (2021) (45 days if background checks are completed); Wyo. Stat. Ann. § 6–8–104 (2021) (60 days); *see also* JA 125 ¶ 13 (declaration of Maryland State Police Captain Andy Johnson) (stating that, "[t]hrough the first quarter of calendar year 2018, there were no completed HQL applications pending disposition for longer than 15 days").

[7] The majority acknowledges that the HQL requirement is a shall-issue law. *See* Maj. Op., at 10 n.6. To the extent that the

The majority, however, passes over the text of the shall-issue discussion, offering another view that elevates form over substance. According to the majority, the shall-issue discussion relates only to *Bruen*'s step-two historical inquiry, because the Supreme Court inserted the footnote containing the shall-issue discussion after explaining why the New York law failed the second step of the *Bruen* framework. Maj. Op., at 13 n.9. The entire substance of the shall-issue discussion, however, corresponds directly with a step-one "infringement" analysis, and the Court did not refer in that discussion to any of the hallmarks of a step-two inquiry, such as the history of shall-issue laws or the question whether such laws are "relevantly similar" to historical regulations. *See Bruen*, 142 S. Ct. at 2132–33. Thus, it is not surprising that the Court, in the course of explaining its conclusion why the may-issue New York law was unconstitutional, added this footnote to emphasize the limits of its holding.

Next, the majority attempts to frame the Supreme Court's shall-issue discussion as irrelevant because the New York law at issue in *Bruen* was a restriction on "public carry," while Maryland's law "limit[s] handgun

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majority seeks to dispense with the Supreme Court's shall-issue discussion as dicta, I observe that "we routinely afford substantial, if not controlling deference to dicta from the Supreme Court." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 281–82 (4th Cir. 2019) (en banc) ("[L]ower courts grappling with complex legal questions of first impression must give due weight to guidance from the Supreme Court, so as to ensure the consistent and uniform development and application of the law."). Such consideration is especially warranted when, as here, the substantive dictum addresses the very issue before us.

possession altogether." Maj. Op., at 13 n.9 (emphasis omitted). But this distinction turns on a false premise, namely, that there is a difference between the Second Amendment right to keep arms and the Second Amendment right to bear arms. Neither the text of the Second Amendment nor the Supreme Court's precedent supports such a reading.[8] Thus, the majority cannot discard the language in the Court's shall-issue discussion on the basis that the Court was addressing only shall-issue public carry laws.

The majority nevertheless declines to address the detailed substance of the shall-issue discussion, perhaps because that discussion generally counsels a measured, fact-intensive approach to the consideration of constitutional challenges to shall-issue regimes. The shall-issue discussion plainly signals the Supreme Court's thinking that, going forward, successful

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[8] A permitting or public carry law may have a more direct effect on either the right to keep or the right to bear arms. The Supreme Court, however, has discussed the importance of these rights in tandem, drawing no distinction between them in establishing the applicable Second Amendment framework or the relative strength of each as a constitutional right. Under the new *Bruen* framework, a court very well may conclude under step two that the historical tradition of laws relating to the right to possess firearms differs from the historical tradition of laws relating to the right to carry those firearms in public. But this step requires the court to conduct a detailed inquiry by which the court first must identify, at a minimum, the burden a particular regulation imposes and the justification for that regulation. Only then may the court compare this burden and justification to the historical analogues identified by the parties, determining whether the burden imposed by, and the justification provided for, the modern regulation is "relevantly similar" to the historical analogues. *Bruen*, 142 S. Ct. at 2132.

constitutional challenges to shall-issue statutes ordinarily will be limited to challenges involving uniquely burdensome requirements such as "lengthy wait times in processing license applications" or "exorbitant fees." *See Bruen*, 142 S. Ct. at 2138 n.9. The majority's contrary conclusion here, invalidating an entire shall-issue statute as facially unconstitutional without any discussion whether the statute's requirements infringe every permit applicant's constitutional rights, thus runs directly against *Bruen*'s clear guidance on shall-issue regimes. *Id.*; *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (explaining that "a plaintiff can only succeed in a facial challenge" by establishing "that the law is unconstitutional in all of its applications").

Shall-issue laws allow individuals with "a general desire for self-defense" to obtain a permit to possess or carry a firearm. *Bruen*, 142 S. Ct. at 2138 n.9. Although such laws may impose conditions that result in some delay in acquiring or bearing a firearm, they do not require a discretionary governmental determination regarding firearm possession or carry, and they generally do not prevent law-abiding, responsible individuals from exercising their Second Amendment rights. *Id.*

The district court is best suited to conduct a *Bruen* step-one "plain text" inquiry in the first instance to determine whether any requirements imposed by a shall-issue regime "infringe" an individual's Second Amendment rights. The Supreme Court's shall-issue discussion has provided clear guidance that an "infringement" of an individual's Second Amendment

rights would require a greater impediment than a simple processing delay, firearms training, or the imposition of an administrative fee.[9] But like most judges, I am not a historian or a linguist capable of considering the full reach of this Second Amendment term in its historical context. Moreover, the parties have not cited the testimony of any expert who purports to have these qualifications. On remand, the parties should be allowed to compile, and the district court should have the opportunity to consider, the interpretive tools that the Supreme Court has relied on in other cases to determine the meaning of

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[9] Notably, some definitions from the Founding era of the term "infringe" support the construction that the Supreme Court appeared to endorse in its discussion of shall-issue regimes, namely, that a particular provision will "infringe" an individual's rights under the plain text of the Second Amendment only if the statutory condition is so burdensome that it ultimately prevents law-abiding, responsible individuals from possessing or bearing a handgun. Samuel Johnson, 1 Dictionary of the English Language 1101 (4th ed. 1773) (hereinafter Johnson) (defining "infringe" as "[t]o violate; to break laws or contracts" or "[t]o destroy; to hinder"); N. Webster, American Dictionary of the English Language (1828) (hereinafter Webster) (same); *Heller*, 554 U.S. at 581, 584 (citing Johnson and Webster to determine the meaning of "arms" and "bear"). Particularly when compared to our modern understanding of "infringe" as a "gradual but clearly identifiable" violation of a right, these Founding era definitions seem to require a greater intrusion. On 'Infringe,' 'Encroach,' and 'Impinge', Merriam-Webster, https://www.merriam-webster.com/words-at-play/infringe-encroach-impinge-usage-difference [https://perma.cc/LE8U-PAA7]; Infringe, Merriam-Webster, https://www.merriam-webster.com/dictionary/infringe [https://perma.cc/234C-JT3N] (defining "infringe" as "to encroach upon in a way that violates . . . the rights of another," while noting that a secondary, "obsolete" definition is to "defeat" or "frustrate")

constitutional terms in the new framework set forth by *Bruen*, while bearing in mind the Supreme Court's warning that material differences exist between may-issue and shall-issue regimes. *See Heller*, 554 U.S. at 579, 581, 595, 597 (referring to Founding-era dictionaries, the context in which the language was used, a comparison of other uses of similar language in the Constitution, the 18th-century meanings as compared to the modern meanings, and the use of such language in other written documents from the Founding era); *Cawthorn v. Amalfi*, 35 F.4th 245, 256 (4th Cir. 2022) ("'[C]onstitutional interpretation'—like statutory construction—involves 'familiar principles' (such as 'careful examination of the textual, structural, and historical evidence put forward by the parties') that are the bread-and-butter of judicial work." (citation omitted)).

After resolving this textual inquiry, the district court next should be required to address whether any of the components of the HQL requirement rise to the level of "infringement," a fact-specific inquiry that again distinguishes this case from *Bruen*. A determination whether the shall-issue permitting law at issue here "infringes" the Second Amendment rights of law-abiding, responsible individuals likely will require consideration of several material factors, such as the extent of any delay imposed and the amount of costs incurred from compliance with the law. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Applying *Bruen* in this new context, the

step-one inquiry is not a purely legal question but is a mixed question of law and fact requiring factual development before the district court.

For these reasons, I would remand this case to the district court for a step-one analysis under *Bruen* of the plain text of the Second Amendment in the context of shall-issue regimes, and for consideration whether any components of the HQL requirement rise to the level of "infringement" of the plaintiffs' Second Amendment rights.[10] Depending on the district court's analysis and resolution of these issues, the district court also may be required to conduct a step-two analysis under *Bruen*.

C.

Finally, my colleagues' analytical error under step one is compounded by their refusal to remand this case for consideration of the severability of any unconstitutional component in the HQL requirement, which consideration mandates a fact-specific, intent-driven analysis under state law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Under Maryland law, "the provisions of all statutes enacted after July 1, 1973, are severable," and "[t]he finding by a court that part of a statute is unconstitutional or void does not affect the validity of the remaining portions of the statute, unless the court finds that the remaining valid provisions alone are incomplete and incapable of being

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[10] Under this view of the case, I do not reach step two of the *Bruen* framework, which would need to be addressed by the district court only if it found that the plaintiffs' proposed course of conduct is "infringed" by any component of the HQL requirement.

executed in accordance with the legislative intent." Md. Code, Gen. Prov. § 1-210. Maryland law thus affords many state statutes, including the HQL requirement, a presumption of severability.

In addition, courts are required to discern whether "the legislative body would have enacted the statute or ordinance if it knew that part of the enactment was invalid." *Cnty. Council of Prince George's Cnty. v. Chaney Enterprises Ltd. P'ship*, 165 A.3d 379, 394 (Md. 2017) (citation omitted). Accordingly, even when a legislature expressly provides that a state statute is severable, disputes may arise regarding whether the other portions will remain valid. *See, e.g., Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006).

Here, the district court rejected the plaintiffs' facial constitutional challenge to the HQL requirement, applying the two-step framework we established in *Kolbe*, 849 F.3d at 132, to determine that each component of the HQL requirement was constitutionally permissible. Because the district court upheld the constitutionality of the entire statute, the court did not need to address whether any individual component of the HQL requirement was severable.

Unsurprisingly, at oral argument before us, the government argued that it had not addressed severability in its brief because, in the government's view, the entire statute passed constitutional muster. Oral Arg., at 25:12–25:22. Thus, the record on appeal lacks any discussion by the district court or any argument from the parties regarding severability.

The Supreme Court has cautioned that "federal

courts are not ideally positioned to address such a sensitive issue of state constitutional law" as severability, counseling that we "may therefore be well advised to consider certifying such a question to the State's highest court." *Carney v. Adams,* 141 S. Ct. 493, 503–04 (2020) (Sotomayor, J., concurring). And in other instances, the Supreme Court has remanded such questions "for the lower courts to determine legislative intent in the first instance." *E.g.*, *Ayotte*, 546 U.S. at 331.

These principles are even more compelling in the context of facial constitutional challenges like the one brought by the plaintiffs in this case. Such challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law that is broader than is required by the precise facts to which it is to be applied." *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020) (quoting *Wash. State Grange,* 552 U.S. at 450–51). Moreover, these challenges "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* (citation omitted). Since *Bruen*, the state and federal trial courts have not had "occasion to construe the [HQL requirement] in the context of actual disputes," nor to "accord the law a limiting construction to avoid constitutional questions." *Wash. State Grange*, 552 U.S. at 450. I thus part with my colleagues' decision to

avoid the issue of severability,[11] and would remand this question for consideration by the district court upon its application of *Bruen*.

II.

The district court in this case has not had the opportunity to apply the new, fact-intensive *Bruen* framework or to consider severability principles under Maryland law, and there is no legitimate reason to

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[11] The majority acknowledges that "remand might be appropriate to determine whether a statute were severable," but declines to further address the issue because, in the majority's view, the government "disavowed a severability argument." Maj. Op., at 20 n.11 (citing Oral Arg., at 25:13 – 25:27 & 26:52–27:00). The majority mischaracterizes the government's position.

At oral argument, Judge Richardson asked government counsel, "But [the HQL requirement] rises or falls together?" Oral Arg., at 25:22–25:24. Government counsel responded, "I, I think that's, I think that's . . . ." Oral Arg., at 25:25–25:27. Government counsel did not finish this sentence, and later admitted that the government was "not necessarily prepared to address severability" as "it was not something [the government had] argued." Oral Arg., at 26:52–27:00.

Contrary to the majority's interpretation, the government's decision not to address severability in its brief is not a "disavow[al]" of the severability argument. Maj. Op., at 20 n.11. Rather, this decision reflects the government's position, consistent with the district court's holdings, that the entire HQL requirement was constitutional. It is imprudent to use the government's silence on this issue to ignore the "normal rule that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 559 (2001) (Scalia, J., dissenting) ("Although no party briefed severability in *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Justices finding partial unconstitutionality considered it necessary to address the issue.").

short-circuit the judicial process and to prevent the development of the record in the district court. Moreover, remand is especially appropriate here, when the plaintiffs bring a facial constitutional challenge to a statute that falls into a class of laws already identified by the Supreme Court as meaningfully distinct from the firearms bans addressed in the Court's prior cases.

In sum, my colleagues turn their back on the shall-issue discussion in *Bruen*. As a result, unable to pound a "shall-issue" law into a framework designed for a "may-issue" regime, the majority fails to produce a legally defensible and workable template for the analysis of "shall-issue" laws. And we are left with the lingering question why the majority ignores the Court's clear guidance on the very issue before us.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, INC., et al.

v.

LAWRENCE HOGAN, Jr., et. al.

REDACTED

Civil Case No. ELH-16-3311

MEMORANDUM OPINION

This Memorandum Opinion resolves a challenge under the Second Amendment to the constitutionality of Maryland's handgun licensing requirement, embodied in Maryland's Firearm Safety Act of 2013 (the "FSA" or the "Act"). The FSA, codified in Md. Code (2018 Repl. Vol.), § 5-117.1 of the Public Safety Article ("P.S."), was enacted by the Maryland General Assembly in the aftermath of the 2012 tragedy in Newtown, Connecticut, when 20 first-graders and six adults were brutally murdered by a 20-year-old individual who killed the victims with an AR-15-type Bushmaster rifle.

Plaintiffs Maryland Shall Issue, Inc. ("MSI"), for itself and approximately 1,900 members; Atlantic Guns, Inc. ("Atlantic Guns"); Deborah Kay Miller; and Susan Vizas filed suit against defendant Lawrence Hogan, Jr., in his capacity as Governor of Maryland, and defendant Colonel William M. Pallozzi, in his capacity as the Secretary and Superintendent of the

Maryland State Police ("MSP").[1] ECF 1 (Complaint); ECF 14 (First Amended Complaint or "FAC").[2] I shall refer to the defendants collectively as the "State."

In particular, plaintiffs challenge the provision of the Act that requires a Handgun Qualification License ("HQL") as a condition for purchasing a handgun in Maryland. The First Amended Complaint (ECF 14) contains three counts. Count I asserts a claim alleging that the HQL contravenes the Second Amendment. Count II asserts a violation of the Due Process Clause of the Fourteenth Amendment, based, *inter alia*, on statutory vagueness. In Count III, plaintiffs assert an ultra vires claim under Md. Code (2014 Repl.), § 10-125(d) of the State Government Article, challenging alleged rulemaking by the MSP.

As discussed, *infra*, I previously found that the plaintiffs lacked Article III standing as to their claims. ECF 98. On appeal, the Fourth Circuit affirmed in part and reversed in part and remanded for further proceedings. *See Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199 (4th Cir. 2020). Only the Second Amendment claim remains.

Cross-motions for summary judgment are now pending. Defendants' motion (ECF 125) is supported by a memorandum (ECF 125-1) (collectively, "Defendants' Motion") and 15 exhibits. ECF 125-2 to ECF 125-16. They argue that plaintiffs have failed to present a genuine

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[1] Colonel Woodrow W. Jones, III has since succeeded Pallozzi as Secretary and Superintendent of the MSP. Neither party sought to substitute Jones for Pallozzi, but defendants specify that their motion for summary judgment (ECF 125) is brought on behalf of Governor Hogan and Col. Jones. The Clerk shall substitute Jones as a defendant.

[2] This case was initially assigned to Judge Marvin Garbis. It was reassigned to me on July 26, 2018, due to the retirement of Judge Garbis. See Docket.

dispute of material fact to support their Second Amendment challenge to the HQL law. ECF 125-1 at 8. Moreover, defendants assert that the Act "easily satisfies intermediate scrutiny" review. *Id.*

Plaintiffs have filed a combined cross-motion for summary judgment and opposition to Defendants' Motion (ECF 135), supported by a memorandum (ECF 135-1) (collectively, "Plaintiffs' Motion") and 28 exhibits. ECF 135-2 to ECF 135-29. They argue that the "undisputed facts" demonstrate that the "HQL requirement is unconstitutional because it effects a ban on handgun acquisition that is inconsistent with the Second Amendment's text, history, and tradition." ECF 135-1 at 12. Further, plaintiffs argue that the Act is subject to strict scrutiny, but they maintain that, even under intermediate scrutiny, defendants cannot meet their burden because the requirements as to the HQL are "unnecessary and ineffective." *Id.* at 27. Plaintiffs take issue with the "30-day delay" in obtaining the HQL, the fingerprint requirement, and the safety course with the live-fire requirement. *Id.* at 46-48. Moreover, plaintiffs argue that the HQL process is "burdensome," *id.* at 12, as well as "superfluous" and "redundant," in light of the "pre-existing and still-continuing handgun registration process," identified by them as the "77R Handgun Registration." *Id.* at 11.

Defendants have filed a combined opposition to Plaintiffs' Motion and a reply in support of their own motion (ECF 140), along with 15 additional exhibits. Plaintiffs have replied (ECF 150) and submitted four additional exhibits.

With leave of Court (ECF 128), Everytown For Gun Safety ("Everytown"), a gun-violenceprevention organization, filed an amicus brief in support of Defendants' Motion. ECF 129 ("Amicus Brief"). The Amicus Brief includes 13 exhibits. Everytown argues that the HQL law is constitutional for three reasons: 1) the background

check process that the law requires "is longstanding and lawful" under *District of Columbia v. Heller*, 554 U.S. 570 (2008); 2) the training requirement is consistent with the original understanding of the Second Amendment; and 3) the licensing fees are consistent with fees and taxes that states have been historically imposed on individuals seeking to obtain a firearm. ECF 129 at 11-12.

No hearing is necessary to resolve the pending motions. See Local Rule 105(6). For the reasons that follow, I conclude that the HQL law is constitutional. Accordingly, I shall grant Defendants' Motion and deny Plaintiffs' Motion.

I. Procedural Summary

Plaintiff MSI is a non-profit membership organization that is "'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.'" ECF 135-3 (Decl. of Mark W. Pennak, MSI President), ¶ 2 (internal citation omitted). MSI's purpose includes "promoting and defending the exercise of the right to keep and bear arms" and "defending the Constitutional right of law-abiding persons to lawfully purchase, own, possess and carry firearms and firearms accessories." *id*. As of January 2021, MSI had approximately 1,900 members throughout Maryland. Id.

Plaintiff Atlantic Guns is a licensed federal firearms dealer that was founded in 1950. ECF 135-2 (Decl. of Stephen Schneider, owner of Atlantic Guns, dated 10/3/2018), ¶¶ 2, 3. According to Schneider, handguns are the most popular firearm of choice for Atlantic Guns' customers and the HQL requirement has "severely impacted" Atlantic Guns' business. *Id*. ¶¶ 6, 7. In particular, Schneider states, *id*. ¶ 8: "Atlantic Guns turns away would be customers every week [because of the HQL

requirement], totaling at least in the hundreds over the five years since the Handgun License requirement took effect. Sometimes prospective customer[s] place a deposit on a handgun, which we then hold pending their obtaining a Handgun License. Some of these customers later request refunds and the sale is not consummated."

The individual plaintiffs, Miller and Vizas, are MSI members. They claim that they would like to own a handgun, but have not attempted to purchase one and do not intend to obtain an HQL.

Miller has never owned a firearm, but her husband owns both handguns and long guns. ECF 135-5 at 7, Tr. 17. In 2017, Miller decided that she wanted to purchase a handgun because she "wanted to be able to defend [herself] in [her] home." *Id*. at 8-9, Tr. 18-19. Further, she decided that she needed to have a gun for herself, rather than use her husband's gun, because she was concerned that under the "new law," using her husband's gun would constitute "receipt," potentially subjecting her to prosecution. *Id*. at 9, Tr. 19. Miller claimed that the "time for the training" is an "inconvenience that has deterred" her from obtaining an HQL. *Id*. at 12, Tr. 33. Specifically, Miller explained that she has "back issues" that make it difficult to sit for the four-hour course and it would also be burdensome to take time off from work. *Id*.

Vizas decided in 2015 that she wanted to purchase a handgun. ECF 135-4 at 5, Tr. 18. She explained that she wanted to "just have it." *Id*. at 7, Tr. 25. Vizas took a "hunter safety training" course in Maryland in 2016 because her children wanted to attend the class. *Id*. at 9, Tr. 37. But, she claimed that the "expense" of the required HQL class and the "time to take the class, to get fingerprints, [and] to wait for a background check" are an "inconvenience that has deterred [her] from obtaining an HQL." *Id*. at 10, Tr. 43.

In the course of this litigation, MSI has also identified other members who do not possess an HQL but who wish to acquire a handgun. ECF 135-27 (Dep. of John Matthew Clark); ECF 135- 17 (Dep. of Dana Hoffman); ECF 135-26 (Dep. of Scott Miller). None of these individuals has actually applied for an HQL. But, they claim that the HQL requirements have deterred them from acquiring licenses and purchasing handguns. Mr. Miller, for example, explained that "the inconvenience" associated with the HQL requirements has deterred him from purchasing a handgun. ECF 135-26 at 3, Tr. 24. But, he also said, *id*.: "I have no reason to believe that I'd be barred from owning one…" *See also* ECF 135-17 at 11-12, Tr. 23-24 (Hoffman explaining that going to the required training would be problematic because of her medical conditions).

As noted, the FAC originally contained three counts. Defendants moved to dismiss. ECF 18. Judge Marvin Garbis, to whom the case was then assigned, issued a Memorandum and Order (ECF 34), granting the motion as to the Instructor Certification Requirement of the Act with respect to Count II. But, he denied the motion as to all other claims. *Id*.

At the conclusion of discovery, the parties filed cross-motions for summary judgment. By Memorandum Opinion (ECF 98) and Order (ECF 99) of March 31, 2019, I concluded that plaintiffs lacked Article III standing as to all claims in the FAC. Therefore, I granted the defendants' summary judgment motion (ECF 59) and denied plaintiffs' cross motion for summary judgment (ECF 77). *See* ECF 102 ("Redacted Memorandum Opinion"). Plaintiffs subsequently appealed to the Fourth Circuit. ECF 103.

On appeal, the Fourth Circuit affirmed in part and reversed in part, and remanded the case for further proceedings. *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199 (4th Cir. 2020). The Court determined that Atlantic Guns has standing to assert a Second Amendment claim,

both “to bring its own, independent Second Amendment claim” and to bring a Second Amendment claim “on behalf of potential customers” under the doctrine of third-party standing. *Id*. at 214, 216. And, “because standing for one party on a given claim is sufficient to allow a case to proceed in its entirety on that issue,” the other plaintiffs (Vizas, Miller, and MSI) also had standing to bring a Second Amendment claim. *Id*. at 210, 216.

Notably, the Fourth Circuit “state[d] no opinion…on the merits of Atlantic Guns’ asserted second amendment claims.” *Id*. at 214 n.5. Moreover, the Fourth Circuit affirmed the decision as to Counts II and III, concluding that plaintiffs lacked standing to bring the constitutional due process claim and the challenge to the MSP regulations as ultra vires. *Id*. at 216-20. Thus, the Court said, *id*. at 216: “In light of our conclusion that Atlantic Guns has both independent and third-party standing, we reverse the district court’s judgment in favor of the State Defendants as to the Second Amendment claims [in Count I] and remand with instructions that the claims proceed to trial.”

Accordingly, only Count I remains at issue. Following the remand by the Fourth Circuit, the parties submitted a proposed scheduling order, which provided for additional discovery. ECF 120. I approved the parties’ proposed schedule. ECF 121. The cross-motions for summary judgment followed.

II. Factual Background[3]

A. Handgun Laws in Maryland

In 1941, Maryland enacted a "Pistols" subtitle to the Maryland Code, which banned the sale or transfer of a handgun to a person convicted of a crime of violence or a fugitive. See Md. Code (1941), Art. 27, §§ 531(A)–(G), now codified at P.S. § 5-118. Since 1966, Maryland has enacted four statutes intended to prevent prohibited persons from acquiring handguns. In 1966, the Maryland General Assembly enacted the 77R Handgun Registration Requirement. It was followed by the Gun Violence Act of 1996; the Responsible Gun Safety Act of 2000; and the Firearm Safety Act of 2013.

The 77R Handgun Registration Requirement ("77R" or "Handgun Registration") has several requirements. Plaintiffs assert that they "are not challenging the 77R background check process." ECF 14, ¶ 50 n.1.

The application under the Handgun Registration statute requires the purchaser to provide, *inter alia*, his or her "name, address, Social Security number…driver's [license] or photographic identification soundex number…" *See* Md. Code (1966), Art. 27, § 442, now codified at P.S. § 5-118. This information is used by the MSP to conduct a

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[3] I incorporate here the facts set forth in my earlier opinion (ECF 98), as supplemented by the new factual material submitted by the parties with their summary judgment motions. In general, when citing to an exhibit, I have identified the exhibit at least once, but not repeatedly. In addition, when citing to the parties' submissions, I use the electronic pagination, which does not always correspond to the page numbers on the submissions.

background check as to a prospective purchaser. P.S. § 5-121; ECF 135-6 (Dep. of Daniel Webster) at 14, Tr. 73.

Under 77R, firearms dealers are prohibited from transferring a handgun to a prospective purchaser "until after seven days shall have elapsed from the time an application to purchase or transfer shall have been executed by the prospective purchaser or transferee…and forwarded by the prospective seller…to the Superintendent of the Maryland State Police." Md. Code (1966), Art. 27, § 442; *see* P.S. §§ 5-118, 5-120, 5-123.

The Gun Violence Act of 1996 made the 77R Handgun Registration requirement applicable to all handgun transfers, including gifts and private sales. Md. Code (1996), Art. 27, § 445, now codified at P.S. § 5-124. And, the Responsible Gun Safety Act of 2000 added the requirement that all prospective handgun purchasers must complete "a certified firearms safety training course that the Police Training Commission conducts…." ECF 135-11; *see* Md. Code (2003), P.S. § 5-118(b)(3)(x)). Pursuant to this requirement, the Police Training Commission created an hour-long, online course for prospective handgun purchasers. ECF 135-1 at 19.

B. FSA

The Maryland General Assembly enacted the FSA in 2013, and it went into effect on October 1, 2013. In relevant part, the Act requires most Maryland handgun purchasers to first obtain an HQL. Subject to

certain exemptions not pertinent here,[4] "[a] dealer or any other person may not sell, rent, or transfer a handgun" to a second person, and the second person "may not purchase, rent, or receive a handgun" from the first person, unless the buyer, lessee, or transferee presents a valid HQL. P.S. § 5-117.1(b), (c). A person who violates the Act is guilty of a misdemeanor, and is subject to imprisonment for up to five years and/or a fine not exceeding $10,000. *Id.* § 5-144(b).

To obtain an HQL, a person must satisfy a handful of conditions. Of relevance here, an applicant must "complete a minimum of 4 hours of firearms safety training within the prior three years" and, "based on an investigation," the individual may not be "prohibited by federal or State law from purchasing or possessing a handgun." *Id.* § 5-117.1(d).[5] The safety training, which is undertaken at the applicant's expense, must cover classroom instruction on "State firearm law[,] home firearm safety[,] and handgun mechanisms and operation," along with a live-fire "firearms orientation component that demonstrates

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[4] Active and retired members of law enforcement agencies and the military are not required to obtain an HQL. P.S. § 5-117.1(a). The FSA also does not apply to "licensed firearms manufacturer[s]" or "a person purchasing, renting, or receiving an antique, curio, or relic firearm," as defined by federal law. *Id.*

[5] The applicant must also be at least 21 years of age to obtain an HQL. P.S. § 5-117.1(d). But *see Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, __ F.4th __, 2021 WL 2934468, at *4 (4th Cir. July 13, 2021) (concluding that federal criminal statutes making it unlawful for federal firearms licensees to sell handguns to people under 21 years of age violate the Second Amendment). The age requirement is not at issue in this case.

the person's safe operation and handling of a firearm." *Id*. § 5-117.1(d)(3).

An applicant must complete a written application, in a manner designated by the Secretary of the MSP (the "Secretary"). See P.S. § 5-101(u) (defining "Secretary"). As authorized by the Act, the MSP adopted regulations to effectuate the HQL requirements. *See* P.S. §§ 5-105; 5-117.1(n); Code of Maryland Regulations ("COMAR") 29.03.01.26-.41.

The application must include the applicant's "name, address, driver's license or photographic identification soundex number," along with other identifiers and a nonrefundable application fee of $50. P.S. § 5-117.1(g); COMAR 29.03.01.28. Moreover, the application must include "a complete set of the applicant's legible fingerprints taken in a format approved by" the Maryland Department of Public Safety and Correctional Services ("DPSCS") and the Federal Bureau of Investigation ("FBI"). P.S. § 5-117.1(f)(3)(i); *see* ECF 125-7 (Decl. of MSP Captain Andy Johnson) at 1-9. The applicant's fingerprints must be taken by a State-certified vendor using "livescan" technology. P.S. § 5-117.1(f)(3)(i); ECF 125-7, ¶ 23.[6] In addition, the applicant must submit proof of completion of the training requirement, and a statement under oath that the applicant is not prohibited from gun ownership. P.S. § 5-117.1(g).

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[6] Plaintiffs complain that there are "hardly any [State-certified] private fingerprinting vendors in rural areas." ECF 135-1 at 25. But, according to the State's website, there are at least 86 vendors across the State that provide fingerprinting services. *See* https://www.dpscs.state.md.us/publicservs /fingerprint.shtml.

Using the fingerprints provided in a completed application, the Secretary must apply to DPSCS for a criminal history records check for all HQL applicants. *Id*. § 5-117.1(f)(2). And, if DPSCS receives criminal history information "after the date of the initial criminal history records check," it must share that information with MSP; MSP may subsequently revoke the HQL of a person who becomes ineligible to possess the handgun. *Id*. § 5-117.1(f)(7); *see* ECF 125-7, ¶¶ 23, 24; ECF 140-4 (Dep. of Andy Johnson) at 9-10, Tr. 133-134 (explaining how DPSCS reports arrests and prosecutions to MPS and if the charge is a "disqualifier" for an HQL, then MSP will revoke the individual's HQL); ECF 125-9 (Affidavit of First Sgt. Donald Pickle, Assistant Commander of MSP's Licensing Div.), ¶ 6.

In order to obtain a valid HQL, most applicants must complete a four-hour, live firearms safety training course, taught by a qualified handgun instructor ("QHI"), consisting of both classroom instruction and "a firearms orientation component that demonstrates the person's safe operation and handling of a firearm." P.S. § 5-117.1(d)(3). In particular, the safety training must cover classroom instruction on "State firearm law"; "home firearm safety"; and "handgun mechanisms and operation." *Id*. And, as part of the "firearms orientation component," which "demonstrates" the "safe operation and handling of a firearm," § 5-117.1(d)(3)(iii), the applicant must "safely fire[] at least one round of live ammunition." COMAR, 29.03.01.29. The safety course is not provided by the MSP, but the MSP has a sample lesson plan for the course on its website for use by QHIs. ECF 135-7 (Dep. of Andy Johnson) at 8-9, Tr. 68-69; ECF 135-9 (Dep. of

MSP Captain James Russell) at 5-6, Tr. 70-71; *Id*. at 14, Tr. 114.[7]

A person can become a QHI if he or she has: "A valid Qualified Handgun Instructor License issued by the Secretary"; "Been recognized by the Maryland Police and Correctional Training Commission"; or "A valid instructor certification issued by a nationally recognized firearms organization." COMAR, 29.03.01.37. An individual may obtain a Qualified Handgun Instructor License from the Secretary by providing, among other things, proof of "formal training in the care, safety, and use of handguns, including a minimum qualification score of 80 percent on a practical police course," and proof of a "minimum of 1 year of experience in instruction in the care, safety and use of handguns." *Id*. 29.03.01.38.

HQL applicants are required to locate, arrange, and pay for training at their own expense. However, an applicant is exempt from the training requirement under certain conditions, including prior completion of a safety training course, lawful ownership of a "regulated firearm," which includes a handgun, or "an honorably discharged member of the armed forces of the United States or the National Guard." P.S. §§ 5-117.1(e), 5-101(r).

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[7] As of November 17, 2017, the MSP permits the use of "non-lethal marking projectiles" to satisfy the HQL's "live fire" training requirement. *See* ECF 125-7 at 100. Moreover, since July 2020, because of the COVID-19 pandemic, the Licensing Division has permitted the instruction component of the training course to be done via "real time, bi-directional audio and video connection." ECF 125-10, ¶ 12.

The Act requires the MSP to process any completed application within 30 days of its receipt. *Id.* § 5-117.1(h). For the most part, HQL applications are processed in the order that they are submitted to MSP. ECF 125-7, ¶ 6. According to the two Commanders of the Licensing Division of MSP, all "properly completed application[s]" that have been received by the MSP since the inception of the HQL law have been processed within this mandated 30-day time frame. *Id.* ¶ 12; ECF 125-10 (Decl. of MSP Captain Andrew Rossignol), ¶ 15. If the application is missing components at the 30-day mark, then the application will receive an administrative denial that can be overturned once all of the components of the applications are submitted. ECF 135-7 at 33-35, Tr. 138-140. This means that some applications are not fully processed within 30 days. *Id.* at 35, Tr. 140.

Once an applicant receives an HQL, then the applicant must comply with P.S. § 5-118 before taking possession of the gun. Section 5-118 requires an individual to complete an application (known as the 77R form) confirming that he or she is not prohibited from acquiring a handgun, among other things, and pay a $10 application fee. Unless an application is disapproved by the MSP within seven days of submitting the 77R form, the applicant may take possession of the gun. P.S. §§ 5-122, 5-123; *see* ECF 135-6 (Dep. of Daniel Webster, Director of the Johns Hopkins University Center for Gun Policy and Research) at 11, Tr. 38. The HQL is valid for ten years (P.S. § 5-117.1(i)) and may be renewed without completion of another firearms safety course or the resubmission of fingerprints. *Id.* § 5-117.1(j); COMAR, 29.03.01.34.

If the HQL is not approved, the Secretary must provide a written denial, along with a statement of reasons and notice of appeal rights. *Id*. § 5-117.1(h). A person whose application is not approved may request a hearing with the Secretary within 30 days of the denial, and thereafter may seek judicial review in State court. *Id*. §§ 5-117.1(I)(1), (3).

According to plaintiffs, the process of obtaining fingerprints, taking the training course, and submitting an application to the MSP may cost an applicant more than $200. ECF 135-1 at 26. For starters, an applicant may have to pay at least $50 for live-scan fingerprints and from $50 to more than $100 for the required safety course. *See* ECF 135-19 ("LiveScan HQL Fingerprinting Costs as of 12/2/2017"); ECF 135-20 (Dep. of Schneider) at 3, Tr. 17; ECF 135-18 (Dep. of Pennak) at 4-5, Tr. 22-23. Then, as noted, an applicant must submit a $50 application fee to MSP with the completed application. P.S. § 5-117.1(g)(2).

In legislative hearings concerning the FSA, the General Assembly heard testimony from various public policy and law enforcement experts advocating for the licensing requirement generally, and the fingerprint and training requirements in particular. *See* ECF 125-3; ECF 125-5; ECF 125-6. Dr. Daniel Webster, ScD, MPH, Director of the Johns Hopkins University Center for Gun Policy and Research, was one of the experts. He testified, ECF 125-3 at 2: "Arguably, the most important objective of a state's gun laws is to prevent dangerous individuals from possessing firearms. Although Maryland has some useful laws to accomplish this task, the system is especially

vulnerable to illegal straw purchases and the individuals using false identification in their applications to purchase regulated firearms."

In support of the Act, Webster discussed various studies of gun violence and public policies. He relied, *inter alia*, on a study conducted by the U.S. Government Accountability Office ("GAO"), in which five "agents acting in an undercover capacity used ... counterfeit driver's licenses in attempts to purchase firearms from gun stores and pawnshops that were licensed by the federal government to sell firearms." ECF 125-4 (GAO–01–427, FIREARMS PURCHASED FROM FEDERAL FIREARM LICENSEES USING BOGUS IDENTIFICATION 2 (2001)) ("GAO Study"), at 5-6.[8] The investigators conducted the study in states that relied on "the instant background check," but which "do not require fingerprinting or a waiting period" for firearm purchases. *Id*. Based on these results, the report concluded that "the instant background check . . . cannot ensure that the prospective purchaser is not a felon or other prohibited person whose receipt and possession of a firearm would be unlawful." *Id*. at 5.

Further, Webster explained that the District of Columbia and five states—Connecticut, Iowa,

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[8] The states in which the GAO conducted its study had adopted the National Instant Criminal Background Check System ("NICS"), see 18 U.S.C. § 922(t), under which the following information is required of each individual who undergoes a NICS check: (1) name, (2) sex, (3) race, (4) date of birth, and (5) state of residence. 28 C.F.R. § 25.7. A dealer may, in addition, report the purchaser's Social Security Number or other identifying number and physical description. *Id*.

Massachusetts, New Jersey, and New York—require individuals to apply directly with a law enforcement agency and be photographed and fingerprinted before they can purchase handguns. ECF 125-3 at 3. Those states, according to Webster, "have some of the lowest age-adjusted firearm mortality rates per 100,000 population in the nation for the period 2006-2010—Connecticut 5.1, Iowa 6.4, Massachusetts 3.5, New Jersey 5.2, and New York 5.0—compared with the overall rate for the nation of 9.5." *Id.* Missouri, however repealed a licensing law that it had in place in 2007. According to Webster, "[i]mmediately following the repeal of Missouri's permit-to-purchase licensing law [in 2007], the share of guns recovered by Missouri police agencies that had an unusually short time interval from retail sale to crime indicative of trafficking more than doubled." *Id.* Further, he explained, *id.*: "Preliminary evidence suggests that the increase in the diversion of guns to criminals linked to the law's repeal may have translated into increases in homicides committed with firearms."

The General Assembly also heard testimony from then-Baltimore County Police Chief James Johnson. *See* ECF 125-5. He maintained that the HQL requirement would "reduce the number of non-intentional shootings by ensuring that gun owners know how to safely use and store firearms"; "will decrease illegal gun sales and purchases by ensuring that all licensees are eligible to possess firearms under Federal and State law"; and "will reduce murder rates." *Id.* at 4. As to the fingerprint requirement, Johnson said that it "will help law enforcement identify people involved in gun crimes," and it "is not an inconvenience" for Marylanders. *Id.* at 4. Further,

with respect to the training requirement, Johnson noted: "The current viewing requirement – viewing a 30-minute video – is insufficient." *Id*. at 5. And, he averred that the training would deter straw purchasers because they would not be inclined to "sit through a four-hour training program." *Id*.[9]

Similarly, then-Baltimore City Police Commissioner Anthony Batts testified that most "of the homicides and non-fatal shootings that plague Baltimore are perpetrated by prohibited persons with illegal guns." ECF 125-6 at 2. According to Batts, the training and fingerprint requirement will "ensur[e] that the applicant is not prohibited from possessing a handgun" and will serve "as a deterrent to straw buyers of handguns." *Id*. at 2-3.

From October 1, 2013, when the FSA went into effect, through the end of 2020, a total of 192,506 Marylanders have successfully obtained an HQL. ECF 140-11 at 4. And, between 2015 through 2020, 180,423 HQL applications were submitted to the Licensing Division of the MSP, of which 5,001 were denied. ECF 135-16 at 1 (MSP Licensing Division Report, 1/4/2018); ECF 140-11 at 4 (MSP Licensing Division Report, 12/31/2020).

According to the evidence, from October 1, 2013 through 2020, some 93,056 HQL applications were initiated but not submitted to the MSP. ECF 135-15 (Pallozzi Third Supp. Interrog. Resp.) at 3-4, 8. Colonel

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[9] "Straw purchases are transactions in which persons who are legally prohibited from purchasing a firearm (due to criminal history or other disqualifying events) recruit third-parties to purchase guns for them." ECF 125-11, ¶ 8.

Pallozzi postulated that there "are a number of reasons why an individual might initiate but not submit an application." *Id*. at 4. For example, he noted that "an application may be created for training purposes, or by an individual who has no intention of submitting an application." *Id*. Further, he explained, *id*.: "MSP personnel who process applications routinely receive communications from individuals who are ineligible for an HQL, including because of their age, immigration status, residency status, or criminal history, who have initiated an application but ultimately decide not to submit the application because they are ineligible for an HQL."

Also of relevance, plaintiffs have provided the following Maryland crime data, gathered from the Maryland Uniform Crime Reports and U.S. Department of Justice Federal Bureau of Investigation, Criminal Justice Information Services Division, ECF 135-23:

Year	Homicides	Shooting Homicides	Handgun Homicides	Shooting Homicide Rate	Handgun Homicide Rate	Recovered Handguns Used in Crime
2009	440	308	299	5.40	5.24	4,359
2010	426	296	278	5.12	4.81	4,378
2011	398	272	265	4.66	4.54	5,515
2012	372	281	271	4.77	4.60	4,546
2013[10]	387	272	268	4.58	4.52	4,611
2014	363	245	231	4.09	3.86	4,487
2015	553	419	398	6.97	6.62	4,963
2016	534	402	368	6.68	6.11	5,291
2017	569	441	401	7.28	6.62	5,269

[10] Plaintiffs omitted data for 2013. But, because the data is publicly available and is subject to judicial notice under Federal Rule of Evidence 201, I have included it. See MD Uniform Crime Report 2013 at 14, 17, https://pilotmdsp.maryland.gov/Document%20Downloads/Crime%20in%20Maryland%202013UCR.pdf; Recovered Handguns Used in Crime data available online is from U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives, Office of Strategic Intelligence and Information, Maryland Firearms Tracing System Data 2013 Report, https://www.atf.gov/resourcecenter/docs/143894-mdatfwebsite13pdf/download.

Year	Homicides	Shooting Homicides	Handgun Homicides	Shooting Homicide Rate	Handgun Homicide Rate	Recovered Handguns Used in Crime
2018	489	452	401	7.48	6.64	6,832
2019[11]	543	514	462	8.50	7.64	5,971

[11] The data for 2020 is not yet available.

The parties also dispute whether the HQL has negatively impacted gun sales in Maryland. The following chart documents the number of handguns sold by Atlantic Guns in Maryland from 2009 through 2020. See ECF 84-1[12]; ECF 141-1 [SEALED].

Year	**Guns Transferred**
2009	
2010	
2011	
2012	
2013	
2014	
2015	
2016	
2017	
2018	
2019	
2020	

[12] This exhibit was filed in 2018 with plaintiffs' first summary judgment motion. *See* ECF 75. Plaintiffs again refer the Court to the document. *See* ECF 135-1 at 15 n.1.

The summary indicates that gun sales fell in the years immediately following the enactment of the FSA. However, during the past four years, Atlantic Guns has [redacted] than it did during the four years immediately preceding the enactment of the FSA.

Additional facts are included, *infra*.

III. Legal Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); *see also Harmoosh*, 848 F.3d at 238 ("A court can grant summary judgment only if, viewing the evidence in the light most favorable to the non-moving party, the case presents no genuine issues of material fact and the moving party demonstrates entitlement to judgment as a matter of law."). The nonmoving party must demonstrate that there are disputes of material fact so as to preclude the award of summary judgment as a matter of law. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

The Supreme Court has clarified that not every factual dispute will defeat a summary judgment motion. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 247-48 (1986) (emphasis in original). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Id.* at 248. There is a genuine issue as to material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *see Sharif v. United Airlines, Inc.*, 841 F.3d 199, 2014 (4th Cir. 2016); *Raynor v. Pugh*, 817 F.3d 123, 130 (4th Cir. 2016); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013). On the other hand, summary judgment is appropriate if the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252. And, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*

Notably, "[a] party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [her] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (quoting former Fed. R. Civ. P. 56(e)), *cert. denied*, 541 U.S. 1042 (May 17, 2004); *see also Celotex*, 477 U.S. at 322-24. As indicated, the court must view all of the facts, including any reasonable inferences to be drawn, in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 587; *accord Roland v. United States Citizenship & Immigration Servs.*, 850 F.3d 625, 628 (4th Cir. 2017); *FDIC v. Cashion*, 720 F.3d 169, 173 (4th Cir. 2013).

The district court's "function" is not "to weigh the evidence and determine the truth of the matter but to

determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *accord Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 216 (4th Cir. 2016). Thus, in considering a summary judgment motion, the court may not make credibility determinations. *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015); *Mercantile Peninsula Bank v. French*, 499 F.3d 345, 352 (4th Cir. 2007). Where there is conflicting evidence, such as competing affidavits, summary judgment ordinarily is not appropriate, because it is the function of the fact-finder to resolve factual disputes, including matters of witness credibility. *See Black & Decker Corp. v. United States*, 436 F.3d 431, 442 (4th Cir. 2006); *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir. 2002).

However, to defeat summary judgment, conflicting evidence must give rise to a genuine dispute of material fact. *Anderson*, 477 U.S. at 247-48. If "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," then a dispute of material fact precludes summary judgment. *Id*. at 248; *see Sharif v. United Airlines, Inc.*, 841 F.3d 199, 204 (4th Cir. 2016). Conversely, summary judgment is appropriate if the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 252. And, "[t]he mere existence of a scintilla of evidence in support of the [movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [movant]." *Id*.

When, as here, the parties have filed cross-motions for summary judgment, the court must "'consider each motion separately on its own merits to determine

whether either of the parties deserves judgment as a matter of law.'" *Def. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 392 (4th Cir. 2014) (citation omitted); *see Belmora LLC v. Bayer Consumer Care*, 987 F.3d 284, 291 (4th Cir. 2021). In doing so, the court "'resolve[s] all factual disputes and any competing, rational inferences in the light most favorable to the party opposing that motion.'" *Def. of Wildlife*, 762 F.3d at 393 (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003), cert. denied, 540 U.S. 822 (2003)); *see Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003).

In sum, simply because multiple parties have filed for summary judgment does not mean that summary judgment to one party or another is necessarily appropriate. Indeed, "[b]oth motions must be denied if the court finds that there is a genuine issue of material fact." 10A C. WRIGHT, A. MILLER,& M.KANE, FEDERAL PRACTICE & PROCEDURE § 2720 (4th ed. Suppl. 2020) (WRIGHT & MILLER).

Notably, there are no material facts in dispute. Rather, the parties disagree over the application of the law to the facts. And, in particular, they disagree about the decision-making of the Maryland General Assembly.

IV. Discussion

A. The Second Amendment Generally

The Second Amendment to the Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." See U.S. Const. amend. II. In *District of Columbia v. Heller*, 554

U.S. 570, 592 (2008) ("*Heller I*"), the Supreme Court determined that, by its operative clause, the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation."

According to the *Heller I* majority, the Second Amendment's "core protection" is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 634-35. Accordingly, the Court found that a complete prohibition on handguns—the class of weapon "overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]" in the home—infringed on the central protection of the Second Amendment and thus failed any level of constitutional scrutiny. *Id*. at 628–29; *see also Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013) (noting that self-defense in the home is the "core protection" of the Second Amendment right).

Nevertheless, the Court recognized that "the right secured by the Second Amendment is not unlimited," in that it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller I*, 554 U.S. at 626; *see Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, __ F.4th __, 2021 WL 2934468, at *4 (4th Cir. July 13, 2021); *Walker v. Donahoe*, __F.4th__, 2021 WL 2816291, at *6 (4th Cir. July 7, 2021). Indeed, the Court has made clear that the Second Amendment permits "reasonable firearms regulations." *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010); *see Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam); *see also Kolbe v. Hogan*, 849 F.3d 114, 132 (4th Cir. 2017) (en banc), cert. denied, __

U.S. __, 138 S. Ct. 469 (2017); *United States v. Chester*, 628 F.3d 673, 675 (4th Cir. 2010).

The *Heller I* Court provided a non-"exhaustive" list of "presumptively lawful regulatory measures," including "longstanding prohibitions" on firearm possession by certain groups of people, and "laws imposing conditions and qualifications on the commercial sale of arms." *Heller I*, 554 U.S. at 626–27 & n.26; *see McDonald*, 561 U.S. at 786 (noting that the Court's holding in Heller "did not cast doubt on such longstanding regulatory measures…[']laws imposing conditions and qualifications on the commercial sale of arms.'") (quoting *Heller I*, 554 U.S. at 626-27). And, in Kolbe, 849 F.3d at 121, the Fourth Circuit concluded that the FSA's ban on assault weapons did not contravene the Second or Fourteenth Amendments, because such weapons are not protected by the Second Amendment. Alternatively, it ruled that, even if the banned weapons "are somehow entitled to Second Amendment protection," the provision was properly subjected to intermediate scrutiny and is "constitutional under that standard of review." *Id*.

The Fourth Circuit, like several other circuits, has adopted a two-pronged approach to analyzing Second Amendment challenges. *Chester*, 628 F.3d at 680; *see Hirschfeld*, 2021 WL 2934468, at *5; *see also Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021) ("Like our sister circuits, we apply a two-prong approach in considering as-applied Second Amendment challenges."); *Kolbe*, 849 F.3d at 132 ("Like most of our sister courts of appeals, we have concluded that "a two-part approach to Second Amendment claims seems appropriate under Heller." (internal citation omitted));

United States v. Hosford, 843 F.3d 161, 165 (4th Cir. 2016) (holding that courts "generally engage in the ... two-pronged [Chester] analysis for facial Second Amendment challenges"); *see, e.g., Medina v. Whitaker*, 913 F.3d 152, 156 (D.C. Cir. 2019); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018); *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012). Under this approach, the court must first determine "'whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.'" *Kolbe*, 849 F.3d at 133 (quoting *Chester*, 628 F.3d at 680). If it does not impose a burden, then the challenged law is valid. *Kolbe*, 849 F.3d at 133. "If, however, the challenged law imposes a burden on conduct protected by the Second Amendment, [the Court must] next 'apply[ ] an appropriate form of means-end scrutiny.'" *Id*. In other words, the court must determine whether to apply strict scrutiny or intermediate scrutiny; this "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." Id. (internal quotations omitted) (noting that courts should look to the First Amendment as a guide in determining the applicable standard of review); *see Hirschfeld*, 2021 WL 2934468, at *5 ("Just as the First Amendment employs strict scrutiny for content-based restrictions but intermediate scrutiny for time, place, and manner regulations, the scrutiny in this context 'depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.'") (quoting *Chester*, 628 F.3d at 682).

Courts "are at liberty to" avoid ruling on the first prong of the test, and "assume that a challenged statute burdens conduct protected by the Second Amendment and focus instead on whether the burden is constitutionally justifiable." *Hosford*, 843 F.3d at 167. Indeed, the Fourth Circuit has found it "prudent" not to rest on the first prong's historical inquiry. Id.; *see Woollard*, 712 F.3d at 875 ("[W]e are not obliged to impart a definitive ruling at the first step of the *Chester* inquiry. And indeed, we and other courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step."); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (assuming that the Second Amendment was implicated by a statute prohibiting possession of firearms in national parks and applying intermediate scrutiny); *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 789 (D. Md. 2014) ("Nevertheless, the court need not resolve whether the banned assault weapons and LCMs are useful or commonly used for lawful purposes… and will assume, although not decide, that the Firearm Safety Act places some burden on the Second Amendment right."), *aff'd in part, vacated in part*, 813 F.3d 160 (4th Cir. 2016), *aff'd on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017).

As to what level of scrutiny to apply, the Fourth Circuit has instructed that when a law severely burdens "the core protection of the Second Amendment, i.e., the right of law-abiding, responsible citizens to use arms for self-defense in the home," it is subject to the strict scrutiny test. *Kolbe*, 849 F.3d at 138. But, if a law "does not severely burden" that core protection, then intermediate scrutiny is the

appropriate standard. *Id.*; *see Chester*, 628 F.3d at 682 ("A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right … may be more easily justified."); *see also New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015) ("NYSRPA") ("Heightened scrutiny need not … be akin to strict scrutiny when a law burdens the Second Amendment—particularly when that burden does not constrain the Amendment's core area of protection." (internal quotation marks omitted)).

To satisfy strict scrutiny, "the government must prove that the challenged law is 'narrowly tailored to achieve a compelling governmental interest.'" *Kolbe*, 849 F.3d at 133 (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)). This is a demanding standard that requires the government to establish that "'no less restrictive alternative' would serve its purpose." *Cent. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 633 (4th Cir. 2016) *(citing United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)); *see Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 237 (D. Md. 2020).

"The less onerous standard of intermediate scrutiny requires the government to show that the challenged law 'is reasonably adapted to a substantial governmental interest.'" *Kolbe*, 849 F.3d at 133 (quoting *Masciandaro*, 638 F.3d at 471). Stated differently, the government must prove "that there is a reasonable fit between the challenged regulation and a substantial governmental objective." Chester, 628 F.3d at 683 (internal quotation marks omitted); *see*

Hirschfeld, 2021 WL 2934468, at *5; *Harley*, 988 F.3d at 769.

Unlike strict scrutiny, intermediate scrutiny "does not demand that the challenged law 'be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question.'" *Kolbe*, 849 F.3d at 133 (quoting *Masciandaro*, 638 F.3d at 474). Rather, the State must demonstrate that there is "a fit that is 'reasonable, not perfect.'" *Woollard*, 712 F.3d at 878 (quoting *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012)) (cleaned up); *see Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 128 (2d Cir. 2020) ("In applying intermediate scrutiny, we ask 'whether the statutes at issue are substantially related to the achievement of an important governmental interest.'") (internal citation omitted); *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) ("Intermediate scrutiny requires the lesser showing of 'a reasonable fit between the challenged regulation and an important government objective.'") (citation omitted), *cert. denied*, __ U.S.__, 141 S. Ct. 1397 (2021). In fact, a "statute may meet this standard despite being overinclusive in nature." *Harley*, 988 F.3d at 769.

B. Text, History, and Tradition

Plaintiffs urge the Court to analyze their Second Amendment claim based on "text, history, and tradition," rather than the two-pronged approach discussed earlier. ECF 135-1 at 34-37; *see Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("*Heller* and *McDonal*d leave little doubt that courts are to assess gun bans and regulations based on text, history,

and tradition ....”). As recently as July 2021, the Fourth Circuit applied the two-step framework in analyzing a Second Amendment claim. *Hirschfeld*, 2021 WL 2934468, at *5; *see also Harley*, 988 F.3d at 769; *Kolbe*, 849 F.3d at 141 (two-step framework “is entirely faithful to the *Heller* decision and appropriately protective of the core Second Amendment right”). As part of the inquiry, however, the Court must also “consider text, structure, history, and practice to reveal the original public meaning of the Second Amendment.” *Hirschfeld*, 2021 WL 2934468, at *8. Therefore, I shall proceed under the two-pronged approach.[13]

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[13] Even if I were to analyze the dispute based only on the “text, history, and tradition,” this would not compel a finding that the HQL is unconstitutional. *Heller I* and *McDonald* “did not hold that a state's firearms licensing laws were unconstitutional[.]” *Libertarian Party of Erie Cty. v. Cuomo*, 300 F. Supp. 3d 424, 434 (W.D.N.Y. 2018). Rather, the *Heller I* Court found unconstitutional a total ban on handguns, but the Court declined to address the constitutionality of a handgun licensing requirement. *See Heller I*, 554 U.S. at 631. Thus, the Second Circuit, for example, rejected the argument that New York State's firearms licensing laws were unconstitutional under *Heller I* and *McDonald*, concluding that so holding “would stretch the conclusions of both decisions well beyond their scope.” *Libertarian Party*, 970 F.3d at 127; *see also, e.g., United States v. Focia*, 869 F.3d 1269, 1283 (11th Cir. 2017) (rejecting claim that federal statute was “an impermissible prior restraint in violation of the Second Amendment because it criminalizes dealing in firearms without a license,” and collecting cases from the First, Second, Third, Fourth, and Seventh Circuits rejecting similar claims); *Berron v. Illinois Concealed Carry Licensing Review Board*, 825 F.3d 843, 847 (7th Cir. 2012) (“If the state may set substantive requirements for ownership, which *Heller* says it may, then it may use a licensing system to enforce them.... Courts of appeals uniformly hold that some kind of license may be required.”);

C. HQL's burden on the Second Amendment

The parties vigorously disagree as to the analysis under two-step framework. Plaintiffs contend that the HQL "requirement burdens conduct within the Second Amendment's guarantee," and they insist that strict scrutiny "is the only appropriate level of scrutiny because the HQL requirement burdens the Second Amendment's core right." ECF 135-1 at 40. According to plaintiffs, the HQL requirements fail the intermediate scrutiny test because (1) the recited harms do not exist and, in any event, the HQL requirement will not "alleviate these harms in a direct and material way," and (2) they dispute "that the HQL requirement is narrowly tailored to serve a substantial government interest." *Id.* at 59.

Conversely, defendants argue that the HQL law does not impose a burden on the exercise of Second Amendment rights because it "does not deprive any 'law-abiding, responsible citizen' of the right to possess a handgun for in-home self-defense." ECF 125-1 at 20 (*quoting Heller I*, 554 U.S. at 635). However, even if the HQL law did impose such a burden, defendants maintain that intermediate scrutiny would be the appropriate test because the law does not severely limit the possession of firearms or prevent individuals from possessing a firearm. *Id.* at 21. And, they insist that the law would survive under the intermediate scrutiny test because Maryland has a substantial

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Powell v. Tompkins, 926 F. Supp. 2d 367, 379 (D. Mass. 2013) ("[T]he requirement of prior approval by a government officer, or a licensing system, does not by itself render [a firearms] statute unconstitutional on its face.") (internal quotation marks omitted), *aff'd*, 783 F.3d 332 (1st Cir. 2015).

interest in promoting public safety, and the HQL requirements are reasonably adapted to that interest. ECF 140 at 26-39.

The Fourth Circuit recently clarified the appropriate approach in *Hirschfeld*, 2021 WL 2934468, which involved "several federal laws and regulations that prevent federally licensed gun dealers from selling handguns to any 18-, 19-, or 20-year-old." It said, *id*. at *8: "At step one of the Chester inquiry, we ask 'whether the conduct at issue was understood to be within the scope of the right *at the time of ratification*.'" (Quoting *Chester*, 628 F.3d at 680) (emphasis in *Hirschfeld*). The *Hirschfeld* Court also said, 2021 WL 2934468 at *8:

> The government bears the burden to show that the regulation clearly falls outside the scope of the Second Amendment. *See* [*Chester*, 628 F.3d] at 681–82; *Ezell* [*v. City of Chicago*], 651 F.3d [684], [] 702–03 [(7th Cir. 2011)]; *Tyler* [*v. Hillsdale*], 837 F.3d [678], [] 688 [(6th Cir. 2016)]. And in the face of historical silence or ambiguity, we assume the conduct is protected. *Chester*, 628 F.3d at 680–82. At the very least, this inquiry requires us to consider text, structure, history, and practice to reveal the original public meaning of the Second Amendment. *See Heller*, 554 U.S. at 576–628, 128 S.Ct. 2783. The relevant question is: What did the right to keep and bear arms mean to the public at the time of ratification?

I need not delve into a historical analysis in this case, however, because the Supreme Court has already determined that the type of firearm at issue under the

HQL law—the handgun— unquestionably falls within the scope of the Second Amendment. Indeed, the Supreme Court has characterized the handgun as "the quintessential self-defense weapon" and observed that handguns are "the most popular weapon chosen by Americans for self-defense in the home." *Heller I*, 554 U.S. at 629 (deeming the District of Columbia's handgun ban to be unconstitutional because it prohibited "an entire class of arms that is overwhelmingly chosen by American society for [selfdefense]" (internal quotation marks omitted)); *see Kolbe*, 849 F.3d at 131.

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." *Heller II*, 670 F.3d at 1255; *see Libertarian Party of Erie County*, 300 F. Supp. 3d at 441 (finding that a firearm licensing law burdens conduct protected by the Second Amendment). Thus, I must proceed to the second step of the two-prong inquiry.

D. Level of Scrutiny

I.

The Second Amendment protects the right of "a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense." *Chester*, 628 F.3d at 682-83 (emphasis in original); see ECF 135-1 at 44-45. As indicated, the handgun is the "quintessential self-defense weapon." *Heller I*, 554 U.S. at 629. And, the licensing law implicates the core of the Second

Amendment right because it places a burden on the ability of law-abiding citizens to own firearms for self-defense in the home.

Because the handgun is protected by the Second Amendment, the Court must decide the level of scrutiny to apply in evaluating the constitutionality of the Act. *See Hirschfeld*, 2021 WL 2934468, at *27 ("Having found that 18-year-olds are protected by the Second Amendment, our precedent requires that we apply 'an appropriate form of means-end scrutiny.'") (internal citation omitted). In addition to considering the "nature of the conduct being regulated," the Court must consider "the degree to which the challenged law burdens the right." *Chester*, 628 F.3d at 682; *see Fyock v. City of Sunnyvale*, 779 F.3d 991, 998-99 (9th Cir. 2015) (determining appropriate level of scrutiny by considering "how severely, if at all, the law burdens [the Second Amendment] right"); *Heller II*, 670 F.3d at 1261 (determining "the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right"). Thus, the applicable level of scrutiny is determined by whether and to what extent the challenged regulation burdens the core Second Amendment right.

Heightened scrutiny is appropriate where the law imposes a severe burden on Second Amendment protections. A law severely burdens the core right if it "effectively disarm[s] individuals or substantially affect[s] their ability to defend themselves." *Kolbe*, 849 F.3d at 139. But, there is no substantial burden "'if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.'" *Libertarian Party of Erie Cty.*, 300 F. Supp. 3d at 442 (quoting

NYSRPA, 804 F.3d at 259). And, "intermediate scrutiny is the appropriate standard [where the challenged provision] does not severely burden the core protection of the Second Amendment, i.e., the right of law-abiding, responsible citizens to use arms for self-defense in the home." *Kolbe*, 849 F.3d at 138; *see Chester*, 628 F.3d at 682 ("A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right ... may be more easily justified.").

The record is clear that plaintiffs and others like them are readily able to acquire handguns in Maryland for self-defense if they obtain an HQL. In fact, the plaintiffs do not provide evidence establishing that any law-abiding, responsible citizen who applied for an HQL was denied the HQL. *See Libertarian Party of Erie Cty*, 970 F.3d at 127–28. Moreover, the HQL requirements place no more than "marginal, incremental, or even appreciable restraint on the right to keep and bear arms." NYSRPA, 804 F.3d at 259 (quoting *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012)).

Only "the narrow class of persons who are adjudged to lack the characteristics necessary for the safe possession of a handgun" face a substantial burden on the core Second Amendment protection as a result of the HQL. *Aron v. Becker*, 48 F. Supp. 3d 347, 371 (N.D.N.Y. 2014). In contrast, "law-abiding, responsible citizens face nothing more than time" and a reasonable "expense" in order to possess a handgun. *Libertarian Party of Erie Cty.*, 300 F. Supp. 3d at 443. I note that plaintiffs have no quarrel with the 77R law, an earlier

statute that also included a training requirement, a waiting period, and a fee.

Although the HQL law implicates the core Second Amendment right, the burden is not so severe as to require strict scrutiny. Other courts addressing challenges to registration and licensing requirements have applied intermediate scrutiny on the ground that "none of the … requirements prevents an individual from possessing a firearm in his home or elsewhere, whether for selfdefense or hunting, or any other lawful purpose." *Heller II* , 670 F.3d at 1258; *see NYSRPA*, 804 F.3d at 260 (applying intermediate scrutiny where "[t]he burden imposed by the challenged legislation is real, but it is not 'severe'" (citation omitted)); *United States v. Marzzarella,* 614 F.3d 85, 96–97 (3d Cir. 2010) (noting that registration requirements "do[ ] not severely limit the possession of firearms"); *Jones v. Becerra*, 498 F. Supp. 3d 1317, 1329 (S.D. Cal. 2020) (noting that the disputed provision "does not categorically ban the possession of arms used for selfdefense. It therefore does not impose a substantial burden on the Second Amendment, and allows for intermediate rather than strict scrutiny.").

Indeed, "there has been near unanimity in the post-*Heller* case law that, when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate." *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *see, e.g., Hirschfeld*, 2021 WL 2934468, at *27-28 (applying intermediate scrutiny without deciding "how close to the core of the Second Amendment these laws strike"); *Kolbe*, 849 F.3d at 138 (applying intermediate scrutiny where the law "does

not severely burden the core protection of the Second Amendment"); *Hosford*, 843 F.3d 161, 168 (4th Cir. 2016) (declining to apply strict scrutiny to a firearms prohibition that "addresses only conduct occurring outside the home," without deciding if or when strict scrutiny applies to a law reaching inside the home); *Woollard*, 712 F.3d at 876 (applying intermediate scrutiny to requirement that an individual demonstrate a "good and substantial reason" for carrying a handgun in public before he can obtain a permit to do so); *Carter*, 669 F.3d at 417 (applying intermediate scrutiny on review of a Second Amendment challenge to prohibition of firearms for users of marijuana); *Masciandaro*, 638 F.3d at 471 (applying intermediate scrutiny to a regulation barring the carrying of loaded weapons in a motor vehicle in a national park); *Chester*, 628 F.3d at 682-83 (applying intermediate scrutiny when reviewing a Second Amendment challenge to 18 U.S.C. § 922(g)(9), which prohibits the possession of firearms by a person convicted of a misdemeanor crime of domestic violence); *see also Sibley v. Watches*, 460 F. Supp. 3d 302, 313-14 (W.D.N.Y. May 18, 2020) ("The Second Circuit and district courts in this Circuit have continually chosen to apply intermediate scrutiny to general challenges under the Second Amendment.") (internal quotation marks omitted); *Doe No. 1 v. Putnam Cty.*, 344 F. Supp. 3d 518, 538 n.12 (S.D.N.Y. 2018) ("[T]he Second Circuit has not yet applied [strict] scrutiny to any statute in the Second Amendment context ....").

Accordingly, because the licensing law implicates the core Second Amendment right, but does not severely burden it, I shall apply intermediate scrutiny.

2.

As a threshold matter, the parties disagree over the precise contours of the intermediate scrutiny test. According to plaintiffs, the Supreme Court's most recent iteration of the test is that "'to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" ECF 135-1 at 49 (quoting *Packingham v. N.C.*, ___ U.S. ___, 137 S. Ct. 1730, 1732 (2017) (internal citation omitted)). Indeed, as the Fourth Circuit recently noted, *Hirschfeld*, 2021 WL 2934468, at *28 n.56: "Exactly what intermediate scrutiny requires in a given situation remains unclear. *Compare Chester*, 628 F.3d at 683 ('reasonable fit'), with Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) ('substantially related')." I shall apply the test as it has been articulated by the Fourth Circuit in its most recent Second Amendment opinions. *See Hirschfeld*, 2021 WL 2934468; *Harley*, 988 F.3d 766; *Kolbe*, 849 F.3d 114.

"Under the standard of intermediate scrutiny, the government bears the burden of establishing a reasonable fit between the challenged law and a substantial governmental objective." *Harley*, 988 F.3d at 769; *see Hirschfeld*, 2021 WL 2934468, at *28. But, the fit need not be perfect or even the least intrusive means of accomplishing the desired objective. *United States v. Staten*, 666 F.3d 154, 162 (4th Cir. 2011). Rather, the defendants must show "'reasonable inferences based on substantial evidence' that the statutes are substantially related to the governmental interest." NYSRPA, 804 F.3d at 264; *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–64 (1994) ("*Turner I*").

"Various evidence can be mustered to meet [the intermediate scrutiny] standard but 'reference to legislative findings, academic studies, or other empirical data is necessary.'" *Hirschfeld*, 2021 WL 2934468, at *28 (quoting *Tyler*, 837 F.3d at 694). Further, "while 'case law, and even common sense' may be relied on, the government may not 'rely upon mere anecdote and supposition.'" *Hirschfeld*, 2021 WL 2934468, at *28 (quoting *Tyler*, 837 F.3d at 694 (internal quotations and citation omitted)); *see also Hirschfeld*, 2021 WL 2934468, at *35 ("Congress may not pass intermediate scrutiny by relying on unsupported conclusory testimony to justify its desired outcome."); *Heller v. District of Columbia*, 801 F.3d 264, 279 (D.C. Cir. 2015) ("*Heller III*") ("[T]he Supreme Court has 'permitted litigants to justify ... restrictions ... based ... on history, consensus, and simple common sense' when the three are conjoined." (internal citation omitted)).

Plaintiffs argue that intermediate scrutiny in the "Second Amendment context does not allow deference to the legislature's findings." ECF 135-1 at 51. But, plaintiffs cite one Second Amendment case in support of this argument: *Duncan v. Becerra*, 970 F.3d 1133, 1166 (9th Cir. 2020), *reh'g granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021) (en banc). Of relevance here, the Supreme Court has said that, "[i]n reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of [the legislature].'" *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"); *accord Schrader v. Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013). And, the Fourth Circuit has instructed courts to "accord substantial deference to the predictive judgments of

[the legislature].” *Kolbe*, 849 F.3d at 140 (internal citation and quotation omitted); *see Hirschfeld*, 2021 WL 2934468, at *34.

Especially in the “context of firearm regulation, the legislature is ‘far better equipped than the judiciary’ to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks.” *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner I*, 512 U.S. at 665); *accord Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (same). Significantly, “the Fourth Circuit has urged courts to approach Second Amendment claims with particular caution, giving due respect to the limits of their Article III powers.” *Hirschfield*, 417 F. Supp. 3d at 758. In *Masciandaro*, 638 F.3d at 475, for example, the Court said: “To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee. This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”

To be sure, even with deference, meaningful review is required. *Hirschfeld*, 2021 WL 2934468, at *34. As the *Hirschfeld* Court said, *id.*: “It is true that we sometimes give weight to Congress's ‘predictive judgments’ under *Turner*…. But this does not mean that we should blindly abdicate our obligation to review Congress’s actions under heightened scrutiny.”

(Quoting *Turner I*, 512 U.S. at 665-66); *see Heller II*, 670 F.3d at 1259 ("Although we do accord substantial deference to the predictive judgments of the legislature when conducting intermediate scrutiny, the State is not thereby insulated from meaningful judicial review." (internal quotations omitted)). But, the court's role is only "to assure that, in formulating its judgments, [Maryland] has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195.

3.

For starters, defendants' interest in promoting public safety in Maryland is clearly a substantial and compelling interest. See Hirschfeld, 2021 WL 2934468, at *28 ("To begin, the government's interests in preventing crime, enhancing public safety, and reducing gun violence are 'not only substantial, but compelling.'") (quoting Kolbe, 849 F.3d at 139). The Fourth Circuit has expressly found that the State has a substantial interest in providing for public safety and preventing crime. See Kolbe, 849 F.3d at 139; Woollard, 712 F.3d at 877-78; see also Masciandaro, 638 F.3d at 473 (finding that the government has a substantial interest in providing for public safety in national parks). And, plaintiffs do not attempt to argue otherwise.

Rather, plaintiffs argue that Maryland's "purported public safety interests are an unconstitutional pretext for preventing law-abiding Maryland citizens from acquiring and possessing handguns." ECF 135-1 at 37. In their view, the HQL requirements were enacted to "'intimidate' the citizens of Maryland from acquiring handguns." *Id.* (citing ECF 135-6 at 7-9, Tr. 30-31).

Further, they claim that the FSA was the culmination of an effort led by former Maryland Attorney General J. Joseph Curran to "'restrict the future sale of handguns to those who can show a real, law enforcement need for one.'" ECF 135-1 at 22-23 (citing Symposium: Guns as a Consumer Product: New Public Health and Legal Strategies to Reduce Gun Violence, 4 J. Health Care L. & Pol'y 1, 5 (2000)).

Former Attorney General Curran did not hold elected office at the time of the passage of the FSA. Nor does the legislative record indicate that he had any role in the enactment of the FSA. Thus, Curran's views are irrelevant to the law at issue in this case. Moreover, the other evidence cited by plaintiffs in support of this argument merely supports the idea that defendants intended to limit the sale of handguns to unlawful purchasers.

Plaintiffs also argue that the defendants have no evidence that there are any actual harms associated with handgun purchases and usage in Maryland. ECF 135-1 at 52. Yet, this contention is belied by the evidence, which establishes that handguns are the firearms most frequently used for criminal activity in Maryland. In 2012, for example, just prior to the passage of the FSA, there were 372 homicides in Maryland. ECF 135-23 at 1. And, out of 281 homicides by firearm, 271 involved a handgun. *Id*. In other words, handguns were used in 73 percent of the reported murders in 2012.[14] This powerful evidence

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[14] In 2019, there were 543 homicides in Maryland. And, out of 514 homicides by firearm, 462 involved a handgun. *See* ECF 135-23 at 1.

indicates the high rate of handgun usage for unlawful purposes and the significant risks associated with inadequate precautions in the sale and distribution of handguns.

Further, the record indicates that background checks conducted by firearm dealers, without fingerprints, are susceptible to fraud. *See, e.g.*, ECF 125-3; ECF 125-4. According to defendants' experts, the firearm registration system in place in Maryland prior to passage of the FSA was "especially vulnerable" and resulted in "illegal straw purchases and…individuals using false identification in their applications to purchase regulated firearms." ECF 125-3 at 2 (noting that prospective purchasers could more easily put inaccurate information on their application forms…in order to avoid a denial of the application"); *see* ECF 125-14 (Decl. of Chief Johnson), ¶ 11 (noting that prior to passage of HQL he was "aware of cases in Baltimore County involving straw purchases of handguns for prohibited person"); ECF 140-3 (Webster's Third Supplemental Decl.), ¶ 12 ("Background checks conducted with only identification documents but without the applicant's fingerprints can lead to 'false negatives' – situations in which individuals are cleared to purchase and possess firearms despite having a disqualifying criminal conviction."). The experts' concern as to fraud is consistent with the findings of the GAO Study that background checks conducted by firearm dealers "cannot ensure that the prospective purchaser is not a felon or other prohibited person whose receipt and possession of a firearm would be unlawful." ECF 125-4 at 2.

Plaintiffs claim that the GAO Study is inapplicable here because it predates the REAL ID Act, 49 U.S.C. § 30301; 6 C.F.R. § 37.14(a)-(b). *See* ECF 135-1 at 63. Further, plaintiffs claim that "[b]ecause Maryland is now a REAL ID compliant state, there is no likelihood that false Maryland identification will be used" to purchase a handgun. Id. at 29. However, plaintiffs misstate the facts. The U.S. Department of Homeland Security has extended until May 3, 2023, the national deadline for REAL ID compliance. *See* Maryland Dept. of Transportation, https://mva.maryland.gov/Pages/mdotmva-current-operations.aspx#realid (last accessed, July 27, 2021). Moreover, plaintiffs do not provide any evidence that the REAL ID Act would eliminate the problem of false identification in this context. In any event, as discussed, *infra*, the addition of another prevention measure is not dispositive.

The susceptibility to fraud has resulted in actual problems. Chief Johnson explained in his testimony before the General Assembly, ECF 125-5 at 4: "In law enforcement, we know that criminals prohibited from buying guns attempt to use straw purchasers.... Often, the people recruited to make a straw purchase are intellectually unsophisticated or coerced into straw purchasing attempts. In a recent case in Baltimore County, an intellectually disabled person was used to purchase numerous weapons, some of which were recovered and confirmed as having been used in crimes of violence." *See also* ECF 140-3, ¶ 10 (Webster noting that "one of the most common ways in which prohibited purchasers obtain firearms" is "through straw purchases or from private unlicensed sellers who purchase firearms from licensed gun dealers and then

sell them in the underground gun market to criminals").

Handguns often fall into the wrong hands. Testifying before the General Assembly, then Baltimore City Police Commissioner Batts explained: "Most of the homicides and non-fatal shootings that plague Baltimore are perpetrated by prohibited persons with illegal guns." ECF 125-6 at 2. To illustrate, he stated that in 2012 "79% of all homicide suspects arrested had prior records and approximately 45% had firearms offenses in their criminal histories." *Id*.

In addition, there are risks associated with handgun users who are not properly trained in handgun use and storage. For example, MSP Capt. James Russell averred, ECF 125-13, ¶ 14: "In my experience, prior to taking a training course, the vast majority of firearms safety students lack a sufficient working knowledge of a handgun to handle and operate it safely." And, Chief Johnson testified at his deposition that he was aware of over 100 accidental discharges of handguns during his time in law enforcement in Maryland. *See* ECF 140-5 at 7-8, Tr. 105-106. These accidental discharges, according to Johnson, are often caused by people who mistakenly pulled the trigger, "unaware that there was a round in the chamber" because they thought ejecting the magazine was "sufficient" to render the weapon safe. *Id*. at 8, Tr. 106. And, as to the problem of improper storage, Chief Johnson stated, ECF 125-14, ¶ 15: "I am aware of at least two instances in which minors accessed improperly-stored firearms within the home, brought the weapons to school, and discharged them at school."

Further, under the video training requirement that preceded the FSA, the MSP could not guarantee that prospective purchasers were actually watching the training material. ECF 125-14, ¶ 7 ("A further advantage of classroom training is that an instructor can verify that an individual attended the training, as opposed to watching a video, which cannot be verified."); ECF 125-13, ¶ 26 (noting that "…students watching a video may leave the room while the video is playing"); ECF 125-5 at 5 (noting that the "current viewing requirement – viewing a 30-minute video—is insufficient").

Based on this evidence, the General Assembly concluded that the risks and challenges associated with the purchase and use of handguns in Maryland required a more robust identification and training requirement, in order to reduce the risks outlined above and to promote public safety. And, it "is beyond cavil that [the State has a] 'substantial, indeed compelling, governmental interest[] in public safety and crime prevention.'" *NYSRPA*, 804 F.3d at 261 (*Kachalsky*, 701 F.3d at 96).

4.

The Court must next decide whether the HQL requirements "are a reasonable fit to" the State's interest in public safety. *See Hirschfeld*, 2021 WL 2934468, at *28. In particular, I must determine whether the fingerprinting requirement and the firearm safety training are substantially related to the government's interest in promoting public safety. In addition, I must ascertain whether the requirements impose more burden on the Second Amendment right than necessary to achieve that interest.

As to the fingerprint requirement, defendants posit that it serves "three critical public safety functions," ECF 125-1 at 26: (1) It "enables MSP to ensure that the applicant is positively identified and not using false identification or altering his or her identification information"; (2) "a fingerprint record can be used to determine if an HQL licensee is convicted of a disqualifying offense subsequent to passing the initial background investigation"; and (3) the fingerprint requirement, "through its inherent and lasting reliability, acts as a deterrent to straw purchasers and those intending to purchase firearms solely for criminal purposes."

Plaintiffs counter that the fingerprint requirement is unnecessary because the preexisting registration requirement already "positively identif[ied] handgun purchasers" and allowed law enforcement "to locate and disarm handgun owners who were subsequently disqualified from handgun ownership." ECF 135-1 at 28. In particular, they point out, ECF 135-1 at 18, that the 77R Handgun Registration application required the prospective purchaser's identifying information, including "name, address, Social Security number, place and date of birth, height, weight, race, eye and hair color, signature, driver's [license] or photographic identification soundex number, [and] occupation." *See* Md. Code (2003), P.S. § 442. And, the MSP used this information to conduct a background check on the prospective firearm purchaser. *See* ECF 135-6 at 14, Tr. 73 (Webster noting that prior to the HQL, there was a requirement that MSP conduct a background check on prospective purchasers).

According to plaintiffs, the HQL fingerprint requirement "is beneficial only for stopping a potential

purchaser whose fingerprints are already in the Central Repository and who attempts to use a false government issued photographic identification of another individual who does not have a criminal record." ECF 135-1 at 29. They assert that defendants "have no evidence that anyone in Maryland has ever attempted to purchase a handgun in such circumstances." *Id.* And, in any event, plaintiffs posit that the "REAL ID" diminishes the "likelihood that false Maryland identification will be used for such a purchase." *Id.* Further, plaintiffs take issue with the evidence that defendants used to establish that the fingerprint requirement is substantially related to serving public safety. *Id.* at 54-58.

Defendants' experts are in agreement that a fingerprint requirement helps to prevent fraud, ensure the identity of gun purchasers, and deter straw purchasers. In particular, two members of law enforcement and Webster provided testimony to the General Assembly as to the benefits of a fingerprinting requirement. *See* ECF 125-3; ECF 125-5; ECF 125-6. Chief Johnson, for example, explained that the fingerprinting requirement would "help law enforcement to identify people involved in gun crimes." ECF 125-5 at 5. And, Commissioner Batts noted that the fingerprint requirement would help "ensur[e] that the applicant is not prohibited from possessing a handgun." ECF 125-6 at 2-3.

In their testimony in support of the FSA, Webster, Johnson, and Batts relied on empirical evidence, in addition to their personal expertise. *See* ECF 125-3; ECF 125-5; ECF 125-6. As noted, during Webster's testimony before the General Assembly, he shared the

conclusions of an array of empirical studies as to the benefits of licensing laws that require fingerprinting. *See* ECF 125- 3. For instance, Webster explained that five states that require citizens to apply directly with a law enforcement agency and be fingerprinted before they can purchase handguns "have some of the lowest age-adjusted firearm mortality rates per 100,000 population in the nation for the period 2006-2010." *Id.* at 3. Johnson and Batts also referenced research from states with licensing requirements. ECF 125-5 at 4 (noting that "other states with licensing requirements have shown such a reduction"); ECF 125-6 ("States like New York, New Jersey and Massachusetts have shown that licensing will also serve as a deterrent to the straw buyers of a handgun.").

Webster and Johnson reaffirmed and emphasized the benefit of the fingerprint requirement in their expert declarations and deposition testimony for this case. *See Kolbe*, 849 F.3d at 140 n.14 (noting that the court may look to evidence outside of the legislative record in order to confirm the reasonableness of the legislature's predictions). For instance, Chief Johnson averred, ECF 125-14, ¶ 8: "Based on my law enforcement experience and conversations with other law enforcement personnel, it is my opinion that an individual who has to render a set of fingerprints to obtain an HQL will be deterred from falsely identifying him or herself during the application process. In contrast, a background investigation based solely on photographic identification can be defeated with false identification." *See also, e.g., id.* ¶ 9 ("[I]t is my opinion that an individual who knows they have to render a set of fingerprints to obtain an HQL is less likely to engage in a straw purchase on behalf of a disqualified

individual."); ECF 135-8 at 2-3 (Dep. of Chief Johnson), Tr. 19-20 ("I believe the fingerprint itself is a more robust element that determines one's true identity. The [previous background check] obviously can be defeated with false identification...."); ECF 140-11, ¶ 12 (Webster explaining that "purchaser licensing systems that use law enforcement agencies and fingerprint verification of an applicant's identity more effectively vet applications to purchase firearms than can be accomplished by gun store owners and clerks who process these applications in the absence of licensing systems or biometric identity markers."). Defendants' witnesses also stressed the importance of the fingerprint requirement to prevent firearms from falling into, or remaining in, the hands of convicted criminals. *See, e.g.*, ECF 125-7 (Decl. of Captain Andy Johnson), ¶¶ 23, 24; ECF 125-11 (Decl. of Webster), ¶ 10.

Plaintiffs counter that, even without the fingerprint requirement, MSP *could have* dispossessed individuals of their registered firearms if they were subsequently disqualified from gun ownership. ECF 135-1 at 28-29. However, before 2013, there was no "systematic or routine reporting" of criminal history record information of registered gun owners. First Sgt. Donald Pickle, Assistant Commander of MSP's Licensing Division, averred, ECF 125-9, ¶ 12: "While it is true that MSP was able to locate and disarm handgun owners prior to the fingerprint requirement when MSP was notified that the individual was subsequently disqualified from handgun ownership, I am unaware of any systematic or routine reporting of this information from any law enforcement agency, court system, or other criminal justify agency prior to

enactment of the Firearm Safety Act and the HQL fingerprint requirement." *See also* ECF 140-2 (Webster Supplemental Decl.), ¶ 6 ("Based on my gun policy research in the State of Maryland, I am aware that there is no such routine reporting of individuals convicted of all disqualifying offenses from local law enforcement agencies to the Maryland State Police.").

The FSA obviates any dependency on reporting by local law enforcement. "Using the fingerprint record generated as part of the HQL application process, DPSCS is able to provide MSP with licensees' updated criminal history information." ECF 125-7 (Decl. of Capt. Andy Johnson), ¶ 23; *see also* ECF 140-2, ¶ 6 (Webster noting that "the reports routinely generated based on the fingerprint records allow the Maryland State Police to track arrests without having to rely on reporting from local law enforcement"); *see* FSA § 5-117.1(f)(7). "This information enables MSP to revoke the HQLs of persons who become ineligible to possess them and to notify the Firearms Enforcement Unit, which is responsible for removing firearms from disqualified individuals. The Firearms Enforcement Unit investigates whether the person is still in possession of firearms and, if so, is responsible for retrieving those firearms." ECF 125-7, ¶ 23. And, as even plaintiffs' expert concedes, it is undeniable that the ability to identify when an HQL licensee subsequently becomes disqualified is beneficial for public safety. ECF 125-15 (Dep. of Kleck) at 3, Tr. 49 (agreeing that there are potential public safety benefits to identifying an HQL licensee who becomes disqualified after receiving an HQL).

Plaintiffs vigorously dispute some of the empirical studies on which defendants have relied. In particular, in his declarations and expert report, Webster argues that empirical evidence from studies conducted about permit-to-purchase firearm laws in Connecticut and Missouri demonstrate that such laws "are an effective means of reducing (1) the diversion of guns for criminal purposes; (2) firearm homicides; and (3) suicides with firearms." ECF 125-11, ¶ 13; *see id.* ¶¶ 14-16. Plaintiffs, through Kleck, question the methodology and conclusions of Webster's studies. ECF 135-1 at 55-57. Kleck posits, for example, that Webster's conclusions are the result of "data dredging" and that the studies' choice of control variables and control areas were "cherrypick[ed]." *Id.* at 57; *see* ECF 135-25, ¶¶ 13-23.

In *Heller III*, 801 F.3d at 275-76, the D.C. Circuit upheld a fingerprinting requirement for handgun registration based, in part, on testimony from Webster and another law enforcement expert, as well as the conclusions of the GAO Study. *Id.* at 275-76. The plaintiffs in *Heller III* argued that "the District [i.e., the defendant] has not experienced a problem with fraud in the registration of firearms" and the problem of fraud "is unlikely to arise, given the increased difficulty of manufacturing fraudulent identification documents today, as compared to 2001, when the GAO concluded its investigation." *Id.* at 276. That argument is similar to the contention advanced here by plaintiffs.

In response to the plaintiffs' argument, the D.C. Circuit reasoned, *id.*: "Even if this is true, however, a prophylactic disclosure measure such as the one at issue here survives intermediate scrutiny if the

deterrent value of the measure will materially further an important governmental interest." The *Heller III* Court noted that the "GAO study indicates the fingerprinting requirement would help deter and detect fraud and thereby prevent disqualified individuals from registering firearms," and the experts' testimony affirmed that using fingerprints "'to positively identify an individual is far more effective than relying simply on a name and social security number.'" *Id.* (internal citation omitted). Thus, the court concluded that "the District has adduced substantial evidence from which it reasonably could conclude that fingerprinting…registrants will directly and materially advance public safety by preventing at least some ineligible individuals from obtaining weapons…." *Id.* at 277.

In the face of these "conflicting views" of Webster's work, the Court need not "put [its] imprimatur" on his research and conclusions. *Turner II*, 520 U.S. at 208. Rather, "'[i]t is the legislature's job," not the job of the Court, "to weigh conflicting evidence and make policy judgments.'" *Kolbe*, 849 F.3d at 140 (quoting *Woollard*, 712 F.3d at 881) (alterations in *Kolbe*). The Court's role is merely to decide whether defendants have provided "substantial evidence" to support the General Assembly "making the judgment that it did." *Turner II*, 520 U.S. at 208; *see also Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (courts should give legislatures "wide discretion to pass legislation in areas where there is ... scientific uncertainty") (collecting cases).

Substantial evidence was presented to the Maryland legislature, from which it was entitled to conclude that the fingerprinting of prospective handgun purchasers

would promote public safety. The State relied on expert testimony, empirical evidence, and "simple common sense" to reasonably infer that a fingerprinting requirement would facilitate identification of a gun's owner, both at the time of licensing and upon any subsequent disqualifying activity. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) ("[W]e have permitted litigants to justify ... restrictions [under intermediate scrutiny] by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense."). Moreover, the General Assembly was of the view that such a requirement would deter straw purchases.

As the Fourth Circuit stated in *Kolbe*, 849 F.3d at 140, with respect to another FSA provision: "The judgment made by the General Assembly of Maryland in enacting the FSA is precisely the type of judgment that legislatures are allowed to make without second-guessing by a court." I am satisfied that the State "adduced substantial evidence" that the fingerprinting requirement will help effectuate public safety by, among other things, preventing fraud and facilitating the removal of firearms from disqualified individuals.

5.

With respect to the live training and live-fire requirement, defendants argue that it "will reduce accidental discharges and access of firearms to ineligible persons, including minors." ECF 140 at 34. In addition to the testimony presented to the General Assembly (ECF 125-3; ECF 125-5; ECF 125-6),

defendants primarily rely on affidavits from Capt. Russell and former Chief Johnson to establish that the training requirement is reasonably adapted to achieve the government's purported interests and is superior to the video training required under the earlier registration scheme. ECF 125-13; ECF 125-14.

According to the defense experts, the training requirement creates an additional deterrent because "straw purchasers will [not] sit through a four-hour training program." ECF 125-5 at 5; see ECF 125-14, ¶ 11 (noting that straw purchasers would be deterred by "taking a four-hour firearms safety training that included an overview of State firearms law"). Further, the experts opine that the training contemplated by the HQL law promotes safe handling, operation, and storage of firearms which reduces the risk of accidental discharges and access of firearms to minors and criminals. ECF 125-13, ¶¶ 19-21; ECF 125-14, ¶ 14-16. Additionally, a live training course, in contrast with video training, "allows for dialogue…such that students can ask questions," ECF 125-14, ¶ 17, and "receive feedback from the instructor." ECF 125-13, ¶ 26. Live training also allows an instructor "to verify that an individual attended the training." ECF 125-14, ¶ 17; ECF 125-13, ¶¶ 22-23; *see also* ECF 125-14, ¶ 17.

Plaintiffs maintain that the new training requirement is unnecessary because it is "substantively identical to the 77R Handgun Registration online presentation." ECF 135-1 at 60. If the law is "substantively identical" to the earlier training program, however, then it is difficult to understand the basis of plaintiffs' complaint. In any event, plaintiffs cite no evidence to support their contention that the four-hour training is identical to

the one-hour video training. In the end, plaintiffs are unhappy with the inconvenience of the requirement. The four-hour classroom requirement for the HQL is a minor inconvenience; it does not violate the Second Amendment.[15]

Both defense experts also stressed the benefits of the live-firing requirement. Capt. Russell, for example, averred that the live-fire requirement "is a significant step toward ensuring responsible and safe gun ownership." ECF 125-13, ¶ 25. According to Chief Johnson, the live fire component of the training could prevent accidental discharges because it would make an individual "accustom[ed] to the mechanism, the operation of the weapon" and the "process of clearing the weapon" to render it safe. ECF 140-5 at 9, Tr. 107; see ECF 135-9 at 12, Tr. 107 (Capt. Russell noting that his students say that they "feel so much [more] comfortable with the nomenclature, how to make it safe, and…shooting procedures" after the live-fire training).

As plaintiffs point out, Chief Johnson also stated that he thinks "just firing one round [of live ammunition] is not adequate." ECF 135-8 at 10, Tr. 52. But, just because the requirement does not go as far as

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[15] Maryland has established training requirements as a condition for licensing in various contexts. To be sure, the training requirements do not always implicate constitutional rights. But, these requirements reflect the legislative approach to licensing. For instance, to qualify for a Maryland driver's license for the first time, individuals must participate in 30 classroom hours of instruction and spend six hours behind the wheel. See Motor Vehicle Administration (https://mva.maryland.gov/drivers/Pages/rookie-driver-general-learners.aspx) (last accessed, July 22, 2021).

it could have or should have does not mean it is unconstitutional. *See Mance v. Sessions*, 896 F.3d 699, 701, 704, 708–09 (5th Cir. 2018) (per curiam) (finding that federal laws preventing federally licensed dealers from directly selling handguns to out-of-state buyers survived strict scrutiny despite their underinclusivity, as governments "need not address all aspects of a problem in one fell swoop"). Moreover, Chief Johnson also noted, ECF 135-8 at 10, Tr. 52: "I do not think the requirement to show proficiency in discharging a round is unreasonable." Thus, even if he did not think the requirement went far enough, he still thought it was reasonable.

Plaintiffs' primary argument as to the live fire requirement is that it "effectively bans completion of the HQL training in almost all urban areas of Maryland because there is nowhere to legally discharge a firearm except at an established firing range." ECF 150 at 13; see ECF 135-3 (Decl. of Pennak), ¶ 22. Although the live firing requirement may present a slight burden on prospective purchasers who live in urban areas, and who therefore must travel outside their immediate neighborhoods to complete the training, the requirement is certainly not the equivalent of a "ban" on the completion of the training. See Connecticut Citizens Defense League, Inc. v. Lamont, 465 F. Supp. 3d 56, 73 (D. Conn. 2020) ("The U.S. Constitution permits the States to set out a procedural road to lawful handgun ownership, rather than simply allowing anyone to acquire and carry a gun.… That road may be long.… It may be narrow.… It may even have tolls.") (citations omitted); Second Amendment Arms v. City of Chicago, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015) ("[A] slight diversion off the

beaten path is no affront to ... Second Amendment rights.").

As discussed, despite this requirement, thousands of Maryland citizens have applied for and successfully received HQL licenses since 2013. Moreover, most of plaintiffs' witnesses who were allegedly deterred from purchasing a handgun by the HQL had already taken firearm safety courses or were exempt from the training requirement. *See* ECF 140-8 (Dep. of Clark) at 5, Tr. 15; ECF 140-7 (Dep. of Mr. Miller) at 9, Tr. 20; ECF 135-4 (Dep. of Vizas) at 9, Tr. 37; but see ECF 135-5 at 12, Tr. 33 (Ms. Miller noting that she was deterred from taking the training because of her back problems). For example, Ms. Vizas, one of the named plaintiffs, had already participated in a hunter safety training course in 2016 simply because her children wanted to attend the class. ECF 135-4 at 9, Tr. 37. Thus, the training requirement is hardly the obstacle that plaintiffs suggest.

Plaintiffs make two additional arguments in attempting to demonstrate that the training requirement is unnecessary, ineffective, and illegal. Both are unpersuasive.

First, plaintiffs argue that there is "no evidence that the training courses actually being taught bear any relationship to any of the asserted government interests." ECF 150 at 24. But, plaintiffs do not present any evidence to demonstrate that the substance of the training courses is problematic. And, the Act provides that the safety training *must* cover "State firearm law[,] home firearm safety[,] and handgun mechanisms and operation." P.S. § 5-117.1(d)(3); *see* COMAR, 29.03.01.29 (setting out the

"minimum curricula" relating to each statutory subject). Additionally, the MSP provides instructors with a sample lesson plan for the course. ECF 135-7 (Dep. of Johnson) at 8-9, Tr. 68-69; ECF 135-9 (Dep. of Russell) at 5-6, Tr. 70-71; *id*. at 14, Tr. 114 (noting that the MSP recommends instructors use the sample lesson plan, although it is not a requirement). And, instructors must meet certain requirements in order to become qualified to teach the course. See COMAR, 29.03.01.37.38.

Second, plaintiffs assert that the exceptions to the safety course illustrate "the pretextual nature of the Defendants' claimed interest." ECF 135-1 at 39. As noted, the Act does not require HQL training for individuals, for example, who already own registered firearms or have passed hunter safety training. P.S. §§ 5-117.1(e). According to plaintiffs, this indicates that the video training course is sufficient to ensure public safety. ECF 135-1 at 39-40. However, the State's experts specifically disputed that claim. Chief Johnson, for example, stated, ECF 125-14, ¶ 17: "I am aware that prior to the enactment of the HQL requirement, purchasers of handguns were required to view a video that, in my opinion, did not amount to training on the safe operation and handling of a firearm. Based on my 39-year career in law enforcement, I do not consider merely watching a video to be training…." And, as noted with respect to the live-fire requirement, just because a law does not address every "facet of a problem at once" does not mean it is unconstitutional. *See Hirschfeld*, 2021 WL 2934468, at *36.

Additionally, both sides rely on *Heller III*, 801 F.3d 264, to support their contentions as to the training requirement. Plaintiffs' reliance is misplaced.

Heller III addressed a challenge to the District's training requirement that mandated a onehour firearms safety course, available online, and a test about local gun laws. The D.C. Circuit said, id. at 278-79: "The District has presented substantial evidence from which it could conclude that training in the safe use of firearms promotes public safety by reducing accidents involving firearms, but has presented no evidence from which it could conclude that passing a test of knowledge about local gun laws does so. The safety training, therefore, is constitutional; the test of legal knowledge is not."

As to the training course requirement, the "District's experts each testified to their belief in the value of training to prevent accidents," and the District "offered anecdotal evidence showing the adoption of training requirements 'in most every law enforcement profession that requires the carrying of a firearm' and a professional consensus in favor of safety training." *Id*. at 279 (citation omitted). Thus, even though the District did not present empirical evidence about the benefits of mandatory training, the court was satisfied that the requirement was justified. *Id*. But, as to the "test" requirement, the court found that the District had not presented sufficient evidence to demonstrate that "knowledge of the District's gun laws will promote public safety." *Id*.

Although the HQL training requirement is more extensive than the training requirement in *Heller III*, the D.C. Circuit's reasoning is instructive. Defendants

submitted declarations from two law enforcement experts who, speaking from "experience and common sense," and based on "hundreds of conversations with other law enforcement officers regarding their experience," expressed their belief in the value of live training to prevent accidents, among other things. ECF 125-14, ¶ 4; *see* ECF 125-13, ¶¶ 18-21. And, unlike the law at issue in *Heller III*, the HQL training requirement does not require applicants to demonstrate their knowledge of State laws that are unrelated to public safety. Plaintiffs do not contend otherwise.

Therefore, as in *Heller III*, I am satisfied that the expert opinions of the State's witnesses, as well as common sense, comprise substantial evidence that the State's training requirement will help to prevent handgun accidents and deter straw purchasers and thus promote public safety.

6.

Overall, plaintiffs argue that the expense and time associated with HQL requirements impose too great a burden on prospective purchasers for its limited benefits. In particular, plaintiffs complain that the HQL requirement is time-consuming because it "imposes an additional statutorily-permissible 30-day waiting period." ECF 135-1 at 24. And, in addition to the 30-day waiting period, plaintiffs complain that "completing an HQL application takes time" and money— at least $200. *Id.* at 24, 26. Specifically, to complete the application, prospective handgun purchasers "must begin an application, find a firearm instructor, complete a half day of firearm instruction in a classroom format, complete the live-fire

requirement, locate a live-scan fingerprint vendor, obtain fingerprints, and complete their application online." *Id.*

However, courts have regularly found that "reasonable" fees and waiting periods are constitutional. *See, e.g., Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016) (noting that "[t]here is … nothing new in having to wait for the delivery of a weapon" and upholding 10-day waiting period); *Heller III*, 801 F.3d at 278 (finding that "reasonable fees associated with constitutional requirements of registration and fingerprinting are also constitutional"); *Kwong v. Bloomberg*, 723 F.3d 160, 165–69 (2d Cir. 2013) (holding constitutional a $340 fee for a license to possess a handgun in one's home); *see also Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (holding, in response to a First Amendment challenge to a parade licensing statute, that a government may impose a fee "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed"); *Kuck v. Danaher*, 600 F.3d 159, 163 (2d Cir. 2010) (recognizing, in the firearms licensing context, "that administrative determinations may require a non-trivial amount of time to complete").

In order to demonstrate the significance of the burden, plaintiffs assert that the HQL requirement "discouraged nearly one-quarter of Maryland citizens who wished to exercise their fundamental Second Amendment rights and who were motivated enough to begin an HQL application from completing it and obtaining their HQL." ECF 135-1 at 13. However, this claim is based on the number of users who initiated an

HQL application on MSP's server but did not complete the application. *Id.* Plaintiffs do not cite to any evidence demonstrating that the applications were not completed *because of* the HQL requirements. As defendants point out, there are many reasons why an application may not be completed. ECF 140 at 11-12; *see* ECF 140-6 (Dep. of Diane Armstrong, supervisor for the Handgun Qualification License Unit); ECF 135-15 (MSP Col. Pallozzi Third Supp. Interrog. Resp.) at 3-4, 8. For example, individuals sometimes inadvertently create multiple accounts and initiate multiple applications on those accounts, but only complete an application on one account. ECF 140-6 at 4, Tr. 8. It is also conceivable that some applications were not completed because the applicants recognized that they would not qualify, perhaps because of a prior criminal record.

Moreover, plaintiffs claim that the FSA has caused a significant decline in gun sales. They point to Atlantic Guns' average yearly handgun sales for the four-year period before the enactment of the FSA, from 2009 to 2012, and compare those sales to its average yearly handgun sales for the four-year period subsequent to the FSA, from 2014 to 2017. The comparison shows a 20 percent reduction in sales, according to plaintiffs. ECF 135-1 at 43; ECF 84, ¶ 9 [SEALED].

To be clear, the Court does not dispute the fact that Atlantic Guns may have lost sales and revenue as a result of the FSA. *See Maryland Shall Issue*, 971 F.3d at 211-12 (noting that after the FSA took effect, the dealer's handgun sales suffered). However, plaintiffs excluded the sales for 2013 from their calculation. And,

in 2013, Atlantic Guns' sales were [redacted] the yearly average from the preceding four years. *See* ECF 84-1 [SEALED].[16]

Further, the four-year period of 2014-2017 does not tell the whole story. Atlantic Guns' sales data from 2017-2020 indicates that the FSA may not have any long-term effect on sales. In the last year four years, Atlantic Guns sold, on average, [redacted] *See* ECF 141-1. And, other than the plaintiffs' witnesses who were purportedly deterred from purchasing handguns, there is no evidence as to whether the law has actually *prevented* any law-abiding, eligible citizens from purchasing handguns.

In addition, throughout their arguments, the parties vigorously dispute whether the Act has actually had the intended effect of promoting public safety. Defendants tout two studies conducted by Webster that purport to assess the FSA's impact on (1) the supply of handguns diverted to criminal use in Baltimore and (2) the homicide rate in Maryland. ECF 125-1 at 29-30; *see* ECF 125-11, ¶¶ 17-18. In response, plaintiffs point out everything that they believe is wrong with those studies. ECF 135-1 at 54-55.

The first study, according to Webster, "shows a strong association between the adoption of Maryland's HQL law and a reduction in the number of handguns diverted to criminals in Baltimore." ECF 125-11, ¶ 18 & n.6 (citing Cassandra K. Crifasi et al., *The initial*

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[16] It is plausible that the sizeable increase in gun sales in 2013 might have had an offsetting effect on gun sales in the following years.

impact of Maryland's Firearm Safety Act of 2013 on the supply of crime guns in Baltimore, 3(5) The Russel Sage Foundation Journal for the Social Sciences 128–40 (2017)) ("2017 Study"). In particular, Webster explained that the "study showed that the FSA with the HQL requirement was associated with a 76 percent reduction in the number of handguns originally sold in Maryland that were (1) recovered by police in connection with a crime within one year of retail sale; and (2) where the person from whom the gun was recovered was not the same as the person who purchased the gun originally." ECF 125-11, ¶ 18. The study also surveyed probationers and parolees in Baltimore, 40% of whom reported that obtaining a handgun was more difficult after the HQL's enactment. *Id.* ¶ 19.

Relying on Kleck's analysis, plaintiffs take issue with Webster's conclusions, stating, ECF 135-1 at 55: "Although [the 2017 Study] concludes that the FSA caused a reduction in the supply of crime handguns in Baltimore, this conclusion is not based on any actual (or reliable) data on the supply of handguns in Baltimore or anywhere else." According to Kleck, the 2017 Study used firearms trace data, which "cannot legitimately be used to assess the supply of crime guns" because the Bureau of Alcohol, Tobacco, Firearms and Explosives states that "[t]he firearms selected [for tracing] do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe." ECF 135-25, ¶¶ 6, 7. Further, with respect to the survey of Baltimore probationers and parolees, Kleck asserts that the "convenien[t] sample of criminals was not

representative of criminals…" and there is no "evidence whatsoever that any of these individuals had actually tried to acquire a gun before or after the FSA went into effect." *Id.* ¶ 11.

Additionally, as to homicide rates, Webster concluded that the HQL requirements were associated with a 48% reduction in firearm homicide rates in Maryland based on data collected from Anne Arundel, Montgomery, and Prince George's counties. ECF 125-11, ¶ 17. Webster purportedly excluded Baltimore City from the statistical model because "the study period included 2015, when firearm homicide rates surge[d] in Baltimore City immediately following the riots over the in-custody death of Freddie Gray, Jr.," so "estimates of the law's impacts in Baltimore or statewide would be biased in the direction of more homicides due to the historical confounder of major riots." *Id.*

Plaintiffs criticize Webster's decision to exclude Baltimore City from his statistical model and emphasize that the HQL requirement is actually associated with an increased homicide rate in Baltimore City, and Maryland as a whole. ECF 135-1 at 30-31; ECF 150 at 20-21. To be sure, it is undisputed that the number of handgun homicides in Maryland has increased overall since 2013. See ECF 135-23 at 1. But, the data is not as clear as plaintiffs suggest. The firearm homicide rate decreased immediately following the passage of the FSA in 2013 and only began to rise again in 2015. And, as defendants contend, that rise may be associated with the aftermath of "the death of Freddie Gray and the ensuing unrest." ECF 140 at 14. And, it is also quite

plausible that, without the HQL the disturbing number of homicides might have been even greater.

Given the array of variables, it may be impossible to determine the effectiveness of the law at this juncture, or at any juncture. *See Hirschfeld*, 2021 WL 2934468, at *37 ("While we recognize that it would be difficult to determine the effectiveness of these laws now…."); *see also id*. at *61 (Wynn, J., dissenting) ("[A]s the majority recognizes, it '[is] difficult to determine the effectiveness of these laws now.'… Given this conceded uncertainty, I would not have this Court stray far beyond its area of expertise to strike down a long-established law because of its perceived ineffectiveness."). In the face of such uncertainty, I would be straying beyond my authority to strike down a law because of its perceived ineffectiveness. *See Masciandaro*, 638 F.3d at 475–76 ("We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.... If ever there was an occasion for restraint, this would seem to be it.").

In any event, the "Supreme Court has stated explicitly that the government satisfies intermediate scrutiny if its predictions about the effect of a challenged law are rational and based on substantial evidence—it need not establish with certitude that the law will actually achieve its desired end." *Heller v. District of Columbia*, 45. F. Supp. 3d 35, 41-42 (D.D.C. 2014) (emphasis added) (citing *Turner I*, 512 U.S. at 666 (stating that, to survive intermediate scrutiny, government must show that "in formulating its judgments, [the legislature] has drawn reasonable

inferences based on substantial evidence")), *aff'd in part*, 801 F.3d 264 (D.C. Cir. 2015).

V. Conclusion

The record demonstrates a reasonable fit between Maryland's HQL law and the State's important interest in promoting public safety. As noted, the evidence indicates that there are real safety risks associated with the misuse of handguns and the possession of handguns by those who are barred under the law from gun possession. And, as discussed above, the fingerprinting and training requirements align directly with the State's need to verify the identity of gun purchasers, deter straw purchasers, and ensure that handgun users have sufficient knowledge about guns, so as to mitigate safety risks.

The fingerprinting and training requirements are reasonably adapted to serve the State's overwhelming interest in protecting public safety. Moreover, the time and expense associated with the requirements are reasonable. *See Heller II*, 670 F.3d at 1249 n.* (noting that "administrative ... provisions incidental to the underlying regime"—which include reasonable fees associated with registration—are lawful insofar as the underlying regime is lawful). "Simply put, the State has shown all that is required: a reasonable, if not perfect, fit between the FSA and Maryland's interest in protecting public safety." *Kolbe*, 849 F.3d at 140-41. I decline to usurp the legislative role by invalidating the measures that the Maryland General Assembly enacted based on substantial evidence that such measures would promote public safety.

As Judge Wilkinson aptly noted in his concurrence in *Kolbe*, 849 F.3d at 150: "No one really knows what the right answer is with respect to the regulation of firearms," but "the profound ambiguities of the Second Amendment" are not "an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic actors." Further, he stated, *id.*: "Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation."

For the reasons set forth above, I shall grant Defendants' Motion and deny Plaintiffs' Motion. An Order follows, consistent with this Memorandum Opinion.[17]

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[17] The Memorandum Opinion will be filed under seal because it contains confidential business information filed under seal by a party. Therefore, the Court will file a redacted version of the Memorandum Opinion or, alternatively, after consultation with counsel, it will lift the seal. By August 23, 2021, the parties shall advise the Court as to whether they object to the lifting of the seal or, alternatively, whether the Court should file a redacted version, limited to pages 17 and 53. If either side requests the filing of a redacted version, the proposed redaction(s) should be submitted by August 23, 2021.

Dated: August 12, 2021 ______/s/______
Ellen L. Hollander
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, INC., et al.

v.

LAWRENCE HOGAN, et. al.

Civil Case No. ELH-16-3311

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is this 12th day of August, 2021, by the United States District Court for the District of Maryland, ORDERED:

1) The Clerk shall substitute Colonel Woodrow W. Jones, III as a defendant, in lieu of Colonel William M. Pallozzi;

2) Defendants' Motion for Summary Judgment (ECF 125) is GRANTED;

3) Plaintiffs' Motion for Summary Judgment (ECF 135) is DENIED;

4) The Memorandum Opinion has been filed under seal. By August 23, 2021, the parties shall advise the Court as to whether they object to the lifting of the seal or, alternatively, whether the Court should file a redacted version, limited to pages 17 and 53.

5) If either side requests the filing of a redacted version, the proposed redaction(s) should be submitted by August 23, 2021.

/s/
Ellen L. Hollander
United States District Judge

APPENDIX E

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1469

MARYLAND SHALL ISSUE INCORPORATED; ATLANTIC GUNS, INCORPORATED; DEBORAH KAY MILLER; SUSAN BRANCATO VIZAS,

Plaintiffs-Appellants,

and

ANA SLIVEIRA; CHRISTINE BUNCH,

Plaintiffs,

v.

LAWRENCE HOGAN, in his capacity as Governor of Maryland; WILLIAM M. PALLOZZI, in his capacity as Superintendent, Maryland State Police,

Defendants-Appellees.

NATIONAL RIFLE ASSOCIATION; MARYLAND STATE RIFLE AND PISTOL ASSOCIATION, INCORPORATED; NATIONAL SHOOTING SPORTS FOUNDATION,

Amici Supporting Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore,
Ellen L. Hollander, District Judge.
(1:16-cv-03311-ELH)

Argued: May 6, 2020
Decided: August 3, 2020
Amended: August 31, 2020

Before AGEE, KEENAN, and RICHARDSON, Circuit Judges.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Judge Agee wrote the opinion, in which Judge Keenan and Judge Richardson joined.

AGEE, Circuit Judge:

Maryland Shall Issue, Inc. ("MSI"); Deborah Kay Miller and Susan Vizas; and Atlantic Guns, Inc. ("Atlantic Guns")[1] brought suit against Lawrence Hogan in his capacity as Governor of Maryland and William M. Pallozzi in his capacity as Superintendent of the Maryland State Police (collectively "State Defendants"). Appellants challenge the constitutionality of Maryland's handgun licensing law, which is part of the Maryland Firearm Safety Act of 2013 ("FSA"), for violating their Second Amendment rights. They also challenge other FSA regulations as

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[1] The opinion refers to Miller and Vizas collectively as the "Individual Plaintiffs" and all four plaintiffs collectively as "Appellants."

vague and ambiguous in contravention of the Fourteenth Amendment and separately attack certain FSA regulations as ultra vires under Maryland law. The district court granted summary judgment to the State Defendants on the ground that Appellants lacked Article III standing as to all claims. Because we hold that Atlantic Guns has standing to pursue the Second Amendment claim, we affirm in part and reverse in part the judgment of the district court and remand this case for further proceedings.

I.

A.

Before addressing the merits of the parties' arguments, we begin with an explanation of the statutory scheme in question. In 2013, the Maryland General Assembly enacted the FSA to "protect[] its citizens and law enforcement officers," by regulating the sale, transfer, and possession of certain firearms within Maryland. *Kolbe v. Hogan*, 849 F.3d 114, 120, 129 (4th Cir. 2017) (en banc).

In relevant part, the FSA provides that "[a] dealer or any other person may not sell, rent, or transfer a handgun to a purchaser, lessee, or transferee unless the purchaser, lessee, or transferee presents to the dealer or other person a valid handgun qualification license issued to the purchaser, lessee, or transferee by the Secretary [of the State Police.]" Md. Code, Pub. Safety § 5-117.1(b). To obtain such a handgun qualification license ("HQL"), a person must: (1) be at least 21 years old; (2) be a resident of Maryland; (3) complete a minimum of 4 hours of firearms safety training within the prior three years; and (4) "based on

an investigation, [not be] prohibited by federal or State law from purchasing or possessing a handgun." *Id.* § 5-117.1(d). The safety training, which is undertaken at the applicant's expense, must cover classroom instruction on "State firearm law[,] home firearm safety[,] and handgun mechanisms and operation" along with a live-fire "firearms orientation component that demonstrates the person's safe operation and handling of a firearm."[2] *Id.* § 5-117.1(d)(3).

An individual may apply for an HQL by submitting the mandated materials, including a written application, a "nonrefundable application fee to cover the costs to administer the program of up to $50," and, as noted above, proof of completing firearms safety training or an exemption to that requirement. *Id.* § 5-117.1(g). Once the HQL application is received, the Secretary of State Police "appl[ies] to [the Criminal Justice Information System Central Repository of the Department of Public Safety and Correctional Services] for a State and national criminal history records check for each applicant[.]" *Id.* § 5-117.1(f)(2). "As part of the application for a criminal history records check," the Secretary must provide, among other things, "a complete set of the applicant's legible fingerprints." *Id.* § 5-117.1(f)(3). Based on the result of this criminal history records check and the information provided by an applicant, the Secretary issues a decision to the applicant "[w]ithin 30 days after

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[2] Certain individuals, such as a "qualified handgun instructor" and "an honorably discharged member of the armed forces of the United States or the National Guard," are exempt from the safety course training requirement. *Id.* § 5-117.1(e).

receiving a properly completed application." *Id*. § 5-117.1(h).

The FSA authorizes the State Police to adopt regulations to implement the HQL requirement. *Id*. § 5-117.1(n). Under this statutory authority, the State Police has adopted various regulations providing guidance on how to obtain an HQL, including what information an applicant must submit and what a qualifying safety training course must include. For instance, the regulations require an applicant to provide, among other things, "[a] complete set of the applicant's fingerprints, taken and submitted in the manner prescribed by the Secretary on the application." Md. Code Regs. 29.03.01.28(B)(3). The applicant is responsible for obtaining his or her fingerprints from an approved vendor at his or her expense. The State Police further mandates that the applicant "safely fire[] at least one round of live ammunition" during the safety training course. Md. Code Regs. 29.03.01.29(C)(4).

Only four designated groups of people are exempt from the HQL requirement:

(1) a licensed firearms manufacturer;

(2) a law enforcement officer or person who is retired in good standing from service with a law enforcement agency of the United States, the State, or a local law enforcement agency of the State;

(3) a member or retired member of the armed forces of the United States or the National Guard; or

(4) a person purchasing, renting, or receiving an antique, curio, or relic firearm, as defined in federal law or in determinations published by the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Md. Code, Pub. Safety § 5-117.1(a). Apart from these limited exceptions, anyone who fails to comply with the HQL requirement "is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $10,000 or both." *Id.* § 5-144(b).

B.

With the statutory framework in mind, we now turn to the specific circumstances of this case. MSI is a non-profit membership organization that, in its own words, is "dedicated to the preservation and advancement of gun owners' rights in Maryland" and "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." Opening Br. 8. It has more than 1,100 members. The Individual Plaintiffs are MSI members who would like to own a handgun, but have not attempted to purchase one and do not intend to obtain an HQL. Atlantic Guns, which has no formal affiliation with any of the other parties, is a family-owned, federally licensed firearms dealer that operates several commercial gun stores in Maryland.

Appellants argue that the FSA has caused them various injuries. The Individual Plaintiffs claim that the FSA prevents them from purchasing a handgun, even though they are willing to do so. Specifically,

Vizas alleges that she is unable to commit the time and the expense required to fulfill the HQL requirement, while Miller alleges that she suffers from a medical condition that prevents her from completing the safety training course. Because the Individual Plaintiffs have neither taken any steps to apply for an HQL nor expressed any desire to obtain one, they do not have an HQL and the FSA precludes them from purchasing a handgun. As a result, they assert that the FSA's "ban on the unlicensed acquisition" of a handgun has harmed them. Opening Br. 20. For its part, MSI claims that the FSA disrupted the pursuit of its organizational mission by deterring its members from acquiring handguns and caused it to alter its mission by expending funds to oppose the FSA. Atlantic Guns separately alleges that the FSA barred it from selling handguns to customers who did not possess an HQL, which constricted its market and caused direct economic loss. Based on these asserted injuries, Appellants allege that the HQL requirement violates their Second Amendment rights to purchase a handgun (or, for Atlantic Guns, its ancillary right to sell firearms) for self-defense and protection in the home.

Further, the Individual Plaintiffs claim that the HQL requirement is void for vagueness under the Fourteenth Amendment based on its use of two terms, "receive" and "receipt," in two specific subsections of the FSA. In their view, these terms as used in the FSA are so vague and ambiguous that they lead to absurd results and do not sufficiently clarify what conduct without an HQL is innocent. Based on this ambiguity, the Individual Plaintiffs allege that the HQL

requirement violates the Due Process Clause of the Fourteenth Amendment.

Lastly, the Individual Plaintiffs assert that the State Police acted ultra vires in violation of the Maryland Administrative Procedure Act, Md. Code, State Gov't § 10-125, by exceeding its rulemaking authority in promulgating certain regulations under the FSA. They claim that the State Police have implemented regulations imposing additional requirements to secure an HQL that are not authorized by the FSA.

Appellants raised those three claims in a complaint filed against the State Defendants in the District of Maryland. The State Defendants moved to dismiss the complaint, arguing in part that all Appellants lacked standing to bring a Second Amendment claim because none of them "allege[d] that they themselves or one of their members or customers are negatively impacted by those requirements." J.A. 53. The district court initially rejected this argument based on MSI's contention that after discovery, it could identify specific members who were injured by the HQL requirement. The court held that this allegation was "plausible" and could establish standing of "some MSI members" to raise a Second Amendment claim at this stage. Because the presence of one party with standing was sufficient to satisfy Article III's case-or-controversy requirement, the district court denied the State Defendants' motion to dismiss the Second Amendment Claim for lack of standing. The court then examined whether MSI and the Individual Plaintiffs alleged plausible due process and ultra vires

claims under Federal Rule of Civil Procedure 12(b)(6), determined that the due process claim only as to the instruction certificate requirement failed to survive this scrutiny, and dismissed that claim accordingly.[3]

The parties proceeded to discovery and then filed cross-motions for summary judgment. The State Defendants again argued that Appellants lacked standing on all claims because they did not suffer a concrete injury that was traceable to the FSA. Specifically, the State Defendants contended that neither of the Individual Plaintiffs had applied for an

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[3] Except as provided in another section of the regulation, Md. Code Regs. 29.03.01.29(A) requires an applicant to "complete a Firearms Safety Training Course and submit a Firearms Safety Training Certificate issued by a Qualified Handgun Instructor." This Certificate "constitute[s] proof that the applicant satisfactorily completed a Firearms Safety Training Course." Md. Code Regs. 29.03.01.29(A). The Individual Plaintiffs and MSI argued to the district court that this certificate requirement violated the Fourteenth Amendment Due Process Clause because an instructor "could refuse to issue such a certificate, thereby preventing an applicant from successfully completing the application and being considered to receive an HQL." J.A. 61. The Individual Plaintiffs and MSI asserted that the FSA and related regulations did not "provide for a hearing or judicial review of an Instructor's denial of a Certificate," which, they alleged, violated procedural due process. J.A. 61. The district court held that this claim was "speculative" and failed to survive Federal Rule of Civil Procedure 12(b)(6) because the Individual Plaintiffs and MSI did not "allege a deprivation due to the denial of a Training Certificate." J.A. 62. They do not challenge this decision on appeal and thus have waived appellate review of the dismissal of the due process claim as to the instructor certification requirement. *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) ("'[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded.'").

HQL; that MSI had not demonstrated the FSA harmed its mission; and that Atlantic Guns had failed to establish economic injury.

The district court agreed with the State Defendants. It first held that the Individual Plaintiffs failed to demonstrate an injury because they had not applied for an HQL, had not requested accommodations necessary to complete an application, or otherwise proved that they could not have obtained an HQL. In the district court's view, these deficiencies were fatal to the Individual Plaintiffs' standing to pursue their claims.

The district court further concluded that MSI lacked standing. At the outset, it observed that the lack of standing for the Individual Plaintiffs—who are MSI members—barred MSI from asserting associational standing[4] through them. The court also concluded that MSI lacked organizational standing because it failed to prove the FSA hindered its ability to pursue its mission.

Lastly, the district court held that Atlantic Guns lacked independent standing because it failed to prove the FSA caused a concrete economic injury to it. In addition, the court rejected the alternative assertion of Atlantic Guns that it had third-party standing on

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4. To establish associational standing, an organization must show: "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Lane v. Holder*, 703 F.3d 668, 674 n.6 (4th Cir. 2012).

behalf of potential customers who would purchase a handgun but for the HQL requirement, holding that this principle did not apply because customers could assert their own claims.

Based on its determination that none of Appellants had established a concrete, traceable injury and thus lacked standing, the district court granted summary judgment to the State Defendants and denied Appellants' motion for summary judgment.

This appeal followed, and we have jurisdiction under 28 U.S.C. § 1291.

II.

A.

We review de novo the district court's determinations as to Appellants' standing. *See Green v. City of Raleigh*, 523 F.3d 293, 298 (4th Cir. 2008). In doing so, we recognize that "[a]t least one plaintiff must demonstrate standing for each claim and form of requested relief" for that claim to proceed. *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018). "[T]he Supreme Court has made it clear that the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (internal quotation marks omitted). Consequently, once it is established that at least one party has standing to bring the claim, no further inquiry is required as to another party's standing to bring that claim. *Horne v. Flores*, 557 U.S. 433, 446–47 (2009) (declining to analyze whether additional plaintiffs had standing when one plaintiff did); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find

[one plaintiff] has standing, we do not consider the standing of the other plaintiffs.").

Against this backdrop, we turn to the first issue raised in this appeal: whether the district court erred in dismissing the Second Amendment challenge based on its conclusion that none of the Appellants had standing. For the reasons discussed in the next section, we conclude the district court erred in holding that Atlantic Guns lacks both independent and third-party standing to bring a Second Amendment claim. And because standing for one party on a given claim is sufficient to allow a case to proceed in its entirety on that issue, we need not reach the question of whether the Individual Plaintiffs and MSI have standing to bring their Second Amendment claims.

B.

Under Article III, "a party invoking the jurisdiction of a federal court [must] seek relief for a personal, particularized injury." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). Therefore, to establish individual standing, a plaintiff must demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. , 136 S. Ct. 1540, 1547 (2016). We address each requirement in turn as it applies to Atlantic Guns.

1.

Requiring plaintiffs to demonstrate they have suffered an injury in fact ensures that they have "'a personal stake in the outcome of the controversy.'" *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Under this

rubric, the Supreme Court has defined such an injury as "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548.

The district court determined that Atlantic Guns failed to meet the injury-in-fact requirement for constitutional standing because it "ha[d] not established that it suffered any economic injury as a result of the HQL requirement." J.A. 1452. To support this conclusion, the court cited three factors. First, the court observed that "Atlantic Guns [was] unable to identify any specific customer who decided not to purchase a gun as a result of the FSA." J.A. 1452. Second, the court noted that, excluding 2012 and 2013, "Atlantic Guns averaged more than 1,700 annual handgun sales from 2000 to 2017," and it "exceeded that average in both 2016 and 2017." J.A. 1453. And third, Atlantic Guns' records showed that: (1) in one of its stores, the gross revenue from handgun sales decreased between 2016 to 2017 —indicating that any lost business was not explained by the FSA; and (2) in its other store, its 2016–2017 gross revenue was higher than the "average annual gross revenue from 2009 through 2017." J.A. 1453. When considered together, the district court found this evidence was sufficient as a matter of law to override any claim that Atlantic Guns had suffered financial harm as a result of the FSA.

In challenging that conclusion, Atlantic Guns argues that the district court erred in deciding factual issues at summary judgment by discrediting its uncontroverted evidence of economic loss while

crediting the State Defendants' arguments. Specifically, Atlantic Guns asserts that the court erroneously focused on the *extent* of the economic injury as opposed to the *existence* of one. We agree. The district court took a selective view of the evidence, essentially rendering a merits determination rather than engaging in the proper inquiry at the summary judgment stage of the proceedings.

"'[F]inancial harm is a classic and paradigmatic form of injury in fact.'" *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (2018) (quoting *Cottrell v. Alcon Labs.*, 874 F.3d 154, 163 (3d Cir. 2017)). And, as the Supreme Court has made clear, lost business opportunities satisfy this requirement. *See, e.g., Craig v. Boren*, 429 U.S. 190, 194 (1976). A careful review of the record shows that Atlantic Guns presented evidence that it has suffered this type of loss.

Atlantic Guns' owner and president, Stephen Schneider, testified during his deposition that "our handgun sales have suffered after the 2013 law went into effect. We—the number of firearm[s], handguns specifically[,] that we're selling has declined at both our locations due to the law." J.A. 339. When asked what "evidence [he] ha[d] that demonstrates those assertions," Schneider pointed to "[s]ales figures" and noted that he also had "a count of the number of . . . handguns that we've sold that would also bear that out." J.A. 339.

This testimony is consistent with Schneider's signed declaration submitted on behalf of Atlantic Guns in opposition to the State's motion for summary judgment. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999) (holding that in order to

discredit an affidavit at summary judgment, it must, for example, "flatly contradict[] that party's earlier sworn deposition"). In his declaration, Schneider averred that Atlantic Guns "has been severely impacted by the passage of Maryland's Handgun License Requirement because it is barred by law from providing handguns to customers who do not have a Handgun License." J.A. 1412. According to Schneider, "Atlantic Guns turns away would be [sic] customers every week for this reason, totaling at least in the hundreds over the five years since the Handgun License requirement took effect." J.A. 1412. As a result, "[s]ince the Handgun License took effect in Maryland, Atlantic Guns has sold significantly fewer handguns per year." J.A. 1412. In fact, Schneider stated that, according to Maryland State Police records, "comparing the four years prior to the Handgun License enactment in 2013 (2009–2012) to the four years following (2014–2017), Atlantic Guns lost approximately 20 percent of its prior handgun sales after the Handgun License requirement was imposed." J.A. 1412, 1413. "Atlantic Guns' gross revenues from handgun sales have also decreased by a similar amount since the Handgun License requirement took effect." J.A. 1412; *see also* J.A. 1414. The State Defendants adduced no evidence to the contrary, and instead sought to recharacterize the sales numbers and gross revenues.

We conclude Schneider's uncontroverted testimony and declaration, along with the pertinent Maryland State Police records and Atlantic Guns' year-over-year sales records, are sufficient to establish an injury in fact for purposes of Article III standing. *See Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 981 (4th

Cir. 1992) (holding that disposition by summary judgment on standing grounds was inappropriate where the district court accepted the conclusions of the defendant's experts over the conclusions offered by the plaintiff's expert). Indeed, for standing purposes, Atlantic Guns is virtually indistinguishable from the beer vendor in *Craig v. Boren*, 429 U.S. 190 (1976), where the Supreme Court concluded that "[t]he operation of" a challenged statute that results in "the constriction of [a vendor's] buyers' market" plainly "inflict[s an] 'injury in fact' . . . sufficient to guarantee [it] concrete adverseness[.]" *Id*. at 194 (internal quotation marks omitted); *see also Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) ("Action Target, as a supplier of firing-range facilities, is harmed by the firing-range ban[.]").

The extent of Atlantic Guns' economic injury—including its ability to identify lost customers as well as the scope of the purported decline in handguns sold and lost revenue— are material issues of fact to be resolved in the Second Amendment analysis on the merits at trial. *See Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 (4th Cir. 2007) (observing that courts "'must not confuse standing with the merits'"); *see also NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013) ("[S]tanding analysis is not an accounting exercise[.]"), *abrogated on other grounds by Murphy v. NCAA*, 138 S. Ct. 1461 (2018). For purposes of standing, the evidence in the record reflects that Atlantic Guns has, in fact, suffered an injury through the constriction of its pool of potential customers. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("[A] loss of even a small amount of money is ordinarily an

'injury.'"); *accord Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008) ("'[T]he fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing.'").

Therefore, we conclude that the district court improperly weighed the evidence, which was error at the summary judgment stage. When considering the uncontroverted evidence under the appropriate standard, we find that Atlantic Guns has adequately established an injury in fact for Article III purposes.

2.

Having found that Atlantic Guns has suffered an injury in fact, we turn to the second requirement for constitutional standing: traceability. An injury is traceable if "there [is] a causal connection between the injury and the conduct complained of" by the plaintiff. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "While the defendant's conduct need not be the last link in the causal chain, the plaintiff must be able to demonstrate that the alleged harm was caused by the defendant, as opposed to the 'independent action of some third party not before the court.'" *Air Evac*, 910 F.3d at 760 (quoting *Frank Krasner Enters., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005)). On the facts of this case, therefore, the question is whether Atlantic Guns can demonstrate that the HQL requirement is "fairly traceable" to its injury, though it does not have to be "the sole or even immediate cause of th[at] injury." *Sierra Club v. Dept. of the Interior*, 899 F.3d 260, 283–84 (4th Cir. 2018).

The district court answered this query in the negative by concluding that Atlantic Guns had "not adduced evidence to create a genuine issue of material fact that the decline [in business since the HQL requirement took effect] is attributable to any regulatory burden placed on its customers' Second Amendment rights." J.A. 1453. According to the court, that is because "the HQL requirement does not impose any categorical prohibition that constricted Atlantic Guns' buyers' market." J.A. 1453. After reviewing the record, we conclude the district court again failed to follow the appropriate summary judgment standard and erred in its ultimate assessment that any injury was not traceable to the FSA.

On its face, the HQL requirement undoubtedly constrains Atlantic Guns' ability to sell handguns and limits its potential customer base. *See Lujan*, 504 U.S. at 561–62 (Where "the plaintiff is himself an object of the action . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."). Although the district court theorized alternative explanations for the decline in Atlantic Guns' business, this was improper at the summary judgment stage. We only require the facts, taken in the light most favorable to the plaintiffs, to support a reasonable inference of a causal relation.

Here, the record supports the requisite inference. First, after the FSA took effect, the dealer's handgun sales suffered. J.A. 339. Temporal correlation does not prove causation, but it is probative. *See United States v. Undetermined Quantities of All Articles of Finished & In-Process Foods*, 936 F.3d 1341, 1349 (11th Cir.

2019) ("Correlation is not causation, but neither must correlation be ignored."). Second, Atlantic Guns has turned away customers who lacked a license. Indeed, certain customers had even gone so far as to put down a deposit—which Atlantic Guns returned when they failed to acquire an HQL. J.A. 348, 343–44. We think it reasonable to infer that some of these customers would have proceeded with a purchase. Third, prospective handgun purchasers have confirmed that they have "been deterred from purchasing a handgun because of the . . . HQL law." *E.g.*, J.A. 294–95, 312; *see also* J.A. 292 ("I went to the sporting goods store and was hoping to purchase a handgun and found out about the [HQL requirement]."). As our previous decisions have made clear, when a "challenged provision[] . . . inhibits [a vendor's] ability to" conduct its business, "the alleged injury is . . . traceable to the" provision at issue. *Air Evac*, 910 F.3d at 760; *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1304 (11th Cir. 2006) (holding that the traceability requirement is "clearly present" when the challenged law "directly and expressly limits" the plaintiff's conduct).

Moreover, "[t]he legal duties created by the [HQL requirement] are addressed directly to vendors such as" Atlantic Guns. *Craig*, 429 U.S. at 194; *cf.* Md. Code, Pub. Safety § 5-117.1(b) (prohibiting firearms dealers from "sell[ing], rent[ing], or transfer[ing] a handgun to [anyone] unless the [individual] presents to the dealer or other person a valid handgun qualification license."). Atlantic Guns is "obliged either to heed the" statute, "thereby incurring a direct economic injury through the constriction of [its] buyers' market, or to disobey the statutory command

and suffer[.]" *Craig*, 429 U.S. at 194; *cf*. Md. Code, Pub. Safety §§ 5-144(b) (stating that violating the HQL requirement is a misdemeanor punishable by up to five years in jail and a $10,000 fine), 5-114(b)(2) (stating that a dealer's license "shall [be] revoke[d]" if the licensee "is convicted of a disqualifying crime"), 5-101(g)(3) (stating that "a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years" is a disqualifying crime). The Supreme Court "repeatedly has recognized that such injuries establish the threshold requirements of a 'case or controversy' mandated by Art. III," and are thus fairly traceable to the challenged statute. *Craig*, 529 U.S. at 194. The same is true here.

3.

Finally, we examine the third requirement for constitutional standing—whether Atlantic Guns' injury is likely to be redressed by a favorable judicial decision. A claim is redressable if a favorable outcome would repeal the "burdens" on purchasing the plaintiff's goods. *See Finlator v. Powers*, 902 F.2d 1158, 1162 (4th Cir. 1990). The district court did not analyze this requirement, and the State Defendants do not dispute that Atlantic Guns satisfies it.

And, indeed, Atlantic Guns' asserted injury is redressable because the injunctive relief sought here would allow it to sell handguns to a broader range of potential customers, thereby increasing its opportunity to make sales and generate revenue. *See Air Evac*, 910 F.3d at 760; *accord Nat'l Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997) (holding that a favorable ruling is likely to redress an injury where the plaintiff "abandoned a line of business

because of passage of the [challenged law] and "would promptly resume the prohibited activities" if "the [challenged law was] declared unconstitutional").

C.

In light of the foregoing, we find that Atlantic Guns has satisfied the constitutional requirements to bring its own, independent Second Amendment claim. But our inquiry does not end here because Atlantic Guns separately seeks third-party—sometimes referred to as *jus tertii*—standing to bring a Second Amendment claim as to its customers' right to purchase firearms.[5] We now turn to the question of whether Atlantic Guns has established standing to bring the latter claim.

Courts have long adhered to the rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. "This rule assumes that the party with the right has the appropriate incentive to challenge (or not

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[5] Of course, because the standing to assert a claim is distinct from the merits of that claim, we state no opinion today on the merits of Atlantic Guns' asserted second amendment claims in either its independent or *jus tertii* capacities. *Compare Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use."), *with Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc) ("[T]he Second Amendment does not confer a freestanding right . . . upon a proprietor of a commercial establishment to sell firearms."). We merely recognize that at least one plaintiff must establish standing to bring suit on each claim. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). It represents "a healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.5 (1984), "the courts might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights,'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 500).

But "this rule [is not] absolute." *Id*. at 129. Instead, the Supreme Court has "recogniz[ed] that there may be circumstances where it is necessary to grant a third[-]party standing to assert the rights of another." *Id*. at 129–30. One such circumstance arises when a party seeks third-party standing to bring claims challenging a statute that injures the rights of others. When considering such a request, the court must determine "whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement"—as Atlantic Guns has here—"and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Joseph H. Munson Co.*, 467 U.S. at 956. To that end, the Supreme Court has generally limited this exception by requiring parties seeking third-party standing to make two showings. First, the court must ascertain whether the party asserting the right has "a close relation[ship]" with the person who possesses the

right. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Second, the court must consider whether there is a "hindrance" to the possessor's ability to protect his own interests. *Id*.

Although the State Defendants argued that Atlantic Guns failed to make a sufficient showing to satisfy either requirement, the district court rested its decision on Atlantic Guns' purported inability to satisfy only the second requirement: an individual's ability to protect his own interests vis a vis an HQL. According to the court, in "other third[-]party standing cases . . ., the businesses' customers or some identified class of customers, were completely prohibited from availing themselves of the businesses' services." J.A. 1453. The district court then opined that "[h]ere, the HQL requirement does not impose any categorical prohibition that constricted Atlantic Guns' buyers' market." J.A. 1453. Based on that conclusion, the district court opined that, "individual handgun purchasers should be able to establish standing to challenge the HQL provision" on their own. J.A. 1454 (emphasis omitted). In reaching this conclusion, however, the district court erred.

The Supreme Court has "been quite forgiving" with the two requirements to establish third-party standing. *Kowalski*, 543 U.S. at 130; *accord Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (holding the requirements for third-party standing satisfied even when there was no hindrance preventing individuals from bringing their own constitutional claims). Indeed, "'the Court has enunciated [several] concerns that justify a lessening of prudential limitations of standing," *Kowalski*, 543

U.S. at 130, including "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights," *Warth*, 422 U.S. at 510.

Thus, the Supreme Court has unequivocally held that "a vendor with standing to challenge the lawfulness of" a regulation—as Atlantic Guns has here—"is entitled to assert those concomitant rights of third parties that would be diluted or adversely affected should [its] constitutional challenge fail and the [regulations] remain in force." *Craig*, 429 U.S. at 195 (internal citation quotation marks omitted). "Otherwise, the threatened imposition of governmental sanctions might deter" a plaintiff and "other similarly situated vendors from selling" their items to members of their potential customer base, "thereby ensuring that enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights." *Id.* (internal quotation marks omitted) (alteration in original). Moreover, the *Craig* Court reached this conclusion despite the dissent's observation that there was "no barrier what[so]ever" to the vendor's customers preventing them from bringing independent claims. *Craig*, 429 U.S. at 216 (Burger, C.J., dissenting).

"Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig*, 429 U.S. at 195 (majority op.); *accord Carey v. Population Servs. Int'l*, 431 U.S. 678, 682–84 (1977) (holding that a mail- order seller of non-medical contraceptives had standing to argue that

a state statute prohibiting distribution of such items violated its customers' substantive due process rights). Courts have invariably found that a vendor has a sufficiently close relationship with its customers when a challenged statute prevents that entity from transacting business with them. *See, e.g., Craig*, 429 U.S. at 192–97 (concluding that vendors have a close relationship with their potential vendees); *Lepelletier v. F.D.I.C.*, 164 F.3d 37, 43–44 (D.C. Cir. 1999) (recognizing a close relationship can exist "on the basis of the vendor-vendee relationship alone").

Courts have likewise consistently held that a vendor has third-party standing to pursue claims on behalf of its customers, regardless of whether a vendor's customers are hindered in bringing their own claims. *See, e.g., Epona, LLC v. Cty. of Ventura*, 876 F.3d 1214, 1219–20 (9th Cir. 2017) (rejecting the argument that affected third parties were fully capable of asserting their own claims and holding that vendors had standing to challenge permitting requirements on behalf of their potential clients); *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc) (citing *Craig* and holding that "Teixeira, as the would-be operator of a gun store, thus has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers"); *Kaahumanu v. Hawaii*, 682 F.3d 789, 797 (9th Cir. 2012) (holding that a wedding planner had standing to challenge permitting regulations on behalf of those who sought to get married); *Ezell*, 651 F.3d at 696 (allowing a vendor to challenge city ordinance banning firing-range facilities on behalf of third parties who seek access to those facilities); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743 (5th Cir. 2008)

(recognizing that the Supreme Court has held that "businesses can assert the rights of their customers and that restricting the ability to purchase an item is tantamount to restricting that item's use"); *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 155 (3d Cir. 2005) (holding that a vendor of obscene materials had standing to challenge a federal obscenity statute on behalf of its customers).

The district court erred in ignoring this long line of precedent, which instructs our decision here. Therefore, in addition to concluding that Atlantic Guns has standing to pursue its individual Second Amendment claim, we further hold that it has third-party standing to challenge the HQL requirement on behalf of potential customers like the Individual Plaintiffs and other similarly situated persons.

* * * *

In light of our conclusion that Atlantic Guns has both independent and third-party standing, we reverse the district court's judgment in favor of the State Defendants as to the Second Amendment claims and remand with instructions that the claims proceed to trial.

III.

Next, we address whether the Individual Plaintiffs and MSI members have standing to bring their vagueness claim as to the FSA under the Fourteenth Amendment. They raise a facial challenge, arguing that the statute's use of two terms, "receive" and "receipt," is unconstitutionally vague. In their view, the ambiguity inherent in these two terms "lead[s] to

absurd results under Maryland law" and "leaves persons woefully uninformed as to [what] conduct is unlawful." J.A. 31–32. The Individual Plaintiffs specifically challenge the use of these terms in two sections: that a person "may . . . *receive* a handgun only if the person . . . possesses a valid [HQL]" and is otherwise not "prohibited from purchasing or possessing a handgun," Md. Code, Pub. Safety § 5-117.1(c) (emphasis added), and that a person "may not . . . knowingly participate in the . . . *receipt* of a regulated firearm in violation of" the HQL requirement, id. § 5-144(a)(1) (emphasis added).[6]

By challenging the HQL requirement without submitting to it, the Individual Plaintiffs "seek preenforcement review" of the FSA. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010). The Supreme Court has held, "[w]hen contesting the constitutionality of a criminal statute, it is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (internal quotations marks and alterations omitted). But to bring a cognizable preenforcement challenge, a party must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B.*

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[6] For instance, plaintiffs contend the FSA—interpreted broadly—could ban the temporary handling of a family member's handgun or the use of an instructor's gun at a firing range. *See* Appellant Br. 30–31

Anthony List v. Driehaus, 573 U.S. 149, 159 (2014). To establish a credible threat of prosecution, plaintiffs must allege "fears of state prosecution" that are not "imaginary or speculative," *Babbitt*, 442 U.S. at 298, and are "actual and well-founded [enough to establish] that the statute will be enforced against them," *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

In *Susan B. Anthony List*, the Supreme Court identified four decisions—*Steffel v. Thompson*, 415 U.S. 42 (1974), *Babbitt*, 442 U.S. at 298, *American Booksellers Association*, 484 U.S. 383, and *Holder*, 561 U.S. at 1—that illustrate "circumstances under which plaintiffs may bring a preenforcement challenge consistent with Article III." 573 U.S. at 159. In the earliest example, *Steffel*, in which "police officers threatened to arrest petitioner and his companion for distributing handbills protesting the Vietnam War," the Supreme Court found a credible threat of enforcement. *Id*. at 159. Because the petitioner "had been warned to stop handbilling and threatened with prosecution if he disobeyed [and] his companion's prosecution showed that his 'concern with arrest' was not 'chimerical,'" the Court allowed a preenforcement challenge to proceed. *Id*. Later, in *Babbitt*, the Supreme Court held that the petitioners had standing to bring a preenforcement challenge because they had "actively engaged in" the proscribed conduct in the past, alleged an intention to continue that conduct in the future, and showed that this plan made prosecution "inevitable." *Id*. at 160.

Likewise, the Supreme Court recognized a preenforcement challenge was permissible in *American*

Booksellers Association because the booksellers had already published books that were covered by the challenged statute and alleged that "costly compliance measures would be necessary to avoid prosecution for displaying such books." *Id*. Lastly, the Supreme Court found a credible threat of prosecution in *Holder* where plaintiffs challenged a law that criminalized knowingly providing material support or resources to a foreign terrorist organization. *Id*. at 160–61. There, "[t]he plaintiffs . . . had provided support to groups designated as terrorist organizations prior to the law's enactment and would provide similar support in the future. The Government had charged 150 persons with violating the law and declined to disavow prosecution if the plaintiffs resumed their support of the designated organizations." *Id*. at 161.

The district court here held that the Individual Plaintiffs failed to present such circumstances and thus establish a credible threat of prosecution. We agree. Assuming that plaintiffs have alleged a sufficient intention "to engage in conduct afflicted with a constitutional interest," they have offered no evidence to support a credible threat of prosecution. *Babbitt*, 442 U.S. at 298. First, Maryland has not threatened prosecution for the supposedly proscribed conduct as in *Steffel* or *Holder*. On the contrary, the State Police issued an "FAQ" affirming that an HQL is not needed to fire a gun at a gun range. J.A. 1281 (Q: "Do I need an HQL to fire at a gun range?" A: "No. An HQL is the only required [sic] to purchase, rent or transfer a firearm."). Second, plaintiffs have offered no evidence of the law having been enforced as they fear, again as in *Steffel* or *Holder*. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013) ("[R]espondents

fail to offer any evidence that their communications have been monitored under § 1881a, a failure that substantially undermines their standing theory"). Third, unlike in *Babbit*, *American Booksellers*, and *Holder*, the Individual Plaintiffs have not alleged any concrete intention to (arguably) violate the FSA by temporarily receiving a family member's gun in an emergency situation. *Cf. Lujan*, 504 U.S. at 564 ("'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

We believe the record before us shows that (1) plaintiffs will not in fact be prosecuted for allegedly protected conduct and (2) they have no intention of engaging in such conduct in the first place. Plaintiffs' generalized fears and concerns do not establish an actual and well-founded fear of prosecution because they show nothing "more than the fact that state officials stand ready to perform their general duty to enforce laws." *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986). Because the Individual Plaintiffs fail to establish a credible threat of prosecution, we affirm the district court's holding that they lack standing to pursue a facial vagueness challenge.

IV.

Lastly, the Individual Plaintiffs assert standing to raise a claim of ultra vires acts by the State Police. They allege that the State Police exceeded its rulemaking authority by enacting HQL regulations that are outside the scope of the FSA. As relief, the Individual Plaintiffs seek a declaratory judgment that

the State Police acted in excess of its statutory authority and that it can no longer enforce the challenged regulations.

The district court examined the Individual Plaintiffs' standing to raise this claim under state law standing principles. In Maryland, "standing to bring a judicial action generally depends on whether one is 'aggrieved,' which means whether a plaintiff has 'an interest such that he or she is personally and specifically affected in a way different from the public generally.'" *Kendall v. Howard Cty.*, 66 A.3d 684, 691 (Md. 2013) (alterations omitted). Thus, "'an individual or an organization has no standing in court unless he has also suffered some kind of special damage from such wrong differing in character and kind from that suffered by the general public.'" *Evans v. State*, 914 A.2d 25, 68 (Md. 2006). The district court held that the Individual Plaintiffs did not establish "a special interest, distinct from that of the general public," as to the challenged regulations and thus lacked standing to raise the ultra vires claim. J.A. 1456.

We agree that the Individual Plaintiffs lack standing for this claim, but do so based on their failure to satisfy the standing requirement of Article III. Before considering their standing under Maryland law, federal courts must first determine whether they have Article III standing because the existence of a "case or controversy" is "*the* threshold question in every federal case." *Warth*, 422 U.S. at 498 (emphasis added). "Standing to sue in any Article III court is . . . a federal question which does not depend on the party's [] standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *see Davis v. Detroit*

Pub. Sch. Cmty. Dist., 899 F.3d 437, 443 (6th Cir. 2018) (holding that in determining standing of plaintiffs who raise state law claims in federal court, the courts "must consider whether [p]laintiffs have standing under Article III before considering whether they have standing under state law"); *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 436 n.1 (7th Cir. 1994) ("Although this cause of action arises under state law, the federal standing requirements of Article III still apply.").

The Individual Plaintiffs argue that the challenged regulations harm them by subjecting them to HQL requirements that are not authorized by the FSA. Specifically, they assert that "the Maryland State Police's 'live fire' requirement in the regulations was unauthorized by the" FSA and the regulations "illegally shifted [the State Police's] fingerprinting duties and costs . . . to the applicants and private vendors" without authority under the FSA. Opening Br. 33. But the Individual Plaintiffs allege this violation even though they have indicated they will not acquire a handgun unless the HQL requirement itself is eliminated. Appellant Br. 20 ("The ban on the unlicensed acquisition imposed by the Handgun License Requirement is itself the harm from which Plaintiffs seek relief"); *see also* J.A. 312 ("Q: What specifically about the HQL has deterred you from purchasing a handgun? A: Its existence."). In other words, plaintiffs do not claim to be injured by the specific requirements of the HQL—they claim to be injured by the existence of the HQL itself.

Accordingly, as to the HQL's specific requirements, they stand in the shoes of all members of the public

who happen to disagree with a particular law. This alleged injury is insufficient to establish Article III standing. The Supreme Court has held that this type of injury establishes nothing more than "the impact on plaintiff . . . plainly undifferentiated and common to all members of the public" and therefore is "an impermissible generalized grievance" that is "an inadequate basis on which to grant standing." *Lujan*, 504 U.S. at 575–76 (alteration and internal quotation marks omitted). The Court has explained that "injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable because assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.* (internal quotation marks omitted).

Instead, to establish standing, the Individual Plaintiffs must demonstrate "a personal stake in the outcome," showing that they have "sustained or [are] immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (internal quotation marks omitted). They have failed to do so here. So long as they never intend to apply for an HQL, the Individual Plaintiffs' alleged injury attributable to the HQL's specific requirements is conjectural at best. *See Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (holding the plaintiff lacked standing to seek a declaratory judgment that a certain New York statute was unconstitutional because it was "most unlikely" that he would be subject to the statute

in the future, which "precluded a finding that there was 'sufficiently immediacy and reality' here").

Therefore, we affirm the district court's holding that the Individual Plaintiffs lack standing to pursue the ultra vires claim.

V.

For the foregoing reasons, the district court's judgment is

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED WITH INSTRUCTIONS.

APPENDIX F

CONSTITUTION OF THE UNITED STATES

Second Amendment

Right to Bear Arms

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

APPENDIX G

MD Code, Public Safety, § 5-117
Formerly cited as MD CODE Art. 27, § 442
Currentness

§ 5-117 Application for regulated firearm required

A person must submit a firearm application in accordance with this subtitle before the person purchases, rents, or transfers a regulated firearm.

MD Code, Public Safety, § 5-117.1

§ 5-117.1.Handgun qualification license required to sell, rent, or transfer handguns

Effective October 1, 2013
Currentness

Application of section

(a) This section does not apply to:

(1) a licensed firearms manufacturer;

(2) a law enforcement officer or person who is retired in good standing from service with a law enforcement agency of the Unite States, the State, or a local law enforcement agencyof the State.

(3) a member or retire member of the armed forces of the United States or the National Guard; or

(4) a person purchasing, renting, or receiving an antique, curio, or relic firearm, as defined in federal law or in determinations published by the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Handgun qualification license required for purchaser, lessee, or transferees

(b) A dealer or any other person may not sell, rent, or transfer a handgun to a purchaser, lessee, or transferee unless the purchaser, lessee, or transferee presents to the dealer or other person a valid handgun qualification license issued to the purchaser, lessee, or transferee by the Secretary

under this section.

Requirements for purchase, rent, or receipt of handguns

(c) A person may purchase, rent, or receive a handgun only if the person:

(1)(i) possesses a valid handgun license issued to the person by the Secretary in accordance with this section;

(ii) possesses valid credentials from a law enforcement agency or retirement credentials from a law enforcement agency;

(iii) is an active or retired member of the armed forces of the United States or the National Guard and possesses a valid military identification card; or

(iv) is purchasing, renting, or receiving an antique, curio, or relic firearm, as defined in federal law or in determinations published by the Bureau of Alcohol, Tobacco, Firearms and Explosives; and

(2) is not otherwise prohibited from purchasing or possessing a handgun under State or federal law.

Issuance of handgun qualification license

(d) Subject to subsections (f) and (g) of this section, the Secretary shall issue a handgun qualification license to a person who the Secretary finds:

(1) is at least 21 years old;

(2) is a resident of the State;

(3) except as provided in subsection (e) of this section, has demonstrated satisfactory completion, within 3 years prior to the submission of the application, of a firearms safety training course approved by the Secretary that includes:

(i) a minimum of 4 hours of instruction by a qualified handgun instructor;

(ii) classroom instruction on:

1. State firearm law;

2. home firearm safety; and

3. handgun mechanisms and operation; and

(iii) a firearms orientation component that demonstrates the person's safe operation and handling of a firearm; and

(4) based on an investigation, is not prohibited by federal or State law from purchasing or possessing a handgun.

Exemptions from firearms safety training course requirements

(e) An applicant for a handgun qualification license is not required to complete a firearms safety training course under subsection (d) of this section if the applicant:

(1) has completed a certified firearms training course approved by the Secretary;

(2) has completed a course of instruction in competency and safety in the handling of firearms prescribed by the Departmentof Natural Resources under § 10-301.1 of the Natural Resources Article;

(3 is a qualified handgun instructor;

(4) is an honorably discharged member of the armed forces of the United States or the National Guard;

(5) is an employee of an armored car company and has a permit issued under Title 5, Subtitle 3 of this article; or

(6) lawfully owns a regulated firearm.

Applications to Central Repository for State and national criminal history records check

(f)(1) In this subsection, "Central Repository" means the Criminal Justice Information System Central Repository of the Department of Public Safety and Correctional Services.

(2) The Secretary shall apply to the Central Repository for a State and national criminal history records check for each applicant for a handgun qualification license.

(3) As part of the application for a criminal history records check, the Secretary shall submit to the Central Repository:

(i) a complete set of the applicant's legible fingerprints taken in a format approved by the Director of the Central Repository and the Director of the Federal Bureau of

Investigation;

(ii) the fee authorized under § 10-221(b)(7) of the Criminal Procedure Article for access to Maryland criminal history records; and

(iii) the mandatory processing fee required by the Federal Bureau of Investigation for a national criminal history records check.

(4) The Central Repository shall provide a receipt to the applicant for the fees paid in accordance with paragraph (3)(ii) and (iii) of this subsection.

(5) In accordance with §§ 10-201 through 10-234 of the Criminal Procedure Article, the Central Repository shall forward to the applicant and the Secretary a printed statement of the applicant's criminal history information.

(6) Information obtained from the Central Repository under this section:

(i) is confidential and may not be disseminated; and

(ii) shall be used only for the licensing purpose authorized by this section.

(7) If criminal history record information is reported to the Central Repository after the date of the initial criminal history records check, the Central Repository shall provide to the Department of State Police Licensing Division a revised printed statement of the applicant's or licensee's State criminal history record.

Application form and fee

(g) An applicant for a handgun qualification license shall submit to the Secretary:

(1) an application in the manner and format designated by the Secretary;

(2) a nonrefundable application fee to cover the costs to administer the program of up to $50;

(3)(i) proof of satisfactory completion of:

1. a firearms safety training course approved by the Secretary; or

2. a course of instruction in competency and safety in the handling of firearms prescribed by the Department of Natural Resources under § 10-301.1 of the Natural Resources Article; or

(ii) a valid firearms instructor certification;

(4) any other identifying information or documentation required by the Secretary; and

(5) a statement made by the applicant under the penalty of perjury that the applicant is not prohibited under federal or State law from possessing a handgun.

Issuance or denial of handgun qualification license

(h)(1) Within 30 days after receiving a properly completed application, the Secretary shall issue to the applicant:

(i) a handgun qualification license if the applicant is approved; or

(ii) a written denial of the application that contains:

1. the reason the application was denied; and

2. a statement of the applicant's appeal rights under subsection (l) of this section.

(2)(i) An individual whose fingerprints have been submitted to the Central Repository, and whose application has been denied, may request that the record of the fingerprints be expunged by obliteration.

(ii) Proceedings to expunge a record under this paragraph shall be conducted in accordance with § 10-105 of the Criminal Procedure Article.

(iii) On receipt of an order to expunge a fingerprint record, the Central Repository shall expunge by obliteration the fingerprints submitted as part of the application process.

(iv) An individual may not be charged a fee for the expungement of a fingerprint record in accordance with this paragraph.

Expiration of license

(i) A handgun qualification license issued under this section expires 10 years from the date of issuance.

Renewal of license

(j)(1) The handgun qualification license may be renewed for successive periods of 10 years each if, at the time of an application for renewal, the applicant:

(i) possesses the qualifications for the issuance of the handgun qualification license; and

(ii) submits a nonrefundable application fee to cover the costs to administer the program up to $20.

(2) An applicant renewing a handgun qualification license under this subsection is not required to:

(i) complete the firearms safety training course required in subsection (d)(3) of this section; or

(ii) submit to a State and national criminal history records check as required in subsection (f) of this section.

Revocation of license

(k)(1) The Secretary may revoke a handgun qualification license issued or renewed under this section on a finding that the licensee no longer satisfies the qualifications set forth in subsection (d) of this section.

(2) A person holding a handgun qualification license that has been revoked by the Secretary shall return the license to the Secretary within 5 days after receipt of the notice of revocation.

Hearing upon denial or revocation of license

(l)(1) A person whose original or renewal application for a handgun qualification license is denied or whose handgun qualification license is revoked, may submit a written request to the Secretary for a hearing within 30 days after the date the written notice of the denial or revocation was sent to the aggrieved person.

(2) A hearing under this section shall be granted by the Secretary within 15 days after the request.

(3) A hearing and any subsequent proceedings of judicial review under this section shall be conducted in accordance with Title 10, Subtitle 2 of the State Government Article.

(4) A hearing under this section shall be held in the county of the legal residence of the aggrieved person.

Lost or stolen licenses

(m)(1) If an original or renewal handgun qualification license is lost or stolen, a person may submit a written request to the Secretary for a replacement license.

(2) Unless the applicant is otherwise disqualified, the Secretary shall issue a replacement handgun qualification license on receipt of a written request and a nonrefundable fee to cover the cost of replacement up to $20.

Regulations

(n) The Secretary may adopt regulations to carry out the provisions of this section.

MD Code, Public Safety, § 5-118
Formerly cited as MD CODE Art. 27, § 442

§ 5-118 Firearm Application

Effective July 1, 2017
Currentness

In general

(a) A firearm applicant shall:

(1) submit to a licensee or designated law enforcement agency a firearm application on the form that the Secretary provides;

and

(2) pay to the licensee or designated law enforcement agency an application fee of $10.

Required information

(b) A firearm application shall contain:

(1) the firearm applicant's name, address, Social Security number, place and date of birth, height, weight, race, eye and hair color, signature, driver's or photographic identification soundex number, occupation, and regulated firearm information for each regulated firearm to be purchased, rented, or transferred;

(2) the date and time that the firearm applicant delivered the completed firearm application to the prospective seller or transferor;

(3) a statement by the firearm applicant under the penalty of perjury that the firearm applicant:

(i) is at least 21 years old;

(ii) has never been convicted of a disqualifying crime;

(iii) has never been convicted of a violation classified as a common law crime and received a term of imprisonment of more than 2 years;

(iv) is not a fugitive from justice;

(v) is not a habitual drunkard;

(vi) is not addicted to a controlled dangerous substance or is not a habitual user;

(vii) does not suffer from a mental disorder as defined in § 10-101(i)(2) of the Health--General Article and have a history of violent behavior against the firearm applicant or another;

(viii) has never been found incompetent to stand trial under § 3-106 of the Criminal Procedure Article;

(ix) has never been found not criminally responsible under § 3-110 of the Criminal Procedure Article;

(x) has never been voluntarily admitted for more than 30 consecutive days to a facility as defined in § 10-101 of the Health–General Article;

(xi) has never been involuntarily committed to a facility as defined in § 10-101 of the Health–General Article;

(xii) is not under the protection of a guardian appointed by a court under § 13-201(c) or § 13-705 of the Estates and Trusts Article, except for cases in which the appointment of a guardian is solely a result of a physical disability;

(xiii) is not a respondent against whom:

1. a current non ex parte civil protective order has been entered under § 4-506 of the Family Law Article; or

2. an order for protection, as defined in § 4-508.1 of the Family Law Article, has been issued by a court of another state or a Native American tribe and is in effect; and

(xiv) if under the age of 30 years at the time of application, has not been adjudicated delinquent by a juvenile court for an act that would be a disqualifying crime if committed by an adult; and

(4) unless the applicant is excluded under § 5-117.1(a) of this subtitle, the applicant's handgun qualification license number.

Required warning

(c) Each firearm application shall contain the following statement: "Any false information supplied or statement made in this application is a crime which may be punished by imprisonment for a period of not more than 3 years, or a fine of not more than $5,000, or both.".

Firearm application of corporation

(d) If the firearm applicant is a corporation, a corporate officer who is a resident of the State shall complete and execute the firearm application.

MD Code, Public Safety, § 5-120
Formerly cited as MD CODE Art. 27, § 442

§ 5-120 Copies of firearm application; fees

Effective October 1, 2013
Currentness

Copy to Secretary

(a) (1) On receipt of a firearm application, a licensee or designated law enforcement agency shall promptly forward one copy of it to the Secretary by electronic means approved by the Secretary.

(2) The copy of the firearm application forwarded to the Secretary shall contain the name, address, and signature of the prospective seller, lessor, or transferor.

Other copies

(b) (1) The prospective seller, lessor, or transferor shall keep one copy of the firearm application for not less than 3 years.

(2) The firearm applicant is entitled to a copy of the firearm application.

Fees

(c) The licensee or designated law enforcement agency shall forward the $10 application fee with the firearm application to the Secretary.

MD Code, Public Safety, § 5-121
Formerly cited as MD CODE Art. 27, § 442

§ 5-121 Investigation of firearm applicant
Application

Currentness

Secretary to conduct investigation

(a) On receipt of a firearm application, the Secretary shall conduct an investigation promptly to determine the truth or falsityo the information supplied and statements made in the firearm application.

Request for assistance

(b) In conducting an investigation under this subsection, the Secretary may request the assistance of the Police Commissioner of Baltimore City, the chief of police in any county maintaining a police force, or the sheriff in a county not maintaining a police force.

MD Code, Public Safety, § 5-122
Formerly cited as MD CODE Art. 27, § 442

§ 5-122 Disapproval of firearm application

Currentness

Grounds

(a) The Secretary shall disapprove a firearm application if:

(1) the Secretary determines that the firearm applicant supplied false information or made a false statement;

(2) the Secretary determines that the firearm application is not properly completed; or

(3) the Secretary receives written notification from the firearm applicant's licensed attending physician that the firearm applicant suffers from a mental disorder and is a danger to the firearm applicant or to another.

Notice

(b) (1) If the Secretary disapproves a firearm application, the Secretary shall notify the prospective seller, lessor, or transferor in writing of the disapproval within 7 days after the date that the executed firearm application is forwarded to the Secretary by certified mail or facsimile machine.

(2) After notifying the prospective seller, lessor, or transferor under paragraph (1) of this subsection, the Secretary shall notify the prospective purchaser, lessee, or transferee in

writing of the disapproval.

(3) The date when the prospective seller, lessor, or transferor forwards the executed firearm application to the Secretary by certified mail or by facsimile machine is the first day of the 7-day period allowed for notice of disapproval to the prospective seller, lessor, or transferor.

MD Code, Public Safety, § 5-123
Formerly cited as MD CODE Art. 27, § 442

§ 5-123 Time for licensee to complete transactions

Currentness

Seven-day waiting period

(a) A licensee may not sell, rent, or transfer a regulated firearm until after 7 days following the time a firearm application is executed by the firearm applicant, in triplicate, and the original is forwarded by the prospective seller or transferor to the Secretary.

Completion required in 90 days

(b) A licensee shall complete the sale, rental, or transfer of a regulated firearm within 90 days after the firearm application was stamped by the Secretary as not being disapproved.

Incomplete transactions

(c) (1) If the sale, rental, or transfer of a regulated firearm is not completed within 90 days after the firearm application was stamped by the Secretary as not being disapproved, a licensee shall return the firearm application to the Secretary within 7 days.

(2) The Secretary shall void a firearm application returned under paragraph (1) of this subsection as an incomplete sale, rental, or transfer.

Notification of completed transaction

(d)(1)(i) A licensee who sells, rents, or transfers a regulated firearm in compliance with this subtitle shall forward a copy of the written notification of the completed transaction to the Secretary within 7 days after delivery of the regulated firearm written notification of the completed transaction to the Secretary within 7 days after delivery of the regulated firearm.

(ii) The notification shall contain an identifying description of the regulated firearm, including its caliber, make, model, any manufacturer's serial number, and any other special or peculiar characteristic or marking by which the regulated firearm may be identified.

(2) The Secretary shall maintain a permanent record of all notifications received of completed sales, rentals, and transfers of regulated firearms in the State.