No. 24-373

IN THE
Supreme Court of the United States

MARYLAND SHALL ISSUE, INC., *ET AL.*,
Petitioners,
v.
WES MOORE, GOVERNOR OF MARYLAND, *ET AL.*,
Respondents.

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

Brief *Amici Curiae* of Gun Owners of America, Inc., Gun Owners Fdn., Gun Owners of CA, Heller Foundation, VA Citizens Def. League, VA Citizens Def. Fdn., Grass Roots NC, Rights Watch Int'l, TN Firearms Assn., TN Firearms Fdn., America's Future, U.S. Constitutional Rights Leg. Def. Fund, and Conservative Legal Def. and Ed. Fund in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Grass Roots North Carolina, Rights Watch International, Tennessee Firearms Association, Tennessee Firearms Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are exempt from federal income taxation under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.

STATEMENT OF THE CASE

In 2013, the state of Maryland passed a handgun license qualification law, requiring that in order to possess a handgun, a Maryland citizen must first provide fingerprints to the state, pass a background check, complete a four-hour firearm-safety training course including firing at least one live round, and wait 30 days for approval. Failure to complete these steps leaves a citizen disqualified from possessing a handgun.

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

In 2016, plaintiffs filed suit challenging Maryland's restrictive law. Prior to this Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the district court upheld Maryland's handgun-licensure law, holding that it did not violate the Second Amendment. *Md. Shall Issue, Inc. v. Hogan*, 566 F. Supp. 3d 404 (D. Md. 2021). On November 21, 2023, a panel of the Fourth Circuit Court of Appeals ruled that the requirement to "qualify" for a license to exercise the Second Amendment right did in fact burden that right. *Maryland Shall Issue, Inc. v. Moore,* 86 F.4th 1038, 1045 (4th Cir. 2023). The panel further found that Maryland's purported historical analogue of "dangerousness" statutes were not relevantly similar, as such laws permitted seizure of weapons from persons adjudicated as dangerous, while Maryland's law required all citizens to first prove they are not "dangerous" as a precondition to a license to own a firearm at all. *Id.* at 1047.

Maryland requested rehearing *en banc*, which the Fourth Circuit granted, and upon rehearing *en banc*, it reversed the panel. The court based its ruling primarily on dicta in Footnote 9 of *Bruen*, and ruled that "'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." *Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 222 (4th Cir. 2024). The court ruled that a plaintiff must "rebut[] this presumption of constitutionality by showing that a 'shall-issue' licensing law effectively 'den[ies]' the right to keep and bear arms," then "the burden shifts to the

government to demonstrate that the regulation 'is consistent with this Nation's historical tradition of firearm regulation.'" *Id.* at 223.

In dissent, Judge Richardson argued that *Bruen* offers no "basis for limiting the term 'infringe' to total or effectively total deprivations of the right to keep or bear arms." *Id.* at 244 (Richardson, J., dissenting). He argued that the licensing law implicates ownership of a firearm, thus "regulat[ing] conduct protected by the Second Amendment's plain text." *Id.* at 240 (Richardson, J., dissenting). He then argued that Maryland's proffered historical "dangerous persons" analogues only banned possession by persons demonstrated to be dangerous. By contrast, he argued, "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." *Id.* at 248.

SUMMARY OF ARGUMENT

Although this Court has been about as clear as it could be in its *Heller* and *Bruen* decisions to set out the methodology by which firearms challenges are to be evaluated, the Fourth Circuit has charted its own path, seeking to evade those decisions. First, it resisted the *Heller* test of "text, history and tradition," preferring for many years the two-step balancing test by which many firearms restrictions were constitutionally approved on the theory they did not

even implicate the Second Amendment. One would have thought that the *Bruen* case which rejected the two-step test was even more clear, but that test too has been circumvented. Under *Bruen*, a firearms restriction that violated the text of the Amendment is presumptively protected, subject only to a showing by the government of relevant historical restrictive analogues. But since the Maryland law in question had no historical analogue of any sort, the Fourth Circuit had to find a way to have the law fail the simple textual threshold, and that is what it did. Its approach was to take the position that only a complete ban violates the Amendment's text.

The Fourth Circuit has likely replaced the Ninth as the Circuit most hostile to gun rights. It appears there is something about the makeup of the federal judiciary which makes them hostile to the gun-owning American public. Rather than wait years to again issue a corrective decision, these *amici* urge this Court to act now before other Circuits adopt this flawed approach. Judges cannot simply say that guns are really dangerous, and use such emotional rhetoric to mask defiance of the Constitution. If "dangerousness" is to be the test, then the Second Amendment is a dead letter, dying at the hands of the judiciary. Judges must realize that guns are routinely used for defensive purposes, and there is no honor in depriving Americans of the right to protect themselves from criminals. And, judges should defer to the well-grounded historical view reflected in the Second Amendment's text that firearms are absolutely "necessary" to maintain liberty in America. Judges who cannot subordinate their own progressive views to

the text of the Constitution have no place on the federal bench.

ARGUMENT

I. THE FOURTH CIRCUIT MISCONSTRUED *BRUEN*.

A. The Fourth Circuit Rejected *Bruen's* Command that Conduct Covered by the Plain Text of the Second Amendment Is Presumptively Protected.

The Fourth Circuit's decision below was rendered well after *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and purported to follow it. It didn't. Rather, the Fourth Circuit followed basically the same approach it has taken for many years in narrowing, or circumventing, this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

This Court's *Heller* decision instructed that Second Amendment challenges would be based on a straightforward application of the Second Amendment's "text," informed by the history and tradition surrounding its ratification. *Heller* at 595. In dissent, Justice Breyer argued that the text could be overridden by balancing, allowing the Second Amendment to be applied selectively to permit abridgements of the "right to keep and bear arms" where the government had an important governmental interest. In this way, modern judges could make decisions as to which laws excessively infringed the Second Amendment and which did not. However, *Heller* expressly rejected

"judge-empowering 'interest-balancing inquir[ies']," explaining that the Second Amendment "is the very *product* of an interest balancing by the people." *Id.* at 634-35.

In order to sidestep *Heller*'s clear teaching, the Fourth Circuit joined most circuit courts applying a "two-step" test by which they balanced the "right" against the alleged "government interest." Under that test, "[i]f a 'core' Second Amendment right is [not] burdened, courts ... appl[ied] intermediate scrutiny and consider[ed] whether the Government can show that the regulation is 'substantially related to the achievement of an important governmental interest.'" *Bruen* at 18-19. As a result, in most circuits, including the Fourth, the right that the Framers provided "shall not be infringed" was being constantly infringed. "Despite the popularity of this two-step approach," *Bruen* made clear, "it is one step too many.... *Heller* does not support applying means-end scrutiny...." *Bruen* at 19. *Bruen* attempted to clear up any confusion, using explicit, clear language for its holding:

> [T]he standard for applying the Second Amendment is as follows: 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. [*Id.* at 24 (emphasis added).]

Judge Richardson noted in dissent below that the court below manifestly failed to follow *Bruen*'s holding. *Md. Shall Issue, Inc.* at 238-39. The Fourth Circuit ignored the rule it recently recognized that "as an inferior court, the Supreme Court's precedents do constrain us.... So even were we to correctly conclude that a Supreme Court precedent contains many infirmities and rests on wobbly, moth-eaten foundations, it remains the Supreme Court's prerogative alone to overrule one of its precedents. *Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021) (internal quotations omitted). Although *Bruen* is far from "wobbly," "moth-eaten," or likely soon to be overruled, as it did with *Heller*, the Fourth Circuit has found ways around *Bruen*'s holding that conduct covered by the plain text of the Second Amendment is "presumptively protected."

In a high-sounding paean to this Court's authority, the Fourth Circuit claimed that it "routinely afford[s] substantial, if not controlling deference to **dicta** from the Supreme Court...." *Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 222 (4th Cir. 2024) (emphasis added). But as Judge Richardson pointed out, the court used the stratagem of elevating dicta in a footnote above the authority of the holding itself. "[T]he majority stretches implications from Supreme Court **dicta** to establish a carveout from Supreme Court **doctrine**." *Id.* at 239 (Richardson, J., dissenting) (emphasis added). In reality, what the Fourth Circuit has done is more than just a carveout in *Bruen*'s doctrine. It is a reversal, through an illegitimate redefinition, of the word "infringe." Judge Richardson correctly noted that

the Fourth Circuit largely attempted to ground its decision in *Bruen*'s Footnote 9, which states:

> [N]othing 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. [*Bruen* at 38 n.9 (internal quotations omitted).]

Accordingly, the Fourth Circuit reached the wrong conclusion when it ruled, "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." *Md. Shall Issue, Inc.* at 222 (emphasis added). In so doing, the Fourth Circuit effectively reversed *Bruen*. Instead of the ability to keep and bear a firearm being "presumptively protected" as this Court required (*Bruen* at 24), it is Maryland's licensing regime that is "presumptively constitutional." The Fourth Circuit flipped on its head the constitutional presumption of

favoring the citizen's right to keep and bear arms, instead favoring the government's infringement of the right.

The Fourth Circuit has essentially resurrected its post-*Heller* balancing test without saying so. Judge Richardson's dissent notes that the Fourth Circuit elevates *Bruen* Footnote 9's dicta that a "shall issue" regime (unlike a "may issue") is presumptively constitutional, to a higher plane than *Bruen*'s express command that if conduct is covered by the plain text, it is presumptively protected. "Reading Footnote Nine [as the majority does] risks elevating perceived implications from dicta over doctrine." *Md. Shall Issue, Inc.* at 242 (Richardson, J., dissenting). It reverses the presumption from one favoring possession to one against possession. The court erred and should be reversed.

B. The Fourth Circuit Misread *Bruen* to Hold that Anything Less than an Effective Ban Is Not an Infringement.

The Fourth Circuit hinged much of its decision on Footnote 9's dicta that "shall issue" laws "do not necessarily prevent" the exercise of the right to keep and bear arms. This Court stated in that footnote that "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." *Bruen* at 38 n.9. The Fourth Circuit then converted this Court's "example" into a "holding"

— that if "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.'" *Md. Shall Issue, Inc.* at 223 (emphasis added) (quoting *Bruen* at 38 n.9). Now, as the Fourth Circuit sees it, unless the plaintiff can show that his right is "effectively denied," his claim conveniently dies at *Bruen*'s first step. That is, of course, not remotely what *Bruen* held.

As Judge Richardson noted in dissent, the Fourth Circuit "contriv[es] a creative way" around *Bruen*'s holding. It argues that:

> each of the Supreme Court's recent Second Amendment cases involved laws that "banned or effectively banned the possession or carry of arms." ... 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 243 (Richardson, J., dissenting) (emphasis added).]

The majority creatively managed to read "infringe" as "effectively ban." Having done so, it neatly avoided having to proceed to the second *Bruen* step of even examining whether there are historical analogues to licensing laws requiring the applicant to demonstrate "non-dangerousness" before being able to exercise the

right. Now, "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." *Id.* at 212. Since a licensing requirement is not an "effective ban," *voila*, it is not an infringement. And the Fourth Circuit pretended it was following *Bruen*.

Judge Richardson drove home the falsity of the Fourth Circuit's approach. "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." *Id.* at 244 (Richardson, J., dissenting). He added, "[o]ther 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))." *Id.*

Judge Richardson adds, "[f]inally, lest there be any doubt, the Court in *Bruen* contemplated challenges to laws that impose burdens short of total prohibitions on the right, such as sensitive-place restrictions. 597 U.S. at 30 (discussing how to analogize modern sensitive-place restrictions to historical ones)." *Id.* at 244-45 (Richardson, J., dissenting).

Finally, Judge Richardson cited this Court's decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), which also makes clear that restrictions on arms-bearing conduct short of "effective bans" still constitute "infringement." "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))." *Md. Shall Issue, Inc.* at 245 (Richardson, J., dissenting).

Judge Richardson does his best to drive the majority back to *Bruen*'s crystal-clear holding. Had that court attempted to follow *Bruen*, rather than to circumvent it, the first step would have been quite simple. Handguns are arms (*see Heller* at 629 ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home")). A mandatory process that must be completed in order to purchase that arm "regulates arms-bearing conduct," since the citizen has no ability to "keep" or "bear" an arm he cannot obtain. *Rahimi* at 1897. Thus, purchasing that arm is covered by the Amendment's plain text. Accordingly, had the Fourth Circuit attempted to follow *Bruen*, nothing would have remained but to go to the second step, to determine whether the regulation closely tracks with relevant historical analogues.

However, by redefining "infringe" as "effectively ban" — which *Bruen* expressly does not do — the

Fourth Circuit reopened the pre-*Bruen* door to upholding any regulation judges may desire, short of a complete ban. Judges are re-empowered, without the need for the proscribed "interest-balancing test," simply by neatly redefining the word "infringe" in a way wholly contrary to *Bruen*.

C. Federal Judges Are People Too.

Without question, the majority of circuit court judges have viewed the *Heller* and *Bruen* decisions with at least skepticism, but more often more with hostility. The preconceptions of federal court judges help us understand why they have such visceral hostility to "the right to keep and bear arms." One can speculate about some factors which may help judges form their preconception that most restrictions on the acquisition and carrying of firearms are good for the society, the Constitution notwithstanding.

- First, *Heller* stripped federal judges of the power to make case-by-case determinations to approve firearms restrictions they believe reasonable, and strike down those they believe unreasonable. No one enjoys having their powers curtailed.
- Second, *Heller* requires federal judges to subordinate their progressive views to the old-fashioned views of the Framers of the Second Amendment.
- Third, most federal judges are drawn from the families of the educational and financial elites of America, often unfamiliar with firearms. These judges may never even have shot a BB

gun — based on parental fear they might put someone's eye out. Probably, few were given a .22 single shot rifle as a Christmas present when they were teenagers. As a consequence, many federal judges may never have even fired a firearm, nor would they allow one in their home. Such views are easier to adopt when being protected by living in wealthy, often gated communities and protected by armed U.S. Marshals.

- Fourth, aside from the ultra-wealthy who hunt, most federal judges have had no connection to hunting, either for food or as sport. Those who own firearms are looked down on by many in government. A former President said about political opponents: "it's not surprising then that they get bitter, **they cling to guns** or religion ... as a way to explain their frustrations."[2]
- Fifth, many federal judges are former federal prosecutors who view firearms only as tools of criminals.
- Sixth, as part of the nation's ruling class, federal judges are resistant to the notion that the Framers wanted an armed citizenry to better resist tyranny, as that hostility to tyranny could include resistance to them as part of the federal government.

The treatment of the Second Amendment by some circuits is so obvious, that it is made fun of by other

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[2] "Obama: 'They cling to guns or religion'," *Christianity Today* (Apr. 13, 2008) (emphasis added).

judges. As Judge Vandyke explained, "In the Ninth Circuit, if a panel upholds a party's Second Amendment rights, it follows automatically that the case will be taken en banc" by the Ninth Circuit. *United States v. Duarte*, 108 F.4th 786, 787 (9th Cir. 2024) (Vandyke, J., dissenting from grant of rehearing en banc). Much like the Fourth Circuit in this case, the "Ninth Circuit is going to joyride *Rahimi* and the GVRs that followed it like a stolen Trans Am...." *Id.* 788.

In another case in which Judge Vandyke was explaining the common denominator for the Ninth Circuit's consistency in ruling against Second Amendment rights: "The answer is a simple four-letter word: guns." *Mai v. United States*, 974 F.3d 1082, 1097 (9th Cir. 2020) (Vandyke, J., dissenting from denial of rehearing en banc). The plaintiff in that case was "another innocent casualty of [the Ninth Circuit's] demonstrated dislike of things that go bang." *Id.*

D. The Fourth Circuit Has a Long Record of Evading the *Heller* Decision.

In April 2009, less than one year after *Heller* was decided, Fourth Circuit Judge J. Harvie Wilkinson used a law review article to signal his displeasure with the *Heller* decision, calling on other courts to join him in expressing their disagreement. Judge Wilkinson acknowledged the "duty of judges on the inferior federal courts to follow, both in letter and in spirit, rules and decisions with which we may not agree," before telegraphing the type of "massive resistance"

that his Court employed to evade *Heller,* because "esteem can likewise be manifest in the **respectful expression of difference** — that too is the essence of the judicial craft."[3]

It did not take the Fourth Circuit long to manifest its "difference" with this Court with its decision in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), where this Court eschewed *Heller's* warnings against interest-balancing and applied the two-step test which was later repudiated in *Bruen*. Actually, the 2022 *Bruen* decision criticized three of this Court's decisions dismissing Second Amendment challenges to firearm restrictions. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), was identified as an example of the two-step test this Court was rejecting. *See Bruen* at 18-19. In *Kolbe*, the Fourth Circuit had upheld another section of the Maryland 2013 Firearms Safety Act which bans (i) so-called "assault weapons" and (ii) so-called "large-capacity magazines" that hold more than 10 rounds of ammunition.

The *Bruen* decision also called out for criticism *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) and *Harley v. Wilkinson*, 988 F.3d 766 (4th Cir. 2021). *See Bruen* at 15 and 19, n.4. In *Masciandaro*, the Fourth Circuit upheld a conviction for possession of a firearm on National Park Service property. Ignoring *Heller*'s *express* disavowal of interest balancing (*Heller* at 634), *Masciandaro* used

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[3] J. Wilkinson, "Of Guns, Abortions, and the Unraveling Rule of Law," 95 VA. L. REV. 253, 255-256 (Apr. 2009) (emphasis added).

intermediate scrutiny. In *Harley*, the Fourth Circuit once again applied the two-step test and upheld the federal ban on firearms possession by a person who has been convicted of a misdemeanor crime of domestic violence. The court applied intermediate scrutiny and rejected a challenge to the law.

Then, just a week after *Bruen* was decided, this Court vacated the Fourth Circuit's decision in *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021), and remanded it for reconsideration in light of *Bruen*. *See Bianchi v. Frosh*, 142 S. Ct. 2898 (2022). *Bianchi* involved an earlier challenge to Maryland's Firearm Safety Act, and the Fourth Circuit had rejected the challenge as foreclosed by its *en banc* decision in *Kolbe* in a one-paragraph *per curiam* opinion.

Now, on remand, the Fourth Circuit has treated *Bruen* with the same "expression of difference" as it previously treated *Heller*. As the dissent noted, the majority employed "exaggerated and hyperbolic" emotional rhetoric, "waxing poetic about the dangers of gun violence and the blood of children," as a cover for its unfaithful application of the Second Amendment and this Court's precedents. *Bianchi v. Brown*, 111 F.4th 438, 520, 532 (4th Cir. 2024) (Richardson, J., dissenting).

The court's antipathy to firearms jumps off the page, seeming shocked at the notion that firearms are dangerous. It obsessed about "a plague of gun violence." *Id.* at 441. "Arms upon arms [creating] a stampede toward the disablement of our democracy." *Id.* at 442. "[A]n AR-15 wound will literally pulverize

the liver, perhaps best described as dropping a watermelon onto concrete." (*Id.* at 455 (internal quotation omitted)). "[C]hildren's bodies stacked up ... like cordwood on the floor." *Id.* at 463 (internal quotation omitted). "[B]lood in the street, bodies in the street while bullets blazed through the sky." *Id.* (internal quotation omitted). It is clear that the Patriots who fought against the British at Lexington and Concord in 1775, of the same generation of men who ratified the Second Amendment in 1791, were grateful that they had dangerous weaponry available to defend our liberties.

With such innate antipathy to firearms, the Fourth Circuit could not hide its "at all costs" determination to uphold Maryland's legislative choice, to adopt Maryland's policy balance of "public safety" over the right of armed self-defense. The majority opinion and concurrences clearly have engaged in balancing, as they prefer to disarm Marylanders rather than follow the Constitution.

- "[W]e decline to wield the Constitution to declare that military-style armaments which have become primary instruments of mass killing and terrorist attacks in the United States are beyond the reach of our nation's democratic processes," the court said. *Id.* at 442.
- "[I]n creating a near absolute Second Amendment right ... the dissent strikes a profound blow to the basic obligation of government to ensure the safety of the governed." *Id.*

- "The Second Amendment, as elucidated by *Heller* and *Bruen*, does not require courts to turn their backs to democratic cries — to pile hopelessness on top of grief." *Id.* at 472-473.

These recent pronouncements are reminiscent of Judge Wilkinson's concurrence in *Kolbe v. Hogan*, where he anguished that the Second Amendment "impair[ed] the ability of government to act prophylactically," fearful that the Court would have to "bide our time until another tragedy is inflicted or irretrievable human damage has once more been done." *Kolbe* at 150 (Wilkinson, J., concurring). Constitutional rights cannot be properly interpreted by judges who are fearful of what the Founders provided. As Justice Alito rightly noted, the Second Amendment is not "the only constitutional right that has controversial public safety implications." *McDonald v. Chicago*, 561 U.S. 742, 783 (2010).

II. MARYLAND'S LAW FAILS TO PASS MUSTER UNDER THE *BRUEN* TEST.

A. The Second Amendment's Text Protects the Act of Acquiring a Handgun.

The right to acquire a handgun is the *sine qua non* of the plain text of the Second Amendment. One cannot lawfully "keep" a weapon one cannot lawfully acquire.[4] And beyond question a handgun is an arm.

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[4] *See, e.g.*, *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017); *Lynchburg Range & Training v. Northam*, 105 Va. Cir. 159, 162 (Lynchburg Cir. Ct. 2020) ("'The right to possess firearms for

Heller cited Cunningham's 1771 dictionary that defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Heller* at 581. *Heller* made clear that "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. As the *Heller* Court noted, "the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 629. An infringement on acquisition of arms is also necessarily an infringement on "keeping" (*i.e.,* having) weapons.

B. There Is No Historical Analogue to Support Maryland's Permitting and 30-Day Waiting Period Requirements.

There is no relevant historical analogue to support the ability of a state to impose an additional "licensing" or "permitting" requirement. In fact, "at no time between 1607 and 1815 did the colonial or state governments of what would become the first 14 states exercise a police power to restrict the ownership of guns by members of the body politic. In essence, American law recognized a zone of immunity surrounding the privately owned guns of citizens."[5]

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protection implies a corresponding right to acquire and maintain proficiency in their use....'").

[5] R. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," 25 LAW AND HISTORY REVIEW 139, 142 (Spring

Eventually, states began to impose licensing requirements. But, as Professor David Kopel notes, "[a]ll of the pre-1900 licensing laws were systemically racist, an enduring problem for some gun control laws, then and now. With one exception (Florida 1893), all of the licenses were textually applicable only to people of color. The Florida law was textually neutral, but was never enforced against white people."[6] Indeed, in 1941, in a concurring opinion, a Florida judge noted the overtly racist intent and enforcement of the one facially neutral 19th-century licensing law:

> **[T]he Act was passed for the purpose of disarming the negro** laborers ... and to give the white citizens in sparsely settled areas a better feeling of security. The statute **was never intended to be applied to the white population** and in practice **has never been so applied**. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute.... [*Watson v. Stone*, 148 Fla. 516, 524 (Fla. 1941) (Buford, J., concurring) (emphasis added).]

With regard to firearm purchase waiting periods, "there is not an iota of pre-1900 historical precedent for waiting period laws." Kopel, *supra.* Here, as well,

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2007).

[6] D. Kopel, "Colorado bill forcing delay of firearms acquisition on shaky constitutional ground," *Complete Colorado* (Mar. 1, 2023).

Maryland concedes 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." Petition for Certiorari at 32.

Today, only 10 states and the District of Columbia impose waiting periods.[7] Moreover, "[f]orced delays in firearms acquisition by adults did not exist when the Second Amendment was ratified in 1791, nor in 1868, when the Fourteenth Amendment was ratified."[8] Thus, "[u]nder modern Supreme Court doctrine, this is an easy case. There were no waiting periods on firearms or other arms anywhere in the United States before 1900. The first waiting period law was enacted in California in 1923, a one-day wait for handgun sales." *Id.* Neither the licensing requirement nor the up to 30-day waiting period is in any way "consistent with this Nation's historical tradition." *Bruen* at 38.

III. BOTH *BRUEN* AND *RAHIMI* PLACE THE "DANGEROUSNESS" BURDEN ON THE GOVERNMENT, NOT THE CITIZEN.

Bruen is clear that once a plaintiff has shown that his conduct is protected by the Second Amendment's plain text, "the burden falls on [the government] to show that [the challenged regulation] is consistent with this Nation's historical tradition of firearm

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[7] "Waiting periods for guns by state," *WorldPopulationReview.com*.

[8] Kopel, *supra*.

regulation." Aside from simply showing that his conduct involves "keeping arms" or "bearing arms," the citizen has no burden. As Judge Richardson noted in his dissent below, this Court in *Rahimi* reiterated the fact that the burden to justify the regulation falls exclusively on the government, and that the citizen is presumed to have the right to keep and bear. This Court reiterated that "when the Government regulates arms-bearing conduct, ... it bears the burden to 'justify its regulation.'" *Rahimi* at 1897 (quoting *Bruen* at 24).

In *Rahimi*, this Court found colonial-era surety laws relevant analogues to a temporary ban on possession by individuals under domestic violence restraining orders. Analogizing to *Bruen*, this Court noted:

> In *Bruen*, we explained that the surety laws were not a proper historical analogue for New York's gun licensing regime.... What distinguished the regimes, we observed, was that the surety laws "presumed that individuals had a right to ... carry," whereas New York's law effectively presumed that no citizen had such a right, absent a special need.... Section 922(g)(8)(C)(i) does not make the same faulty presumption. To the contrary, it presumes, like the surety laws before it, 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. [*Rahimi* at 1902.]

Further, *Rahimi* made clear, "Section 922(g)(8) applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another.... That matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at 1901-02. *Rahimi* thus stands for the proposition that the government must prove dangerousness; the citizen's non-dangerousness and entitlement to keep and bear arms, rather, is presumed.

Under *Rahimi*, not only is the burden on the government to justify the regulation, but the constitutional presumption must also fall in favor of keeping and bearing arms, not against it. In stark contrast, Maryland's law makes its citizens wait until the government gets around to convincing itself that a given citizen is not dangerous. The Fourth Circuit inverts the presumptions and burdens imposed by the Second Amendment, and reiterated in both *Bruen* and *Rahimi*.

IV. BY DELAYING ACCESS TO FIREARMS, MARYLAND EVISCERATES THE RIGHT FOR A LENGTHY PERIOD, RISKING DEADLY CONSEQUENCES.

Although Maryland may describe its statute as simply imposing a modest delay on the acquisition of handguns, it should be viewed as completely preventing the acquisition of such firearms for a protracted period. Such a ban imposes costs and burdens on Marylanders, in many cases costing lives.

Two well known historical examples illustrate the problem of delaying access to handguns for self-defense.

In March 1991, Bonnie Elmasri called to seek a firearms permit to protect herself from an abusive husband who had threatened her life.[9] She was told she could not purchase a weapon until after a 48-hour waiting period. "But unfortunately, Bonnie was never able to pick up her gun. She and her two sons were killed the next day by an abusive husband of whom the police were well aware." *Id.*

On April 21, 2015, Carol Bowne sought a firearms license in New Jersey. She had a protective order against ex-boyfriend Michael Eitel. The local police chief failed to act on her application, and in June, Eitel went to Bowne's home and stabbed her to death.[10] *Id.* The delay in approving her firearms license application proved fatal.

The general rule is that any constitutional violation, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Although that rule is often overlooked in terms of the Second Amendment, that act of judicial neglect can be the cause of consequences more severe than the deprivation of most

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[9] Gun Owners of America, "GOA laments first 'Brady victim,'" *GunOwners.org* (Mar. 30, 2021).

[10] P. Chiaramonte, "'No one helped her': NJ woman murdered by ex while awaiting gun permit," *Fox News* (June 10, 2015).

rights: "A person who is denied the right to bear arms for a week may, at the end of the week, be dead."[11]

In *Bruen*, this Court made clear that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 70 (quoting *McDonald v. City of Chicago* at 780). Maryland generally does not require a license to exercise a First Amendment right, let alone imposing a delay of 30 days, even allowing residents to register to vote on **the same day** as exercising the right.[12] Yet, Maryland continues erecting barriers to the exercise of what its laws treat as a "second class right" — the Second Amendment right of effective self-defense.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[11] D. Kopel, "Why gun waiting periods threaten public safety" at 52, *Independence Institute* (Sept. 21, 1993).

[12] *See* Maryland State Board of Elections, The Registration Process, "When may I apply to register to vote?" ("You can also register to vote during early voting or on election day.")

Respectfully submitted,

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