No. 24-373

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

REPLY BRIEF FOR PETITIONERS

JOHN PARKER SWEENEY
Counsel of Record
JAMES W. PORTER, III
W. CHADWICK LAMAR, JR.
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L STREET NW
WASHINGTON, DC 20036
(202) 719-8216
jsweeney@bradley.com

Counsel for Petitioner Atlantic Guns, Inc.

(additional counsel listed on inside cover)

December 23, 2024

CARY J. HANSEL, III
2514 N. Charles St.
Baltimore, MD 21218
Phone: (301) 461-1040
cary@hansellaw.com

MARK W. PENNAK
MARYLAND SHALL ISSUE, INC.
9613 Harford Rd.,
Suite C #1015
Baltimore, MD 21234
Phone: (301) 873-3671
m.pennak@me.com

Counsel for Petitioners Maryland Shall Issue, Inc., Deborah Kay Miller, and Susan Brancato Vizas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY BRIEF

The State of Maryland's brief in opposition confirms that it has neither text nor history on its side. Maryland hangs the defense of its novel and burdensome Handgun Qualification License ("HQL") Requirement on a single slender thread—inapposite dicta in *Bruen*'s footnote 9. But that footnote dealt with "shall-issue" licenses for public carry (bearing), which is textually and historically distinct from licenses for possession (keeping). Footnote 9 did not alter the original public meaning of "infringe." Nor did it exempt even "shall-issue" carry regimes from faithful text-and-history analysis or declare that all "shall-issue" licensing regimes are constitutional, as Maryland claims. Footnote 9 cannot bear the weight Maryland imposes on it.

The decision below, upholding the HQL Requirement as not even triggering the Second Amendment's textual protections, is irreconcilable with this Court's Second Amendment cases. The en banc Fourth Circuit's cramped and narrow textual reading of "infringe" is not grounded in this Court's jurisprudence and deepens substantive and methodological circuit splits. Intervention is necessary to prevent further infringement on the acquisition and possession of protected arms based on dicta about issues that were "simply not presented." *United States v. Rahimi*, 602 U.S. 680, 702 (2024).

This Court's precedents require lower courts at the textual-analysis stage to apply the original public meaning of each of the Second Amendment's terms, including "infringe[]." But the Fourth Circuit openly disregarded the Founding Era meaning of "infringe."

App.27a. Just like the Fourth Circuit, Maryland now defends the HQL Requirement solely by misappropriating *Bruen*'s footnote 9 from its carry-license context, misconstruing what it says, and injecting it into the textual analysis, to distort beyond recognition "the Second Amendment's 'unqualified command'" not to infringe the right. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). The HQL Requirement undoubtedly infringes the right.

The HQL Requirement fares no better when measured against historical tradition than it did against the text. Maryland offers no sound historical defense; it again invokes footnote 9 and references a tradition of disarming dangerous individuals after a determination of dangerousness has been made. But the HQL Requirement is an ahistorical and burdensome precondition on every Marylander's exercise of Second Amendment rights. It has no historical antecedent and is unconstitutional.

Maryland fails to rebut that this case presents deepening circuit splits concerning both the original public meaning of "infringe"—*i.e.*, what nature and degree of restrictions satisfy the textual inquiry—and whether dicta can substitute for the text-and-history analysis. Maryland's invocations of prematurity and percolation are especially weak given Maryland's heavy reliance on "guidance" it has taken from footnote 9's public-carry discussion. Given how far afield from *Bruen* the Fourth Circuit has strayed, this Court's review would surely aid lower courts weighing Second Amendment challenges.

Only this Court can confirm that footnote 9 did nothing more than defer the historical analysis of

shall-issue carry-license regimes to a later day. That footnote did not alter—let alone supplant—the governing text-and-history analysis, and it certainly cannot sustain Maryland's possessory licensing regime. The Court should grant certiorari to forestall further elevation of dicta that threatens to swallow *Bruen*'s text-and-history standard whole.

ARGUMENT

I. Maryland's dicta dependent defense conflicts with this Court's precedents.

A. Like the Fourth Circuit, Maryland makes no effort to ground its textual argument in the original public meaning of the Second Amendment's text. *Contra Bruen*, 597 U.S. at 32 (finding "little difficulty" holding the textual inquiry satisfied based on Founding Era "definition[s]"). The State ignores this Court's repeated command to conduct the "textual analysis" by focusing "on the normal and ordinary meaning of the Second Amendment's language," *id.* at 20 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–77, 578 (2008)) (quotation marks omitted), as it would "have been known to ordinary citizens in the founding generation," *Heller*, 554 U.S. at 577. Maryland does not even try to rebut that the Founders understood "infringe[]" to cover, as a matter of plain text, any restriction that hinders or obstructs the acquisition, keeping, or bearing of arms for offensive or defensive action. (Pet. 17 (relying on the same Founding Era sources that this Court used in *Heller*); App. 65a–67a (Richardson, J., dissenting)).

Maryland instead defends the Fourth Circuit's holding that the HQL Requirement does not even trigger the Second Amendment's textual protections

with nothing but *Bruen*'s dicta about shall-issue carry-license regimes. (Br. in Opp. 20). Maryland parrots the Fourth Circuit's rationale that footnote 9 "introduced a more nuanced consideration of the concept of 'infringement,'" without any attempt to explain what that conjured notion even means, let alone how it is consistent with textual-analysis methodology. (*Id.* at 21). Manufacturing inferences from footnote 9 is clearly not textual analysis at all.

Because the original public meaning of "infringe" includes temporary and otherwise less-than-total deprivations of protected conduct, the Second Amendment's textual protections are triggered here. Maryland itself acknowledges that licensing schemes such as the HQL Requirement "impact" citizens' ability to have and use firearms for self-defense. (*Id.*). Any justification for such an infringement can come only from history—not from a too-narrow reading of the text and certainly not from footnote 9's dicta that is manifestly inapplicable to the issues in this case.

Footnote 9 does not even say what Maryland claims is says: that any and all "shall-issue" licensing regimes are entirely insulated from judicial review. But that is not the case. The Court merely reserved scrutiny of the historical "pedigree of shall-issue licensing regimes" for later cases. (App.62a (Richardson, J., dissenting)). Maryland's reliance on footnote 9 suffers the same flaw as the argument rejected in *Rahimi* that only "responsible" citizens have Second Amendment rights. 602 U.S. at 702. Just like the issue of responsibility, "[t]he question" of whether shall-issue possession-licensing regimes (or, for that matter, any shall-issue regimes) are

constitutional "was simply not presented" in *Bruen*. *Id.* That footnote thus cannot be construed as "approving" of regimes like Maryland's HQL Requirement, since it did not even consider them. (Br. in Opp. 21); *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

Maryland also misreads footnote 9 in several other ways. The footnote self-evidently had nothing to do with textual analysis, nor does it even mention infringement. The footnote came after the Court "turn[ed] to [New York's] historical evidence"; it was appended to a sentence discussing historical tradition, not text; and it contrasted the burdens of may-issue with shall-issue regimes (a historical inquiry). *Bruen*, 597 U.S. at 38 & n.9. The footnote had nothing to say about licenses to acquire and possess a firearm—it concerned public carry. Although "[n]othing in the Second Amendment's **text** draws a home/public distinction," *id.* at 32 (emphasis added), possession and carry **are** distinct as a matter of historical tradition. Public carry "has traditionally been subject to well-defined restrictions" that were not applicable to mere acquisition and possession. *Id.* at 38. Footnote 9's dicta about public carry cannot justify restrictions on possession, including in the home where the need for "defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. Nor can it justify the State's result-driven textual analysis.

Maryland also made no effort to rebut Petitioners' demonstration (*see* Pet. 18–19) that the Fourth Circuit's decision is incompatible with this Court's cases interpreting the Second Amendment and other guarantees found in the Bill of Rights. Each Second Amendment case involved a law imposing a

temporary or less-than-total deprivation of the right to keep and bear arms. *See, e.g.*, *Rahimi*, 602 U.S. at 699 (temporary disarmament); *Bruen*, 597 U.S. at 16 (recognizing the plaintiffs could carry to certain places or for certain purposes); *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (ban only on stun guns); *Heller*, 554 U.S. at 629 (ban only on handguns).

The Fourth Circuit was wrong to declare that this Court's cases triggered the Second Amendment's textual protections because each involved laws that "effectively banned the possession or carry of arms." (App.14a). And even if the Fourth Circuit were correct, that distinction still would not support a finding that **only** permanent or total deprivations satisfy the text: "[t]he distinction between laws burdening and laws banning [protected conduct] is but a matter of degree." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000). A law that burdens (but does not ban) protected conduct must be justified by historical tradition all the same. *Rahimi*, 602 U.S. at 691 (requiring a historical tradition "when the Government **regulates** arms-bearing conduct" (emphasis added)).

Worse still, Maryland and the Fourth Circuit have disregarded the methodology that the Second Amendment "demands": analysis of "text, as informed by history." *Bruen*, 597 U.S. at 19. The Fourth Circuit expressly declined to address the original public meaning of the text, App.27a, and upheld the HQL Requirement without reaching historical tradition, App.32a. It elevated dicta to evade the required text-and-history standard. This Court must intervene now to prevent resurgence of the methodological distortions that necessitated *Bruen* in the first place.

B. Recognizing the infirmity of the Fourth Circuit's textual analysis, Maryland retreats to historical tradition. But this argument fares no better. Under *Bruen*, a firearm restriction is unconstitutional unless the government "affirmatively prove[s]" that the restriction is justified by "a comparable tradition of regulation." 597 U.S. at 19, 27. All that Maryland can muster is another invocation of footnote 9 and an abstract reference to a tradition of individualized dispossession of "dangerous individuals." (Br. in Opp. 21–23). But the HQL Requirement's blanket precondition on possession cannot be justified by fusing footnote 9 with a dangerousness tradition.

Maryland's historical argument begins with another overreading of footnote 9. But *Bruen* did not suggest that shall-issue carry-license regimes are comparable to historical laws disarming dangerous individuals or classes, as Maryland argues. Nor could *Bruen* have done so consistently with its two requisite analytical metrics: "how" and "why" the regulations burden Second Amendment rights. 597 U.S. at 29.

Historical laws disarming dangerous persons do not share a remotely "comparable burden on the right of armed self-defense" with Maryland's law. *Id*. As Judge Richardson explained, "[e]very 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." App.73a. Maryland's HQL Requirement operates through an ex ante enforcement mechanism by preemptively disarming the entire public, which Maryland admits is different from "historical laws that disarmed individuals only after they were

determined to be dangerous." (Br. in Opp. at 22). But laws that "broadly restrict arms use by the public generally" are not relevantly similar to historical individualized disarmament of dangerous persons. *Rahimi*, 602 U.S. at 698. And *Bruen* rejected an analogy to historical surety laws for New York's licensing regime, precisely because of their disparate burdens and enforcement mechanisms. 597 U.S. at 56. The HQL Requirement burdens conduct far "beyond what was done at the founding" and violates the Second Amendment. *Rahimi*, 602 U.S. at 692.

Second Amendment rights are not contingent on navigating "administrative burden[s]" or obtaining "government approval." (Br. in Opp. 22). The opposite is true: The Second Amendment is "self-executing," and Maryland "transgresse[d] it as soon as the State implement[ed] a licensing regime" unsupported by our Nation's historical tradition. *Wilson v. Hawaii*, --- S. Ct. ----, 2024 WL 5036306, at *3 (Dec. 9, 2024) (Statement of Thomas, J.). There is no historical tradition of conditioning the acquisition and possession of a handgun upon completion of a burdensome licensing regime—much less completion of one scheme (HQL Requirement) that the citizen must endure only as a prerequisite to another redundant regime (77R Registration).[1] The HQL Requirement is ahistorical and thus unconstitutional.

---

[1] Even if footnote 9 were instructive for historical scrutiny, the HQL Requirement still violates the Second Amendment because it is functionally redundant of the State's preexisting acquisition-and-possession licensing regime (77R Registration). It constitutes an "abusive" and unnecessary restriction that remains unconstitutional even under the Fourth Circuit's construction of footnote 9's dicta. *Bruen*, 597 U.S. at 38 n.9.

II. Review would allow this Court to resolve two circuit splits.

The Fourth Circuit's decision worsens conflicts among lower courts over the original public meaning of "infringe" and whether this Court's dicta allow states to evade faithful text-and-history analysis. (Pet. 27–30).

Maryland does not dispute that the decision below conflicts with the Third Circuit's holding that the Second Amendment's plain text "forbids lesser violations that hinder" protected conduct. *Frein v. Penn. State Police*, 47 F.4th 247, 254 (3d Cir. 2022); *accord United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (similarly construing "infringed"). The Fourth and Fifth Circuits have deployed footnote 9 to hold that various preconditions to possession are not "covered by the plain text" absent exceptional abuse. App.4a–5a (HQL Requirement); *McRorey v. Garland*, 99 F.4th 831, 838–39 (5th Cir. 2024) (expanded background check).

Maryland blithely dismisses this case as "distinct" from *Frein*. (Br. in Opp. at 27). But *Frein* faithfully applied the Founding Era definition of "infringe." 47 F.4th at 254. And Maryland cannot deny, as a matter of text, that the Second Amendment's terms must always have "the same meaning," *Torres v. Madrid*, 592 U.S. 306, 332 (2021) (Gorsuch, J., dissenting), or that any context-specific limitations are the result of "historical tradition," *Bruen*, 597 U.S. at 19. Granting certiorari would allow the Court to resolve this textual-analysis-stage conflict.

Maryland similarly fails to dispute that lower courts disagree over the role of dicta within the text-and-history analysis, which the Fourth Circuit's decision has deepened. *Contrast United States v. Williams*, 113 F.4th 637 (6th Cir. 2024) (holding that *Bruen* forbids "applying *Heller*'s dicta uncritically"), *and Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023) (rejecting attempt to invoke dicta as a "sidestep" to text and history), *with Antonyuk v. James*, 120 F.4th 941, 983 (2d Cir. 2024) (construing footnote 9 as "approv[ing] of 'shall-issue' licensing regimes"). That disagreement worsens by the day. The Tenth Circuit recently invoked *Heller*'s dicta about restrictions "on the commercial sale of arms" to (incorrectly) justify holding that 18-to-20-year-olds have no textually protected right to buy a firearm. *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 119–20 (10th Cir. 2024) (holding that "an aged-based" restriction "falls outside of the scope of the Second Amendment's right to 'keep and bear' arms"). The Tenth Circuit's textual error also creates an irreconcilable conflict with *Worth v. Jacobson*, 108 F.4th 677, 683 (8th Cir. 2024), where the Eighth Circuit held that Minnesota's age-based carry ban violates the Second Amendment.

Maryland again casts aside this conflict as "illusory," suggesting that review would be unlikely to "benefit" lower courts. (Br. in Opp. at 27, 29). But its own defense of the HQL Requirement belies that claim—the State defends its law by transplanting dicta about carry-license regimes into a dispute about acquisition and possession.

Certiorari would aid lower courts weighing how to reconcile their duty to conduct the text-and-history analysis with this Court's dicta. And a decision that

footnote 9 should not have substantively altered the Fourth Circuit's *Bruen* analysis would immediately correct other lower courts' rights-eviscerating efforts in other contexts. The Court should take this case and resolve these conflicts.

III. Correction of the Fourth Circuit's decision is necessary now.

The Court should grant certiorari because of the exceptional importance of the question and issues presented. As demonstrated in the Petition, certain lower courts continue to creatively evade the text-and-history standard to uphold restrictive state laws. (Pet. 35–37). They defied *Heller* for more than a decade, and they will continue trying to defy *Bruen* until this Court intervenes.

Maryland provides no good reason to deny review. The State's plea for additional percolation rings hollow. (Br. in Opp. 29). The meaning of "infringe" is not a difficult interpretive question. The Court heard *Rahimi* despite the absence of a post-*Bruen* circuit split on the constitutionality of the precise kind of law at issue. And a case interpreting the Second Amendment too narrowly (this case) is no less deserving of review than one interpreting it too broadly (*Rahimi*). In any event, the State's weak percolation argument should be rejected in light of the Fourth Circuit's irreconcilable disregard of the Second Amendment's plain text, lower-court conflict over the meaning of "infringe," and the unwillingness of some lower courts to take the Second Amendment's command at its "unqualified" word.

The State also downplays the HQL Requirement's burdensome nature. It boasts that

approximately 200,000 Marylanders obtained HQLs between 2013 and 2020, (Br. in Opp. at 5–6), but omits that tens of thousands have been deterred from obtaining an HQL because of its attendant delays and burdens, *see* App.32a n.19. Maryland also lauds the "public safety benefits" of the HQL Requirement, (Br. in Opp. 6–7), while ignoring its unnecessary redundancies with the State's 77R Registration regime that, since 1966, has positively identified prohibited purchasers as well as handgun owners who subsequently became disqualified. And Maryland's not-so-subtle plea for interest balancing is irrelevant—no amount of public benefit can render constitutional a law that finds no support in our Nation's historical tradition.

Unless the Court intervenes now, the Second Amendment's protections will be defined by the outcome of unguided lower courts weighing the severity of the burden on Second Amendment rights imposed by novel firearm restrictions, like the HQL Requirement. That is little more than a reversion to the pre-*Bruen* step-two analysis, or even the interest-balancing test rejected in *Heller*.

The Court should grant certiorari in this case as well as in *Snope v. Brown*, No. 24-203, also presenting the Fourth Circuit's inability to faithfully apply the Second Amendment's plain text. At a minimum, if certiorari is granted in *Snope*, then the Court should hold this Petition pending the outcome of *Snope* to consider whether that decision warrants vacatur and remand here.

CONCLUSION

Petitioners respectfully request this Court grant the Petition for Writ of Certiorari and reverse the judgment below.

Respectfully submitted,

JOHN PARKER SWEENEY
Counsel of Record
JAMES W. PORTER, III
W. CHADWICK LAMAR, JR.
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L STREET NW
WASHINGTON, DC 20036
(202) 719-8216
jsweeney@bradley.com

Counsel for Petitioner Atlantic Guns, Inc.

CARY J. HANSEL, III
2514 N. Charles Street
Baltimore, MD 21218
Phone: 301-461-1040
cary@hansellaw.com

MARK W. PENNAK
MARYLAND SHALL ISSUE, INC.
9613 Harford Rd.,
Suite C #1015
Baltimore, MD 21234
(301) 873-3671
m.pennak@me.com

Counsel for Petitioners Maryland Shall Issue, Inc., Deborah Kay Miller, and Susan Brancato Vizas