

No. 18-2377

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIAN KIRK MALPASSO, *et al.*,

Plaintiffs-Appellants,

v.

WILLIAM L. PALLOZZI,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
(Ellen L. Hollander, District Judge)

BRIEF OF APPELLEE

BRIAN E. FROSH
Attorney General of Maryland

MARK H. BOWEN
Assistant Attorney General
1201 Reisterstown Road
Pikesville, Maryland 21208
Tel. (410) 653-4226

January 25, 2019

Attorneys for Appellee

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

William M. Pallozzi
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
 If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
 If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
 If yes, identify any trustee and the members of any creditors' committee:

Signature: Mark H. Bowen
 Counsel for: William M. Pallozzi

Date: November 26, 2018

CERTIFICATE OF SERVICE

I certify that on November 26, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Mark H. Bowen
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BRIEF OF APPELLEE

ISSUE PRESENTED FOR REVIEW

Did the district court correctly dismiss the plaintiffs' Second Amendment challenge to Maryland's requirement that applicants for a handgun wear-and-carry permit demonstrate that they have a good and substantial reason to wear, carry, or transport a handgun in public, where this Court previously upheld the

constitutionality of the challenged provision in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir.), *cert. denied*, 571 U.S. 952 (2013)?

STATEMENT OF THE CASE

The plaintiffs-appellants, Brian Kirk Malpasso and the Maryland State Rifle and Pistol Association, Inc. (the “plaintiffs”), filed this action seeking declaratory and injunctive relief to prevent the defendant-appellee, the Secretary of the Maryland State Police (“MSP”), from enforcing provisions of Maryland’s handgun wear-and-carry permit laws against them. The plaintiffs allege that the requirement of Maryland’s handgun permit law that an applicant demonstrate “good and substantial reason to wear, carry or transport a handgun” violates the Second Amendment to the United States Constitution.

Maryland’s Handgun Permit Law

Subject to numerous exceptions, Maryland law generally makes it a misdemeanor to wear, carry, or transport a handgun on one’s person or in a vehicle. Md. Code Ann., Criminal Law (“CL”) § 4-203(a).¹ Exceptions include the wear, carry, or transport of a handgun:

- in one’s home or business or on property one owns, CL § 4-203(b)(6);

¹ The criminal and permit statutes relevant to this case apply only to handguns. Maryland’s permit laws do not apply to other firearms, including rifles, shotguns, or other “long guns.”

- in connection with, among other activities, hunting, trapping, a target shoot, formal or informal target practice, a sport shooting event, certain firearms and hunter safety classes, or an organized military activity, CL § 4-203(b)(4);
- in the moving of a gun collection for exhibition by a bona fide gun collector, CL § 4-203(b)(5);
- by a supervisory employee in the course of business under certain conditions, CL § 4-203(b)(7); and
- while transporting the handgun between places or activities where the individual is allowed to possess it, CL § 4-203(b)(3).

Maryland law generally requires an individual who wants to wear and carry a handgun: (i) in public; (ii) outside of these and other protected places; and (iii) apart from these and other protected activities, to apply for a permit to do so. CL § 4-203(b)(2).

An individual is eligible to obtain a handgun wear and carry permit if that person is an adult who has not been convicted of certain criminal offenses, is not presently an alcoholic, addict, or habitual drug user, and, based on an investigation by the MSP: (1) has not exhibited a propensity for violence or instability that may render his/her possession of a handgun a danger; and (2) “has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.” Md. Code Ann, Public Safety § 5-306(a). It is the last of these conditions, the good and substantial reason requirement, that plaintiffs challenge in this lawsuit.

Factual Background

Mr. Malpasso applied for and was denied a permit on the basis that he did not have a “good and substantial reason” to wear, carry, or transport a handgun. (J.A. 12, ¶¶ 23, 24.) Plaintiff Maryland State Rifle and Pistol Association, Inc. states that it has at least one member who was denied a permit for failing to satisfy the “good and substantial reason” requirement. (J.A. 13, ¶ 26.)

Procedural History

On April 12, 2018, the plaintiffs filed their complaint in this action. (J.A. 3, 6-15.) The plaintiffs challenged the requirement that an applicant seeking a permit to wear, carry, or transport a handgun demonstrate a “good and substantial reason” as impermissibly infringing on the right to bear arms in public under the Second Amendment. (J.A. 13-14.)

On June 11, 2018, William Pallozzi, Secretary of the MSP, filed a motion to dismiss the complaint for failure to state a claim, relying on this Court’s prior decision in *Woollard*, 712 F.3d 865, that the “good and substantial reason” requirement did not violate the Second Amendment. (J.A. 4.) On October 15, 2018, the district court granted the motion to dismiss. (J.A. 4, 37-39.) This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly dismissed the plaintiffs' complaint because their claims are foreclosed by this Court's decision in *Woollard*, 712 F.3d 865, which held that Maryland's application of the "good and substantial reason" requirement does not violate the Second Amendment. Because this Court's decision in *Woollard* has not been overruled and, thus, "is binding on other panels" of this Court, *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005), the judgment of the district court must be affirmed. Moreover, publicly available social science statistics continue to support Maryland's predictive judgment that enforcing the "good and substantial reason" requirement furthers the State's compelling interest in protecting its citizenry and promoting public safety.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

This court reviews *de novo* the district court's decision to grant a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 685 (4th Cir. 2018).

II. THIS COURT'S DECISION IN *WOOLLARD V. GALLAGHER* UPHOLDING MARYLAND'S "GOOD AND SUBSTANTIAL REASON" REQUIREMENT FORECLOSES THE PLAINTIFFS' SECOND AMENDMENT CHALLENGE.

The plaintiffs acknowledge that this Court's decision in *Woollard*, 712 F.3d 865, is binding precedent. (J.A. 8, ¶ 6; Appellants' Br. 2.) Although the plaintiffs

assert that *Woollard* should be overruled in light of the decision in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), this Court's decision in *Woollard* is the law of this Circuit and cannot be overruled by another panel of this Court. *Collins*, 415 F.3d at 311.

The holding in *Woollard* clearly controls this case. Like the plaintiffs here, the plaintiff in *Woollard* argued that the “good and substantial reason requirement” for obtaining a handgun wear-and-carry permit violated the Second Amendment. This Court assumed that the “good and substantial reason” requirement burdened the Second Amendment right, but held that the State had demonstrated that the requirement “is reasonably adapted to Maryland’s significant interests in protecting public safety and preventing crime” and, thus, the challenged requirement satisfied the applicable intermediate scrutiny standard. *Woollard*, 712 F. 3d at 882.

For these reasons, this Court’s decision in *Woollard* forecloses the plaintiffs’ Second Amendment challenge, and the judgment of the district court should be affirmed.

III. THIS COURT IN *WOOLLARD* CORRECTLY CONCLUDED THAT MARYLAND’S “GOOD AND SUBSTANTIAL REASON” REQUIREMENT DOES NOT VIOLATE THE SECOND AMENDMENT.

Despite their acknowledgment that *Woollard* is controlling law on this issue, the plaintiffs challenge this Court’s selection and application of the intermediate scrutiny standard in reviewing Maryland’s “good and substantial reason”

requirement. On the contrary, this Court in *Woollard*, relying on Supreme Court and Fourth Circuit precedent, correctly determined that intermediate scrutiny was the appropriate standard and correctly applied that standard to Maryland's "good and substantial reason" requirement.

This Court has reiterated on multiple occasions the scope of the "core" Second Amendment right identified in *District of Columbia v. Heller*, 554 U.S. 570 (2008): the "clearly-defined fundamental right to possess firearms for self-defense within the home." *United States v. Masciandaro*, 638 F.3d 458, 567 (4th Cir. 2011); *see also United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012) (stating that *Heller* recognized "the right of law-abiding responsible citizens to use arms in defense of hearth and home") (quoting *Heller*, 554 U.S. at 635); *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012) (same); *United States v. Chapman*, 666 F.3d 220, 224 (4th Cir. 2012) (same); *United States v. Staten*, 666 F.3d 154, 158 (4th Cir. 2011) (same).

As explained in *Woollard*, this Court in *Masciandaro* held that intermediate scrutiny, rather than strict scrutiny, applies "to laws that burden [any] right to keep and bear arms outside of the home," because "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *Woollard*, 712 F.3d at 876 (quoting *Masciandaro*, 638 F.3d at 470-71); *see also Woollard*, 712 F.3d at 878

(acknowledging that this Court had “rejected the proposition that [the court] must ‘apply strict scrutiny whenever a law impinges upon a [fundamental] right.’” (quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010))). In contrast, and out of step with Fourth Circuit precedent discussed above, the D.C. Circuit held that the individual right to carry common firearms beyond the home for self-defense falls within the core of the Second Amendment’s protections. *Wrenn*, 864 F.3d. 650. The plaintiffs’ call for this Court to re-evaluate the decision in *Woollard* in light of the D.C. Circuit’s decision in *Wrenn* is unwarranted and untethered from the binding precedent of this Court that preceded *Woollard* and was reaffirmed in *Woollard*.

Having properly concluded that intermediate scrutiny was the appropriate standard of review, this Court in *Woollard* went on to find that Maryland satisfied that standard. This Court held that the State had “clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public,” which “protects citizens and inhibits crime” in a number of demonstrable ways, including: “Decreasing the availability of handguns available to criminals via theft”; “Lessening ‘the likelihood that basic confrontations between individuals would turn deadly’”; “Averting the confusion, along with the ‘potentially tragic consequences’ thereof, that can result from the presence of a third person with a handgun during a confrontation between a police officer and a criminal suspect”;

“Curtailling the presence of handguns during routine police-citizen encounters”; “Reducing the number of ‘handgun sightings’ that must be investigated”; and “Facilitating the identification of those persons carrying handguns who pose a menace.” *Woollard*, 712 F. 3d at 879-80 (quoting State’s evidence); *see also id.* at 877 n.6 (noting that State’s evidence included declarations from law enforcement officials who had between them “amassed more than 100 years of law enforcement experience in Maryland”). This Court, thus, properly accepted the State’s assertion that, “the good-and-substantial-reason requirement ‘strikes the proper balance between ensuring access to handgun permits for those who need them while preventing a greater-than-necessary proliferation of handguns in public places that . . . increases risks to public safety.’” *Id.* at 880.

IV. PUBLICLY AVAILABLE EMPIRICAL EVIDENCE BOLSTERS THE STATE’S EVIDENCE IN *WOOLLARD* THAT THE “GOOD AND SUBSTANTIAL REASON” REQUIREMENT FURTHERS PUBLIC SAFETY.

As discussed above, this Court’s controlling decision in *Woollard*, 712 F.3d 865, requires that the lower court’s dismissal of the complaint with prejudice be affirmed. Moreover, empirical social science research published after this Court’s decision in *Woollard* strongly demonstrates that licensing laws regulating the public

carrying of guns, like Maryland's wear-and-carry permit statute, substantially advance the State's compelling interests in protecting its citizens from gun violence.²

Recent studies have shown that violent crime increases 12.3 percent after states move from laws requiring a showing of a need to carry firearms in public places, such as Maryland's "good and substantial reason" requirement, to a more permissive right-to-carry system, with the effect increasing by 1.1 percent each year thereafter. Daniel W. Webster, *et al.*, Johns Hopkins Bloomberg School of Public Health, *Firearms on College Campuses: Research Evidence and Policy Implications* 13-16 (2016).³ Another comprehensive study found that right-to-carry laws are associated with 13-15 percent higher aggregate violent crime rates ten years after adoption. John Donohue, *et al.*, National Bureau of Economic Research, *Right to Carry laws and Violent Crime: a Comprehensive Assessment Using Panel Data and a State Level Synthetic Controls Analysis* (rev. 2018).⁴ And handgun licensing laws that leave licensing officials with little or no discretion have been found to be

² This Court may "may properly take judicial notice of matters of public record," *United States ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014), including "publicly available" statistics, *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (citing *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986)).

³ Available at https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_pdfs/GunsOnCampus.pdf (last visited Jan. 23, 2019).

⁴ Available at <https://www.nber.org/papers/w23510.pdf> (last visited Jan. 23, 2019).

significantly associated with 6.5 percent higher total homicide rates, 8.6 percent higher firearm homicide rates, and 10.6 percent higher handgun homicide rates. Michael Siegel, *et al.*, *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States* (2017).⁵

These empirical social science statistics bolster the State's evidence that this Court relied on in *Woollard*, and lend further support to this Court's conclusion that "the good-and-substantial-reason requirement is reasonably adapted to Maryland's significant interests in protecting public safety and preventing crime." 712 F.3d at 882.

⁵ Available at <https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304057> (last visited Jan. 23, 2019).

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be affirmed.

BRIAN E. FROSH
Attorney General of Maryland

/s/ Mark H. Bowen
MARK H. BOWEN
Assistant Attorney General
1201 Reisterstown Road
Pikesville, Maryland 21208
Tel. 410-653-4228

January 25, 2019

Attorneys for Appellee

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,130 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

/s/ Mark H. Bowen
MARK H. BOWEN

January 25, 2019

Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that, on this 25th day of January 2019, the foregoing Brief of Appellee was served on all counsel of record through the CM/ECF System.

/s/ Mark H. Bowen
MARK H. BOWEN

January 25, 2019

Attorney for Appellee