No. 18-2377

In The
United States Court of Appeals
For the Fourth Circuit

BRIAN KIRK MALPASSO; MARYLAND
STATE RIFLE AND PISTOL ASSOCIATION, INC.,

Plaintiffs-Appellants,

v.

WILLIAM M. PALLOZZI, in his official capacity as
Maryland Secretary of State Police,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND (No. 1:18-cv-1064-ELH)

BRIEF OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-2377 Caption: Brian Malpasso v. William Pallozzi

Pursuant to FRAP 26.1 and Local Rule 26.1,

Brian Kirk Malpasso
(name of party/amicus)

who is a Plaintiff-Appellant, 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(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: s/ David H. Thompson Date: December 20, 2018

Counsel for: Plaintiffs-Appellants

CERTIFICATE OF SERVICE

****

I certify that on 12/20/2018 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:

s/ David H. Thompson
(signature)

December 20, 2018
(date)

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No. 18-2377 Caption: Brian Malpasso v. William Pallozzi

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Maryland State Rifle and Pistol Association, Inc.
(name of party/amicus)

who is a Plaintiff-Appellant, 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:

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INTRODUCTION

At the core of the Second Amendment lies "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). When the people elevated that right into the Nation's fundamental charter, they did not mean to leave the freedom to exercise it at the mercy of the very government officials whose hands they sought to bind. No, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

Yet Maryland has imposed limits on "the right of the people to . . . bear Arms," U.S. CONST. amend. II, that flout these basic constitutional principles at every turn. It has seized the very power forbidden it by the Second Amendment: the power to decide, on a case-by-case basis, whether an applicant for a license to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, has, in the estimation of the State licensing authority, shown a sufficiently "good and substantial reason" to exercise that right, MD. CODE PUB. SAFETY § 5-306(a)(6)(ii). Worse still, the State has determined that a general desire to carry a weapon for the purpose of self-defense is not a sufficiently good reason—demanding, instead, *documented evidence* of *concrete threats* or recent assaults, that set the applicant apart from the "average person." *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137, 1148 (Md. Ct. Spec. App. 2005). Maryland has thus struck a balance *directly contrary* to the

Constitution's demand that the right to self-defense be protected as "the *central component*" of the Second Amendment, *Heller*, 554 U.S. at 599.

To be sure, as the district court pointed out, this Court—in precedent we concede is binding on this panel at this stage in the litigation—has upheld Maryland's "good and substantial reason" limit. *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). But *Woollard* is deeply flawed, and it should be overturned at the first opportunity by a court competent to do so. *Woollard* does not meaningfully acknowledge the extensive textual and historical evidence demonstrating that the right to carry firearms for self-protection outside the home is at the very core of the Second Amendment. It adopts merely "intermediate" constitutional scrutiny, effectively relegating the right to bear arms to second-class status. And even if the choice of intermediate scrutiny were defensible, *Woollard*'s application of it—essentially deferring to the State's judgment without discussing or even *identifying* the empirical evidence on which that judgment was supposedly based—is not.

In sum, although this Court is presently bound by precedent to uphold it, Maryland's "good and substantial reason" restriction is unconstitutional.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Plaintiffs' constitutional challenge to the state laws and regulations governing the carrying of firearms outside the home in Maryland under 28 U.S.C. §§ 1331, 1343. The district court entered a

final order dismissing Plaintiffs' sole claim against Defendant under FED. R. CIV. P. 12(b)(6) on October 15, 2018. Joint Appendix at 39 ("JA"). Plaintiffs timely noticed their appeal from the district court's final judgment on November 13, 2018, JA 40, and this Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the Second Amendment protects the right to carry a firearm outside the home for self-defense.

2. Whether the government may condition the exercise of the right to bear arms on a showing that a citizen has a "good and substantial reason" for carrying a firearm beyond self-defense.

3. Whether this Court's decision in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), should be overruled.

STATEMENT OF THE CASE

I. Maryland's "good and substantial reason" requirement

Under Maryland law, an ordinary member of the general public who wishes to "wear, carry, or transport a handgun" in public, "whether concealed or open," must first obtain a permit to do so (a "Handgun Carry Permit") from the Maryland Secretary of State Police, Defendant Pallozzi. MD. CODE CRIM. LAW § 4-203(a)(1)(i), (b)(2); *see also* MD. CODE PUB. SAFETY § 5-303. Maryland imposes a number of objective restrictions on the eligibility for a Handgun Carry Permit. For

example, an applicant must be an adult, must not have been convicted of any felony or any misdemeanor involving controlled substances, and must not be an alcoholic or addicted to any controlled substance. MD. CODE PUB. SAFETY § 5-306(a). An applicant must also pass a background check, *id.* § 5-305, must satisfy the Secretary, after investigation, that the applicant "has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or to another," *id.* § 5-306(a)(6)(i), and must have completed an extensive firearms safety training course, *id.* § 5-306(a)(5).

In addition to these eligibility requirements, Maryland law also imposes a more subjective restriction on the availability of Handgun Carry Permits: an applicant must demonstrate that he or she "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." *Id.* § 5-306(a)(6)(ii). Secretary Pallozzi has issued regulations and guidance further fleshing out this standard, clarifying that an applicant seeking a permit for "[p]ersonal [p]rotection" must provide "documented evidence of recent threats, robberies, and/or assaults, supported by official police reports or notarized statements from witnesses." *See* JA 18 (Licensing Division Application Instructions). And Maryland state courts have decided that living in a high-crime neighborhood or being subject to "vague threat[s]" are *not* "good and substantial reasons" to obtain a permit—since if they

were, "[e]ach person *could decide for himself or herself* that he or she was in danger." *Snowden v. Handgun Permit Review Bd.*, 413 A.2d 295, 298 (Md. Ct. Spec. App. 1980) (emphasis added). Instead, an applicant must generally provide evidence of a concrete risk that sets him or her apart from "an average person" who would like to carry a firearm because he or she "lives in a dangerous society." *Scherr*, 880 A.2d at 1148.

Accordingly, typical Maryland citizens—the vast majority of citizens who cannot provide "documented evidence of recent threats," JA 18, that set them apart from the "average person," *Scherr*, 880 A.2d at 1148—effectively remain subject to a ban on carrying handguns outside the home for self-defense.

II. Defendant's refusal to issue handgun carry permits to Plaintiffs

Pursuant to this restriction, Defendant denied a request by Plaintiff Malpasso for a Handgun Carry Permit that would allow him to carry a handgun in public for self-defense. Mr. Malpasso applied to Defendant Pallozzi for a permit to carry a handgun in public on January 7, 2018. JA 22 (Licensing Division Application). His application was denied on March 23, 2018. JA 33 (Notification of Denial). Secretary Pallozzi did not determine that Mr. Malpasso failed to meet any of the eligibility or training requirements imposed by Maryland law, but he nonetheless denied the application because he concluded that Mr. Malpasso has no "good and substantial reason" to carry a handgun in public, because he did not provide evidence of any

concrete, present fear for his safety, such as harassment, stalking, or documented threats of violence. *See id.* Secretary Pallozzi has also refused, on the basis of the "good and substantial reason" requirement, to grant at least one member of organizational Plaintiff Maryland State Rifle and Pistol Association ("MSRPA") a permit that would allow the carrying of a firearm outside the home for self-defense. JA 13 (Complaint ¶ 26).

III. The proceedings below

On April 12, 2018, Plaintiffs Malpasso and MSRPA filed suit in the U.S. District Court for the District of Maryland, alleging that Maryland's "good and substantial reason" restriction on the availability of Handgun Carry Permits is facially unconstitutional under the Second Amendment, applicable to Maryland under the Fourteenth Amendment. JA 13–14 (Complaint ¶¶ 27–32). Plaintiffs' Complaint conceded that their Second Amendment claim was foreclosed at the district-court level by this Court's decision in *Woollard*, 712 F.3d 865, which specifically upheld Maryland's "good and substantial reason" requirement against an earlier Second Amendment challenge. JA 8 (Complaint ¶ 6).

On June 11, 2018, Secretary Pallozzi moved to dismiss Plaintiffs' Second Amendment claim under FED. R. CIV. P. 12(b)(6), on *Woollard*'s authority. In response, Plaintiffs again conceded that *Woollard* is controlling but argued that it was wrongly decided and should be overruled by a court competent to do so. JA 38

(Memorandum at 2). On October 15, 2018, the district court granted Defendants' motion to dismiss, reasoning that the "controlling decision of the United States Court of Appeals for the Fourth Circuit" in *Woollard* "holding that Maryland's application of the 'good and substantial reason' requirement does not violate the Second Amendment" foreclosed Plaintiffs' claim. *Id.*

Plaintiffs timely noticed this appeal. JA 40.

SUMMARY OF THE ARGUMENT

I. The Second Amendment guarantees that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Supreme Court has twice affirmed, in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), that the core of the Second Amendment guarantee is the right to keep and bear arms for purposes of self-defense. And the abundant historical record from every relevant period confirms what is clear from the constitutional text alone: "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections." *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017). Indeed, a contrary holding would require this Court to *repudiate* the Supreme Court's binding analysis of the Second Amendment's text, history, and purpose. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012).

II. Because Maryland's restrictions on carrying firearms in public severely impinge on the right of ordinary, law-abiding citizens to carry arms for self-defense, they are unconstitutional *per se*. *Heller* makes clear that a restriction on core Second Amendment conduct so severe that it is akin to a total ban is unconstitutional categorically, without regard to "the traditionally expressed levels [of scrutiny]." *Heller*, 554 U.S. at 634–36. The "good and substantial reason" requirement, by limiting the core right to bear arms to those with a special, atypical self-defense need, "is necessarily a total ban on most . . . residents' right to carry a gun in the face of ordinary self-defense needs," so it must meet the same fate. *Wrenn*, 864 F.3d at 666. Accordingly, it is flatly inconsistent with the Second Amendment.

III. Maryland's requirement that law-abiding citizens wishing to exercise their Second Amendment rights outside the home must establish a "good and substantial reason" to do so—other than the desire for self-defense—also fails any potentially applicable level of constitutional scrutiny. Maryland's real goal is not some generic interest in public safety, but rather the naked desire to eliminate as much Second Amendment conduct as it can get away with. That goal is never legitimate—even if used as an indirect means of curbing secondary effects associated with protected conduct. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 449–50 (2002) (Kennedy, J., concurring in judgment); *Heller v. District of Columbia ("Heller III")*, 801 F.3d 264, 280 (D.C. Cir. 2015). What is

more, the empirical record does not provide anything more than a rational basis, at most, for thinking that restrictions like Maryland's will cause any improvement in public safety. *Moore*, 702 F.3d at 939, 942.

ARGUMENT

This Court "review[s] de novo the grant of a motion to dismiss for failure to state a claim." *Garnett v. Remedi Seniorcare of Virginia, LLC*, 892 F.3d 140, 142 (4th Cir. 2018). In weighing a challenge brought under the Second Amendment, the Court has adopted "a two-part approach." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). "The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* (quotation marks omitted). "This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *Id.* If the answer to this first question is yes, the Court moves to "the second step of applying an appropriate form of means-end scrutiny." *Id.*[1]

Here, the conduct restricted by Maryland—carrying the quintessential self-defense weapon outside the home for self-protection—lies not only within the scope of the Second Amendment but at its very core. Because Maryland's "good and

[1] Applying a means-end scrutiny balancing test is inconsistent with *Heller*'s textual and historical approach, *see Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), and we reserve the right to argue as much in the Supreme Court.

substantial reason" requirement effectively bans typical law-abiding citizens from engaging in core Second Amendment conduct, under *Heller* it is unconstitutional *per se*, wholly apart from any means-end scrutiny. And even if that were not so, Maryland's law flunks any form of heightened constitutional scrutiny.

I. The conduct restricted by Maryland's "good and substantial reason" requirement lies at the core of the Second Amendment.

a. Text, history, precedent, and purpose all confirm that the right to keep and bear arms extends outside the home.

Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634–35, deciding whether a government restriction challenged on Second Amendment grounds can be squared with that provision involves close "textual analysis" and "historical inquiry," *Chester*, 628 F.3d at 675, 680. Here, text, precedent, purpose, and history uniformly show that the carrying of firearms outside the home for self-defense is squarely protected by the Second Amendment right.

1. The text of the Second Amendment leaves no doubt that it applies outside the home. The substance of the Second Amendment right reposes in the twin verbs of the operative clause: "the right of the people to keep *and bear* Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added). This turn-of-phrase is not, the Supreme Court has held, "some sort of term of art" with a "unitary meaning," but is rather a conjoining of two related guarantees. *Heller*, 554 U.S. at 591.

Interpreting the protections of the Second Amendment as confined to the home would read the second of these guarantees—the right to bear arms—out of the Constitution's text altogether, for the right to keep arms standing alone would be sufficient to protect the right to have arms in the home. Any such interpretation would directly contradict the fundamental canon that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

Indeed, because "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage," the Constitution's explicit inclusion of the "right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore*, 702 F.3d at 936. "[T]he idea of carrying a gun," after all, "does not exactly conjure up images of father stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee." *Peruta v. County of San Diego*, 742 F.3d 1144, 1152 (9th Cir. 2014), *vacated*, 781 F.3d 1106 (9th Cir. 2015) (en banc). Limiting the Second Amendment to the home would thus be flatly contrary to its text, for it would require either reading "the right to keep and bear arms" as a single, unitary right in the way *Heller* expressly forbids, or striking the word "bear" from the provision altogether.

2. Confining the right to keep and bear arms to the home would also be at war with precedent. The Supreme Court's decision in "*Heller* repeatedly invokes a

broader Second Amendment right than the right to have a gun in one's home." *Moore*, 702 F.3d at 935–36. For instance, *Heller* squarely holds that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation," 554 U.S. at 592 (emphasis added), and it defines the key constitutional phrase "bear arms" as to " 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person,' " *id.* at 584 (alteration in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). *Heller*'s indication that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful" also clearly, if implicitly, recognizes a general right to bear arms in public; otherwise there would be no need to identify exceptions. *Id.* at 626, 627 n.26. Moreover, *Heller* extensively cites and significantly relies upon *Nunn v. State*, a nineteenth-century Georgia case that "struck down a ban on carrying pistols openly" under the Second Amendment. *Id.* at 612. Indeed, the bulk of *Heller*'s textual and historical analysis treats with the Second Amendment's guarantee of the right *to bear* arms, rather than the right to keep them. *See id.* at 584–91.

The Supreme Court's recent decision in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), provides further confirmation that the Second Amendment is not a

home-bound right. The defendant in that case, Jaime Caetano, challenged her conviction for carrying a stun gun, illegal under Massachusetts law, in a public parking lot. The Massachusetts Supreme Judicial Court rejected Caetano's argument that *Heller* and *McDonald* "afford her a right under the Second Amendment to the United States Constitution to possess a stun gun *in public* for the purpose of self-defense," *Commonwealth v. Caetano*, 26 N.E.3d 688, 689 (Mass. 2015) (emphasis added), but the Supreme Court summarily vacated that judgment. And while the reasoning of both the state court and Supreme Court opinions primarily concerns whether stun guns are "Arms" protected by the Second Amendment, if that provision did not protect a right to bear arms outside the home, all that analysis would be utterly irrelevant.

While this Court in *Woollard* "assume[d] that the *Heller* right exists outside the home," 712 F.3d at 876, it has not squarely resolved the question—and, indeed, has characterized the issue as "a vast *terra incognita*." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). Other courts have not had such difficulty charting this terrain. Four circuit courts have squarely held that the core Second Amendment right to armed self-defense does not give out at the doorstep. In *Moore*, the Seventh Circuit held that because the "right to bear arms for self-defense . . . is as important outside the home as inside," limiting the right to the home would require the court "to repudiate the [Supreme] Court's historical analysis" in *Heller*. 702 F.3d at 935,

942. "That [an appellate court] can't do." *Id.* at 935. In *Wrenn*, the D.C. Circuit similarly concluded that "the individual right to carry common firearms beyond the home for self-defense . . . falls within the core of the Second Amendment's protections." 864 F.3d at 661. In *Gould v. Morgan*, the First Circuit likewise read "*Heller* as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home." 907 F.3d 659, 670 (1st Cir. 2018). And in *Young v. Hawaii*, the Ninth Circuit squarely rejected the "argument that the Second Amendment only has force within the home." 896 F.3d 1044, 1068 (9th Cir. 2018). By contrast, *no* federal court of appeals has held that the Amendment *does not* apply outside the home.

3. Confining the Second Amendment's reach to the home would also be at war with its purposes. As announced by its "prefatory" clause, the Second Amendment was codified "to prevent elimination of the militia." *Heller*, 554 U.S. at 599. A right to bear arms limited to the home plainly would be ill-suited to the purpose of "rearing up and qualifying a well-regulated militia," *id.* at 612 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)), for if citizens could be prohibited from carrying arms in public they simply could not act as the militia at all.

Of course, the militia was not "the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." *Id.* at 599. Hunting obviously cannot be conducted by those bearing arms

only within their homes. And the same reasoning applies with even more force to the Second Amendment's "core lawful purpose" of safeguarding the right to "self-defense." *Id.* at 630. *Heller* held that individual self-defense is "the *central component*" of the Second Amendment right. *Id.* at 599. The Supreme Court's subsequent decision in *McDonald* reiterates that "in *Heller*, we held that individual self-defense is the central component of the Second Amendment right." 561 U.S. at 767 (quotation marks and emphasis omitted). These cases hold that the core of the Second Amendment is individual self-defense—*period*. There is nothing in the Court's language to suggest that this core purpose may only be pursued in the home—and there is certainly no such suggestion in the text of the Second Amendment, which presumptively must protect both the right of keeping *and bearing* arms in self-defense.

As the Seventh Circuit has held, "one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore*, 702 F.3d at 936. "The Supreme Court has decided that the [Second Amendment] confers a right to bear arms for self-defense, which is as important outside the home as inside." *Id.* at 942. Indeed, according to the latest nationwide data from the Bureau of Justice Statistics, 18.4% of violent crimes occur at or in the victim's home, while 26.5% occur on the

street or in a parking lot or garage.[2] Thus, "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Moore*, 702 F.3d at 937.

4. Finally, the historical understanding of the right to keep and bear arms strongly supports what is obvious from the Second Amendment's text and the binding and persuasive case law interpreting it: the right to keep and bear arms extends outside the home.

As *McDonald* explains, "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." 561 U.S. at 767. And because the need for self-defense may arise in public, it was recognized in England long before the Revolution that the right to self-defense may be exercised in public. Thus, "[i]f any person attempts a robbery or murder of another, *or* attempts to break open a house in the night time, . . . and shall be killed in such attempt, the slayer shall be acquitted and discharged." 4 WILLIAM BLACKSTONE, COMMENTARIES *180 (emphasis added). "Sergeant William Hawkins's widely read Treatise of the Pleas of the Crown," *Atwater v. City of Lago Vista*, 532 U.S. 318, 331 (2001), likewise explained that "the killing of a Wrong-doer . . . may be justified . . . where a Man kills one who assaults him in the Highway to rob or murder him." 1 WILLIAM

[2] BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES tbl. 61 (2010), http://goo.gl/6NAuIB.

HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 71 (1716); *see also* 1 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE 481 (Sollom Emlyn ed. 1736) ("If a thief assault a true man *either* abroad *or* in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony." (emphasis added)).

Because the right to self-defense was understood to extend beyond the home, the right to *armed* self-defense naturally was as well. Accordingly, by the late seventeenth century the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for their security." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686). A century later, the Recorder of London—a judge and "the foremost legal advisor to the city," *Parker v. District of Columbia*, 478 F.3d 370, 382 n.8 (D.C. Cir. 2007)—opined that "the right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable." *Legality of the London Military Foot-Association* (1780), *reprinted in* WILLIAM BLIZZARD, DESULTORY REFLECTIONS ON POLICE 59 (1785). These "lawful purposes, for which arms may be used," were not limited to the home, for they included "immediate self-defence, . . . suppression of violent and felonious breaches of the peace, and assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders." *Id*. at 63. Likewise, Edward Christian, a law professor at Cambridge, published an edition of Blackstone

in which he noted that "every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game." 2 WILLIAM BLACKSTONE, COMMENTARIES *411 n.2 (Christian ed., 1794).

That understanding was shared on this side of the Atlantic. Indeed, "about half the colonies had laws *requiring* arms-carrying in certain circumstances," such as when traveling or attending church. NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., FIREARMS LAW & THE SECOND AMENDMENT 106–08 (2012) (emphasis added). Plainly, if the law imposed on individuals a civic duty to bear arms "for public-safety reasons," *Heller*, 554 U.S. at 601, the law necessarily conferred on those citizens a corresponding right to do so.

That understanding endured in the next century, both before and after the Revolution. As *Heller* noted, for example, "nine state constitutional provisions written in the 18th century or the first two decades of the 19th . . . enshrined a right of citizens to 'bear arms in defense of themselves and the state' or 'bear arms in defense of himself and the state,' " *Heller*, 554 U.S. at 584–85—language that is not amenable to a homebound interpretation, since the need "for self-defense . . . is as important outside the home as inside," *Moore*, 702 F.3d at 942. Indeed, as Judge St. George Tucker observed in 1803, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5

WILLIAM BLACKSTONE, COMMENTARIES App. n.B, at 19 (St. George Tucker ed., 1803). And Tucker made clear that Congress would exceed its authority were it to "pass a law prohibiting any person from bearing arms." 1 WILLIAM BLACKSTONE, COMMENTARIES App. n.D, at 289 (St. George Tucker ed., 1803).

The practices of the Founding generation confirm that the right to carry arms was well-established. George Washington, for example, carried a firearm on an expedition into the Ohio Country. WILLIAM M. DARLINGTON, CHRISTOPHER GIST'S JOURNALS 85–86 (1893). Thomas Jefferson advised his nephew to "[l]et your gun . . . be the constant companion of your walks," 1 THE WORKS OF THOMAS JEFFERSON 398 (letter of Aug. 19, 1785) (H. A. Washington ed., 1884), and Jefferson himself traveled with pistols for self-protection and designed a holster to allow for their ready retrieval, *see Firearms*, MONTICELLO, https://goo.gl/W6FSpM. Even in defending the British soldiers charged in the Boston Massacre, John Adams conceded that, in this country, "every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770*, *in* 6 MASTERPIECES OF ELOQUENCE 2569, 2578 (Hazeltine et al. eds., 1905). And as an attorney, Patrick Henry regularly carried a firearm while walking from his home to the courthouse. HARLOW GILES UNGER, LION OF LIBERTY 30 (2010).

This understanding was also reflected in contemporary judicial decisions. As the panel decision in *Peruta v. County of San Diego* concluded after an exhaustive survey of the early-American case law, although "some courts approved limitations on the manner of carry outside the home, none approved a total destruction of the right to carry in public." 742 F.3d at 1160; *see also, e.g.*, *Nunn*, 1 Ga. at 243, 249–51; *State v. Reid*, 1 Ala. 612, 616–17 (1840); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91–93 (1822). "Indeed, the few nineteenth-century cases that *upheld* onerous limits on carrying against challenges under the Second Amendment or close analogues are sapped of authority by *Heller* . . . because each of them assumed that the Amendment was only about militias and not personal self-defense"—a premise flatly rejected by the Supreme Court. *Wrenn*, 864 F.3d at 658.

To be sure, as *Heller* itself recognized, the right to bear arms is not a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. For example, in the pre-history of the Second Amendment, English courts had read the medieval Statute of Northampton as "prohibiting the carrying of 'dangerous and unusual weapons,' " *id.* at 627—weapons not protected by the right to keep and bear arms, *id.* at 623–24, 627—or otherwise "go[ing] armed to terrify the King's subjects," *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). But this rule against "*riding* or *going armed*, with dangerous or unusual weapons" and thereby "terrifying the good people of the land,"

4 WILLIAM BLACKSTONE, COMMENTARIES *148–49, was not understood as extending to the ordinary carrying of weapons "usually worne and borne," WILLIAM LAMBARD, EIRENARCHA 135 (1588), unless "accompanied with such circumstances as are apt to terrify the people," 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (1716). After all, even by the late seventeenth century there was "a general connivance to gentlemen to ride armed for their security." *Rex*, 90 Eng. Rep. 330.

Early American courts and commentators shared this same understanding of the scope of the right to bear arms in self-defense. For instance, James Wilson, a leading Framer and Supreme Court Justice, explained in his widely read Lectures on Law that it was unlawful only to carry "dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people." 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 79 (1804). After all, as another commentator explained, "in this country the constitution guarranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily." CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *see also State v. Huntly*, 25 N.C. 418, 422–23 (1843) ("[T]he carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun."); *Simpson v. State*, 13 Tenn. 356,

359–60 (1833) (to the extent the Statute of Northampton stood as a prohibition on bearing arms, a state constitutional guarantee of the right to keep and bear arms "abrogated" it).

This reading of the Second Amendment persisted throughout the nineteenth century. Under *Heller*, Reconstruction Era views are "instructive" evidence of the Second Amendment's historical scope because they reflect "*the public understanding* of [the Amendment] in the period after its enactment." 554 U.S. at 605, 614. And those who wrote and ratified the Fourteenth Amendment in 1868 clearly understood the right to bear arms to protect the carrying of firearms outside the home for self-defense.

For decades before the Civil War, the southern States had schemed to prevent their enslaved and free black populations from bearing arms at every turn. An 1825 Florida statute, for example, authorized the creation of "patrols" which were directed to "enter into all negro houses and suspected places, and search for arms and other offensive or improper weapons . . . and take away all such arms." Act of Dec. 6, 1825, sec. 8, 1825 Fla. Laws 52, 55. An 1832 Delaware law forbade any "free negroes [or] free mulattoes to have own keep or possess any Gun [or] Pistol," unless they first received a permit from "the Justice of the Peace" certifying "that the circumstances of his case justify his keeping and using a gun." Act of Feb. 10, 1832, sec. 1, Del. Laws 180 (1832); *see also* Robert J. Cottrol & Raymond T.

Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 336–38 (1991) (citing similar laws in Texas, Mississippi, Louisiana, South Carolina, Maryland, Virginia, and Georgia). Indeed, Chief Justice Taney recoiled so strongly in the infamous *Dred Scott* case from recognizing African Americans as citizens precisely because he understood that doing so would entitle them "to keep and carry arms wherever they went." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

After the Civil War, these noxious efforts to suppress the rights of former slaves to carry arms for their self-defense continued. Mississippi's notorious "Black Code," for example, forbade any "freedman, free negro or mulatto" to "keep or carry fire-arms of any kind." An Act To Punish Certain Offences Therein Named, and for Other Purposes, ch. 23, § 1, 1865 Miss. Laws 165. Like restrictions were enacted in Louisiana and Alabama. Cottrol & Diamond, *supra*, at 344–45. In an ordinance strikingly similar in operation to Maryland's "good and substantial reason" law, several Louisiana towns provided that no freedman "shall be allowed to carry fire-arms, or any kind of weapons, within the parish" without the approval of "the nearest and most convenient chief of patrol." 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279–80 (1906). And a series of 1866 reports to Congress from a Freedmen's Bureau Commissioner in Kentucky lamented that the State's "civil law prohibits the colored man from bearing arms," Letter from

Assistant Comm'r Fisk, H.R. EXEC. DOC. NO. 70, 39th Cong., at 233 (1st Sess. 1866), and detailed how "[o]utlaws in different sections of the State . . . make brutal attacks and raids upon the freedmen, who are defenceless, for the civil law-officers disarm the colored man and hand him over to armed marauders," *id.* at 239.

As the Supreme Court explained at length in *McDonald*, the Reconstruction Congress labored mightily to entomb this legacy of prejudice. *See* 561 U.S. at 770–77. On July 16, 1866, for example, Congress passed—over President Johnson's veto—the Freedman's Bureau Bill of 1866, which secured to the citizens of former slave States the "full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to bear arms*, . . . without respect to race or color, or previous condition of slavery." Freedmen's Bureau Bill of 1866, sec. 14, 14 Stat. 173, 176–77 (1866) (emphasis added).

The contemporaneously enacted Civil Rights Act of 1866, by similarly securing the "full and equal benefit and all laws . . . for the security of person and property" without regard to race, Civil Rights Act of 1866, sec. 1, 14 Stat. 27 (1866), was likewise designed to "destroy" the southern States' continued efforts to "prohibit any negro or mulatto from having fire-arms," CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS 264–66 (1998). And of course, Congress's efforts culminated in the

adoption of the Fourteenth Amendment, which ensured the right of every American, regardless of race, to "bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Pomeroy); *see also McDonald*, 561 U.S. at 775–76.

b. *Woollard* erred in concluding that the right to carry firearms outside the home is not at the core of the Second Amendment.

The right to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, is not only within the scope of the Second Amendment, it lies at the very core of that guarantee. *Heller* makes clear that the right to individual self-defense is "the *central component*" of the Second Amendment. *Id.* at 599. Given that the Second Amendment's text, history, and purposes all show that its protections extend outside the home, the right to carry firearms "for the core lawful purpose of self-defense" necessarily extends beyond those four walls as well. *Id.* at 630. "Thus, the Amendment's core generally covers carrying in public for self-defense." *Wrenn*, 864 F.3d at 659.

In *Woollard*, this Court disagreed with this proposition, based on its earlier conclusion in *Masciandaro* that the Second Amendment right is "more limited" in public than within the home, and that restrictions on carrying arms outside the home are thus subject to only intermediate scrutiny. 638 F.3d at 470–71. That reasoning fails for multiple reasons. To begin, because both *Masciandaro* and *Woollard* explicitly declined to conduct any meaningful textual and historical analysis of

whether the Second Amendment applies outside the home, *id.* at 474 (opinion of Wilkinson, J.), the panels in those cases had little basis for concluding that the right to bear arms outside the home falls outside the core of the Second Amendment. While the Court's decision to "assume that the *Heller* right exists outside the home," *Woollard*, 712 F.3d at 876, may have been "meant to be generous to the plaintiffs, by granting a premise in their favor," its effect was to sweep under the rug the overwhelming historical and textual support, discussed above, for the conclusion that the right to bear arms in public lies at the very heart of the Second Amendment, *Wrenn*, 864 F.3d at 663.

Instead of grappling with the historical evidence discussed above, *Masciandaro* merely asserted that "firearm rights have always been more limited" outside the home, based on a series of laws, dating from the nineteenth century and later, which targeted the carrying of *concealed* weapons. 638 F.3d at 470. These laws, according to this Court, evinced a "longstanding out-of-the-home/in-the-home distinction." *Id.* Not so. While these laws limited the carrying of *concealed* firearms—a practice that was considered dishonorable and especially dangerous by the social mores of the day—they did so against the background of *freely allowing* the *open* carrying of arms, thus "le[aving] ample opportunities for bearing arms." *Wrenn*, 864 F.3d at 662.

The fact that these laws left intact the background right to carry firearms in *some* manner was absolutely *critical* to most of the judicial opinions assessing their constitutionality. The distinction was relied on by courts that upheld this type of law against constitutional challenge. *See State v. Chandler*, 5 La. Ann. 489, 490 (1850) (concealed carry ban "interfered with no man's right to carry arms . . . 'in full open view,' " and thus did not interfere with "the right guaranteed by the Constitution of the United States"); *Aymette v. State*, 21 Tenn. 154, 160–61 (1840); *Reid*, 1 Ala. at 616–17. And it was also endorsed by the opinions *striking down* limitations on carrying firearms that cut too close to the core. *See Nunn*, 1 Ga. at 251 (limitation on "the practice of carrying certain weapons *secretly*" was "valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms," but "prohibition against bearing arms *openly*" was "in conflict with the Constitution, and *void*"); *see also Bliss*, 12 Ky. at 91–94.[3] These laws thus provide no historical pedigree for restrictions, like Maryland's, which prohibit *both* open and concealed carrying and therefore add up to "a denial of the right altogether." *Aymette*, 21 Tenn. at 161.

[3] A few courts from this era upheld concealed carry bans without relying on this distinction, but they did so "on the basis of an interpretation of the Second Amendment . . . that conflicts with [*Heller*.]" *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 n.14 (2d Cir. 2012). Those outlier decisions are thus "sapped of authority by *Heller*," and cannot be cited as reliable guides to the Second Amendment's scope. *Wrenn*, 864 F.3d at 658.

Masciandaro specifically cited the Georgia Supreme Court's decision in *Nunn*, but that case *refutes Masciandaro*'s analysis. The *Masciandaro* court cited *Nunn* for the proposition that "a law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution." *Masciandaro*, 638 F.3d at 470–71 (quoting *Nunn*, 1 Ga. at 249). What *Masciandaro* neglects to mention is that *Nunn struck down* the state law at issue in the case, reasoning that because it did not allow citizens to carry firearms *either concealed or openly* it "amount[ed] to a *destruction* of the right." *Nunn*, 1 Ga. at 249. Indeed, the Supreme Court in *Heller* expressly noted that *Nunn*—a case that "perfectly captured" the proper relationship between the prefatory and operative clause of the Second Amendment—"struck down a ban on carrying pistols openly," citing it as an example of how a law that imposes a "severe restriction" on the right to keep and bear arms should be categorically "struck down." 554 U.S. at 612, 629.

Had this Court in *Woollard* or *Masciandaro* fairly engaged in the textual and historical analysis required by *Heller*, it would have reached the same conclusion as the two circuits that *have* treated seriously with the Second Amendment's text and history. *See Wrenn*, 864 F.3d at 661; *Moore*, 702 F.3d at 937, 942. For as shown

above, these sources of authority leave no doubt that this constitutional guarantee extends outside the home. *See supra*, Part I.A. And because that is so, the right to *bear* arms "for the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, can be no further from the heartland of the Second Amendment than the right to *keep* them.

II. Under *Heller*, Defendant's requirement that law-abiding citizens demonstrate a special need for self-defense to exercise their Second Amendment rights is categorically unconstitutional.

Given that the core of the Second Amendment extends to armed self-defense outside the home, *Heller* makes the next analytical steps clear. "The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id*. at 634. But that is precisely what Maryland does here—it reserves to itself the right to determine whether a citizen is justified in exercising the right to bear arms, and, worse still, rejects the simple desire for self-defense as a valid justification. Maryland's wholesale prohibition on the right of typical, law-abiding citizens to bear arms for the purpose of self-defense is an infringement of core Second Amendment conduct that is flatly unconstitutional.

Heller requires *per se* invalidation of broad bans that strike at the heart of the Second Amendment. In *Heller*, the Supreme Court declined the invitation to analyze the ban on the right to keep arms at issue there under "an interest-balancing inquiry"

based on the "approach . . . the Court has applied . . . in various constitutional contexts, including election-law cases, speech cases, and due process cases," *id*. at 689–90 (Breyer, J., dissenting), ruling instead that the People themselves already had balanced the interests in favor of the right to bear arms when they chose to enshrine it in the Constitution's text, *id.* at 635 (majority opinion). And in *McDonald*, the Court reaffirmed that *Heller* had deliberately and "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785 (plurality opinion). This reasoning applies equally to the broad ban on the right to bear arms at issue here.

Maryland's demand that applicants provide "documented evidence of recent threats," JA 18, that sets them apart from the "average person," *Scherr*, 880 A.2d at 1148, *extinguishes* the core Second Amendment rights of *typical* citizens—who, by definition, cannot distinguish their need for self-defense from that of the general concern of "liv[ing] in a dangerous society," *id.* To be sure, Maryland's limits allow individuals to carry firearms if they can first show that it is "necessary as a reasonable precaution for the applicant against apprehended danger." MD. CODE REGS. § 29.03.02.03. But the Second Amendment does not set up a race between law-abiding citizens and their assailants to the license bureau. For those whose lives or safety are being threatened, it is cold comfort to know that they could have carried a firearm *if only they could have documented their "apprehended danger" in*

advance. Surely under the Second Amendment—which protects the right to bear arms "*in case* of confrontation," *Heller*, 554 U.S. at 592 (emphasis added)—that scheme turns the right to bear arms on its head.

Indeed, Maryland's demand that citizens prove to the State's satisfaction that they have a good enough reason to carry a handgun is flatly inconsistent with the very nature of the Second Amendment right. The existence of that right is itself reason enough for its exercise. Constitutional rights by their very nature and design are meant to settle, at least to some extent, the permissible scope of state power; they settle nothing at all if the state has authority to require law-abiding citizens to give a "good and substantial reason" before exercising the right. Put differently, the Second Amendment right has force as a right only if those who disagree with the central value choice made by those who adopted it—that an individual's interest in self-defense is of such paramount importance that the freedom "to possess and carry weapons in case of confrontation" must be given constitutional protection, *id.*—are bound to follow it in the teeth of that disagreement. By seizing the authority to veto the ordinary, law-abiding citizen's choice to carry a firearm, Maryland has struck at the heart of the Second Amendment.

It is thus no surprise that courts have rejected this kind of "ask-permission-first" regime across a wide variety of constitutional rights, reasoning that the government has failed to honor a right if it demands to know—and assess *de novo*—

the reasons justifying each occasion of its exercise. That principle is perhaps most familiar in the free speech context, where it has been understood for centuries that the most serious infringement on the right of free expression is the "prior restraint": a requirement that before you get permission to speak, you must explain to the government why what you have to say is worth hearing. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–23 (1931); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732–44 (1833). The Constitution simply will not brook a licensing scheme that allows government officials to bar one from speaking because "they do not approve" of the proposed speech's "effects upon the general welfare." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958).

The rule that the government can no more demand an explanation for the desire to engage in constitutionally protected conduct than it may prohibit such conduct altogether is also well established in the free exercise context. The government cannot, for example, arrogate to itself the authority to second-guess citizens' religious judgments. Those judgments are for citizens, and citizens alone, to make. While courts can determine whether an asserted religious conviction is an "honest" one, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981), they cannot proceed to "question the centrality" or "plausibility" of that conviction, *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872,

887 (1990); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

A shared principle unites these doctrinal contexts: if the government cannot prohibit a person from engaging in certain constitutionally protected conduct, it also cannot condition a person's right to engage in the protected conduct upon demonstration of a "good and substantial reason" for wanting to engage in it. "A Constitutional guarantee subject to future . . . assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. But Maryland has seized *precisely* this power. By requiring its residents to prove that they have a special need for self-defense greater than that of the "average person" before exercising their right to bear arms, *Scherr*, 880 A.2d at 1148, Maryland has arrogated to itself the authority to ban any exercise of this Second Amendment conduct by typical, law-abiding citizens.

In short, as the D.C. Circuit persuasively concluded, a "good reason" requirement that limits the carrying of firearms outside the home to those with a "heightened need" for self-defense "is necessarily a total ban on most . . . residents' right to carry a gun in the face of ordinary self-defense needs." *Wrenn*, 864 F.3d at 666. Indeed, such a restriction "destroys the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations . . . , but by design: it looks precisely for needs 'distinguishable' from those of the community." *Id.* Such

a prohibition is unconstitutional *per se*, "apart from any particular balancing test," since no "showing[ ] of public benefits could save this destruction of so many commonly situated . . . residents' constitutional right to bear common arms for self-defense in any fashion at all." *Id.*

III. *Woollard* was wrong to uphold Defendant's "good and substantial reason" restriction under intermediate scrutiny.

a. Strict scrutiny should apply.

Even if Defendant's restrictions were not *categorically* unconstitutional, they should at the least be subjected to the highest level of constitutional scrutiny. As the Supreme Court has explained, "strict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms is not only enumerated in the constitutional text; it was also counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778. *Woollard*'s application of merely intermediate scrutiny, by contrast, relegates the Second Amendment to "a second-class right." *Id.* at 780 (plurality).

b. Maryland's "good and substantial reason" restriction fails even intermediate scrutiny, properly applied.

Ultimately determining the correct standard of scrutiny is immaterial, however, because the "good and substantial reason" restriction should be struck down under *any* level of heightened scrutiny.

1. That is so, first, as a matter of law. By *Woollard*'s own description, Maryland's restrictions will reduce firearm violence, if at all, *only by reducing the quantity of firearms in public*. That is "not a permissible strategy"—even if used as a means to the further end of increasing public safety. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650. That conclusion follows directly from the Supreme Court's precedents in the secondary-effects area of free speech doctrine.

The Supreme Court has held that government restrictions on certain types of expressive conduct—most commonly, zoning ordinances that apply specifically to establishments offering adult entertainment—are subject to merely intermediate scrutiny even though they are content-based. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–51 (1986). But this lesser scrutiny applies only so long as the *purpose and effect* of the restrictions is to reduce the negative "secondary effects" of the expression—such as the increased crime that occurs in neighborhoods with a high concentration of adult theaters—rather than to suppress the expression itself. *Id.* at 49.

Justice Kennedy's controlling[4] opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), makes clear that in defending a restriction as sufficiently tailored to further an important or substantial governmental interest, the government may not rely on the proposition "that it will reduce secondary effects by reducing speech in the same proportion." *Id.* at 449. "It is no trick to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech." *Id.* at 450.

Courts have applied similar reasoning in the Second Amendment context. For instance, in *Heller III*, 801 F.3d at 280, the D.C. Circuit struck down the District of Columbia's prohibition on registering more than one pistol per month. The District defended that ban as designed to "promote public safety by limiting the number of guns in circulation," based on its theory "that more guns lead to more gun theft, more gun accidents, more gun suicides, and more gun crimes." *Id.* But the court rejected that simplistic syllogism, explaining that "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home," and so it simply cannot be right. *Id.*; *see also Grace*, 187 F. Supp. 3d at 148 (reasoning that "it is not a permissible strategy to reduce the alleged negative effects of a constitutionally protected right by simply reducing the number of people exercising the right"

[4] *See, e.g.*, *Joelner v. Village of Washington Park*, 378 F.3d 613, 624 n.7 (7th Cir. 2004); *Center for Fair Pub. Policy v. Maricopa Cty.*, 336 F.3d 1153, 1161 (9th Cir. 2003).

(quotation marks omitted)). In other words, the government may not adopt a law with the design and direct effect of limiting the quantity of conduct protected by the Second Amendment.

But that is precisely what Maryland has done here. Its restrictive licensing policies do not regulate the *manner* of bearing arms or impose reasonable training and safety requirements. No, their purpose and effect is to *limit the number of arms borne in public*. As *Woollard* itself describes, to the extent "the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime" it is "because it reduces the number of handguns carried in public." 712 F.3d at 879. Limits like Defendant's "good and substantial reason" restriction thus "destroy[ ] the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations . . . but by design." *Wrenn*, 864 F.3d at 666. That is "not a permissible strategy," *Grace*, 187 F. Supp. 3d at 148, under any level of heightened scrutiny.

2. Even if this objection is set aside, the heightened need requirement still flunks intermediate scrutiny, and *Woollard* was still wrong to uphold it. To survive intermediate scrutiny, a restriction must be "substantially related to the achievement" of the government's objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). "The burden of justification is demanding and it rests entirely on the State." *Id.* As Judge Posner concluded after surveying "the empirical literature

on the effects of allowing the carriage of guns in public," the available data do not provide "more than merely a rational basis for believing that [a ban on public carriage] is justified by an increase in public safety." *Moore*, 702 F.3d at 939, 942.

This is confirmed by experience. Forty-two States do not restrict the carrying of firearms to a privileged few. *See Gun Laws*, NRA-ILA, https://goo.gl/Nggx50. Yet "many years of evidence across different states and time periods overwhelmingly rejects" the claim that "permit holders will use their guns to commit crimes instead of using their guns for self-defense." David B. Mustard, *Comment*, *in* EVALUATING GUN POLICY 325, 330 (Jens Ludwig & Philip J. Cook eds., 2003); *see also id.* at 330–31. As social scientists in favor of gun control have acknowledged, there would be "relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand," since "[t]he available data about permit holders . . . imply that they are at fairly low risk of misusing guns." Philip J. Cook et al., *Gun Control After* Heller, 56 UCLA L. REV. 1041, 1082 (2009).

Further, even if laws that more freely grant permits have not been shown to decrease crime, there is no persuasive evidence that they *increase* crime—and that is the proposition Defendants would need to support with "substantial evidence," *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997), for their ban to survive intermediate scrutiny. The debate over firearms regulation is so ridden with strife

that statisticians, criminologists, and public health researchers often sound less like objective social scientists than zealous advocates. It is important to keep in mind, therefore, that not all articles on firearms regulation are created equal. The most persuasive studies are those conducted by respected, independent groups and that systematically review the entire body of firearms social science. For instance, in 2004 the National Academy of Sciences' National Research Council ("NRC") conducted an exhaustive review of the entire body of social-scientific literature on firearms regulation in an effort to determine what inferences could be safely drawn from the current research. The NRC concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ.

Similarly, in 2003 the Centers for Disease Control ("CDC") convened an independent Task Force to conduct "a systematic review of scientific evidence regarding the effectiveness of firearms laws in preventing violence, including violent crimes, suicide, and unintentional injury." CDC, MORBIDITY & MORTALITY WEEKLY REPORT VOL. 52, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS 11 (Oct. 3, 2003), http://goo.gl/VqWAVM. The CDC Task Force also concluded that the data were

insufficient to support the hypothesis "that the presence of more firearms" being carried in public by licensed citizens "increases rates of unintended and intended injury in interpersonal confrontations." Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 53 (2005), http://goo.gl/zOpJFL; *see also* Mark E. Hamill et al., *State Level Firearm Concealed-Carry Legislation & Rates of Homicide & Other Violent Crime*, J. AM. C. SURGEONS (forthcoming Jan. 2019) (finding no statistically-significant association between adoption of more permissive firearm carry laws and rates of homicide or other violent crime).

Woollard's cursory discussion of whether Maryland's "good and substantial reason" requirement actually advances its public-safety justification fell far short of the duty "to assure that, in formulating its judgments, [Maryland] has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994). *Woollard* did little more than parrot Maryland's assertion that its restriction advances public safety by, for example, "[d]ecreasing the availability of handguns to criminals via theft," and "[c]urtailing the presence of handguns during routine police-citizen encounters." 712 F.3d at 879–80. The Court did not analyze *any* empirical studies supporting these propositions, nor did it weigh (or even mention) the robust social-science evidence cited above *failing* to find any causal link between public safety and restrictions on carrying firearms outside the

home. *Woollard*'s facile scrutiny of the "good and substantial reason" requirement was "heightened" in name only.

The lack of evidence that a law such as Maryland's advances public safety should not be surprising, because violent criminals will continue to carry guns in public regardless, leaving law-abiding citizens defenseless when confronted with criminal violence. As the Supreme Court recently held in the context of abortion restrictions, "[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to [change their conduct] by a new overlay of regulations." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313–14 (2016). This is not a novel proposition. In a passage Thomas Jefferson copied into his personal quotation book, the influential Italian criminologist Cesare Beccaria reasoned that laws forbidding the

> wear[ing of] arms . . . disarm[ ] those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? . . . [Such a law] certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder.

See Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151, 154 (1986).

Accordingly, instead of focusing on the special need requirement's (likely nonexistent) effect on hardened criminals, a realistic assessment of that limit's

potential costs and benefits must instead look at those persons "for whom the provision is an actual rather than an irrelevant restriction." *Hellerstedt*, 136 S. Ct. at 2320 (brackets omitted). Here, that class is comprised of those persons who Secretary Pallozzi has determined pass all of the State's eligibility restrictions (lack of criminal history, substance abuse, etc.). MD. CODE PUB. SAFETY § 5-306(a). It is no surprise, given all of these criteria—which, again, Plaintiffs do not challenge—that data from other states indicate that carry license holders as a group are "much more law-abiding than the general population." David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 572 (2009); *id.* at 564–70 (discussing government data from Minnesota, Michigan, Ohio, Louisiana, Texas, and Florida); *see also* H. STERLING BURNETT, NATIONAL CENTER FOR POLICY ANALYSIS, TEXAS CONCEALED HANDGUN CARRIERS: LAW-ABIDING PUBLIC BENEFACTORS 1 (2000), https://goo.gl/7MvkD9 (finding that concealed-carry license holders in Texas have "arrest rates far lower than the general population for every category of crime"); FLORIDA DEP'T OF AGRIC. & CONSUMER SERVS., DIVISION OF LICENSING, CONCEALED WEAPON OR FIREARM LICENSE SUMMARY REPORT, OCT. 1, 1987–NOV. 30, 2017, http://goo.gl/yFzIwv (finding that since 1987, Florida has revoked less than 0.5% of the concealed-carry licenses it has issued for any reason, with the vast majority of those revocations having nothing to do with misuse of a firearm).

It is these highly law-abiding individuals who are, disproportionately, prevented from carrying firearms by the "good and substantial reason" limit. And that has very real public-safety *costs*—costs that Maryland entirely ignores. Although the number of defensive gun uses is difficult to measure, the leading study on the issue, the National Self-Defense Survey, "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). "At least 19 other surveys have resulted in [similar] estimated numbers of defensive gun uses." NATIONAL RESEARCH COUNCIL, *supra*, at 103; *see also* Gary Kleck, *What do CDC's Surveys Say About the Frequency of Defensive Gun Uses?* (July 11, 2018), *available at* https://goo.gl/nu1NiW. Many of these defensive gun uses involve carrying firearms in public. The National Self-Defense Survey indicates that "anywhere from 670,000 to 1,570,000 [defensive gun uses] a year occur in connection with gun carrying in a public place." Gary Kleck & Marc Gertz, *Carrying Guns for Protection: Results from the National Self-Defense Survey*, 35 J. RESEARCH IN CRIME & DELINQUENCY 193, 195 (1998). What is more, "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million, in the context of about 300,000

violent crimes involving firearms in 2008." INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (2013), http://goo.gl/oO6oRp (citation omitted).

Depriving law-abiding citizens of the right to carry firearms also may embolden criminals to commit additional crimes. "[Q]uite apart from their effects in disrupting crimes that have already been initiated, gun carrying among prospective victims may discourage some crimes from being attempted in the first place, due to criminals anticipating greater risks of injury to themselves and lower rates of success completing the crimes." Kleck & Gertz, *Carrying Guns for Protection*, *supra*, at 195. In other words, "knowing that many law-abiding citizens are walking the streets armed may make criminals timid." *Moore*, 702 F.3d at 937.

Accordingly, while restricting the carrying of firearms to a favored few is unlikely to prevent *criminals* from engaging in that conduct, it does mean that many *law-abiding citizens* will not be able to use firearms defensively outside the home. Any realistic appraisal of existing social-scientific data thus leads inexorably to the conclusion that the "good and substantial reason" requirement cannot be shown to benefit the public safety—but it may well harm it.

3. Finally, even if Maryland's "good and substantial reason" requirement did advance public safety—and, as explained above, it does not—that restriction independently fails heightened scrutiny because it is not properly tailored to the

government's asserted goals. While laws subject to intermediate scrutiny "need not be the least restrictive or least intrusive means of serving the government's interests," they still must be narrowly tailored, possessing "a close fit between ends and means." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534–35 (2014) (quotation marks omitted). Here, there is an utter lack of fit between the State's restrictions and its purported objective of public safety.

After all, "the fact that a person can demonstrate a heightened need for self-defense says nothing about whether he or she is more or less likely to misuse a gun." *Grace*, 187 F. Supp. 3d at 149. "This limitation will neither make it less likely that those who meet the [good and substantial reason] requirement will accidentally shoot themselves or others, nor make it less likely that they will turn to a life of crime. Put simply, the solution is unrelated to the problem it intends to solve." *Drake v. Filko*, 724 F.3d 426, 454 (3d Cir. 2013) (Hardiman, J., dissenting).

This disconnect points to another problem under *McCullen*—under intermediate scrutiny "the government must demonstrate that alternative measures that [would] burden substantially less [protected conduct] *would fail* to achieve the government's interests." 134 S. Ct. at 2540 (emphasis added). Here, there are myriad alternatives Maryland could try or already employs that actually *are* targeted at the problem of handguns being carried by those likely to misuse them rather than simply seeking to suppress the exercise of the right. These alternatives include a "shall

issue" licensing system, along the lines used by the vast majority of the States, that requires the issuance of a license to citizens that meet objective criteria, a training requirement, and a prohibition on carrying by individuals with a demonstrated propensity to violence (such as violent criminals). As explained above, the State cannot show that these alternatives would fail to advance its interests to a similar extent as its "good and substantial reason" requirement.

Plaintiffs are not arguing for a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Rather, Plaintiffs are arguing for the right of vetted, law-abiding citizens to carry "the quintessential self-defense weapon" in the manner of Maryland's choosing for the "core lawful purpose of self-defense." *Id*. at 629, 630. If the right to bear arms does not protect this conduct, it might as well not be in the Constitution.

CONCLUSION

For the foregoing reasons, the district court's opinion and order should be reversed.

Dated: December 20, 2018

Respectfully submitted,

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This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 11,413 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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Dated: December 20, 2018

s/ David H. Thompson
David H. Thompson

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STATUTORY ADDENDUM

MD. CODE CRIM. LAW § 4-203. Wearing, carrying, or transporting handgun.

Prohibited

(a)(1) Except as provided in subsection (b) of this section, a person may not:

(i) wear, carry, or transport a handgun, whether concealed or open, on or about the person;

(ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State;

(iii) violate item (i) or (ii) of this paragraph while on public school property in the State;

(iv) violate item (i) or (ii) of this paragraph with the deliberate purpose of injuring or killing another person; or

(v) violate item (i) or (ii) of this paragraph with a handgun loaded with ammunition.

(2) There is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly.

Exceptions

(b) This section does not prohibit:

(1) the wearing, carrying, or transporting of a handgun by a person who is authorized at the time and under the circumstances to wear, carry, or transport the handgun as part of the person's official equipment, and is:

(i) a law enforcement official of the United States, the State, or a county or city of the State;

(ii) a member of the armed forces of the United States or of the National Guard on duty or traveling to or from duty;

(iii) a law enforcement official of another state or subdivision of another state temporarily in this State on official business;

(iv) a correctional officer or warden of a correctional facility in the State;

(v) a sheriff or full-time assistant or deputy sheriff of the State; or

(vi) a temporary or part-time sheriff's deputy;

(2) the wearing, carrying, or transporting of a handgun, in compliance with any limitations imposed under § 5-307 of the Public Safety Article, by a person to whom a permit to wear, carry, or transport the handgun has been issued under Title 5, Subtitle 3 of the Public Safety Article;

(3) the carrying of a handgun on the person or in a vehicle while the person is transporting the handgun to or from the place of legal purchase or sale, or to or from a bona fide repair shop, or between bona fide residences of the person, or between the bona fide residence and place of business of the person, if the business is operated and owned substantially by the person if each handgun is unloaded and carried in an enclosed case or an enclosed holster;

(4) the wearing, carrying, or transporting by a person of a handgun used in connection with an organized military activity, a target shoot, formal or informal target practice, sport shooting event, hunting, a Department of Natural Resources-sponsored firearms and hunter safety class, trapping, or a dog obedience training class or show, while the person is engaged in, on the way to, or returning from that activity if each handgun is unloaded and carried in an enclosed case or an enclosed holster;

(5) the moving by a bona fide gun collector of part or all of the collector's gun collection from place to place for public or private exhibition if each handgun is unloaded and carried in an enclosed case or an enclosed holster;

(6) the wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases;

(7) the wearing, carrying, or transporting of a handgun by a supervisory employee:

(i) in the course of employment;

(ii) within the confines of the business establishment in which the supervisory employee is employed; and

(iii) when so authorized by the owner or manager of the business establishment;

(8) the carrying or transporting of a signal pistol or other visual distress signal approved by the United States Coast Guard in a vessel on the waterways of the State or, if the signal pistol or other visual distress signal is unloaded and carried in an enclosed case, in a vehicle; or

(9) the wearing, carrying, or transporting of a handgun by a person who is carrying a court order requiring the surrender of the handgun, if:

(i) the handgun is unloaded;

(ii) the person has notified the law enforcement unit, barracks, or station that the handgun is being transported in accordance with the court order; and

(iii) the person transports the handgun directly to the law enforcement unit, barracks, or station.

Penalty

(c)(1) A person who violates this section is guilty of a misdemeanor and on conviction is subject to the penalties provided in this subsection.

(2) If the person has not previously been convicted under this section, § 4-204 of this subtitle, or § 4-101 or § 4-102 of this title:

(i) except as provided in item (ii) of this paragraph, the person is subject to imprisonment for not less than 30 days and not exceeding 3 years or a fine of not less than $250 and not exceeding $2,500 or both; or

(ii) if the person violates subsection (a)(1)(iii) of this section, the person shall be sentenced to imprisonment for not less than 90 days.

(3)(i) If the person has previously been convicted once under this section, § 4-204 of this subtitle, or § 4-101 or § 4-102 of this title:

1. except as provided in item 2 of this subparagraph, the person is subject to imprisonment for not less than 1 year and not exceeding 10 years; or

2. if the person violates subsection (a)(1)(iii) of this section, the person is subject to imprisonment for not less than 3 years and not exceeding 10 years.

(ii) 1. Except as provided in subsubparagraph 2 of this subparagraph, the court may not impose less than the applicable minimum sentence provided under subparagraph (i) of this paragraph.

2. If the person violates subsection (a)(1)(v) of this section, the court may not suspend any part of or impose less than the applicable mandatory minimum sentence provided under subparagraph (i) of this paragraph.

(iii) Except as provided in § 4-305 of the Correctional Services Article, if the person violates subsection (a)(1)(v) of this section, the person is not eligible for parole during the mandatory minimum sentence.

(iv) A mandatory minimum sentence under subparagraph (ii)2 of this paragraph may not be imposed unless the State's Attorney notifies the defendant in writing at least 30 days before trial of the State's intention to seek the mandatory minimum sentence.

(4)(i) If the person has previously been convicted more than once under this section, § 4-204 of this subtitle, or § 4-101 or § 4-102 of this title, or of any combination of these crimes:

1. except as provided in item 2 of this subparagraph, the person is subject to imprisonment for not less than 3 years and not exceeding 10 years; or

2. A. if the person violates subsection (a)(1)(iii) of this section, the person is subject to imprisonment for not less than 5 years and not exceeding 10 years; or

B. if the person violates subsection (a)(1)(iv) of this section, the person is subject to imprisonment for not less than 5 years and not exceeding 10 years.

(ii) 1. Except as provided in subsubparagraph 2 of this subparagraph, the court may not impose less than the applicable minimum sentence provided under subparagraph (i) of this paragraph.

2. If the person violates subsection (a)(1)(v) of this section, the court may not suspend any part of or impose less than the applicable mandatory minimum sentence provided under subparagraph (i) of this paragraph.

(iii) Except as provided in § 4-305 of the Correctional Services Article, if the person violates subsection (a)(1)(v) of this section, the person is not eligible for parole during the mandatory minimum sentence.

(iv) A mandatory minimum sentence under subparagraph (ii)2 of this paragraph may not be imposed unless the State's Attorney notifies the defendant in writing at least 30 days before trial of the State's intention to seek the mandatory minimum sentence.

MD. CODE PUB. SAFETY § 5-303. Permit required.

A person shall have a permit issued under this subtitle before the person carries, wears, or transports a handgun.

MD. CODE PUB. SAFETY § 5-304. Application for permit.

Oath

(a) An application for a permit shall be made under oath.

Fees—In general

(b)(1) Subject to subsections (c) and (d) of this section, the Secretary may charge a nonrefundable fee payable when an application is filed for a permit.

. . .

MD. CODE PUB. SAFETY § 5-305. Criminal history records check.

"Central Repository" defined

(a) In this section, "Central Repository" means the Criminal Justice Information System Central Repository of the Department of Public Safety and Correctional Services.

Application required

(b) Except as provided in subsection (g) of this section, the Secretary shall apply to the Central Repository for a State and national criminal history records check for each applicant for a permit.

Contents of application

(c) As part of the application for a criminal history records check, the Secretary shall submit to the Central Repository:

(1) two complete sets of the applicant's legible fingerprints taken on forms approved by the Director of the Central Repository and the Director of the Federal Bureau of Investigation;

(2) the fee authorized under § 10-221(b)(7) of the Criminal Procedure Article for access to Maryland criminal history records; and

(3) the mandatory processing fee required by the Federal Bureau of Investigation for a national criminal history records check.

Information forwarded to
applicant and State Police

(d) 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 record information.

Restrictions on information

(e) Information obtained from the Central Repository under this section:

(1) is confidential and may not be disseminated; and

(2) shall be used only for the licensing purpose authorized by this section.

Subject may contest contents

(f) The subject of a criminal history records check under this section may contest the contents of the printed statement issued by the Central Repository as provided in § 10-223 of the Criminal Procedure Article.

. . .

MD. CODE PUB. SAFETY § 5-306. Qualifications for permit.

In general

(a) Subject to subsection (c) of this section, the Secretary shall issue a permit within a reasonable time to a person who the Secretary finds:

(1) is an adult;

(2) (i) has not been convicted of a felony or of a misdemeanor for which a sentence of imprisonment for more than 1 year has been imposed; or

(ii) if convicted of a crime described in item (i) of this item, has been pardoned or has been granted relief under 18 U.S.C. § 925(c);

(3) has not been convicted of a crime involving the possession, use, or distribution of a controlled dangerous substance;

(4) is not presently an alcoholic, addict, or habitual user of a controlled dangerous substance unless the habitual use of the controlled dangerous substance is under legitimate medical direction;

(5) except as provided in subsection (b) of this section, has successfully completed prior to application and each renewal, a firearms training course approved by the Secretary that includes:

(i) 1. for an initial application, a minimum of 16 hours of instruction by a qualified handgun instructor; or

2. for a renewal application, 8 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 qualification component that demonstrates the applicant's proficiency and use of the firearm; and

(6) based on an investigation:

(i) has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or to another; and

(ii) 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.

Exemption from completing
certified firearms training course

(b) An applicant for a permit is not required to complete a certified firearms training course under subsection (a) of this section if the applicant:

(1) is a law enforcement officer or a person who is retired in good standing from service with a law enforcement agency of the United States, the State, or any local law enforcement agency in the State;

(2) is a member, retired member, or honorably discharged member of the armed forces of the United States or the National Guard;

(3) is a qualified handgun instructor; or

(4) has completed a firearms training course approved by the Secretary.

Applicants under the age of 30

(c) An applicant under the age of 30 years is qualified only if the Secretary finds that the applicant has not been:

(1) committed to a detention, training, or correctional institution for juveniles for longer than 1 year after an adjudication of delinquency by a juvenile court; or

(2) adjudicated delinquent by a juvenile court for:

(i) an act that would be a crime of violence if committed by an adult;

(ii) an act that would be a felony in this State if committed by an adult; or

(iii) an act that would be a misdemeanor in this State that carries a statutory penalty of more than 2 years if committed by an adult.

Handgun qualification licenses

(d) The Secretary may issue a handgun qualification license, without an additional application or fee, to a person who:

(1) meets the requirements for issuance of a permit under this section; and

(2) does not have a handgun qualification license issued under § 5-117. 1 of this title.

MD. CODE PUB. SAFETY § 5-307. Scope of permit.

In general

(a) A permit is valid for each handgun legally in the possession of the person to whom the permit is issued.

Limitations

(b) The Secretary may limit the geographic area, circumstances, or times of the day, week, month, or year in which a permit is effective.

MD. CODE PUB. SAFETY § 5-308. Possession of permit required.

A person to whom a permit is issued or renewed shall carry the permit in the person's possession whenever the person carries, wears, or transports a handgun.

MD. CODE PUB. SAFETY § 5-309. Term and renewal of permit.

Term of permit

(a) Except as provided in subsection (d) of this section, a permit expires on the last day of the holder's birth month following 2 years after the date the permit is issued.

Renewal of permit

(b) Subject to subsection (c) of this section, a permit may be renewed for successive periods of 3 years each if, at the time of an application for renewal, the applicant possesses the qualifications for the issuance of a permit and pays the renewal fee stated in this subtitle.

Fingerprint requirement

(c) A person who applies for a renewal of a permit is not required to be fingerprinted unless the Secretary requires a set of the person's fingerprints to resolve a question of the person's identity.

. . .

MD. CODE PUB. SAFETY § 5-310. Revocations.

In general

(a) The Secretary may revoke a permit on a finding that the holder:

(1) does not meet the qualifications described in § 5-306 of this subtitle; or

(2) violated § 5-308 of this subtitle.

Return of permit

(b) A holder of a permit that is revoked by the Secretary shall return the permit to the Secretary within 10 days after receipt of written notice of the revocation.

MD. CODE PUB. SAFETY § 5-311. Informal review of Secretary's action.

Request for informal review

(a) A person who is denied a permit or renewal of a permit or whose permit is revoked or limited may request the Secretary to conduct an informal review by filing a written request within 10 days after receipt of written notice of the Secretary's initial action.

Personal interview

(b) An informal review:

(1) may include a personal interview of the person who requested the informal review; and

(2) is not subject to Title 10, Subtitle 2 of the State Government Article.

Action by Secretary

(c) In an informal review, the Secretary shall sustain, reverse, or modify the initial action taken and notify the person who requested the informal review of the decision in writing within 30 days after receipt of the request for informal review.

Request for review by Board

(d) A person need not file a request for an informal review under this section before requesting review under § 5-312 of this subtitle.

MD. CODE PUB. SAFETY § 5-312. Action by Board.

Request for review authorized

(a)(1) A person who is denied a permit or renewal of a permit or whose permit is revoked or limited may request the Board to review the decision of the Secretary by filing a written request with the Board within 10 days after receipt of written notice of the Secretary's final action.

(2) A person whose application for a permit or renewal of a permit is not acted on by the Secretary within 90 days after submitting the application to the Secretary may request a hearing before the Board by filing a written request with the Board.

Form of review

(b) Within 90 days after receiving a request to review a decision of the Secretary, the Board shall:

(1) review the record developed by the Secretary; or

(2) conduct a hearing.

Evidence

(c) The Board may receive and consider additional evidence submitted by a party in conducting a review of the decision of the Secretary.

Decision by Board

(d)(1) Based on the Board's consideration of the record and any additional evidence, the Board shall sustain, reverse, or modify the decision of the Secretary.

(2) If the action by the Board results in the denial of a permit or renewal of a permit or the revocation or limitation of a permit, the Board shall submit in

writing to the applicant or the holder of the permit the reasons for the action taken by the Board.

Administrative procedures

(e)(1) Any hearing and any subsequent proceedings of judicial review shall be conducted in accordance with Title 10, Subtitle 2 of the State Government Article.

(2) Notwithstanding paragraph (1) of this subsection, a court may not order the issuance or renewal of a permit or alter a limitation on a permit pending a final determination of the proceeding.

MD. CODE PUB. SAFETY § 5-313. Failure to return revoked permit.

Prohibited

(a) A person may not fail to return a revoked permit.

Penalty

(b) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine of not less than $100 or exceeding $1,000 or both.

MD. CODE PUB. SAFETY § 5-314. Carrying, wearing, or transporting handgun while under influence of alcohol or drugs.

Prohibited

(a) A person who holds a permit may not wear, carry, or transport a handgun while the person is under the influence of alcohol or drugs.

Penalty

(b) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both.

MD. CODE REGS. 29.03.02.03

A. Qualifications. In accordance with Public Safety Article, §5-306, Annotated Code of Maryland, a person is eligible for issuance of a handgun permit only if the person:

(1) Is an adult;

(2) Is not prohibited from possessing a handgun under COMAR 29.03.01.03 or otherwise prohibited from purchasing or possessing a handgun under federal or State law;

(3) Has not been convicted of a felony or misdemeanor for which a sentence of imprisonment for more than 1 year has been imposed, unless the person has been pardoned or the United States Attorney General has granted relief;

(4) Has not been convicted of a crime involving the possession, use, or distribution of a controlled dangerous substance;

(5) Is not presently an alcoholic, addict, or habitual user of a controlled dangerous substance, unless the habitual use of a controlled dangerous substance is under legitimate medical direction;

(6) Has not exhibited propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or another;

(7) Has a good and substantial reason to wear, carry, or transport a handgun; and

(8) If younger than 30 years old, has not been committed to a detention, training, or correctional institution for juveniles for longer than 1 year after an adjudication of delinquency by a juvenile court.

B. Investigation Criteria. The following areas will be a part of the investigation of every applicant and will be considered by the Secretary in determining whether a permit will be issued:

(1) Age of the applicant;

(2) Occupation, profession, or employment of the applicant;

(3) Verification of the applicant's qualifications;

(4) Verification of the information supplied by the applicant in the application;

(5) Information received from personal references and other persons interviewed;

(6) Information received from business or employment references as may be necessary in the discretion of the investigator;

(7) Criminal record of applicant, including any juvenile record for an applicant younger than 30 years old;

(8) Medical history of applicant as it may pertain to the applicant's fitness to carry, wear, or transport a handgun;

(9) Psychiatric or psychological background of the applicant as it may pertain to the applicant's fitness to carry, wear, or transport a handgun;

(10) The applicant's propensity for violence or instability which could reasonably render the applicant's wearing, carrying, or transporting of a handgun a danger to the applicant or to others;

(11) The applicant's use of intoxicating beverages and drugs;

(12) The reasons given by the applicant for carrying, wearing, or transporting a handgun, and whether those reasons are good and substantial; and

(13) Whether the permit is necessary as a reasonable precaution for the applicant against apprehended danger.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on December 20, 2018. I certify that service will be accomplished by the appellate CM/ECF system on all parties or their counsel.

Dated: December 20, 2018

s/ David H. Thompson
David H. Thompson

Counsel for Plaintiffs-Appellants