**IN THE**

**COURT OF SPECIAL APPEALS OF MARYLAND**

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September Term, 2018

No. CSA-REG-2431-2018

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EDWARD HOLMES WHALEN,
*Appellant*,

vs.
HANDGUN PERMIT REVIEW BOARD,
*Appellee*.

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Appeal from the Circuit Court for the City of Baltimore
(The Honorable John S. Nugent)

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# BRIEF OF APPELLANT

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Edward Holmes Whalen
[redacted]
Appellant

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## STATEMENT OF THE CASE

On March 9, 2017, Appellant, Edward Holmes Whalen, submitted an application to the Maryland State Police fSnoor a permit to carry a handgun in public (herein "wear and carry application" or "application") pursuant to MD Code Public Safety § 5-306. On July 5, 2017, The Maryland State Police denied Mr. Whalen's application, citing a failure to demonstrate he had a "good and substantial reason" to carry a firearm.

On July 27, 2017, an Informal Review of Mr. Whalen's application was conducted by the Maryland State Police Licensing Division's Handgun Permit Unit. On August 9, 2017, the State Police sustained the denial of his application. On September 19, 2017, the Handgun Permit Review Board ("Board") voted to sustain the denial of Mr. Whalen's application, issuing its written decision on January 25, 2018.

Mr. Whalen appealed that decision to Circuit Court for the City of Baltimore. On August 24, 2018, Judge Nugent issued a written Memorandum and Order which upheld the decision of the Board to sustain the denial of Mr. Whalen's application by the State Police. On August 31, 2018, Mr. Whalen timely filed a Notice of Appeal of Judge Nugent's Memorandum and Order.

## QUESTIONS PRESENTED

1. Whether the statutory requirement for a "good and substantial reason" set forth in MD Code Public Safety § 5-306(a)(6)(ii), for the issuance of a Maryland handgun wear and carry permit facially violates the Second Amendment.

2. Independently of Question 1, whether the Maryland State Police and the Handgun Permit Review Board used an erroneous legal standard by failing to apply the Fourth Circuit's decision in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), in denying Mr. Whalen's application for a handgun wear and carry permit.

## STATEMENT OF THE FACTS

### A. Statutory Scheme

Under MD Code, Criminal Law, § 4-203(a), carrying a handgun on one's person or within one's vehicle is strictly prohibited in Maryland, subject to limited and specified examples. It is a serious criminal offense to carry a handgun in violation of Section 4-203. Under Section 4-203(c), on a first offense "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." See App.1-3. Because a violation of Section 4-203 is a misdemeanor punishable by imprisonment for a term in excess of two years, any conviction under Section 4-203 results in a lifetime federal firearms disability. See 18 U.S.C. § 922(g), and 18 U.S.C. § 921(a)(20). A similar disability is imposed under Maryland law. See MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1).

However, the prohibitions imposed by Section 4-203 do not apply to "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." MD Code, Criminal Law, § 4-203(b)(2). MD Code Public Safety, §5-306 provides authority to the Maryland State Police to issue such "wear and carry" permits. See App.507. Specifically, Section 5-306(a)(6) directs the State Police to issue a carry permit to anyone who "(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." MD Code Public Safety §5-306(a)(6)(i),(ii). As of October 1, 2013, with the passage of Senate Bill 281, Acts 2013, c. 427, § 1, eff. Oct. 1, 2013, an applicant for a wear and carry permit must (unless training exempt) have a minimum of 16 hours of instruction by a qualified handgun instructor prior to submission of the application.

Under MD Code, Public Safety, § 5-311, an applicant whose application for a wear and carry permit has been denied by the State Police may request an informal review of the denial before the State Police by filing a written request within 10 days of the denial. Under MD Code, Public Safety, § 5-312, such an applicant may also seek review before the Handgun Permit Review Board, established under MD Code, Public

Safety, § 5-302.[1] See App.8-9. Under an earlier version of Section 5-312 applicable to these proceedings,[2] the Board was directed to review the record, conduct a hearing, and receive and consider "additional evidence" submitted by any party and was empowered "to sustain, reverse, or modify the decision of the Secretary." MD Code, Public Safety, § 302(c),(d)(1)). Under that version of MD Code, Public Safety, § 5-312(e)(1), a Board decision was subject to judicial review in accordance with "Title 10, Subtitle 2 of the State Government Article." See MD Code State Gov't., § 10-222.

### B. Statement of Facts

#### 1. The Application

On March 9, 2017, Petitioner, Edward Holmes Whalen, submitted an application to the Maryland State Police for a permit to carry a handgun in public. On May 24, 2017, Mr. Whalen traveled to the Waterloo Police Barracks, in Jessup, Maryland, for an interview with Ms. Sylia L. Wright, an Administrative Investigator for the Maryland State Police. Unaware of the rigorous manner in which Administrative Investigators and State Troopers evaluate an applicant's "good and substantial reason," Mr. Whalen's

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[1] "The Board consists of five members appointed from the public by the Governor with the advice and consent of the Senate." MD Code, Public Safety, § 5-302(b).

[2] With enactment of Acts 2018, c. 253, § 1, eff. Oct. 1, 2018, Section 5-312 was amended to provide that a decision of the Handgun Permit Review Board may be appealed for a *de novo* hearing before the Office of Administrative Hearings ("OAH"). A decision of the OAH is appealable to circuit court. However, the Board's decision in this case was entered on January 25, 2018, well prior to the October 1, 2018, effective date of these amendments. This appeal is thus governed by the prior version of Section 5-312. See *Langston v. Riffe*, 359 Md. 396, 406 (2000) ("there is a general presumption in the law that a [statute] is intended to have purely prospective effect"). That prior version is set forth in the attached Appendix.

initial application noted that his desire for Wear and Carry Permit was for "personal protection and all other lawful purposes." Mr. Whalen elaborated on these reasons by presenting the State Police investigator with a detailed written "Statement of 'good and substantial reason'" when he arrived for his interview. (E.1).

First, Mr. Whalen cited the fact that he was a local elected official – an "ANC Commissioner" – in D.C., in a district directly adjacent to the Maryland state line on Western Avenue, N.W. Second, Mr. Whalen cited the fact that his father was a federal judge currently serving on the United States Tax Court. Third, Mr. Whalen detailed his employment by the United States Congress, the Members for whom he worked in either chamber, the issues in his portfolio, and consequential pieces of legislation on which he worked. Fourth, Mr. Whalen cited his Secret level security clearance and the fact that his sensitive personal information had been – and potentially was still being – bought and sold by aliens after computer "hack" of the employment records of 22 million federal employees maintained by the Office of Personnel Management. (E.1-3).

On July 5, 2017, the Maryland State Police denied Mr. Whalen's application for failure to demonstrate a "good and substantial reason" to carry a firearm. R.4. Shortly thereafter, and within the 10-day time prescribed by statute, MD Code Public Safety § 5-311, Mr. Whalen requested an "Informal Review" by the State Police, and a hearing before the Handgun Permit Review Board. An Informal Review of Mr. Whalen's application was conducted by First Sergeant Kevin Moriarty of the Maryland State Police Licensing Division's Handgun Permit Unit. At this meeting, Mr. Whalen presented Mr.

Moriarty with another written statement expanding upon the matters raised in the original statement he had submitted to Investigator Wright. (E.7-8). In this second statement, Mr. Whalen noted the fact that he had, in the past, experienced forceful encounters with constituents, over the telephone, while serving as a Legislative Assistant on Capitol Hill. Additionally, in this second statement, Mr. Whalen provided Mr. Moriarty a copy of his biography and headshot that would be publicly posted on the website maintained by ANC3D, on which Mr. Whalen served as a Commissioner. (E.9). The informal review was unsuccessful (E.10) and Mr. Whalen pursued his appeal before the Handgun Permit Review Board.

### 2. The Board Decision

Mr. Whalen's appeal was considered by the Handgun Permit Review Board on September 19, 2017. During a dialogue with Mr. Whalen, the Board members discussed, at great length, whether Mr. Whalen had applied for his permit in Washington, D.C., noting that Mr. Whalen's application would be "more palatable," if he had a D.C. permit already. (E.33). In addition, towards the end of the hearing, a third Board Member, Ms. Shari Judah, noted that her feelings might change if Mr. Whalen had a D.C. permit, placing his application "…in the maybe category..." (E.40).

The Maryland State Police's denial of Mr. Whalen's application was sustained by the Board. (E.40). However, a written decision, as required by Section 5-312, did not issue until January 25, 2018. (E.43). That decision found Mr. Whalen's testimony to be "compelling" and "appeared truthful." (E.41). The decision likewise noted that Mr.

Whalen lives on the District line adjacent to Maryland, but found significant hat Mr. Whalen had not then applied for a concealed carry permit from the District of Columbia. (E.44). The Board concluded that "[t]he Board does not see the need for a Maryland permit when Mr. Whalen's activities, work and residence are all in the District of Columbia." *Id*.

### 3. Decision of the Circuit Court below

Mr. Whalen appealed the Board's decision to the Circuit Court for Baltimore City. The merits of Mr. Whalen's appeal were heard on August 18, 2018, before Judge John S. Nugent. (E.62). At the same hearing, Judge Nugent considered and denied Mr. Whalen's Motion For Leave To Offer Additional Evidence pertinent to his application. (E.58). See MD Code, State Gov't, § 10-222(f) (providing for submission of additional evidence). Mr. Whalen's Motion For Leave To Offer Additional Evidence was an effort to submit for the Court's consideration copies of both Mr. Whalen's D.C. Concealed Carry Pistol License, and his father's, Judge Whalen, Maryland Wear & Carry Permit. *Id*. On August 24, 2018, Judge Nugent issued a Memorandum (E.89) and Order (E.101) denying the Motion, and affirming the decision of the Board. On August 31, 2018, Mr. Whalen timely filed a Notice of Appeal of Judge Nugent's Memorandum and Order. (E.102).

## STATEMENT OF THE STANDARD OF REVIEW

All the issues presented on this appeal are legal issues. The standard of review applicable to administrative agency decisions applies to Board cases. See *Brown v.*

*Handgun Permit Review Bd*., 188 Md. App. 455, 466-67 (2009). In reviewing determinations of an administrative agency, legal questions are subject to the *de novo* standard of review. *Ak's Daks Communications, Inc. v. Maryland Securities Div*., 138 Md.App. 314, 326 (2001) ("We apply a *de novo* standard of review to legal determinations made by an administrative agency" and "[i]n ascertaining the propriety of an agency's legal conclusions, we must consider whether the agency recognized and applied the correct principles of law governing the case."). See also *Schwartz v. Md. Dep't of Natural Res*., 385 Md. 534, 554 (2005) ("With respect to an agency's conclusions of law, we have often stated that a court reviews *de novo* for correctness."); *Bozeman v. Disability Review Board of the Prince George's County Police Pension Plan*, 126 Md.App. 1, 5 (1999) ("When the question before the agency involves interpretation of an ordinance or statute, our review is more expansive. We are not bound by the agency's interpretation.").

In this respect, this Court reviews the decision of the administrative agency, not the decision of the circuit court. See, e.g., *Employees' Retirement System v. Dorsey*, 203 Md. App. 304, 312 (2012) ("We review the decision of the administrative agency itself, … and not the findings of fact and conclusions of law made by the circuit court.") (citations omitted). An error of law committed by an administrative body generally requires that the decision be vacated, and the matter remanded to the Board for further proceedings under the correct legal standard, unless a remand would be futile. See, e.g., *O'Donnell v. Bassler*, 289 Md. 501, 509–11 (1981) ("if an administrative function

remains to be performed after a reviewing court has determined that an administrative agency has made an error of law, the court ordinarily may not modify the agency order. Under such circumstances, the court should remand the matter to the administrative agency without modification."). See also *County Council of P.G. Co., v. Zimmer Dev. Co*., 444 Md. 490, 581 (2015) ("When an administrative function remains to be exercised at the end of the day, we hold generally that a court must remand the case to the administrative agency.").

## ARGUMENT

### I. THE GOOD AND SUBSTANTIAL REASON REQUIREMENT IMPOSED BY MD CODE, PUBLIC SAFETY SECTION 5-306 IS UNCONSTITUTIONAL UNDER THE SECOND AMENDMENT

#### A. Introduction

As detailed below, the "good and substantial reason" requirement is facially unconstitutional under the Second Amendment. This Court should thus strike down the good and substantial reason requirement and order the issuance of the permit, as it undisputed that Mr. Whalen otherwise meets all the other requirements imposed by statute. Alternatively and independently, the Court should hold that the Board applied an erroneous legal standard in adjudicating Mr. Whalen's appeal from the denial of his application for a carry permit. The Court should establish the correct legal standard for these types of administrative proceedings before the Board and remand the case to the Board for further proceedings consistent with the Court's ruling.

### B. The Second Amendment Applies Outside the Home

The Supreme Court has squarely addressed, and held, that the Second Amendment, bestows an individual right to bear arms, including a handgun, inside the home. See *District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment is applicable to the States via the Due Process Clause of the Fourteenth Amendment); See also *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016) (summarily reversing a decision of the Massachusetts Supreme Judicial Court under *Heller* on grounds that it "contradicts this Court's precedent"). These opinions of the Supreme Court establish "a framework for how to proceed." *Palmer v. Dist. of Columbia*, 59 F.Supp.3d 173, 178 (D.D.C. 2014), citing *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011).

The framework established in *Heller* makes clear that the Second Amendment applies outside the home. The Court in *Heller* explained that "self-defense" is "the central component of the right," 554 U.S. at 599; that the "right of self-defense" is "central to the Second Amendment right," *id*. at 628; and that the Second Amendment guarantees a right to use firearms "for the core lawful purpose of self-defense," *id*. at 630. In *McDonald*, the Court reaffirmed that "individual self-defense is 'the central component' of the Second Amendment right" and that the "'inherent right of self-defense [is] central to the Second Amendment right.'" *McDonald*, 561 U.S. at 767 (citations omitted). See also *Peruta v. California*, 127 S.Ct. 1995, 1998 (2017) (Thomas, J., Gorsuch, J., dissenting from denial of certiorari) ("This Court has already suggested that the Second Amendment

protects the right to carry firearms in public in some fashion."). In neither case did the Court suggest that the right was limited to the home.

In the wake of these rulings, the Seventh Circuit has squarely held that the Second Amendment applies outside the home. See *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2013). In *Moore*, the court noted the fact 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. Accordingly, "[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*." *Id*. at 937. The Seventh Circuit thus held that the Illinois statute banning carriage outside the home was facially unconstitutional. *Moore*, 702 F.3d at 942 ("The Supreme Court's interpretation of the Second Amendment therefore compels us to reverse the decisions in the two cases before us and remand them to their respective district courts for the entry of declarations of unconstitutionality and permanent injunctions.").

More recently, in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), the D.C. Circuit likewise squarely held that the Second Amendment applied outside the home, and further held unconstitutional, under the Second Amendment, D.C.'s requirement that an applicant for a carry permit show "good reason to fear injury." Under that "good reason" requirement imposed by the D.C. statute, D.C. Code §7-2509.11(1)(A), "applicants must show a 'special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous

attacks that demonstrate a special danger to the applicant's life.'" *Wrenn*, 864 F.2d at 655 (quoting D.C. Code § 7-2509.11).

In striking this requirement down, the *Wrenn* court explained, "the legally decisive fact" was that "the good-reason law is necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs, where these residents are no more dangerous with a gun than the next law-abiding citizen." That requirement at issue in *Wrenn* is indistinguishable from the "good and substantial reason" requirement imposed by MD Code Public Safety § 5-306(a)(6)(ii). Indeed, the D.C. government modeled the "good reason to fear injury" threshold after Maryland's "good and substantial reason" standard. See D.C. Code § 24-2332; *Metropolitan Police Dept., Notice of Third Emergency Rulemaking,* 62 DCR 9781 (July 17, 2015).

In another case, *Young v. Hawaii*, a Ninth Circuit panel evaluated the "good reason to fear injury to person or property" standard to be granted a permit in Hawaii. A three judge panel concluded that "the right to bear arms must guarantee some right to self-defense in public"—whether through carrying a handgun openly or concealed. See *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018), *rehearing en banc granted,* 915 F.3d 681 (9th Cir. 2019), en banc consideration stayed, Order of Feb. 14, 2019 (9th Cir.) (en banc). Because Hawaii's law "entirely foreclosed" the "typical, law-abiding citizen" from bearing arms outside the home, *Young* concluded that it "eviscerates a core Second Amendment right—and must therefore be unconstitutional." Id. at 1048, 1071.

*Moore*, *Wrenn*, and *Young* do not stand alone on the question of whether the Second Amendment applies outside the home. The Second, Third, and Fourth Circuits have likewise assumed (without deciding) that the Second Amendment applies outside the home in sustaining, against a facial attack, "good reason" state statutes (including the "good and substantial reason" requirement in Maryland) that likewise limited carry permits to persons who could show a "good reason" to carry outside the home. See *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), *petition for certiorari pending* No.18-1272, (filed U.S. April 1, 2019); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming that "right exists outside the home" but upholding, on a facial challenge, Maryland's law requiring applicants show "good and substantial reason" for obtaining handgun permit under intermediate scrutiny test). Indeed, most recently in *Gould*, the First Circuit expressly 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," even though the court ultimately sustained the constitutionality of the Massachusetts "good cause" statute. *Gould*, 907 F.3d at 670. In summary, seven federal circuits have held or assumed that the Second Amendment applies outside the home. To date, no federal court of appeals has held that the right is confined to the home.

Mr. Whalen acknowledges that the Maryland Court of Appeals stated in *Williams v. State*, 417 Md. 479, 481 (2011), that "Section 4–203(a)(1)(i) of the Criminal Law Article, which prohibits wearing, carrying, or transporting a handgun, without a permit

and outside of one's home, is outside of the scope of the Second Amendment." However, that holding cannot be read as a general holding that the Second Amendment has no application outside the home. As the statement of the Court's holding makes clear, in *Williams*, the defendant was convicted of unlawful possession of a handgun under MD Code, Criminal Law, § 4-203, and the issue presented was whether that criminal statute was unconstitutional in so far as it prohibited possession of a handgun outside the home *without a permit*. Unlike Mr. Whalen in this case, in *Williams*, the criminal defendant had not previously applied for a wear and carry permit under Section 5-306 of the Public Safety Article. For that reason, the *Williams* Court expressly refused to consider the constitutionality of the "good and substantial reason" requirement of Section 5-306 (the issue presented here), holding that "because Williams failed to apply for a permit to wear, carry, or transport a handgun, he lacks standing to challenge Section 5–301 et seq. of the Public Safety Article, Maryland Code (2003), as well as COMAR 29.03.02.04." *Id*. That holding makes clear that the Court was not considering the constitutionality of Section 5-306 of the Public Safety Article in the context of an application for a permit to carry a handgun in public. For all these reasons, *Williams* has no application to a case, in which the constitutionality of Section 5-306 is squarely presented.

Indeed, there are good reasons to limit the scope of *Williams* in this manner. For the reasons ably set forth by the Seventh Circuit in *Moore* and, most recently, by the D.C. Circuit in *Wrenn*, and by the Ninth Circuit panel in *Young*, any suggestion that the Second Amendment simply has no application outside the home would be untenable.

Other decisions, post-dating *Williams,* confirms that conclusion. For example, in holding that Section 4-203 of the Criminal Law Article was outside the Second Amendment, *Williams* relied on an Illinois intermediate appellate court decision, *People v. Dawson*, 403 Ill.App.3d 499, 934 N.E.2d 598 (2010), and a D.C. Court of Appeals decision in *Little v. United States*, 989 A.2d 1096 (D.C. 2010). Yet, *Dawson* was expressly overruled by the Illinois Supreme Court in *People v. Aguilar*, 2 N.E. 3d 321, 327 (Ill. 2013), where the court followed *Moore* and concluded that the "that the Second Amendment protects the right to possess and use a firearm for self-defense outside the home…." Similarly, the D.C. Court of Appeals' decision in *Little* was effectively abrogated by the D.C. Circuit's decision in *Wrenn*, where the D.C. Circuit held that "the rights to keep and bear arms are on equal footing—that the law must leave responsible, law-abiding citizens some reasonable means of exercising each." *Wrenn* at 663.

These recent holdings make sense. Language in *Heller* and *McDonald*, and the actual holdings in *Wrenn*, *Moore, Young* and *Aguilar*, demonstrate that the Second Amendment does indeed apply outside the home, at least in some manner. *Heller* and *McDonald* "say that 'the need for defense of self, family, and property is most acute' in the home, but that doesn't mean it is not acute outside the home." *Moore,* 702 F.3d at 935 (quoting *Heller* and *McDonald*). And, as *Young* explained, "*McDonald* similarly described the right as 'most notabl[e] within the home, implying the right exists, perhaps less notably, outside the home." *Young*, 896 F.3d at 1053, quoting *McDonald*, 561 U.S. at 780. As both *Moore* and *Young* thus recognize, the phrase, "most acute," demonstrates

the Court's contemplation of other locations in which the need for "defense of self, family, and property" exists (i.e. a public setting). By its logical extension, the "acuteness" of this need continues when a law-abiding citizen walks out of her house and enters public space. See Nicholas J. Johnson et al., Firearms Law and the Second Amendment: Regulation, Rights, and Policy (2d ed. 2003) at 984.

Fundamentally, the right recognized in *Heller* was the right to be "armed [with a firearm] and ready for offensive or defensive action in a case of conflict with another person." *Heller* at 584 (quoting *Muscarello v. United States,* 524 U.S. 125, 143 (1998) (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1998)). The Court in *Heller* went further to specify "that the constitutional right to 'bear arms' was a right to 'carry weapons in case of confrontation,'" language that points beyond the home. "Confrontations" obviously occur both inside and outside the home. See Nicholas J. Johnson et al., Firearms Law and the Second Amendment: Regulation, Rights, and Policy (2d ed. 2003) at 983. For all these reasons, *Williams* must be narrowly construed. That leaves the question open for decision by this Court.

### C. The Proper Test For Assessing The Constitutionality Of A Statute Under the Second Amendment Is Whether Statute's Restrictions Are Supported By "The Text, History and Tradition," The Test Actually Adopted in *Heller*

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35. Under that test, deciding whether a government restriction challenged on Second Amendment grounds is constitutional requires a close "textual analysis" and "historical inquiry," *United States v.*

*Chester*, 628 F.3d 680 (4th Cir. 2010). This lesson has been lost on those courts that have upheld "good cause" statutes, including the Fourth Circuit's decision in *Woollard* sustaining Maryland's "good and substantial reason" requirement. These courts have sustained these statutes under "intermediate scrutiny" on the premise that the carrying of handguns outside the home is outside the supposed "core" of the Second Amendment. These courts have thus employed a balancing test under intermediate scrutiny to sustain "good cause" requirements. Under that standard, the State has the burden to demonstrate that its law does not "burden substantially more [protected conduct] than is necessary to further the government's legitimate interest." *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (citation omitted).

However, these decisions have misconstrued the Second Amendment in holding that the "core" of the Second Amendment is limited to possession within the home. First, the "core" or "central component" of the Second Amendment right to keep and bear arms protects "individual self-defense." *McDonald*, 561 U.S. at 742, 767-78. Thus, "the core lawful purpose" of the right is self-defense, not merely self-defense in the home. *Heller*, 554 U.S. at 630. As *Wrenn, Moore*, and *Young* hold, it would be nonsensical to hold that this "core" right of self-defense is limited to the home. See *Wrenn*, 864 F.3d at 667 ("At the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home ...."); *Young*, 896 F.3d at 1052 ("The prospect of confrontation is, of course, not limited to one's dwelling."). And, as *Wrenn* reasoned, levels of scrutiny cannot apply to any restriction that effectively and categorically denies a right to the overwhelming majority of persons who are entitled to exercise the right. See

*Young*, 896 F.3d at 1071 ("An individual right that does not apply to the ordinary citizen would be a contradiction in terms; its existence instead would wax and wane with the whims of the ruling majority.").

The text of the Second Amendment leaves little 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. 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. As stated in *Young*, "[t]o 'bear,' the Court explained, means to 'wear' or to '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.'" *Young*, 896 F.3d at 1052, quoting *Heller*, 554 U.S. at 584. See also *Moore*, 702 F.3d at 936 ("To speak of "bearing" arms within one's home would at all times have been an awkward usage.").

The text also recognizes that the right is held by "the people." That language includes, as *Heller* states, all "law-abiding, responsible" people, *Heller*, 554 U.S. at 635, not simply a subclass of the "people" who can persuade a law enforcement agency that they possess a "good and substantial reason." See *Wrenn*, 864 F.3d at 664 ("the Second Amendment must enable armed self-defense by commonly situated citizens: those who

possess common levels of need and pose only common levels of risk."). A right reserved to the "people" cannot be logically limited to a mere subset of the "people." This Court would not tolerate a statute that limited the right to speak, or to have an abortion, or exercise any other fundamental right to those who can demonstrate to the police that they have a "good and substantial reason" for the exercise of the right. As *Heller* held, the Second Amendment is not subject to any such "freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. "[T]here is no such distinction between, or hierarchy among, constitutional rights." *Caplin & Drysdale v. United States*, 491 U.S. 617, 628 (1989).

Similarly, the historical and traditional understanding of the right to keep and bear arms strongly supports what is obvious from the Second Amendment's text. See *Young*, 896 F.3d at 1061-1068 (exhaustively discussing the history and tradition of the Second Amendment, including a "good cause" requirement). 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. 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*, available at https://goo.gl/W6FSpM (last viewed July 19, 2017).

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). 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). In sum, there is no basis for any suggestion that the right can be limited to persons who possess a special reason for being armed, either inside or outside the home.

These issues are now pending before the Supreme Court which has accepted review in *NYSRPA v. NYC*, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S.Ct. 939 (S.Ct. Jan. 22, 2019). There, the central question presented whether the Second Amendment applies outside the home and, if so, the appropriate standard of review. In deciding that case, the Supreme Court may well reject both immediate and strict scrutiny tests and hold that the constitutionality of gun laws must be analyzed under the "text, history and tradition" test that was actually used in *Heller* and *McDonald*. That is the proper reading of *Heller* and *McDonald*. See, e.g., *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). That is the same "text, history, and tradition" standard of review used in

*Wrenn* and *Young*.[3] See also *Silvester v. Becerra*, 138 S.Ct. 945, 947 (2018) (Thomas J., dissenting from the denial of certiorari) (noting that "[s]everal jurists" have suggested that "courts should instead ask whether the challenged law complies with the text, history, and tradition of the Second Amendment.").

Because the Court in *NYSRPA* is likely to establish a proper standard of review for assessing challenges under the Second Amendment, the Court's decision will be far-reaching. Indeed, a number of "good cause" statute cases are now pending before the Supreme Court and are apparently being held by the Court pending a decision in *NYSPRA*. Specifically, after the decision in *Wrenn*, separate suits were filed in federal district court in New York, New Jersey and Maryland challenging "good cause" statutes. The Maryland case is *Malpasso v. Pallozzi*, No. 18-1064 (D. Md., filed April 4, 2018) (Complaint ¶6, stating that "[p]laintiffs acknowledge that the result they seek is contrary to *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), but, for the reasons explained in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), that case was wrongly decided.).

The same type of suit was filed in in New York, *NYSRPA v. Beach*, No. 18-134, filed March 26, 2018 (N.D. N.Y.) (challenging the ruling in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), that the New York "good reason" statute was

[3] Significantly, the Solicitor General of the United States has filed an amicus brief in *NYSRPA*, arguing that "text, history and tradition" is the proper standard and that the Second Amendment fully applies outside the home. Brief For The United States Supporting Petitioners at 13, available at available at https://bit.ly/2Sl7pus (last viewed July 19, 2019).

facially constitutional), and in New Jersey, *Rogers v. Grewal*, No. 18-1544 (D. N.J.) (challenging the ruling in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2014), that the New Jersey "good reason" statute was facially constitutional). A similar suit had already been filed in Massachuetts, challenging that State's "good cause" requirement. *Gould v. O'Leary*, 291 F.Supp.3d 155 (D. Mass. 2017), *aff'd sub nom. Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), *petition for certiorari docketed sub nom Gould v. Lipson,* No. 18-1272 (U.S. April 1, 2019).

Of these cases, the New Jersey case, *Rogers,* has taken the lead. There, the district court promptly granted a motion to dismiss on the basis of *Drake*, *Rogers v. Grewal*, 2018 WL 2298359 (D. N.J. 2018), and the Third Circuit summarily affirmed that dismissal of complaint on the same basis on July 19, 2018. *Rogers v. Grewal,* No. 18-2366 (July 19, 2018) (unreported) (see App.). A petition for certiorari was filed in January. *Rogers v. Grewal*, No. 18-824 (filed January 2, 2019). The Supreme Court has yet to act on that petition, even though it was distributed for conference on May 23, 2019. In the meantime, the First Circuit sustained the Massachusetts "good cause" statute in *Gould*. A petition for certiorari was filed in *Gould* on April 1, 2019, and the Supreme Court has yet to act that petition even though it was distributed for conference on June 6, 2019. *Gould v. Lipson,* No. 18-1272 (docketed April 1, 2019).

The same pattern is emerging in the Maryland case, *Malpasso*. The district court in that case dismissed the complaint on the basis of *Woollard* and that decision was summarily affirmed by the Fourth Circuit on that basis on April 29, 2019. *Malpasso v. Pallozzi*, 767 Fed.Appx. 525 (4th Cir. 2019) (Mem.). A petition for certiorari in

*Malpasso* is currently due September 26, 2019, as extended. See https://bit.ly/2XRF9pz (last viewed July 19, 2019). The *Malpasso* petition, when filed, will likely also be held pending a decision in *NYSRPA,* just as *Rogers* and *Gould* have been held.[4] Other Second Amendment cases pending before the Supreme Court have likewise been held.[5]

The Ninth Circuit has followed the Supreme Court's lead. As noted, the Ninth Circuit granted rehearing en banc from the panel decision in *Young*. Yet, a month before en banc oral argument was scheduled, the en banc court, acting *sua sponte*, issued an order (unreported) on February 14, 2019, stating: "En banc proceedings are stayed and submission of this case for decision by the en banc court is deferred pending the issuance of an opinion by the United States Supreme Court in *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280 and further order of this Court." See App. Appellant respectfully suggests that this Court follow suit and likewise hold this case in abeyance pending the Supreme Court's decision in *NYSRPA*. Doing so will enable this Court to have the benefit of further guidance from the Supreme Court on the issues presented.

## II. MARYLAND CASE LAWADDRESSING THE "GOOD AND SUBSTANTIAL REASON" STANDARD HAS BEEN SUPERSEDED BY *HELLER* AND *McDONALD*

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[4] The New York case, *Beach*, is moving more slowly. There, the district court dismissed the complaint on the basis of *Kachalsky*. *NYSRPA v. Beach*, 354 F.Supp.3d 143 (N.D.N.Y. 2018), and the plaintiffs' appeal from that decision is now pending in the Second Circuit, where it is scheduled for argument the week of October 21, 2019. *NYSRPA v. Beach*, No. 19-156 (2d Cir., docketed January 15, 2019).

[5] See *Mance v. Barr*, No. 18-663, docketed Nov. 21, 2018; *Pena v. Horan*, No. 18-843, docketed January 3, 2019. Both of these cases were considered at the Friday conference on April 12, 2019, but have since been held by the Supreme Court.

For all the foregoing reasons, this Court should hold that the Second Amendment extends outside the home and extends as well to every "law-abiding, responsible citizens" *Heller*, 554 U.S. at 635, without regard to any "special need" or "good and substantial reason." However, alternatively, the legal test employed by the Board and State Police must still be overturned. As set forth below, in that case, the Court should adopt the reasoning of the Fourth Circuit in *Woollard* and hold that applicants demonstrating a "palpable need" meet the requirements of Section 5-306(a)(6)(ii). The Court should therefore overrule its prior decisions that pre-date *Heller* and *McDonald*, subject, of course, to any decision in *NYSPRA* or in any of the other Second Amendment cases before the Court.

### A. *Snowden* and *Scherr* Are No Longer Good Law

In considering carry permit applications under Section 5-306 of the Public Safety Article, the State Police and the Board continue to rely on *Scherr v. Handgun Permit Review Board*, 163 Md.App. 417, *cert. denied*, 390 Md. 92 (2005), and *Snowden v. Handgun Permit Review Board*, 45 Md.App. 464, *cert. denied*, 288 Md. 742 (1980), as authoritative. Indeed, those decisions are prominently displayed on the State Police website as setting for the standard that the State Police follow in applying the "good and substantial reason" requirement of Section 5-306. See Maryland State Police, *Cases Referencing Good and Substantial Reason*, available at https://tinyurl.com/hj7a2k2 (last accessed June 25, 2019). Yet, as detailed below, these decisions should no longer be considered controlling with respect to the meaning of

"good and substantial." The Board's (and the State Police's) continued reliance on these cases is thus an error of law that require reversal and a remand. In so holding, this Court should make clear that, until the Supreme Court has clarified the law in *NYSRPA* or in any other case, the Board and the State Police must follow the Fourth Circuit's construction of Section 5-306 in *Woollard*,

First, both *Scherr* and *Snowden* predate the Supreme Court's decisions in *Heller* and *McDonald,* and were effectively abrogated by those decisions. Unsurprisingly (given the state of the law at the time), the court in *Scherr* expressly rejected the applicant's Second Amendment-based arguments, including the argument that the meaning of "good and substantial" must be construed by reference to, and in the context of, the Second Amendment. For example, *Scherr* relied on *Presser v. Illinois*, 116 U.S. 252, 264 (1886), to hold that the Second Amendment did not embody an individual right. Yet, that holding was abrogated by *Heller*, which expressly held that *Presser* "does not refute the individual-rights interpretation of the Amendment." See *Heller* at 621.

Next, *Scherr* rejected the applicant's argument that the Handgun Permit Review Board was obligated to apply the Second Amendment in reviewing his application, holding that the Second Amendment does not even apply to the States, relying on *Onderdonk v. Handgun Permit Review Board,* 44 Md.App. 132, 134-35 (1979). See *Scherr* at 442-43. That holding in *Scherr* and in *Onderdonk* was abrogated by the Supreme Court in *McDonald* which held that "the Due Process Clause of the

Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." See *Heller* at 791. The Second Amendment applies to the States no less than it does to the federal government.

Finally, *Scherr* rejected the applicant's argument that the good and substantial reason requirement of Section 5-306 deprived him of due process under the 14th Amendment. The Court reasoned that there was no violation of substantive due process because that right "'protects only against government interference with certain *fundamental rights and liberty interests*.'" *Scherr*, 880 A.2d at 1152 (citation omitted) (emphasis the Court's). That holding was abrogated in *McDonald*, where the Court held that "[a] survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms among those *fundamental rights necessary to the Nation's system of ordered liberty*. (561 U.S. at 778) (emphasis added). On that basis the *McDonald* Court incorporated the Second Amendment into the Fourteenth Amendment's Due Process Clause.

*Snowden* is even less pertinent after *Heller* and *McDonald*. There, this Court simply applied the "substantial evidence" and "arbitrary and capricious" standards, deferred to the Board, and held that the Board's decision to deny a permit was supported by the evidence and was not arbitrary and capricious. *Snowden*, 45 Md.App. at 468-71. In so holding, the Court also stated that "good and substantial reason" meant "something more" than the reasons submitted by the applicant in that case, *id*. at 469, but the Court did not purport to define the meaning of the term or even apply a

principled analysis of the term's meaning. What that needs to be shown is, of course, a question that can only be answered by reference to *Heller* and *McDonald*. In sum, *Scherr* and *Snowden* have been superseded by Supreme Court authority. See, e.g., *Scott v. State*, 454 Md. 146, 181 (2017) (holding that prior Maryland precedent had "been superseded by significant changes in the Supreme Court's jurisprudence"); *United States v. Plouffe*, 445 F3d 1126, 1128 (9th Cir. 2006) ("we are free to disregard the now superseded precedents").

Even apart from *Heller* and *McDonald*, both *Scherr* and *Snowden* merely affirmed a prior administrative interpretation of "good and substantial" imposed by the Board. In each case the Board acted in ad hoc quasi-judicial proceedings which turned on particular facts. Neither case presented any authoritative interpretation of the phrase "good and substantial reasons." For example, the Board's interpretation in *Scherr*, was 'made up' by the State Trooper reviewing Mr. Scherr's application for a permit. See *Scherr*, 163 Md.App. at 428 ("Q: In other words, for lack of a better word, you made that up? A: Yes."). In this regard, the trooper's "made up standard" had the effect of further restricting the issuance of permits only to citizens that could establish anxiety or fear greater than other citizens.

That "made up" standard has no basis in the statutory language of Section 5-306. The statutory standard is whether there is a "good and substantial reason" for the permit, including – but not limited to – whether "the permit is necessary as a reasonable precaution against apprehended danger." MD Code, Public Safety § 5-

306(a)(6)(ii). That language is quite different than the more restrictive "greater than other citizens" standard at issue in *Scherr*. Read reasonably, the "apprehended danger" merely needs to be a reasonable apprehension, an inquiry that is not governed by whether that apprehension is shared with or measurably more than another person. As explained below, the statutory language of the statute is consistent with the approach actually taken in *Woollard*.

### B. The Fourth Circuit's "Palpable Need" Test In *Woollard* Is Now Controlling Precedent.

In *Woollard*, the Fourth Circuit relied heavily on a two-part test, enumerated in *United States v. Chester*, to justify its application of intermediate scrutiny to the constitutionality of the "good and substantial reason" standard in Maryland. See *Woollard v. Gallagher,* 712 F.3d 865 (4th Cir. 2013); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). Following the *Chester* decision, the *Woollard* court absolved itself from making any sort of historical inquiry, instead deeming it "prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step," (i.e. an application of intermediate scrutiny to the law). See *Woollard* at 875.

Applying intermediate scrutiny, the *Woollard* court stated that "the good-and-substantial reason requirement ensures that those persons in *palpable need* of self-protection can arm themselves in public places where Maryland's various permit exceptions [under MD Code Criminal Law §4-203(b)] do not apply." *Woollard*, 712 F.3d at 880 (emphasis added). In so holding, the court "specifically subscribe[d]" to

the Second Circuit's statement in *Kachalsky* that a good cause requirement was "'a more moderate approach'" than a total ban. *Id*. at 881, quoting *Kachalsky*, 701 F.3d at 98-99. The *Woollard* court then explained that, under this "more moderate approach," carry permits would be available "'to persons who have *an articulable basis* for believing that they will need the weapon for self-defense.'" Id., quoting *Kachalsky*, 701 F.3d at 100 (emphasis added). Based on that interpretation, the court rejected the facial challenge to the "good and substantial reason" requirement of Section 5-306(a)(6)(ii).

The *Woollard* court's reasoning cannot be dismissed as mere *obiter dictum*, as the circuit court seemingly suggested. (E.99). Rather, the reasoning was essential to the court's holding that the "good and substantial reason" requirement was not contrary to the Second Amendment under intermediate scrutiny. See, e.g., *Schmidt v. Prince Georges Hospital*, 366 Md. 535, 550 (2001) ("When a question of law is raised properly by the issues in a case and the Court supplies a deliberate expression of its opinion upon that question, such opinion is not to be regarded as *obiter dictum*, although the final judgment in the case may be rooted in another point also raised by the record."); *Carstairs v. Cochran*, 95 Md. 488 (1902) ("All that is necessary in Maryland to render the decision of the Court of Appeals authoritative on any point decided, is to show that there was an application of the judicial mind to the precise question adjudged") (citation omitted).

The "palpable need" test is not a particularly rigorous or difficult standard. Rather, it merely means that the applicant's need is "easily perceptible by the mind." See *Merriam-Webster.com*. 2019 (last accessed July 19, 2019). The term "palpable" is synonymous with the following: perceptible, appreciable, sensible, ostensible, and plausible. See "palpable," *Thesaurus.com*. 2018 (last accessed July 19, 2019). See also *Blacks Law Dictionary* at 1265 (4th Ed. 1968) ("Easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest."). Plainly, the "palpable need" or "articulable basis" test does not require that a citizen show a particularized need greater than his or her fellow citizens, the standard currently employed by the State Police and the Board d accepted by *Scherr*.

Indeed, it would be odd in the extreme to hold that *Woollard* court somehow endorsed *Scherr's* test, where all of *Scherr*'s reasoning has been abrogated by the Supreme Court's decisions in *Heller* and *McDonald*. Intermediate scrutiny, as applied in *Woollard*, is simply incompatible with the *Scherr*'s holding that the Second Amendment does not embody an individual, fundamental right and that the core right of self-defense right can be reserved to only to those individuals who can demonstrate a need for self-defense greater than his neighbor's. See *Wrenn*, 864 F.3d at 664 ("the Amendment enables self-defense at least against the level of threat generally faced by those covered by the Amendment: responsible and law-abiding citizens"). The terms "palpable need" and "articulable basis" should be given their ordinary meaning. See,

e.g, *Union Trust Co. v. Harrisons' Nurseries*, 181 Md. 291, 294 (1943) ("Words are to be given their natural or ordinary meaning.").

### C. As Mr. Whalen Has Arguably Demonstrated A Palpable Need, A Remand To The Board Is Required

As explained above, under the applicable standard of review, this Court must correct any administrative error of law and remand to the agency for application of correct legal standard, unless the remand would be futile. See, e.g., *Zimmer*, 444 Md. at 581 ("When an administrative function remains to be exercised at the end of the day, we hold generally that a court must remand the case to the administrative agency."). A remand is unnecessary if there is "only one action" the agency take on remand. *Id*. Here, it is perfectly possible for the Board to reach a different result under the "palpable need" or "articulable basis" test employed in *Woollard*. Mr. Whalen is thus entitled to have his evidence first considered by the Board under the proper legal standard.[6]

First, Mr. Whalen is a Republican Congressional staffer who quite reasonably has an apprehension of immediate danger. For example, on June 14, 2017, a lone gunman – who was said to be "distraught" over President Trump's election – opened fire on members of the Republican Congressional baseball team at a practice field in Alexandria, Virginia. One current Hill staffer, one former Hill staffer, two Capitol Police Officers, and House Republican Whip Steve Scalise (LA-01) were shot by the gunman. Such threats of violence are getting worse. See Roll Call, "*Threats against*

[6] Mr. Whalen is no longer an ANC Commissioner, so Mr. Whalen's prior evidence of such service would not be relevant on remand.

*members increasing, Capitol Police chief says*," available at https://bit.ly/2YUYrXj (last viewed July 19, 2019).

Similarly, on March 16, 2018, researchers at the University of Pennsylvania published a study confirming that assaults more than doubled when hosting presidential campaign rallies for Donald Trump. See Penn Medicine News Release, *Assaults Spiked on Trump Rally Days During 2016 Election*, available at https://tinyurl.com/y7b56xz4 (last visited July 16, 2019). On July 4, 2018, a man was attacked in a restaurant for simply wearing a red "MAGA" hat in a Texas restaurant. See Ben Tobin, *San Antonio Police Probe Alleged Assault of Teen Wearing a Make America Great Again Hat*, USA Today, available at https://tinyurl.com/y8kcwpyh (last accessed July 16, 2019). With the 2020 general election campaigns already underway, these risks will only continue to rise. Indeed, ignoring such threats would blink reality.

In addition, Mr. Whalen holds a national security clearance at the "Secret" level at work and thus has access to information "may cause serious damage to national security if disclosed without authorization." See https://bit.ly/2Lu7nzT (last accessed July 16, 2019). Access to such information makes Mr. Whalen a potential target for terrorists, domestic and foreign, particularly in light of the reality that personal information of federal employees was recently "hacked" from OPM databases by unknown entities. See Flashpoint, CyberCrime, Office of Personnel Management Data Allegedly Being Traded on Dark Web (2015), available at https://bit.ly/2XNvtMG (last viewed July 16, 2019). According to recent credit reporting services, since May 2019,

Mr. Whalen's sensitive personal information has indeed been compromised, and is now available on the "Dark Web." Mr. Whalen's employment as a Congressional staffer thus provides a reasonable basis for having an apprehension of danger, especially in the context of seemingly endless reports of politically-motivated violence across the nation. These circumstances easily satisfy the "palpable need" test of *Woollard*.

Moreover, the Board's decision on Mr. Whalen's need for a Maryland permit was plainly influenced by the lack of a D.C. carry permit. On remand, Mr. Whalen will present evidence, submitted to the circuit court below, that Mr. Whalen received a D.C. carry permit soon after the Board's hearing. See Motion to file additional evidence. (E.58-61). That the Board considered the absence of a D.C. Permit to be material is beyond reasonable dispute. See Transcript of Board Hearing at E.24, 31-36. The Board will also have an opportunity on remand to reconsider the relevance of his relationship with his father (a retired federal judge) who was issued an unrestricted carry permit by the State Police on an "assumed risk" basis. After all, an attack on a retired federal judge may well imperil his family as well. The remand is appropriate so as to allow the Board to consider all this evidence under the *Woollard* "palpable need" standard.

## CONCLUSION

For all the foregoing reasons, this Court should (1) hold that the "good and substantial reason" requirement of Section 5-306 is facially unconstitutional under the Second Amendment and order the issuance of the permit, as it undisputed that Mr. Whalen otherwise meets all the other requirements imposed by statute, or (2) alternatively, hold this appeal in abeyance pending a Supreme Court decision in *NYSRPA*, or (3) alternatively, vacate the Board's decision and remand the matter to the Board for further consideration under the *Woollard* "palpable need" standard.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the Brief of Appellant and two copies of the Record Extracts, via first class mail, postage prepaid, and via email at counsels' email addresses, on July 22, 2019, to:

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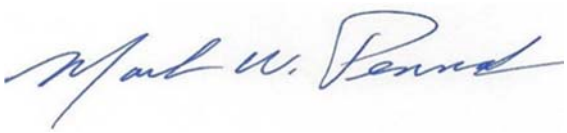

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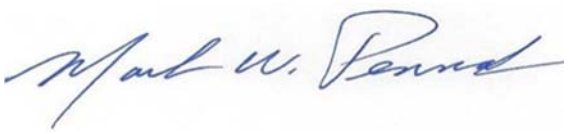

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Mark W. Pennak,
Counsel for Appellant

# APPENDIX

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MD Code, Criminal Law, § 4-203
Formerly cited as MD CODE Art. 27, § 36B

# § 4-203. Wearing, carrying, or transporting handgun

Effective: October 1, 2018
Currentness

**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;


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(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;


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(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.


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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.

**Credits**

Added by Acts 2002, c. 26, § 2, eff. Oct. 1, 2002. Amended by Acts 2003, c. 17, § 1, eff. Oct. 1, 2003; Acts 2003, c. 21, § 1, eff. April 8, 2003; Acts 2004, c. 25, § 1, eff. April 13, 2004; Acts 2005, c. 482, § 1, eff. Oct. 1, 2005; Acts 2010, c. 712, § 1, eff. Oct. 1, 2010; Acts 2011, c. 65, § 1, eff. April 12, 2011; Acts 2013, c. 427, § 1, eff. Oct. 1, 2013; Acts 2018, c. 146, § 1, eff. Oct. 1, 2018.

**Formerly** Art. 27, § 36B.


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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Unconstitutional by Woollard v. Sheridan, D.Md., Mar. 02, 2012

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

West's Annotated Code of Maryland
Public Safety (Refs & Annos)
Title 5. Firearms (Refs & Annos)
Subtitle 3. Handgun Permits (Refs & Annos)

MD Code, Public Safety, § 5-306
Formerly cited as MD CODE Art. 27, § 36E

# § 5-306. Qualifications for permit

Effective: October 1, 2013
Currentness

**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;


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(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


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(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.

**Credits**

Added by Acts 2003, c. 5, § 2, eff. Oct. 1, 2003. Amended by Acts 2013, c. 427, § 1, eff. Oct. 1, 2013.

**Editors' Notes**

**VALIDITY**

<See Woollard v. Sheridan, 2012, 863 F.Supp.2d. 462.>

**LEGISLATIVE NOTES**

Revisor's Note (Acts 2003, c. 5):

This section is new language derived without substantive change from former Art. 27, § 36E(a)(1) through (6) and the first and third clauses of the introductory language of (a).

In subsection (a)(1) of this section, the reference to an “adult” is substituted for the former reference to a person “eighteen years of age or older” for brevity in light of the definition of the term “adult” in Art. 1, § 24.

In the introductory language of subsection (a)(5) of this section, the former reference to the “results” of an investigation is deleted as implicit in the reference to an “investigation”.

In subsection (a)(5)(i) of this section, the former reference to a “law-abiding” person is deleted as unnecessarily narrowing the field of persons to whom an applicant for a permit may not exhibit a propensity or instability that may reasonably render handgun possession a danger.


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KeyC te Ye ow F ag Negat ve Treatment
Proposed Leg s at on

West's Annotated Code of Maryland
Public Safety (Refs & Annos)
Title 5. Firearms (Refs & Annos)
Subtitle 3. Handgun Permits (Refs & Annos)

MD Code, Public Safety, § 5-312
Formerly cited as MD CODE Art. 27, § 36E

# § 5-312. Action by Board

Currentness

**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.


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(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.

**Credits**
Added by Acts 2003, c. 5, § 2, eff. Oct. 1, 2003.

**Editors' Notes**

**LEGISLATIVE NOTES**

Revisor's Note (Acts 2003, c. 5):

This section is new language derived without substantive change from former Art. 27, § 36E(i)(2), (3), and (4).

In subsection (d)(2) of this section, the reference to an "applicant or the holder of the permit" is substituted for the former reference to "that person" for clarity.

In subsection (e)(2) of this section, the former reference to a court "of this State" is deleted as implicit.

The Public Safety Article Review Committee notes, for the consideration of the General Assembly, that in subsection (a)(2) of this section there is no time period stated within which a written request for a hearing before the Board must be made if the Secretary has not acted on an application for a permit or renewal of a permit.

Defined terms: "Board" § 5-301

"Permit" § 5-301

"Person" § 1-101

"Secretary" § 5-301

MD Code, Public Safety, § 5-312, MD PUBLIC SAFETY § 5-312
Current through legislation effective July 1, 2018, from the 2018 Regular Session of the General Assembly

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FILED

FEB 14 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| GEORGE K. YOUNG, Jr.,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>STATE OF HAWAII, *et. al.*;<br><br>Defendants-Appellees. | No. 12-17808<br><br>D.C. No.<br>1:12-cv-00336-HG-BMK<br><br>ORDER |

Before: THOMAS, Chief Judge

En banc proceedings are stayed and submission of this case for decision by the en banc court is deferred pending the issuance of an opinion by the United States Supreme Court in *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280 and further order of this Court.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July 19, 2018
ACO-097

No. 18-2366

Thomas Rogers; Association of New Jersey
Rifle and Pistol Clubs, Inc.;
Appellants

v.

Attorney General New Jersey; Patrick J. Callahan,
in his official capacity as Acting Superintendent of the
New Jersey Division of State Police; Kenneth J. Brown,
in his official capacity as Chief of the Wall Township
Police Department; Joseph W. Oxley, in his official
capacity as Judge of the Superior court of New Jersey, Law Division,
Monmouth County; N. Peter Conforti, in his official capacity as
Judge of the Superior Court of New Jersey; Law Division, Sussex County

(D.N.J. No. 3-18-cv-01544)

Present: MCKEE, VANASKIE and SCIRICA, Circuit Judges

1. Unopposed Motion by Appellants for Summary Action.

Respectfully,
Clerk/clw

_____ORDER_____

The foregoing motion for summary action is granted.

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: September 21, 2018
CLW/cc: John D. Ohlendorf, Esq.
Peter A. Patterson, Esq.
Daniel L. Schmutter, Esq.
David H. Thompson, Esq.

Bryan E. Lucas, Esq.
Mitchell B. Jacobs, Esq.