No. 19-1469

In the
United States Court of Appeals
for the Fourth Circuit

MARYLAND SHALL ISSUE, *et al.*,
Plaintiffs-Appellants

v.

LAWRENCE HOGAN, *et al.*,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Maryland
No. 1:16-cv-03311-ELH (Hon. Ellen L. Hollander)

REPLY BRIEF OF APPELLANTS

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Defendants do not dispute that Individual Plaintiffs, MSI members, or Atlantic Guns are objects of the Handgun License Requirement, leaving "little question" that they have standing to challenge it. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992); Opening Br. at 16. Nor do Defendants dispute the material facts that confirm each Plaintiff's standing.

Defendants instead ask this Court to ignore the mandates of Rule 56, which require this Court to construe the facts in the light most favorable to Plaintiffs, *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 331 (4th Cir. 2007); draw all reasonable inferences in Plaintiffs' favor, *id.*, and against Defendants, *Butler v. Cooper*, 554 F.2d 645, 647 (4th Cir. 1977); take as true Plaintiffs' deposition and declaration testimony, *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017); and not weigh Plaintiffs' evidence against other evidence, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The undisputed facts demonstrate that Plaintiffs have standing under this Court's and the Supreme Court's controlling precedent.

I. Undisputed material facts demonstrate that Plaintiffs have standing to bring their Second Amendment claim as a matter of settled law.

If Plaintiffs had brought any other constitutional challenge based on the infringement of a fundamental right, there would be no question regarding their standing. In the First Amendment context, for instance, this Court holds that

"standing requirements are somewhat relaxed . . . particularly regarding the injury-in-fact requirement." *Davison v. Randall*, 912 F.3d 666, 678 (4th Cir. 2019). In other contexts, plaintiffs with factual backgrounds analogous to Plaintiffs have standing to challenge restrictions on the exercise of their unenumerated, fundamental rights. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164, 194 n.16 (4th Cir. 2000) (abortion providers had standing to challenge alleged restriction of their ability to offer abortion services); *Hall v. Virginia*, 385 F.3d 421, 427 n.10 (4th Cir. 2004) (plaintiffs had standing to challenge alleged restriction of their ability to elect candidates of their choice); *Bostic v. Schaefer*, 760 F.3d 352, 371 (4th Cir. 2014) (plaintiff had standing to challenge alleged restriction on same-sex marriage).

The Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010). It should not be given different, unfavorable treatment here. No constitutional right is "less fundamental than" others, and there is "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) (rejecting "a view of standing under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases").

A. Individual Plaintiffs and MSI members have personal standing.

Defendants do not dispute that Individual Plaintiffs and MSI members have the right to acquire a handgun for lawful purposes, including self-defense in the home. Opp. at 33; Opening Br. at 41–42. Defendants also do not dispute that the Handgun License Requirement directly infringes upon Individual Plaintiffs' and MSI members' right to acquire a handgun without first obtaining a Handgun License. Opp. at 22 (Plaintiffs can "purchase a handgun if they comply with the License requirements."). There can be "little question" that they have personal standing to challenge the Handgun License Requirement. *Lujan*, 504 U.S. at 561–62.

Defendants also do not dispute that Individual Plaintiffs and MSI members intend to purchase a handgun and would do so but for the Handgun License Requirement, Opp. at 8–11, effectively admitting that each of these Plaintiffs' injuries are actual and imminent and satisfy the injury, causation, and redressability requirements. *See Dearth v. Holder*, 641 F.3d 499 (D.C. Cir. 2011) (holding that plaintiff's injury was "sufficiently real and immediate" because he intended to visit the United States and purchase a firearm, despite having "no concrete" plans to do so).

Rather than dispute these material facts, Defendants ask this Court to weigh them against evidence that Individual Plaintiffs have not "research[ed]"

either what specific handgun they wish to purchase or the Handgun License Requirement itself. Opp. at 23–24. But Individual Plaintiffs need only show that they "intend" to acquire a handgun and that they could not do so without complying with the Handgun License Requirement, *Dearth*, 641 F.3d at 502–03, material facts that Defendants do not dispute. Not only is Defendants' argument beside the point, it asks this Court to ignore Rule 56's mandates to construe facts in the light most favorable to Plaintiffs, draw all inferences in their favor and against Defendants, take as true Plaintiffs' testimony, and refrain from weighing the evidence. *Supra* p. 1.

Defendants also argue that Individual Plaintiffs and MSI members lack standing because the Handgun License Requirement does not make it "impossible" for them to purchase a handgun. Opp. at 22–23. This argument was rejected in *Dearth* and *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008), where plaintiffs had standing to assert their "right to possess [a firearm], not the right to a permit or license" without first applying for the permit they challenged. *Dearth*, 641 F.3d at 502 (citing *Parker*, 478 F.3d at 374, 376). *Dearth* and *Parker* are clear that Plaintiffs need not first apply for a Handgun License to challenge the Handgun License Requirement. 641 F.3d at 502; 478 F.3d at 376. Standing does not require a complete ban or even a severe injury, just that the "injury affects the

plaintiff in a personal and individual way," as the Handgun License Requirement does by infringing Plaintiffs' right to acquire a handgun. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 636 (3d Cir. 2017).

Ms. Miller's and Ms. Hoffman's purported failure to seek an accommodation is irrelevant to their standing. *See* Opp. at 21–22. Their undisputed testimony demonstrates that their physical disabilities make it difficult or impossible for them to complete the Handgun License Requirement's training component. Opening Br. at 7–8. Any effort to obtain an accommodation would be futile because Maryland State Police have no statutory or other authority to grant an accommodation from requirements imposed by statute or regulation. *See Thanner Enters., LLC v. Balt. Cty.*, 995 A.2d 257, 263 (Md. 2010) ("An agency's authority extends only as far as the General Assembly prescribes."). Even if accommodation could be made, Plaintiffs are not required to exhaust available administrative remedies. *E.g.*, *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 509 (1982).

Defendants also argue that First Amendment standing precedent is not available to support Individual Plaintiffs' and MSI members' standing to bring a Second Amendment claim. Defendants' reliance upon *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), and *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), is misplaced. Opp. at 25. *Woollard* turned exclusively on the merits and

accepted plaintiff's standing. 712 F.3d at 871 n.3. *Masciandaro* is inapplicable here because it is a criminal case that necessarily does not involve standing. 638 F.3d at 474. Rather, the Court merely reiterated the longstanding principle of constitutional avoidance that, in a criminal case, a court will not consider an overbreadth challenge where the defendant's conduct was clearly proscribed by the challenged statute. *Id*. Neither case forecloses Individual Plaintiffs' or MSI members' standing or that First Amendment precedent cannot guide the Court. Instead, the Supreme Court has likened the Second Amendment to the First, Fourth, and Ninth Amendments, noting that they use "very similar terminology" in referring to a right of "the people" to establish individual rights. *Heller*, 554 U.S. at 579.

B. MSI has associational standing on behalf of its members as well as organizational standing.

There can be no question that MSI has associational standing to bring this challenge on behalf of its members because its members have personal standing. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). MSI also has organizational standing because the Handgun License Requirement causes it to divert resources and adversely impacts its ability to attract and retain members. Both injuries satisfy the requirements for organizational standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("[C]oncrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's

resources—constitutes far more than simply a setback to the organization's abstract social interests."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 135 (1951) (organization suffered injury where "many potential members have declined to join it"); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019) (a "diversion of resources" satisfies the injury requirement).

Part of MSI's core mission is to educate the public about the right of self-protection and to encourage acquisition of handguns for lawful self-defense. JA 558. The undisputed facts demonstrate that the Handgun License Requirement causes MSI to divert time, energy, and other resources away from this core mission and towards educating its members and the public on navigating the Handgun License Requirement's obstacles to acquiring a handgun. Opening Br. at 37–38. Defendants ask this Court to discredit MSI's undisputed evidence as "bare," Opp. at 31, which would require this Court to ignore Rule 56's mandates to construe facts in the light most favorable to Plaintiffs, draw all inferences in their favor and against Defendants, take as true Plaintiffs' testimony, and refrain from weighing evidence. *Supra* p. 1.

MSI's president testified that the Handgun License Requirement harms MSI's ability to "attract new members." JA 561–62 (stating that the Handgun License Requirement made it more difficult to acquire a handgun thereby reducing the incentive for individuals to join MSI and causing its membership to

shrink). Defendants do not dispute this evidence. They instead argue that it is "uncorroborated" and lacks "any factual support." Opp. at 31–32. They also ask this Court to weigh this evidence against other evidence regarding MSI's membership. *Id*. Defendants' arguments require this Court to ignore Rule 56's mandates. *Supra* p. 1.

C. Atlantic Guns has personal standing and third party standing on behalf of its customers.

1. The Handgun License Requirement directly infringes Atlantic Guns' right to sell handguns, restricting its handgun buyer market and causing loss of sales and revenue.

Defendants do not dispute that Atlantic Guns is licensed by Maryland and the federal government to sell handguns. Opp. at 11–12; Opening Br. at 10. Nor do Defendants dispute that the Second Amendment confers on Atlantic Guns the ancillary right to sell handguns to law-abiding, responsible Maryland citizens. Opp. at 33–37; Opening Br. at 41–45.

Defendants instead argue that there is no "freestanding" right to sell arms. Opp. at 33–37. This strawman argument must fail because Atlantic Guns asserts only its ancillary right to sell. *Teixeira*, relied upon heavily by Defendants, Opp. at 33–37, recognized that "[c]ommerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc). The Court elaborated on the ancillary right to sell:

> After *Heller*, this court and other federal courts of appeals have held that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense. . . . *Marzzarella* rightly observed that in contemporary society, permitting an overall ban on gun sales would be untenable under *Heller* because a total prohibition would severely limit the ability of citizens to acquire firearms.

Id. at 677, 688 (quotations and citation omitted). *Teixeira* did not address the merits of plaintiff's ancillary right to sell because the Court already had held that the ordinance at issue did not infringe his customers' right to buy. *Id*. at 678 ("Whatever the scope of [the ancillary] right, Teixeira has failed to state a claim that the ordinance impedes Alameda County residents from acquiring firearms."). The ordinance instead prohibited only the opening of one firearms store on a specific piece of land. *Id*. at 679. Because it did not restrict any other firearms dealer's conduct, plaintiff's customers could still buy a handgun at a number of nearby firearms dealers. *Id*.

The Handgun License Requirement, in stark contrast with the ordinance at issue in *Teixeira*, infringes Atlantic Guns' customers' right to buy, placing Atlantic Guns' undisputed ancillary right to sell squarely at issue. Opening Br. at 41–45. The Handgun License Requirement prohibits not just Atlantic Guns but all Maryland firearms dealers from selling handguns to non-Handgun License holders, Md. Code Ann., Pub. Safety § 5-117.1(b), completely foreclosing Atlantic Guns' customers' ability to buy a handgun if they lack a Handgun License.

Defendants also do not dispute that Atlantic Guns is an object of the Handgun License Requirement's prohibition on sales to non-Handgun License holders. *See* Opp. at 41 ("Atlantic Guns is free to continue to sell handguns to the entirety of its customer base so long as each customer obtains a License."). There is "little question" that Atlantic Guns has standing to challenge the infringement of its undisputed ancillary right to sell. *E.g.*, *Lujan*, 504 U.S. at 561–62.

Atlantic Guns suffers two distinct injuries resulting from the Handgun License Requirement's prohibition on sales to non-Handgun License holders. The Handgun License Requirement inarguably constricts Atlantic Guns' handgun buyer market—reducing it from millions of law-abiding responsible Maryland citizens previously eligible to a buy a handgun to tens of thousands who have managed to obtain a Handgun License in the six years since the law took effect. JA 124, 898 (Maryland issued 93,155 Handgun Licenses through 2017). Defendants also do not dispute tens of thousands of would-be handgun buyers initiated but never completed Handgun License applications, raising the inference that the Handgun License Requirement will deter would-be buyers from obtaining a handgun. JA 889, 1412; Opening Br. at 53. Such a market constriction satisfies the injury requirement as a matter of law. *Craig v. Boren*, 429 U.S. 190, 194 (1976) ("This Court repeatedly has recognized that [market constriction] establish[es] the threshold requirements of a case or controversy mandated by Art. III.") (internal citations and quotations omitted).

Defendants' own data shows that Atlantic Guns' handgun sales are down by about 20 percent since the Handgun License Requirement's implementation in 2013 (comparing Atlantic Guns' sales for the four years before (2009–12) and after (2014–17) the Handgun License Requirement took effect in 2013). JA 1413–14; Opening Br. at 11. Atlantic Guns' owner, Stephen Schneider, confirmed these injuries, testifying:

> Atlantic Guns' business has been severely impacted by the . . . Handgun License [R]equirement because it is barred by law from providing handguns to customers who do not have a Handgun License.

JA 1412; Opening Br. at 11. Mr. Schneider further testified that Atlantic Guns continues to suffer these injuries on an ongoing basis because it "turns away would be customers every week" rather than selling them handguns. JA 1412; Opening Br. at 47–49. Defendants do not dispute Mr. Schneider's testimony. Opp. at 37–40.

Defendants offer no evidence to dispute that the Handgun License Requirement caused these undisputed injuries or that a favorable ruling would redress them. The Handgun License Requirement directly and expressly limits Atlantic Guns' conduct, Md. Code Ann., Pub. Safety § 5-117.1(b), satisfying the causation requirement as a matter of law. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1304 (11th Cir. 2006) (holding that the traceability requirement is "clearly present" when the challenged law "directly and expressly limits" the plaintiff's conduct); Opening Br. at 48–49. Mr. Schneider's

undisputed testimony confirms that the Handgun License Requirement causes Atlantic Guns to turn would-be handgun customers away. JA 1412; Opening Br. at 47–49.

Defendants do not dispute their own data or Atlantic Guns' data demonstrating Atlantic Guns' reduced sales and revenue. JA 1412–13; Opening Br. at 11. They instead ask this Court to ignore each of Rule 56's mandates. *Supra* p. 1.[1] Defendants ask this Court to discredit Atlantic Guns' undisputed evidence in light of other evidence that "Maryland experienced robust handgun sales in 2017." Opp. at 12, 38. Evidence of one year's handgun sales for all of Maryland's firearms dealers cannot negate undisputed evidence that Atlantic Guns' sales and revenue are down 20 percent since the Handgun License Requirement's implementation. And in any event, this Court must reject Defendants' request to weigh evidence on summary judgment. *Supra* p. 1.

Defendants also fail to dispute Mr. Schneider's testimony that the Handgun License Requirement causes Atlantic Guns to turn away handgun customers every

[1] Defendants incorrectly argue at the end of a lengthy footnote that the district court made factual findings, which would be reviewed for clear error, that Atlantic Guns did not suffer injury. Opp. at 38 n. 18. But whether Atlantic Guns suffered injury is a legal conclusion that is reviewed de novo. *Schneider v. Donaldson Funeral Home, P.A.*, 733 F. App'x 641, 644 (4th Cir. 2018) (determination of injury is "one of law"); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 659 & n.18 (9th Cir. 2002) (whether party suffered injury was a legal conclusion). In any event, Defendants' argument proves too much, revealing that the district court weighed the evidence and made findings, which Rule 56 forbids. *Anderson*, 477 U.S at 249.

week. They instead ask this Court to discredit Mr. Schneider's uncontroverted testimony, claiming that it is inconsistent with his deposition testimony, uncorroborated, and relies upon hearsay. Opp. at 39–40. It is none of these. At deposition, Mr. Schneider confirmed that Atlantic Guns turns customers away due to the Handgun License Requirement and that the Handgun License Requirement causes Atlantic Guns to lose sales. JA 337–38, 342–43. He did not identify any customer by name, nor did he have evidence that Atlantic Guns' injuries "w[ere] caused *exclusively* by the HQL requirement and not by anything else."[2] JA 339–40 (emphasis added). These statements confirm, rather than "flatly contradict[]," Mr. Schneider's testimony that Atlantic Guns turned customers away because of the Handgun License Requirement and suffered injury as a result. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999) (to discredit affidavit at summary judgment, the affidavit must "flatly contradict[] that party's earlier sworn deposition"). Defendants do not argue that Mr. Schneider's declaration is a sham or should be struck; rather, they urge this Court to weigh evidence and discredit it.

[2] Atlantic Guns need not demonstrate that the Handgun License Requirement is the exclusive cause of Atlantic Guns' economic injury, as Defendants imply. Rather, the Handgun License Requirement need only to be "fairly traceable" to Atlantic Guns' injury and need not be "the sole or even immediate cause of the injury." *Sierra Club v. Dept. of the Interior*, 899 F.3d 260, 283–84 (4th Cir. 2018).

Mr. Schneider's testimony is also corroborated by emails from Atlantic Guns' would-be customers who inquired about purchasing a handgun but were told they could not by Mr. Schneider because they did not possess a Handgun License.[3] Mr. Schneider's testimony is not hearsay; it is a recollection based upon his personal, first-hand interaction with customers that does not rely upon any person's out-of-court statement. The undisputed evidence shows Mr. Schneider turned customers away because he could not sell them a handgun without a Handgun License.

To affirm the district court's opinion, this Court must ignore each of Rule 56's mandates by construing data of Atlantic Guns' sales in the light most favorable to Defendants, drawing all reasonable inferences in Defendants' favor and against Atlantic Guns, discrediting Mr. Schneider's testimony, and weighing evidence of handgun sales in Maryland in 2017 against evidence of Atlantic Guns' sales data from 2009–2012 and 2014–2017. Rule 56 prohibits this, *supra* p. 3, and the Court should instead reverse the district court's ruling.

[3] Defendants admitted that Atlantic Guns "produced in discovery emails with customer names redacted," Opp. at 12, but they also mistakenly argued that "indeed, no such emails were produced," Opp. at 40. Not only did Atlantic Guns produce these emails to Defendants, but Defendants marked them as Exhibit 30 and used them to examine Mr. Schneider at his deposition, where he authenticated them and explained that they were redacted to protect the customers' privacy pursuant to the protective order. *See* Schneider Dep., at 56–58 and Ex. 30, attached as Exhibit 1 to Plaintiffs' Motion for Leave to File Attachment.

2. The Handgun License Requirement indirectly infringes Atlantic Guns' customers' right to buy handguns by prohibiting Atlantic Guns from selling handguns to non-Handgun License holders.

Even if Atlantic Guns does not have a right to sell handguns (and Defendants do not dispute Atlantic Guns' ancillary right to sell handguns), it has standing to challenge the Handgun License Requirement on behalf of its customers whose undisputed right to buy a handgun is indirectly infringed by Atlantic Guns' compliance with the Handgun License Requirement. *Teixeira* noted presciently that usually "there will be no need to disentangle an asserted right of retailers to sell firearms from the rights of potential firearm buyers and owners to acquire them" because firearms dealers have third party standing to sue on behalf of their customers. 873 F.3d at 687. This case is no different.

The Handgun License Requirement expressly prohibits dealers like Atlantic Guns from selling handguns to their customers who lack a Handgun License. Md. Code Ann., Pub. Safety § 5-117.1(b). Atlantic Guns' compliance with this prohibition prevents law-abiding, responsible Marylanders without a Handgun License from buying a handgun, infringing upon their right to do so. Defendants do not dispute Mr. Schneider's testimony, which confirms that enforcement of the Handgun License Requirement against Atlantic Guns indirectly infringes its customers' right to buy a handgun:

> Atlantic Guns' customers are law-abiding, responsible Maryland citizens who wish to possess handguns . . . but are deterred from doing so because of the Handgun License [R]equirement [and that Atlantic Guns would sell handguns to these individuals but does not] because it is barred by law from providing handguns to customers who do not have a Handgun License.

JA 1412.

Defendants do not dispute these material facts demonstrating Atlantic Guns' third party standing. Defendants dispute only whether any individuals have actually been deterred from buying a handgun. Opp. at 44–45. Defendants would have this Court ignore undisputed evidence that Atlantic Guns turned away would-be customers who lacked a Handgun License, undisputed evidence that Atlantic Guns sold fewer handguns after enactment of the Handgun License Requirement, and undisputed evidence that tens of thousands of Handgun License applications were started but not completed. JA 889. Defendants urge this Court to infer that none of the individuals who started but did not complete a Handgun License application were ultimately deterred from getting a handgun. *See* Opp. at 41. Such an inference is prohibited by Rule 56. As Magistrate Judge Coulson stated in his order compelling Defendants to produce the evidence of those uncompleted applications, it may give rise to the opposite inference—that the applicants stopped their applications "due to frustration or fatigue related to the process causing the applicant to abandon it altogether." *See* Dkt. 54, at p. 1. Rule 56 requires this inference rather than the one Defendants prefer. *Supra* p. 1.

Failing to dispute the material facts, Defendants misstate the case law. First, Defendants argue without citation that the challenged law must restrict only the seller's activity. Opp. 43–44. Defendants' argument is refuted by *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), where a physician had standing to challenge a law criminalizing both the use and dispensing of birth control.

Seizing upon dicta in *Craig*, Defendants also argue that the vendor must be the "least awkward challenger." Opp. at 44 (citing *Craig*, 429 U.S. at 196 (noting that the vendor was the "obvious claimant")). *Craig*'s least awkward challenger dicta is not a requirement, *see, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (no such requirement enumerated), and never has been, *Griswold*, 381 U.S. 479 (same). But even if a third party litigant must be the least awkward challenger, Atlantic Guns certainly is that. The vendor in *Craig* was the least awkward challenger because the challenged law restricted its sales activities. *Craig*, 429 U.S. at 192–93. Atlantic Guns is likewise the least awkward challenger because the Handgun License Requirement restricts its sales activities. Md. Code Ann., Pub. Safety § 5-117.1(b).

Defendants also argue that the challenged law must prohibit sales to a "fixed class or make it impossible for Atlantic Guns to operate or continue its business practices." Opp. at 44. But the customers in *Craig* were a "fluid membership," not a fixed class. *Craig*, 429 U.S. at 194. By the time the Supreme Court decided the case, the plaintiffs had aged out of the class of minor individuals to whom the vendor

could not sell. *Id*. Similarly refuting Defendants' argument, the vendor in *Craig* continued its operations by selling beer to males over the age of 21 and females, *id*., just as Atlantic Guns continues to sell handguns to Handgun License holders and those few individuals exempt from the Handgun License Requirement.

"A plaintiff's standing to bring a case does not depend upon his ultimate success on the merits underlying his case." *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 (4th Cir. 2007). Plaintiffs have demonstrated their standing as set forth above, and that is all they need do.

II. Undisputed material facts demonstrate that Plaintiffs have standing to bring their vagueness claim because they reasonably fear prosecution if they were to receive a handgun without having a Handgun License.

Defendants do not dispute Ms. Miller's testimony that she fears prosecution because she would like to "receive" her husband's handguns. Opp. at 8–9; Opening Br. at 30. Nor do they dispute Mr. Pennak's testimony that MSI instructors (including himself) are reluctant to temporarily loan handguns for instructional purposes because of their fear of prosecution. Opp. at 48; Opening Br. at 30. As Defendants concede, a plaintiff mounting a vagueness challenge need only show "[1] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [2] there exists a credible threat of prosecution thereunder.'" Opp. at 47 (quoting *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018)). Plaintiffs have made this showing.

Defendants misstate the law to require an actual threat of prosecution. Opp. at 47. But an actual threat is not required; the fear of criminal prosecution need only be reasonable, defined as "not imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S 289, 302 (1979). Ms. Miller's and Mr. Pennak's uncontroverted testimonies satisfy this standard easily, demonstrating Plaintiffs' standing to challenge the vagueness of the terms "receive" and "receipt" in the Handgun License Requirement.

Defendants improperly argue the merits in asserting that Plaintiffs lack standing. This Court, sitting en banc, recently rejected such an argument, holding that a vagueness challenge cannot be dismissed on standing grounds because "the question [of what conduct] falls within the [statutory] scheme necessarily requires an evaluation of the merits of that vagueness challenge as applied to the[] plaintiffs." *Manning v. Cadwell*, 930 F.3d 264, 278 n.12 (4th Cir. 2019). In this case, Judge Garbis denied Defendants' motion to dismiss on standing for that reason: "[t]o address Defendants' arguments, the Court would have to analyze the merits of Plaintiffs' vagueness claim." JA 64. As *Manning* holds, the question of whether Plaintiffs' conduct falls within the Handgun License Requirement must await consideration of the merits and is improperly raised in a preliminary standing challenge. 930 F.3d at 278 n.12.

In any event, Defendants do not dispute Plaintiffs' point, Opening Br. at 30, that "receive" and "receipt" are most reasonably read to include temporary receipt or temporary possession. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (noting that in interpreting a statute, a court "must presume that a legislature says in a statute what it means and means in a statute what it says there"). Defendants also do not dispute that such a reading would criminalize the receipt of a handgun and directly infringe the right to possess a handgun in the home. Nor do they dispute that such a reading would potentially criminalize other activities protected by the Second Amendment, such as training and practice, directly harming the ability of MSI instructors, and other MSI members, to loan or receive handguns in a multitude of training activities and recreational shooting scenarios. JA 559; *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("[T]he core right wouldn't mean much without the training and practice that make it effective.").

As Judge Garbis explained in denying Defendants' motion to dismiss, Defendants are arguing the merits, JA 64–65, asking the Court to ignore the normal English usage and dictionary definitions of "receipt" and "receive" because Defendants have informally construed those terms to mean "transfer," as that specific term is used in a *different* statute, Md. Code Ann., Pub. Safety 5-124, as construed by the Maryland Court of Appeals in *Chow v. State*, 903 A.2d

388, 401–02 (Md. 2006). Defendants do not deny that these interpretations are not embodied in formal regulations and are not binding on anyone, including the Maryland State Police and state prosecutors. Opening Br. at 31–32. While Defendants deny that the Maryland State Police Advisory is a "litigation position," Opp. at 49, this Court will not credit administrative interpretations rendered during ongoing litigation "that do not reflect an exercise of delegated legislative authority." *Sierra Club*, 899 F.3d at 286–87. The Advisory is especially suspect here because Defendants issued it *after* they lost their motion to dismiss on this issue before Judge Garbis.

Defendants also do not deny that MSI formally requested Maryland State Police to address this issue by regulation when the Handgun License Requirement regulations were originally issued in 2013. JA 581. Defendants still have failed to initiate a rulemaking proceeding to address the issue, leaving it up to the State's Attorneys' discretion to prosecute temporary "receipts" whenever they should so choose in the future. The risk of arbitrary enforcement remains real. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide."). Given Defendants' conduct, Plaintiffs' fear of arbitrary enforcement cannot be viewed as "imaginary."

Defendants' reliance on *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), is also wrong. Opp. at 48. *Kolbe* held that a *pre-existing and formal* Attorney General's opinion, *coupled* with a *pre-existing* Maryland State Police bulletin concerning the term "copies," provided guidance with regard to the meaning of the term "copycat" as used by the General Assembly in *subsequent* legislation on the same subject matter. *Kolbe*, 849 F.3d at 148–49. The pre-existence of such published material was crucial to the Court's holding in *Kolbe*, as the Court accepted it as evidence of "legislative acquiescence." *Id*. at 149. Here, in contrast, neither the Attorney General nor the Maryland State Police has ever issued any such published formal opinions or bulletins on this point prior to the enactment of this legislation.

The Office of Attorney General position, relied upon by Defendants, Opp. at 48, was an informal, one-page, private letter addressed to an individual member of the Maryland General Assembly by the counsel to the General Assembly (not the Attorney General), which offered the personal opinion of the author. JA 211. Such a letter cannot be equated to the published, formal opinion of the Attorney General in *Kolbe*. Defendants have not shown that this letter was published or even shared with the other 186 members of the General Assembly. Such informal letters cannot outweigh the uncertainty created by the language actually employed by the legislature because legislative intent is determined by

giving the statutory language its "plain and common sense meaning." *The Arundel Corp. v. Marie*, 860 A.2d 886, 894 (Md. 2004). Maryland courts resort to the common dictionary definitions for statutory terms. *Chow*, 903 A.2d at 396. There is no basis for any inference that the legislature was fully informed of Defendants' novel interpretation of "receive" and "receipt" as actually meaning "transfer."

Defendants fare no better in their reliance on the Maryland State Police's post-enactment Frequently Asked Questions ("FAQ") for the proposition that a Handgun License is not needed "to fire at a gun range" but is "only required to purchase, rent or transfer a firearm." Opp. at 49. While Maryland Code Ann., Pub. Safety § 5-117.1(b) provides that "[a] dealer or any other person may not sell, rent, or transfer a handgun" if the recipient does not have a Handgun License, subsection 5-117.1(c) provides that "[a] person may purchase, rent, *or receive* a handgun only if" they have a Handgun License. (emphasis added). The FAQ does not mention, much less shed light on, the meaning of "receive" as used in subsection 5-117.1(c). And the FAQ addresses only firing a handgun "at a gun range" and does not provide the broad interpretation Defendants urge. The prohibitions of Section 5-117.1 are indisputably applicable outside the limited context of a gun range.

Defendants' merits arguments, even if properly before this Court on a preliminary standing challenge, amount to little more than the assertion that Plaintiffs should ignore the actual language of the statute at issue and "trust" that every law enforcement officer and every prosecutor in the State will adhere to the Maryland State Police's non-binding assurances. Defendants have no response to Plaintiffs' point, Opening Br. at 31–33, that Defendants' assurances cannot inoculate the government from judicial review of an offending statutory restriction. *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1322 (11th Cir. 2017) (en banc) ("we cannot find clarity in a wholly ambiguous statute simply by relying on the benevolence or good faith of those enforcing it"). Given the continuing refusal of the Maryland State Police to issue binding regulations, neither Plaintiffs nor this Court has reason to "trust" Defendants. Plaintiffs have standing to pursue judicial review of the vagueness of these statutory terms.

III. Undisputed material facts demonstrate that Plaintiffs have standing to bring their state law claims because Defendants' regulations exceed their statutory authority and threaten interference with Plaintiffs' right to acquire a handgun.

Defendants argue that Plaintiffs lack standing to bring their *ultra vires* claim because "the Second Amendment right is the only legal right alleged by Plaintiffs to have been infringed by the regulations at issue." Opp. at 51. That is false. The *ultra vires* claims are independent claims brought under State law. Md. Code Ann., State Gov't § 10-125. Section 10-125(d) expressly authorizes a court

to declare a regulation invalid if the court finds that "(1) the provision violates any provision of the United States or Maryland Constitution; [or] (2) the provision exceeds the statutory authority of the unit." Plaintiffs bring their *ultra vires* claim under subsection 10-125(d)(2). This claim is independent of their Second Amendment and Due Process Clause challenges under subsection 10-125(d)(1).

Defendants assert, without authority, that Individual Plaintiffs lack standing distinct from the general public because the *ultra vires* provisions apply only to applicants, and Individual Plaintiffs are not applicants because they have not applied. Subsection 10-125(b) provides that "[a] court may determine the validity of any regulation if it appears to the court that the regulation or its threatened application interferes with or impairs or threatens to interfere with or impair a legal right or privilege of the petitioner." Under Subsection 10-125(a)(1), that right is broadly accorded to any "person" and obtains "whether or not the person has asked the unit to consider the validity of the regulation."

Each of the Individual Plaintiffs is a "person" whose right to acquire a handgun has been "interfere[d] with, impair[ed] or threaten[ed] to interfere with or impair" by the *ultra vires* regulations, including the live fire training, livescan fingerprinting, and licensed handgun instructor requirements. Plaintiffs need not be actual applicants to be harmed in these ways because Maryland Code Ann.,

State Gov't § 10-125(b) expressly provides judicial review of regulations that "threaten[]" interference with Individual Plaintiffs' legal rights. Not surprisingly, Defendants cite no authority for their extraordinarily limited construction of Section 10-125(b).

Similarly wrong is Defendants' assertion that MSI lacks standing because it has not suffered "some kind of special damage from such wrong differing in character and kind from that suffered by the general public." Opp. at 53 (quoting *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Bd.*, 152 A.3d 827, 838 (Md. 2017)). But MSI has suffered the required special damage, and MSI has standing to bring these *ultra vires* claims for the same reason it has standing to sue under *Havens*. *Supra* pp. 6–8.

Defendants are also wrong that Plaintiffs fail to meet Maryland's standing requirement, which "generally depends on whether one is 'aggrieved,' which means whether a plaintiff has 'an interest such that [he, she, or it] is personally and specifically affected in a way different from . . . the public generally.'" *Kendall v. Howard Co.*, 66 A.2d 684, 691 (Md. 2013) (citation omitted). MSI has such an interest because it submitted comprehensive formal comments to the Maryland State Police opposing the very regulations that are now at issue in this suit. JA 570–89. Moreover, as explained on page 6, MSI promotes the acquisition of handguns by law-abiding adults. The live fire requirement, as well as the other

ultra vires policies challenged by plaintiffs, obstruct MSI in a manner distinct from the general public. MSI must divert resources from educating the public concerning their individual right of self-defense, into educating and assisting the public and its members on how to satisfy the *ultra vires* requirements wrongfully imposed by the Maryland State Police.

In particular, MSI, as an entity, relies on its NRA instructor members to carry out many of these educational functions. MSI is thus harmed directly by the Maryland State Police's *ultra vires* practices that are specifically directed at instructors. See JA 563–64. All these harms are more than enough to demonstrate standing. *See Fraternal Order of Police v. Montgomery Cty.*, 132 A.3d 311, 321 (Md. 2016) (police union had standing to challenge county's use of public funds to defeat referendum concerning statute on collective bargaining because statute affected the scope of bargaining by the union on behalf of its members).

CONCLUSION

For the reasons stated above and in the opening brief, Plaintiffs have standing to challenge the Handgun License Requirement. Plaintiffs respectfully request that this Court REVERSE the judgment of the district court and REMAND the case to be decided on its merits.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains less than 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(viii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: August 27, 2019.

/s/ John Parker Sweeney
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August, Appellants' brief was served, via electronic delivery to all parties' counsel via the Court's appellate CM/ECF system which will forward copies to Counsel of Record.

/s/ John Parker Sweeney
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