

**IN THE  
COURT OF SPECIAL APPEALS OF MARYLAND**

-----  
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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**MOTION OF APPELLANT TO STRIKE  
THE APPELLEE'S APPENDIX AND TO STRIKE THOSE PORTIONS OF THE  
BRIEF OF APPELLEE THAT PURPORT TO RELY ON THAT APPENDIX**

Edward Holmes Whalen  
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Appellant

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## STATEMENT AND ARGUMENT

Pursuant to Rule 8-431, the Appellant, Edward Holmes Whalen, by and through his counsel, hereby respectfully moves this Court for an order striking the Appendix attached to the Brief of the Appellee filed in this case on August 28, 2019. The Appellant further moves this Court for an order striking the arguments and contentions advanced by Appellee that purport to rely on that Appendix. This motion has not been consented to by Appellee. This motion should be granted for the following reasons:

1. On July 22, 2019, Appellant filed the Brief of Appellant and a separately bound Appendix containing the relevant parts of the record in this case. Appellant consulted with Counsel for the Appellee in the preparation of that Appendix and included record material requested by such Counsel in the Appendix.

2. On August 28, 2019, the Appellee filed its Brief of Appellee. The Appellee cites (Br. at 9 n.4) and attaches to its brief, as an Appendix, an Amicus Brief filed by a gun control advocacy group, “Everytown for Gun Safety” (“Everytown”), in support of Maryland’s position in *Malpasso v. Pallozzi*, 767 Fed.Appx. 525 (4th Cir. Feb. 1, 2019), a case in which the Maryland “good and substantial reason” requirement was at issue before the Fourth Circuit. The Everytown Amicus Brief filed in *Malpasso* is 6,496 words long, according to its Certificate of Compliance. The Appellee’s brief is 4,626 words long, according to its Certificate of Compliance.

3. First, by attaching and incorporating Everytown’s *Malpasso* Amicus Brief wholesale, the Board has effectively and improperly given itself a substantial expansion

of the 9,100 word limit established by Rule 8-503(d) of the Rules. See *Maryland Green Party v. State Bd. of Elections*, 165 Md.App. 113, 143 n.16 (2005) (admonishing counsel from using “means of sidestepping the page limit requirements”). See also Rule 8-504(c). Second, attaching that Amicus Brief in an Appendix also violates Rule 8-501(e), as it is not “part of the record” in this case and only “record” may be inserted in an appendix. See *Franklin Credit Mgmt. Corp. v. Nefflen*, 208 Md. App. 712, 724 (2012) (granting a Motion to Strike on grounds that “[p]arties to an appeal are not entitled to supplement the record”).

4. As explained in the accompanying Reply of Appellant, if incorporation of this sort is permissible, then Mr. Whalen should likewise be entitled to incorporate by reference briefs filed in other cases, such as the Amicus Briefs filed in *NYSPRA v. NYC*, 883 F.3d 45 (2d Cir. 2018), *cert. granted* 139 S.Ct. 939 (2019), or other briefs filed in *Malpasso*. Yet, as is apparent, allowing such incorporation of arguments by reference would quickly become absurd as it would allow counsel to evade the page limits and invite the wholesale introduction of extra-record materials. Pursuant to Rule 8-504(c), this Court should therefore enforce Rule 8-501(e) and Rule 8-503(d) and strike the Appendix to the Brief of Appellee as well as strike any argument (Br. at 9 n.4) based on that Appendix.

5. The contents of the Everytown Amicus Brief are not subject to judicial notice, either in Circuit Court under Rule 5-201, or in this Court. Under Rule 5-201, judicial notice is limited to “adjudicative facts,” that are “not subject to reasonable dispute.” The

same principles apply to judicial notice in this Court. See, e.g, *75-80 Properties, LLC v. Rale, Inc.*, slip op. at n.5, 2019 WL 4072331 (Aug. 29, 2019) (applying Rule 5-201). As set forth more fully in the Reply of Appellant, the Everytown Amicus Brief presents legal arguments, not facts, and those arguments are most certainly subject to “reasonable dispute” (and are disputed by Appellant). Judicial notice of the arguments set forth in Everytown’s Amicus Brief is thus not appropriate. See *State v. Thomas*, 464 Md. 133, 140 (2019) (applying Rule 5-201 and denying judicial notice). By not properly presenting those arguments in its brief, Appellee has forfeited those arguments. This Court should so hold.

**CONCLUSION**

This Court should Strike the Board's Appendix and strike as well that portion of the Board's brief (Br. at 9 n.4) that purports to rely on the Appendix.

Respectfully submitted,



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*Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the “Motion Of Appellant To Strike The Appellee’s Appendix And To Strike Those Portions Of The Brief Of Appellee That Purport To Rely On That Appendix,” via first class mail, postage prepaid, and via email at counsels’ email addresses, on September 17, 2019, to:

Mark H. Bowen  
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and

James Pasko  
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A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is written in a cursive style with a large, stylized initial 'M'.

Mark W. Pennak,  
Counsel for Appellant

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**PROPOSED ORDER ON MOTION TO STRIKE**

The motion of Appellant to strike the Appendix filed with the Brief of Appellant and to strike the that portion of the Brief of Appellee that purports to reply on the material set forth in the Appendix attached to the Brief of Appellee (Br. at 9 n.4) is hereby GRANTED and such material is hereby STRICKEN from the Brief of Appellee.

SO ORDERED: