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Captain Andrew J. Rossignol
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Dear Captain Rossignol:

You have asked two questions about the effect on Maryland law of the United States Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, __ U.S. __, No. 20-843, 2022 WL 2251305 (June 23, 2022). Maryland law currently provides that a permit to wear, carry, or transport a handgun shall be issued only to a person who "has good and substantial reason" to do so, "such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." Md. Code Ann., Pub. Safety ("PS") § 5-306(a)(6)(ii). But the Supreme Court recently struck down a similar provision of New York law as unconstitutional under the Second and Fourteenth Amendments of the U.S. Constitution. You have thus asked whether Maryland's "good and substantial reason" requirement is likewise unconstitutional. And if that requirement is unconstitutional, you also asked whether the Department of State Police (the "Department") is required to continue enforcing it until a court specifically rules on the constitutionality of Maryland's provision.

As explained in more detail below, Maryland's "good and substantial reason" requirement is now clearly unconstitutional, based on controlling Supreme Court precedent that is directly on point. Indeed, the Court of Special Appeals concluded as much just a few days ago in an unreported decision. *In re Rounds*, No. 1533, Sept. Term, 2021 (Md. Ct. Spec. App. July 1, 2022) (unreported). Thus, the Department is not required to continue enforcing—and, in fact, may not continue to enforce—the "good and substantial reason" requirement in processing public-carry permit applications.

But that conclusion applies only to the "good and substantial reason" requirement. That is, with limited exceptions specifically authorized by law, it remains illegal for an individual to carry, wear, or transport a handgun in public in Maryland without a permit from the Department of State Police. *See* Md. Code Ann., Crim. Law ("CL") § 4-203. The Department also must continue to enforce all other statutory prerequisites for the issuance of public-carry permits. For example, among other statutory prerequisites, the Department still is prohibited from issuing a permit to an applicant who has been convicted of "a felony or of a misdemeanor for which a sentence of imprisonment for more than 1 year has been imposed," PS § 5-306(a)(2)(i), or who has "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," PS § 5-306(a)(6)(i). In addition, Maryland's laws and regulations prohibiting the carrying of handguns in certain sensitive places—like schools—remain in effect.

To be clear, this advice letter does not address the wisdom of the Supreme Court's interpretation of the Second Amendment. The Attorney General has made clear that he disagrees with the Court's decision and that, in his view, the decision will lead to "more deaths and more pain in a country already awash in gun violence." But the Office of the Attorney General's role in answering your questions is a different one—to offer "our best legal analysis," 106 *Opinions of the Attorney General* 82, 91 (2021), on the current constitutionality of the "good and substantial reason" requirement to the clients responsible for administering that requirement.

I
Background

Under Maryland law, an individual generally must have a permit to carry, wear, or transport a handgun in public. PS § 5-303; *see also* CL § 4-203. To obtain that permit, an applicant must satisfy several requirements. PS § 5-306. One of those requirements, as relevant here, is that the Secretary of State Police must find, based on an investigation, that the applicant "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." PS § 5-306(a)(6)(ii). That requirement has long been interpreted to mean that, to be granted a license, an applicant must have greater need to carry a handgun than members of the general public. *See Woollard v. Gallagher*, 712 F.3d 865, 869-70 (4th Cir. 2013). To satisfy that burden, applicants must show either a heightened need because of their profession or an "apprehen[sion] [of] danger" that is objectively reasonable, *see Snowden v. Handgun Permit Review Bd.*, 45 Md. App. 464, 469 (1980), and rises above the level of a "vague threat" or a "general fear of living in a dangerous society," *Woollard*, 712 F.3d at

870 (cleaned up) (quoting *Scherr v. Handgun Permit Review Bd.*, 163 Md. App. 417, 437 (2005)).

II
Analysis

Your first question is whether the Supreme Court's decision in *Bruen* renders unconstitutional Maryland's "good and substantial reason" requirement. Although Maryland's requirement was not directly before the Supreme Court in *Bruen*, the Court of Special Appeals recently concluded in an unpublished opinion that—given the similarity between the provision of New York law struck down in *Bruen* and Maryland's "good and substantial reason" requirement—Maryland's requirement is now unconstitutional as well. *Rounds*, slip op. at 1, 4-8. Under the New York law at issue in *Bruen*, an applicant for a license to carry a firearm outside the home for self-defense had to show "proper cause" for the issuance of a license. *Bruen*, slip op. at 3. "Proper cause" was defined as "a special need for self-protection distinguishable from that of the general community." *Id.* (citation omitted). The Supreme Court concluded that this New York requirement to "demonstrate[] a special need for self-defense" violated the Constitution. *Id.*, slip op. at 1-2.

That same conclusion applies to Maryland's "good and substantial reason" requirement. New York's licensing provision, as the Court of Special Appeals recognized, is similar to Maryland's "good and substantial reason" requirement, given the way that Maryland's requirement has long been interpreted by the Department and by the Maryland courts. *See Rounds*, slip op. at 7-8. In fact, the Supreme Court specifically noted in its opinion that five other states—including Maryland—had licensing regimes that, like New York's, "condition[] issuance of a license to carry on a citizen's showing of some additional special need," *Bruen*, slip op. at 1-2, 5-6, which is what the Supreme Court found to be unconstitutional about New York's regime. Regardless of any differences that might exist between New York's "proper cause" requirement and Maryland's "good and substantial reason" requirement, then, they are the same in the way that mattered to the Supreme Court: Maryland "issues public-carry licenses only when an applicant demonstrates a special need for self-defense." *Id.* at 1-2. Thus, Maryland's "good and substantial reason" requirement is now clearly unconstitutional under *Bruen*.

The next question is whether the Department is nonetheless required to continue enforcing the "good and substantial reason" requirement. Ordinarily, a State agency must comply with the enactments of the General Assembly that govern its conduct. *See, e.g.*, 106 *Opinions of the Attorney General* 38, 52-53 (2021). After all, the General Assembly's enactments are presumed to be constitutional. *See, e.g.*, *State ex rel. Att'y Gen. v. Burning Tree Club, Inc.*, 301 Md. 9, 35 (1984). And only a court, not the Office of the Attorney

General, can "invalidate an act of the General Assembly." *E.g.*, 106 *Opinions of the Attorney General* at 92.

Here, the Court of Special Appeals has found that Maryland's "good and substantial reason" requirement is unconstitutional. *See Rounds*, slip op. at 2. Although it did so in an unreported decision—which lacks precedential effect—the Department is no longer obligated to enforce the requirement because, as the Court of Special Appeals recognized, the requirement is clearly unconstitutional under controlling Supreme Court precedent. Indeed, when a statutory provision is clearly unconstitutional under controlling Supreme Court case law that is directly on point, the Office of the Attorney General has generally advised that the statutory provision is "unenforceable." *E.g.*, 71 *Opinions of the Attorney General* 266, 270, 272 (1986); 70 *Opinions of the Attorney General* 3, 20 (1985) (advising the then-Secretary of Health and Mental Hygiene that certain abortion laws were unconstitutional and "may not be enforced"); *see also* 49 *Opinions of the Attorney General* 243, 246-47 (1964) (concluding that "no tax can be collected" under a statute where a recent Supreme Court decision "unavoidably requires" a conclusion of its unconstitutionality).[1] Continued enforcement of a clearly unconstitutional statute would also expose State officials to the risk of litigation and individual liability under federal law. *See* 42 U.S.C. § 1983. Of course, given that the General Assembly's enactments are presumed to be constitutional, this Office will conclude only in rare cases that a Maryland law is unconstitutional and that it does not need to be enforced. *See* 93 *Opinions of the Attorney General* 154, 161 (2008). But this is one of those rare cases: the *Bruen* Court all but explicitly stated that Maryland's "good and substantial reason" requirement is invalid for the same reasons as New York's "proper cause" requirement.

To be clear, however, the "good and substantial reason" requirement is the only statutory prerequisite for the issuance of a public-carry permit that has been rendered unconstitutional by *Bruen*. As the Supreme Court made clear in its opinion, states may still enforce requirements designed to ensure that "those [individuals] bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Bruen*, slip op. at 30 n.9 (citation omitted). In particular, the Court emphasized that "nothing in [its] analysis" should be understood as calling into doubt requirements, such as background checks and firearm safety training, that are included under the so-called "shall-issue" permitting regimes that apply in most other states (and that also apply in Maryland). *Id.*; *see also id.* (Kavanaugh, J., concurring), slip op. at 1-2 (explaining that "[t]he Court's decision

[1] More difficult questions about the authority of an agency to decline to enforce a State law may arise when the constitutionality of a statute has been called into serious question by case law, but the statute is not yet *clearly* unconstitutional under controlling authority that is squarely on point. There is no need to consider those questions here.

addresses only the unusual discretionary licensing regimes, known as 'may-issue' regimes, that are employed by 6 States including New York" and that even those states "may continue to require licenses for carrying handguns for self-defense so long as [they] employ objective licensing requirements like those used by the 43 shall-issue States").

There is also no reason under Maryland law why the "good and substantial reason" requirement cannot be severed from the rest of the statute. Whether a state statute is severable "is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam). And Maryland law contains a "strong presumption" in favor of the severability of Maryland statutes. *See, e.g.*, *Montrose Christian Sch. Corp. v. Walsh*, 363 Md. 565, 596 (2001). Indeed, the General Assembly itself has reiterated that presumption by declaring that "[t]he finding by a court that part of a statute is unconstitutional or void does not affect the validity of the remaining portions of the statute, unless . . . the remaining valid portions alone are incomplete and incapable of being executed in accordance with legislative intent." Md. Code Ann., Gen. Prov. § 1-210(b). There is no reason to think that the General Assembly, had it known that the "good and substantial reason" requirement was unconstitutional, would have wanted the rest of the statute to be invalidated.[2]

Thus, the Department must continue to apply all other requirements governing the qualifications to obtain public-carry permits. For example, among other qualifications, the Department must still deny a permit to an applicant who has "been convicted of a felony

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[2] Some language in the Court's opinion refers to New York's licensing "regime" as unconstitutional. *E.g.*, *Bruen*, slip op. at 2. But, reading the opinion as a whole, it is clear from context that the Court invalidated only New York's requirement of "proper cause," not its entire licensing regime. *See, e.g.*, *id.*, slip op. at 30, 63 (holding that the "proper-cause requirement" is unconstitutional). In addition, because the State may still require anyone who wishes to carry a handgun in public to obtain a permit and meet certain other requirements, *see id.*, slip op. at 30 n.9, *Bruen* does not seem to impose any blanket prohibition on the criminal prosecution of individuals who carry handguns without a permit, regardless of whether they were charged before or after *Bruen* was decided. *See* CL § 4-203. Although this Office has not yet had the opportunity to exhaustively research the matter, this appears to be so for at least two reasons. First, the Court of Appeals has held that an individual who did not apply for a permit lacked standing to challenge the constitutionality of the permit requirement as part of a challenge to their criminal conviction. *See Williams v. State*, 417 Md. 479, 482, 488 & n.7 (2011). Second, even assuming the existence of standing, a defendant would at the very least need to show that the defendant was "otherwise qualified to receive a license" absent the "good and substantial reason" requirement—that is, that the defendant satisfied all other prerequisites for a permit. *See Dubose v. United States*, 213 A.3d 599, 604-05 (D.C. 2019) (reaching that conclusion following invalidation of the District of Columbia's own "may-issue" provision); *Hooks v. United States*, 191 A.3d 1141, 1144-46 (D.C. 2018) (same).

or of a misdemeanor for which a sentence of imprisonment for more than 1 year has been imposed," PS § 5-306(a)(2)(i); who has "been convicted of a crime involving the possession, use, or distribution of a controlled dangerous substance," PS § 5-306(a)(3); or who is "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," PS § 5-306(a)(4). Similarly, with certain limited exceptions, the Department must still deny a permit to an applicant who has not completed a "firearms training course approved by the Secretary." PS § 5-306(a)(5). And, as another example, the Department must still deny a permit to an individual if, "based on an investigation," the Department finds that the individual has "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." PS § 5-306(a)(6)(i).

It is also worth noting that the Supreme Court's decision does not require the State of Maryland to allow for the public carry of firearms in every type of location in the State, without any limits. Rather, the Court in *Bruen* explicitly reaffirmed that states may still prohibit carrying firearms in "sensitive places such as schools and government buildings," though it did not "comprehensively define" every location that would (or would not) qualify as a "sensitive place[]." *Bruen*, slip op. at 21-22 (citation omitted). That means that even those individuals with a public-carry permit remain prohibited from carrying firearms in certain sensitive places, such as schools, where doing so is prohibited by law. *See, e.g.*, CL § 4-102(b) ("A person may not carry or possess a firearm . . . on public school property."); Md. Code Ann., State Gov't § 2-1702(e) (generally prohibiting firearms in State legislative buildings); COMAR 04.05.01.03B (generally prohibiting firearms in State buildings).[3]

Although this letter is not an official Opinion of the Attorney General, I hope it is responsive to your request.

Sincerely,

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[3] To be clear, this is not intended to be a comprehensive list of sensitive-place restrictions under Maryland law.