IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE, DHSc RDN; ROGER T. BOYCE, SR.; and the DELAWARE STATE SPORTSMEN'S ASSOCIATION,

Plaintiffs Below,
Appellants,

v.

DAVID SMALL, SECRETARY OF THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; ED KEE, SECRETARY OF DELAWARE DEPARTMENT OF AGRICULTURE; and DELAWARE DEPARTMENT OF AGRICULTURE,

Defendants Below,
Appellees.

No. 15, 2017

Appeal from the Superior Court
of the State of Delaware
C.A. No. S16C-06-018 THG

AMICUS CURIAE BRIEF OF PINK PISTOLS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*

Pink Pistols is a shooting society that honors diversity, and that is open to all. It advocates the responsible use of lawfully owned and lawfully carried firearms for self-defense, whether by sexual minorities (a group that FBI statistics identify as particularly subject to violence based on discriminatory animus) or by others, all of whom have a constitutional right to armed self-defense. Pink Pistols, therefore, has a deep and abiding interest in the vindication of this right by the Plaintiffs in this case. Pink Pistols files this brief pursuant to Rule 28 and by leave of this Court.

SUMMARY OF ARGUMENT

To justify the challenged regulations' wholesale suspension of the constitutional right to bear arms in self-defense in state parks and forests, Delaware must show more than a general safety concern about the hazards of firearms. It has not done so. The court conceded that Plaintiffs are licensed and responsible gun owners and there is a mountain of evidence that the carriage of firearms by such individuals promotes, rather than impairs, public safety. The court below identified no evidence to the contrary. Nor did that court specify, let alone substantiate, anything about Delaware's unpopulated parks and forests that would make them vulnerable to a public-safety risk from the carriage of defensive handguns that the State itself necessarily concedes is absent from the busy sidewalks and public squares of Delaware cities where carriage of handguns is permitted. Although the

court below did not cite any authority suggesting that the carriage of defensive firearms is simply incompatible with the safety concerns present in parks and forests, the Defendants did invoke a number of federal decisions. But those decisions are inapposite (in part because the federal courts, in contrast to this Court, have generally not yet recognized that the right to bear arms in self-defense extends beyond the home) and unpersuasive as to the supposed dangers of guns in parks (in large part because, contrary to Defendants' apparent belief, defensive firearms *are permitted* in America's National Parks pursuant to congressional mandate).

The gravest error committed by the court below was its rationale that it was justified in suspending the Section 20 right to bear arms in self-defense in Delaware's parks and forests because an individual's need for armed self-defense is supposedly diminished when firearms are prohibited in those areas. As a matter of *fact*, this notion is untenable: outlawing the carriage of firearms in a given area does not make law-abiding citizens safer because criminals do not obey such bans. As a matter of *logic*, the trial court's misguided notion proves far too much: it would justify stripping people of their right to bear arms in any place where the "need" was "diminished" by a government ban on firearms. Such obvious bootstrapping is bizarre and farcical. Finally, as a matter of *law*, the trial court's notion is indefensible: an enumerated constitutional right does not evaporate because a judge opines that the "need" for the right "is diminished." "Need" is the language of

policy, not the language of *rights*. Delaware citizens do not have fundamental rights because they "need" them; they have such rights because they are entitled to them as human beings—an entitlement recognized by Article I of the Delaware Constitution.

ARGUMENT

THE REGULATIONS BARRING CARRIAGE OF DEFENSIVE FIREARMS IN DELAWARE'S STATE FORESTS AND PARKS VIOLATE THE CONSTITUTIONAL RIGHT TO BEAR ARMS IN SELF-DEFENSE.

I. IT IS BEYOND DISPUTE THAT THE CHALLENGED REGULATIONS BURDEN THE RIGHT OF LAW-ABIDING INDIVIDUALS TO BEAR ARMS IN DEFENSE OF SELF, FAMILY AND HOME.

Article I, Section 20 of the Delaware Constitution provides that "[a] person has the right to keep and bear arms for the defense of self, family, [and] home ...." DEL. CONST. art. I, § 20. That provision guarantees "the fundamental right of responsible, law-abiding citizens to keep and bear arms for the defense of self, family, and home." *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 667 (Del. 2014). As the Court explained in its seminal decision in *Doe*, "[o]n its face, the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside the home .... Section 20 specifically provides for the defense of self and family *in addition* to the home." *Id.* at 665.

The constitutionally guaranteed right to bear arms for defense of "family" and "self" is implicated just as much when an individual and his or her family are hiking,

bicycling, fishing, and otherwise enjoying Delaware's public parks and forests as when they are walking the streets of Delaware's cities. Similarly, the right to bear arms for defense of "home" is implicated just as much when individuals temporarily make their homes in cabins or tents in Delaware's forests and parks as when they rent a motel room or abide in their own dwellings.

Given that Section 20 is an individual right that extends outside the home, it necessarily applies to a temporary dwelling, such as a cabin or a tent on public lands. The courts have repeatedly held that individuals may assert Fourth Amendment rights against unreasonable searches and seizures when they occupy tents that they have pitched on public lands. *See United States v. Gooch*, 6 F.3d 673, 677–78 (9th Cir. 1993) (state campground); *United States v. Basher*, 629 F.3d 1161, 1169 (9th Cir. 2011) (lands managed by the U.S. Forest Service). Because both the Second and Fourth Amendments protect individual rights, there is no reason to suppose that individuals can assert Fourth Amendment rights in tents on public lands, but not Second Amendment rights. *See District of Columbia v. Heller*, 554 U.S. 570, 579 (2008). This is especially true considering that personal security and the right to be free from unreasonable searches and seizures are similar interests. *Compare Heller*, 554 U.S. at 635 (The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."), *with Kyllo v. United States*, 533 U.S. 27, 31 (2001) (" 'At the very core' of

the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " (quoting *Silverman v. Unites States*, 365 U.S. 505, 511 (1961))). A Federal District Court in Idaho recognized this similarity when it enjoined a federal rule barring defensive firearms from lands administered by the Corps of Engineers:

> While often temporary, a tent is more importantly a place—just like a home—where a person withdraws from public view, and seeks privacy and security for himself and...his family.... Indeed, a typical home at the time the Second Amendment was passed was cramped and drafty with a dirt floor—more akin to a large tent than a modern home. Americans in 1791—the year the Second Amendment was ratified—were probably more apt to see a tent as a home than we are today. *Heller*, 554 U.S. at 605 (holding that "public understanding" at time of ratification is "critical tool of constitutional interpretation"). Moreover, under Fourth Amendment analysis, "tents are protected ...like a more permanent structure," and are deemed to be "more like a house than a car." *U.S. v. Gooch*, 6 F.3d 673 (9th Cir. 1993). The privacy concerns of the Fourth Amendment carry over well into the Second Amendment's security concerns.

Morris v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 1082, 1086 (D. Idaho 2014), *appeal pending*, No. 14-36049 (9th Cir.). The Delaware Constitution likewise protects both the right to keep and bear arms (Art. I, § 20) and the right against unreasonable searches and seizures (Art. I, § 6); we respectfully submit that the analysis here should be the same as in the federal sphere.

In *Doe*, this Court struck down a regulation because it "severely burden[ed] the right by functionally disallowing armed self-defense in areas that Residents, their families, and guests may occupy as part of their living space" that they rent from a

government landlord. 88 A.3d at 668–69. The regulations challenged here likewise "severely burden[ ] the right [to bear arms] by functionally disallowing armed self-defense in areas" that Delaware campers and cabin tenants "may occupy as part of their living space." *Id.* Therefore, "Section 20 of the Delaware Constitution precludes [the State's park and forest agencies] from adopting such a policy." *Id.* at 669.

II. DELAWARE HAS FAILED TO MEET ITS CONSTITUTIONAL BURDEN TO DEMONSTRATE MORE THAN A GENERAL SAFETY CONCERN ABOUT THE PRESENCE OF DEFENSIVE HANDGUNS IN THE STATE'S FORESTS AND PARKS.

A. Delaware "Must Show More Than a General Safety Concern."

Because Section 20 enumerates a "fundamental right," governmental regulation of it "must serve important governmental objectives," "must be substantially related to the achievement of those objectives," and "cannot burden the right more than is reasonably necessary" to achieve them. *Doe*, 88 A.3d at 666–67 (brackets and quotation marks omitted). Although this standard of scrutiny "allows a court to consider public safety and other important governmental interests," *id.* at 667, the "State has the burden of showing that the state action is constitutional." *Id.* at 666. Specifically, the State "must show more than a general safety concern," *id.* at 667. Here, as in *Doe*, the State "has not done so." *Id.*

B. Neither the Court Below nor Defendants Identified Any Particular Safety Threat Arising from Plaintiffs' Possession of Defensive Handguns in Delaware Forests and Parks.

The court below stated that "ensuring the safety of all visitors" to Delaware's parks and forests "is an important consideration" and observed that firearms are inherently dangerous. *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 2016 WL 7428412, at * 4 (Del. Super. Ct. Dec. 23, 2016). Neither of those propositions is in dispute. But in its next breath the court leapt, with no intervening analysis, to the holding that the "Defendants were not unreasonable in concluding that permitting unregulated firearms in State Parks and State Forests would heighten the potential of injury or death to the visitors thereto." *Id.* at *5. In *Doe* the defendants likewise argued that "dangers inhere in the increased presence of firearms." 88 A.3d at 667. The court below merely identified the "general safety concern" that this Court deemed constitutionally insufficient in *Doe*. *Id.* Neither the court below nor the Defendants pointed to anything in particular about either (1) the Plaintiffs or (2) the place—the State's forests and parks—that creates a public-safety hazard sufficient to warrant suspending the Section 20 "right to keep and bear arms for the defense of self, family, [and] home."

1. The Plaintiffs.

Neither the court below nor Defendants even asserted, let alone demonstrated, that anything about the Plaintiffs posed a threat to public safety beyond the bland

and patently inadequate proposition that "dangers inhere in the increased presence of firearms." *Doe*, 88 A.3d at 667. On the contrary, the court below found that the Plaintiffs "have permits to carry concealed deadly weapons" and are "responsible gun owners and users." 2016 WL 7428412, at *1, *5. Thus the court recognized that the Plaintiffs had passed all of the training, proficiency, responsibility, character and background-check requirements imposed by Delaware law and have been formally licensed to carry concealed firearms even on the crowded streets and sidewalks of Wilmington and Dover. *See* DEL. CODE ANN. tit. 11, § 1441. It is hard to imagine how Plaintiffs' licensed possession of firearms could nevertheless threaten public safety in 100,000 empty acres of Delaware's uncongested forests and glades. Surely the standard announced in *Doe* requires a more substantial showing of a public-safety threat than this.

Delaware's failure to offer evidence supporting its public-safety rationale is particularly damning because the carriage of defensive firearms by licensed, law-abiding citizens promotes, rather than threatens, public safety. The armed "right of self-preservation" enshrined in the Delaware Constitution, which allows "Delaware citizens" to "repel force by force" when "the intervention of society...may be too late," *Doe*, 88 A.3d at 663 (citations, brackets, and quotation marks omitted), promotes, rather than imperils, public safety. Defensive firearm use is a common and effective way for ordinary citizens to defend themselves "against both public

and private violence." *Id.* (quotation marks omitted). The federal government's National Research Council and Institute of Medicine have recognized that "[d]efensive uses of guns by crime victims is a common occurrence.... Almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million." PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (Alan I. Leshner et al. eds., 2013). Defensive gun use is not only common, it is effective: "Studies that directly assessed the effect of actual defensive uses of guns (*i.e.*, incidents in which a gun was 'used' by the crime victim in the sense of attacking or threatening an offender) have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies." *Id.* at 15–16.

Citizens need to be able to carry firearms to defend themselves in public because the sad truth is that the police are rarely present when a person is being assaulted. Consider the FBI's national crime statistics for 2010: in that year the police were unable to prevent 14,748 murders, 84,767 rapes, and 367,832 robberies.[1] Indeed, in 1989, the Justice Department found that there were 168,881 crimes of

[1] Federal Bureau of Investigation, *Crime in the U.S. 2010*, *cited in* PERSONAL & HOME DEFENSE, 2013 BUYER'S GUIDE 11 (2013).

violence where it took the police over an hour to respond.[2] Those camping and hiking in Delaware's forests and parks are particularly at risk because the State has a mere 21 rangers to police 100,000 acres of forest, fish, and wildlife habitat and more than 500 miles of trails and roads. (A143, A471, A473–74). As this Court recognized in *Doe*, the right of Delaware citizens to defend themselves with firearms is most critical "when the intervention of society on their behalf may be too late to prevent an injury." 88 A.3d at 668.

It is important to underscore that the court below found that the Plaintiff sportsmen here, who are licensed to carry concealed firearms, are "responsible gun owners." 2016 WL 7428412, at *5 ("Of course, there are many responsible gun owners and users, including Plaintiffs and/or their members."). Private citizens who have studied, trained, and been licensed by the government to carry weapons do not diminish public safety. To the contrary, lawfully armed civilians are an asset, not a threat, to public safety: "Regardless of which counts of homicides by police are used, the results indicate that civilians legally kill far more felons than police officers do." Gary Kleck, *Keeping, Carrying, and Shooting Guns for Self-Protection*, *in* THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS AND VIOLENCE 199 (Don B. Kates, Jr. and Gary Kleck eds., 1997). The National Research Council has surveyed all of the extant firearms literature and concluded that it is simply "not tenable" to

[2] *Id.*

argue that "owning firearms for personal protection is counterproductive [or] that people should be strongly discouraged from keeping guns" for self-defense. NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 118–19 (Charles F. Wellford, John V. Pepper, and Carol V. Petrie eds., 2005) (quotation marks omitted).

It is well established that the proportion of private citizens licensed to carry firearms who commit crimes with their weapons is miniscule. Since they must pass background checks and other investigations conducted by the police, it is hardly surprising that gun-permit holders are the most law-abiding of citizens. Even those who vehemently opposed shall-issue laws have been forced to acknowledge that license holders are extremely law-abiding and pose little threat. David B. Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J. L. & ECON. 635, 638 (2001). *See also* Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009) ("The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders."). In any event, Plaintiffs do not need to prove that allowing citizens to carry defensive firearms in Delaware's parks would reduce crime, because the justification for the right to bear arms is not that it is sound policy, but that it is an enumerated

constitutional right. Rather, it is the State that bears "the burden of showing that the state action is constitutional." *Doe*, 88 A.3d at 666.

Nonetheless, a great deal of research indicates that an armed citizenry reduces crime. For example, so-called "shall-issue" statutes requiring the issuance of gun-carry permits to law-abiding citizens are strongly associated "with fewer murders, aggravated assaults, and rapes." JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 57 (3d ed. 2010). Even the most fervent gun-control advocates have acknowledged that, "[b]ased on available empirical data,...we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand." Cook, *supra*, 56 UCLA L. REV. at 1082. *See also Moore v. Madigan*, 702 F.3d 933, 938 (7th Cir. 2012) (same) (quoting Cook article); David B. Mustard, *Comment* to John J. Donohue, *The Impact of Concealed-Carry Laws*, *in* EVALUATING GUN POLICY 326 (Jens Ludwig and Philip J. Cook eds., 2003).

The federal Centers for Disease Control ("CDC") reviewed the entire corpus of firearms literature and found that it does not support the proposition that increasing the number of law-abiding citizens carrying firearms in public increases gun violence. *See First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 MORBIDITY & MORTALITY WEEKLY REPORT 11, 11 (CDC Oct. 3, 2003). Unlike the studies on which self-defense

opponents rely, the CDC applied "systematic epidemiologic evaluations and syntheses of all available literature meeting specified criteria." Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 42 (2005). The CDC concluded that there were insufficient data to support the hypothesis "that the presence of more firearms" being carried in public by law-abiding citizens "increases rates of unintended and intended injury in interpersonal confrontations." *Id.* at 53. Instead, the research of "greatest design suitability" indicated that public areas became safer and homicide rates went down when more citizens lawfully carried firearms. *Id.* at 54. Thus the *only* two comprehensive and authoritative reviews of the literature—those of the National Research Council and the Centers for Disease Control—have found the evidence to be far too inconclusive to serve as a basis for policies banning firearms. *Id.*

2. The Place.

The court below did not identify, let alone substantiate, anything about Delaware's parks and forests that would make them vulnerable to a public-safety risk from the carriage of licensed, defensive handguns that the State itself necessarily concedes is absent from the busy sidewalks and public squares of Delaware cities where carriage of handguns is permitted. The court below conceded that hunting is allowed in Delaware forests, 2016 WL 7428412, at *1, *2, *5, but did not explain how handguns create an "undue risk of harm," *id.* at *5, sufficient to overcome the

constitutional right to bear arms while far more powerful shotguns and rifles do not. Instead, the court rather curiously reasoned from the *other* end of the hazard spectrum, pointing out that "slingshots" are forbidden in State parks, and that "[t]o ban slingshots" but "to allow firearms defies logic." *Id.* But of course the reason for that distinction is obvious: the Delaware Constitution protects the right to bear arms but says nothing about slingshots. To be sure, constitutional scrutiny "allows a court to consider public safety" when reviewing a ban on firearms, *Doe*, 88 A.3d at 667, but if the State wishes to outlaw the bearing of firearms for self-defense on grounds of public safety, it "must show more than a general safety concern," *id.*

Although the court below did not cite any authority suggesting that the carriage of defensive firearms is simply incompatible with the safety concerns present in forests and parks, the Defendants did invoke a number of federal decisions—but those decisions are inapposite and unpersuasive.

Defendants relied most heavily on *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), where the Fourth Circuit upheld a conviction for possession of a firearm in a vehicle in a parking lot in a federal park adjacent to a highway. But the regulation restricting firearms in *Masciandaro* was interpreted to forbid firearms *only* in vehicles. *See id.* at 472; *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790 (E.D. Va. 2009) ("§ 2.4(b) does not prohibit carrying or possessing a loaded firearm on National Park land *outside* motor vehicles.") (original emphasis). Thus,

the regulation at issue there allowed the carrying of loaded handguns for protection on National Park land *outside* vehicles, for example on hiking trails or in tents in campgrounds. Consequently, the regulation "le[ft] largely intact the right to 'possess and carry weapons in case of confrontation.' " *Masciandaro*, 638 F.3d at 474 (quoting *Heller*, 554 U.S. at 592). The regulation challenged here sweeps far more broadly, banning defensive firearms *in toto*.

Second, the regulation sustained in *Masciandaro* was abrogated by Congress even before *Masciandaro*'s case got to the U.S. District Court. *See* 638 F.3d at 462–63. Congress expressly and formally found "that 'the right of the people to keep and bear Arms' " applies within the entirety of the National Park System and that government regulations far more permissive than the one challenged here "entrapped law-abiding gun owners while" on National Park lands. 54 U.S.C. § 104906(a)(1), (4). Congress apparently found no threat to public safety (or any other government interest) from the carriage of loaded firearms for self-defense in the National Parks by law-abiding citizens. *See id.* Even more pointedly, Congress declared it unacceptable "that unelected bureaucrats" who administer the parks were abusing their regulatory powers by trying to "override the [Second] amendment rights of law-abiding citizens on 83,600,000 acres of [Park] System land." *Id.* § 104906(a)(6).

Defendants also relied on *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008). But that case involved an equal protection claim brought by an employee against a government employer. *See id.* at 594. At most, the case stands for the unremarkable proposition that the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id.* at 599. Thus, although *Engquist* might allow Delaware to prohibit its employees from carrying firearms for self-defense while at work in Delaware forests and parks, it does not mean that the State can apply that same prohibition to non-employees—such as the Plaintiffs here—without violating the constitutional right to bear arms. *See NASA v. Nelson*, 562 U.S. 134, 147–49 (2011).

Baker v. Schwarb, 40 F. Supp. 3d 881 (E.D. Mich. 2014), involved the question of qualified immunity in a lawsuit brought under 42 U.S.C. § 1983 by two "heavily armed men walking on a city street" carrying "AK-47s" who were "peacefully" and "briefly detained" by suburban police officers who merely checked their I.D.'s and "verified" that their "firearms were lawfully possessed." 40 F. Supp. 3d at 884. The court reasoned that the men had no claim for a violation of their constitutional rights because they were, by their own admission, "trolling for a confrontation [by] display[ing] their firearms in a way that was extraordinary for the neighborhood." *Id.* at 890. The proposition that there is no clearly established

Second Amendment right to troll for a confrontation with the police has no bearing on this case, especially given that the *Baker* court itself pointed out that the carrying of those firearms would have been unremarkable "[o]ut on the forested frontier," where "it was commonplace—and never worrisome—to see buckskin-wearing men setting off toting their flintlocks and hunting knives." *Id.* at 884. The same is true today in Delaware's forests.

Embody v. Ward, 695 F.3d 577 (6th Cir. 2012), was another qualified immunity case involving an individual trolling for a confrontation by carrying an AK-47 pistol with a thirty-round magazine in a Tennessee state park near Nashville. *Id.* at 579. State law allowed the carrying of properly licensed pistols in such areas, with pistol defined as a firearm with a barrel of less than twelve inches; plaintiff Embody's AK-47 had a barrel eleven-and-a-half inches long. *Id.* "Making matters worse (or at least more suspicious), Embody had painted the barrel tip of the gun orange, typically an indication that the gun is a toy." *Id.* at 581. Accordingly, the court ruled that "[a]n officer could fairly suspect that Embody had used the paint to disguise an illegal weapon. On this record, an officer could reasonably suspect something was amiss." *Id.* The court concluded that, "[h]aving worked hard to appear suspicious in an armed-and-loaded visit to the park, Embody cannot cry foul after park rangers, to say nothing of passers-by, took the bait." *Id.* A right to bear arms is not violated when a park ranger merely confirms that an individual has the

necessary license to carry a lawful firearm, any more than the right to bear arms for hunting is violated when a ranger confirms that a hunter has a hunting license or the right to free speech is violated when the police confirm that a parade on a city street has obtained the necessary parade permit. *Embody* does not help the Defendants here.

GeorgiaCarry.org, Inc. v. U.S. Army Corps of Engineers, 788 F.3d 1318 (11th Cir. 2015), is equally inapposite. First, as both the trial and appellate courts there repeatedly stressed, the case involved not regular park land, but property owned and operated by the military. *See id.* at 1321; *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 38 F. Supp. 3d 1365, 1372, 1373, 1374, 1377 (N.D. Ga. 2014). Second, the court emphasized that "plaintiffs hang their hats on a single, sweeping argument: that the regulation completely destroys their Second Amendment rights, thereby obviating the need for a traditional scrutiny analysis." 788 F.3d at 1320; *see also id.* at 1324–25, 1326. Therefore, the Eleventh Circuit "ha[d] no reason to"—and did not—"address whether the Corps' firearms regulation would pass muster under any form of elevated scrutiny." *Id.* at 1324. In contrast, it is that very elevated scrutiny which this Court must apply to the Delaware regulations challenged here—and which the Delaware regulations cannot survive.

III. THE COURT BELOW MISCONCEIVED THE NATURE OF CONSTITUTIONAL RIGHTS.

The gravest error committed by the court below was its rationale that it was justified in suspending the Section 20 right to bear arms in self-defense in Delaware's parks and forests on the supposition that the right "is not hindered but, rather, aided in effect by the presence of the Regulations." 2016 WL 7428412, at *5. The court reasoned that, "[a]s for Plaintiffs' concerns for self defense, the Court observes the *need* to respond to a threat with a firearm is diminished when firearms are prohibited in the area." *Id.* (emphasis added). As a matter of *fact*, this notion is untenable: outlawing the carriage of firearms in a given area does not make law-abiding citizens safer because criminals do not obey such bans. And as a matter of *logic*, the trial court's misguided notion proves far too much: it would justify stripping people of their right to bear arms entirely in any place where the government chose to ban firearms generally, because then the "need" for law-abiding citizens to be armed for self-defense would of course be "diminished." Such obvious bootstrapping is both bizarre and farcical.

Finally, as a matter of *law*, the trial court's notion is indefensible. An enumerated constitutional right does not evaporate because a judge opines that the "*need*" for the right "is diminished." "Need" is the language of *policy*, not the language of *rights*. Delaware citizens do not have fundamental rights to freedom of speech or armed self-defense because they "need" them; they have such rights

because they are entitled to them as human beings—an entitlement recognized by Article I of the Delaware Constitution.

> Rights permit their holders to act in certain ways...even if some social aim would be served by doing otherwise.

Rights, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2015 ed.) (citing John Stuart Mill).[3] Many rights guaranteed by the Delaware Constitution—*e.g.*, rights against self-incrimination, Art. I, § 8, and against warrantless searches, Art. I, § 6—shield criminal defendants and sometimes allow the guilty to go free, thereby imperiling public safety. Thus "[t]he right to keep and bear arms ...is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010). But fundamental rights remain *rights*, and "[t]he very enumeration of the right takes out of the hands of government...the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634.

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[3] *Available at* https://plato.stanford.edu/archives/fall2015/entries/rights/.

CONCLUSION

For the reasons given above, *amicus curiae* Pink Pistols respectfully submits that the challenged regulations are unconstitutional.

Respectfully submitted,

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