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

APPENDIX TO APPELLANTS' OPENING BRIEF

Volume I of II

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Dated: February 23, 2017

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Case History Search

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Court:	DE Superior Court-Sussex County	**Judge:**	Graves, T Henley	**File & ServeXpress Live Date:**	6/10/2016
Division:	N/A	**Case Number:**	S16C-06-018 THG	**Document(s) Filed:**	35
Case Type:	CDEJ - Declaratory Judgment	**Case Name:**	CLO Bridgeville Rifle & Pistol Club vs. David Small	**Date Range:**	All
Linked Case (s):	15,2017 [View Case History]				

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Transaction	Date/Time	Option	Case Number Case Name	Authorizer Organization	#	Document Type	Document Title	Size
59131342	6/10/2016 2:43 PM EDT	File Only	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Aimee M Czachorowski, Eckert Seamans Cherin & Mellott LLC	1	Complaint	Complaint for Declaratory Relief • Linked from (4)	0.1MB
						Case Information Statement	Case Information Statement	0.1MB
						Praecipe	Praecipe	0.1MB
59142624	6/14/2016 12:15 PM EDT	File Only	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Francis GX Pileggi, Eckert Seamans Cherin & Mellott LLC	2	Letter	LETTER FROM FRANCIS G.X. PILEGGI TO JUDGE GRAVES RE: REQUESTING THAT THIS COURT ACCEPT THE BRIEFS PREVIOUSLY FILED IN THE COURT OF CHANCERY. • Linked to (1)	0.1MB
59160829	6/17/2016 11:59 AM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Ralph Durstein, Department of Justice-Wilmington	3	Entry of Appearance	Ralph K. Durstein, III and Devera B. Scott enter their appearance on behalf of the Defendants • Linked to (1)	0.1MB
						Certificate of Service	Certificate of Service	0.1MB
						Letter	Letter from Ralph K. Durstein, III to the Hon. T. Henley Graves RE: accepting service on behalf of the defendants. Has no objection to the Plaintiffs' request that the Court accept the briefs previously filed in the Court of Chancery. Requesting that counsel is allowed to submit short letters regarding new decisions regarding the briefs • Linked from (2)	0.1MB
59162875	6/17/2016 3:36 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Aimee M Czachorowski, Eckert Seamans Cherin & Mellott LLC	4	Notice	Notice of Acceptance of Service for the Defendants by their attorney Ralph K. Durstein • Linked to (2)	0.1MB
59168183	6/20/2016 3:07 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol	Francis GX Pileggi, Eckert Seamans	5	Letter	Letter from Francis G.X. Pileggi to Resident Judge Graves Re: agreeing to the proposed efficiency suggested by defense counsel in	0.1MB

			Club vs. David Small	Cherin & Mellott LLC			their letter of 6-17-16. Counsel expect to submit shortly a proposed scheduling order regarding filing of the dispositive motions and related briefing for Your Honor's consideration. • Linked to (1)	
59173192	6/21/2016 1:14 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Margaret MMT Thatcher, DE Superior Court-Sussex County	6	Response	JUDGE T. HENLEY GRAVES' 6-20-16 RESPONSE TO COUNSEL REQUESTING THIS COURT ACCEPT THE BRIEFS PREVIOUSLY FILED IN THE COURT OF CHANCERY. JUDGE GRAVES RESPONSE: "PLEASE FILE YOUR COPIES OF WHAT HAS BEEN BRIEFED AND IT WILL GO ON 90 DAY LIST WHEN ALL ARRIVES" . • Linked from (1)	0.2MB
59199147	6/27/2016 4:45 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Devera Scott, Department of Justice-Wilmington	7	Motion	Motion for Judgment on the Pleadings (RALPH K. DURSTEIN)	0.2MB
						Proposed Order	Proposed Order	0.1MB
						Opening Brief	Opening Brief in Support of DNREC's Motion for Judgment on the Pleadings • Linked from (3)	0.3MB
						Reply Brief	Reply Brief in Support of DNREC's Motion for Judgment on the Pleadings and Answering Brief to Plaintiff's Motion for Judgment on the Pleadings • Linked from (3)	0.5MB
59286595	7/15/2016 4:34 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Francis GX Pileggi, Eckert Seamans Cherin & Mellott LLC	8	Opening Brief	PLAINTIFFS' COMBINED OPENING BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS BY FRANCIS G.X. PILEGGI, ESQUIRE • Linked to (2) • Linked from (1)	0.1MB
						Compendium	JOINT COMPENDIUM OF AUTHORITIES CITED IN PLAINTIFFS' COMBINED OPENING BRIEF	7.2MB
						Certificate of Service	CERTIFICATE OF SERVICE	0.1MB
59286737	7/15/2016 4:47 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Francis GX Pileggi, Eckert Seamans Cherin & Mellott LLC	9	Motion	PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS • Linked to (2)	0.1MB
59286745	7/15/2016 4:48 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Francis GX Pileggi, Eckert Seamans Cherin & Mellott LLC	10	Reply Brief	PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS • Linked to (2) • Linked from (1)	0.1MB
						Certificate of Service	CERTIFICATE OF SERVICE OF	0.1MB
59291368					11	Letter		0.1MB

	7/18/2016 2:54 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Ralph Durstein, Department of Justice-Wilmington		Letter from Ralph K. Durstein, III to the Honorable T. Henley Graves RE: asking the Court to include thee cases at oral argument • Linked from (1)	
59292645	7/18/2016 4:38 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Aimee M Czachorowski, Eckert Seamans Cherin & Mellott LLC	12 Letter	Letter from Francis G.X. Pileggi to The Honorable T. Henley Graves RE: enclosing courtesy copies of (1) Order dated June 20, 2016, (2) Plaintiffs' Combined Opening Brief in Support of our Cross-Motion for Judgment on the Pleadings and Answering Brief in Opposition to the Defendants' Motion for Judgment on the Pleadings, (3) Plaintiffs' Reply Brief in further support of their Cross-Motion for Judgment on the Pleadings, and (4) Joint Compendium • Linked to (3)	0.1MB
59305363	7/20/2016 3:54 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Francis GX Pileggi, Eckert Seamans Cherin & Mellott LLC	13 Letter	LETTER FROM FRANCIS PILEGGI TO RESIDENT JUDGE GRAVES RE: RESPONSE TO DEFENDANTS' LETTER ABOUT RECENT COURT DECISIONS • Linked to (1)	0.1MB
59336701	7/27/2016 2:28 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Margaret MMT Thatcher, DE Superior Court-Sussex County	14 Letter	LETTER FROM JUDGE T. HENLEY GRAVES TO COUNSEL RE: THE COURT WOULD LIKE TO HAVE THE LANGUAGE OF THE REGULATIONS THROUGH THE YEARS AND THE DATES OF ANY CHANGES. • Linked from (2)	0.2MB
59409624	8/11/2016 1:09 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Ralph Durstein, Department of Justice-Wilmington	15 Letter	Letter from Ralph Durstein's to Hon. T. Henley Graves RE:response of the Court's request to provide language of the Regulations governing firearms through the years. • Linked to (1) • Linked from (1)	0.1MB
59446703	8/19/2016 12:46 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Devera Scott, Department of Justice-Wilmington	16 Letter	Letter from Ralph K. Durstein, III to Resident Judge Graves RE: transmitting regulations as requested.	0.1MB
					Exhibits	Ex. A; DNREC regulations, part 1 of 2	8.5MB
					Exhibits	Ex. A; DNREC regulations; part 2 of 2	8.0MB
					Exhibits	Ex. B; State Forest regulations; part 1 of 2	1.4MB
					Exhibits	Ex. B; State Forest regulations; part 2 of 2	12.4MB
59507973	9/2/2016 1:19 PM EDT	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Francis GX Pileggi, Eckert Seamans Cherin & Mellott LLC	17 Letter	LETTER FROM FRANCIS PILEGGI TO RESIDENT JUDGE GRAVES RE: HISTORICAL CHANGES TO REGULATIONS • Linked to (2)	1.5MB
59993017	12/23/2016 1:39 PM EST	File And Serve	S16C-06-018 THG CLO Bridgeville	Margaret MMT Thatcher, DE Superior	18 Opinion	OPINION SUBMITTED BY JUDGE T. HENLEY GRAVES, FILED ON 12-23-16. DATE SUBMITTED: 9-2-16 AND DATE	4.0MB

			Rifle & Pistol Club vs. David Small	Court-Sussex County			DECIDED: 12-23-16. THE COURT GRANTS DEFENDANTS' MOTION ON THE PLEADINGS. IT IS SO ORDERED.	
60047326	1/10/2017 9:46 AM EST	File Only	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	T Henley Graves, DE Superior Court-Sussex County	19	Notice of Appeal to Supreme Court	Notice of appeal	0.1MB
					20	Letter	Letter from Senior Court Clerk to Prothonotary RE: the record is due to be filed by 2-2-2017	0.1MB
60054273	1/11/2017 9:31 AM EST	File And Serve	S16C-06-018 THG CLO Bridgeville Rifle & Pistol Club vs. David Small	Margaret MMT Thatcher, DE Superior Court-Sussex County	21	Letter	LETTER FROM MARGARET THATCHER TO COUNSEL RE: SUPREME COURT APPEAL FEE NOW DUE.	0.2MB

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Transaction ID 59131342
Case No. S16C-06-018 THG

IN THE SUPERIOR 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, 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.	C.A. No. S16C-_____

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs, 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, (collectively referred to herein as "Plaintiffs"), hereby file this Complaint for Declaratory Relief against Defendants David Small, Secretary of the Delaware Department of Natural

Resources and Environmental Control ("DNREC"); DNREC; Ed Kee, Secretary of the Delaware Department of Agriculture ("Department of Agriculture"); and the Department of Agriculture (collectively referred to herein as "Defendants") pursuant to 10 *Del. C.* §6501. Plaintiffs seek to redress the deprivation, under color of law, of rights, privileges or immunities secured by the Constitution of the State of Delaware.

Parties

1. Plaintiff Bridgeville Rifle & Pistol Club, Ltd. ("Bridgeville") is a private organization based in Bridgeville, Delaware. Bridgeville has approximately 1,200 members who are predominately residents of Delaware and other nearby states. Bridgeville is a constituent "Club Member" of the Delaware State Sportsmen's Association.

2. Plaintiff Mark Hester is a member of Bridgeville and the Delaware State Sportsmen's Association, and resides in Kent County, Delaware. He is licensed to carry a concealed weapon.

3. Plaintiff John R. Sylvester is a member of Bridgeville.

4. Plaintiff Marshall Kenneth Watkins is a member of the Delaware State Sportsmen's Association, and resides in Kent County, Delaware. He is licensed to carry a concealed deadly weapon.

5. Plaintiff Barbara Boyce, DHSc, RDN, is a resident of the State of Delaware, and currently resides in New Castle County. Barbara Boyce is a member of the Delaware State Sportsmen's Association.

6. Plaintiff Roger T. Boyce, Sr., husband of Plaintiff Barbara Boyce, DHSc, RDN, is a resident of the State of Delaware, and currently resides in New Castle County. Roger Boyce is a member of the Delaware State Sportsmen's Association.

7. Plaintiff Delaware State Sportsmen's Association ("DSSA") is a statewide private organization with approximately 820 individual members, and 8 constituent clubs. The DSSA is the official state affiliate of the National Rifle Association of America in Delaware and has a mailing address in Lincoln, Delaware.

8. Defendant David Small is the Secretary of DNREC. Defendant DNREC is an agency of the State of Delaware, established by 29 *Del. C.* § 8001, and which derives its powers from, *inter alia*, Title 7, Chapter 60 of the Delaware Code. The office of the Secretary of the Department of Natural Resources and Environmental Control is located at 89 Kings Highway, Dover, Delaware 19901.

9. Defendant Ed Kee is the Secretary of the Department of Agriculture. Defendant Department of Agriculture is an agency of the State of Delaware that was established pursuant to 29 *Del. C.* § 8101. The office of the Secretary of the

Department of Agriculture is located at 2320 South DuPont Highway, Dover, Delaware 19901.

Background

10. Bridgeville conducts rifle and pistol sporting competitions, and its members who participate often seek to camp at Trapp Pond State Park or rent a cottage at Sea Shore State Park. But, they are prohibited from using those facilities while carrying the firearms they will be using in the competition or transporting them in their vehicle.

11. Many of Bridgeville's members are licensed to carry concealed deadly weapons pursuant to 11 *Del. C.* § 1441 and/or § 1441A. But for the regulations discussed below, they would exercise their right to carry a concealed deadly weapon when visiting State Parks, State Wildlife areas and State Forests.

12. Plaintiff Mark Hester is a retired police officer from the City of Dover Police Department and a Bridgeville member. He is permitted to carry a concealed firearm pursuant to 11 *Del. C.* § 1441B. Hester also holds a "surf fishing vehicle permit" pursuant to 7 Del. Admin. Code § 9201.10, which allows him to fish at Delaware State Park beaches. But for certain regulations issued by one or more Defendants, Plaintiff Hester would exercise his right to possess a firearm within Delaware's State Parks and State Forest Lands in accordance with the laws of the State of Delaware.

13. Plaintiff John R. Sylvester participates in rifle shooting competitions. But for Defendants' regulations, he would avail himself of the camping facilities at Trapp Pond State Park and similar State Forest and State Park facilities in Sussex County.

14. Plaintiff Marshall Kenneth Watkins avails himself of lawful hunting activities on private land and is concerned about inadvertently violating Defendants' regulations on state land that abuts private hunting grounds. Watkins is licensed to carry a concealed deadly weapon in Delaware. But for certain regulations issued by Defendants, Watkins would exercise his right to carry a concealed weapon during pre-season scouting of state-owned hunting lands.

15. Plaintiffs Barbara Boyce and Roger Boyce (the "Boyces") are both licensed to carry concealed deadly weapons in Delaware, Pennsylvania, and Florida. The Boyces are avid bicyclists, riding between 4,000 and 6,000 miles per season. The Boyces are responsible, law-abiding adults who are qualified to own and possess firearms. But for certain regulations issued by Defendants, the Boyces would exercise their rights to possess firearms within Delaware's State Parks and State Forest Lands in accordance with the laws of the State of Delaware.

16. The DSSA is an organization that promotes and protects the interests of gun owners in and around Delaware. Many DSSA members are licensed to carry

concealed deadly weapons, and are prevented from exercising those rights by Defendants.

Applicable Law

17. Article I, Section 20 of the Constitution of the State of Delaware provides, "[a] person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." The right to keep arms and the right to bear arms are two distinct rights.

18. The Delaware Supreme Court recently established, in a unanimous *en banc* opinion, that, by its express terms, Article I, § 20 recognizes a right to bear arms outside of the home. *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 665 (Del. 2014). Specifically, the Court explained, "the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside the home, including for hunting and recreation. Section 20 specifically provides for the defense of self and family *in addition to* the home." *Id.* (emphasis in original).

19. In addition to the Constitutional rights set forth above, the Delaware General Assembly has enacted a comprehensive regulatory scheme governing the use and possession of firearms.

20. Specifically, the General Assembly has enacted statutes governing persons who may carry concealed deadly weapons within the State's borders. *See*

11 *Del. C.* §§ 1441; 1441A; and 1441B. Section 1441 enumerates the steps to be taken by persons wishing to be licensed to carry concealed deadly weapons. Section 1441A allows qualified law enforcement officers to carry concealed firearms. Section 1441B allows qualified retired law enforcement officers to carry concealed firearms.

21. Within Title 11 of the Delaware Code, the Delaware General Assembly has also established an extensive framework of restrictions on the possession of firearms that provide for criminal penalties. The General Assembly has adopted laws, including, but not limited to: restricting sale, use and possession of sawed-off shotguns and machine guns (11 *Del. C.* §1444); prohibiting sale or transfer of a firearm to a minor (11 *Del. C.* § 1445); criminalizing possession of a firearm during the commission of a felony (11 *Del. C.* §§ 1447, 1447A); prohibiting certain persons from owning, using or purchasing firearms (11 *Del. C.* § 1448); requiring a criminal background check prior to the purchase or sale of a firearm (11 *Del. C.* § 1448A); criminalizing the act of giving a firearm to a prohibited person or engaging in a sale or purchase of a firearm on behalf of a person not legally allowed to sell or purchase firearms (11 *Del. C.* §§ 1454, 1455); and criminalizing unlawfully permitting a minor access to a firearm (11 *Del. C.* § 1456).

22. The only restrictions upon locations in which persons can lawfully carry firearms, as set forth by the Delaware General Assembly, are identified in 11

Del. C. § 1457: Possession of a Weapon in a Safe School and Recreational Zone. The General Assembly has defined "Safe School and Recreational Zone," in § 1457 (c), as follows:

> (1) Any building, structure, athletic field, sports stadium or real property owned, operated, leased or rented by any public or private school including, but not limited to, any kindergarten, elementary, secondary or vocational-technical school or any college or university, within 1000 feet thereof; or
>
> (2) Any motor vehicle owned, operated, leased or rented by any public or private school including, but not limited to, any kindergarten, elementary, secondary or vocational-technical school or any college or university; or
>
> (3) Any building or structure owned, operated, leased or rented by any county or municipality, or by the State, or by any board, agency, commission, department, corporation or any other entity thereof, or any private organization, which is used as a recreation center, athletic field, or sports stadium.

23. The General Assembly has placed no restrictions on the lawful possession of firearms within Delaware State Parks or State Forest Lands.[1]

[1] The General Assembly recently gave municipal governments, effective August 17, 2015, at 22 *Del. C.* § 111, the limited and narrowly circumscribed power to adopt ordinances regulating the possession of firearms, ammunition, components of firearms, or explosives in police stations and municipal buildings. Section 111, however, specifically states that "[a]n ordinance adopted by a municipal government shall not prevent the following in municipal buildings or police stations: … (6) carrying firearms and ammunition by persons who hold a valid license pursuant to either § 1441 or § 1441A of Title 11 of this Code so long as the firearm remains concealed except for inadvertent display or for self-defense or defense of others …." Because the General Assembly specifically excluded from the allowable limitations in § 111 those persons properly authorized to carry concealed firearms pursuant to 11 *Del. C.* §§ 1441 and 1441A, § 111 has no bearing on the arguments made herein.

24. Defendants' regulations forbidding the lawful use and possession of firearms, as set forth below, are inconsistent with and preempted by the comprehensive regulatory scheme provided by the Delaware General Assembly as well as the Delaware Constitution.

Unlawful Regulations at Issue

DNREC

25. DNREC regulation § 9201.24.3 states, "[i]t shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division, except by those persons lawfully hunting in those areas specifically designed for hunting by the Division, or those with prior written approval of the Director." "Division" is defined in 7 Del. Admin. Code § 9201.1 as the "Division of Parks and Recreation of the Department of Natural Resources and Environmental Control."

26. Violators of the rules and regulations promulgated by the "Department of Natural Resources and Environmental Control, Division of Parks and Recreation, shall be fined not less than $25.00 nor more than $250.00 and costs for each offense, or imprisoned not more than thirty (30) days, or both. For each subsequent like

offense, he/she shall be fined not less than $50.00 nor more than $500.00." 7 Del. Admin. Code § 9201.28.1.[2]

27. Presumably these regulations forbid simple possession even if a firearm is unloaded in a locked case in one's trunk in a parking lot, or in a locked compartment of a boat docked at Sea Shore State Park while purchasing gas.

28. Under 7 *Del. C.* § 6001, DNREC has the power and authority to adopt regulations that: best serve the interest of the public; are reasonable and beneficial use of the State's resources; and maintain adequate supplies of such resources for domestic, industrial, power, agricultural, recreational, and other beneficial uses. *See also* 7 *Del. C.* § 4701(a)(4). But this power is not unlimited.

29. Section 6010 of Title 7 of the Delaware Code prohibits DNREC from implementing rules or regulations that "extend, modify or conflict with any law of [the State of Delaware] or the reasonable implementation thereof."

Department of Agriculture

30. Defendant Department of Agriculture was established by 29 *Del. C.* § 8101, and has the powers to, *inter alia*, "devise and promulgate rules and regulations for the enforcement of the state forestry laws and for the protection of forest lands …." 3 *Del C.* § 1011. The Department of Agriculture, however, is prohibited from

[2] It is noteworthy that firearms are permitted in national parks despite the Second Amendment to the United States Constitution providing a more narrowly prescribed right to bear arms. *See* 36 C.F.R. § 2.4.

adopting rules and regulations that "extend, modify, or conflict with any law of [the State of Delaware] or the reasonable implications thereof." 3 *Del. C.* § 101(3).

31. Under 3 Del. Admin. Code § 8.8, adopted by the Department of Agriculture, "[f]irearms are allowed for legal hunting only and are otherwise prohibited on State Forest Lands."

32. Violations of the State Forest Regulations adopted by the Department of Agriculture are unclassified misdemeanors and are punishable by fines ranging from $25 to $500. *See* 3 Del. Admin. Code § 10.2.

33. Neither DNREC nor the Department of Agriculture have the power or authority to issue rules or regulations governing the lawful possession of firearms under their enabling statutes. Therefore, the Defendants exceeded their authority by adopting 7 Del. Admin. Code § 9201.24.3 and 3 Del. Admin. Code § 8.8, which are contrary to their legislative purpose and the Delaware Constitution. Furthermore, both 7 Del. Admin. Code § 9201.24.3 and 3 Del. Admin. Code § 8.8 extend, modify and conflict with laws of the State of Delaware, including, but not limited to, 11 *Del. C.* §§ 1441, 1441A, 1441B.

34. At all relevant times, Defendants acted under, and seek to act under, the color of law of the State of Delaware.

Harm Suffered

35. But for the Defendants' above-referenced regulations prohibiting the lawful possession of firearms within Delaware State Parks and State Forest Lands, Plaintiff Mark Hester would exercise his right to keep and bear arms as guaranteed in Article I, § 20.

36. But for the Defendants' above-referenced regulations prohibiting the lawful possession of firearms within Delaware State Parks and State Forest Lands, Plaintiff John R. Sylvester would avail himself of camping facilities at Trapp Pond State Park and similar State Forest campgrounds or State Parks in Sussex County.

37. But for the Defendants' above-referenced regulations prohibiting the lawful possession of firearms within Delaware State Parks and State Forest Lands, Plaintiff Marshall Kenneth Watkins would avail himself of lawful hunting activities without fear of inadvertently violating Defendants' regulations on state lands that abut private hunting grounds. But for the above-referenced regulations, Plaintiff Marshall Kenneth Watkins would exercise his right to carry a concealed weapon as permitted by 11 *Del. C.* § 1441 during his pre-season scouting of state-owned hunting lands.

38. But for the Defendants' above-referenced regulations prohibiting the lawful possession of firearms within Delaware State Parks and State Forest Lands, Plaintiffs Barbara and Roger Boyce would be allowed, without risk of arrest, to

bicycle through State Parks and State Forest Lands while exercising their rights to keep and bear firearms as guaranteed in Article I, § 20.

COUNT I

DECLARATORY RELIEF UNDER 10 *DEL. C.* § 6501

39. Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth at length herein.

40. A clear controversy exists between Plaintiffs and Defendants as to whether Defendants' regulations forbidding the possession of firearms within Delaware State Parks and State Forest Lands are unlawful.

41. The controversy involves the rights or other legal relations of the Plaintiffs and this action is asserted against persons and entities who have an interest in contesting the claim, and have contested the claims.

42. The controversy is between parties whose interests are real and adverse, and the issues involved are ripe for judicial determination.

43. Plaintiffs seek a declaratory judgment that Defendants' regulations forbidding the lawful possession of firearms within Delaware State Parks and State Forest Lands are unlawful (and therefore unenforceable) because they violate Article I, § 20 of the Delaware State Constitution, are preempted by existing Delaware law, and/or exceed the statutory scope of authority granted to Defendants.

44. A declaratory judgment is necessary and proper in order to determine whether the Defendants' regulations forbidding the lawful possession of firearms within Delaware State Parks and State Forest Lands are unlawful.

WHEREFORE, Plaintiffs request that this Court:

1. Grant a declaratory judgment in favor of Plaintiffs, declaring that Defendants' regulations pertaining to the possession of firearms at Delaware State Parks and State Forest Lands violate Article I, § 20 of the Constitution of the State of Delaware, are preempted by existing Delaware law, and/or exceed the statutory scope of authority granted to Defendants; and declare that their enforcement be prohibited;

3. Award Plaintiffs such further relief as allowed by statute and common law;

4. Award Plaintiffs attorneys' fees and costs; and

5. Award such other and further relief as the Court deems just, and proper, including costs, pre-judgment and post-judgment interest.

ECKERT SEAMANS CHERIN & MELLOTT, LLC

By: */s/ Francis G.X. Pileggi*

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Dated: June 10, 2016

EFiled: Jun 10 2016 02:43PM EDT
Transaction ID 59131342
Case No. S16C-06-018 THG

SUPERIOR COURT
CIVIL CASE INFORMATION STATEMENT (CIS)

COUNTY: ☐ N ☐ K ☑ S CIVIL ACTION NUMBER: _____

Caption:
Bridgeville Rifle & Pistol Club, Ltd.; et al.
Plaintiffs,
v.
David Small, Secretary of DNREC, et al.
Defendants.

Civil Case Code: CDEJ
Civil Case Type: Declaratory Judgment
(See Reverse Side for Code and Type)

Name and Status of Party filing document:
Plaintiffs, Bridgeville Rifle & Pistol Club, Ltd., et al.

Document Type: (e.g.; Complaint; Answer with Counterclaim)
Complaint for Declaratory Relief

Jury Demand: Yes ☐ No ☑

Attorney Name(s):
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Identify any related cases now pending in the Superior Court or any related cases that have been closed in this court within the last two years by caption and civil action number including judge's initials:

Explain the relationship(s):

Other unusual issues that affect Case Management:
See additional sheet.

(If additional space is needed, please attach page)

The Prothonotary will not process the complaint, answer, or first responsive pleading in this matter for service until the case information statement (CIS) is filed. The failure to file the CIS and have the pleading processed for service may result in the dismissal of the complaint or may result in the answer or first responsive pleading being stricken.

Revised 5/2009

Additional Sheet to Superior Court Civil Case Information Statement (CIS)

This case was initially filed in the Court of Chancery, CA No. 11832. The Court of Chancery dismissed CA No. 11832 with leave to re-file in the Superior Court. Cross Motions for Judgment on the Pleadings were fully briefed in the Court of Chancery, and we will request that the Court accept the previously filed briefs and rule on them.

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June 14, 2016

VIA FILE&SERVEXPRESS AND FEDEX

The Honorable T. Henley Graves
Superior Court of Delaware
Sussex County Courthouse
1 The Circle, Suite 2
Georgetown, DE 19947

Re: ***Bridgeville Rifle & Pistol Club, Ltd., et al. v. David Small, Secretary of the Delaware Department of Natural Resources and Environmental Control, et al.***
Del. Super., C.A. No. S16C-06-018 THG

Dear Resident Judge Graves:

I write on behalf of Plaintiffs in the above-referenced matter. This matter was previously filed in the Court of Chancery, where Cross-Motions for Judgment on the Pleadings were made, as there were no issues of material fact in dispute. Defendants also argued that equitable jurisdiction was lacking. The motions were fully briefed. At the recent hearing on the motions, Vice Chancellor Glasscock, - - without ruling on the merits - - held that equitable jurisdiction was lacking, but gave Plaintiffs leave to refile in Superior Court.

Because the Cross-Motions for Judgment on the Pleadings were fully briefed, Plaintiffs respectfully request that this Court accept the briefs previously filed in the Court of Chancery, (disregarding those portions of the briefs discussing

Defendants' moot arguments about equitable jurisdiction), in the interest of judicial economy and avoiding the wasteful inefficiency that would result from the time and expense that would be involved in re-briefing the same substantive issues still pending, but that the Court did not decide. If the Court prefers, we can provide courtesy copies of all the briefs filed in Chancery on the dispositive motions.

Counsel remain available should Your Honor have any questions or need additional information.

Respectfully,

Francis G.X. Pileggi

Francis G.X. Pileggi (Bar No. 2624)

FGXP/mc

cc: Aimee M. Czachorowski, Esquire
Ralph Durstein, Esquire

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June 17, 2016

Hon. T. Henley Graves
Superior Court of Delaware
Sussex County Courthouse
1 The Circle
Georgetown, DE 19947

Re: ***Bridgeville R&P Club v. DNREC, et al.***
C.A. No. S16C-06-018 THG

Your Honor:

I will be representing the defendants in the above-captioned matter. My clients have authorized me to accept service of the lawsuit on their behalf, and I will shortly be entering my appearance, along with Deputy Attorney General Devera B. Scott, on their behalf, and filing an Answer to the Complaint.

We agree that this matter raises purely legal issues, and can be resolved in the context of cross-motions for judgment on the pleadings. We have no objection to the plaintiffs' request that the Court accept the Briefs previously filed in the Court of Chancery on the statutory and constitutional issues (the jurisdictional issue having been resolved by Vice Chancellor Glasscock). Under the circumstances, it may make better sense for us to change the captions and remove the portions of the argument relating to equitable jurisdiction, and then submit the "rebranded" briefs to the Court.

I would have one request of the Court. In light of the fact that there have been several recent decisions (since the Briefs were filed) worth calling to the Court's attention, I would respectfully request leave of Court for counsel to submit short letters, regarding such new decisions. This approach should facilitate getting this dispute before the Court in short order.

Respectfully submitted,

/s/ Ralph K. Durstein III
Ralph K. Durstein III, ID No. 912
Deputy Attorney General
Attorney for Defendants

xc: Devera B. Scott, Esquire
Francis G. X. Pileggi, Esquire
Aimee M. Czachorowski, Esquire

Defendants' moot arguments about equitable jurisdiction), in the interest of judicial economy and avoiding the wasteful inefficiency that would result from the time and expense that would be involved in re-briefing the same substantive issues still pending, but that the Court did not decide. If the Court prefers, we can provide courtesy copies of all the briefs filed in Chancery on the dispositive motions.

Counsel remain available should Your Honor have any questions or need additional information.

Respectfully,

Francis G.X. Pileggi

Francis G.X. Pileggi (Bar No. 2624)

FGXP/mc

cc: Aimee M. Czachorowski, Esquire
Ralph Durstein, Esquire

To All Counsel
Please file your
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2016 JUN 20 PM 1:50
SUSSEX COUNTY

EFiled: Jun 27 2016 04:45PM EDT
Transaction ID 59199147
Case No. S16C-06-018 THG

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE; ROGER T. BOYCE, SR.; DELAWARE STATE SPORTSMEN'S ASSOC., Plaintiffs,	)	
v.	)	No. S16C-06-018 THG
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; DEPARTMENT OF AGRICULTURE, Defendants.	)	

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

The Defendants, through undersigned counsel, hereby move this Honorable Court to enter an Order granting their Motion for Judgment on the Pleadings on the grounds set forth in the accompanying Opening Brief.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Ralph K. Durstein

Ralph K. Durstein, III, I.D. No. 912
Devera B. Scott, I.D. No. 4756
Deputy Attorneys General
102 West Water Street
Dover, DE 19904
(302) 577-8510

Attorneys for Defendants

Dated: June 27, 2016

EFiled: Jun 27 2016 04:45PM EDT
Transaction ID 59199147
Case No. S16C-06-018 THG

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE, ROGER T. BOYCE, SR.; and the DELAWARE STATE SPORTSMEN'S ASSOCIATION,	)	
Plaintiffs,	)	
	)	
v.	)	**No. S16C-06-018 THG**
	)	
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.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Ralph K. Durstein, III, I.D. No. 912
Devera B. Scott, I.D. No. 4756
Deputy Attorneys General
102 West Water Street
Dover, DE 19904
(302)577-8510
Attorneys for Defendants

Dated: June 27, 2016

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NATURE AND STAGE OF PROCEEDINGS

The Plaintiffs originally filed an action in the Court of Chancery on December 21, 2015, seeking a declaratory judgment and injunctive relief as to whether regulations governing conduct on State land, which were promulgated by the Delaware Department of Agriculture ("DDA") and the Department of Natural Resources and Environmental Control ("DNREC") pursuant to the authority of the General Assembly ("Regulations"), exceeded the statutory authority to promulgate such regulations, could be harmonized with other laws regulating firearms, or were implicitly repealed by the an amendment to the Delaware Constitution.

On December 28, 2015, the Plaintiffs filed a Motion for Preliminary Injunction, seeking to prevent DDA and DNREC from enforcing regulations limiting the use of firearms on State land to DDA and DNREC law enforcement personnel and appropriate weapons during various hunting seasons.

Finally, on December 29, 2015, the Plaintiffs filed a Motion to Expedite, claiming that exigent circumstances required the Court to immediately allow them to carry the firearm of their choice for purposes of defense within State Parks and State Forests, regardless of the statutory and regulatory authority.

On January 5, 2016, the Court of Chancery held a telephone conference regarding the pending motions and scheduling. By agreement of the parties, it was determined that all pending legal issues raised by the pleadings and motions,

including the motion to dismiss to be filed on behalf of the Defendants, would be resolved through a single briefing schedule. The Motion to Expedite was thus rendered moot, and the Defendants' opposition to the Motion for Preliminary Injunction was noted by the Court without the need for a formal response.

The Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction, and for failure to state a claim, on January 12, 2016. The Defendants also filed an Answer to the Complaint, with affirmative defenses, on February 4, 2016, and a Motion for Judgment on the Pleadings. The parties briefed the legal issues on a stipulated schedule, and the Court heard oral argument on June 6, 2016 in Georgetown. Vice Chancellor Glasscock, ruling from the bench, declined to issue an injunction, and granted the Defendants' Motion to Dismiss, for lack of equitable jurisdiction, without prejudice to the filing of a declaratory judgment action in the Superior Court.

The Plaintiffs filed their Complaint in this Court on June 10, 2016. Counsel agreed to accept service on behalf of all Defendants. An Answer was filed on June 22, 2016. The Defendants also filed a Motion for Judgment on the Pleadings. The parties agreed to submit the legal issues to the Court on cross-motions for judgment on the pleadings through reformatted versions of the four briefs previously filed in the Court of Chancery. The Defendants today submit revised versions of their Opening Brief and combined Reply and Answering Brief.

STATEMENT OF FACTS

The Plaintiffs seek the Court's endorsement of an unlimited right to carry firearms of their choosing within State Parks and Forests at any time. They claim this right, regardless of the risk of harm presented to other members of the public. They seek lethal protection from undisclosed threats, despite the security provided by law enforcement officers. They seek to invoke this Court's authority to prevent State law enforcement officers from enforcing statutes and regulations limiting the use and possession of firearms in State Parks and Forests to established seasons for hunting game. They readily acknowledge that the General Assembly may enact a wide variety of criminal laws regulating firearms – including geographical restrictions protecting government educational and recreational facilities - without violating the State Constitution, but contend that DDA and DNREC are powerless to regulate firearms on State property devoted to education and recreation.

No instance of tangible harm is cited in the Complaint. The Plaintiffs make only abstract claims that their rights have been violated. No instance of an arrest or prosecution of any Plaintiff is cited. No Plaintiff cites an incident to support the theoretical claims of the need for self-defense or the defense of family within State Parks or Forests. There are no facts suggesting any Plaintiff or family member has sustained harm on State property. The Complaint lacks any example of the purported need for "protection" and fails to identify the threat of harm from which

protection is sought. No facts are alleged to suggest that any Plaintiff or family member would be at risk or insufficiently protected by law enforcement officers assigned by the Defendant agencies to patrol State Parks and State Forest lands.

The lawsuit is brought by seven plaintiffs: five individuals and two organizations. The Plaintiff Bridgeville Rifle and Pistol Club ("Bridgeville") conducts firearm "sporting competitions" on private property that are not regulated by the Defendants. Bridgeville's only claim is that its members cannot rent a cottage or camp at State Parks while carrying or transporting firearms in their vehicles. The members do not dispute that they are free to camp and rent a cottage, so long as they obey the rules and leave their firearms behind, with the exception of recreational hunting seasons.

The Plaintiff Hester is a retired police officer who also holds a concealed carry permit, pursuant to 11 *Del. C.* §1441, and a surf-fishing vehicle permit. Hester asserts a right to bring firearms into State Parks and Forests for unstated reasons, presumably while fishing and otherwise making use of State beaches. He asserts no other claim, reason, or interest in possessing a firearm on such lands, and fails to cite any instance of harm or threat to himself or his family.

The Plaintiff Sylvester is a Bridgeville member who participates in rifle shooting competitions. No such competitions take place in State Parks or Forests. DNREC does afford recreational shooting opportunities at two locations, in Sussex

County and New Castle County. Sylvester apparently seeks to bring firearms into camping facilities in State Parks and Forests, for unstated reasons. He asserts no other claim, reason, or interest in possessing a firearm on such lands, and fails to cite any instance of harm or threat to himself or his family.

The Plaintiff Watkins hunts on private land, not regulated by Defendants, but worries that he might "inadvertently" carry a firearm onto State land, during "pre-season scouting of state-owned lands."[1] Watkins apparently asserts a right to enter – accidentally - onto State Parks and Forests, with a firearm, other than during the recreational hunting seasons established by the Regulations. He asserts no other claim, reason, or interest in possessing a firearm on such lands, and fails to cite any instance of harm or threat to himself or his family.

The Boyce Plaintiffs are bicyclists who claim to be "responsible, law-abiding adults who are qualified to own and possess firearms."[2] Yet they each claim the right to carry firearms while cycling through State Parks and Forests. Neither Boyce Plaintiff sets forth any particular claim, interest, or reason in possessing a firearm on such lands, and they fail to cite any instance of harm or threat to themselves or to their family.

[1] Compl. ¶14.
[2] Compl. ¶15.

The Plaintiff Delaware State Sportsmen's Association ("DSSA") purports to promote and protect the interests of gun owners. DSSA asserts, without elaboration, that the Defendants have prevented its members from exercising their licenses to carry a concealed weapon, pursuant to 11 *Del. C.* §1441. No DSSA member sets forth any particular claim, interest, or reason to carry a concealed deadly weapon within a State Park or Forest, and the organization fails to cite any instance of harm or threat of harm to its members.

It is undisputed that the Defendant agencies adopted the Regulations governing recreational hunting on State land, which allow for the reasonable use of appropriate weapons during defined seasons for particular game in specified locations. These Regulations specifically allow the use of such firearms within State Parks and Forests. The Regulations also prohibit the possession and use of firearms on such State lands, other than during the recreational hunting seasons. The Regulations and other criminal laws are enforced by officers in the interest of public safety.

STATEMENT OF QUESTIONS PRESENTED

1. Did the regulations issued by the DDA and DNREC to control firearms on State property exceed the scope of the statutory authority granted to each agency by the General Assembly to exercise law enforcement power to protect public safety?

2. Did the General Assembly explicitly or implicitly repeal existing criminal laws and regulations by enacting a Constitutional provision providing for a limited right to "keep and bear" firearms outside the home?

3. Are the Regulations governing public safety and regulating firearms in State Parks and Forests compatible with other criminal laws regulating the use and possession of firearms?

ARGUMENT

I. THE GENERAL ASSEMBLY GRANTED BROAD AUTHORITY TO STATE AGENCIES TO REGULATE CONDUCT WITHIN STATE PARKS AND FORESTS, AND THE REGULATIONS LIMITING FIREARMS ARE WITHIN THAT AUTHORITY.

Plaintiffs challenge the authority of the Defendants to regulate firearms on the public land that they administer. Specifically, they cite the State Park Regulation found at 7 Del. Admin. C. §9201-24.3:

> It shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division, except by those persons lawfully hunting in those areas specifically designated for hunting by the Division, or those with prior written approval of the Director.

Plaintiffs also cite the State Forest Regulation, 3 Del. Admin C. §402-8.8:

> Target shooting is prohibited. Firearms are allowed for legal hunting only and are otherwise prohibited on State Forest lands.

As discussed in Sections II and III *infra*, the Regulations do not conflict with the Delaware Constitution or Delaware law. The question is whether the agencies have exceeded their statutory authority by promulgating regulations that promote public safety by limiting firearms in State Parks and State Forests to legal hunting. The answer is no. The General Assembly granted DNREC and DDA broad authority to promulgate regulations for the protection of the land that they administer and the visitors to those locations.

DNREC and DDA have been charged with the responsibility to protect both natural resources within State Parks and Forests and the visitors to those facilities. Regulation of firearms is an integral part of the exercise of police power. Seasonal restrictions on firearms in the context of recreational hunting are well within the scope of the regulatory authority granted. The General Assembly has repeatedly reaffirmed and extended the authority to enforce laws through appropriate arrests and penalties. *See, e.g.,* 80 Del. Laws Ch. 161 (August 14, 2015) *and* 79 Del. Laws Ch. 421 (Sept. 2, 2014). Since 1987, the General Assembly has not seen fit to curtail or limit or revoke the authority to regulate firearms in State Parks or in State Forests.

With respect to DNREC, Plaintiffs incorrectly cite 7 *Del. C.* §6001 as the sole basis for its regulatory authority. In fact, the State Park statute grants DNREC the broad authority to: "Make and enforce regulations relating to the protection, care and use of the areas it administers…." 7 *Del. C.* §4701(a)(4).

Plaintiffs also attempt to limit the DDA's authority to promulgate regulations for the public's safety by citing Section 101(3) of Title 3. But like DNREC, the General Assembly has granted DDA broad authority to establish rules "for the enforcement of the state forestry laws and for the protection of forest lands…." 3 *Del. C.* §1011.

Implicit in this broad grant of authority to manage public lands is the authority to establish rules to protect the safety of members of the public invited to enter onto such lands for recreation and education. Without such authority, these state agencies could not establish rules for the "safety, protection and general welfare of the visitors and personnel on properties under its jurisdiction." 7 Del. Admin. C. §9201-2.1. *See also* 3 Del. Admin. C. §402-5.0. Without this authority, DNREC and DDA could not establish rules limiting areas for hunting, fishing, and swimming, nor could they regulate the hours that the lands are open to the public. In the absence of the enabling laws, the agencies also could not regulate safety concerns such as open fires or operating motor vehicles or water craft. More importantly, the agencies could not establish rules to provide for law enforcement on the lands that they administer without the authority delegated by the legislature. Such a limited reading would render these agencies powerless to control entry and conduct in the interest of public safety.

Visitors to State Parks and Forests expect and demand to be safe and secure while enjoying such facilities. The Defendants have undertaken an obligation, pursuant to authority delegated by the legislature, to provide security and to punish any violators. A critical component of that public safety obligation has been the regulation of firearms, with the explicit authority and implicit blessing of the General Assembly.

II. THE GENERAL ASSEMBLY DID NOT REPEAL EXISTING CRIMINAL LAWS AND REGULATIONS BY RECOGNIZING A LIMITED CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS OUTSIDE THE HOME

In their pleadings, the Plaintiffs argue that this Court should declare that DDA and DNREC Regulations governing recreational hunting and firearms on State property violate a provision of the Delaware Constitution enacted in 1987. They seek an order invalidating those Regulations, and preventing their enforcement, thus removing any limits on the use and possession of firearms within State Parks and Forests, regardless of hunting season. There is no evidence cited of an explicit repeal by the General Assembly of such Regulations, either in 1987 or since that time. Thus, the Plaintiffs are forced to argue that the legislature implicitly intended to repeal such Regulations, despite a distinct lack of legislative action limiting or amending the statutory authority of DDA and DNREC to protect public safety in Parks and Forests, over fifty years of such regulations, and in the face of repeated reaffirmation of the police power. The question becomes, whether the limited Constitutional right defined by Article I, Section 20 can be reconciled with the Regulations placing both seasonal and geographical limits on the possession and use of firearms in such public places. The Plaintiffs bear the burden of showing that such reasonable restrictions on recreation, hunting, and defense on State property violate the Delaware Constitution.

A. The Applicable Test

In *Doe v. WHA*, 88 A.3d 654, 666 (Del. 2014), the Supreme Court applied intermediate scrutiny - and not strict scrutiny - to a public housing rule governing firearms in private dwelling units and common areas, challenged under Article I, Section 20 of the Delaware Constitution. Intermediate scrutiny seeks to balance potential burdens on fundamental rights against the valid interests of government. *Id.* In order to survive such scrutiny, governmental action must be reasonably related to the achievement of important governmental objectives, and may impose burdens no greater than necessary to ensure that the asserted objective is met. *Id.* at 666-667 (citing *Turnbull v. Fink*, 668 A.2d 1370, 1379 (Del.1995)). In an as-applied challenge to a conviction based on Article I, Section 20, in *Griffin v. State*, 47 A.3d 487, 489-490 (Del. 2012), the Court balanced the criminal defendant's interest in carrying a concealed weapon against the State's interest in public safety, and found that the defendant could be prosecuted for CCDW on remand. The criminal defendant's interest in carrying a deadly weapon within the home gave way to the State's interest in protecting law enforcement officers from death or injury from deadly weapons. *Id.* The Court held that there is no Constitutionally-protected right to carry a concealed deadly weapon. *Id.* at 491.

In this declaratory judgment action, the Plaintiffs lack an as-applied scenario, and the Court thus lacks the opportunity to apply intermediate scrutiny

and the balancing test to a particular set of facts. The Plaintiffs essentially argue that under any set of facts, their interest in bringing guns into State Parks and Forests - public places open to scores of their (unarmed) fellow citizens - would trump Defendants' interest in law enforcement, keeping the peace, and public safety. That approach is not sustainable under *Doe v. WHA*. Outside the home, in a public place, the interest of law enforcement in keeping the peace substantially outweighs the abstract claims of these Plaintiffs to "keep and bear arms" outside of hunting season, for reasons that are not defined. In their Complaint, the Plaintiffs have presented no set of facts regarding self-defense or the defense of family, and no plausible scenario regarding recreational hunting, that would give greater weight to their abstract conception of gun rights than to the rights of others to be free from the risk of harm from firearms in public places.

B. The Scope of the Delaware Constitutional Provision

The right conferred by Article I, Section 20 is not absolute. *Doe v. WHA, supra*, at 667; *Griffin, supra*, at 488. The same General Assembly that enacted the Constitutional amendment in 1987 left undisturbed the "comprehensive regulatory scheme" affecting the right to keep and bear arms, including the forerunners of the Regulations challenged by the present Plaintiffs.[3] The Court in *Doe v. WHA*,

[3] DNREC Regulations restricting the use of firearms in Parks were originally promulgated as early as **1962**.

supra, referred to the "careful and nuanced approach" of the legislature, supporting an analysis that allowed the Court to consider public safety and other important governmental interests justifying firearms regulation. *Id.* at 667.

An individual's interest in the right to keep and bear arms is strongest when the weapon is in the person's home or business and is being used for protection. *Griffin, supra,* 47 A.3d at 491.[4] In *Doe v. WHA*, that interest was extended to include common areas of public housing units, based on the perceived need for security to repel an intruder. *Id.* at 668. While the Court in *Doe* noted that Article I, Section 20 is not limited to the home, and protects the right to bear arms outside the home, including for hunting and recreation, that statement was *dicta*, as the Court was not called upon to review any limitations on firearms outside the confines of the building. The Plaintiffs cannot rely on the *Doe v. WHA* opinion to define the scope of the Constitutional right outside the home. All that the case teaches is that the individual's interest declines, away from the home, and the State's interest in public safety correspondingly increases.

The Court in *Doe v. WHA* distinguished the public housing facility from a state office building, a courthouse, a college, or a university, based on the fact that it was a home as a well as a government building. *Id.* This distinction was based on the services provided to residents by WHA as landlord, which the Court found

[4] No such claim is made in this case.

were not typical of the services typically provided to the public on government property. *Id.* A State Park or Forest is not a home. The services provided to the public in State Parks and Forests, such as hunting, surf-fishing, camping, nature education, and recreation, are comparable to those provided in similar State facilities like schools, colleges, and universities. As in a State office building or courthouse, the Defendants provide protection for the public through law enforcement officers – and by prohibiting anyone else from bringing firearms onto State property. Any personal concerns over safety or defense are thus alleviated by the presence of security, as in State Parks and Forests. The State's interest on such property in public safety substantially outweighs any individual selfish interest in possession of a firearm. In fact, private possession of firearms is inconsistent with, and contrary to, preserving public safety. As the Court noted in *Doe v. WHA*, the State's interest in regulating firearms in places where State employees work and State business is conducted would survive Constitutional scrutiny. *Id.*

The Court in *Doe v. WHA* observed that Article I, Section 20, unlike the Second Amendment, protects the individual right to bear arms, for defense, hunting, and recreation. In that sense the Delaware provision is broader than the collective right of state Militia members to "keep and bear arms" that was the original intent of the Second Amendment. However, the Delaware provision lacks the absolute language of the Second Amendment prohibiting limits on the right

conferred: "shall not be abridged". Outside of the confines of the home, the Delaware Constitution affords a limited right to defend self and family, as well as the right to recreation and hunting using firearms. Again, the right to defense is reduced outside the home, and the exercise of the right to firearms must be balanced against the State's strong interest, in public places, to prevent injury and maintain order and protect individuals from harm. The Secretary of Agriculture, and the DNREC Secretary, under authority granted by the General Assembly, may properly determine whether important government objectives are advanced by prohibiting firearms from State Parks and Forests, outside of recreational hunting seasons.

C. Balance Favors Law Enforcement

The holding in *Doe v. WHA, supra*, regarding the Constitutional right to defense of the "home" as defined therein lends no support to the Plaintiffs' claims of such rights outside the home, in public places, where the State affords security. Not only can the decision be distinguished on its facts, but the case's *dicta* – the diminished defensive rights outside the home and in public places – supports the Defendants' position here. The only elements of Article I, Section 20 that are at issue here are [1] the reduced right to "keep and bear arms" for defense of self and family, and [2] the seasonal right to "keep and bear arms" for recreation and hunting.

1. Defense of Self and Family

As noted in the Statement of Facts, above, the Plaintiffs in their pleadings do not articulate any particular instance or scenario where they claim that a firearm would be necessary to defend themselves or their family from some danger in a State Park or Forest. They suggest only a vague notion of the need for "protection", without identifying the threat or risk of harm presented. The Court is thus left to speculate as to what dangers might be lurking in a park or forest, that would justify carrying firearms for "protection". There are no allegations as to violent crime or dangerous predators, either animal or human. Rather, the sparse facts alleged suggest instead that the Plaintiffs' desire to bring firearms onto State property is more a matter of convenience: to visit or stay overnight on the way to a competition, to continuously carry firearms on their bicycles, to maintain a gun in a surf-fishing vehicle rather than removing it and storing it at home, or to avoid "inadvertently" entering onto State land with a firearm out of season. Mere convenience is a weak and shallow justification for overturning longstanding Regulations intended to protect others from harm from guns. Personal convenience does not tip the scales toward the Plaintiffs and their guns, when balanced against legitimate law enforcement needs.

Where, as here, there is no showing of any plausible danger within State public lands presenting a need for self-defense or the defense of family, the case

for possession of firearms for security or protection is exceedingly weak. None of the Plaintiffs claim to have been harmed, attacked, or threatened in a State Park or Forest. There is no allegation that the Defendants have failed to maintain a police presence, or to afford public safety through law enforcement. There is no evidence of a violent crime problem within State Parks or Forests.[5] It is hard to even imagine a legitimate defensive use of a firearm at Lums Pond or Killens Pond or Cape Henlopen, or in Blackbird State Forest. On the other hand, it is easy to imagine the risk of harm to thousands of unarmed persons at Delaware Seashore State Park on Fourth of July weekend from the discharge of a firearm. The balance of equities strongly favors the Defendants, public safety, and law enforcement, and not the convenience of the Plaintiffs.

2. Hunting and Recreational Use

The only issue presented as to hunting and recreational use of firearms is whether the Defendants' Regulations defining seasons for recreational hunting are valid under the Delaware Constitution. Here, it is determinative, in applying the balancing test, that the Defendants allow, rather than prohibit, hunting for recreation. It is uncontested that the Defendants provide ample opportunities for recreational hunting in State Parks and Forests. The Plaintiffs do not challenge the authority of the Defendants to establish hunting seasons. It is reasonable to limit

[5] Perhaps this is due to the Regulations restricting firearms?

the use and possession of firearms for hunting in such public places to certain times and places and types of weapons.

The Plaintiffs do not appear to dispute this proposition, but instead question whether firearms should be permitted within State Parks or Forests, outside of established seasons. To the extent that this is a claim of self-defense or the defense of family, it has been dealt with above. On the other hand, if the Plaintiffs' argument is for the expansion of hunting seasons, that is an argument properly addressed to the Defendant State agencies and their Secretaries, who have been given full authority by the General Assembly to regulate recreational hunting and fishing seasons, in order to preserve stocks of fish and game. *See, e.g.*, 3 *Del. C.* § 1001(5); 7 *Del. C.* §103(a). The statutory authority explicitly vests in DDA and DNREC the discretion to set limits on hunting and fishing by species, season, location, and weapon. Moreover, each agency is authorized to issue regulations defining these limits. The legislature, in enacting Article I, Section 20, did not intend to abolish this authority, or to declare "open season" on all game, all the time, with any weapon. Rather, the Constitutional provision can and should be read in harmony with longstanding fish and game laws, that effectively limit the use and possession of firearms for recreational hunting.

To the extent that the Plaintiffs argue that their Constitutional right to recreation and hunting cannot be burdened with Regulations governing firearms,

the case of *W. Va. Dept. of Natural Res. v. Cline*, 488 S.E.2d 376, 383 (W.Va. 1997) is instructive. In that case, the state's highest court upheld a state statute regulating firearms, as a legitimate exercise of the police power. The Court held that the statutory prohibition on loaded firearms in a vehicle did not violate a state constitutional provision permitting a person to "keep and bear arms" for "lawful hunting and recreational use".[6] *Id.* The Court found this to be a "reasonable and narrow restriction on a person's right to keep and bear arms". *Id.* at 382. Further, the Court recognized that the state has a legitimate police power interest in protecting its citizens from the dangers of transporting loaded firearms, and found that the restriction was reasonable, because it did not infringe upon a sportsperson's right to keep and bear arms for hunting purposes. *Id.* Under the balancing test of *Doe v. WHA*, the State's interest in regulating firearms for important public safety reasons would not unduly infringe on the seasonal use of appropriate weapons for recreational hunting.

The Plaintiffs have also questioned whether the Defendants may burden their right to "keep and bear arms" in a vehicle, within a State Park or Forest. They argue that no risk would be presented by a firearm carried in the course of hunting, surf-fishing, or travel to or from a private shooting event. The response of the West Virginia Court to a similar argument, minimizing the risk and questioning

[6] The West Virginia Constitutional provision was adopted on November 4, 1986.

the police power, is set forth below. *W. Va. Div. of Natural Res.,* 488 S.E.2d at 383.

> Although the facts presently before the Court suggest a rather harmless incident of transporting a loaded gun in a vehicle, the tragic experience of other jurisdictions does not support this interpretation. Rather, the jurisprudence of other states recounts many unfortunate accidents arising from the seemingly innocent practice of transporting a loaded gun in a vehicle. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Partridge,* 514 P.2d 123 (Cal.App.1973) (passenger paralyzed when driver drove over rough terrain in pursuit of game causing loaded pistol to discharge); *Glens Falls Ins. Co. v. Rich,* 122 Cal.Rptr. 696 (Cal.App.1975) (passenger injured when driver attempted to remove loaded shotgun from under front seat of car during hunting outing); *Kohl v. Union Ins. Co.,* 731 P.2d 134 (Colo.1986) (two bystanders injured and one bystander killed when loaded rifle discharged while hunter attempted to remove it from gun rack of jeep); *Hutcherson v. Amen,* 572 P.2d 879 (Idaho 1977) (driver injured when loaded hunting rifle, resting in camper shell of truck, discharged); *Reliance Ins. Co. v. Walker,* 234 S.E.2d 206 (N.C.App.1977) (bystander injured when loaded rifle, resting in gun rack of truck, discharged as a result of vibrations from driver or passenger sitting on truck seat or driver's starting of truck engine); *State Farm Mut. Auto. Ins. Co. v. Powell,* 318 S.E.2d 393 (Va.1984) (bystander killed when loaded shotgun in gun rack of truck discharged); *Allstate Ins. Co. v. Truck Ins. Exch.,* 216 N.W.2d 205 (Wisc.1974) (driver killed when passenger's loaded rifle discharged while passenger was exiting truck in pursuit of game). *See generally* 1 Turley & Rooks, Firearms Litigation: Law, Science, and Practice §§ 14.01, 14.03-14.05 (1988), and cases cited therein. [citations altered to conform to Delaware format]

As with the West Virginia law, the Delaware Regulations are a valid and limited exercise of the police power to protect the public, by limiting the use of

firearms within State Parks and Forests to defined recreational hunting seasons. In providing a variety of recreational hunting opportunities at multiple sites with the State, the Defendants have facilitated the exercise of the hunting and recreation rights set forth in the Constitution. The challenge to the Regulations under the "hunting and recreation" clause must fail.

III. THE PUBLIC SAFETY REGULATIONS GOVERNING CONDUCT IN STATE PARKS AND FORESTS ARE CONSISTENT WITH OTHER CRIMINAL LAWS REGULATING FIREARMS.

The Plaintiffs admit that the General Assembly has enacted criminal laws that extensively restrict the possession and use of firearms[7], 11 *Del. C.* §§1441, 1444, 1445, 1447, 1447A, 1448, 1448A, 1454, 1455, 1457, as well as laws regulating firearms dealers and sales[8], 24 *Del. C.* §§901-904A, and has delegated to municipal governments the authority to regulate firearms in public places[9]. 22 *Del. C.* §111. They do not contend that any of these firearm regulations conflict with Article I, Section 20 of the Delaware Constitution. Instead, they argue that this "comprehensive regulatory scheme"[10] fully occupies the field, so as to prevent the Defendants from adopting public safety regulations pursuant to the authority granted to them by the General Assembly. Their argument is that State Park and

[7] Compl. ¶¶21, 22.
[8] Motion for Preliminary Injunction ("MPI") ¶13.
[9] Compl. at 8, footnote 1.
[10] MPI 13.

Forest Regulations governing recreational hunting and firearms somehow conflict with distinct laws restricting the sale, use, and possession of sawed-off shotguns and machine guns, prohibiting the sale or transfer of a firearm to a minor, punishing the possession of a firearm during the commission of a felony, prohibiting certain persons with criminal convictions or adverse mental health history from using or purchasing firearms, requiring a criminal background check to purchase a firearm, punishing illegal firearm sales, or prohibiting permitting a minor to gain access to a firearm. How? The Plaintiffs provide no example of such a conflict, and cite no case so holding. The truth is that the Regulations challenged in this case are compatible with the firearms provisions of the Criminal Code, and with the restrictions on sales. There is nothing inconsistent with limiting the use of firearms for recreational hunting, or prohibiting firearms in public places, just as there is no conflict in allowing municipalities to regulate firearms.

The Delaware Supreme Court rejected an argument similar to that of the Plaintiffs in *Hayward v. Gaston*, 542 A.2d 760, 767 (Del. 1988). The defendant argued on appeal that a statute enacted by the General Assembly governing mental health residential treatment centers pre-empted a Kent County zoning ordinance. The Court found this argument unpersuasive in that, as here, there was no conflict or inconsistency. The ordinance did not hinder the enforcement of the statute, just

as the Regulations adopted by the Defendants in no way hinder the enforcement[11] of criminal laws or registration statutes governing firearms. Therefore, the Regulations have not been superseded by compatible firearms laws that can be enforced in harmony with restrictions on firearms in Parks and Forests.

The Plaintiffs concede that the General Assembly has placed geographical restrictions on the possession of firearms, by enacting a statute, 11 *Del. C.* §1457, that prohibits firearms within 1,000 feet of a building, structure, athletic field, sports stadium, or real property used by a public or private school, kindergarten, college, or university; or in a motor vehicle used by any such institution; or in any municipal, county, or State recreation center, athletic field, or sports stadium. The Plaintiffs do not contend that such restrictions on firearms violate the Delaware Constitution. Instead they argue that this very inclusive statute should instead be interpreted as exclusive, despite the lack of any language suggesting an intent to limit the prohibition of guns to the places set forth. Surely, if the legislature can prohibit guns in schools and on campuses and from recreation facilities, it can prohibit guns in State Parks and Forests. The broad police power to limit harm from firearms can be exercised through the Criminal Code, through regulation of sales, through delegation to municipalities, and through delegation to State agencies. Far from being in conflict, the challenged Regulations are an integral

[11] Ironically, by Defendant agency law enforcement officers.

part of the overall penal and regulatory program placing affirmative limits on the possession and use of guns in public places.

In *Fla. Carry, Inc. v. Univ. of Fla.*, 2015 WL 6567665 (Fla. App. Oct. 30, 2015), the Florida District Court of Appeal rejected an argument that the state legislature had pre-empted the field, and upheld a regulation prohibiting firearms in university housing. The Court reconciled the challenged provision with other firearms laws enacted by the legislature, and found that the statute enacted most recently expressed the legislative intent to prohibit firearms on university property. *Id.* at 7. It is thus noteworthy that the General Assembly has left undisturbed, since 1987, the broad statutory authority for DDA and DNREC to enact public safety regulations covering Parks and Forests, and the firearms limitations promulgated by the Defendants.

The Plaintiffs cannot single out the Regulations issued by the Defendants for a Constitutional attack, and simultaneously ignore the other parts of the "comprehensive regulatory scheme" that impose equivalent (or greater) burdens on firearms. The fatal flaw with such a selective argument is its inconsistency as a matter of law. While the Plaintiffs may try to pick and choose laws they do not like, and ignore others, the Court has no such luxury. If the Plaintiffs are right, and the General Assembly is powerless to limit the wholesale use of guns in State Parks and Forests, based on an exaggerated right to "keep and bear arms" for

defense outside the home, then the equivalent geographical prohibition of §1457 cannot survive Constitutional scrutiny. In this area of Constitutional jurisprudence, "what's good for the goose is good for the gander". If the Defendants cannot limit the use of firearms to recreational hunting during defined seasons, then it is doubtful that the State can regulate the sale and purchase of firearms. Indeed, many criminal defendants accused of firearms violations could make the same theoretical right to defense arguments that the Plaintiffs advance, thus questioning the Constitutional basis for their convictions. It would indeed be a slippery slope.

Preventing DDA and DNREC officers from enforcing firearms prohibitions and limitations is no different from preventing police officers from enforcing other geographical restrictions on firearms, in schools or courthouses or other public areas. The General Assembly did not enact Article I, Section 20 in 1987 to interfere with legitimate law enforcement efforts to protect the public. There was no explicit or implicit repeal of the State's police power. Rather, the laws and regulations and ordinances with respect to firearms, enacted before and after 1987, including the laws challenged here, were intended to protect the public, without running afoul of the legitimate rights of individuals to defense and recreational hunting. The Court in *Doe v. WHA* specifically acknowledged this "careful and nuanced approach" and emphasized considerations of public safety and other governmental interests. Regulations governing recreational hunting and limiting

firearms in State Parks and Forests are an integral part of that balanced approach to public safety.

CONCLUSION

As the Court of Chancery recognized, the mere assertion of a purported violation of a constitutional right is not sufficient to invoke equitable jurisdiction, where there is no risk of imminent harm from the continued enforcement of laws regulating conduct on public land and permitting use of weapons during hunting season, and no showing of any material harm sustained from past enforcement. The Plaintiffs have failed to show that their abstract arguments regarding purported rights would justify the use of this Court's power to thwart law enforcement and permit the possession and use of firearms of all kinds on public lands, regardless of hunting season or threat to public safety.

Plaintiffs have failed to articulate any claim, interest, or reason, beyond mere personal preference and convenience, to justify bringing firearms into State Parks and Forests. They cite no harm or threat that would invoke the power of this Court to intervene and suspend the operations of law enforcement in Parks and Forests. Abstract notions and personal preference are no substitute for such a showing.

The Plaintiffs have failed to show how the Regulations issued by the Defendants, pursuant to explicit and broad authority granted by the General Assembly and reaffirmed repeatedly, would conflict with, extend, or modify any other law of the State. Rather, the Plaintiffs concede that the General Assembly has regulated firearms in many ways, including geographical limitations that apply

to schools, recreational facilities, police stations, and municipal buildings. Geographical limits on firearms on State land, in the interest of public safety, are consistent with such criminal laws. The challenged Regulations are likewise compatible with the limited privilege to carry concealed weapons, granted to law enforcement officers, former officers, and those able to qualify for permits.

The Plaintiffs have failed to show that the General Assembly, in defining a limited right to defense and recreation, implicitly repealed the statutory authority of the DDA and DNREC to regulate conduct on State lands in the interest of public safety. The State agencies afford ample opportunities for the use of weapons during appropriate hunting seasons. Affiliated law enforcement officers provide security to persons entering onto State lands, and there has been no showing that visitors to State Parks or Forests have any legitimate need to carry firearms for personal protection, or for the protection of family. The interest that Plaintiffs claim in carrying firearms in public places must be balanced against the risk of harm to unarmed members of the public from unregulated use and possession, and the threat posed by such arsenals. A State Park or a State Forest, much like a State college campus, a public school or library, a police station, or a courthouse, is a shared public place where individual preferences and convenience must yield to the common interest in public safety. The statutes and regulations that Plaintiffs challenge have much in common with the many criminal offenses and regulations

governing firearms, that Plaintiffs admit are valid and enforceable. Article I Section 20 should be interpreted to preserve the ability of law enforcement officers to keep the peace on public lands and in public places, through reasonable limitations on the possession and use of firearms.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE; ROGER T. BOYCE, SR.; DELAWARE STATE SPORTSMEN'S ASSOC.,	)	
Plaintiffs,	)	
	)	
v.	)	**No. S16C-06-018 THG**
	)	
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; DEPARTMENT OF AGRICULTURE,	)	
Defendants.	)	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENSE MOTION FOR JUDGMENT ON THE PLEADINGS AND ANSWERING BRIEF ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
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INTRODUCTION

The Plaintiffs originally sought from the Court of Chancery an injunction barring DNREC and DDA law enforcement officers from enforcing Regulations preventing visitors to State Parks and Forests from carrying or possessing firearms, except during established seasons for recreational hunting. Although the Plaintiffs envision a so-called "natural right" to guns, the sole stated legal basis for their claims is a Delaware Constitutional provision enacted in 1987. Therefore, their numerous citations and references to the Second Amendment to the United States Constitution – which they concede differs in scope and intent from Article I, Section 20 of the Delaware Constitution – are irrelevant to their arguments, and offer no support for their claims.

In sustaining a dismissal of their original lawsuit seeking injunctive relief, the Plaintiffs failed to identify irreparable harm sustained as a result of a specific Constitutional violation, within the confines of the Delaware Constitution. They have not cited any instance of arrest, or attack, or any plausible scenario requiring the use of deadly force on public lands for purposes of defense. In the absence of any showing of material harm, or of likely success in their advocacy of an unlimited right to carry any gun, anywhere, at any time, in any State Park or Forest, the Court of Chancery declined to exercise equitable jurisdiction over these claims, and declined to issue an injunction to prevent enforcement of the law.

Contrary to the allegation hidden in a footnote,[1] the Defendants do not oppose the right to recreational hunting exercised by "sportsmen". Rather, the Regulations challenged by Plaintiffs specifically provide for the use of firearms during defined hunting seasons. The General Assembly authorized the State to regulate the time, place, and manner of hunting thirteen enumerated game animals[2] and five classes of game birds[3] on State lands. *See* 7 *Del. C.* Ch. 7. Many legitimate sportsmen would be astounded to hear the term invoked in an attempt to justify the unlimited use and possession of firearms in public areas. True "sportsmen" would understand and respect the need for game conservation and the risk of deadly harm to innocent visitors from the discharge of firearms. Carrying a gun in public places out of season is neither hunting nor recreation.

The most that the Plaintiffs can muster to support their claims regarding self-defense or the defense of others is speculation as to the risk of an unnamed harm on State lands. For all their ominous claims, the Plaintiffs never identify the nature of the deadly threat, be it man or beast, that they would cite to justify the necessity

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[1] Answering Brief at 2, footnote 1.

[2] Mink, snapping turtle, raccoon, opossum, gray squirrel, otter, muskrat, red fox, hare, rabbit, frog, deer and beaver. 7 *Del. C.* § 701.

[3] The Anatidae, commonly known as geese, brant and river and sea ducks; the Rallidae, commonly known as rails, coots, mudhens and gallinules; the Limicolae, commonly known as shore birds, plovers, surf birds, snipe, woodcock, sandpipers, tattlers and curlews; the Gallinae, commonly known as wild turkeys, grouse, prairie chickens, pheasants, chukar partridges, partridges and quail; also the reed bird of the Icteridae; and the dove. 7 *Del. C.* § 702.

of a firearm. They admit that DDA and DNREC provide a law enforcement presence within State Parks and Forests to protect public safety. They do not cite a history of violent crime, or dangerous animals, or unexplained death or disappearance of visitors to State Parks or Forests. Never do they answer the question where and when and under what circumstances a visitor with firearms would discharge them, to enable the Defendants and the Court to assess the risk to other (unarmed) visitors in a public place. What is it, exactly, that the Plaintiffs fear? In the absence of any hint of danger, the Court cannot balance the unexplained need for armed resistance against the clear and present risk of harm to unarmed citizens in a public place from the discharge of firearms. In claiming an absolute right, the Plaintiffs rule out time, place, or manner restrictions on firearms in public places. They would refuse to acknowledge the distinctions between rifles and shotguns commonly used for hunting, versus assault rifles and semi-automatic weapons. The Plaintiffs reject the need for balance, and boldly claim that their need for guns outweighs the safety and rights of others, and even the authority of law enforcement officers to disarm visitors who violate the firearms restrictions.

It is a paradox that the Plaintiffs readily acknowledge the legislative authority, given the limited scope of Article I Section 20, to impose broad limits on firearms in the interest of public safety, but would deny that authority, when it comes to their personal preferences and convenience. It is a curious exercise in

arbitrary line-drawing that would recognize legislative authority to prohibit firearms on the grounds of schools,[4] museums, playgrounds, courthouses, museums, state office buildings, and on campus, while denying any ability to regulate firearms in similar public spaces such as forests, campgrounds, cabins, beaches, and parks, where numerous people gather. Contrary to the Plaintiffs' hyperbole, the issue here is not "a complete abolition of the right to possess arms as well as to carry arms,"[5] but rather whether the limited right secured by the Delaware Constitution can be restricted, in forests and parks, as it is in other public spaces, in the interest of public safety.

The Plaintiffs, despite their "natural law" rhetoric, do not contest the authority of the General Assembly to impose "comprehensive restrictions" on firearms in Title 11 and Title 24 of the Delaware Code, including penalties for improper use or possession.[6] They single out the Title 3 and Title 7 restrictions

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[4] State parks and forests have an important educational function, including weekly, half-day, full-day, and overnight summer camps and educational programs for individuals, schools, scout troops, and church groups. Many school classes of students and teachers regularly visit, and for that reason alone, the Regulations banning firearms should stand. Like schools, parks and forests are places where children spend time learning, playing, and socializing together. The sound policy decision to remove firearms from schools for public safety reasons is consistent with the state's interest in restricting firearms in state parks and forests. See *Summer Camps at Delaware State Parks*, http://www.destateparks.com/programs/summer-camps/; *Forestry Education*, http://dda.delaware.gov/forestry/educat.shtml.

[5] AB at 4; footnote #3.

[6] AB at 4; footnote #3.

and penalties as somehow different, and argue that firearms registration and criminal offenses are "not at issue", whereas forest and park regulations, including hunting seasons, alone trigger constitutional scrutiny. In their selective treatment, police officers can enforce registration requirements and criminal laws, even ban firearms on private property in safe school zones, but environmental officers may not enforce regulations within parks and forests and wildlife areas, on state land, where firearms are involved. Yet the Plaintiffs do not articulate any coherent basis for this Court to differentiate between firearms restrictions in similar public places. They fail to explain why the Constitution should be read to permit some prohibitions and restrictions, but not others. There is no basis for such a distinction. Either the limited rights secured by the Delaware Constitution must yield to legitimate restrictions on firearms in public places, or the legislature is powerless to deal with the threat of violence posed by loaded guns in the hands of those claiming an absolute right to defense from an unidentified but omnipresent threat.

The DDA and DNREC Regulations at issue do not violate Article I, Section 20 of the Delaware Constitution. They predated the Constitutional amendment, and complement the Title 11 and Title 24 restrictions of firearms, which the Plaintiffs accept and do not challenge. The Regulations afford legitimate "sportsmen" the ability to engage in recreational hunting for many kinds of game

during multiple seasons with a variety of weapons. There has been no showing that any of the Plaintiffs would actually need firearms in order to defend themselves or others in a state park or forest. The Defendants, under authority from the General Assembly, properly concluded that the risk of harm from improper use or accidental discharge of firearms in a public place would far exceed the threat of harm from violence to visitors, where the State maintains security. Nothing in the Plaintiff pleadings suggests that this common-sense policy determination violated any right secured by the Delaware Constitution.

If visitors to State Parks and Forests are to be allowed to carry firearms without regulation, it stands to reason that they will bring ammunition, and that the guns will be loaded. This disturbing scenario presents the distinct risk that the guns will be fired, either intentionally or accidentally, with care or carelessly, randomly or at a target, with justification or without. The firearms, if this Court would strike the Regulations, could be anything from revolvers to shotguns to rifles to semi-automatic weapons capable of firing multiple rounds per second, with quick-change magazines. Presumably, in the absence of restrictions, the Plaintiffs could arm themselves with as many guns as they could carry, and law

enforcement officers would be powerless to stop them.[7] Whether for defense, recreation, or hunting, under the Plaintiffs' interpretation, there could be no limits on the possession or use of these weapons. Whether on the Junction and Breakwater Trail, the beach at Cape Henlopen crowded with surf fishermen and their families, Indian River Inlet on a Summer holiday weekend, Bellevue Park at sunset, the Killens Pond water park, the "swinging bridge" at Brandywine Park in Wilmington, or a family campground picnic area, the risk of gun violence would be imported to public places. Such a scenario is not what the General Assembly contemplated in granting DDA and DNREC the broad power to enact regulations to protect visitors on State lands, or in subsequently amending the Constitution to provide for a limited right to firearms. There has been no showing of a need to extend the scope of that right to invalidate legitimate Regulations protecting public safety.[8]

[7] The Plaintiffs, in seeking intervention of this Court to prevent enforcement of Regulations protecting public safety, can accurately be described as opposing law enforcement. The role of police officers in maintaining the peace in public areas where firearms were unrestricted would include the threat of escalation of disputes and confrontations into gunfire, exposing the officers and park visitors to harm.

[8] Kozlowski, "Gun Rights Tested in Parks and Open Spaces", *Parks & Recreation* (March 1, 2016). http://www.parksandrecreation.org/2016/March/Gun-Rights-Tested-in-Parks-and-Public-Spaces/.

NATURE AND STAGE OF PROCEEDINGS

The original lawsuit in the Court of Chancery was submitted, by stipulation of the parties, and with the approval of the Court, on the Defendant's Motion to Dismiss for lack of subject matter jurisdiction, and on cross-motions for judgment on the pleadings pursuant to Rule 12(c) of that Court. The express intent was to reach the legal issues presented, without resort to discovery or affidavits or testimony. The Defendants, at the instigation of the Plaintiffs, filed an Answer, so as to better focus the contentions of the parties. No discovery was served, no depositions were noticed, and no affidavits were submitted. The legal issues were clearly drawn and ultimately resolved by the Court Order dismissing the case for lack of jurisdiction.

At pages 27-28 of their Brief, the Plaintiffs cite to a research study[9] that draws conclusions as to the effectiveness of laws such as the Regulations restricting the use of firearms in State Parks and Forests. They relegate to a footnote an unfortunate comment purporting to correlate gun control with the persecution of racial minorities.[10] The cited study was not peer-reviewed and

[9] Don B. Kates and Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide*, 30 Harvard J. Law and Pub. Pol. 649, 660-61 (2007).

[10] AB at 28; footnote #14. As there are no allegations of racial discrimination in this case, the citation is nothing more than a blatant and ill-advised bid to play the "race card" in a desperate attempt to gain traction for arguments unrelated to race.

received no academic scrutiny prior to publication. It has received negative scrutiny since publication, with some sources concluding that the study's findings have been "debunked."[11] If the intent of the Plaintiffs were to incorporate such matters outside the pleadings in this briefing, and thus to convert their motion into one for summary judgment, the Defendants would be prepared to submit extensive authority for the proposition that restricting guns reduces needless death and injury, both misguided and accidental. But, rather than argue social science findings that relate to policy, the Defendants would urge the Court to exclude such matters, as permitted by Rule 12(c), in that such considerations are reserved to the legislature in enacting laws, and the executive branch in promulgating regulations, and should have no bearing on the judicial determinations as to Constitutionality. To the extent that the Plaintiffs seek to supplement the record by submitting the opinions of purported experts, they must seek leave of Court to do so, or otherwise they violate the current stipulation as to briefing. The Defendants would oppose conversion of the narrow legal arguments into broad questions combining facts (or

[11] http://www.huffingtonpost.com/evan-defilippis/better-than-somalia-how-to-feel-good_b_6717972.html. *See also* David Hemenway, PhD, Harvard School of Public Health, *https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1264/2013/06/Kates-Mauser.pdf*.

purported facts) and law, in the context of summary judgment. This matter should proceed to decision according to the stipulation of counsel approved by the Court.

STATEMENT OF FACTS

The **State Forestry Regulations** challenged by the Plaintiffs were adopted pursuant to the authority granted by the General Assembly set forth at 3 *Del. C.* §1008 (authorizing the Delaware Department of Agriculture to acquire lands for the establishment of state forests, forest parks, demonstration areas, and experimental stations, and to hold, manage, regulate, control, maintain, and utilize such lands; and also to adopt standards and regulations for issuances of permits, including fees for the use of state forest property) and 3 *Del. C.* §1011 (granting authority to the Secretary of Agriculture to devise and promulgate rules and regulations for the enforcement of the state forestry laws and for the protection of forest lands, and impose fines in furtherance thereof; and to enforce all laws pertaining to forest and brush covered lands and assist in the prosecution, in the name of the State, of violations of those laws). Section 8 of the Regulations is captioned "Hunting Rules and Regulations", and establishes that State Forests are year-round multiple use areas, shared by hunters with other public users such as hikers, campers, horseback riders, firewood cutters, and loggers. 3 Del. Admin. C. § 402-8.1. No special permits are required to hunt on State Forest lands, except as specified in the *Hunting and Trapping Guide* published by the DNREC Division of

Fish and Wildlife.[12] Properly-licensed hunters may hunt during any open season subject to those restrictions, except on areas otherwise designated, such as those marked with Wildlife Sanctuary, NO HUNTING, or with Safety Zone signs. §§8.2, 8.11. Target shooting is prohibited, and firearms are allowed for legal hunting only, and are otherwise prohibited on State Forest lands. §8.8. The DDA Secretary (a Defendant in this case) also enjoys broad general authority to adopt rules for the government of the Department of Agriculture, pursuant to 3 *Del. C.* §101(3). The Secretary is further empowered to employ law enforcement officers and other employees as necessary to carry out the provisions of Title 3, and to make rules for their conduct. 3 *Del. C.* § 101(4), (5).

The Department of Natural Resources and Environmental Control ("DNREC") is authorized by 7 *Del. C.* §4701(a)(4) to promulgate and enforce regulations relating to the protection, care, and use of the areas it administers. Further, the DNREC Secretary is empowered by 7 *Del. C.* § 6010(a) to adopt, amend, modify or repeal rules or regulations, or plans, after public hearing, to effectuate the policy and purposes set forth at 7 *Del. C.* § 6001. The **findings** of the General Assembly include the following:

> The land, water, underwater and air resources of the State can best be utilized, conserved and protected if utilization thereof is restricted to beneficial uses and controlled by a state agency responsible for proper

[12] The Division of Fish and Wildlife regulates the use and discharge of firearms during recreational hunting. *See, e.g.*, 7 Del. Admin. C. § 3900-8.3.4.

> development and utilization of the land, water, underwater and air resources of the State. 7 *Del. C.* §6001(a)(6).

The General Assembly further noted the rapid growth of population, agriculture, industry, and other economic activities, and found that the land, water and air resources of the State must be protected, conserved and controlled to assure their reasonable and beneficial use in the interest of the people of the State. The legislature defined the **policy** of the State to include the following:

> The State, in the exercise of its sovereign power, acting through the Department, should control the development and use of the land, water, underwater and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State. 7 *Del. C.* §6001(b) (2).

The stated **purpose** of Chapter 60 of Title 7 is to effectuate this broad State policy by providing, *inter alia*,

> A program for the protection and conservation of the land, water, underwater and air resources of the State, for public recreational purposes, and for the conservation of wildlife and aquatic life. 7 *Del. C.* §6001(c)(3).

The Secretary thus enjoys a broad mandate to implement regulations governing the use, care, and protection of natural resources, in order to promote public recreation and conservation.

The **Regulations Governing State Parks** are essential to the protection of Park resources and improvements, and to the safety, protection, and general welfare of the visitors and personnel on properties under DNREC jurisdiction. 7

Del. Admin. C. § 9201-2.1. The Rules govern the use of all applicable lands, recreation areas, historic sites, natural areas, nature preserves, conservation easements, marinas, waters, and facilities administered by the Division of Parks and Recreation. Rule 2.2. With regard to the issue of pre-emption, and other Code provisions regulating firearms, Rule 2.2 further provides that "No Rule or Regulation herein shall preclude the enforcement of any statute under the Delaware Code." Section 21 of the Regulations is entitled "Hunting, Fishing and Wildlife Management". Hunting in accordance with state and federal laws, rules and regulations is permitted under Rule 21.3 in certain areas and at times authorized by the Division. A hunter registration card issued by the Division is required, in addition to a valid Delaware hunting license, for hunting on lands administered by the Division that are opened for hunting. Rule 21.1 reads as follows:

> It shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division, except by those persons lawfully hunting in those areas specifically designated for hunting by the Division, or those with prior written approval of the Director.

The authority of DNREC **law enforcement officers** is conferred under 29 *Del. C.* § 8003A. Such officers are responsible for the enforcement of all laws, regulations, rules, permits, licenses, orders, and program requirements of the Department. § 8003A(a). These officers have police powers similar to those of constables, peace officers, and other police officers, such as powers of

investigation, search, seizure, detention, and arrest. § 8003A(b). Further enforcement authority is conferred by 7 *Del. C.* §4701(a)(8), and set forth in Section 27 of the Rules. DNREC is authorized to employ law enforcement officers for the enforcement of the Division Rules and Regulations. Rule 24.1. No person may willfully fail or refuse to comply with any lawful order or direction of any Enforcement Officer on lands or waters administered by the Division. Rule 24.4. These officers thus have broad authority to protect public safety within parks and other lands administered by DNREC.

This Court need not be drawn far into a pointless discussion of what constitutes a "sportsman".[13] To the extent that the Plaintiffs seek to exercise a right to recreational hunting on State land, the Defendants have, through the challenged Regulations, recognized such a right, by providing for the use of various weapons in designated places and during appropriate hunting seasons. There is thus ample opportunity for a true "sportsman" to engage in recreational hunting using firearms. In the face of that, the allegation that the Defendants oppose the civil rights of sportsmen[14] is nonsense. A "sportsman" [15] is defined as someone who hunts or shoots wild animals as a pastime. The definition does not

[13] Answering Brief at 2-5.
[14] Answering Brief at 2, footnote 2.
[15] http://www.merriam-webster.com/dictionary/sportsman.
https://www.google.com/?gws_rd=ssl#safe=strict&q=definition+of+sportsman

extend to someone who claims the right to use a firearm for purposes of self-defense or the defense of others. There is no sporting justification to carry a rifle or shotgun, let alone a handgun or semi-automatic weapon, out of hunting season, on a crowded beach, while riding a bicycle, surf fishing, or in a campground. Plaintiffs' attempt to hijack a term supporting the responsible and limited use of weapons for sport, to justify the needless and unlimited use and possession of firearms, makes a mockery of the concept of "sportsman". A "sportsman" respects the rules for hunting, and does not use any weapon out of season. A "sportsman" shoots game, and not people.

The Plaintiffs attached as "Exhibit A" to their Brief a document which purported to list "admissions" by the Defendants. By the Plaintiffs' own admission, this is not a stipulation. This document fails to conform to Rule 36 of this Court, and should be stricken and disregarded by the Court. It is misleading, in that it takes the factual contentions of the Defendants out of the context of the Answer. The respective factual positions of the parties are as set forth in the pleadings, which form the basis for the cross-motions under Rule 12(c). Attached to this Brief, as Exhibit A, is the Answer filed by the Defendants.

STATEMENT OF QUESTIONS PRESENTED

1. Did the regulations issued by the DDA and DNREC to control firearms on State property exceed the scope of the statutory authority granted to each agency by the General Assembly to exercise law enforcement power to protect public safety?

2. Do the Regulations restricting recreational hunting and firearms in State Parks and Forests violate the Delaware Constitutional provision providing for a limited right to "keep and bear" arms outside the home?

3. Are the Regulations governing public safety and regulating firearms in State Parks and Forests compatible with other criminal and licensing laws regulating the use and possession of firearms?

ARGUMENT

I. THE GENERAL ASSEMBLY GRANTED BROAD AUTHORITY TO STATE AGENCIES TO REGULATE CONDUCT WITHIN STATE PARKS AND FORESTS, AND THE REGULATIONS LIMITING FIREARMS ARE WITHIN THAT AUTHORITY.

As set forth in detail in the Statement of Facts, at 3-7, the State Forestry Regulations and the Regulations Governing State Parks (collectively referred to as "Regulations") emanate from the desire of the legislature to preserve and protect natural areas, and to delegate to DDA and DNREC broad authority to regulate conduct and to protect public safety. When the General Assembly grants authority to an administrative agency, that authority "should be construed so as to permit the fullest accomplishment of the legislative intent or policy." *Atlantis I Condo. Ass'n v. Bryson*, 403 A.2d 711, 713 (Del. 1979). And as such, the agency's authority includes the power to "do all that is reasonably necessary to execute that power or authority." *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649 (Del. 1973). Moreover, when the issue is the agency's authority to protect the "public morals, health, safety or general welfare, more latitude is given the agency in order to provide the flexibility necessary to carry out the legislative will." *Raley v. State*, 604 A.2d 418 (Del. 1991) (citing *Atlantis I Condo Ass'n*, *supra*).

DDA exercises a statutory mandate to hold, manage, regulate, control, maintain, and utilize State forest lands, by adopting standards and regulations; to

promulgate rules and regulations for the enforcement of the state forestry laws and for the protection of forest lands; to impose fines and enforce all laws pertaining to forest lands; and to assist in the prosecution, in the name of the State, of violations of those laws. 3 *Del. C.* §§ 1008, 1011. State Forests are year-round multiple use areas, shared by hunters with other public users such as hikers, campers, horseback riders, firewood cutters, and loggers.

Likewise, DNREC and its Division of Parks and Recreation enjoy broad legislative authority to promulgate and enforce regulations relating to the protection, care, and use of State Parks. 7 *Del. C.* §4701(a)(4). Further, the DNREC Secretary (a Defendant in this case) has been tasked by the legislature to adopt regulations to effectuate the public policy and purposes set forth at 7 *Del. C.* §6001. 7 *Del. C.* §6010(a). The stated legislative policy with respect to Parks is to control the development and use of the land, water, underwater, and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State. 7 *Del. C.* §6001(b)(2). The legislative purpose includes a program for the protection and conservation of such resources, for public recreational purposes, and for the conservation of wildlife and aquatic life. 7 *Del. C.* §6001(c)(3). This mandate is based on legislative findings that the resources of the State can best be conserved and protected if utilization thereof is

restricted to beneficial uses and controlled by a responsible State agency, namely DNREC. 7 *Del. C.* §6001(a)(6).

There is no conflict between the challenged Regulations and the authority granted by the General Assembly to qualified law enforcement officers, 11 *Del. C.* §1441A, and retired officers, 11 *Del. C.* §1441B, to carry concealed weapons. Each section contains the following qualification:

> (b) This section shall not be construed to supersede or limit the laws of any state that:
>
> (1) Permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
>
> (2) Prohibit or restrict the possession of firearms on any *state* or local *government property*, installation, building, base, or *park*.

State parks, and property including forests, are specifically excluded from the privilege granted by the legislature.[16] If the right to concealed carry is to be extended, that would be for the General Assembly to undertake by amendment of §1441A and §1441B. It is also worth noting that the exemption for State property and parks is coextensive with that for private property owners. Just as the Plaintiffs could not expect to carry guns onto private property or into private buildings where they are prohibited or restricted, they should have no expectation

[16] The specific reference in Title 11 to the prohibition and restriction of firearms in parks and on government property seriously undermines Plaintiffs' argument that the legislature did not grant DDA and DNREC the authority to prohibit and restrict firearms in parks and forests.

of greater rights in a forest or park maintained by the Defendants, where the legislature has authorized such prohibitions and restrictions.

It is not for the Plaintiffs here to question the explicit findings, purpose, or policy enunciated by the General Assembly in granting broad regulatory authority to DNREC over State Parks, and DDA over State Forests, or in creating exceptions to firearms privileges based on that authority. The grant of authority to issue regulations is supported by the specific authority conveyed on both the DDA Secretary and the DNREC Secretary to hire law enforcement officers to enforce those rules and to preserve the peace and protect the public. *See* 3 *Del. C.* § 101(4) and 29 *Del. C.* § 8003A. Moreover, those statutory and regulatory provisions have not been withdrawn in the twenty-nine years since Article I, Section 20 was added to the Constitution.[17] The General Assembly has not seen fit to curtail the restrictions on hunting or on the recreational use of firearms, nor have the legislative or executive branches of government abrogated the ban on firearms out of season. DNREC and DDA enacted the Regulations under the General Assembly's broad grant of authority to ensure the public safety and general welfare of everyone who visits a state park or forest. DNREC and DDA's authority must

[17] *See, e.g., Harvey v. City of Newark*, 2010 WL 4240625 (Del.Ch. Oct. 20, 2010), wherein the Chancellor refused to accept a novel interpretation of a city charter provision in place since 1951.

be construed to allow them to do all that is necessary to fulfill their statutory mandate, and therefore, the Court should uphold the Regulations.

II. THE REGULATIONS GOVERNING RECREATIONAL HUNTING AND RESTRICTING FIREARMS WITHIN STATE PARKS AND FORESTS DO NOT VIOLATE THE LIMITED CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS OUTSIDE THE HOME.

The Plaintiffs assert that they have distinct rights to "keep" and to "bear" arms, without ever defining the nature or scope of such rights.[18] The dictionary defines to "keep" as to save for someone (as "keep a secret"), or to put away or store ("keep your passport safe"), or to protect ("may the Lord bless and keep you"). To "bear" is to carry something so that it can be seen ("she still bears the scars") or while moving ("three kings bearing gifts"), or to take responsibility ("bear the blame"). In English usage, dating to the 18th Century, to "bear arms" meant to be a soldier, or to fight.[19] The 1987 Delaware Constitutional amendment borrows the phrase "keep and bear arms" from the 1791 Second Amendment, which historically preserved the colonial militias.[20] In that context, "keep" meant to store or protect arms, as in an armory, and "bear" meant to fight, with the militia, in the common defense. So, while the Plaintiffs are undoubtedly correct

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[18] AB at 15-16.

[19] www.oxfordlearnerssdictionaries.com/us/definition/english/bear/keep.

[20] *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).

that two distinct rights are invoked, the historical definitions are of no help to them in their self-defense arguments. This case involves neither an armory nor a militia. The problem for Plaintiffs is that the General Assembly chose to borrow the archaic terms with specific limitations, rather than use the terms that the Plaintiffs would prefer: "use" and "possess". It is pointless, in the absence of further legislative guidance, to ponder that curious choice, or, worse yet, for the Plaintiffs to simply ignore it. As the challenged Regulations do not affect the right to keep and bear arms as understood in 1791 and incorporated in Article I, Section 20 in 1987, Plaintiffs' reliance on the language is futile.

The Plaintiffs are mistaken in claiming that the Delaware Constitution "provides greater rights" than the United States Constitution provides, in the context of the present action.[21] While the express original intent of the Second Amendment was to preserve the right to maintain state militias under the new federal government, that collective right was eradicated by the *Heller* and *McDonald* decisions, which recognized a new, but limited, individual right to armed defense of the home[22]. This Court, of course, is not bound by those cases in interpreting Article I, Section 20. *Doe v. WHA*, 88 A.3d 654, 665 (Del. 2014)

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[21] AB at 17.

[22] The majority Opinion in *Heller* ignores both the explicit language of the Second Amendment defining the right in terms of "[a] well regulated Militia" and the concluding clause providing that the right secured "shall not be infringed".

(holding that courts should interpret Article I, Section 20 independently from, not coextensively with the Second Amendment). However, it is worth noting that the Delaware Supreme Court, in *Doe v. WHA*, took the same approach, in its focus on the home, including common areas incorporated into the home, for purposes of analyzing the scope of the protected right to defense. As Plaintiffs concede, the right extends beyond the home to a lesser degree.[23]

What the Plaintiffs overlook, in comparing the Constitutional provisions, are two important distinctions not considered by the Court in *Doe v. WHA* (and not necessary to the decision reached). The first is the broad prohibition, "shall not be infringed" found in the Second Amendment, but missing in Article I, Section 20. The second is the limitation of the right conferred by the Delaware Constitution to defense, recreation, and hunting. Reading Article I, Section 20 in light of these distinctions, it is apparent that the right conferred is not unlimited, and in fact is limited to the three purposes set forth. Since, as set forth below, the Regulations specifically provide for hunting and recreation using firearms, there is no deprivation of those rights. The only issue for the Court is whether the reduced

[23] AB at 17-18. Under the Second Amendment, it remains unsettled whether the right to self-defense extends outside the home. *Drake v. Filco,* 724 F.3d 426, 430 (3d Cir.2013)(upholding New Jersey handgun permit law); *Gonzalez v. Village of West Milwaukee,* 671 F.3d 649, 659 (7th Cir.2012)(referring to this issue as "unsettled territory").

right to defense, outside the home, can be restricted in public places, in the interest of public safety, as provided by the General Assembly.[24] The Court in *Doe v. WHA* considered only the right to self-defense within the home, and had no occasion to define the limits on that right outside the home, or in public places.

The Plaintiffs devote a footnote in their Brief to an argument that campsites available for overnight rental are to be equated with dwellings, for purposes of gun rights. They cite *Morris v. Corps of Engineers*, 990 F.Supp.2d 1082 (D. Idaho 2014), which barred enforcement of a regulation limiting the possession of loaded weapons on Corps property. The Court acknowledged that the Corps rule at issue was "designed to protect both critical infrastructure and the public", and stated that, if it ended there, it would satisfy the test for reasonableness under "intermediate scrutiny". *Id.* at 1087. The holding was not followed in *GeorgiaCarry.Org v. Corps of Engineers*, 38 F.Supp.3d 1365 (N.D.Ga. 2014), a case that upheld the same regulation. The Georgia District Court found that the regulation did not infringe on the right to defense within the home, and that the

[24] Contrary to the accusations found on page 15 of the Answering Brief, it is the Plaintiffs, not the Defendants, who "argue the pros and cons of public policy issues that have already been decided by the Delaware legislature". As set forth more fully in Argument II above, the General Assembly has resolved the policy issues in a manner contrary to the plaintiffs' political views, by entrusting the Defendants to maintain and protect Forests and Parks and the visiting public.

plaintiff camper could avoid a perceived threat of harm by choosing to recreate elsewhere. *Id.* at 1374, 1375. The rationale was as follows:

> Indeed, courts have found carry restrictions on properties far more integral to citizens' everyday lives to fall outside the scope of the Second Amendment. *See, e.g., Young[v. Hawaii],* 911 F.Supp.2d [972] at 989–90 [D. Hawaii 2012] [Plaintiff does not allege a constitutional violation under Hawaii's Firearm Carrying Laws, which allow firearms to be carried in public with a showing of special need; because the right to bear arms does not include the right to carry any weapon whatsoever in any manner whatsoever and for whatever purpose]; *Kachalsky v. Cacace,* 817 F.Supp.2d 235, 240, 264 (S.D.N.Y.2011) (finding that a New York law banning handgun possession outside of the home without a showing of "a special need for self-protection distinguishable from that of the general community" fell outside the scope of the Second Amendment), *aff'd* 701 F.3d 81 (2d Cir.2012); *Digiacinto v. Rector & Visitors of George Mason Univ.,* 704 S.E.2d 365, 370 (Va.2011) (finding that almost total ban of firearm possession on university campus did not violate second amendment); *United States v. Dorosan,* 350 Fed.Appx. 874, 875–76 (5th Cir.2009) (per curiam) (finding that a firearms ban in post office parking lots fell outside the scope of the Second Amendment). *Id.*

In addressing the purported Constitutional violation, the Georgia District Court applied intermediate level scrutiny, because the regulation was not a broad act of governance applicable to private property, but rather a managerial action affecting only government-owned lands. *Id.* at 1376 (citing *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 598 (2008); *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir.2012)(upholding a law stating that "[e]very person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor"); and *United States v. Masciandaro*, 638 F.3d

458, 473 (4th Cir.2011)), *infra*. The purely voluntary and temporary presence of the plaintiff on Corps property for recreation placed only a limited burden on his rights. The Court quoted from *Moore v. Madigan*, 702 F.2d 933, 940 (7th Cir. 2012), a case relied on by Plaintiffs[25] in support: "when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need."

And in *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)(upholding a municipal handgun storage and ammunition sale ordinance) the Circuit Court applied to a Second Amendment case the First Amendment principle that reasonable "time, place, or manner" restrictions on protected speech that leave open alternative channels for communication pose less of a Constitutional burden. "[T]he Second Amendment right, like the First Amendment right to freedom of speech, may be subjected to governmental restrictions which survive the appropriate level of scrutiny." *Id.* at 970. The same is true for the qualified right secured by Article I, Section 20 of the Delaware Constitution.

A State Park does not become a home when a visitor stays overnight as a guest with the State's permission on rented premises. A member of the public who chooses to stay at a campsite, cabin, boat slip, or yurt within a Delaware State Park

[25] AB at 18.

is a guest of DNREC, subject to the rules and regulations governing the brief stay. The guest becomes part of an ever-changing community comprised of other guests, who share communal facilities. In many ways, including personal privacy, the rights of the individual yield to the rights of the group as a whole, for example in terms of "lights out" and "quiet time". Security is maintained by the State, for the protection of the guests. Just as a private campground or motel owner may ban smoking, or fireworks, or weapons, the State as landowner may take such precautionary measures to assure public safety. A Park guest has no property interest in a campsite or cabin, and cannot exclude a Park official who wishes to inspect or enter the premises. A guest consents to the rules governing the stay, and the State reserves the right to remove any guest who violates the rules. A tent, cabin, berth, or yurt is not a private dwelling, and individual preferences must yield to the collective good. A temporary guest cannot prevent the State from excluding firearms from Park facilities.

In *United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011), *cert. denied*, 132 S.Ct. 756 (2011), a conviction for carrying a loaded handgun[26] in a motor vehicle within a national park area was affirmed. The criminal defendant testified at trial that he carried the gun for self-defense, because he carried

[26] A search of the motor vehicle produced a machete and a loaded 9 millimeter Kahr semi-automatic pistol.

valuables and frequently slept in his car. He claimed the Constitutional right to carry and possess a gun "in case of a confrontation". *Id.* at 465. Moreover, he sought to claim the same right of self-defense when sleeping overnight in his car as that recognized by a divided United States Supreme Court in *Heller, supra,* 554 U.S. 570 (2008) for purposes of a dwelling.

Much like the Delaware Supreme Court in *Doe v. WHA, supra,* the Fourth Circuit found a fundamental right to possess firearms for self-defense within the home. But the Court acknowledged a "considerable degree of uncertainty….as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation." *Masciandaro, supra*, at 467. Whereas the right to armed self-defense within the home was thought to be fundamental, "…as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense". *Id.* at 470. The Court declined to subject the federal firearm regulation at issue to strict scrutiny, because doing so "…would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to prevent armed mayhem in public places, and depriving them of "a variety of tools for combating that problem." *Id.* at 471. Accordingly, the *Masciandaro* Court, like the Delaware Supreme Court in *Doe,* applied the standard of intermediate scrutiny. The prosecution was required to show that the firearm

ban was reasonably adapted to further a substantial governmental interest. Under that standard, the Regulations challenged by the Plaintiffs would survive, in that they do not unduly burden the right to self-defense outside the home and in public places, where innocent people may be harmed by gunfire, and they surely do advance the substantial government interest in public safety.

The Court in *Masciandaro* wrestled with the *dicta* in *Heller, supra* at 595, where the U.S. Supreme Court stated that "nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings". The Court regarded such restrictions as "presumptively lawful". *Id.* at 627, n.26. The Fourth Circuit did not reach the question of whether such places were entirely outside the scope of the Second Amendment, finding instead that the challenged federal park regulation passed Constitutional muster under intermediate scrutiny. *Masciandaro, supra,* at 473. This holding provides a clear path for the analysis that this Court must undertake under Article I, Section 20 of the Delaware Constitution, as firearms regulations in parks and forests are presumed lawful and satisfy the balancing test implicit in intermediate scrutiny.

As the Court recognized in *Masciandaro*, the government has a substantial interest in providing for the safety of individuals who visit and make use of parks. Although the government's interest need not be "compelling" under intermediate

scrutiny, cases have sometimes described the government's interest in public safety in that fashion. *Schenck v. Pro–Choice Network,* 519 U.S. 357, 376 (1997) (referring to the "significant governmental interest in public safety"); *United States v. Salerno,* 481 U.S. 739, 745 (1987) (commenting on the "Federal Government's compelling interests in public safety"). The location of the arrest in *Masciandaro*, Daingerfield Island, is a national park area where large numbers of people, including children, congregate for recreation. Such circumstances justify reasonable measures to secure public safety. *Id.* at 473. In Delaware's State Parks and Forests, it is reasonable to restrict firearms in the same way for the identical reasons.[27] As even the Plaintiffs concede, Article I, Section 20 "does not allow for an absolute and unfettered right" outside the home.[28]

Plaintiffs, noting that the holding in *Doe v. WHA* extended the right to self-defense in the home to common areas[29], would have this Court compare State Parks and Forests to the public housing building lobby, because both are open to

[27] The case of *Kolbe v. Maryland*, 2016 WL 425829 (Feb. 4, 2016) cited by Plaintiffs, AB at 19, footnote 10, will be reheard *en banc* by the Fourth Circuit. As the case dealt with a statewide ban on assault weapons, it is readily distinguished. The criminal case of *U.S. v. Robinson,* 2016 WL 714968 (4th Cir. Feb. 23, 2016) cited in the same footnote, dealt with a Fourth Amendment search issue, in the context of a suppression motion, and has nothing to do with the issues presented here.

[28] AB at 19.

[29] AB at 19.

the public and outside the confines of home.[30] The illogic of this cognitive leap can be refuted by simple geometry. The tenants in *Doe* could only access their residential units through the lobby. Hence, upholding a ban on weapons in common areas would render it practically impossible to transport those weapons to the "home". In order for the residents to carry weapons from the Point A (the street, where they were presumptively legal to possess) to Point B (the dwelling unit, where the Court held they were protected by Article I, Section 20), the Court was constrained to extend the concept of "home" to the common areas such as the lobby and elevators. Geometry holds no similar promise to the present Plaintiffs, who have no need to pass through State Parks or Forests on the way to and from Point A and Point B. Plaintiffs' reliance on *State v. DeCiccio,* 105 A.3d 165 (Conn. 2014) is misplaced. Transporting weapons for the purposes of moving residences cannot be equated with a visit to a State Park. Plaintiffs are free to transport arms and to travel to and from shooting competitions, so long as they do not enter onto State lands. Mere inconvenience is insufficient to invalidate State laws.

This case is not about "open carry". The Defendants advocate no limitations on the ability of the Plaintiffs to carry firearms on the street, in their homes, or in their vehicles, so long as they do not enter onto (or within 1000 feet of, in some

[30] Ab at 30, 31.

cases) State property such as a school, campus, courthouse, office, museum, park, or forest. And, where and when hunting or shooting on State land is permitted, Plaintiffs can "open carry" their weapons. However, the Plaintiffs are mistaken in pretending that the right to "open carry" is absolute.[31] *Doe v. WHA* does not so hold. In *Baker v. Schwarb*, 40 F. Supp. 3d 881 (E.D. Mich. 2014), the Court granted qualified immunity to police officers who briefly detained two heavily-armed men walking near a public park. The Court found that the plaintiffs, by their own admission, were "trolling for a confrontation, by displaying their arms in a way that was extraordinary for the neighborhood." *Id.* at 890. The police were justified in stopping and detaining them and briefly seizing their weapons. The Court held that the Second Amendment right claimed - the right to bear arms for the purpose of self-defense outside the home—is not clearly established under the Second Amendment. *Id.* at 894. The same result was reached in *Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012), where a park ranger detained a visitor to a state park dressed in camouflage and armed with a Draco AK-47 pistol slung across his chest. The pistol had an 11.5-inch barrel with a fully loaded, 30-round magazine attached to it. The Court found that the ranger had qualified immunity from a Civil Rights lawsuit, rejecting the plaintiff's Second Amendment claim, finding that

[31] AB at 19-20.

"[n]o court has held that the Second Amendment encompasses a right to bear arms within state parks." *Id.* at 581.

Plaintiffs advocate self-help, through the use of firearms, to deal with "confrontations", rather than waiting for assistance from law enforcement.[32] They acknowledge the State's public safety obligations, but speculate (without citing any examples) that the Defendants may not be able to provide sufficient security due to limited resources.[33] What is missing from this incomplete equation is some allegation as to the threat presented. Conspicuously missing from their Complaint are any statistics concerning violent crime in State Parks and Forests. What are the "emergency situations" for which the Plaintiffs demand firearms? Under what circumstances would a DDA or DNREC officer be "too late to prevent an injury" leaving "sportsmen" at the "mercy of others".[34] The Plaintiffs paint a lurid picture to justify their need for an armed defense, but it is pure fiction.[35] There is no

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[32] AB at 20.

[33] They complain that a total of 700 officers (679 State Police with statewide jurisdiction and 21 Park positions, as of a 2003-2008 study) is not enough, but then state that "no amount of increase" would justify the Regulations. In other words, even if the State could provide what Plaintiffs would deem "adequate security", they would still claim the right to arm themselves. Their claims thus seem to have nothing to do with the adequacy of law enforcement.

[34] AB at 20-21.

[35] The Plaintiffs' numbers argument, AB at 20 n.11, ignores the relative size of the jurisdictions normally patrolled by DNREC officers, as compare to State Troopers. A total of 21 Park officers covering 26,000 acres means one officer for every **1,238** acres. (See http://www.destateparks.com/downloads/programs/guides/

evidence or factual allegation before the Court that would support the bare unsubstantiated claim that the Defendants failed to provide for public safety. The Defendants have demanded substantiation, and the Plaintiffs have responded with rhetoric.[36]

Plaintiffs are also mistaken in contending that the Defendants deny them the right to hunting and recreation guaranteed by the Constitution.[37] As noted in the Opening Brief and in the Statement of Facts in this Brief, DDA and DNREC afford ample opportunities for recreational hunting for a wide variety of game, using a variety of weapons, including various firearms, during appropriate seasons, and in designated places around the State. This is the kind of "time, place, and manner" limitation routinely upheld by the courts in cases such as *Jackson, supra.* The plaintiffs are mistaken in claiming that the Defendants "interfere" with recreational shooting, apart from hunting. To the contrary, DNREC, through its Division of

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SpringGuide2016.pdf.). Whereas 679 state troopers covering 1,982 square miles (1,268,480 acres), mean one state trooper for every **1,868** acres of land. (See http://delaware.gov/topics/facts/ geo.shtml) And, as noted previously, every one of the 679 Troopers has statewide arrest authority.

[36] The Plaintiffs question, AB at 25, the inconsistency, raised by the Defendants, between visitors' firearms and officers preserving public safety. OB at 22. The General Assembly, in determining that trained law enforcement officers should protect the public in Parks and Forests, did not rely on "amorphous safety concerns" or "discredited scare tactics", but rather the risk of harm presented by loaded guns.

[37] AB at 21-22.

Fish & Wildlife, operates facilities at Ommelanden Hunter Education Training Center[38] in New Castle County and Owens Station in Sussex County, which include shooting ranges for rifles, pistols, archery, trap, and skeet, and a hunter education center.[39] The truth is that the Defendants promote and facilitate both hunting and recreational shooting, consistent with Article I, Section 20. The Plaintiffs cannot claim the absolute right to hunt or shoot anything, anywhere, at any time. The Regulations are calibrated to insure reasonable stocks of game, as well as ample and varied shooting and hunting experiences.

The Plaintiffs concede that intermediate scrutiny[40], and not strict scrutiny, is appropriate in evaluating the Regulations and the enabling statutes, which were left in place when the Constitution was amended in 1987. The governmental action here does not burden the right to recreational hunting or shooting, but in fact encourages it. Use of firearms in State Parks and Forests is limited; not prohibited. The reduced right to self-defense and defense of others, outside the confines of the home, must be balanced with the plain risk presented to innocent visitors by the discharge of firearms by visitors without training or standards. There has been

[38] http://www.dnrec.delaware.gov/fw/HunterEd/Documents/Ommelanden%20schedule%209-30-14.pdf.
[39] http://www.dnrec.delaware.gov/News/Pages/Owens-Station-Shooting-Sports-and-Hunter-Education-Center-dedicated-as-downstate-state-owned-facility.aspx.
[40] AB at 22.

zero showing of any threat of violence to unarmed visitors, attributable no doubt to the fact that the Defendants provide security and protect public safety in Parks and Forests through uniform officers, with backup from State Police officers having full arrest authority.[41] On balance, the limits on firearms on public land further a legitimate government objective in maintaining the peace. Given the Plaintiffs' failure to plead any threat of violence, the Defendants have no burden to justify the policy adopted by the General Assembly and implemented by the Defendants.

It is the Plaintiffs, not the Defendants,[42] who have emerged the losers in the policy debates. The General Assembly charged the Defendants with regulating recreation and hunting, and with preserving public safety on State lands under their control. The enabling statutes were the product of the democratic process, and the Regulations issued thereunder were likewise the product of a transparent process of notice, comment, hearings, and amendment. They have remained in place for more than five decades because the public supports them, and the General Assembly has not been inclined to repeal them.

The Plaintiffs attempt to turn the tables on the issue of safety concerns, whereas they are the ones with the "irrational fear"[43] of an undefined threat, man or beast, present in State Parks and Forests, that they insist requires them to be armed,

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[41] 11 *Del. C.* §8302.
[42] AB at 24.
[43] AB at 26.

at all times, in order to use lethal force to protect themselves and others. This is wrong. The Defendants have no burden to justify the determination of the General Assembly to have DDA and DNREC take responsibility for public safety, or the action of the Governor, through Defendants, to issue the Regulations. Unrestricted "open carry" of firearms unlimited by number or type or training or experience, on crowded beaches and in family campgrounds or peaceful forests, presents a clear and present danger that the firearms will be discharged, perhaps in anger, perhaps by accident, or in a misguided and unjustified attempt at defense. The lingering question, in terms of "irrational fear", is the unexplained threat of violence that the Plaintiffs cite repeatedly as their reason for needing protection, without ever identifying who or what it is that causes that fear.[44]

The Plaintiffs' further policy arguments should simply be disregarded. The same kind of junk science could be used to attack laws barring guns from within 1000 feet of a school or college campus, courthouses, state office buildings, museums, or other public places on government land. The Courts have spoken, and such firearms restrictions in such "sensitive places" have been upheld, as a matter of Constitutional law, as a legitimate exercise of legislative authority to

[44] The reference to "Jim Crow", AB at 26, is an unfortunate effort to inject race into an argument where it has no place. Needless to say, there is no evidence or allegation that the Defendants have engaged in discrimination. Likewise, the citations at footnote #14 on page 28 only distort the issues.

protect the public. To the extent that arguments such as those belatedly advanced by the Plaintiffs were made to the policy-makers, they were rejected. To the extent that the Plaintiffs question such laws, they have already lost.[45]

The Plaintiffs appear to argue that laws regulating firearms in such "sensitive places" can be overturned, under *Doe v. WHA*. The distinction turns on how one regards "traditional government services" in the context of the *Doe* holding. *Id.* at 668. What the Court meant by this formulation in *Doe* was that regardless of the State's role as landlord, a residence in a public housing unit should be treated the same as any other dwelling. Even in government housing, the focus of Article I, Section 20 on defense of the home and family meant that the WHA regulations must yield. Yet the Court recognized that other "sensitive places" maintained by government exist, which are not anyone's dwelling-place, but are instead where large numbers of citizens gather, and the state is responsible for their well-being. The question facing this Court, in light of this background, is whether a State Park or Forest is like a private dwelling, or is more like a university campus, a schoolyard, or the grounds of a state office building or other

[45] Plaintiffs err in citing a change in federal regulations to defer to state law in determining whether firearms may be brought into National Parks. A policy decision by the President, or by the Congress, can have no effect on the Constitutionality of the Regulations under Article I, Section 20. What is noteworthy is that the former federal regulations were upheld in *United States v. Masciandaro, supra.*

facility, a museum, a stadium or recreation area. For purposes of the right to carry firearms for defense, a State Park or Forest has nothing in common with a private dwelling. Visitors leave the sanctity of the home to visit – voluntarily – a state facility. They share a forest or park with other visitors, on a temporary basis, as guests. As with the other places where visitors congregate, the State may reasonably restrict weapons in the interest of public safety, just as police officers may enforce the provisions of Title 11 and Title 24 as to firearms.

III. THE PUBLIC SAFETY REGULATIONS GOVERNING CONDUCT IN STATE PARKS AND FORESTS ARE CONSISTENT WITH OTHER CRIMINAL LAWS REGULATING FIREARMS.

It is a paradox that the Plaintiffs can boldly proclaim that "[t]he comprehensive restrictions imposed by the legislature on the right to keep and to bear arms are not at issue in this matter"[46], with respect to Title 11 and Title 24 of the Delaware Code, while categorically opposing Regulations issued pursuant to the authority of the General Assembly found in Title 3 and Title 7 that are part of those "comprehensive restrictions". For the Plaintiffs, apparently, some "comprehensive restrictions" are okay, while others are not. They reserve the right to pick and choose which laws governing firearms they wish to obey, and which they find inconvenient to their lifestyle or offensive to their personal philosophy. This fundamental inconsistency dooms their argument. In conceding that criminal

[46] AB at 4, footnote #3.

laws regulating firearms pass Constitutional muster, including even 11 *Del. C.* §1457 regarding safe zones extending onto private property, they forfeit the ability to selectively denounce comparable restrictions in other public areas. Not only is prohibiting firearms near a school or recreation area consistent with restrictions on firearms in State Forests and Parks, but if the former does not offend Article I, Section 20, then the same must hold true for the latter.

It is noteworthy that the Plaintiffs completely ignore the case of *Fla. Carry, Inc. v. Univ. of Fla.*, 2015 WL 6567665 (Fla. App. Oct. 30, 2015)[47], in which the Court rejected the same argument which Plaintiffs attempt here, that the state legislature had pre-empted the field, in the course of upholding a regulation prohibiting firearms in university housing. Plaintiffs' silence in the face of this authority speaks volumes.

Plaintiffs argue that the Regulations are "inconsistent with and *preempted* by" criminal and licensing laws enacted by the Delaware General Assembly. AB at 31 (citing *Cantinca v. Fontana*, 884 A.2d. 468 (Del 2005)) (emphasis added). The doctrine of preemption applies to situations in which "the law of a superior sovereign takes precedence over the laws of a lesser sovereign; for example, a federal law preempting a state law or a state law preempting a city or county ordinance." *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1121 (Del.

[47] Cited in the Opening Brief at 31-32.

2009). Delaware law does not preclude the General Assembly and its political subdivisions from enacting similar provisions and regulations, if the two laws do not conflict. *Cantinca*, 884 A.2d at 473; *Poynter v. Walling*, 177 A.2d 641, 646 (Del. Super. 1962); and *Firemen's Ins. Co. of Washington, D.C. v. Washington*, 483 F.2d 1323, 1328 (D.C.Cir.1973) ("Statutory and local regulation may coexist in identical areas although the latter, not inconsistently with the former, exacts additional requirements, or imposes additional penalties.").

The preemption test considers "whether the state statute was intended to be exclusive." *Cantinca v. Fontana*, 884 A.2d 468, 473 (Del. 2005); citing *Poynter*, 177 A.2d at 646. The General Assembly's intention to make a state statute exclusive of any regulation of the same subject matter by a political subdivision may be express or implied. *Cantinca*, 884 A.2d at 474. The legislature's express exclusive intent can be demonstrated when "the statutory text or legislative history explicitly provides or demonstrates that the state statute is intended to replace or prevail over any pre-existing laws or ordinances that govern the same subject matter." *Cantinca*, 884 A.2d at 474. On the other hand, implied exclusive intent is shown when the state and local laws are inconsistent – "for example, where a state statute prohibits an act that is permitted by a local ordinance." *Cantinca*, 884 A.2d at 474 (citing *Hayward v. Gaston*, 542 A.2d 760, 767 (Del.1988))("holding that the Kent County Zoning Ordinance was not preempted by Chapter 90 of the Delaware

Code because they were not inconsistent"). The laws are inconsistent when the local law hinders the state law. *Cantinca*, 884 A.2d at 474 (citing *Hayward*, 542 A.2d at 767) ("The two sets of regulations were not inconsistent because the county zoning authority in no way hindered the objectives of Chapter 90.").

In 1987, when the General Assembly enacted Article I, Section 20, the DNREC Regulation prohibiting the possession of a firearm in the park, except for lawful hunting, had been on the books for twenty-five years.[48] There is no indication that the General Assembly expressly intended to occupy the field of firearms in areas other than proscribed criminal conduct, and registration. Nor is there any evidence that the legislature sought to preclude public safety measures within their respective jurisdictions by DNREC or DDA. Neither the plain language of the Constitution nor any state statute demonstrates such an intent, nor can any such intent to pre-empt be implied from the statutory scheme.

An intent to preempt the Regulations cannot be implied, because the State law and Regulations do not conflict, and they are not inconsistent, but rather complementary. Plaintiffs cite several criminal statutes in an attempt to demonstrate such a conflict, but their argument is unavailing. None of the statutes that establish the procedures and requirements for obtaining a license to carry a concealed deadly weapon put any limitations on government entities – such as a

[48] OB at 20 n.4.

court or school – from prohibiting licensed individuals from possessing deadly weapons. *See* 11 *Del. C.* §§ 1441, 1441A, 1441B. These statutes do not guarantee a right to such a license. A person applying for a license to carry a concealed deadly weapon must strictly comply with numerous conditions, and once granted, the license is not unfettered. The license is limited in duration, and it is revocable. Both §1441A and §1441B, which address licenses for active-duty and retired law enforcement officers, expressly state that the statutes *do not* preempt any state restriction on the possession of a firearm in a park.

> This section [§1441B] shall not be construed to supersede or limit the laws of any state that:
>
> (1) Permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
>
> (2) Prohibit or restrict the possession of firearms on any state or local government property, installation, building, base, or park.

Plaintiffs' reliance on statutes that criminalize or elevate the criminal penalties for possessing a deadly weapon also do not conflict with the Regulations. Those laws encompass a different statutory scheme – the illegal possession of a concealed deadly weapon. The fact that firearms are deadly weapons cannot logically lead to the conclusion that these laws are an express or implied

preemption of the Regulations.[49] As the Plaintiffs have stated, Delaware is an "open carry" state, meaning that carrying a concealed firearm without a license is a crime. The flip side of this law is that open carry is not illegal, absent other laws or regulations that apply. Examples would be persons prohibited from carrying a weapon due to past criminal convictions, 11 *Del. C.* §1448, or persons carrying a weapon while committing a felony, 11 *Del. C.* §1447, or possessing a weapon within 1000 feet of a school zone, 11 *Del. C.* §1457. Another example would be the DDA and DNREC Regulations restricting firearms in state forests and parks. These laws complement, rather than conflict with, the Regulations.

Likewise, Plaintiffs' citation to the statutes governing licensing of firearms does not demonstrate that those laws pre-empt the Regulations. Those statutes, which are governed by Title 24 "Professions and Occupations," address the licensing requirements for deadly weapons dealers, not a state agency or other local government. 24 *Del. C.* §§901-905, and are easily distinguished. Finally, Plaintiffs' citation to 22 *Del. C.* §111 is also futile. That statute solely concerns, and limits the regulatory authority of, municipalities, and not the State's own agencies such as DNREC or DDA. If anything, the existence of 22 *Del. C.* §111

[49] A criminal defendant could be prosecuted for both Carrying a Concealed Deadly Weapon and for Illegal Possession of a Firearm in a Park, and, if applicable, Possession of a Deadly Weapon by a Person Prohibited, 11 *Del. C.* §1448, or Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del. C.* §1447, without offending the Double Jeopardy Clause.

demonstrates that the General Assembly knows how to limit firearm regulatory authority, if and as it cares to do so. The Court should not extend this law to any government entity other than the ones that the General Assembly expressly and unequivocally address here – municipalities.

CONCLUSION

The Plaintiff Brief, with its abstract references to "natural law" and "fundamental rights" and heavy reliance on secondary sources, seems detached from reality and unmoored in applicable precedent. Contrary to the romantic frontier images conjured up, the reality is that the Plaintiffs advocate a change in the law that would permit anyone to bring any firearm – or assortment of firearms – into any State Park or Forest, at any time, under any circumstances, regardless of the risk presented to other citizens. This case is not just about the concealed carry permit holder, or the "wayward hunter", or the bicycle posse, or the overnight camper and their arsenal. As Delaware is an "open carry" state, this lawsuit is about encouraging citizens to strap on a loaded revolver in a holster, or a semi-automatic weapon, perhaps an AK-47, with a full magazine, and wander down the beach at Cape Henlopen or Indian River, or through a campsite at Killens Pond, or along the Brandywine River. The Plaintiffs aim to interfere with law enforcement officers keeping the peace, in favor of taking matters into their own hands. Yet they have made no showing that such an escalation in firepower is necessary, or that the Constitutional provision on which they rely would justify such conduct by invalidating the Regulations promulgated in the interest of public safety. Nor have the Plaintiffs shown how the Regulations differ from other laws prohibiting firearms on state property that they admit are Constitutional.

A wholesale call to arms is not what the General Assembly envisioned, when in 1987 it adopted a Constitutional Amendment regarding the use of firearms for recreation, hunting, and the defense of home and family. The limited categorical right to "keep and bear arms" did not explicitly or implicitly repeal existing criminal statutes or regulations governing public safety. Affording a right to armed defense within a dwelling did not authorize the unrestricted use of possession of firearms in public places on government property. By statute, the State provides law enforcement officers and takes responsibility for public safety on State lands. The Plaintiffs have not alleged a single threat or danger in a park or forest that would necessitate armed resistance or the use of deadly force. Unreasoned fear is not a justification for carrying a firearm, but rather an excellent reason to restrict use and possession. Visitors to State Parks and Forests are entitled to enjoy themselves, free of the risk of harm presented by unrestricted firearms.

Nowhere in the text of the Constitutional amendment or the legislative history is there any evidence that the legislature sought to undercut the historic state restriction of recreational hunting to defined seasons. The authority of DDA and DNREC, conveyed by the General Assembly, to limit recreational hunting by type of game, weapon, location, and dates survives intact. The Plaintiffs state no basis for upending Regulations that guarantee, rather than prohibit, the right to

recreation and hunting on State lands, in a reasonable way that preserves game stock and protects the public.

Finally, it is noteworthy that the Court of Chancery, in dismissing the original lawsuit, found that the Plaintiffs had failed to allege facts sufficient to invoke equitable jurisdiction to enjoin the enforcement of the law. No Plaintiff has cited an incident or arrest, or an attack, for that matter. Their rights have not been violated in any material way. Their complaints amount to nothing more than personal convenience, preferences, and abstractions. They make no showing of prejudice or harm from enforcement of the existing Regulations. There is no risk of irreparable harm that could arise from simply respecting regulations that are binding on other members of the public, for purposes of mutual safety. The objections to the law are theoretical. Such abstract notions and personal preferences must give way to the duty to protect public safety on State lands.

STATE OF DELAWARE
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IN THE SUPERIOR 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, 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.	C.A. No. S16C-06-018 THG

PLAINTIFFS' COMBINED OPENING BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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Dated: July 15, 2016

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I. Introduction

Plaintiffs[1] (collectively referred to as the "Sportsmen"), initiated this matter[2] to prohibit Defendants[3] (collectively referred to as "the Agencies") from enforcing regulations promulgated by the DOA and DNREC that unconstitutionally prohibit Sportsmen's right to keep and bear arms for defense of self and family, and for recreation pursuant to Article I, § 20 of the Delaware Constitution.

The Agencies casually trifle with a right that the United States Supreme Court has recognized to be so fundamental that the United States Constitution did not actually grant that right—rather it recognized the right to self-defense and to bear arms as a pre-existing right granted at birth.[4] *District of Columbia v. Heller*,

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[1] 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.

[2] This matter was initially filed in the Court of Chancery to seek preliminary and injunctive relief, but that Court determined that it lacked equitable jurisdiction.

[3] David Small, Secretary of the Delaware Department of Natural Resources and Environmental Control, the Delaware Department of Natural Resources and Environmental Control ("DNREC"), Ed Kee, Secretary of the Delaware Department of Agriculture, and the Delaware Department of Agriculture ("DOA").

[4] The Agencies can accurately be described as opposing Sportsmen's civil rights. Federal courts have recognized that the right to bear arms is a basic civil right. *See, e.g., National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2600, 183 L.Ed.2d 450, 489 (2012) ("protected civil rights, such as the right to bear arms or vote in elections."); *DuPont v. Nashua Police Dept.*, 113 A.3d 239, 247 (N.H. 2015), *cert. denied*, 133 S.Ct. 533 (2015) ("Second Amendment right to keep and bear arms is a civil right"). Plaintiff Delaware State Sportsmen's Association has

554 U.S. 570, 594 (2008).

These fundamental constitutional rights are also enshrined in Article I, § 20 of the Delaware Constitution, which the unanimous *en banc* Delaware Supreme Court recently rejuvenated as Delaware's broader version of the Second Amendment in *Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014).

The Agencies fail in their briefs filed in this matter to recognize the holding in *Doe v. WHA* and they falsely characterize its holding, in which our Supreme Court confirms that Article I, § 20 includes the right to bear arms outside one's home. Sportsmen have already alleged that but for the Agencies' regulations, they would exercise their right to possess and carry a firearm in State Parks and State Forests. The law is settled that Sportsmen are not required to suffer harm,[5] or be arrested for violating the law, or allege impending death or serious bodily harm requiring self-defense to sufficiently state a claim that the Agencies' regulations prevent them from exercising their fundamental, constitutionally guaranteed rights.

Likewise, Sportsmen are not required to justify their need, or state a reason

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been Delaware's NRA State Association since 1968. *See* www.dssa.us. The National Rifle Association is America's longest-standing civil rights group, founded in 1871. *See* https://home.nra.org/about-the-nra/.

[5] Notwithstanding the multitude of repetitious assertions to the contrary - without authority - in the briefs of the Agencies', Sportsmen do not need to establish harm in order to vindicate their fundamental constitutional rights.

for possessing a firearm, or show harm from being deprived of the right, because Article I, § 20 already established the public policy of this state to allow them to do so without such a showing. By way of comparison, the Agencies' argument would be as absurd as if they were to suggest that, before challenging a restriction on their right to free speech or freedom of religion, citizens must first demonstrate a need for free speech, or demonstrate a "tangible" harm from a regulation prohibiting the freedom of religion.

The Agencies obfuscate the real issues in their briefs and raise issues that are not contested and not necessary for this Court to decide. The only issues this Court needs to address can be simply stated as follows:

- Are the regulations that prohibit firearms in State Parks and Forests in violation of Article I, § 20 of the Delaware Constitution?
- Are the regulations preempted?
- Do the regulations exceed the statutory authority of the agencies?

The Agencies present Sportsmen with a "Morton's Fork."[6] They seek to force Sportsmen to choose between two equally unappealing alternatives: deny

[6] *See Hermelin v. K-V Pharmaceutical Co.*, 54 A.3d 1093, 1099 n.19 (Del. Ch. 2012) (stating the plaintiff's predicament was "a "Morton's Fork": a choice between two equally undesirable alternatives).

themselves the benefits offered by State Parks and Forests, or deny themselves their natural rights, recognized by the Delaware Constitution, to exercise their entitlement to self-defense in State Parks and Forests (and risk arrest if they attempt to exercise that right). The Delaware Constitution does not allow the Agencies to impose such a dilemma on Sportsmen.

Sportsmen seek to exercise their fundamental, constitutionally guaranteed rights without fear of arrest or fines, and within the confines of the existing comprehensive statutory framework imposed by the legislature that already limits those rights.[7]

DNREC regulation 9201.24.3 prohibits the possession of firearms upon any lands or waters administered by the Division of Parks and Recreation of the Department of Natural Resources and Environmental Control. Also, 3 Del. Admin. Code § 8.8, (together with DNREC regulation 9201.24.3, the "Regulations")

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[7] The comprehensive restrictions imposed by the legislature on the right to keep and to bear arms are not at issue in this matter. They provide existing limits on the use of firearms in State Parks and Forests. *See, e.g.*, 24 *Del. C.* §§ 901, 902, 903, 904, 904A; 11 *Del. C.* §§ 1441, 1441A, 1442, 1444, 1448, 1448A. As the foregoing statutes demonstrate, it is not correct, as the Agencies assert, that "Plaintiffs seek the Court's endorsement of an unlimited right to carry firearms of their choosing within State Parks and Forests at any time." Op. Br. at 3. At issue is a complete abolition (other than for hunting) of the right to possess arms as well as to carry arms in State Parks and Forests, both of which the legislature already restricts extensively. Those existing restrictions imposed by the legislature are not at issue in this case.

adopted by the DOA, prohibits firearms on State Forest lands, with a narrow exception for legal hunting.

The Agencies do not squarely address or acknowledge their burden of proof to prove that the Regulations at issue do not violate Article I, § 20 of the Delaware Constitution. The Agencies agree that the Regulations at issue prohibit Sportsmen from possessing or carrying firearms in State Parks and State Forests, except for limited hunting[8] use at designated times and locations by license, but still assert that the Regulations were properly enacted.

The legislature has preempted the field of firearms regulation such that the Agencies may not also regulate that field. No enabling statute on which DNREC and DOA allegedly rely for their power to impose the Regulations can authorize the Agencies to eviscerate Sportsmen's constitutional rights.

[8] The limited hunting permissible is not an issue in this case.

II. Nature and Stage of the Proceeding

On December 22, 2015, Sportsmen filed their complaint in the Delaware Court of Chancery, seeking injunctive and declaratory relief, and alleging that the Regulations at issue are unconstitutional. Sportsmen then filed a Motion for Preliminary Injunction on December 28, 2015, and a Motion to Expedite the next day. On June 6, 2016, after oral argument, the Court of Chancery decided from the bench that it did not have subject matter jurisdiction.

On June 10, 2016, Sportsmen filed their complaint in this Court. On June 21, 2016, this Court entered an Order (D.I. 6), allowing the parties to submit the same briefs they filed in the Court of Chancery in support of their Cross-Motions for Judgment on the Pleadings. On June 27, 2016, the Agencies filed simultaneously both a revised Opening Brief and Reply Brief in support of their Motion for Judgment on the Pleadings, with citations to several new cases and revised arguments compared to their briefs filed in the Court of Chancery.

This is Sportsmen's revised Combined Opening Brief in Support of their Cross-Motion for Judgment on the Pleadings and Answering Brief in Opposition to the Agencies' Motion for Judgment on the Pleadings.

III. Statement of Facts

Sportsmen seek an adjudication that the Agencies' challenged Regulations breach fundamental constitutional rights enshrined in Article I, Section 20 of the Delaware Constitution and recently recognized by a unanimous *en banc* opinion of the Delaware Supreme Court in *Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014), by prohibiting Sportsmen, and others similarly situated, from possessing and carrying firearms in State Parks and State Forests.

A. The Parties

Plaintiff Bridgeville Rifle & Pistol Club, Ltd. ("Bridgeville") is a private organization based in Bridgeville, Delaware. Compl. ¶ 1. Many of Bridgeville's members are licensed to carry concealed deadly weapons pursuant to 11 *Del. C.* § 1441 and/or § 1441A. *Id*. at ¶¶ 1, 11.

Plaintiff Mark Hester is a member of Bridgeville, and resides in Kent County, Delaware. *Id*. at ¶¶ 2, 12. He is retired from the City of Dover Police Department, and is licensed to carry a concealed weapon pursuant to §§ 1441 and 1441B of Title 11 of the Delaware Code. *Id*. at ¶¶ 2, 12. Plaintiff Hester also holds a "surf fishing vehicle permit" pursuant to 7 Del. Admin. Code § 9201.10, which allows him to fish at the Delaware State Park beaches. *Id*. at ¶¶ 12. But for the Agencies' Regulations, Hester would exercise his right to carry a concealed weapon at Delaware State Park

beaches. *Id*.

Plaintiff John R. Sylvester is a member of Bridgeville, participates in rifle shooting competitions, and but for the Agencies' Regulations, would avail himself of camping facilities in Sussex County State Parks or State Forests while attending competitions at Bridgeville that extend for more than one day. Compl. at ¶¶ 3, 13.

Plaintiff Marshall Kenneth Watkins is a member of the Delaware State Sportsmen's Association, and is licensed to carry a concealed deadly weapon in Delaware pursuant to 11 *Del. C.* § 1441. *Id*. at ¶¶ 4, 14. But for certain Regulations issued by the Agencies, discussed below, Watkins would exercise his right to carry a concealed weapon during pre-season scouting of state-owned hunting lands. *Id*. at ¶ 14.

Plaintiffs Barbara Boyce and Roger Boyce are both members of the Delaware State Sportsmen's Association, and are lawfully licensed to carry concealed firearms in the States of Delaware, Pennsylvania, and Florida. *Id.* at ¶¶ 5, 6, 15. The Boyces are avid bicyclists, and but for the Agencies' Regulations, would exercise their right to possess firearms while cycling in Delaware's State Parks and State Forests. *Id*. at ¶ 15.

Delaware State Sportsmen's Association is an organization that promotes and protects the interests of gun owners in and around Delaware. *Id*. at ¶ 16.

The individual Plaintiffs are responsible, law-abiding citizens, who are permitted, under 11 *Del. C.* §§ 1441, 1441A, and/or 1441B, to carry concealed weapons. Compl. at ¶¶ 12, 14, 15.

Campsites for tents and campers, cabins and yurts, which are similar to cabins, are available for rental by members of the public at the Delaware State Parks. *See* http://www.destateparks.com/camping/index.asp.

B. Regulations at Issue

DNREC regulation 9201.24.3 prohibits the possession of firearms upon any lands or waters administered by the Division of Parks and Recreation of the Department of Natural Resources and Environmental Control. Compl. ¶ 25. 3 Del. Admin. Code § 8.8, adopted by the DOA, prohibits firearms on State Forest lands, with a narrow exception for legal hunting. *Id*. at ¶ 31.

DNREC regulation 9201.24.3 states, "[i]t shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division, except by those persons lawfully hunting in those areas specifically designated by the Division, or those with prior written approval of the Director." *Id*. at ¶ 25. "Division" is defined in 7 Del. Admin. Code § 9201.1 as the "Division of Parks and Recreation of the Department of Natural Resources and Environmental Control." *Id.*

Similarly, under 3 Del. Admin. Code § 8.8, the DOA prohibits the lawful possession of firearms within State Forest Lands, except when being used for legal hunting purposes: "[f]irearms are allowed for legal hunting only and are otherwise prohibited on State Forest Lands." *Id.* at ¶ 31.

C. The Regulations Impermissibly Conflict with state law

Both DNREC and DOA are prohibited from adopting rules and regulations that "extend, modify, or conflict with any law of [the State of Delaware] or the reasonable implications thereof." *See* 7 *Del. C.* § 6010; 3 *Del. C.* § 101(3); Compl. ¶¶ 29, 30. The Agencies violate these statutes.

The Regulations prohibiting the lawful possession of firearms within Delaware State Parks and State Forest lands, respectively, *extend, conflict with, and modify existing laws of* the State of Delaware. Specifically, the Regulations conflict with Article I, § 20 of the Constitution of the State of Delaware, which provides, "[a] person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." Compl. ¶ 17.

Neither Article I, § 20, nor statutory provisions regulating firearms, categorically prohibit the lawful possession of firearms within Delaware State Parks or State Forests.[9] Importantly, the Delaware Supreme Court unanimously clarified

[9] The only geographical limitations on the lawful possession of firearms enacted by

that, by its express terms, Article I, § 20 recognizes a right to bear arms outside of the home. *Doe*, 88 A.3d at 665 ("the scope of the protections [Article I, Section 20] provides *are not limited to the home*") (emphasis added).[10]

Specifically, the Court explained, "the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside of the home, including for hunting and recreation. Section 20 specifically provides for the defense of self and family *in addition to* the home." *Id.* (emphasis in original).

Furthermore, the adoption of the challenged Regulations is outside of the

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the Delaware General Assembly in Title 11 of the Delaware Code are discussed in 11 *Del. C.* § 1457—Possession of a Weapon in a Safe School Zone. That statute does not apply here. Also, the General Assembly, at 22 *Del. C.* § 111, recently gave municipal governments, effective August 17, 2015, the limited and narrowly circumscribed power to adopt ordinances regulating the possession of firearms, ammunition, components of firearms, or explosives in police stations and municipal buildings. Section 111, however, specifically states that "[a]n ordinance adopted by a municipal government shall not prevent the following in municipal buildings or police stations: … (6) carrying firearms and ammunition by persons who hold a valid license pursuant to either § 1441 or § 1441A of Title 11 of this Code so long as the firearm remains concealed except for inadvertent display or for self-defense or defense of others …." Because the General Assembly specifically excluded from the allowable limitations in § 111 those persons properly authorized to carry concealed firearms pursuant to 11 *Del. C.* §§ 1441 or 1441A, this new statute does not help the Agencies. It provides a recent example of the legislature's ability to expressly and specifically restrict possession and carrying of firearms.

[10] The Agencies fail to acknowledge this expressed part of the holding in *Doe*. Defs.' Opening Br. at 16. Worse—they mistakenly state that the quoted language from *Doe* in the above text was not part of the Court's holding.

scope and powers conferred upon the Agencies by the Delaware General Assembly. Neither Defendant has the authority to deprive Delaware residents of firearms for lawful protection contrary to the State statutory scheme or the Delaware Constitution. Defendant DNREC, under 7 *Del. C.* § 6001, has the power and authority to adopt regulations which best serve the interests of the public, consistent with reasonable and beneficial use of the State's resources, and the adequate supplies of such resources for the domestic, industrial, power, agricultural, recreational, and other beneficial use. *See also* 7 *Del. C.* § 4701(a)(4). Defendant DOA has the power to, *inter alia*, "devise and promulgate rules and regulations for the enforcement of state forestry laws and for the protection of forest lands" 29 *Del. C.* § 8101.

The power to regulate the possession of firearms was never conferred upon the Agencies by the Delaware General Assembly. But for the aforementioned Regulations adopted by the Agencies, Sportsmen would exercise their state constitutional rights to keep and bear firearms within Delaware State Parks and State Forest Lands.

IV. Questions Presented

1. Do the Regulations Violate Article I, Section 20 of the Delaware Constitution?

2. Are the Regulations Preempted?

3. Have The Agencies Exceeded the Scope of their Authority in Promulgating the Regulations?

V. Argument

A. The Regulations are unconstitutional

1. The Regulations Violate Article I, Section 20 of the Delaware Constitution

The Agencies' Regulations forbidding the lawful possession of firearms infringe upon Sportsmen's rights to keep and bear arms within Delaware State Parks and State Forests as guaranteed by Article I, § 20 of the Delaware Constitution. Article I, § 20 provides: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use."

The right to keep arms and the right to bear arms are two distinct rights. The Regulations are invalid, as they explicitly ban the right to "bear arms" for defensive purposes—and simply to possess arms, contrary to Article I, § 20.

The Agencies make policy arguments that are long on rhetoric, but short on citation to authority or legal analysis. They argue the pros and cons of public policy issues that have already been decided by the Delaware legislature when it adopted Article I, § 20 in 1987, and by the people when the Second Amendment to the United States Constitution was adopted in 1791.[11] Article I, § 20, according to the synopsis

[11] "For as the Constitution does not derive its force from the convention which framed it, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense

of the House Bill by which it was enacted, was added to the Delaware Constitution in 1987 to "explicitly protect[] the traditional lawful right to keep and bear arms."[12] H.B. 554, 133rd Gen. Assemb. (Del. 1986); H.B. 30, 134th Gen. Assemb. (Del. 1987).

As Justice Antonin Scalia wrote in the seminal United States Supreme Court opinion in *Heller*: "Undoubtedly some think that the Second Amendment is outmoded . . . . That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." 554 U.S. at 636.

Delaware historically has relished its sovereignty to afford greater rights and protections than provided by the Federal Constitution. *See State v. Ranken*, 25 A.3d 845, 855 (Del. Super. 2010) (recognizing that "Delaware has a history of expanding and jealously guarding the rights of its citizens in different areas of constitutional

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most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." *People v. Smith*, 733 N.W.2d 351, 354–55 (Mich. 2007) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 81 (1871)). *See also* Randy J. Holland, *The Delaware Constitution of 1897: The First One Hundred Years* 8 (1997) (ultimate power to form constitution is derived from the people).

[12] Notably, following § 20 is the statement: "WE DECLARE THAT EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED." DEL. CONST. art. I (end) (full capitalization in original). *See generally* Holland, *supra*, n.6, at 79, nn. 23–24 (discussing various interpretations of the foregoing statement).

law.”).

i) *Federal law Provides a Floor of Minimum Rights*

Although Article I, § 20 provides greater rights than the Second Amendment, cases discussing the lesser protection provided by the Second Amendment may also be instructive for historical purposes and for describing the *minimum* level of rights guaranteed. The *Heller* decision illuminates several important features of the right to bear arms as guaranteed by the Second Amendment. First, *Heller* acknowledges that the right to bear arms recognizes, at its core, the right to self-defense. 554 U.S. at 594. *Heller* also teaches that the right to bear arms is a natural right that each person is born with, and that the United States Constitution did not guarantee that right, but instead recognized the right to bear arms as a pre-existing natural right. *Id*. (“it is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense.”).

ii) *The Right to Self-Defense Extends Beyond the Home*

After the *Heller* decision, *McDonald v. City of Chicago*, 560 U.S. 742 (2010), clarified that “‘the need for defense of self, family, and property is most acute’ in the home,” thereby acknowledging that the right to bear arms extends beyond the home, although to a lesser degree.[13] 560 U.S. at 744 (citing *Heller*, 554 U.S. at 679);

[13] It warrants noting that campsites for tents or campers, cabins and yurts (similar to

see also Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012) (Seventh Circuit reasoned: "Both *Heller* and *McDonald* do say that 'the need for defense of self, family, and property is most acute' in the home, but that doesn't mean it is not acute outside the home.") (citation omitted). Indeed, the Seventh Circuit interprets *Heller* to mean that the Second Amendment (which is more limited than Article I, § 20) "confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942.

The Second Amendment, even as interpreted in *Heller* and *McDonald*, is more narrow in scope than Article I, § 20, but cases construing the Second Amendment are helpful to establish a baseline, below which Article I, § 20 cannot descend. Even when construing the more limited scope of the Second Amendment, Judge Posner

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cabins) are available for rental by members of the public at the Delaware State Parks. *See* http://www.destateparks.com/camping/index.asp. Although one federal court reached a different result on different facts, at least one federal court struck down regulations prohibiting firearms in tents on land under the authority of the Army Corps of Engineers. *See Morris v. U.S. Army Corps of Engineers*, 990 F. Supp. 2d 1082 (D. Idaho 2014). The same result should be reached here due to the availability of home-like rental cabins, tents, and yurts in State Parks. The right to mere possession in these "homes away from home" also applies to boats that can be used at State Parks. A widely recognized constitutional law scholar whose Second Amendment writings have been cited by the United States Supreme Court, Stephen Halbrook, refers to the *Morris* decision as reasoning that: "Banning a possession of a gun in a tent was likened to banning one in the home, requiring strict scrutiny." Stephen P. Halbrook, *Firearms Law Desk Book* § 1:13 (2015).

reasoned in *Moore* that "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.'" *Moore*, 702 F.3d at 936 (quoting *Heller*, 554 U.S. at 592).[14]

iii) *Delaware Supreme Court Recognizes a Constitutional Right to bear arms Outside the Home*

While § 20 does not allow for an absolute and unfettered right, by its express terms it extends to areas outside of the home. "Section 20 specifically provides for the defense of self and family *in addition to* the home." *Doe,* 88 A.3d at 665 (emphasis in original).

In *Doe*, the high court ruled that the right to bear arms extended to the common areas of a public housing authority—including outside areas—which were open to the public, and struck down a regulation that restricted the right to carry firearms to the confines of a resident's apartment. *Doe*, 88 A.3d at 668-69.

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[14] The Agencies rely upon several pre-*Heller* decisions including *State ex rel. West Virginia Div. of Nat. Resources v. Cline*, 200 W.Va. 101 (1997), but ignore the overruling effect on that case of both *Heller* and the recent Fourth Circuit (which includes West Virginia) decisions in *Kolbe v. Maryland*, 813 F.3d 160 (4th Cir. 2016) (applying strict scrutiny). The Agencies cite to several cases from other jurisdictions that involve facts that bear no similarity to those involved in this case. To the extent that they rely on other state constitutions or federal cases that pre-date *Heller*, they have no bearing on this case.

The Court also recognized the right to "open carry" based on Article I, Section 20 of the Delaware Constitution. *Doe*, 88 A.3d at 663. The Agencies' Regulations by definition conflict with the Supreme Court's recognition of a right to "open carry."

The need for self-defense may arise outside the home, while jogging or bicycling in State Parks. As Justice Scalia noted in *Heller*: "Confrontations are not limited to the home." *Heller*, 554 U.S. at 592. Delaware's State Forests and State Parks are vast, and, naturally, parts of them are remote.[15] The Agencies' Regulations effectively eliminate Sportsmen's ability to defend themselves with a firearm, and force them to wait for assistance to arrive in the form of a police officer or state park employee.[16] The Agencies may attempt to provide security at State Parks and Forests, but their resources are not unlimited, and assistance may not be as readily

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[15] David Small, *Finding a Fair Balance Is Not Easily Done*, The News J., May 28, 2016, at 9A ("[DNREC] manages nearly 100,000 acres of lands for outdoor recreation, fish and wildlife habitat. Those lands hold hundreds of buildings, . . .[and] nearly 500 miles of roads and trails . . . .").

[16] According to the April 2010 report by the Office of Management and Budget Statistical Analysis Center, "Crime In Delaware 2003-2008 An Analysis of Delaware Crime," State of Delaware Document number 10-0208 100302, Delaware had only 21 park rangers to cover the entire state. When compared to the number of state troopers statewide, 679, and the expanse of State Parks and Forests, visitors to State Parks and Forests cannot rely solely on assistance from the State in emergency situations. (Even if the number of security personnel has increased from the date of this report, no amount of increase justifies the unconstitutional Regulations.)

available as the Agencies would have this Court believe.

As the Delaware Supreme Court recognized in *Doe*, a citizen must be permitted to defend himself "when the intervention of society in his behalf may be too late to prevent an injury." *Doe*, 88 A.3d at 663. Sportsmen should not be left to the mercy of others simply because the Agencies have enacted Regulations that are both unconstitutional and outside the scope of the authority designated to them by the Delaware legislature.

iv) *The Delaware Constitution Provides for the Right to bear arms for Hunting and Recreation in Addition to Self-Defense*

The Delaware Supreme Court's unanimous *en banc* decision in *Doe* recognized the broad scope of this fundamental right when it explained that "the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside the home, including for hunting and recreation." *Doe*, 88 A.3d at 665.

The Agencies conflate the right in Article I, § 20 to bear arms for the separate purpose of "recreation" and for "hunting," as opposed to what the Agencies refer to as "recreational hunting." *See, e.g.*, Op. Br. at 4–6, 9, 11, 13, 18, 20, 22, 23, 26. The Agencies' brief fails to recognize them as separate constitutional rights. Sportsmen's Complaint refers to their enjoyment of the shooting sports at shooting tournaments for recreation, apart from hunting. Complaint ¶¶ 11, 13. The Agencies'

Regulations interfere with this recreational pursuit, which is separate from hunting. Section 20 requires both rights to be honored. "To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." *Lake Cty. v. Rollins*, 130 U.S. 662, 670 (1889). The Agencies' position ignores Section 20. When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright v. U.S.*, 302 U.S. 583, 588 (1938). *See also Kelo v. City of New London, Conn.*, 545 U.S. 469, 496 (2005). Thus, Sportsmen's right to possess and carry arms for recreation is separate from the exercise of that right for hunting.

2. The Regulations Fail when Subjected to Intermediate Scrutiny

The Delaware Supreme Court in *Doe* determined that "[a]lthough the right to bear arms under the Delaware Declaration of Rights is a fundamental right, . . . it is not absolute." *Doe*, 88 A.3d at 667. Because the General Assembly left in place a series of statutes regulating the right to bear arms, an intermediate scrutiny analysis is appropriate when considering firearm restrictions. *Id.*

i) *The Agencies have the Burden of Proof to show the Regulations are Constitutional*

"Where heightened scrutiny applies, the State has the burden of showing that the state action is constitutional." *Id*. at 666. The Agencies therefore have the burden of showing that their adoption of the Regulations passes intermediate scrutiny; that is, that the Regulations have an important governmental objective and are substantially related to the achievement of those objectives. *Id*. (citing *Turnbull v. Fink*, 668 A.2d 1370, 1379 (Del. 1995)).

ii) *The Agencies Cannot Satisfy their Burden of Proof*

"The governmental action cannot burden the right more than is reasonably necessary to ensure that the asserted governmental objective is met." *Id*. at 666-67. In the instant case, as in *Doe*, the Regulations at issue prohibit the mere possession of a firearm. The Court in *Doe* held that such a restriction was "overbroad and burden[ed] the right to bear arms more than is reasonably necessary" and that it "functionally disallowe[ed] armed self-defense." *Id*. at 668. As the Regulations here also prohibit mere possession of a firearm in State Parks and Forests, the result here should be the same.

Moreover, the legislature already performed the balancing of state and individual interests in their comprehensive regulatory scheme, including the rigorous requirements for a license to carry a concealed deadly weapon pursuant to

11 *Del. C.* §§ 1441, 1441A or 1442.

iii) *Special Provisions for Retired Police Officers*

Notably, the Court in *Doe* underscored that the provision at issue in that case would restrict even active and retired police officers from carrying firearms. *Doe*, 88 A.3d at 668. The Court expressly stated that:

> Delaware law places special trust in active and retired police officers to carry concealed weapons. Active police and peace officers are exempted from the concealed-carry license requirements and may carry a firearm while on or off duty. Further, retired police officers may be specially licensed by statute to carry a concealed weapon following their retirement.

Id. The Regulations at issue here similarly dispossess active and retired police officers of their right to carry firearms. Indeed, Plaintiff Mark Hester is a retired police officer, and is prevented from carrying his firearm at Delaware State Parks by the Regulations promulgated by DNREC.

In addition to the reference to *Doe v. WHA* which invalidated a similar restriction barring retired police from carrying firearms, the recent decision by the U.S. Court of Appeals for the District of the Columbia Circuit provides added authority based on federal law. In *Duberry v. District of Columbia*, --- F.3d ---- 2016 WL 3125217 (D.C. Cir. June 3, 2016), the court held that four retired law enforcement officers were improperly deprived of their federal right under the Law

Enforcement Officers Safety Act ("the LEOSA"), 18 U.S.C. Section 926C, to carry a concealed weapon. The LEOSA creates that right, notwithstanding contrary state or local law, for active and retired "qualified law enforcement officers" who meet certain requirements. Those requirements include that the officer receive firearms training within the 12 months prior to carrying a concealed weapon and, prior to retirement, had the power to make arrests. The *WHA* case invalidated a similar regulation that impermissibly conflicted with that right.

iv) *Rhetoric does not Satisfy the Burden of the Agencies to Present Evidence*

The state's interest must be bolstered by actual evidence. *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1011 (3d Cir. 1993) (requiring probative evidence to support stated interest). But the Agencies have set forth no evidence whatsoever. The rhetoric and policy debates argued by the Agencies have long ago been decided contrary to their position when the legislature adopted Article I, § 20 and the Delaware Supreme Court endorsed it with a recent robust interpretation. The Agencies provide no foundation for the Court to determine that the Regulations are substantially related to the achievement of their state objectives.

Nowhere in their Opening Brief do the Agencies describe how they can satisfy their burden of proof. Nor do they explain how the contested Regulations impose no greater restriction than necessary.

The Agencies cite no authority to support their uninformed and unconstitutional argument that "private possession of firearms is inconsistent with, and contrary to, preserving public safety." Op. Br. at 15. The Agencies' erroneous statement and failed public policy proposal was rejected by Article I, § 20, and its death knell was sounded in *Heller* and *Doe.* The Agencies' unsupportable theories and lack of evidence prohibit them from carrying their burden of proof. The Agencies provide nothing more than amorphous safety concerns and discredited scare tactics that do not satisfy their burden of proof.

The Agencies also fail to acknowledge existing case law recognizing that transporting weapons[17] is part of the right to bear arms. The Agencies assert that Sportsmen are "free to camp and rent a cottage, so long as they leave their firearms behind, with the exception of recreational hunting seasons." Op. Br. at 4. It is unclear where the Agencies think Sportsmen would leave their firearms if they are traveling to participate in shooting competitions and staying overnight in State Parks. The Agencies' requirement that Sportsmen "leave their firearms behind" necessarily deprives them of the right to bear arms by depriving them of the recognized right to

[17] *State v. Diciccio*, 105 A.3d 165, 197 (Conn. 2014) (holding that transporting weapons between residences is protected under Second Amendment).

transport them.[18] Constitutional rights cannot be abridged in a designated location "on the plea that it may be exercised in some other place." *Ezell*, 651 F.3d 684, 697 (7th Cir. 2011) (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981)).

v) *The Agencies' Unsupported Safety Arguments are Unavailing*

As the Court indicated in *Doe*, the Agencies "must show more than a general safety concern" to satisfy their burden. *Id*. at 667. The Agencies in *Doe* also argued that the policy in that case was adopted for the protection of its residents. But the Delaware Supreme Court rejected general unsubstantiated safety arguments.

The Agencies' undefined expressions of concern for safety, without support from statistical analysis, logic, or legal authority, should not be given any weight. As one constitutional law scholar recently wrote:

> The notion of upholding an infringement on a constitutionally protected right because the infringement might soothe the irrational fears of some portion of the populace is a novel one. If taken seriously, it might have significant application beyond the jurisprudence of the Second Amendment. It is easy, at least, to imagine other rights whose infringement might reduce the irrational fears of some sectors of the

[18] At some point a right can be so restricted as to be tantamount to a destruction or an outright ban of the right. One court observed many years ago that "[a] statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *Alabama v. Reid*, 1 Ala. 612, 616-17 (1840).

> populace, though I had thought that our abandonment of Jim Crow had put that approach behind us.

Glenn Harlan Reynolds, *Second Amendment Limitations* (forthcoming in GEORGETOWN J. LAW AND PUB. POL., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727790). (emphasis supplied).

Moreover, there is no convincing evidence that gun control regulations, such as the Regulations at issue here, reduce criminal violence. *See Moore*, 702 F.3d at 937 (citing Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 59 (2005) (identifying inconclusive correlation between firearms regulation and violence)).

To the contrary, the *Moore* Court, relying on empirical data, found that laws that prohibit gun carrying outside the home have little impact on public safety in states that utilize a permit system for public carry, like Delaware. *Moore*, 702 F.3d at 938. Further, the evidence available "is consistent with concluding that a right to carry firearms in public may promote self-defense." *Moore*, 702 F.3d at 942.

While there is scant data available to justify firearm restrictions, there is evidence to prove that there is a negative correlation between gun ownership and crime. One recent study found that restrictions on the carrying of concealed weapons tended to lead to higher murder rates at the state level. Mark Gius, *An examination of the effects of concealed weapons laws and assault weapons bans on state-level*

murder rates, Applied Economics Letters, 21:4, 265-267 (2014) (copy included in Compendium). *See also* Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide,* 30 Harv. J. Law and Pub. Pol. 649, 660–61 (2007) (study concludes that more gun control does not lead to lower death rates or less violent crime).[19]

Even public health experts who zealously advocate handgun controls have concluded—in the wake of *Heller*—that the empirical evidence suggests that there would be "'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.'" *Moore*, 702 F.3d at 938 (quoting Philip J. Cook, Jens Ludwig, & Adam M. Samaha, *Gun Control After* Heller: *Threats and Sideshows from a Social Welfare Perspective,* 56 UCLA L. Rev. 1041, 1082 (2009)).[20]

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[19] The history of gun control in the United States often coincides with the history of discrimination against minorities or those marginalized by society. For example, in his concurrence to the Supreme Court's decision in the *McDonald* opinion, Justice Clarence Thomas quoted Frederick Douglass as stating: "The black man has never had the right either to keep or bear arms," which would be remedied by adoption of the Fourteenth Amendment. 130 S.Ct. at 3083 (Thomas, J., concurring). *See generally* An Act in Relation to Free Negroes and Mullatoes, §7, Ch. 305, Mar. 18, 1863, in 12 Del. Laws 332 (1863) (referring to an enactment which provided that "free negroes and free mullatoes are prohibited from owning or having in their possession, a gun, pistol, sword, or any warlike instrument.").

[20] Although the Agencies refer generally to safety concerns with no citation to

It is notable that, although the Second Amendment provides lesser protection than that provided by Article I, § 20, federal law allows the carrying of firearms in *national* parks. *See* 36 C.F.R. § 2.4. It follows that the Regulations should be stricken under the greater protection of Article I, § 20.

vi) *The Agencies Mischaracterize* Griffin *and* Doe

The Agencies rely primarily upon *Griffin v. State*, 47 A.3d 487 (Del. 2012), and wrongly refer to holdings in *Doe* as *dicta*. Op. Br. at 12–14. In *Griffin*, the Court reversed and remanded for further consideration of the question of whether Griffin had disclosed to police that he had a knife in his pants when, inside his home, he was handcuffed (unable to remove the knife from his pants) and involuntarily removed from his home. *Griffin*, 47 A.3d at 491–92. The Court's opinion was limited to the right to a concealed weapon inside one's home when being arrested. The Agencies' assertions to the contrary are wrong. *See* Op. Br. at 12.

The Agencies similarly misstate the holdings in *Doe*. The Agencies egregiously err when they state that it was *dicta* for the Court in *Doe* to recognize the right to bear arms outside the home—when that was the central issue in the case

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authority or evidence, when Sportsmen rebut those arguments with case law and scholarly publications, the Agencies suggest those citations are not apt in the context of this briefing. Op. Br. at 13–14.

that was decided. *Compare Doe*, 88 A.3d at 668, with Op. Br. at 14 ("While the Court in *Doe* noted that Article I, Section 20 is not limited to the home, . . . that statement was *dicta*, as the Court was not called upon to review any limitations on firearms outside the confines of the building."). Delaware's high court was interpreting Article I, § 20, to resolve whether Delawareans had a right to bear arms outside the home. Indeed, that was the precise issue the Supreme Court accepted upon certification by the United States Court of Appeals for the Third Circuit. *Doe*, 88 A.3d at 657–58.

Doe also recognized, contrary to the Agencies' reference to the case, a distinction between the type of government buildings that provide typical government services, such as a courthouse, and other government property where traditional government services are not provided. *Doe*, 88 A.3d at 668. The governmental agency involved in *Doe* was responsible for "maintaining the grounds and buildings for the residents"—not for providing traditional governmental services. *Id.* The same is true in this case. Maintaining parks and campgrounds is not a traditional government service such that a ban on firearms would be warranted.

Doe does not, as the Agencies allege, stand for the position that wherever state employees work, all firearms can be banned. The Agencies do not, and cannot, quote any language in *Doe* that supports that argument.

The Agencies similarly cite no authority for their position that the right to bear arms does not exist outside the home where, as in public places, the State provides security. Taken to its logical conclusion that argument would mean that the right to bear arms would be abrogated on every city sidewalk where the police department provides protection.

Contrary to the Agencies' assertions, *Doe's* ruling was not *dicta* to the extent that it ruled that a ban on firearms in a common area, *open to the public and outside the confines of one's apartment*, including outside areas, violated the right enshrined in Article I, § 20 to bear arms outside one's home. *Doe*, 88 A.3d at 668. That was the central holding and the primary issue certified to the Delaware Supreme Court by the United States Court of Appeals for the Third Circuit. *Doe v. Wilmington Hous. Auth.*, No. 12-3433 (3d Cir. July 18, 2013) (copy included in Compendium).

Another of the several examples of the Agencies' mistaken interpretation of *Doe* is the faulty statement in the Agencies' Reply Brief as follows: "[*Doe*] had no occasion to define limits of the right to self-defense outside the home." Reply Br. at 18. This is not an accurate statement from *Doe* as made clear from the citation from the *Doe* opinion, 88 A.3d at 668, in which the Delaware Supreme Court expressly ruled that the ban on firearms was invalid to the extent that it prohibited firearms in

areas outside of one's apartment, which included common areas outside of the apartment building.

The Agencies also demonstrate a misunderstanding of the facts of the *Doe* case in their Reply Brief in which they aver that "simple geometry" explains why *Doe* invalidated a ban on common areas prohibiting tenants from transporting firearms to their apartments. Reply Br. at 25. This is false because as the Supreme Court explains in its opinion in *Doe v. WHA*, the regulation that the Court invalidated expressly allowed for transporting firearms to apartments, but the restriction also extended to common areas outside of the apartments and outside the buildings; thus, it was struck down as violating Article I, § 20.

As in the *Doe* case, the Regulations at issue here "infringe[] the fundamental right of responsible, law-abiding citizens to keep and bear arms for the defense of self, family, and home." *Doe*, 88 A.3d at 668. Because there is no justification for the Agencies' Regulations, Sportsmen's fundamental constitutional rights outweigh the Agencies' unsubstantiated interest in imposing excessive and ineffective firearm restrictions.

B. The Agencies' Regulations are Preempted by Existing Delaware law

1. Implied Preemption

The restrictions on the lawful possession and use of firearms imposed by DNREC regulation 9201.24.2 and 3 Del. Admin. Code § 8.8 are inconsistent with and preempted by the comprehensive regulatory scheme promulgated by the Delaware General Assembly. *See Cantinca v. Fontana*, 884 A.2d 468, 473 n.23 (Del. 2005) (holding that preemption may be evidenced, *inter alia*, "where the legislature has enacted a comprehensive regulatory scheme in such a manner as to demonstrate a legislative intention that the field is preempted by state law.") (quotations omitted). *See generally Capital Area Dist. Library v. Michigan Open Carry, Inc.*, 826 N.W.2d 736, 738 (Mich. Ct. App. 2012) ("Our court has held that, in light of MCL 123.1102, state law *completely occupies* the field of firearm regulation to the exclusion of local units of government.") (emphasis in the original).

The Delaware General Assembly has enacted a comprehensive regulatory scheme governing the use and possession of firearms, including, but not limited to, the following regulations: a licensing requirement (24 *Del. C.* §§ 901, 902); prohibition of sales to minors or intoxicated persons (24 *Del. C.* § 903); requiring record keeping and criminal history checks (24 *Del. C.* §§ 904, 904A); requiring a license to carry a concealed weapon (11 *Del. C.* §§ 1441, 1441A, 1442); restrictions

on the sale, use, and possession of sawed-off shotguns and machine guns (11 *Del. C.* § 1444); prohibiting certain persons from owning, using or purchasing firearms (11 *Del. C.* § 1448); and requiring a criminal background check prior to purchase/sale of a firearm (11 *Del. C.* § 1448A).

The Regulations at issue in this action prohibit law-abiding citizens from exercising their right to carry a firearm for self-defense. Such Regulations restrict the use and possession of firearms to a significantly greater degree than does this regulatory scheme, and should be invalidated accordingly. There is a significant difference between the General Assembly enacting criminal laws regulating firearms (which it has done), and an agency such as DNREC or DOA usurping the legislative prerogative to do so.

2. Express Preemption

The Delaware General Assembly has expressly preempted municipalities and counties from regulating firearm possession. Section 111 of Title 22 of the Delaware Code provides, in pertinent part: "The municipal governments shall enact no law, ordinance or regulation prohibiting, restricting or licensing the ownership, transfer, possession or transportation of firearms or components of firearms or ammunition except that the discharge of a firearm may be regulated." 22 *Del. C.* § 111.

Moreover, Section 330(c) of Title 9 provides, in pertinent part: "The county governments shall enact no law or regulation prohibiting, restricting or licensing the ownership, transfer, possession or transportation of firearms or components of firearms or ammunition except that the discharge of a firearm may be regulated; provided any law, ordinance or regulation incorporates the justification defenses as found in Title 11 of the Delaware Code." 9 *Del. C.* § 330(c). Although neither DNREC nor the DOA are municipal or county governments, it makes little sense to suggest that the General Assembly intended to allow these agencies to restrict fundamental constitutional rights that cities and counties cannot lawfully restrict.

Similarly, by comparison, under federal administrative law, administrative agencies have only the authority granted to them by statute. For example, the EPA is a federal agency—a creature of statute. It has no constitutional or common law existence of authority, but only that authority conferred upon it by Congress. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). *See also Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). In addition, the legislature knows how to draft legislation prohibiting carrying firearms in certain places. *See* 11 *Del. C.* §1457(b)(1)–(6). The

fact that they did not do that for State Parks demonstrates that they want people to have the ability to exercise their rights there.

Likewise, when the legislature amended 22 *Del. C.* § 330 (county preemption) and 9 *Del. C.* § 111 (municipal preemption) to allow a ban of open carry in sensitive areas, it did *not* prohibit those with a permit to carry a concealed weapon from possession in those areas. Thus, the legislature knows when to allow limits on Article I, § 20, but has not done so for State Parks.

The Agencies conflate preemption by occupying the field and preemption by direct conflict. Op. Br. at 25–27. One of the flaws in their argument is in their assertion that, to challenge the Regulations, Sportsmen must also challenge 11 *Del. C.* § 1457, on the purported grounds that, as it is a geographic restriction on firearms, it must also be invalid. Op. Br. at 26. The Agencies' argument, which cites to no authority for support, is misplaced.

Sportsmen are not arguing that the *legislature* cannot act to impose proper restrictions on firearms. Sportsmen argue that DNREC and DOA cannot do so. The authority of DNREC and DOA, creatures of statute, to impose regulations restricting the right to bear arms, is a materially different than the ability of a legislature to pass a statute. The Agencies' "goose and gander" argument lacks any citation to any source of authority and is devoid of logic.

The Agencies make a bewildering statement: "The challenged [R]egulations are likewise compatible with the limited privilege to carry concealed weapons, granted to law enforcement officers, former officers, and those able to qualify for permits." Op. Br. at 29. That is expressly contrary to the the Agencies' assertions in their Answer and elsewhere in their Opening Brief. Certain of the Sportsmen have a license to carry a concealed deadly weapon, and Plaintiff Mark Hester is a retired police officer. How can the Agencies argue that the Regulations are compatible with the requirements for carrying a concealed deadly weapon when they have expressly stated that Sportsmen, including those holding a license to carry a concealed deadly weapon and/or are retired law enforcement officers, are forbidden from bringing a firearm into a State Park or State Forest?

Furthermore, there is no basis for the Agencies' assertion that permitting firearms by retired police officers in State Parks and Forests would interfere with the ability of "law enforcement officers to keep the peace on public lands and in public places." Op. Br. at 36. *See also Duberry v. District of Columbia*, --- F.3d ----, 2016 WL 3125213 (D.C. Cir. June 3, 2016) (holding the Law Enforcement Officer Safety Act grants an individual right to retired law enforcement officers to carry a concealed weapon). In sum, there is no support for the position that the General Assembly would have expected or allowed DNREC or the DOA to develop their own firearms

regulations, given its comprehensive regulatory scheme governing the use and possession of firearms, and its prohibition against municipalities and county governments from regulating in this field.

C. The Agencies Exceeded the Scope of their Authority

The Agencies have no authority to adopt or enforce regulations that deprive Sportsmen of firearms for lawful protection contrary to the State statutory scheme. *See* 29 *Del. C.* § 8001 (establishing DNREC); 29 *Del. C.* § 8101 (establishing DOA).

As administrative agencies, the Agencies have limited powers, and may only act within the scope of authority delineated by the statutes creating them.[21] *See Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 740 (Del. Super. 1962) (citations omitted) (agency's actions will not be sustained if its actions are not justified under the statute creating the agency); *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 654 (Del. Super. 1973) ("The powers of an administrative

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[21] *See also Farmers for Fairness v. Kent County*, 940 A.2d 947, 956 n.43 (Del. Ch. 2008) ("[W]hen one legislative body having superior authority—such as the General Assembly—has required that another legislative body—such as the Kent County Levy Court—follow certain procedures, the court must do its duty and enforce the requirements imposed on the latter's lawmaking authority."); *State v. Amalfitano*, 1993 WL 603340, at *4 (Del. Super. Apr. 5, 1993) ("An administrative agency may not exercise power which exceeds that granted by the legislation from which it arose."); *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989) ("[I]t is axiomatic that delegated power may be exercised only in accordance with the terms of its delegation.").

agency must be exercised in accordance with the statute conferring power upon it. An agency's authority to act depends upon compliance with the procedural provisions laid down in the statute.").

Unable to cite any specific statutory provision granting them the power to regulate firearms, the Agencies argue instead that such power is implied through broad language in various statutes. *See* Op. Br., at 9 ("[T]he State Park statute grants DNREC the broad authority to: 'Make and enforce regulations relating to the protection, care and use of the areas it administers. . . .' 7 *Del. C.* § 4701(a)(4)."); *Id.*, at 16 ("[L]ike DNREC, the General Assembly has granted [the Department of Agriculture] broad authority to establish rules 'for the enforcement of the state forestry laws and for the protection of forest lands. . . .' 3 *Del. C.* § 1011."); *Id.* at 10 ("Implicit in this broad grant of authority to manage public lands is the authority to establish rules to protect public safety. Without such authority, these state agencies could not establish rules for the 'safety, protection and general welfare of the visitors and personnel on properties under its jurisdiction.' 7 Del. Admin. C. § 9201-2.1."). The Agencies also argue that without a broad reading of these statutes, the Agencies would be unable to establish basic rules regulating activities such as hunting, fishing and swimming. *Id.*

The Agencies' arguments are unavailing for several reasons. First, the legislature's delegation of authority to establish rules relating to activities such as fishing and swimming on park grounds is vastly distinct from a delegation of authority to establish rules limiting fundamental constitutional rights such as the right to bear arms. Nothing in DNREC's governing statutes give it the power to make rules in an area where the legislature has demonstrated its exclusive intent to regulate the field. *See* 29 *Del. C.* §§ 8001; 8003 (establishing DNREC and enumerating its powers). The same holds true for the DOA. *See* 29 *Del. C.* §§ 8101; 8103 (establishing DOA and enumerating its powers). Neither DNREC's, nor DOA's, authority allows either agency to prohibit the lawful possession of firearms in Delaware State Parks or State Forest Lands.

1. Challenged Regulations Impermissibly Conflict with state law

Both of the Agencies are specifically prohibited from implementing rules or Regulations that "*extend, modify or conflict with any law of [the State of Delaware] or the reasonable implications thereof.*" *See* 3 *Del. C.* § 101(3) (legislature's designation of power to DOA) (emphasis added); 7 *Del. C.* § 6001 (legislature's findings, policy and purpose on conservation, natural resources and environmental control). The contested Regulations that specifically prohibit law-abiding citizens from exercising their constitutional right to carry firearms for self-defense plainly

conflict with, or at minimum, modify without permission the laws of the State of Delaware such as Article I, § 20. Thus, the Regulations are invalid.

VI. Conclusion

For the foregoing reasons, Sportsmen respectfully request that this Honorable Court find that the challenged Regulations promulgated by the Agencies impermissibly restrict Sportsmen's right to possess and bear arms, and, therefore, violate Article I, § 20 of the Delaware Constitution. Moreover, the Agencies have exceeded their statutory authority in promulgating the Regulations, which also have been preempted by the General Assembly.

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IN THE SUPERIOR 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, 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.	C.A. No. S16C-06-018 THG

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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I. Introduction

The central issue for the Court to decide in this case is whether the challenged Regulations promulgated by Defendants Delaware Department of Natural Resources and Environmental Control, David Small, Ed Kee, and Delaware Department of Agriculture, ("the Agencies" or "DNREC and DOA") violate the fundamental right to keep and bear arms, enshrined in Article I, Section 20 of the Delaware Constitution, and recently reinforced by the Delaware Supreme Court.

Instead of attempting to address applicable authorities, the Agencies' Combined Answering and Reply Brief (the "AAB") relies primarily on rejected policy arguments instead of prevailing constitutional jurisprudence, and supplants displeasure with binding precedent for legal reasoning. The arguments of the Agencies are unburdened by citation to controlling authority or scholarly treatises. DNREC and DOA hurl barbs at Plaintiffs personally, and mischaracterize or ignore Plaintiffs' legal arguments and quotations from precedential Delaware Supreme Court and United States Supreme Court cases. DNREC and DOA resort to puerile personal attacks, such as referring to a married couple who enjoy bicycling as a "bicycle posse." Their tactic impedes an organized and businesslike presentation of legal arguments.

The Agencies' repeated mockery of Plaintiffs,[1] and questioning the bona fides of a "true sportsman," is not appropriate and will not be dignified with a direct response. The term "Sportsmen" was used to describe Plaintiffs simply because most of them are members of the Delaware State *Sportsmen's* Association. A discussion of the etymology of the word "sportsmen" is not relevant to the issues before the Court.

The Agencies refer to "natural law rhetoric," but rhetoric is a poor choice of words to describe a natural, fundamental right at issue here. The Agencies belittle this fundamental constitutional right, and it is unsurprising they cite no authority to support their narrative of contempt for an important part of Delaware's Bill of Rights, also referred to as the Declaration of Rights.[2] Contrary to the Agencies' assertion, Rule 12(c) does not prevent citation to law review articles with scholarly insights; it prohibits only reference to extrinsic evidence or facts not contained in the Complaint or Answer.[3]

The Agencies repeatedly mischaracterize Sportsmen's positions, and assert

[1] In Plaintiffs' Combined Opening and Answering Brief, and in this Brief, Plaintiffs are alternately referred to as "Sportsmen."
[2] The Agencies' primary rebuttal to law review articles and scholarly treatises cited by the Sportsmen is a cite to a *Huffington Post* piece.
[3] *See* Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 4.06[b] (2015) ("[T]he Court should limit its analysis to the pleadings in considering a motion for judgment on the pleadings, but also may consider documents incorporated in the complaint or documents relied upon for matters other than the truth of the statements contained therein.").

irrelevant arguments to direct attention away from the core issues presented. As explained in Sportsmen's Combined Opening and Answering Brief, Sportsmen neither seek an unlimited right to carry firearms, nor do they seek to carry firearms without the restrictions already imposed by the existing comprehensive statutory scheme.

Another straw-man argument made by the Agencies, that does not represent the Sportsmen's position, requires Sportsmen to emphasize that they are not contesting any regulations relating to hunting. The issue of hunting is not before the Court in this case. Nor is this case about preserving game stock and conserving public lands, or challenging the authority of police officers, as the Agencies argue irrelevantly in their Answering Brief. Instead, the issue is whether the Regulations are valid prohibitions on the exercise of Sportsmen's fundamental constitutional rights, which are more than mere "personal preferences" as the Agencies describe them.

II. Argument

A. Procedural Standard

The procedural standard for this motion is well-settled: "A motion for judgment on the pleadings may be granted only where no material issue of fact exists, and where the moving party is entitled to judgment as a matter of law." *Banks v. Banks*, 135 A.3d 311, 315 (Del. Ch. 2016). There is no dispute of material fact. The statutory and constitutional interpretation issues are controlled by recent Delaware Supreme Court precedent.

B. The Regulations Violate Article I, Section 20 of the Delaware Constitution

The Delaware Supreme Court, in *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 665 (Del. 2014), established that Article I, Section 20 provides greater protection than the Second Amendment: "On its face, the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside the home, including for hunting and recreation. Section 20 specifically provides for the defense of self and family *in addition to* the home." *Id*. (emphasis in the original).

Regardless of the Agencies' frustration with the *Doe* opinion, and the difference in wording between the Second Amendment and Article 1, Section 20, the Delaware Supreme Court has authoritatively spoken on that issue, and unequivocally decided that the Delaware Constitution provides greater protection

than the Second Amendment.

1. Federal law Establishes a Baseline—not Maximum Rights

Although Article I, Section 20 is broader than the Second Amendment, cases interpreting the Second Amendment establish a baseline, below which the protections of Article I, Section 20 cannot descend. As explained by Delaware Supreme Court Justice Randy J. Holland: "Federal constitutional standards, however, set only a minimum level of protection . . . [A] state's constitution may . . . provide for broader or additional rights." Randy J. Holland, *The Delaware Constitution of 1897: The First One Hundred Years*, 17 (1997). Nevertheless, the Supremacy Clause requires that "state action must comport with the United States Supreme Court's interpretations of federal liberty guarantees." *Id*.

The *Doe* Court explicitly held Article I, Section 20 provides *expanded* rights affording greater protection than the Second Amendment. *Doe*, 88 A.3d at 665. At various points throughout their arguments, DNREC and DOA cast aspersions on the legitimacy of the Sportsmen's lawful pursuit of constitutionally protected activities. *See, e.g.*, AAB at vi ("True 'Sportsmen' would understand and respect the need for game conservation and the risk of deadly harm to innocent visitors from the discharge of firearms"); AAB at 9 ("a 'sportsman' shoots game, and not people"); AAB at 29 ("Plaintiffs cannot claim an absolute right to hunt or shoot anything, anywhere and at any time"); AAB at 40 ("bicycle posse, or the overnight camper

and their arsenal"). These histrionics demonstrate that they are uninformed or uninterested in the distinction between using a gun for hunting and for the other separate, itemized purposes recognized in Article I, Section 20, such as for recreation and for defense of family. Even though *Doe* is a recent Delaware Supreme Court decision explaining that Article I, Section 20 does provide greater rights than the United States Constitution, DNREC and DOA disagree with or disregard this controlling authority without so much as a reference to a contrary legal citation to support their displeasure with binding precedent.

The Agencies' reliance on federal decisions to the exclusion of the Delaware Supreme Court's *Doe* opinion fails to recognize that the Second Amendment provides the floor, or minimum level, of rights and, as *Doe* explained, the Delaware Constitution provides more rights. Therefore, it is at least ironic that national parks allow firearms but state parks in Delaware do not. *See* 36 C.F.R. § 2.4.

Curiously, DNREC and DOA rely on cases interpreting the Second Amendment as if they provide the maximum scope of the rights available to Delaware. Not true. The Agencies in essence ask this Court to ignore the Delaware Supreme Court decision in *Doe* that explains the more generous rights afforded to Delawareans, and instead focus on decisions that interpret a more narrowly circumscribed federal right. Not helpful.

Contrary to the Agencies' assertions, the natural and fundamental

constitutional rights on which Sportsmen's arguments rely are not simply a "personal philosophy" or a "misguided and unjustified attempt[] at defense." AAB at 33, 31. The Agencies never adequately address a core issue in this case: whether there is a lawful basis on which the Agencies can eliminate constitutional rights, and whether the General Assembly expressly allowed them to infringe constitutional rights with regulations.

2. The Agencies Ignore or Mischaracterize United States Supreme Court and Delaware Supreme Court Precedent

The Agencies consistently ignore binding precedent and the most recent case law in favor of discredited policy pronouncements lacking legal support, or they attempt to support their arguments with distinguishable cases. Instead of responding to quotes from Delaware Supreme Court opinions and United States Supreme Court majority decisions on which Sportsmen rely, the Agencies simply "disagree" with that controlling authority without reference to specific pages of those opinions and without reference to contrary authority or persuasive scholarly commentary. Rather, they create straw-man arguments that mischaracterize Sportsmen's positions, and address issues that are either not before the court or do not represent the Sportsmen's positions. *See, e.g.*, AAB at 20–21, 24–27, 28–29, 33–38.

The Agencies appear to argue that Delaware need not be bound by relevant decisions of the United States Supreme Court—and indeed—that the Supreme Court got it wrong in *District of Columbia v. Heller*, 554 U.S. 570 (2008). According to

the Agencies, the Supreme Court misconstrued language in the Second Amendment. AAB at 16 n.22. The Agencies' preference for Justice Steven's dissent in *Heller* does not make that dissent controlling law. Even had the Agencies cited case law or treatises in support of their argument that the United States Supreme Court was wrong in *Heller*, the task would be in vain.[4] The Agencies waste everyone's time and resources by expressing their irrelevant displeasure with binding Supreme Court decisions.

The Supreme Court in *Heller* acknowledged that the right to keep and bear arms recognizes, at its core, the right to self-defense. *Id*. at 594. *Heller* also teaches that the right to bear arms is a natural right with which each person is born, and that the Constitution did not guarantee that right, but instead recognized the pre-existing natural right to bear arms. *Id*. ("It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense.") (citations and internal quotation marks omitted).

Justices Samuel Alito and Clarence Thomas, in their recent concurrence in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), recently reaffirmed that principle, stating: "It is settled that the Second Amendment protects an individual right to keep

[4] Indeed, only a constitutional amendment—not an outdated regulation—could abrogate the right to keep and bear arms guaranteed by the Second Amendment. "If the government and the people in their wisdom come to the conclusion that no need for the right of the people to be armed exists, or that such a right does more harm than good, then amendment is the course that should be followed." Joyce Lee Malcolm, *To Keep and Bear Arms—the Origins of an Anglo-American Right* 176 (1994).

and bear arms that applies against both the Federal Government and the States. That right vindicates the 'basic right' of 'individual self-defense.'" *Id*. at 1028 (citing *Heller* and *McDonald v. City of Chicago*, 560 U.S. 742 (2010)) (internal citations omitted).

Despite these clear statements in *Heller* and *Caetano*, the Agencies persist in their unsupported arguments. The Agencies rely upon and quote Justice Stevens' dissent in *Heller*, whose position concerning colonial militias has been repeatedly rejected by a majority of the United States Supreme Court. AAB at 15 n.20. His dissent unsuccessfully argued that the Second Amendment focused on colonial militias, which is contrary to the majority opinion and has no bearing under current law on the meaning of "keep and bear arms." The majority in *Heller* rejected Justice Stevens' position and again rejected it in *McDonald*.

It bears emphasis that DNREC and DOA failed to respond to Plaintiffs' quotes from *Doe* and failed to respond to Sportsmen's arguments based on those quotes. The Agencies mischaracterize and disagree with *Doe's* holdings without providing legal reasoning for their disagreement, or legal analysis, or citation to any legal sources, secondary or otherwise, that would support their disregard for precedent and controlling authority. AAB at 17.

The Agencies also cite *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318 (11th Cir. 2015), to refute *Morris v. U.S. Army Corps of*

Engineers, 990 F. Supp. 2d 1082 (D. Idaho 2014). The Georgia case is unavailing. First, the Eleventh Circuit referred to the property involved as "military" property under the Corps' jurisdiction. No military property is involved in the instant case. The plaintiffs in that case also disregarded the established two-step test for determining Second Amendment cases. They never argued any level of scrutiny—arguing that the regulation was unconstitutional *per se*. Furthermore, in arguing *Morris* before the *GeorgiaCarry.Org* court, the plaintiffs were arguing a non-binding decision from another circuit, and, as the court noted, the regulations in *Morris* were much more restrictive than the regulations challenged in *GeorgiaCarry.Org*. *See* 788 F.3d at 1325.

The *GeorgiaCarry.Org* court observed that neither the Georgia state parks nor the national parks prohibited firearms. *Id*. at 1326. Unlike the Georgia case, Delaware state parks do not allow firearms, and DNREC and DOA's citation to this case, at best, cancels the *Morris* decision relating to military land controlled by the Army Corps of Engineers. Neither case is binding on this Court.

3. The Agencies seek to Force the Exercise of Constitutional Rights on the Agencies' Terms or not at all

The Agencies make two arguments demonstrating their lack of understanding of constitutional rights. First, they argue that should Sportsmen seek to exercise their constitutional rights, they should simply do so elsewhere. This is as untenable as if they were to argue that, in the context of the exercise of religion, should a

camper wish to say a blessing before a meal, she should camp elsewhere. Second, they make an argument rejected by the Delaware Supreme Court that the public should helplessly wait for state assistance should the need for self-defense arise.

Contrary to the Agencies' statements, constitutional rights are not dependent on crime statistics or threats of personal harm. AAB at 27–28. Both *Doe* and Justice Alito's recent concurrence in *Caetano* reject the argument that individuals must rely exclusively on the state for protection. *Doe*, 88 A.3d at 663; *Caetano*, 136 S. Ct. at 1033.

Justice Alito explained: "The State's most basic responsibility is to keep its people safe . . . . If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe." *Caetano*, 136 S. Ct. at 1033. The concurring opinion reasoned that, because the state was "unable or unwilling" to protect the victim in the *Caetano* case, "she was forced to protect herself." *Id*.

DNREC and DOA claim Sportsmen are mistaken when they refer to the Regulations as interfering with the exercise of constitutional rights. One example of such interference is that Sportsmen who wish to use the campgrounds overnight while competing in nearby shooting competitions cannot have the firearms they need for the competitions in their vehicles. DNREC and DOA argue that the Sportsmen

seek an "absolute right to hunt or shoot anything, anywhere, at any time" but that is false, and a mischaracterization of Plaintiffs' argument. AAB at 29.

The Agencies argue without citation to any sources, that the "rights of the individual yield to the rights of the group as a whole, for example in terms of 'lights out' and 'quiet time.'" AAB at 20. Perhaps there would be some persuasiveness to that position if the issue here were conduct among children in a day care center, but this situation involves adults and fundamental constitutional rights. Unsurprisingly, DNREC and DOA do not cite to any source of authority or legal commentary for their "utopia theory" of constitutional interpretation.

4. State Parks and Forests are not Sensitive Areas

DNREC and DOA awkwardly frame the issue of whether a state park or forest is like the other sensitive places that are outside the protection of the Second Amendment. AAB at 32–33. The United States Supreme Court stated: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as … 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings….'" *McDonald*, 561 U.S. at 786.

Parks and forests are unlike sensitive places such as schools and government buildings because, in part, as the Agencies repeatedly state, hunting is allowed there. We are not aware of any instance where hunting is allowed in schools and government buildings. If parks and forests are "sensitive places" for purposes of the

Second Amendment, then effectively all places are sensitive, and the distinction would have no meaning.

The Delaware Supreme Court in *Doe* reasoned that the right to keep and bear arms cannot be banned in areas where, unlike a courthouse or post office, typical government services are *not* provided, such as "maintaining the grounds and buildings for the residents." *Doe*, 88 A.3d at 668. So too, in this matter, DNREC and DOA maintain the grounds and buildings at state parks and forests—which *Doe* explained is *not* the type of typical government service that would make a park or forest a sensitive area. Thus, as in *Doe*, the restriction in this case on the possession of firearms is not reasonable in relation to the governmental interest, and therefore cannot pass intermediate scrutiny. *Id*.

DNREC and DOA bemoan *Doe's* holding, but do not respond to specific quotes from the *Doe* opinion on which Sportsmen rely. AAB at 32–33. Instead, they provide a flowery diatribe that is untethered to authority or authoritative commentary. *Id*. The Agencies attempt to create issues beyond those presented to the Court and that do not reflect Sportsmen's position. *See* AAB at 31–32.

5. Delaware Permits Open Carry

DNREC and DOA frequently argue, without citation, that carrying or possessing a gun is inherently dangerous, but they do not address Delaware's uncontroverted law, made clear in *Doe*, that permits "open carry" of firearms. *Doe*,

88 A.3d at 663 ("Delaware is an 'open carry' state.").[5] DNREC and DOA argue, without reference to any particular page, that *Doe* does not acknowledge Delaware's open carry laws. AAB at 25. That is a false reading of *Doe*. The Agencies' anxieties about what could happen in state parks and forests are not supported by Delaware law.

The Agencies inaccurately describe "open carry." They state: "Delaware is an 'open carry' state, meaning that carrying a concealed firearm without a license is a crime." AAB at 38. This is not an accurate definition of "open carry." To open carry is to carry the firearm in a visible manner instead of concealing it. *See Shepard v. Madigan*, 734 F.3d 748, 750 (7th Cir. 2013). Delaware is an open carry state. One could legally walk in Rodney Square with an unconcealed handgun, subject to a wide range of statutory restrictions. The Agencies cite only to cases from other jurisdictions on this point—and do not mention whether those jurisdictions are open carry or not. AAB at 26–27.

Continuing their habit of disagreeing with controlling precedent without legal analysis and without citation to contrary authority or recognized constitutional scholars, the Agencies refer to the *Doe* decision as "constrained" without citing to any specific page in the opinion and without addressing the quoted parts of the

[5] The Agencies also object to the Sportsmen's citations to case law and scholarly articles that refute their unsupported generic statement that allowing guns in parks would decrease safety.

opinion on which Sportsmen rely. AAB at 24.

6. Longevity does not make the Regulations Valid

The Agencies argue, in essence, because the Regulations were enacted so long ago, they must be valid. AAB at 29, 36. Simply because the Regulations have not been challenged before, and have been in place for many decades does not *ipso facto* make them valid. By the Agencies' logic, longstanding laws upholding slavery and discriminating against minorities that Justice Thomas referred to in *McDonald* were constitutional for many years before the courts invalidated them. *See* Plaintiffs' Combined Br. at 28 n.19.

The stabilizing canon known as the "Presumption Against Implied Repeal" has a variation that applies here. For example: "When a statute specifically permits what an earlier statute prohibited, or prohibits what is permitted, the earlier statute is (no doubt about it) implicitly repealed." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 327 (2012). Moreover:

> The Supreme Court of the United States long ago announced that an implied repeal may occur in either of two circumstances: "(1) Where provisions in the two acts are in irreconcilable conflict, the latter act to the extent that the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, will operate similarly as a repeal of the earlier act."

Id. at 328 (quoting *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936)).

So too, in the instant case, Article I, § 20 of the Delaware Constitution

specifically provides for a right to bear arms. Prior Regulations of the Agencies prohibit the exercise of that right. Therefore the Regulations should be considered implicitly repealed.

C. The Regulations are Preempted

Once again, the Agencies have either misread the Sportsmen's arguments concerning preemption, or have ignored them in favor of unsupported scare tactics. DNREC and DOA ominously warn that, if the Regulations are enjoined, a "Wild West" scenario will come about in which bands of evildoers, bristling with automatic weapons would roam about the state parks in a flagrant display of contempt for police authority. If this scenario has not yet come about in the rest of the state where open or concealed carry is permitted, why would chaos ensue only in the state parks?

Delaware has an existing, comprehensive statutory scheme that extensively regulates firearms. The crux of Sportsmen's argument is that the Agencies' regulations conflict with, and are preempted by, existing firearm laws that were enacted by the legislature, not an administrative agency without the authority to do so. Delaware not only has an existing concealed carry permitting system, but also has a comprehensive scheme of criminal laws relating to the restricted use of firearms that will not change if the Agencies' Regulations are invalidated.

Instead, if Sportsmen prevail, Delaware's firearm laws will be uniformly applied across the state, rather than having a carve-out by regulation only for state

parks and forests where those who would otherwise be permitted to carry firearms are prohibited from doing so. Contrary to what the Agencies argue, this case *does* directly impact the concealed carry permit holder and her ability to exercise that benefit.

Whether or not the legislature authorized state agencies to deprive Sportsmen of that right is one of the issues before the Court. Contrary to the Agencies' mischaracterization, the Sportsmen do not deny the authority that the legislature has to impose reasonable limitations on certain rights, but this case is about the lack of authority of DNREC and DOA to restrict such fundamental rights, not the power of the legislature to do so.

The Agencies refuse to acknowledge that a legislatively adopted statute is not on the same footing as a regulation issued by an agency. Contrary to the Agencies' arguments, the general authority to manage parks and forests does not overcome preemption—and preemption includes occupying the field of regulation, not just two sources of law that are inconsistent with each other. *See, e.g.*, *Shea v. Matassa*, 918 A.2d 1090, 1092 (Del. 2007) ("The General Assembly heavily regulates the sale and use of alcohol and by so doing has clearly announced its intent to occupy exclusively the field of policy making in that subject area.").

DNREC and DOA argue in vain, along with a misleading paraphrase of the "quoted" statute, that the Regulations are not preempted because Sections 1441A

and 1441B[6] reference "laws of the state." AAB at 37. Contrary to the Agencies' assertions, regulations promulgated by administrative agencies do not constitute "law of the state" as that phrase is used in the statute.

The Delaware Supreme Court recently addressed regulations promulgated by the Delaware Department of Labor, and indicated that they are not on the same footing as legislation, and do not constitute the "law of the state" equal to a statute. In so finding, the Court stated: "The DOL may adopt regulations . . . but [] only those regulations that are 'not inconsistent with the laws of this state.' Regulation 5.5.1 conflicts directly with 19 *Del. C.* § 2361 and therefore impermissibly abridges Claimants' rights under the statute." *Christiana Care Health Srvs. v. Palomino*, 74 A.3d 627, 632 (Del. 2013) (internal citations omitted).

The Florida campus carry case cited by the Agencies in support of their preemption argument is easily distinguishable. AAB at 34. First, Florida law prohibits possessing a firearm on school grounds in general. *See* Fla. Stat. Ann. § 790.115 (2)(a). Therefore the University was *enforcing* state law by enacting its no weapons policy. Second, schools are one of the sensitive places listed in *Heller*. Parks and forests are not, so that challenge was made on different grounds.

[6] The Agencies equate, without explanation, state parks with private property, because of a reference in Sections 1441A and 1441B. AAB at 13.

1. The Regulations were Implicitly Repealed

Sportsmen rely on specific statutes that bar counties and municipal authorities from regulating firearms, as discussed earlier. Although the preemption statutes do not specifically address state agencies, the negative-implication canon known as the "expression of one thing implies the exclusion of others" also has a variation that applies in this case. The Latin version of the canon is: *expressio unius est exclusio alterius*. The doctrine applies when:

> the *unius* . . . can reasonably thought to be an expression of *all* that shares in the grant or prohibition involved. Common sense often suggests when this is or is not so. The sign outside a restaurant "No Dogs Allowed" cannot be thought to mean that no other creatures are excluded—as if pet monkeys, potbellied pigs, and baby elephants might be quite welcome. Dogs are specifically addressed because they are the animals that customers are most likely to bring in . . . ."

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) (emphasis in original). Likewise in the instance of the legislature specifically excluding municipal authorities and counties, those entities were specifically addressed because they are the governmental bodies most likely to legislate on this topic, but should not be considered complete or exclusive. Rather, the legislature undoubtedly intended to prevent legislation in the field by any "lesser governmental body" beneath the General Assembly in the legislative hierarchy.

D. The Agencies have Exceeded the Scope of their Authority

Without citation to direct authority, the Agencies refer to the "broad mandate to implement regulations governing the use, care, and protection of natural resources, in order to promote public recreation and conservation," but nothing cited by the Agencies, including the purposes they list, allows an agency to abolish basic rights guaranteed by the Delaware Constitution. AAB at 6, 12–13. The Agencies continually miss the point of Sportsmen's arguments, and fail to focus on the issue of whether the Regulations being challenged exceed the statutory authority of the agencies. Indeed, the Agencies seem to imply that DNREC has unlimited authority to impose whatever regulations it deems necessary. AAB at 14. The Agencies do not appear to acknowledge any limit on DNREC's power to regulate.

The Agencies have a habit in their briefs in this case of assuming, without citing controlling authority and without discussion, their righteousness on the key issues that are contested in this case. A key issue in this case is whether the legislature authorized DNREC and DOA to deprive the Sportsmen of basic constitutional rights. Throughout their brief the Agencies assume that the legislature did provide such authorization, without providing legal analysis or binding authority to support their position.

For the first time in their Answering Brief, DNREC and DOA disclose that, at certain times of the year, educational programs are held in some parts of some

state parks. AAB at viii n.4. That new information is not the talisman that DNREC and DOA want it to be for this case. The legislature did not include state parks or state forests when designating those limited places within the state that firearms may not be possessed. *See, e.g.*, 11 *Del. C.* § 1457; 22 *Del. C.* § 111. If truly necessary, unless the summer camps the Agencies refer to occupy the entire state forest system or all parts of the state parks, those portions of the park that summer camps occupy could be subject to seasonal restrictions with rifled precision without banning firearms all year round in all areas of all state parks and all state forests.

III. Conclusion

In their conclusion, DNREC and DOA refer to Sportsmen's reliance on natural law and fundamental rights as "abstract," but there is nothing abstract about relying on the most fundamental source of legal authority. DNREC and DOA also refer to Sportsmen's arguments as "romantic," but even if being able to defend one's life and the lives of one's family were considered romantic, the use of that adjective does not justify DNREC and DOA's violation of Sportsmen's constitutional rights.

Sportsmen's fundamental constitutional rights are at stake, and no amount of unsupported sermonizing on the Agencies' part should divert the focus from the core issue of whether, as administrative agencies, DNREC and DOA may deprive Sportsmen of their natural and constitutional right to self-defense.

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Dated: July 15, 2016

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

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RE: *Bridgeville Rifle & Pistol Club, Ltd, et al., v. DNREC, et al.*
C. A. No.: S16C-06-018 THG

Dear Counsel:

In your brief you state the regulations at issue have been in existence for over 50 years in one form or another.

The Court would like to have the language of the regulations through the years and the dates of any changes.

It's summertime so there is no rush. Thank you.

Very truly yours,

T. Henley Graves

oc: Prothonotary
cc: Francis G.X. Pileggi, Esquire
Aimee M. Czachorowski, Esquire
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