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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

APPELLANTS' REPLY BRIEF

Francis G.X. Pileggi (No. 2624)
Alexandra D. Rogin (No. 6197)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
(302) 574-7400

Attorneys for Plaintiffs Below/Appellants

Dated: May 31, 2017

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PRELIMINARY STATEMENT

The Agencies[1] prohibit Delawareans from exercising their fundamental and natural right to self-defense in Delaware's State Parks and State Forests in an overbearing manner, with *de minimis* exceptions, in violation of this Court's recent unanimous *en banc* reaffirmation of the Sportsmen's right to keep and bear arms pursuant to Article I, Section 20 of the Delaware Constitution ("Section 20").[2] In their Answering Brief, the Agencies misstate the facts, mischaracterize the law, wrongly describe the issues presented to this Court, and improperly rely on cases that have been superseded.

In their reluctant reference to controlling precedent of the United States Supreme Court, and in their errant description of this Court's recent opinion in *Doe v. Wilmington Housing Authority*, the Agencies make the frivolous and false argument that Section 20 does not grant broader rights than the Second Amendment. *Compare* AB at 26–28 ("The Scope of the Right to Defense in Public Places under the Delaware Constitution is No Greater than that under the Second Amendment to

[1] The "Agencies" refer to the Defendants Below/Appellees, as defined in the Appellants' Amended Opening Brief ("Opening Brief" or "OB"). The "Sportsmen" refer to the Plaintiffs Below/Appellants.

[2] *See generally Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014) (striking a firearm ban in the public areas of an apartment complex based on Section 20's expansive protection of the right to bear arms *outside* the home).

the United States Constitution.") *with Doe*, 88 A.3d at 665 ("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."). Instead of applying this Court's controlling precedent in *Doe*, the Agencies argue that this Court should follow federal cases that construe federal law, which this Court recently explained provides for fewer rights than Section 20. *See Doe*, 88 A.3d at 665.

Doe is controlling on the merits of this appeal, and it also governs the standard of review. In *Doe*, this Court applied intermediate scrutiny to a firearms ban, explaining that "[w]here government action infringes a fundamental right, Delaware courts will apply a heightened scrutiny analysis. Where heightened scrutiny applies, the State has the burden of showing that the state action is constitutional." *Id*. at 666. Despite this Court's controlling precedent—and the Agencies' admission that intermediate scrutiny applies—the Agencies unjustifiably attempt to shift the burden to the Sportsmen to demonstrate why firearms are necessary for self-defense.[3] That is not the law. Nor should it be.

[3] For example, the Agencies admit that intermediate scrutiny applies, *see* AB at 17, but claim: "Appellants bear the heavy burden of establishing that the challenged Regulations are unconstitutional on their face." AB at 16.

The Agencies also repeatedly mischaracterize the issues before this Court. The Agencies state: "The sole issue presented is whether the Delaware General Assembly sought to implicitly repeal established laws governing guns in public places, in favor of an unlimited right to openly carry any gun without limitation," and also that: "The only issue before the Court is whether the use of gunfire for purposes of defense, outside the home, can be restricted in 'sensitive' public places…." AB at 7, 27. It is irrefutable that neither of the two "sole" issues the Agencies describe were articulated by the Sportsmen in this appeal, which focuses on the fundamental right to keep and to bear arms for self-defense within existing statutory limitations.[4]

There is also no good faith basis for the Agencies to assert that the Sportsmen seek "an unlimited right to openly carry any gun without limitation." AB at 8. Contrary to the Agencies' disingenuous assertions, the Sportsmen are not asking for "unfettered" and "unlimited" use of firearms, "anywhere, anytime, [with] any gun." *Id*. at 3, 5, 8. Instead, as the Sportsmen repeatedly make clear, they merely seek to "vindicate their fundamental, constitutionally guaranteed rights to keep and bear arms without fear of arrest or fines, within the confines of the existing restrictions

[4] The Questions Presented in the Opening Brief are found at pages 13, 30, and 39.

contained within the comprehensive statutory framework imposed by the Legislature…." OB at 3.

As an example of the Agencies' misstatement of facts, the Agencies wrongly assert that the Sportsmen "failed to establish an imminent risk of irreparable harm or a likelihood of success on the merits of their claim" in the initial Chancery Court action. AB at 1 n.1. In actuality, the Chancery Court did not issue a ruling on the merits because it lacked equitable jurisdiction over the matter.[5]

In sum, the Agencies cannot abrogate as "super-legislators" an enshrined, fundamental constitutional right to self-defense, which the Delaware Bill of Rights recognizes as a pre-existing right with which all persons are born. The existence of the Regulations[6] prior to the 1987 passage of Section 20 does not, *ipso facto*, render the Regulations immune from challenge.

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[5] The Chancery Court found:

> There was a request for injunctive relief here, and I certainly believe it was made in good faith….
>
> The argument here today that didn't address jurisdiction is wasted time, I suppose….I think it would be improper for me, on this case as it's been presented, to presume to retain jurisdiction over what are really purely legal issues. So for that reason, the motion to dismiss is granted with leave to refile under the statutory period in Superior Court….I am without jurisdiction to go forward.

Bridgeville Rifle & Pistol Club, Ltd. v. Small, Del. Ch., No. 11832-VCG, transcript (Jun. 6, 2016) (AR005–AR007).

[6] The Regulations, which are described in the Opening Brief, are found at 3 *Del.*

The Agencies' attempt to satisfy their burden of proof by mislabeling State Parks and Forests as "sensitive" areas akin to courthouses, post offices, and schools cannot withstand scrutiny. While some government buildings are considered sensitive areas for purposes of the relevant constitutional analysis, unlike State Parks and Forests, no hunting is allowed in courthouses, schools, or post offices, nor do those buildings house wild animals on vast public lands.

Therefore, and for the reasons set forth more fully herein and in the Opening Brief, the Agencies cannot satisfy their burden of proof under intermediate scrutiny, as required by this Court in *Doe*.

Admin. C. § 402-8.0 and 7 *Del. Admin. C.* 9201-21.0.

ARGUMENT

I. The Regulations Impermissibly Prohibit Delaware Citizens from Exercising Their Fundamental Right to Defend Themselves and Their Families

A. The Rights Enshrined in Section 20 Extend Beyond the Home Pursuant to this Court's Recent *En Banc* Precedent

This Court's recent unanimous opinion in *Doe* indisputably remains controlling law applicable to this appeal, despite the Agencies' attempt to minimize its import.[7] *See* 88 A.3d at 654 (finding that the right to bear arms, through Section 20, extends beyond the home). As explained by this Court in *Doe*, the Delaware Constitution, through Section 20, provides greater rights than the Second Amendment of the United States Constitution:

> The text of Section 20, enacted in 1987, and the Second Amendment, effective beginning in 1791, is not the same. 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. Accordingly, our interpretation of Section 20 is not constrained by the federal precedent relied upon by the WHA, which explains that at the core of the Second Amendment is the right of lawabiding, responsible citizens to use arms in defense of "hearth and home…." Article I, Section 20 is not a mirror image of the Second Amendment and [] the scope of the protections it provides are not limited to the home.

[7] The Agencies admit that the intermediate scrutiny analysis adopted by this Court in *Doe* applies to the present action. AB at 17.

Id. at 665. Thus, it is simply not the case, as the Agencies argue, that the Delaware Constitution limits the right to keep and bear arms in a manner that is more restrictive than the Second Amendment.[8] *See* AB at 26–28.

In the Agencies' attempt to deflect this Court's controlling precedent, they mistakenly rely on federal cases that provide fewer, minimum rights based on the Second Amendment. Yet, this Court has already determined that "the interpretation of Section 20 is not dependent upon federal interpretations of the Second Amendment." *Doe*, 88 A.3d at 665. This is because the language and legislative history of Section 20,[9] and the laws passed by the General Assembly, demonstrate the General Assembly's intent to provide a right to keep and to bear arms independent of the federal right. *See id*. Therefore, in accordance with *Doe*, the

[8] The Second Amendment reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II. Section 20 reads: "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." DEL. CONST., art. I, § 20.

[9] *Doe* recognized Delaware's "long history, dating back to the Revolution, of allowing responsible citizens to lawfully carry and use firearms in our state." *Id*. at 663. "An individual's right to bear arms was 'understood to be an individual right protecting against both public and private violence.'" *Id*. (quoting *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008)). Scholars have recognized that the history of infringement on the right to bear arms has disproportionately affected minorities. *See, e.g*., Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J. L. & PUB. POL'Y 17 (Winter 1995) (detailing the historical evidence of the racism underlying gun control laws).

Delaware Constitution affords greater rights to Delaware citizens than the United States Constitution. *See id*.; Randy J. Holland, *The Delaware Constitution of 1987: The First One Hundred Years* 17 (1997) ("Federal constitutional standards, however, set only a minimum level of protection. The declaration of rights or substantive provisions in a state's constitution may, and often do, provide for broader or additional rights.") (AR013).

The Agencies' reliance on federal cases is misplaced. Because Section 20 is broader than the Second Amendment, federal cases merely provide a "floor" of minimum rights—not a "ceiling" that limits individuals' maximum allowable rights. *See Doe*, 88 A.3d at 665; Randy J. Holland, *The Delaware Constitution of 1987: The First One Hundred Years* 17 (1997) (AR013).

In interpreting the wider scope of Section 20, this Court recognized that the right to bear arms is not limited to the home. *Doe*, 88 A.3d at 665. Although a person's interest in carrying a weapon for self-defense is strongest in the home, under Delaware law, and even based on an interpretation of the less robust Second Amendment, the right has been persuasively held to extend beyond the home. *See id*.; *Moore v. Madigan*,[10] 702 F.3d 933, 935 (7th Cir. 2012) ("Both *Heller* and

[10] The Agencies rely on *Moore* for the proposition that there is a lesser burden on the right to bear arms in public places, *see* AB at 30, but fail to acknowledge that *Moore*, which is cited by this Court in *Doe*, goes on to state that the right to bear arms does exist outside the home. *See Doe*, 88 A.3d at 665 n.47 (citing *Moore*, 702

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.") (internal citation omitted) (emphasis in original).[11]

Because *Doe* expressly recognizes a right to keep and to bear arms outside the home, and the Regulations ban firearms in State Parks and Forests, the Regulations violate Section 20.[12]

B. The Agencies Invert Their Burden Under Intermediate Scrutiny

The Agencies repeatedly invert their burden under intermediate scrutiny. For example, in support of their argument, the Agencies state: "There has been no showing that any of the Appellants – or anyone else – has been placed at risk of harm in State Parks or Forests, due to the lack of a gun." AB at 5. They also claim that the Sportsmen "fail to cite any instance of harm to themselves or to their family that

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F.3d at 936)) (the "right to bear arms thus implies a right to carry a loaded gun outside the home").

[11] *See also Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (declining to definitively answer whether the right to bear arms extends beyond the home, but finding that "the Second Amendment's individual right to bear arms may have some application beyond the home.").

[12] The constitutional infirmity of the Regulations is even more apparent as applied to the expensive cottages that individuals may reside in with their families for weeks at a time in State Parks. *See* OB at 25–26.

would justify armed resistance or gunfire." *Id*. at 8. The correct standard places a reverse burden on the Agencies.

First, the Sportsmen are not asking for the right to "gunfire." *Id*. The Sportsmen merely seek rights recognized after the deliberately tortuous legislative process in connection with Section 20's passage by two successive sessions of the General Assembly: "the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." DEL. CONST. art. I, Sec. 20.

More importantly, though, the Sportsmen need not show that the right to bear arms is necessary—it is a pre-existing right, which is already enshrined in the Delaware Constitution.[13] The Agencies' argument is akin to unreasonably asserting that a person needs to show why she wants to exercise her right to free speech or the practice of religion, before being able to enforce that right.

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[13] The right to bear arms is

> a species of right we denominate as "fundamental," reflecting our understanding that it finds its protection, but not its source, in our constitutions. The right's existence precedes, and is independent of, such documents. Bearing arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."

Wisconsin Carry, Inc. v. City of Madison, 892 N.W.2d 233, 238 (Wis. 2017) (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1875)) (citing *Heller*, 554 U.S. at 592 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed….")).

Section 20 is the result of a public policy decision debated over many years and memorialized in 1987. The Agencies want to reargue that decision. This Court is not the correct forum to determine whether the Delaware Constitution, which protects the fundamental right to bear arms, should be amended to eliminate this protection.

Section 20 is the law of Delaware. The burden is on the Agencies to establish that repudiation of this fundamental constitutional right is substantially related to their proffered interests in protecting public safety. *See Doe*, 88 A.3d at 666 (explaining that where heightened scrutiny, including intermediate scrutiny, applies, "the State has the burden of showing that the state action is constitutional."). Accordingly, the correct question is not why guns are necessary to self-defense in State Parks and Forests, but rather: why the gun ban is "reasonably necessary to ensure the [Agencies'] objective is met." *Id*. at 666–67.

In light of the foregoing, the Sportsmen also need *not* prove, as the Agencies wrongly suggest, that confrontations will arise, for which the Sportsmen will require firearms. *See* AB at 19–20. This is both a false test and an incorrect shift of the burden of proof.

Similarly, the Sportsmen need *not* prove that police officers will "come too late" to intervene or to prevent injury. *Id*. at 20. Both the United States Supreme Court in *Heller*, and this Court in *Doe* rejected the Agencies' view that citizens

should wait for the intervention of a park ranger, who is responsible for controlling nearly 100,000 acres. *See Heller*, 554 U.S. at 595; *Doe*, 88 A.3d at 663; David Small, *Finding a Fair Balance Is Not Easily Done*, THE NEWS J., May 28, 2016, at 9A (A471). The right to bear arms is meant to permit a citizen "to 'repe[l] force by force' when 'the intervention of society in his behalf, *may* be too late to prevent an injury.'" *Heller*, 554 U.S. at 595 (emphasis added); *Doe*, 88 A.3d at 663.

This right serves as a preventative measure. Thus, individuals need not "justify their need for an armed defense," *see* AB at 20, because the General Assembly has recognized that the right to keep and bear arms pursuant to the Delaware Constitution is fundamental.[14] *Doe*, 88 A.3d at 664.

[14] While the Sportsmen also need not prove, as suggested by the Agencies, that they will be attacked by wild animals unless they are afforded their constitutionally protected right to bear arms, *see* AB at 10, 15, undomesticated animals do present a danger in State Parks and Forests. There are 800 species of wild animals in Delaware, including black bear, wild hogs, snakes, bobcats, coyotes, and foxes. *See* Press Release, DNREC, Bear seen in northern New Castle; public advised to contact DNREC if spotted (May 18, 2016), *available at* http://www.dnrec.delaware.gov/News/Pages/Bear-seen-in-northern-New-Castle-County-public-advised-to-contact-DNREC-if-spotted.aspx; DEL. DIV. OF FISH & WILDLIFE, *Wildlife Species Conservation & Research Program*, DELAWARE.GOV, http://www.dnrec.delaware.gov/fw/NHESP/Pages/default.aspx (last visited May 18, 2017); Molly Murray, *Caught on Camera: Pesky wild pigs in Delaware*, THE NEWS J. (Apr. 1, 2015, 5:16 PM) http://www.delawareonline.com/story/news/local/2015/ 04/01/photoincreases-fear-wild-pigs/70778754/; DEL. DIV. OF FISH & WILDLIFE, *Coyotes in Delaware*, DELAWARE.GOV, http://www.dnrec.delaware.gov/fw/Hunting/Pages/Coyotes.aspx (last visited May 18, 2017).

In their attempt to improperly shift the burden to the Sportsmen to show that firearms are necessary for self-defense, despite the fact that Section 20 already protects this individual right, the Agencies fail to establish that the Regulations are substantially related to protecting State Park and Forest visitors.[15] Although the Agencies assert that the ban on firearms is necessary to protect public safety, the record is devoid of any support for how a ban on firearms actually makes people safer, other than "general concerns," which this Court recently held is insufficient to carry the Agencies' burden under intermediate scrutiny. *See id*. at 667 (striking down a firearm ban because the Wilmington Housing Authority needed to "show more than a general safety concern and it [did] not….").[16]

The Agencies' citation to a 1997 West Virginia case detailing incidents where individuals were accidentally killed while carrying loaded weapons inside their vehicles, does not satisfy the Agencies' burden to show that the Regulations are

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[15] Temporary visitors can include those who rent cottages for several weeks at $1,900 per week. *See* OB at 25, n.19. Currently, that expensive family housing does not include the right to defend or protect one's family.

[16] Relying on United States Supreme Court precedent, the Sixth Circuit has explained that "[u]nder intermediate scrutiny, '[t]he burden of justification is demanding and it rests entirely on the State.'" *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 693–94 (6th Cir. 2016) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). "In discharging this burden, the government can rely on a wide range of sources…but it may not rely upon mere anecdote and supposition." *Id*. at 694 (quoting *United States v. Playboy Enter. Grp., Inc*., 529 U.S. 803, 822 (2000)) (internal quotation marks omitted).

substantially related to, and reasonably necessary to, protecting public safety in State Parks and Forests. *See* AB at 34 (citing *W.Va. Dept. of Natural Res. v. Cline*, 488 S.E.2d 376, 383 (W.Va. 1997)). The inherent risk of accidental injury associated with carrying loaded firearms without taking adequate safety measures did not deter the General Assembly from adopting an even broader version of the Second Amendment, and to allow generally for open carrying of firearms in Delaware, though they have imposed a restriction on carrying loaded rifles and shotguns in a vehicle. *See* 7 *Del. C.* § 708.

Instead of providing record evidence to support that the Regulations are substantially related to protecting public safety, the Agencies borrow from First Amendment principles and couch the Regulations as merely time, place, and manner restrictions, which they are not. *See* AB at 7, 21, 31–32. Consequently, the Agencies argue that the Regulations pose less of a constitutional burden than outright prohibition. *See id*. Yet, the Regulations are a total ban on firearms for defensive purposes. Indeed, outside the hunting season, the Regulations ban all firearms, at all times, in all places, in any manner, across all State Park and Forest lands.

Instead of explaining how the severe burden on the right to keep and bear arms is no more restrictive than necessary to protecting public safety, the Agencies claim that protecting the public simply outweighs any interest in "private gun rights." *See* AB at 28. However, the Agencies fail to recognize that it is the public that is afforded

"private gun rights" by the General Assembly for purposes of self-defense under Section 20.

In arguing that the mere invocation of public safety is enough to outweigh the burden on the fundamental rights of Delaware citizens, the Agencies cite federal cases, which are constrained to the narrower scope of the Second Amendment. The Agencies assign misplaced emphasis on federal cases as if they provide a limit on Section 20. To the contrary, Section 20 provides the "ceiling," and the federal cases only describe the minimum "floor level" of rights, as previously explained.

For example, the Agencies cite to cases such as *GeorgiaCarry.Org v. United States Army Corps of Engineers*, 38 F. Supp. 3d 1365 (N.D. Ga. 2014), and *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011). *See* AB at 29–30. By contrast, the court in *Morris v. United States Army Corps of Engineers* declined to follow *GeorgiaCarry.Org*. *See Morris*, 60 F. Supp. 3d 1120, 1124 (D. Idaho 2014). The *Morris* court was critical of *GeorgiaCarry.Org* for its reliance on *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012)—which is also cited by the Agencies—because the core right to self-defense was not at issue in *Nordyke*. *See id*.

In contravention of *Masciandaro*, *Morris* also held that outdoor parks are not sensitive areas, and the total ban on firearms at issue was unconstitutional under any

level of scrutiny. *See id*. at 1123–26. This is supported by federal law signed by President Obama in 2009 allowing firearms in national parks.[17]

The Agencies also rely on *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), and *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), to support their view. *See* AB at 24. *Fyock* provides little guidance in this action because that case involved a prohibition on large-capacity magazines, *see id*., and not a total ban on all firearms, on all State Park and Forest lands, for most of the year.

Unlike the total prohibition on firearms in this case, at issue in *Drake*—which did acknowledge that the right to bear arms may extend beyond the home—was a challenge to a concealed carry licensing requirement. *Drake* was also distinguished by *Norman v. State*, which explicitly found that:

> [A] total ban on the public carrying of ready-to-use handguns outside the home cannot survive a constitutional challenge under any level of scrutiny. A blanket prohibition on carrying [a] gun in public prevents a person from defending himself anywhere except inside his home, and as such constitutes a substantial…curtailment of the right of armed self-defense.

159 So.3d 205, 212 (Fla. Ct. App. Feb. 18, 2015). *Norman* went on to explain that the "degree of legislative deference exhibited in cases such as…*Drake*…goes too

[17] *See* NAT'L PARK SERV., U.S. DEPT. OF THE INTERIOR, *Firearms in National Parks*, https://www.nps.gov/gate/learn/management/firearms-in-national-parks.htm (last visited May 14, 2017); NAT'L PARK SERV., U.S. DEPT. OF THE INTERIOR, GUN REGULATIONS IN THE NATIONAL PARKS (Feb. 2010) *available at* https://www.nps.gov/grca/learn/management/upload/Firearms-in-IMRparks2-2010.pdf.

far, and would serve to validate expansive restrictions inconsistent with those rights guaranteed by the Second Amendment and the Florida Constitution." *Id*. at 225. Furthermore, "[a]ny complete prohibition on public carry [like the Regulations at issue] would violate the Second Amendment and analogous state constitutional provisions [such as Section 20]." *Id*. at 226.

Moreover, the Agencies' citation to *Baker v. Schwarb*, 40 F. Supp. 3d 881 (E.D. Mich. 2014), and *Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012), provides no help to their argument. *See* AB at 32. *Baker* determined that police officers were granted qualified immunity in a case involving the detention of individuals who were "trolling for a confrontation, by displaying their arms in a way that was extraordinary for the neighborhood." 40 F. Supp. 3d at 890. *Embody* similarly addressed the issue of qualified immunity with respect to detention of an individual openly carrying a fully loaded AK-47. *See* 695 F.3d at 581. There is no question that the Sportsmen are responsible gun owners.[18] Furthermore, the Sportsmen do not seek permission to "troll[] for confrontation," but to vindicate their right to possess arms for self-defense in accordance with Section 20, and within the confines of Delaware's comprehensive legislative scheme restricting firearm use and possession.[19]

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[18] *See* OB at 10 n.10 (citing the trial court's recognition that the Sportsmen are responsible gun owners).

[19] "Trolling for confrontation" would likely amount to the crime of aggravated menacing under Delaware law, which a person is guilty of "when by displaying what

The Agencies repeatedly rely on federal cases that interpret the narrower Second Amendment. The Agencies should have focused more carefully on this Court's interpretation of the more expansive rights made sacred in Section 20. *See Doe*, 88 A.3d at 665 (recognizing that Section 20 is a broader independent source for recognizing and protecting the right to keep and bear arms).

While the Agencies attempt to marginalize the holding of *Doe* and rely on distinguishable federal precedent throughout their brief, it is noteworthy that the Agencies do recognize that the record on appeal in this case is similar to that of *Doe*. *See* AB at 24. *Doe* also involved government regulation and prohibition of the right to possess and carry firearms outside the home in common areas of public housing (including lawns and parking lots).[20] Just as this Court found in *Doe*, the Regulations in this case should also be found to violate Section 20.

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appears to be a deadly weapon that person intentionally places another person in fear of imminent physical injury." 11 *Del. C.* § 602(b). Aggravated menacing is a felony. *See id.*

[20] The provision at issue in *Doe* banned firearms in "common areas" "outside of Plaintiffs' 'hearth and home.'" *Doe v. Wilmington Housing Auth.*, 880 F. Supp. 2d 513, 528 (D. Del. 2012), *rev'd*, 568 F. App'x 128 (3d Cir. 2014). The "common areas" included "space over which no individual resident has the power to exclude all other individuals. The 'common areas' are open to all tenants and guests, as well as WHA employees; they are not Plaintiffs' private residences, i.e., the unit for which a resident has signed a lease agreement." *Id.* (internal citations omitted). Procedurally, this Court's decision in *Doe* was based on a certified question of law from the U.S. Court of Appeals for the Third Circuit.

Because the Agencies have not satisfied their burden to demonstrate that the Regulations are substantially related to their proffered goal of protecting public safety, and the Regulations place an undue burden on the right to keep and to bear arms as codified by Section 20, the Agencies fail to satisfy the requirements of intermediate scrutiny.

C. The Agencies' Inflammatory Attack on the Amici Curiae is Unfounded

Rather than attempt to support the constitutionality of the Regulations, the Agencies attack the various briefs filed by the amici curiae, which include the brief filed by former Chief Justice Myron Steele on behalf of selected members of the Delaware General Assembly. The Agencies claim that those briefs "rely on pseudoscientific commentary to craft a rationale for what amounts to vigilante justice through heavily-armed private citizens." AB at 22. Not quite. The Sportsmen seek only to exercise their constitutionally protected rights to keep and to bear arms within the confines of the existing comprehensive legislative scheme; the Sportsmen do not seek a right for "vigilante" citizens to fire any weapon, at any time, without any limitation. *See id*. at 1, 5, 7, 8, 22, 33.

The briefs filed by the amici curiae in support of the Sportsmen's appeal are based on authoritative reasoning and reliable sources. The twisting of the Sportsmen's positions is an example of the Agencies' frequent use of failures of

logic, including the fallacies of *argumentum in terrorem* and *argumentum ad hominem*.

Moreover, the Agencies are incorrect that the amici briefs must be disregarded because the cited studies were not previously brought to the attention of the Superior Court. This Court may allow for the participation of amicus curiae where the brief presents non-duplicative arguments. *See Turnbull v. Fink*, 644 A.2d 1322, 1324–25 (Del. 1994). The amici curiae briefs complied with that requirement, and this Court granted the motions for leave to file the briefs without objection on the part of the Agencies.

Furthermore, the amicus brief filed by the Law Center to Prevent Gun Violence (the "Law Center") in support of the Agencies also cites resources not previously before the Superior Court. The Agencies do the same in their own Answering Brief.[21]

Although the Agencies attempt to discredit the amici briefs filed in support of the Sportsmen, genuine flaws exist within the Law Center's brief. For example, the Law Center attacks the studies cited in support of the Sportsmen's appeal as

[21] The Agencies also rely on dystopian doomsday predictions instead of controlling authority, coupled with hyperbolic scare tactics in footnotes that refer to tragic deaths caused by mentally ill persons or terrorists. *See* AB at 8 n.13. These statistics would have similar relevance if this case were about allowing the sale of trucks, and the Agencies referred to the multiple incidents involving terrorists who use trucks to kill large numbers of people.

"outdated." *See* Law Center Br. at 13–15. Yet, in doing so, the Law Center cites to publications that are much older than the primary source it takes issue with—John Lott's 2010 publication, MORE GUNS, LESS CRIME. *See id.* Furthermore, the Law Center labels, without explaining, State Parks and Forests as sensitive areas as that term is used in *Heller*. *See id*. at 2–6. If that mislabeling were correct, there would not be any space in Delaware that would be safe from the "sensitive" label. Therefore, it is the Law Center's brief in support of the Agencies argument—not the Sportsmen's supporting amici briefs—that should be given less weight by this Court.

II. Laws Enacted by the Delaware General Assembly Preempt the Regulations

The Sportsmen seek nothing more than their constitutionally protected rights limited by an existing comprehensive range of firearms restrictions in the Delaware Code and legislative scheme, which preempt the Regulations.

A. The Sportsmen Have Properly Asserted the Issue of Preemption

As an initial matter, the Agencies assert that Section 20 should not be considered as a source of preemption because the Sportsmen did not explicitly raise that issue on appeal. AB at 37. To the contrary, in arguing that the Delaware legislative scheme, which includes the Delaware Constitution as enacted by the Delaware General Assembly, preempts the Regulations, the Sportsmen have adequately preserved this issue on appeal. (A157–A162; A186–A189). It remains hard to imagine how one could be truly surprised that Section 20 continues to be a major part of the Sportsmen's arguments in this appeal.

Similarly, the Agencies ask this Court not to consider the numerous firearms-related statutes within the Delaware Code as evidence of the existing comprehensive legislative scheme because the Sportsmen did not cite each and every statute as additional support in their trial court briefing. *See* AB at 38–39. The Sportsmen were not required to cite every statute in support of their assertion below for the proposition that the existing comprehensive legislative scheme preempts conflicting Regulations by a lesser body. By that faulty logic, parties to an appeal would not be

permitted to expand on arguments in appellate briefs. Furthermore, the list of statutes in the trial court briefing was illustrative, and not intended to be exhaustive. There is no doubt that the issue of preemption was raised, and the Agencies were on notice of the same.[22] (A157–A162; A186–A189).

In recognition of the fact that this Court may consider the numerous statutes cited by the Sportsmen in support of the General Assembly's intent to preempt the Regulations, the Agencies attempt to argue that the statutes do not bear a close enough "nexus" to the issue to be persuasive. *See* AB at 39. The statutes in the Delaware Code need not be mirror images of the Regulations at issue to evidence preemption in the overall field of firearms regulation. Instead, it is easily confirmed that the Delaware Code contains numerous and wide-sweeping provisions related to the possession and use of firearms. This bolsters the argument that the Delaware General Assembly has developed a comprehensive legislative scheme preempting the inconsistent Regulations. *See* OB at 35 n.26.[23]

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[22] Supreme Court Rule 8 states: "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice require, the Court may consider and determine any question not so presented." The question of whether Delaware's comprehensive legislative scheme preempts the Regulations was fairly presented and addressed in all prior briefing by both parties.

[23] Statutes addressing firearms in the Delaware Code include: 24 *Del. C.* §§ 901, 902, 903, 904, 904A, 905 (regulating the sale of firearms); 24 *Del. C.* § 1321 (prohibiting security guards from carrying firearms without proper license); 9 *Del. C.* § 330 (prohibiting counties from regulating firearms); 22 *Del. C.* 111 (prohibiting municipalities from regulating firearms); 11 *Del. C.* § 1441 (allowing retired police

B. The Agencies Misinterpret the Significance of 11 *Del. C.* §§ 1441, 1441A, 1441B and Fail to Recognize this Court's Prior Precedent

The Sportsmen accurately represented sections 1441A and 1441B of Title 11 of the Delaware Code in their Opening Brief. The Agencies argue that the Sportsmen left out the fact that those statutes are not meant to supersede state law regarding possession of firearms on private property or on state or local government property, including in parks. *See* AB at 40. Without quoting the entire statutes, the Sportsmen did accurately state that § 1441A and § 1441B, which borrow language from federal statutes, "are subject to state law regulating firearms on state government property," OB at 37, which is the type of property at issue in this appeal.

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officers to be specially licensed to carry a concealed weapon); 11 *Del. C.* §§ 1441A, 1441B (extending federal law allowing retired police officers to carry concealed firearms); 11 *Del. C.* § 1442 (prohibiting a non-law enforcement officer to conceal any firearm without a license); 11 *Del. C.* § 1444 (prohibiting possession of a firearm silencer or weapon adaptable for use as a machine gun); 11 *Del. C.* §§ 1448, 1448A (prohibiting certain individuals from possessing deadly weapons); 11 *Del. C.* § 1457 (restricting firearms in school zones); 11 *Del. C.* § 1459 (prohibiting possession of a weapon with an obliterated serial number); 11 *Del. C.* § 1460 (prohibiting firearm possession in a public place while under the influence); 11 *Del. C.* § 602 (prohibiting display of firearm with intent to place another in fear of physical injury); 11 *Del. C.* § 603 (prohibiting guardians from allowing purchase of firearm by a juvenile); 7 *Del. C.* § 1707 (prohibiting training of hunting dogs while carrying a firearm); 10 *Del. C.* §§ 2703, 2806 (regulating possession of firearms by constables); 10 *Del. C.* § 9224 (requiring drug testing for Justice of Police employees who carry firearms); 10 *Del. C.* § 1045 (allowing court to order temporary relinquishment or ban on possession of firearms in connection with protective order); 29 *Del. C.* § 9005 (requiring training for officers who carry firearms at work for Department of Services for Children, Youth and Their Families); 7 *Del. C.* § 708 (restricting individuals from carrying loaded rifles and shotguns in vehicles).

The Sportsmen did not attempt to obscure that fact. Instead, the Sportsmen presented an argument as to why that language of § 1441A and § 1441B was not dispositive of the preemption issue in this case as argued by the Agencies.

In addition to the Sportsmen's explanation in the Opening Brief, the truism that § 1441A and § 1441B are not meant to supersede contrary state law is inconsequential, as the Regulations were enacted by the Agencies, not the Delaware General Assembly. The Agencies do not have the same law-making power as the Legislature in terms of legislative authority, and the Regulations do not carry the same weight as state statutes—or Constitutional amendments—enacted by the General Assembly. *See Christiana Care Health Servs. v. Palomino,* 74 A.3d 627, 632 (Del. 2013) (Department of Labor regulation conflicted with the Delaware Code and impermissibly abridged the claimant's right under a Delaware statute).

Thus, whether § 1441A or § 1441B are meant to supersede state law is immaterial to determining whether the Delaware Code as a whole is meant to preempt conflicting regulations enacted by a lesser entity beneath the Legislature in governmental status. Regardless of whether § 1441A and § 1441B are intended to supersede conflicting state law, though, the multiple Delaware statutes addressing firearms evidence the General Assembly's intent to occupy the field of firearms legislation, and therefore, preempt conflicting regulations enacted by agencies with inferior legislative authority.

In striking down a similar ban on firearms, in *Doe* this Court found that the language of § 1441 and § 1441A actually supported its decision. This Court explained: "Even active and retired police officers who are residents, household members, or guests are disarmed by the [regulation]. They are restricted in possessing firearms in the public housing common areas of the apartment buildings despite their exemption by the General Assembly from concealed-carry license requirements." *Doe*, 88 A.3d at 668. The *Doe* Court went on to state:

> 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. 11 *Del. C*. § 1441(g). Further, retired police officers may be specially licensed to carry a concealed weapon following their retirement. *Id*. § 1441(h).

Id. at 668 n.62. "Delaware has also implemented the *federal* Law Enforcement Officers Safety Act [§1441A] allowing qualified active and retired officers to carry concealed weapons within or outside of their home jurisdiction. *Id*. § 1441A." *Id*. (emphasis added).

In *Doe*, this Court declined to address the significance of the "preemption" language in § 1441A, as addressed by the Agencies and the lower court. Instead, this Court struck down the firearm ban at issue in *Doe*, finding that its decision was supported by the language of § 1441 and § 1441A. As in the present action, the ban also impermissibly applied to retired and current police officers, whom the Delaware General Assembly explicitly exempted from other firearms regulations.

C. The General Assembly Has Evidenced an Intent to Preempt the Regulations

The Agencies' assertion that the "unrelated collection of statutes that the [Sportsmen] have cobbled together do not demonstrate the General Assembly's implied intent to occupy the field of firearms," AB at 41, is rebutted by the fact that the various provisions of the Delaware Code and Section 20 collectively govern the "who, what, where, and when" of firearms regulation.

Although not binding on this Court, the Wisconsin Supreme Court's recent decision in *Wisconsin Carry* is instructive. *See generally* 892 N.W.2d 233 (finding that a city had no authority to impose firearms regulation that was more stringent than, and conflicted with, state statute). Wisconsin, like Delaware, affords broad rights to its citizens to bear arms for protection: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." *Id*. at 238. In *Wisconsin Carry*, the court determined that a Wisconsin licensing statute's evident purpose was to allow carrying of concealed weapons in as broad a sense as possible. "This breadth, coupled with the assurance that only the legislature can add new restrictions, allows individuals to move about the entire state with confidence they are not violating the law." *Id*. at 254. Accordingly, the court found that the city could not enforce a more restrictive rule banning firearms on public busses against concealed-carry licensees who were in compliance with the state statute. *Id*.

Similarly, the Agencies' Regulations are inconsistent with the broad nature of Section 20 and the comprehensive regulatory framework enacted by the Delaware Legislature. As in *Wisconsin Carry*, the Agencies should be enjoined from enforcing the more restrictive Regulations against individuals who are in compliance with Section 20 and the Delaware Code.

Moreover, the Agencies misconstrue the canon of statutory interpretation known as *expressio unius est exclusio alterius*, in stating that the General Assembly had to explicitly identify the Agencies by name if it intended to prohibit the Agencies from enacting conflicting firearm-related regulations. *See* AB at 40–41. The Agencies misunderstand this canon of construction, and its exception, which stand for the principle that the General Assembly need *not* explicitly identify *every* governmental agency or entity that should be precluded from enacting inconsistent law.[24] *See* OB at 32–34; *see also Wisconsin Carry*, 892 N.W.2d at 246–47 (finding that to accept the city's argument that the legislature must explicitly list every prohibited legislative act to evidence intent to preempt certain acts is "law-making as comedy.").[25]

[24] The Agencies (and the trial court) failed to address the second canon of statutory construction cited by the Sportsmen in their Opening Brief: "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." OB at 34–35.

[25] Specifically, Wisconsin's high court explained:

In sum, Section 20, which was drafted with language intentionally broader than the Second Amendment, coupled with the copious existing Delaware statutes enacted by the General Assembly governing the possession and use of firearms, as well as related activity, is evidence of the Legislature's intent to preempt the Regulations, which impose a total ban on the defensive use of firearms in State Parks and State Forests.

> Accepting the City's argument would require the legislature to list every possible label for a legislative act before we could conclude that its intention was to withdraw from a municipality the authority to regulate a particular subject. And it would further require that the legislature amend the statute every time a municipality conceived of a new label for its legislative acts. But *this is law-making as comedy*, with a hapless legislature chasing about a wily municipality as it first enacts an ordinance on a forbidden subject, and then a policy, then a rule, then a standard, and on and on until one of them wearies of the pursuit or the other exhausts the thesaurus. The City advocated its interests in a competent and professional manner, so we are confident it does not really intend that we understand the legislative process in this fashion. Thus, in the absence of any discernible reason to do so, we will not.

Wisconsin Carry, 892 N.W.2d at 246–47. (emphasis added).

III. The Agencies Fail to Establish that the Regulations are Reasonably Necessary To Carry Out Their Authority to Protect and Care for State Park and Forest Lands

Whether the Agencies have the power to regulate State Park and Forest lands to protect those lands is not at issue in this appeal. The inquiry instead focuses on whether the Regulations are reasonably necessary to further that purpose. As set forth by this Court:

> Intermediate scrutiny seeks to balance potential burdens on fundamental rights against the valid interests of government. To survive intermediate scrutiny, governmental action must "serve important governmental objectives and [must be] substantially related to [the] achievement of those objectives." The governmental action cannot burden the right more than is reasonably necessary to ensure that the asserted governmental objective is met.

Doe, 88 A.3d at 666–67 (quoting *Turnbull v. Fink*, 668 A.2d 1370, 1379 (Del. 1995)). Because the Regulations "infringe[] the fundamental right of responsible, law-abiding citizens to keep and bear arms for the defense of self, family, and home," the Agencies "ha[ve] the burden to demonstrate that [their] governmental action passes intermediate scrutiny." *Id*. at 667.

The Agencies argue that when the General Assembly grants authority to an administrative agency, that power "should be construed so as to permit the fullest accomplishment of the legislative intent or policy." AB at 45 (quoting *Atlantis I Condominium Ass'n v. Bryson*, 403 A.2d 711, 713 (Del. 1979)). Furthermore, they assert that "[a]n expressed grant of legislative power to an agency carries with it the

authority to do all that is reasonably necessary to execute that power." *Id*. (quoting *Dept. of Correction v. Worsham*, 638 A.2d 1104, 1107 (Del. 1994)).

The Agencies miss a crucial facet of such authority: they are only authorized to act within the scope of legislative intent, and the act must be reasonably necessary to execute the grant of legislative power. *See Atlantis I*, 403 A.2d at 713; *Worsham*, 638 A.2d at 1107.

The broad protections of Section 20 and the existing comprehensive legislative scheme indicate that the Legislature did not intend to allow the Agencies to completely eviscerate a fundamental constitutional right. Individuals should not be prohibited from exercising their right to keep and bear arms for self-defense, within the confines of Delaware law. This policy decision was made in 1987 by the Legislature after a multi-year deliberative legislative process. This process was intentionally designed to make constitutional amendments difficult, with the requirement of passing a bill in two successive General Assemblies. That policy should not be reversed in this forum. Legislative Hall in Dover is the appropriate venue for the Agencies to seek the nullification of Section 20.

Moreover, it is unreasonable to conclude that the General Assembly would allow the exercise of rights recognized by Section 20 in crowded public places, such as Rodney Square in Wilmington, as well as the vast majority of other more populated public spaces in Delaware, but not the remote and mostly unpopulated

expanses of State Parks and Forests. Therefore, the Agencies cannot rightly be described as acting within the scope of legislative intent in enacting Regulations that conflict with Delaware law.

The Agencies also fail to show how a ban on firearms is reasonably necessary to protect and care for their lands or promote public safety. *See Worsham*, 638 A.2d at 1107 (agencies may do what is "reasonably necessary" to execute their grant of authority); *Doe*, 88 A.3d at 666–67 (a governmental action may not burden a right more than is "reasonably necessary" to ensure that the asserted objective is met). The Agencies provide no explanation for how they satisfy this requirement.

To the contrary, selected retired Delaware police officers, who filed an amicus curiae brief on behalf of the Sportsmen, state: "From a law enforcement and public safety point of view, there is no justification for completely banning the possession and carry of firearms by law-abiding citizens for purposes of self-defense."[26] So, too, the effectiveness of defensive gun use is also reported by numerous government entities as explained in the Amicus Curiae Brief of Pink Pistols in Support of Plaintiffs-Appellants, at pages 8 through 13. The Agencies provide no evidence to

[26] *See* Amicus Curiae Brief of Law Enforcement Legal Defense Fund, Law Enforcement Action Network, and Retired Delaware Police Officers Hosefelt, Smith, Deputy, Egolf, Monaghan, Briggs, Roe, Brode, Capitan, Konnick, and Guittari in Support of Appellants and Reversal, at 8.

the contrary in making the blanket assertion that the Regulations are consistent with and further the interest of public safety. *See* AB at 47.

Instead of promoting public safety, sound reasoning supports that "[g]un-control laws have a tendency of turning into criminals peaceable citizens whom the state has no reason to have on its radar," as firearm offenses "are *malum prohibitum*[27] offenses that ostensibly seek to prevent already-prohibited secondary conduct, and which sometimes impose penalties greater than those for heinous *malum in se*[28] offenses." Robert Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should take the Second Amendment Seriously*, 14 GEO. J. OF L. & PUB. POL'Y 17, 37–38 (2016). The ineffectiveness of gun control in preventing crime has also been recognized. *See id*. at 39–41 (quoting Jeffrey R. Snyder, *A Nation of Cowards*, 113 PUB. INT. 40, 46–47 (1993)).

Given the Agencies' inability to support their assertion that the Regulations are reasonably necessary to further the goal of protecting public safety, or that the General Assembly intended to grant broad authority to the Agencies to enact

[27] Black's Law Dictionary defines a *malum prohibitum* offense as one that "is a crime merely because it is prohibited by statute although the act itself is not necessary immoral." BLACK'S LAW DICTIONARY 1103 (10th ed. 2014) (AR014).

[28] Black's Law Dictionary defines a *malum in se* offense as one that is "inherently immoral, such as murder, arson, or rape." BLACK'S LAW DICTIONARY 1103 (10th ed. 2014) (AR015).

Regulations that conflict with Delaware law (including Delaware's Bill of Rights), the Agencies have impermissibly acted outside the scope of their authority in enacting the constitutionally infirm Regulations at issue.

CONCLUSION

This Court recently reinforced the fundamental right to self-defense, which each person is born with, in its unanimous *en banc* opinion in *Doe*. That right is enshrined in Section 20. This Court recognizes that the Delaware Constitution protects the right to both keep and bear arms outside the home.

The Regulations ban the exercise of that fundamental right in State Parks and Forests, including within costly cottages where families reside. The Agencies fail to cite any record evidence to support their burden to meet intermediate scrutiny. Instead, they rely on unsupported general safety concerns, which this Court in *Doe* recently ruled was insufficient for the Agencies to satisfy intermediate scrutiny. The Sportsmen respectfully request that this Court find that the challenged Regulations impermissibly restrict the Sportsmen's right to possess and bear arms in violation of Section 20.

Furthermore, this Court should rule that the Agencies exceeded their statutory authority in enacting the Regulations, which conflict with existing Delaware law, and which have been preempted by the General Assembly. Therefore, and for the reasons also explained in the Sportsmen's Opening Brief, and by several amici curiae in support of the Sportsmen's appeal, the Sportsmen respectfully request that this Court reverse the trial court below, and declare that enforcement of the

Regulations is prohibited.

ECKERT SEAMANS CHERIN & MELLOTT, LLC

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

Francis G.X. Pileggi (DE No. 2624)
Alexandra D. Rogin (DE No. 6197)
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
302-574-7400
fpileggi@eckertseamans.com
arogin@eckertseamans.com

Attorneys for Plaintiffs Below/Appellants

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