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Via FedEx

Senator Margaret Rose Henry
Senate Judiciary Committee, Chair
Legislative Hall
411 Legislative Avenue
Dover, DE 19901-3623

Senator Gregory F. Lavelle
Senate Judiciary Committee, Member
Legislative Hall
411 Legislative Avenue
Dover, DE 19901-3623

Senator Bruce C. Ennis
Senate Judiciary Committee, Member
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411 Legislative Avenue
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Senator Dave G. Lawson
Senate Judiciary Committee, Member
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Senator Robert Marshall
Senate Judiciary Committee, Member
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411 Legislative Avenue
Dover, DE 19901-3623

Re: Senate Bill 163
Objections by Delaware State Sportsmen's Association based on
Constitutional Arguments

Dear Senators Henry, Ennis, Marshall, Lavelle and Lawson:

I have been asked by the Delaware State Sportsmen's Association ("DSSA")
to conduct a legal analysis of Senate Bill 163, which I understand is scheduled to

be considered by your committee, in order to determine the constitutionality of S.B. 163.

The constitutional problems with the proposed legislation begin with the deficient and misleading synopsis of the bill, which is both inaccurate in its description of the law and incomplete in its surprising omission of reference to the Constitution of the State of Delaware as interpreted by recent Delaware Supreme Court decisions. Highlights of the key legal arguments that explain why the legislation would likely be found unconstitutional by the courts, include the following points:

- 1) The only two decisions by the Delaware Supreme Court that directly and fully address the counterpart in Delaware's Constitution to the Second Amendment of the U.S. Constitution, regarding the scope of the right to bear arms *outside* the home, must be the starting point for any legal analysis regarding the constitutionality of any proposed state statute that purports to restrict the right to bear arms. I successfully argued both Delaware Supreme Court decisions interpreting Delaware's Constitutional provision recognizing the right to bear arms outside the home, (along with the help of DSSA and many others).

2) Article I, Section 20 of the Delaware Constitution, which was adopted by supermajorities of two successive Delaware General Assemblies, and became effective in 1987, is much broader than the more limited scope of the right to bear arms contained in the Second Amendment to the U.S. Constitution, as the following comparison with Section 20 demonstrates:

Text of Second Amendment:	Text of Section 20:
“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.”	“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.”

3) The Delaware Supreme Court’s decision in *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 665 (Del. 2014), explained that “our interpretation of Section 20 is not constrained by federal precedent,” and emphasized that the scope of Section 20 is much broader than the scope of the Second Amendment to the U.S. Constitution--and that Section 20 of Article I of the Delaware Constitution recognizes the more expansive right of “defense of self and family *in addition to* home.” *Id.* (emphasis in original). The Supreme Court in *Doe* also recognized that Delaware is an “open carry” state, where one may openly

carry firearms (subject to a comprehensive scheme of existing statutory restrictions).

4) In the *Doe* case, I successfully argued that a resident of public housing is entitled to carry a firearm outside her home in the common areas of the public housing facilities, such as parking lots and front lawns and other areas open to the public both in, and around, the buildings. The court invalidated regulations that would restrict the right to bear firearms because Article I, Section 20 extends the right to defend one's self and family beyond the home, as well as for "recreational and hunting purposes."

5) More recently, I represented the winning party in the 2017 Delaware Supreme Court decision in *Bridgeville Rifle & Pistol Club, Ltd. v. Small*. In that decision, the court relied on the provisions of Article I, Section 20 to invalidate a regulation that banned firearms in Delaware state parks and state forests.

6) One of the substantial problems with proposed S.B. 163 and its synopsis, is that it focuses for its purported legal support almost exclusively on a decision of the United States Court of Appeals for the Fourth Circuit--which has no binding authority in the State of Delaware. Nor does the synopsis even mention applicable Delaware law. The State of Delaware is within the jurisdiction of the

United States Court of Appeals for the Third Circuit, and neither the Third Circuit nor the U.S. District Court for the District of Delaware have considered the specific issue addressed by the Fourth Circuit's *Kolbe* case relied on in the synopsis. There is no reason to believe that the Third Circuit Court of Appeals would follow the novel and extreme positions taken in the decision of the Fourth Circuit Court of Appeals in *Kolbe v. Hogan*.¹ To the contrary, the U.S. Third Circuit Court of Appeals has taken a more balanced view of restrictions on the right to bear arms as indicated in its decision styled *United States v. Marzarella*, 120 F.3d 85 (3d Cir. 2010).²

7) It remains important to emphasize that the Second Amendment to the U.S. Constitution only provides the *minimum* level of rights available to Delaware citizens, and that the Delaware Constitution provides greater rights. See Randy J.

¹ Notably, the decision in *Kolbe* relied on in the synopsis was by a sharply divided court, featuring a vigorous dissent. The divided en banc Fourth Circuit in *Kolbe* reversed a prior decision by a panel of the Fourth Circuit that found the assault gun ban unconstitutional. This strong split of opinions on the same court supports the position that a decision by the Third Circuit Court of Appeals, which covers Delaware, would be hardly predictable on this issue.

² Other decisions by various U.S. Courts of Appeal have differed in the approach by the Fourth Circuit in the *Kolbe* case. For example, the U.S. Court of Appeals for the Seventh Circuit applied the U.S. Supreme Court decisions in *Heller* and *McDonald* to explain that "broadly prohibitory laws restricting the core Second Amendment right are categorically unconstitutional." See *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

Holland, *The Delaware State Constitution*, 36 (2d ed. 2017) (“the provisions in the federal Bill of Rights set only a minimum level of protection.”). Delaware law provides more than the minimum federal rights.

8) The Delaware Supreme Court in the *Bridgeville Rifle* case confirmed that the right to bear arms in Section 20 extends the right to carry firearms outside the home, where the need for self-defense is also present, and provides broader rights than the Federal Constitution. See footnotes 46, 47, 100 and 101, and accompanying text.

9) The *Bridgeville Rifle* decision also recognized that the United States Supreme Court decisions in both *Heller* and *McDonald* explained that the right to bear arms, which has at its core the right to self-defense, was codified in the Second Amendment as a *pre-existing* right that was not granted by the Constitution. Rather, it was merely acknowledged as a natural right that each person is born with. See footnote 92 and accompanying text. The Third Circuit Court of Appeals, whose decisions are binding in Delaware regarding the interpretation of federal law (unlike the Fourth Circuit decision in *Kolbe*), also recognized this individual right. See *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 343, 357 (3d Cir. 2016) (quoting *Heller*, 544 U.S. 582) (view

expressed in two plurality opinions accounting for majority of the en banc Third Circuit).

10) Article I, Section 20 of the Delaware Constitution, as recently interpreted by the Delaware Supreme Court, must be the first step in any analysis of the constitutionality of a bill like S.B. 163, which attempts to encroach in a draconian and overly broad manner, the right to bear arms for self-defense or defense of one's family, as well as for recreational and hunting purposes. The Delaware Supreme Court very recently emphasized that regardless of what the Second Amendment allows, in the State of Delaware, the Delaware Constitution is clear: "The right to keep and bear arms exists outside the home," and is a fundamental right. *See* footnote 101 and accompanying text (citing the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Wrenn v. District of Columbia*, 864 F.3d 650, 659 (D.C. Cir. 2017)).

11) When such fundamental rights are restricted, the courts apply heightened scrutiny. Restricting a whole class and entire categories of firearms such as proposed Senate Bill 163 seeks to do, encroaches on a fundamental right. Both the two referenced recent Delaware Supreme Court decisions and decisions

of the Third Circuit Court of Appeals have established that when such a fundamental right is encroached it must pass a two-step constitutional analysis.

12) The Delaware Supreme Court decisions in the *Doe* and *Bridgeville Rifle* cases, in connection with analyzing the right to bear arms under the Delaware Constitution, applied the two-step constitutional analysis forged by the Third Circuit in *United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010), when it confronted facial challenges to statutes alleged to encroach on Second Amendment rights that are not total bans. The first step in that analysis requires one to ask “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.” *Id.* at 89. If the answer to that question is yes, the next step is to “evaluate the law under some form of means-end scrutiny” such as intermediate scrutiny, to determine whether the statute or regulation can survive a facial challenge. *See id.* That analysis also applies when the rights guaranteed by Article I, Section 20 of the Delaware Constitution are encroached, as they would be if S.B. 163 were to become law.

13) In *Bridgeville Rifle*, the court explained that when regulations limit the right of all citizens, instead of merely a narrow class of citizens such as convicted felons, and the restrictions do not just infringe, but destroy the core

Section 20 right of self-defense for ordinary citizens, “one might legitimately argue that we need not apply any level of scrutiny.”³ Slip op. at 35.

14) In *Bridgeville Rifle*, however, the court found that even assuming intermediate scrutiny applied, the regulations failed because under intermediate scrutiny, the *State of Delaware* (not the person challenging the infringement) *has the burden of proof*. Namely, the State must: “First, articulate their important governmental objectives in enacting the Regulations; second, demonstrate that the Regulations are substantially related to achieving those objectives; and third, show that the Agencies have not burdened the fundamental right to bear arms in self-defense more than is reasonably necessary to ensure that the asserted governmental objectives are met. The Agencies are required to show more than a “general safety concern.” (quoting *Doe*, 88 A.3d at 666 – 67.) The State cannot carry its burden to satisfy these constitutional requirements with S.B. 163.⁴

15) For example, there is nothing in the legislative record of S.B. 163, other than a “general safety concern.” Our Supreme Court found that absence to

³ In addition to using the firearms banned by S.B. 163 for defense of self and family, the banned firearms are also used for hunting and recreation, two rights guaranteed by Article I, Section 20—and not mentioned in the *Kolbe* case.

⁴ The legal infirmity of S.B. 163 is more glaring than the regulations banning firearms in state parks that were struck down by the court in *Bridgeville Rifle*, because S.B. 163 is a total ban on mere possession at any location—including one’s home.

be constitutionally insufficient for the state to carry its burden in a constitutional analysis. Rather, the bill proposes, with no supporting statistics or other scientific basis, that criminals will follow the proposed new prohibitions on commonly used firearms. Contrary to logic, statistics, experience and common knowledge, S.B. 163 assumes that criminals will refrain from using weapons that the law attempts to prevent law-abiding citizens from possessing. These conclusory and misplaced assumptions are no more than a general safety concern that the Delaware Supreme Court has ruled to be insufficient and not a substitute for a sound basis to justify how the proposed legislation will achieve its stated purpose; i.e., how the means employed will achieve the desired end. Moreover: (i) nothing in the record supports the view that every firearm listed is so exceptionally dangerous it must be banned; and (ii) nor is there a nexus between the generic definition of “assault long guns” and the listed firearms.

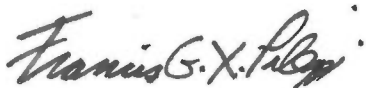
16) The Delaware Supreme Court in *Bridgeville Rifle* explained that in order to pass constitutional muster, restrictions on the rights protected by Section 20 to self-defense and defense of family both inside and outside the home, *places the burden of proof on the State* to show that the state has “not burdened the fundamental right to bear arms for defense of self and family more than reasonably

necessary to achieve important government objectives.” Slip op. at 46. There is no evidence in the legislative record that the extreme restrictions that S.B. 163 seeks to impose on law-abiding citizens will have any likelihood of achieving the stated government objectives.⁵ The State should be more focused on the mental health basis and cultural reasons for the tragedies they seek to prevent.

Conclusion

Based on the foregoing legal arguments, and others too lengthy to include in this letter, we are confident that S.B. 163 will be invalidated as unconstitutional if challenged in either state court or federal court.

Respectfully,



Francis G.X. Pileggi

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⁵ The faulty presumption that S.B. 163 is based on was already rejected by the Delaware Supreme Court when it explained why it was reversing the Superior Court’s ruling on the DNREC regulations banning firearms in state parks and state forests. Delaware’s high court explained that the Superior Court’s conclusion that a ban on firearms promoted safety and did not unduly interfere with the right to bear arms for self-defense: “. . . is premised on the questionable notion—unsupported by reference to any evidence—that outlawing possession of firearms in an area makes law-abiding citizens safer because criminals will, for some reason, obey the Regulations.” *Bridgeville Rifle*, Slip op. at 5-6.

cc: John Sigler, Esquire
Jeff Hague, DSSA
Brian Gottesman, Esquire, Delaware Association
of Second Amendment Lawyers