IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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<tr><td>DELAWARE STATE SPORTSMEN'S ASSOCIATION; BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; and JOHN R. SYLVESTER;

Plaintiffs,

v.

SHAWN M. GARVIN; DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; MICHAEL SCUSE; DELAWARE DEPARTMENT OF AGRICULTURE,

Defendants.</td><td>)
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DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Defendant Secretaries of the Department of Natural Resources and Environmental Control ("DNREC") and the Delaware Department of Agriculture ("DDA") respond by and through undersigned counsel to the Answering Brief of the Plaintiffs Delaware State Sportsmen's Association and Bridgeville Rifle & Pistol Club ("the institutional Plaintiffs") and John R. Sylvester ("the individual Plaintiff"), and in further support of the Motion for Judgment on the Pleadings filed on behalf of the Defendants on June 8, 2018; as provided for in the Scheduling Order issued by the Court on May 31, 2018.

INTRODUCTION

The issues presented by the Defendants' Motion for Judgment on the Pleadings are narrow and few in number, and are subject to resolution as a matter of law. The **"procedural issue"** is whether the individual Plaintiff, Mr. Sylvester, or the institutional Plaintiffs, two social clubs, have been aggrieved by the new Regulations, or have shown that they are entitled to relief from "uncertainty and insecurity with respect to rights, status, or other legal relations". 10 *Del.C.* §6512. The **"substantive issue"** is whether the Constitutional rights of any individual have been violated by the adoption of new, diminished firearms limits covering less than 1% of the land area subject to the firearms prohibitions struck down in *Bridgeville R. & P. Club v. Small,* 176 A.2d 632 (Del. 2017). The pleadings reflect no harm inflicted on the Plaintiffs, and no reason for "uncertainty and insecurity" in the ongoing implementation of the new Regulations, given the complete access to facilities afforded to them. The lack of harm is fatal to their Constitutional claims, as there is no evidence in the record that their rights have been violated. The Defendant agencies and their Secretaries have properly exercised their statutory authority, in that the new Regulations have been carefully tailored to conform to the Court's guidance in *Bridgeville, supra* at 658, as to permissible limits on firearms in "sensitive places" for those other than concealed-carry permit holders or active-duty or qualified retired law enforcement officers.

The Court in *Bridgeville* struck down a "total ban" on firearms throughout some 41,000 acres[1] of State Park and Forest lands. *Id.* The agencies responded by limiting firearms only for visitors without a permit or law enforcement credentials, and in compact areas comprising less than 1,000 acres in the aggregate.[2] After the Court criticized the agencies' "general safety concern" as inadequate, *Bridgeville, supra,* at 656, the agencies relied on numerous studies and legal authority supporting firearms limits in crowded areas such as public campgrounds, particularly as applied to those without training or law enforcement experience. In response to the criticism that the agencies "made no attempt whatsoever to determine which areas of state park and forest lands are truly sensitive and which are not", *Bridgeville, supra,* at 661-662, the agencies carefully restricted the residual limits on firearms to facilities with boundaries depicted on aerial maps presented at a series of workshops and a public hearing.[3] The new Regulations respect individual rights, while affording a measure of protection to the vulnerable visitors in the most sensitive areas of the Parks and Forests.[4]

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[1] Approximately 64 square miles, or, as the Court observed, an area almost the size of the District of Columbia, at 68.34 square miles.

[2] Approximately 1.5 square miles, or an area about the size of Rehoboth Beach.

[3] Exhibit 17.

[4] The agencies have never relied on the "questionable notion...that outlawing possession of firearms in an area makes law-abiding citizens safer because criminals will...obey the regulations". *Bridgeville* at 638. Rather, in limiting firearms in areas where families and children are clustered in close quarters, the agencies rely on research findings and statistic documenting the risk of death and

In part, the Plaintiff arguments are a product of misconceptions about the new Regulations. It is erroneous to claim that the Regulations prohibit the possession of firearms in parked vehicles near camping areas.[5] They do not. Each of the challenged Regulations permits visitors without a permit or law enforcement credentials to carry firearms anywhere outside of designated areas.[6] Parking lots are not designated areas, and a visitor could secure his or her firearm in a vehicle, before entering a designated area such as a public campground. In campgrounds where the parking area is adjacent to the campsite, or where a recreational vehicle is used, the firearm can be brought onto the site, but must remain in the vehicle. Thus, the deprivation of rights claimed by the Plaintiffs would not, in fact, occur.

The Plaintiffs repeatedly quote a portion of the *Bridgeville* Opinion, that is *dicta*, incompletely and out of context.[7] The full quote refers to the right to a firearm while camping overnight or hiking *in remote areas*.[8] The clear import, in light of the twenty-five pages of elaboration by the majority that follow, is that visitors in isolated areas might feel threatened and should be able to carry firearms for defensive purposes. A fair point, and there is nothing in the new Regulations to

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serious injury presented by the misuse of firearms by those without law enforcement experience or training or a concealed carry permit.

[5] Plaintiff Answering Brief (hereinafter "PAB") at 1.

[6] 3 *Del.Admin.C.* Ch. 402 at §8.8.4; 7 *Del.Admin.C.* Ch. 9201 at §21.1.5; Ch. 3900 at §8.3.4.10.

[7] PAB at 2.

[8] *Bridgeville*, *supra*, at 638.

prevent a visitor in a remote area of a Park or Forest from carrying a gun. None of the "designated areas" where firearms are limited are remote or isolated. Per the Court's directive, they are readily accessible to first responders. Outside the designated areas, any visitor not prohibited by law, 11 *Del.C.* §1448, may carry a firearm.

Were there any doubt about the significance of the oft-quoted statement, in the very next paragraph the Court recognizes that "the right to carry a firearm in self-defense is not absolute and may be restricted". *Id.* The issue in *Bridgeville* was not whether the government could regulate firearms (it could), but only whether a "near-total ban" could be justified (it could not). *Id.* at 639. The fragment to which the Plaintiffs cling was subsequently clarified by the Court's acknowledgement that firearms could properly be restricted in "sensitive areas" of the Forests and Parks. *Id.* at 658-659. The Court further suggested that sensitive areas would ideally have controlled entry points, and either a police presence or ready access for law enforcement and emergency responders. *Id.* at 659. The designated areas depicted on the aerial maps, including the lodge and campgrounds mentioned by the Plaintiffs, are not remote or isolated sites, but compact areas where visitors gather, and where the threat posed by isolated sites is absent. Each includes the factors cited by the Court, including defined boundaries, common facilities, and ease of access for emergency responders.

COUNTERSTATEMENT OF FACTS

The Plaintiffs present a misleading and inaccurate account of the regulatory history that followed the December 7, 2017 decision in *Bridgeville*.[9] They write that the agency Defendants "would like this court [sic] to believe that they solicited comments on the emergency regulations".[10] They claim that "the emergency regulations were not subject to any type of public review and comment.[11] The Orders issuing the respective emergency regulations (for DDA, in its administration of State Forests; and for the DNREC Divisions of Parks and Fish & Wildlife) each contained the following statement:

> Consistent with the requirements of 29 *Del.C.* §10119(4), the Department will receive, consider, and respond to petitions by any interested person for the reconsideration or revision of this Order. Petitions should be presented to the Office of the Secretary......

Comments were solicited, and comments were received. The Plaintiffs "would like this [C]ourt to believe" that no comments were solicited or reviewed; but that is not the case.[12]

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[9] The reference, PAB at 3, to an "existing comprehensive statutory framework of firearms regulations", whatever that means, is confusing. Statutes are not regulations. With the issuance of the Court's mandate, there would have been a vacuum with respect to regulation of firearms in Parks and Forests, had not the agencies adopted interim emergency regulations on December 26, 2017.

[10] PAB at 4, footnote 7.

[11] PAB at 5, footnote 8.

[12] Ironically, one of the comments on the emergency regulations was submitted by a lawyer in Plaintiff counsels' office. Exhibit 25.

The feedback received by the agencies resulted in changes in the proposed regulations, when they were published on February 1, 2018.[13] The provision for the recognition of equivalent out-of-state concealed-carry licenses was added to each set of regulations.[14] The Fish & Wildlife Regulations were modified to include as designated areas "facilities or locations used for authorized special events or festivals" in addition to Division offices, visitor centers, nature centers, educational facilities, and maintenance shops.[15] Similarly, the Parks Regulations were adjusted to include "playgrounds" and "facilities while used for sporting events, concerts, and festivals" to park offices, visitor centers, nature centers, bathhouses, restaurants and snack bars, stadiums, museums, zoos, stables, educational facilities, dormitories, camping areas, swimming pools, guarded beaches, and water parks.[16]

The Plaintiffs grudgingly acknowledge that the agencies made "several substantive changes from the emergency regulations to the proposed regulations",[17] but they implicitly complain that no further changes were made. The impact of the workshop and hearing process is reflected in the interpretive documents found in

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[13] Volume 21, Delaware *Register of Regulations,* Issue 8 (Monday, February 1, 2018) at 604, 614, 616.
[14] 3 *Del.Admin.C.* Ch. 402 §8.8.3; 7 *Del.Admin.C.* Ch. 3900 §8.3.4.9; 7 *Del.Admin.C.* Ch. 9201 §21.1.4.
[15] §8.3.4.6.
[16] §21.1.1.
[17] PAB at 5, footnote 8.

the Hearing Officer's record. In particular, the response memo offered on behalf of the agencies clarified that concealed-carry permits from states with laws certified as equivalent by the Department of Justice would be accepted from visitors; that the "day pass" system was intended to expand, not limit, gun rights; that law enforcement officers would operate within Constitutional and statutory limits on detention and arrest; and that visitors occupying tents and cabins could secure firearms in their vehicles, as could those staying overnight in an RV.[18] DDA and DNREC are bound by these clarifications of the Regulations in the real world of implementation.

Plaintiffs' Constitutional challenge also fails due to an almost casual vagueness as to what is at issue in their lawsuit. They quote the DNREC Parks and DDA Regulations (but not the DNREC Fish & Wildlife Regulations) in their entirety, without ever indicating, e.g. by Italics or bold font or other highlighting, which portions they challenge. They vaguely assert that "some of the Regulations" are unconstitutional[19] and seek to invalidate "many of the DOA [sic] Regulations"[20] without specifying the language they claim has brought them grief. To further the mystery, they unhelpfully explain that "[t]he portions of the foregoing DNREC and DOA [sic] Regulations that are being challenged in this

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[18] Exhibit #3 to the hearing record.
[19] PAB at 6.
[20] PAB at 7.

case are often referred to as 'the Regulations'"[21], which is a step backward in comprehending the target of their attacks. The Plaintiffs on the one hand object to the characterization of their position as seeking to eliminate all regulatory limits on firearms in Parks and Forests, while on the other hand they contend that the Regulations are "unnecessary".[22] Whether an "unnecessary" regulation is to be deemed unconstitutional is left to the imagination. This lack of clarity is fatal not only to their Constitutional claim, but also to the threshold requirement to establish their standing to bring a declaratory judgment action in the first place.

It is the Plaintiffs, not the Defendants, who refuse to accept the Supreme Court's holding in *Bridgeville*, *supra*, as to the scope of the right to defensive use of firearms set forth in the Delaware Constitution. The Plaintiffs simply cannot accept the reaffirmation in *Bridgeville*, *supra* at 638, of the holding in *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 667 (Del. 2014), that "the right to carry a firearm for self-defense is not absolute and may be restricted" or the Court's observation that "there certainly could be some 'sensitive' areas in State Parks and State Forests where the carrying of firearms may be restricted." *Bridgeville, supra,* at 658. It is the Defendants, not the Plaintiffs, who ask this Court to follow *Bridgeville*.

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[21] PAB at 8.
[22] PAB at 20.

ARGUMENT

1. The agencies had clear statutory authority to issue regulations in the interest of public safety in State Forests, Parks, and natural areas.

The Plaintiffs cannot rely on *Bridgeville* to support their standalone argument on statutory authority, because in *Bridgeville* that issue is inseparable from the Constitutional ruling. The Court held that "the Regulations fall outside the scope of the Agencies' authority because they are inconsistent with the laws of this State"[23], citing Article I, Section 20 of the Delaware Constitution. In other words, based solely on the Constitutional violation, the former regulations violated the mandate of 29 *Del.C.* §8003(7) and 3 Del.C. §101(3). This is strictly a Constitutional ruling, and there is no independent finding of a statutory violation beyond that. Thus, there is no support in *Bridgeville* for the Plaintiffs' argument that the General Assembly did not want the agencies to protect public safety in areas they administer. The point of the Bridgeville holding is that the statutory power to promulgate regulations to keep the peace must be exercised in a way that respects Article I, Section 20 of the Delaware Constitution. Plaintiffs' Argument I is nothing more than a rehash of their Constitutional arguments, and it fails for the same reason (as set forth below).

[23] *Id.* at 661.

Nor do the Plaintiffs cite to any statutory limitations placed on the ability of the agencies to safeguard visitors. Both agencies have been doing so for decades, through enforcement of various regulations, including criminal violations, and no General Assembly has seen fit to withdraw or limit the authority of either agency. What the legislators have done is provide explicit guidance to the reviewing Court considering a statutory challenge to the scope and thus validity of regulations. Shorn of its Constitutional veneer, the Plaintiffs' statutory argument cannot overcome the presumption of validity and obligation of deference conferred by 29 *Del.C.* §10141(e). Not only are the Regulations presumed valid, but the Plaintiffs bear the burden of proving that the adoption process was "substantially unlawful" and that they were prejudiced. *Id.* The Court is also required to take due account of the experience and specialized competence of the agencies. *Id.* Here, the Plaintiffs have failed to show any prejudice, and the agencies have justified the presumption of validity and the obligation of deference, by embarking on a more measured regulation of firearms in public spaces.

In vacantly arguing pre-emption, the Plaintiffs fail to cite a single example of a criminal statute that conflicts with the Regulations. There are none. To be sure, they dutifully recite a number of criminal statutes that punish various acts involving weapons. Surely their burden would include the citation of a single such statute that they claim pre-empts firearms regulations, so that the Court could make

a comparison and rule. But no. Their Brief is short on specifics, and long on citations to generic law on delegation of authority, which does not amplify their argument. The rash proposition that "regulations do not constitute the laws of the state"[24] is contradicted by the authority cited, *Christiana Care* v. *Palomino,* 74 A.3d 627, 631-632 (Del. 2013), which merely repeats the statutory admonition that regulations may not conflict with other laws of the State. Where, as in *Palomino*, a regulation conflicts with a statute, the statute controls. Where, as in this case, there has been no showing of any such statutory conflict, the Regulations are valid laws of this State, and a proper exercise of statutory authority.

2. <u>The limits on firearms for untrained visitors within compact crowded areas readily satisfy intermediate scrutiny.</u>

The parties are in agreement that the Regulations are subject to the "intermediate scrutiny" test in the face of the Constitutional challenge. The Plaintiffs have not argued that the "strict scrutiny" standard should apply. The Defendants have consistently applied the intermediate scrutiny analysis to the Regulations. In this case, unlike *Bridgeville*, the revised Regulations, tailored to meet the Court's criticisms and to respect individual rights, survive intermediate scrutiny under the State and federal Constitutions.

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[24] PAB at 12.

In contrast to the distinct lack of regulatory adoption history for the prior regulations[25], the record here reflects a surgical approach to public safety, supported by the record[26], limiting firearms restrictions to those few locations where gunfire would pose the greatest risk to human life. The studies cited in the hearing record reflect the danger to visitors posed by the use of firearms by untrained, unlicensed, and inexperienced persons in close quarters with others, including families and children. Avoiding the risk of injury from accidental discharge or improvident use of guns is an important responsibility of the Defendants in protecting visitors.

The Regulations, limited to facilities and confined areas where gunfire is far more likely to cause injury (based on studies cited by the agencies), are substantially related to achieving those public safety objectives. Consistent with the Court's approach in *Bridgeville*, each of the designated areas has defined boundaries, entry points, and ready access for first responders.[27] Each of the

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[25] The prior regulations dated back over fifty years, and any record accompanying their adoption was lost in the mists of time.

[26] For example, Exhibit 17. The Plaintiffs purport to rely on an *amicus* brief submitted in the *Bridgeville* case, PAB at 19, but this Court has not authorized the filing of *amicus* briefs, and "Exhibit B" to the PAB comes too late, and should be disregarded. The brief was not submitted to the Hearing Officer, and is not a part of the record in this case. To the extent that any such materials were submitted, the Hearing Officer and the Cabinet Secretaries were free to disregard them, in favor of more credible sources and studies. 29 Del.C. §10141(e).

[27] See the aerial photographs showing the designated areas in red at slides 27-41 of Exhibit 18, the PowerPoint presentation used at the three workshops.

designated areas satisfies the criteria established by the Court. What the playgrounds, zoos, stadiums, dormitories, swimming pools, beaches, water parks, restaurants and snack bars, stables, offices, cabins, yurts, campsites and the lodge have in common is the presence of large numbers of visitors, including families and children, in a confined area, much like a courthouse or school or airport.

Finally, the new Regulations do not burden the right to use deadly force in self-defense any more than is reasonably necessary to protect the public from gunfire. In the compact designated areas, a proper balance – as recognized in *Bridgeville* – has been struck between gun rights and public safety. Active-duty and qualified retired law enforcement officers may carry firearms in designated areas, as may any visitor with a valid concealed-carry permit. These individuals have both training and experience, and their presence could constitute the first line of defense, in the event of an incident in a designated area.[28] Each of the designated areas is readily accessible to first responders. None are in remote or isolated areas. The State is not an insurer of public safety; but the Defendants can and do promote security in such venues, by limiting firearms to those with training, credentials, and experience handling them.

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[28] The regulatory record does not reflect any credible evidence of a violent crime problem within designated areas of the Parks and Forests. No incidents have been reported in the record during the six months-plus that the interim regulations have been in effect.

The Defendants have never said – as Plaintiffs allege, PAB at 16 – that "there is no need for self-defense" in designated areas. Rather, the point is that this right must be balanced against the risk presented to unarmed visitors from the presence of firearms in the hands of those without training or experience, as contrasted with off-duty police officers and visitors with a permit to carry a concealed firearm, while also taking into account "safety in numbers" and the security of sites accessible to law enforcement.

The relative size of the area in which firearms are regulated is not irrelevant, as the Plaintiffs contend.[29] It was not irrelevant to the Delaware Supreme Court, which repeatedly referenced the "total ban" on firearms over 41,000 acres – nearly the size of the District of Columbia.[30] For the Plaintiffs to assert that the scope of firearms limits has "no relevance to their [C]onstitutionality" is to ignore the very aspects of the "total ban" criticized by the Court. Whereas a "total ban" on firearms over 41,000 acres could not be justified, a partial ban covering less than 1,000 acres in the aggregate presents a very different Constitutional issue. This is particularly true, when the regulated area is not contiguous, but broken into a series of tiny tracts and facilities and defined areas. The designated areas are not only limited in size but devoted to particular activities typically involving large numbers

[29] PAB at 15.

[30] *Bridgeville, supra,* at 637, 654, 658.

of people, including children and families.[31] The Plaintiffs' refusal to acknowledge this fact reflects a failure to understand (or to accept) the rationale for the *Bridgeville* holding.

True, the Constitutional issue hinges not just on the total area regulated, but on the location of each designated area, and the justification for limiting firearms therein. For example, 26.7 acres - out of a total of 5,298 acres within Cape Henlopen State Park - comprise campgrounds, youth camps, the Biden Center, a nature center, ranger offices, the bait and tackle shop, the amphitheater, the park offices, and the bathhouse. Firearms are restricted on another 30.4 acres of guarded beaches (when guards are present).[32] At Killens Pond, firearms are limited only on 20.4 acres comprised of the water park, nature center, playgrounds, park offices, campgrounds, and cabins, and during events at the amphitheater on 0.2 acres - as compared to a total Park size of 1,441 acres.[33] At Lum's Pond, the designated areas include the campground, playground, nature center, equestrian center, food concession building, day camp, park office, nature store, and the Grain Restaurant, a total of 48 acres - within a Park of 1,903 acres.[34]

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[31] It is not odd, PAB-17, but consistent with the approach taken in *Bridgeville*, that the designated areas share these attributes with such other recognized sensitive places as courthouses, airports, or passenger aircraft, as well as schools.
[32] Exhibit 18; slide #27.
[33] Slide #28.
[34] Slide #29.

A similar pattern of narrow, targeted limits on firearms within compact areas and facilities holds true at St. Jones Reserve (0.37 out of 430 total acres), Assawoman (.08 out of 2,401 acres), Little Creek (0.34 out of 4,328 acres), McGinnis Pond (.06 out of 142 acres), Mispillion Marine Reserve (.08 out of 199 acres), Nanticoke Wildlife Area (.01 out of 4,352 acres), Norman G. Wilder (.01 out of 4,442 acres), Woodland Beach Wildlife Area (.27 out of 6,260 acres), Blackbird State Forest (2.93 out of 5,900 acres), Redden State Forest (.08 out of 10,589 acres), and Taber State Forest (1.46 out of 1,271 acres).[35] Each and every designated area is limited in size and consistent in purpose or use with the factors set forth in *Bridgeville* and reflected in the narrow Regulations.

In a sense, the Plaintiffs are right. The tiny fraction of the total area subject to firearms restrictions does not, in and of itself, end the Constitutional inquiry. But the new approach is a game-changer that the Plaintiffs are foolish to deny. Each and every designated area is consistent with the guidelines laid down by the Court in *Bridgeville*, *supra* at 658-659. The Court demanded that the agencies provide record support to document safety concerns within designated areas, and the agencies have done so. The agencies were tasked with delineating these areas so as not to infringe on Constitutional rights, and the agencies have painstakingly done exactly that. *Id.*

[35] Slides ##30-41.

At times the Plaintiffs seem to be needlessly fighting a battle they have already won. They want to park in the camping areas with their rifles in their vehicles between competitions.[36] They can do so. The new Regulations, unlike their predecessors, allow them to keep their unloaded and locked rifle in a vehicle while parked in the camping area. Their claims to the contrary are simply untrue.[37] The Regulations specifically allow anyone not prohibited by law to carry a firearm outside designated areas. Mr. Sylvester is not barred from parking adjacent to the camping areas to rest while transporting a sporting rifle in his vehicle during multi-day competitions. Moreover, Mr. Sylvester could also choose to carry a concealed firearm for protection within the camping area or the lodge, with a valid Pennsylvania concealed-carry permit.

The Plaintiffs continue to perpetuate the myth of "remote camping areas", which they awkwardly compare to "vacation homes or hotels".[38] This is Delaware, not Montana. DDA and DNREC do not allow backpackers to pitch a tent in isolated areas on State land in Delaware. There is no remote camping, where lone

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[36] PAB at 17; footnote 16. Note that this is not, as claimed, an aspect of the right to self-defense protected by Article I, Section 20, but rather a matter of convenience, in order to facilitate the right to use firearms for recreation.

[37] PAB at 24, 27.

[38] PAB at 18. While perhaps "[i]t should be obvious" that "remote camping areas" are unlike other sensitive spaces, the point is irrelevant within Delaware, which has no such "remote camping areas" in State Parks or Forests. How such fictitious remote camping areas would be like hotels is a head-scratcher.

campers would be forced to fend for themselves in the wilderness. It is a romantic Wild West notion that lends itself to armed camping; but it is a fiction in Delaware. The only camping available is group camping at campsites with shared facilities. Whether in a dormitory, cabin, hut, yurt, or a tent, camping in Delaware is a collective activity within demarcated, confined areas. An overnight stay in a lodge or campground is by advance reservation, in an assigned room or at an assigned site, obviously requiring interaction with agency staff to confirm accommodations and identification and to enter the area. The agencies are thus able to maintain control over who enters the area for an overnight stay, and will have received payment as well as information about the guest. These factors, together with the ease of access for first responders to camping areas, satisfy the criteria of *Bridgeville, supra* at 658-659, for sensitive places where firearms may be limited.[39]

The authority of the State to limit firearms for public safety purposes is exemplified by the gun-free school and recreation (and vehicle) zone statute. 11 *Del.C.* §1457. Like the Regulations at issue, §1457 exempts holders of a valid concealed carry permit from the general prohibition on weapons, as the Plaintiffs

[39] The unfortunate reference to a "gatekeeper's shed" and other factual claims absent from the record, PAB at 21, should be stricken and disregarded. No camping area within a Park or Forest is more than minutes away by road from the entrance for emergency responders. DDA is fully capable of screening visitors staying at the lodge in Redden State Forest from within the facility.

admit.[40] Contrary to Plaintiffs' analysis, the failure of the General Assembly to extend §1457 to campgrounds and other sensitive areas within Parks and Forests does not represent a relinquishment or denial of the agencies' statutory authority to do so. Rather, §1457, which the Plaintiffs do not challenge, represents a template for limiting firearms in sensitive areas of Parks and Forests. If guns can be prohibited within 1,000 feet of a campus, schoolyards, playing fields, athletic centers, sports stadiums, and school buildings, then surely guns can be limited within comparable facilities within Parks and Forests. If, as the Plaintiffs concede, it is permissible under Article I, Section 20 to prohibit firearms within a broad perimeter around such school and recreational facilities, then surely it must be permissible to limit firearms within far more compact and narrow educational and recreational facilities in Parks and Forests. What is good for the goose (public education and recreation free from guns) is good for the gander (family nature education and recreation free from guns). The point of overnight lodging in campgrounds and cabins and lodges is not residence or domicile, but recreation. Just as a school overnight sleepover does not void the protections afforded by §1457, a temporary stay in a campground does not void Regulations intended, like §1457, to protect innocent persons engaging in recreation and education.

[40] PAB at 18.

The Plaintiffs' feigned confusion over the Regulations[41] is not persuasive. It is clear beyond question that the Regulations apply to out-of-state visitors, as well as to Delaware residents. Any visitor with a valid concealed carry permit or law enforcement credentials,[42] including those from other states, may carry a firearm in the designated areas. Where an out-of-state concealed-carry law has been certified as equivalent to Delaware's law by the Department of Justice, or where the agencies determine a non-certified out-of-state law is equivalent, that visitor may carry a firearm.[43] Active-duty and qualified retired law enforcement officers may also carry firearms in the designated areas. These changes from the prior regulations meet two of the severe criticisms of the Court in the *Bridgeville* decision. As a practical matter, the new approach assures that those carrying firearms in sensitive areas will have had training in their use. It stands to reason that those who have undertaken the effort to obtain such permits, and those who have served or are serving as police officers, are more likely to use firearms in a crowded place in a responsible manner, with due regard for the safety of others. The transparent attempt by the Plaintiffs to sow doubt about the meaning of the Regulations is not a "fair reading". The Regulations are clear, not vague or

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[41] PAB at 22: "their interpretive structure is not easily discerned".
[42] More than 12,500 individuals in Delaware alone.
[43] Hearing Exhibit 3.

confusing, and the Defendants have provided signage, maps, warnings, and guidance as to where firearms are permitted and by whom.[44]

3. Neither the individual plaintiff nor the institutional plaintiffs have sustained harm sufficient to give them standing to sue.

In *Stevenson v. Small,* ___A.3d____, 2018 WL 3134849 (Del.Super. June 26, 2018) the Court rightly characterized plaintiffs who could show no discernable harm from new regulations as "intermeddlers" and dismissed their lawsuit for lack of standing to bring a declaratory judgment action. *Id.* at 16. The same standard, applied to the sole individual plaintiff here and to the institutional plaintiffs, yields the same result. The Plaintiffs in this lawsuit, like those in *Stevenson*, have failed to show an interest that is distinguishable from that of the public in general. *Id.* at 12. As in *Stevenson*, this is an instance where the Court should apply the concept of standing as a matter of self-restraint, to avoid the rendering of advisory opinions at the behest of parties who are "mere intermeddlers". *Stuart Kingston, Inc. v. Robinson,* 596 A.2d 1378, 1382 (Del. 1991).

It is telling that the Plaintiffs here, like the plaintiffs in *Stevenson, supra,* vehemently opposed the adoption of regulations (as is their right). Once the

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[44] It should be noted that a prior version of the current Regulations has been in effect now for over six months, and there have been no documented instances of confusion, much less disputes over permits or credentials.

regulations were adopted, each set of plaintiffs pursued their political and philosophical views through a lawsuit seeking a declaratory judgment to invalidate the regulations with which they disagreed. Each lawsuit attacked the substance of the regulations; not the process by which they were adopted. Yet none of the plaintiffs could show that they had been injured by the regulations. The lawsuits were a barely-disguised attempt to carry forward policy arguments that have no place in a courtroom. Dismissal is the appropriate remedy.

The Complaint in this case, read together with the Answer for purposes of the pending Motion for Judgment on the Pleadings, fails to cite any injury-in-fact that is "concrete and particularized, not conjectural or hypothetical". *Dover Historical Soc. v. City of Dover Planning Comm.,* 838 A.2d 1103, 1110 (Del. 2003). The Plaintiffs in their briefs refer to the "threat of an injury-in-fact" or "the Sportsmen's injuries" as a result of the Regulations that "can be redressed" – all without any further elaboration of what those injuries might be.[45] Surely the Plaintiffs bear the burden of showing just how they would suffer harm from the enforcement of Regulations that allow them to openly carry firearms within 99% of the land area at issue in this case, and to carry a concealed weapon within the remaining 1% with a readily-obtained permit.

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[45] PAB at 27.

Nor is there any showing of a causal connection between any injury-in-fact and the challenged Regulations. *Id.* The claims are speculative, and a decision invalidating the Regulations would only affect those lacking a concealed-carry permit or law enforcement credentials, at the expense of families and children in group campgrounds, nature centers, bathhouses, guarded beaches, restaurants, stadiums, museums, zoos, stables, educational facilities, dormitories, playgrounds, swimming pools, water parks, those attending sporting events, concerts, and festivals, and Park and Forest staff in offices and visitor centers.

The argument for standing on behalf of the individual Plaintiff is based on a misunderstanding. The new Regulations do not prohibit Mr. Sylvester "from keeping his unloaded and locked rifle in his vehicle while parked in the camping area en route to a rifle competition."[46] In fact, the Regulations allow any visitor not prohibited by law to carry a firearm outside the designated areas. Firearms are permitted in all parking areas, including parking "pads" adjacent to some campsites. In truth, the Regulations encourage visitors such as Mr. Sylvester to secure and lock firearms in their vehicles, rather than carry them into a tent or cabin or lodge or other group accommodation area. Thus, his sole claim to have been "aggrieved" by the Regulations is contrived and baseless. He is free to camp, to stay in the lodge, to rent a cabin, or to park an RV within the campground, so

[46] PAB at 27.

long as the rifles are secured in the vehicle. Further, Mr. Sylvester, a Pennsylvania resident, may carry a concealed firearm for protection within the designated group camping areas, provided he can display a valid concealed-carry permit. The Plaintiffs otherwise fail to articulate any harm sustained as a result of the new Regulations. They have not met that burden and lack standing to seek a declaratory judgment. As in *Stevenson*, there is no need for the Court to address regulations that have had no adverse impact on the Plaintiffs. *Id.* at 32.

The institutional Plaintiffs fail to meet the test of *Oceanport Ind. Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892 (Del. 1994) for institutional standing. For such sporting organizations to sustain a lawsuit on behalf of their members, the claim must be germane to the group's purpose. Here there is a disconnect between the collective interest of "sportsmen" in hunting and recreational shooting, and a lawsuit that asserts a right to use firearms – and thus deadly force – for defensive purposes in crowded areas of parks. This case is about handguns and, conceivably, assault weapons, whereas the Plaintiff organizations encourage the sporting use of rifles and shotguns for hunting and pleasure.

A claim for deprivation of Constitutional rights requires the participation of individual members; not merely an organization. *Id.* In order to establish standing to sue, the Plaintiffs must show they have been personally "aggrieved" – i.e. have

sustained harm as a result of the new Regulations. They cannot rely on vague references to hypothetical threats or fears.

Finally, the *Oceanport* test requires that the organization's members have standing as individuals. Circling back to the analysis above, there has been no showing that any member has sustained injury-in-fact. The only member identified, Mr. Sylvester, clearly has not sustained the only harm he claims as a result of the adoption of the Regulations. The many members who are active duty or retired law enforcement officers, or those who carry a valid concealed-carry permit, can claim no impact from the new Regulations, which allow them to carry firearms without limitation within 100% of the land area in question. There has been no showing of any adverse impact on any member lacking such credentials. Conjecture on the part of counsel is no substitute for evidence of actual harm caused by the Regulations.

The Plaintiffs are far better off under the new Regulations than under the former "total ban" on firearms under the invalidated regulations. Their rights have been vindicated by the *Bridgeville* decision, and by the adoption of revised, diminished firearms limits, consistent with its mandate, that respect the scope of Article I, Section 20 defined by the Court. It is paradoxical that, having succeeded in eliminating most firearms restrictions, they now seek to undermine that holding.. In this, their reach exceeds their grasp.

It is telling that the Plaintiffs are referred to in their briefs by the euphemism "Sportsmen". If their interest is sporting, then their focus should be on hunting regulations. In truth, their interest, in raising a Constitutional issue, can only be in the use of deadly force in self-defense, and the defense of others – not for purposes of sport or recreational shooting, which are not at issue here. The Constitutional claim is meaningless without that element, and the Court should not permit the Plaintiffs to avoid the consequences implicit in the use of firearms for defensive purposes. Their claim has nothing to do with sport. Their burden, with respect to standing, is to show that they have sustained actual harm as a result of a denial of their right to use firearms in defense. This they have not done and cannot do.

4. The plaintiffs have failed in their efforts to generate uncertainty or controversy sufficient to support a declaratory judgment action, and the Court should decline to issue a judgment.

The Plaintiffs would be free to bring a declaratory judgment action at any time a genuine question as to rights, status, or legal relations arose with respect to the Regulations. 10 *Del.C.* §6501. In challenging specific actions taken by DDA or DNREC pursuant to the Regulations, they would not be bound by the thirty-day limitation period governing procedural challenges to new regulations under the Administrative Procedures Act ("APA"). 29 *Del.C.* §10141(d). The APA guarantees the right to contest the lawfulness of any regulation, in the context of a "case decision". 29 *Del.C.* §10141(c). With these options in mind, there is no

need for this Court to entertain a purely abstract and theoretical challenge to the Regulations, that is not based on an actual case, controversy, or dispute, and where no tangible harm has been sustained. The Court should exercise its statutory discretion to refuse to enter a declaratory judgment, due to the lack of "uncertainty or controversy" here. 10 *Del.C.* §6506.

Put bluntly, the Plaintiffs have not given the agencies sufficient time to implement the new Regulations. Instead, they seek a pre-enforcement review.[47] In doing so they confront a considerable burden of proving that the Regulations are unconstitutional on their face, rather than as applied on the ground. They are not entitled to relief unless the Court would find that <u>any</u> application of the new Regulations would inevitably violate the Constitution. Here the reverse is true. There is no contemplated use of the Regulations that would violate the rights of visitors to carry firearms for legitimate defensive purposes as defined in *Bridgeville*, *supra*. The scenarios put forward by the Plaintiffs to create a "controversy" have no basis in reality, and ignore both the letter of the Regulations and the substantial record accompanying their adoption, which outlines both the interpretation and planned implementation of the Regulations by DDA and DNREC. The agencies are bound by those commitments, which are a matter of record, and they cannot be undone by speculation.

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[47] PAB at 30.

This Court should reject the facial Constitutional challenge, and should admonish the Plaintiffs to "give it time". If in fact any visitor feels that his or her rights have been violated by the Defendants, the lawfulness of the Regulations could then be challenged in the context of an actual – not hypothetical – adverse action. 29 *Del.C.* §10141(c). If an actual dispute arose over the implementation of the new Regulations, any citizen could then file an action seeking a declaratory judgment, based on the differences in interpretation, again with a record, and genuine uncertainty and controversy, rather than mere conjecture.

The Plaintiffs' declaratory judgment action is premature. At this early stage in the process, they cannot show a "controversy" over the new Regulations, let alone show prejudice or harm sustained as a result of the mere existence of significantly-reduced limitations on firearms. The fog of "confusion" they seek to generate through argument is readily dissipated by the refined language in the Regulations, as further clarified by the hearing record. The filing is a misuse of the declaratory judgment process, and the Court should decline to render a purely advisory opinion on entirely hypothetical scenarios with no basis in the real world.

Conclusion

The Plaintiff lawsuit is ripe for dismissal for lack of standing, and due to insufficient grounds to support a declaratory judgment action, each based on the lack of "grief" sustained - ultimately the lack of substance - in the claims asserted.

This Court should not be called upon to resolve abstract philosophical disputes that have no basis in actual facts on the ground, where no one has been harmed. The individual Plaintiff is licensed and can carry a firearm wherever he wishes within the areas administered by the agencies.[48] There has been no showing that the institutional Plaintiffs can satisfy the criteria of *Oceanport, supra,* in that the very nature of the claim requires an individual sustaining harm or generating controversy, factors absent here. The reality is that Mr. Sylvester has sustained no harm, and the members of the organizations who are plaintiffs can freely hike, camp, bathe, stay overnight, and hunt within the lands at issue. The Plaintiffs are "intermeddlers" who are wasting the Court's time.

The Plaintiffs do not contest the process that culminated in the adoption of the new Regulations. Pursuant to the APA, they were afforded every opportunity to comment on the proposed regulations, and before that on the interim regulations – and they did so. Their point of view – a distinct minority view – did not ultimately prevail; although adjustments to the emergency regulations were made in response to suggestions and criticism. Like other citizens who visit the Parks and Forests, the Plaintiffs are now bound by the Regulations, which reflect the

[48] 7 Del.Admin.Code Ch. 3900, Section 8.3.4.9; Ch. 9201, Section 21.1.4; 3 Del.Admin.Code Ch. 402, Section 8.8.3.

constraints dictated by the Supreme Court in interpreting the Delaware Constitution.

A close reading of the pleadings in this case reflects that the claims asserted are based on a misunderstanding of the Regulations, combined with a tendency to imagine or assume a worst-case scenario with no basis in reality. A litigant making a facial challenge on Constitutional grounds bears the considerable burden of showing that the regulations are invalid on their face, regardless of how they could be implemented or enforced. That burden simply cannot be met by arguing hypothetical claims that are contradicted by the record. Under the applicable test of intermediate scrutiny, the residual limitations on firearms in sensitive areas satisfy the strong interest of the government in protecting citizens – including particularly families and children – from the potential tragedy presented by firearms in the hands of untrained, unlicensed individuals lacking credentials in close quarters with others.

The agencies hewed to the narrow approach to regulation of firearms sketched out by the Supreme Court in *Bridgeville, supra*. The Plaintiffs may not like the holding that some limits on firearms in sensitive places – as defined by the Court and respected by the agencies – are permissible; but both they and the agencies have to live with that result. To challenge the Regulations is to challenge the *Bridgeville* decision, which dictated their scope. The Plaintiffs have failed to

give this Court a reason to depart from the *Bridgeville* holding by extending the right to firearms beyond the contours set forth in that decision. It is the Defendants who have embraced the holding and used it as a road map in radically reducing the scope and coverage of the new Regulations to avoid infringing on the rights identified by the Court.

WHEREFORE, the Defendants respectfully ask that the Complaint be dismissed, for lack of standing, or, in the alternative, for a lack of grounds for a declaratory judgment. In the absence of dismissal, the Defendants ask for judgment on the pleadings and the stipulated record, as a matter of law, for the reasons stated herein and in the two prior legal memoranda.

STATE OF DELAWARE

DEPARTMENT OF JUSTICE

/s/ *Ralph K. Durstein, III*
Ralph K. Durstein, III, I.D. 912
Devera B. Scott
Deputy Attorneys General
820 N. French St.
Wilmington, DE 19801
(302)577-8510
Attorneys for DNREC

July 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I filed a Reply Memorandum in support of the Defendants' Motion for Judgment on the Pleadings with the Clerk of Court using File & Serve Xpress. I further certify that on July 13, 2018, I caused that document to be served on the following:

Francis G.X. Pileggi (No. 2624)
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
(302) 574-7000
fpileggi@eckertseamans.com
Counsel for Plaintiff

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Ralph K. Durstein III
Ralph K. Durstein III, ID No. 0912
Deputy Attorney General
102 W. Water St., 3rd Floor
Dover, DE 19901
(302)739-4636
ralph.durstein@state.de.us
Attorney for DNREC