IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DELAWARE STATE SPORTSMEN'S ASSOCIATION; BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; and JOHN R. SYLVESTER, Plaintiffs, v. SHAWN M. GARVIN, in his official capacity as Secretary of the Delaware Department of Natural Resources and Environmental Control; DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; MICHAEL T. SCUSE, in his official capacity as Secretary of the Delaware Department of Agriculture; and DELAWARE DEPARTMENT OF AGRICULTURE, Defendants.	C.A. No. K18C-05-047 JJC

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Regulations[1] fail to comply with Article I, Section 20 of the Delaware Constitution ("Section 20") as recently interpreted in *Bridgeville Rifle & Pistol Club Ltd. v. Small*, 176 A.3d 632 (Del. 2017), as well as the Second Amendment to the United States Constitution ("Second Amendment"). The prohibition against possessing firearms for self-defense and recreation in overnight accommodations and adjacent parking areas in the campgrounds of the state parks and lodges in the state forests for persons who do not have a license to carry a concealed weapon wrongfully infringes on the right to keep and bear arms pursuant to the Second Amendment, and impermissibly infringes on the right to keep and bear arms for the protection of self, family, home and for recreational purposes pursuant to Section 20.

In addition, the Agencies[2] have exceeded their authority by regulating firearms despite an existing statutory framework imposed by the General Assembly

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[1] The regulations being challenged in this case are quoted in the Complaint as recent amendments to 7 *Del. Admin. C.* § 9201-21.1, adopted by DNREC on May 11, 2018, and regulations adopted by DOA on May 11, 2018, which amended 3 *Del. Admin. C.* § 402-8.8. These regulations may be referred to in this brief as "the Regulations."

[2] The Defendants in this case are Shawn W. Garvin, in his capacity as Secretary of the Delaware Department of Natural Resources and Environmental Control; the Delaware Department of Resources and Environmental Control ("DNREC"); Michael T. Scuse, in his official capacity as Secretary of the Delaware Department of Agriculture; and the Delaware Department of Agriculture ("DOA"). DNREC and the DOA may sometimes be referred to in this brief as the "Agencies."

that applies to state parks and state forests. For example, the Regulations require an individual to produce identification, sufficient to undertake a background check without reasonable suspicion that the individual has or is about to commit a crime, is in violation of the Fourth Amendment to the U.S. Constitution ("Fourth Amendment") and Article I, Section 6 of the Delaware Constitution ("Section 6").

The Agencies have unilaterally determined that, notwithstanding the existing statutory framework that gives only the Delaware Attorney General the power to determine which out-of-state licenses to carry concealed weapons will be recognized and despite the existing statutory framework for determining the intricate process for issuing licenses to carry concealed weapons, the Agencies have impermissibly attempted to legislate by regulation and to supersede those statutory provisions with their unilateral discretion.

This is the Sportsmen's Reply Brief in Support of its Motion for Summary Judgment. Oral argument in this case is scheduled on July 20, 2018 at 1:30 p.m. in Dover.

ARGUMENT

I. **Response to "Counterstatement of Facts"**

A) Sportsmen Rely on the Actual Words of the Regulations

In the Defendants' Answering Memorandum of Law filed on June 29, 2018 ("Defts' Ans. Mem."), their introductory section entitled "Counterstatement of Facts" is more accurately described as an unstructured amalgam of arguments without citation to controlling authority. The Agencies assert that the Sportsmen "rely on interpretations of the Regulations that are contrary to those articulated by the Defendants." Defts' Ans. Mem. at 2. In support of that statement, the Agencies refer to the legal memorandum that was prepared by counsel for the Agencies and submitted to the hearing examiner who considered public comment on the Regulations. *See* Tab 3 in Joint Stipulation of Facts ("Agencies' Memo of April 7, 2018 to Hearing Examiner"). But their internal memo is not authority and the Agencies cite nothing to support their view that they are bound by it.

The Sportsmen rely on the actual words of the Regulations for their arguments to challenge the constitutionality of, and lack of statutory basis for, the Regulations.

For example, without citation to authority or even to the specific page of the internal communications relied upon, the Agencies argue that campers may secure firearms in their vehicle upon entering the campground. *See* Defts' Ans. Mem. at 3. The problem with that argument is that the Regulations do not provide for campers

to keep firearms in their vehicle while in the "camping areas;" rather, to the contrary, the Regulations prohibit possession in camping areas of firearms by those without licenses to carry. *See* 7 *Del. Admin. C*. § 9201-21.1.1 (including "camping areas" as a "designated area" where firearms are not permitted without a license to carry). *See* Tab 11 of Joint Stipulation of Facts (map of Cape Henlopen State Park showing parking lots within the campground area).

B) False Premises of the Agencies' Arguments

There are two basic false premises on which the arguments of the Agencies falter:

(1) The Agencies wrongly assert that the Sportsmen are required to establish a "need" for self-defense. Not true. Self-defense is a fundamental, natural right that each person is born with, and the courts impose the burden of proof on the State to establish why such a right should be infringed. *See Bridgeville*, 176 A.3d at n.92 (citing *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (describing the "pre-existing" right)); *see also Bridgeville*, 176 A.3d at 656 (the Agencies have the burden to meet the test of constitutionality).

(2) In addition, the arguments of the Agencies[3] are based on the misplaced assumption that the existing comprehensive statutory scheme for the regulation of

[3] We do not ascribe ill motives to the Agencies in their quest to deprive the full enjoyment of constitutional rights to those who seek recreational accommodations in state parks. The Regulations should be compared to the rules that were struck

firearms that applies to state parks and forests is insufficient[4]—even though that statutory regime of regulations has been deemed by the legislature to be sufficient for the rest of Delaware's public spaces.

C) Studies the Agencies Cite Are Not Conclusive

The Agencies refer to studies to support the Regulations, but as explained by Judge Posner in *Moore v. Madigan*, the leading studies trying to establish a connection between the regulation of firearms and crime are inconclusive. 702 F.3d

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down in *Doe v. Wilmington Housing Authority,* 88 A.3d 654 (Del. 2014), that denied rights recognized by Section 20 for those who were not able to afford their own homes. The history of gun regulations in this country reveals a disparate impact on the underprivileged sectors of society.

In his concurrence to the Supreme Court's decision in *McDonald v. City of Chicago,* 561 U.S. 742 (2010), Justice Clarence Thomas referred to states that "enacted legislation prohibiting blacks from carrying firearms without a license. . . ." 561 U.S. at 847.

For example, in 1863, in the midst of the Civil War, the provision in the law enacted in 1832 providing for a license allowing possession of firearms by a free black person was repealed, and the penalty for violation was greatly increased. The enactment provided that "free negroes and free mullatoes are prohibited from owning or having in their possession, a gun, pistol, sword, or any war-like instrument . . . ." *See* An Act in Relation to Free Negroes and Mullatoes, § 7, Ch. 305, Mar. 18, 1863, in 12 Del. Laws 332 (1863).

[4] As argued before the Delaware Supreme Court in *Bridgeville*, deference to the expertise of an agency that might apply in other circumstances, does not apply here. "First, the General Assembly . . . affirmatively regulates firearms, undercutting any need for agency expertise, and second, the Agencies' expertise is in forestry, among others, but not in firearms." *Amicus Curiae* Brief by Members of the General Assembly at n.15, filed in *Bridgeville Rifle & Pistol Club, Ltd. v. Small*. (A copy of that Brief is included at Tab 2 in the Compendium of Selected Sources submitted with Plaintiffs' Opening Brief in Support of their Motion for Summary Judgment, filed on June 22, 2018.)

934, 937 (7th Cir. 2012). In addition, in *Doe v. Wilmington Housing Authority*, the Delaware Supreme Court held that the risk of danger from a firearm was not a sufficient justification to ban firearms inside apartments or in common areas of public housing projects. 88 A.3d 654, 667 (Del. 2014).

After reviewing extensive literature on the impact of regulations on firearms and safety—and finding the evidence inconclusive—Judge Posner explained that "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts." *Moore v. Madigan*, 702 F.3d at 939 citing *Heller*, 554 U.S. at 636. Moreover, the Seventh Circuit added that: "[i]f the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way . . . ." *Id*.

The Agencies cite to a study that refers to the impact of "lax" right-to-carry laws, *see* Defts' Ans. Mem. at 4, n.5, but the challenge to the Regulations focuses on the prohibition against possessing firearms in overnight accommodations and parked cars by those without a license to carry, making the impact of right-to-carry laws, or gun-free schools, of no relevance. Two of the studies cited by the Agencies refer to the impact of gun-free zones around schools. *Id*. at n.7 and n.9. Analogizing the camping areas to schools is not an appropriate comparison.

The key issue presented in this case is the restriction of firearms in temporary living accommodations[5] for families enjoying the state parks for recreation, which is a wholly different comparison to that of schools and airports. *See generally, Amicus Curiae* Brief of the National Rifle Association submitted to the Delaware Supreme Court in *Bridgeville* (citing multiple studies, books and treatises to support the lack of convincing evidence that increased gun regulations and an increased restriction on the exercise of the right to bear arms negatively impacts safety) (a copy of that Brief is attached as Exhibit "B" to the Sportsmen's Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, filed on June 29, 2018.).[6]

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[5] An individual is afforded constitutional protection under the Fourth Amendment from unreasonable searches and seizures in the temporary residence of a hotel room. *Stoner v. State of California*, 376 U.S. 483, 490 (1964). It is incongruent to think that the Second Amendment would not encompass an equal level of constitutional protection within a temporary residence, including a tent. *See Morris v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 1082, 1086 (D. Idaho 2014) ("While often temporary, a tent is more importantly a place—just like a home—where a person withdraws from public view, and seeks privacy and security for himself and perhaps also for his family and/or his property.").

For the sake of clarity, we note that in the Plaintiffs' Opening Brief in Support of their Motion for Summary Judgment, and Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, we cited to two separate decisions with the same caption*: Morris v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 1082 (D. Idaho 2014) and *Morris v. U.S. Army Corps of Eng'rs*, 60 F. Supp. 3d 1120 (D. Idaho 2014).

[6] The Agencies refer to the decision in *Digiacinto v. George Mason University*, 704 S.E.2d 365, 370 (Va. 2011), which restricted firearms on some parts of a university campus. The *Digiacinto* case observed that a school is similar to a government

The Agencies fail to acknowledge the well-settled law in Delaware that they have the burden to satisfy the constitutionality of the Regulations. *Bridgeville*, 176 A.3d at 656. Contrary to the Agencies' arguments, the Sportsmen do not have the burden to "substantiate [our] fears." *See* Defts' Ans. Mem. at 9-10.

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building, and, unlike a public park, schools are not generally open to the public. *See* Stephen P. Halbrook, *Firearms Law Deskbook* at 101, § 1:13 (2014-2015).

Also in their "Counterstatement of Facts," the Agencies rely upon *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), in an attempt to justify their misguided definition of "sensitive places." The Ninth Circuit vacated its decision in *Nordyke v. King*, 563 F.3d 439, in light of the U.S. Supreme Court's ruling in *McDonald v. City of Chicago*. *See Nordyke v. King*, 611 F.3d 1015 (9th Cir. 2010). Thus, the Agencies' reliance on, or analogy to, *Nordyke* lacks merit.

II. <u>The Agencies Cannot Satisfy their Burden to Establish Constitutionality</u>

A) The Regulations Violate Article I, Section 20 of the Delaware Constitution

The Agencies' argument about whether the Regulations are in violation of Section 20 is weak on reasoning and barren of citations to controlling authority. The most notable argument they make is that the Delaware Supreme Court's decision in *Doe v. Wilmington Housing Authority* should not apply here because the restrictions struck down in *Doe* applied to residents of public housing who were living there "permanently" and not on a "temporary" basis. *See* Defts' Ans. Mem. at 17. But that is a distinction without a difference. Section 20 protects a natural right that each person is born with to keep and bear arms to defend oneself and one's family regardless of the term of the lease on a home, as well as for recreation and other purposes.

Moreover, the Agencies seem to avoid the legal point that in *Bridgeville*, the Supreme Court rejected the idea that state parks and state forests are "sensitive areas," like a courthouse, for Section 20 purposes. *Bridgeville*, 176 A.3d at 658-659. The high court ruled that: "[i]n contrast to a permissible sensitive place such as a courthouse, where visitors are screened for security, most State Parks and State Forests do not have controlled entry points. One can easily enter a State Park or a State Forest with a weapon . . . ." *Id*. at 659. It remains bold for the Agencies to continue to argue a position that contradicts this holding.

The Agencies' disrespect for the Supreme Court's rulings on this issue is also evident in their reference to the court's reasoning as a "canard",[7] *see* Defts' Ans. Mem. at 10, when the court invalidated restrictions that prohibited, as the current Regulations do, the right of people to keep and bear arms when "the intervention of society on their behalf may be too late to prevent injury." *Doe*, 88 A.3d at 668.[8]

The Delaware Supreme Court in *Bridgeville* recognized that the Second Amendment provides a "floor" or baseline of rights. 176 A.3d at 642. In connection with rejecting an "interest-balancing approach" for the right to bear arms, the Supreme Court in *Heller* ruled that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634 (emphasis in original).

The nation's high court explained that the time has passed for debating whether the right to keep and bear arms is worth the risks or is "really needed" because, like the First Amendment, the Second Amendment "is the very *product* of an interest balancing by the people . . . ." *Id*. at 635 (emphasis in original).

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[7] Canard is defined by dictionary.com as: "a false or baseless, usually derogatory story, report, or rumor."

[8] There is no justification for the Agencies' accusation that the Sportsmen's arguments included personal attacks. *See* Defts' Ans. Mem. at 13.

Moreover, "it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*.

Despite problems that may arise with the unlawful use of firearms, ". . . the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Id*. at 636.

The intermediate scrutiny test cannot be met by the Agencies. *See Bridgeville*, 176 A.3d at 656. Namely, the Agencies cannot demonstrate that the Regulations are substantially related to achieving their objectives. As shown, the studies in this field are inconclusive and cannot prove that restrictions imposed by the Regulations will increase safety. Also, as indicated above, *Heller* reasoned that by virtue of its inclusion in the Bill of Rights, the right to keep and bear arms is not subject to a balancing test, nor can it be revoked after a debate about whether it is a right that has more advantages than disadvantages. 554 U.S. at 634-35. The Agencies have not shown more than a "general safety concern," which is not sufficient to pass muster. *Bridgeville*, 176 A.3d at 656.

Lastly, the Agencies have not demonstrated that they have not burdened Section 20 rights more than is reasonably necessary to ensure their objectives are met. The Agencies also fail the intermediate scrutiny test because:

(i) they have not shown that camping areas meet the description in *Bridgeville* of "sensitive areas;"

(ii) they have not proven that preventing the possession of firearms in cabins and the like, as well as in adjacent parking areas, will increase safety; and

(iii) they have not explained how they have complied with the Supreme Court's admonition in the *Bridgeville* that: "[r]esponsible law-abiding Delawareans should not have to give up access to State Parks and State Forests in order to enjoy their constitutional right to carry a firearm for self-defense." 176 A.3d at 659.[9]

B) <u>The Regulations Violate the Second Amendment</u>

The U.S. Supreme Court was clear in *Heller* that the Second Amendment protects an individual's right to possess and use a firearm for self-defense within the home and for other lawful purposes, noting specifically that "it has always been widely understood that the Second Amendment…codified a *pre-existing* right" to keep and bear arms. 554 U.S. at 592 (emphasis in original). Through *McDonald v. City of Chicago*, the U.S. Supreme Court extended the pre-existing right conferred through the Second Amendment to the states. 561 U.S. at 742.

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[9] The Agencies rely on two cases that were previously distinguished in the Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, at 19 and 20: *GeorgiaCarry.org v. U.S. Army Corps of Eng'rs*, 38 F.Supp. 3d 1365 (N.D. Ga. 2014) and *U.S. v. Gettier*, 2008 WL 822073 (W.D. Va.).

On a parallel course, in enacting Section 20, the Delaware General Assembly sought to "explicitly protect[] the traditional lawful right to keep and bear arms." Synopsis, H.B. 554, 133rd Gen. Assemb. (Del. 1986); Synopsis, H.B. 30, 134th Gen. Assemb. (Del. 1987). While the text of the Second Amendment and Article 20 is facially distinguishable, the intent is the same: to protect the right to keep and bear arms.

The court in *Bridgeville* provided three reasons why the Second Amendment extends the right to bear arms outside the home. 176 A.3d at 651. First, *Heller* recognized separate rights to "keep" and to "bear" arms, suggesting that the right to carry is not confined to the home. *Id.* Second, the Second Amendment recognizes the inherent natural right to self-defense that each person is born with, and that the need to exercise the right to self-defense may arise outside the home. *Id.* Third, by emphasizing that the need for self-defense is most "acute" in the home, *Heller* suggests that the need still exists, even if less acute, outside the home. *Id.*

Sportsmen do not and have never contended that the right to keep and bear arms, either through the Second Amendment or Section 20, is absolute. The Agencies continually blur the details by the misconstruction of the terms "fundamental" and "absolute." An individual's right to public carry for self-defense

is fundamental, but not absolute.[10] *Bridgeville*, 176 A.3d at 652. Reasonable restrictions on firearms are permissible in sensitive places "such as a courthouse, where visitors are screened for security." *Id*. at 659. However, the high court also noted that state parks and state forests are not like courthouses. *Id*.

The Agencies cite a laundry list of cases not binding on this court where limitations on firearms in sensitive places survive an intermediate scrutiny analysis. *See* Defts' Ans. Mem. at 20. *Bonidy v. U.S. Postal Service*, 790 F.3d 1121 (10th Cir. 2015), is particularly distinguishable. The court in *Bonidy* upheld a U.S. Postal Service regulation prohibiting the storage and carriage of firearms on USPS property. *Id*. at 1123. The Tenth Circuit felt bound by its own precedent that "Second Amendment protection does not include a right to carry a concealed firearm

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[10] The Agencies attempt to minimize the lengthy process for obtaining a concealed carry permit. But an individual seeking to obtain a concealed carry permit must: (1) file an application with the Prothonotary at least 15 days before the next term of the Superior Court and pay a $65 fee; (2) obtain fingerprints through the State Bureau of Identification within 45 days prior to filing the application; (3) include two color official passport photos taken within six months of the application; (4) have five individuals in the county in which the applicant resides (not related to the applicant) complete a reference questionnaire; (5) file a notarized certificate that the applicant has completed a firearms training course; (6) arrange for publication of the intent to obtain a concealed carry permit with a newspaper of general circulation in the county where the applicant resides at least 10 business days before filing the application; (7) obtain an affidavit from the newspaper company stating the publication has occurred; and (8) wait for the application to be approved by the Department of Justice, the Attorney General and the Superior Court (including discretionary approval by a Superior Court judge). *See* 11 *Del. C.* § 1441; Superior Court Procedural Rules for Application and Administration of 11 *Del. C.* § 1441.

outside of the home." *Id*. (citing *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013)). The comparison between federal postal property where government business regularly occurs and cabins in state parks fails.

The Agencies also rely upon *U.S. v. Masciandaro*, 638 F.3d 458, 559 (4th Cir. 2011). The challenged regulation in *Masciandaro* was promulgated by the Department of the Interior, an agency of the federal government. *Id*. The court therefore interpreted the regulation under the scope of the Second Amendment, not under the scope of a state constitutional provision broader in scope than the Second Amendment. *See Doe*, 88 A.3d at 665.

Notwithstanding the scope of interpretation, *Masciandaro* lacks applicability because the challenged regulation on which the ruling was based was subsequently preempted by a law enacted by Congress. 638 F.3d at 461-62.

The right to keep and bear arms is a fundamental right, and any governmental infringements are subject to intermediate scrutiny. *See Doe*, 88 A.3d at 664-65 (citing the two-prong framework established in *U.S. v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). The *Marzzarella* framework applies to "facial challenges to statutes alleged to impinge on Second Amendment rights, yet do not qualify as total bans." *Bridgeville*, 176 A.3d at 654-655.). The Agencies cannot meet the intermediate scrutiny test under the Second Amendment for the same reasons explained above in the Section 20 analysis.

III. **The Regulations Exceed the Authority of the Agencies**

DNREC and DOA do not have their own independent authority vested through the Delaware Constitution akin to the legislative, judicial and executive branches of Delaware government. An agency's authority is conferred and defined by the Delaware General Assembly. An administrative agency is a creature of limited power and when it acts outside of its delegated power that action is void. *See New Castle Cty. Council v. BC Dev. Assoc.*, 567 A.2d 1271, 1275 (Del. 1989) (it is "axiomatic that delegated power may be exercised only in accordance with the terms of its delegation."). The Founding Fathers safeguarded individual liberties by dividing the powers of the federal government among three branches: legislative, judicial and executive. *See generally* THE FEDERALIST NOS. 47, 51 (James Madison).

Pursuant to Section 4701(a)(4) of Title 7 of the Delaware Code, DNREC may only make and enforce regulations relating to the protection, care and use of the areas it administers. That authority is limited by Section 8003(7) of Title 29 of the Delaware Code, which states that the Secretary of DNREC may establish and promulgate such rules and regulations governing the administration and operation of the Department as may be deemed necessary by the Secretary, and which are not inconsistent with the laws of Delaware.

Similarly, the DOA has the power to promulgate rules and regulations for the enforcement of state forestry laws and for the protection of forest lands, pursuant to

Section 1011 of Title 3 of the Delaware Code, but under Section 101(3) of Title 3 of the Delaware Code, the DOA is prohibited from adopting rules and regulations that extend, modify, or conflict with any law in the State of Delaware or the reasonable implications thereof.

Regulations of DNREC and DOA restricting the possession of firearms in state parks and state forests fall outside the scope of the Agencies' authority because they are inconsistent with the laws of Delaware (namely Section 20) and are in violation of Section 8003(7) of Title 29 of the Delaware Code and Section 101(3) of Title 3 of the Delaware Code. *See Bridgeville*, 176 A.3d at 662.

IV. The Request for Identification Provided for in the Regulations is Unconstitutional

The Sportsmen's challenge to the Regulations requiring an individual to produce identification sufficient to undertake a background check is firmly rooted on one premise: an individual's right to be free from arbitrary invasions by government officials. *See Camara v. Mun. Court of the City and Cty. of San Francisco,* 387 U.S. 523, 528 (1967) (The core principle of the Fourth Amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

The Regulations disregard the fundamental constitutional right of an individual to be free from unreasonable search and seizure[11] by requiring that "[a]ny person possessing a firearm *shall* display identification upon request, sufficient to enable a law enforcement officer to undertake a background check" (emphasis added). *See* 7 *Del. Admin. C.* § 9201-21.1.7 and 3 *Del. Admin. C.* § 402-8.8.6.

The Agencies broadly assert that the Regulations properly place the burden on the permit holder to produce her license to carry credentials. Defts' Ans. Mem. at 37. But, the Agencies' statement is void of any statutory or legal basis for this

[11] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…". U.S. CONST. amend. IV. *See also* Section 6: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures…". DEL. CONST. art. I, § 6.

position. The Agencies attempt to manufacture a standard for reasonable suspicion is void of any legal premise and in violation of the Fourth Amendment and Section 6.

Furthermore, the approach to enforcement of 7 *Del. Admin. C.* § 9201-21.1.7 and 3 *Del. Admin. C.* § 402-8.8.6 detailed in the Defendants' Answering Memorandum of Law is inconsistent with the actual text of the Regulations. The Agencies attempt to clarify the ambiguities through supplemental materials in the hearing record by stating that if an individual carrying a firearm in a designated area is approached by a law enforcement officer and asked to produce valid identification, as soon as the individual produces such identification, she would be free to go. Why then, is it necessary to include language in the Regulations that the identification must be "sufficient to enable a law enforcement officer to undertake a background check"? *See* 7 *Del. Admin. C.* § 9201-21.1.7 and 3 *Del. Admin. C.* § 402-8.8.6. The purported allowance for a background check absent reasonable suspicion crosses the line of constitutionality. *See Moore v. State*, 997 A.2d 656, 663 (Del. 2010)[12] (the nature of an investigatory stop requires "reasonable and articulable suspicion to

[12] Delaware has codified the holding in *Moore* in 11 *Del. C.* § 1902(a): "A peace officer may stop any person abroad, or in a public place, *who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime*, and may demand the person's name, address, business abroad and destination." (emphasis added).

believe the individual is committing, has committed, or is about to commit a crime."); *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968).

The Regulations violate an individual's right to be free from unreasonable search and seizure without reasonable suspicion and the Regulations, as written, leave law enforcement officers with a Hobson's choice of either violating the Regulations through non-enforcement or violating the United States and Delaware Constitutions by enforcing the unconstitutional Regulations.

The Agencies exceeded their authority by enacting regulations that are in violation of the Fourth Amendment and Section 6. The Regulations, therefore, are invalid. *See Bridgeville*, 176 A.3d at 662.

V. The Agencies Exceed Their Authority with Discretionary Recognition of Out-of-State Concealed Carry Permits

The Agencies take the unsupported position that the Regulations are intended to "extend, not limit" recognition of out-of-state carry permits. *See* Defts' Ans. Mem. at 39.

First, if the intention of the Agencies is only to "extend, not limit" existing state law, then the express language of the Regulations is, at best, vague and misleading. The Regulations state: "[r]esidents of other states holding an equivalent permit or license to carry a concealed firearm *may* be permitted to carry a concealed firearm at the discretion of the Director [or Department]" (emphasis added). *See* 7 *Del. Admin. C.* § 9201-21.1.4 and 3 *Del. Admin. C.* § 402-8.8.3. There is no limitation in the Regulations for the Agencies to only "extend, not limit" recognition of out-of-state carry permits.

Second, and contrary to the Agencies' assertion, the General Assembly gave the Attorney General the *exclusive* authority to decide which out-of-state permits Delaware recognizes. *See* 11 *Del. C.* § 1441(j). The only reasonable reading of the Regulations is that they *only* provide the Agencies with the discretion to *limit* existing state law with respect to recognition of out-of-state permits.

Lastly, it is unreasonable for the Agencies to take the position that they can choose to honor out-of-state carry permits that are not authorized under existing

Delaware state law, as any person relying only upon the Agencies' discretion would arguably subject themselves to criminal penalty under Delaware state statutes.

By granting themselves the authority to subjectively decide whether to honor out-of-state concealed carry permits when the General Assembly has given only the Attorney General the authority to determine which states will receive reciprocity, the Regulations clearly conflict with 11 *Del C.* § 1441(j), are inconsistent with the laws of this State, are beyond the scope of the Agencies' authority and are therefore, invalid. *See Bridgeville*, 176 A.3d at 662.

VI. The Agencies Do Not Have the Authority to Issue "Day Passes" for Licenses to Carry Concealed Weapons

The "day pass" Regulations are without legal support, despite the Agencies' argument that they expand rights. *See* Defts' Ans. Mem. at 40.

As previously discussed, the General Assembly has provided the Attorney General with the exclusive power to oversee the issuance of temporary concealed carry licenses to non-residents.[13] The Regulations do not explain the criteria the Agencies will use to grant "day passes" or their authority for doing so—or what the procedure will be to request a "day pass."

By granting themselves the authority to subjectively decide whether to issue "day passes" to park visitors to carry firearms, when the General Assembly has given only the Attorney General the authority to so, the Regulations conflict with 11 *Del C.* § 1441(k), are inconsistent with the laws of this State, are beyond the scope of the Agencies' authority and are therefore, invalid. *See Bridgeville*, 176 A.3d at 662.

[13] 11 *Del. C.* § 1441(k) states: "The Attorney General shall have the discretion to issue, on a limited basis, a temporary license to carry concealed a deadly weapon to any individual who is not a resident of this State and whom the Attorney General determines has a short-term need to carry such a weapon within this State in conjunction with that individual's employment for the protection of person or property."

CONCLUSION

This Court should find that the Regulations are in violation of both Section 20 and the Second Amendment. This Court should also find that the Regulations relating to the request for identification are in violation of both Section 6 and the Fourth Amendment. As the Regulations are in violation of both state and federal constitutional principles, the Regulations are inconsistent with the laws of this State and exceed the statutory authority of the Agencies. The Regulations, therefore, are invalid. The Regulations are also preempted by the existing comprehensive framework that the General Assembly imposed by statute to regulate firearms.

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