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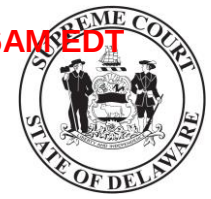

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE, ROGER T. BOYCE, SR.; and the DELAWARE STATE SPORTSMEN'S ASSOCIATION,	)	
Plaintiffs Below, Appellants,	)	
v.	)	**No. 15, 2017**
DAVID SMALL, SECRETARY OF THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; ED KEE, SECRETARY OF DELAWARE DEPARTMENT OF AGRICULTURE; and DELAWARE DEPARTMENT OF AGRICULTURE,	)	**Appeal from the Superior Court of the State of Delaware C.A. No. S16C-06-018 THG**
Defendants.	)	

APPELLEES' CORRECTED ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
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Dated: May 5, 2017

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NATURE OF THE PROCEEDINGS

This is an appeal from a decision of the Superior Court, Sussex County, rejecting a challenge to longstanding Regulations promulgated by the Delaware Department of Agriculture ("DDA") and the Department of Natural Resources and Environmental Control ("DNREC"). The lawsuit was brought by seven individuals and organizations seeking the unlimited ability to carry firearms of their choosing into State Parks and Forests. Appellants do not contest the Regulations as applied, but instead have pursued a facial constitutional challenge, arguing that *any* limitation on *any* person with *any* gun in *any* such place is invalid.

The Appellants originally sought injunctive relief in the Court of Chancery, which on June 6, 2016 granted Defendants' (present Appellees) Motion to Dismiss for lack of subject matter jurisdiction.[1] A Complaint seeking declaratory relief[2] was then filed in the Superior Court and assigned to Judge Graves. The parties filed cross-motions for judgment on the pleadings. The Court granted the Defense Motion in an Opinion handed down on December 23, 2016.[3]

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[1] The Appellants failed to establish an imminent risk of irreparable harm or a likelihood of success on the merits of their claim.

[2] Contrary to the statement at page 9 of the Opening Brief (hereinafter, "OB at 9"), the Appellants do not "seek to enjoin" the enforcement of public safety regulations in this action.

[3] *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 2016 WL 7428412 (Del.Super. Dec. 23, 2016).

The Court found that DDA and DNREC had established that the firearm restrictions were substantially related to an important government objective (the safety of visitors), and did not burden the Plaintiffs more than was reasonably necessary. The Regulations thus satisfied the "intermediate scrutiny" test applied by this Court in *Doe v. Wilmington Housing Authority*.[4] The Court observed that a citizen's right to arms is strongest when the gun is in a home or business or used for security, factors not present with respect to visitors to State Parks and Forests. Quoting from this Court's Opinion in *Doe v. WHA*, the Superior Court found that regulating firearms was proper in a park or forest, just as in a public area such as a State office building, courthouse, school, college or university campus, in that all are instances of services typically provided to the public on government property.

> A contextual, objective reading of the Regulations reveals the primary concern of the Agency Defendants is to permit all visitors to enjoy the State's public areas without undue risk of harm.[5]

The Court observed that DDA and DNREC were not unreasonable in concluding that unregulated firearms in State Parks and Forests would heighten the potential for injury or death to visitors. As to the Appellants' perceived need for self-defense, the Court observed that "the need to respond to a threat with a firearm is diminished when firearms are prohibited in the area."[6] The Opinion recognizes the important

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[4] *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 666-667 (Del.2014).
[5] *Bridgeville Rifle & Pistol Club, Ltd.*, 2016 WL 7428412, at *4.
[6] *Id.*

governmental objective of keeping the public safe from the potential harm from the unfettered introduction of firearms in State Parks and Forests.

The Superior Court also found no conflict between laws requiring a license to carry a concealed weapon, or regulating weapons dealers, and the Regulations at issue. The Court pointed out that the Criminal Code provisions allowing active-duty or retired police officers to carry concealed weapons, 11 *Del.C.* §1441A and §1441B, recognize as exceptions state laws, including regulations, restricting firearms on government property, including parks.[7] The Court rejected the argument that laws restricting the delegation of authority to counties and municipalities should be applied to State agencies by implication.

> It is disingenuous to cite *specific* statutory language preempting other agencies for the proposition that the Defendants were *implicitly* included.[8]

Preemption requires more than concurrent regulation of the same subject matter.[9] Appellants failed to demonstrate that the challenged Regulations hindered the objectives of any other state statute regulating firearms.

[7] *Id.* at *6.
[8] *Id.* at *5.
[9] *Id.* at *7.

Finally, the Court rejected the argument that the Regulations exceeded the scope of the broad statutory authority granted to both agencies to afford safety and protect the welfare of visitors and personnel on State properties.

> Each agency adopted regulations aimed at addressing and ensuring the safety of State-owned lands. Such regulation was not only authorized by State delegation of authority but encouraged.[10]

This appeal followed.

[10] *Id.* at *6.

SUMMARY OF ARGUMENT

1. Denied. In 1987 the Delaware General Assembly adopted a Constitutional provision regarding firearms that recognized a limited right to possess guns for purposes of hunting, recreation, and defense. The uncontradicted record below establishes that the Appellee State agencies provide reasonable opportunities for hunting and recreation, including target shooting and training. It is further clear from the record that these agencies provide a law enforcement presence in State Parks and Forests, for purposes of public safety, and to prevent violence, and have maintained these peaceful sanctuaries for over fifty years. Appellants take the radical and unsupported view that unlimited guns are necessary for their self-defense, due to a purported risk of harm from unidentified threats. There has been no showing that any of the Appellants – or anyone else – has been placed at risk of harm in State Parks or Forests, due to the lack of a gun. The course of action advocated by Appellants would allow over a million visitors to State public areas each year to bring the firearm(s) of their choice along, without limitation, including automatic weapons and military assault rifles. This dystopian view cannot be sustained under a Constitutional provision that this Court has interpreted to afford only a limited right to defend oneself, one's family, and one's home from danger or attack. The Appellants' facial challenge to the Regulations should be rejected for the reasons set forth by the Superior Court.

2. Denied. The General Assembly did not preempt any existing criminal laws or regulations when it enacted a Constitutional provision providing for a limited Constitutional right to carry guns for purposes of defense. At the time the Constitutional provision was enacted in 1987, DDA and DNREC had regulations in place for decades that prohibited the possession of firearms in State Parks and Forests, except during legal hunting. The General Assembly did not repeal those existing Regulations – explicitly or implicitly – when it enacted Article I, Section 20 of the Delaware Constitution. The DDA and DNREC Regulations are not inconsistent, nor do they hinder the objectives of Section 20, or any Delaware statute, and therefore, they should be upheld.

3. Denied. The General Assembly vested DDA and DNREC with the authority to promulgate regulations to enforce the statutes that they administer. When considering that broad grant of regulatory authority, a Court should construe that power to allow the fullest accomplishment of the legislative intent or policy of the statutes. DDA's and DNREC's statutes authorize them to protect the lands that they administer, and both statutes include a public safety component. Therefore, neither DDA nor DNREC exceeded the scope of their statutory authority when they promulgated regulations that prohibit the possession of firearms, except for legal hunting, in State Parks and Forests, because those Regulations are a valid exercise of DDA's and DNREC's statutory authority to protect the public safety.

STATEMENT OF FACTS

This is a case in which seven Appellants[11] have pursued an abstract facial challenge to longstanding Regulations enforced by DDA and DNREC, with the goal of gaining an f right to possess guns of their choosing[12] in State Parks and Forests, regardless of the risk of harm presented to other visitors. The procedural vehicle for the legal challenge was a declaratory judgment, based on purely theoretical claims. In the absence of an "as applied" challenge, the Appellants' argument rests on pure conjecture as to risk, and speculation as to circumstances justifying gunfire in a public place.

The appeal presents a narrow issue under the Delaware Constitution regarding the asserted unlimited right to armed defense in a public place. The Appellants do not dispute the State's authority to determine the time, place, and manner of hunting or recreational shooting on State lands. Nor is this a case involving defense of the home, or common areas contiguous with a dwelling. The sole issue presented is whether the Delaware General Assembly sought to implicitly repeal established laws

[11] Although Appellants call themselves "Sportsmen", they do not question the Regulations governing hunting or recreational shooting; nor do they limit their weapons of choice to long guns or "sporting" weapons. Appellants argue the need for self-defense: the use of guns against human beings, not game.

[12] Contrary to Appellants' claims, OB-21, their argument would permit any visitor to carry any legal weapon, without limitation, including for example a Glock or an AR-15 with a high-capacity magazine, into a State Park or Forest.

governing guns in public places, in favor of an unlimited right to openly carry any gun without limitation.

The claim by Appellants that they are responsible gun owners is irrelevant, where the privilege they claim would apply to any park visitor, regardless of age, training, competency, stability, or responsibility. The declaratory judgment sought would not apply only to Appellants and "responsible" shooters, but to over a million park visitors not otherwise prohibited by law from carrying a gun. Anyone, anywhere, anytime, any gun.[13] The change in the law advocated by the Appellants would effectively prevent law enforcement officers from intervening to preserve the peace, at least until shots were fired in a public place.

The lawsuit was brought by seven plaintiffs: five individuals and two organizations, who collectively seek to invalidate State laws limiting the possession, use, and discharge of firearms on State property where visitors are welcome. None of the Appellants sets forth any particular claim, interest, or reason to carry a gun in

[13] Unlike our sister state of Maryland, *see Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (upholding Maryland's law), Delaware does not ban military-style assault rifles or large-capacity detachable magazines, the type of weapon used in massacres at Sandy Hook Elementary School in Connecticut in December 2012; Aurora, Colorado in July 2012; San Bernadino, California in December 2015; the Pulse nightclub in Orlando, Florida in June 2016; Virginia Tech University in April 2007; Fort Hood, Texas in November 2009; Binghampton, New York in April 2009; and Tucson, Arizona in January 2011.

State Parks or Forests, and they fail to cite any instance of harm to themselves or to their family that would justify armed resistance or gunfire.

Appellant **Hester** is a retired police officer who also holds a concealed carry permit, issued pursuant to 11 *Del.C.* §1441, and a surf-fishing vehicle permit. Hester asserts a right to bring firearms into State Parks and Forests for unstated reasons, presumably while fishing and otherwise making use of State beaches.

Appellant **Sylvester** participates in rifle shooting competitions. No such competitions take place in State Parks or Forests. DNREC does afford recreational shooting opportunities at two locations, in Sussex County and New Castle County. Sylvester apparently seeks to bring firearms into camping facilities in State Parks and Forests, for unspecified reasons.

Appellant **Watkins** hunts on private land, not regulated by Appellees, but worries that he might "inadvertently" carry a firearm onto State land, during "pre-season scouting of state-owned lands."[14] Watkins apparently asserts a right to enter – accidentally – onto State Parks and Forests, with a firearm, other than during the recreational hunting seasons established by the Regulations.

The **Boyce** appellants are bicyclists who claim to be "responsible, law-abiding adults who are qualified to own and possess firearms."[15] Yet they each claim the

[14] Compl. ¶14.
[15] Compl. ¶15.

right to carry firearms (whether in a holster or their saddlebags is unspecified) while cycling through State Parks and Forests, in order to defend themselves from unknown, unidentified, unspecified adversaries.

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

The **Bridgeville Rifle and Pistol Club** ("Bridgeville") conducts firearm "sporting competitions" on private property that are not regulated by the Appellees. Bridgeville's only claim is one of inconvenience: that its members cannot rent a cottage or camp at State Parks while carrying or transporting firearms in their vehicles. The members do not dispute that they are free to camp and rent a cottage, so long as they obey the rules and leave their guns behind.

Appellants fail to cite a history of violent crime, or dangerous animals, or unexplained death or disappearance of visitors to State Parks or Forests. Never do they answer the question where and when and under what circumstances a visitor with firearms would discharge them, thus preventing the Court from assessing the

risk to other (unarmed) adults and children in a public place, and depriving the Court of the ability to balance the demand for armed resistance against the clear and present risk of harm to unarmed citizens in a public place from gunfire.

The **State Forestry Regulations** challenged by the Plaintiffs were adopted under authority granted by the General Assembly set forth at 3 *Del.C.* §1008 and 3 *Del.C.* §1011. The DDA Secretary (an Appellee in this case) also enjoys broad general authority to adopt rules for the management of the Department of Agriculture, pursuant to 3 *Del.C.* §101(3). The Secretary is further empowered to employ law enforcement officers and other employees as necessary to carry out the provisions of Title 3, and to make rules for their conduct.[16]

Section 8 of the DDA Regulations is captioned "Hunting Rules and Regulations", and establishes that State Forests are year-round multiple use areas, shared by hunters with other public users such as hikers, campers, horseback riders, firewood cutters, and loggers.[17] No special permits are required to hunt on State Forest lands, except as specified in the *Hunting and Trapping Guide* published by the DNREC Division of Fish and Wildlife.[18] Licensed hunters may hunt during any open season subject to those restrictions, except on areas otherwise designated, such

[16] 3 *Del.C.* §101(4), (5).

[17] 3 Del.Admin. C. §402-8.1.

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

as those marked with Wildlife Sanctuary, NO HUNTING, or with Safety Zone signs.[19] Target shooting is prohibited, and firearms are allowed for legal hunting only, and are otherwise prohibited on State Forest lands.[20]

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

> The land, water, underwater and air resources of the State can best be utilized, conserved and protected if utilization thereof is restricted to beneficial uses and controlled by a state agency responsible for proper development and utilization of the land, water, underwater and air resources of the State.[21]

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

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[19] 7 Del.Admin.C. § 3900-8.2, 8.11.
[20] 7 Del.Admin.C. § 3900-8.8.
[21] 7 *Del.C.* §6001(a)(6).

> The State, in the exercise of its sovereign power, acting through the Department, should control the development and use of the land, water, underwater and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State.[22]

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

> A program for the protection and conservation of the land, water, underwater and air resources of the State, for public recreational purposes, and for the conservation of wildlife and aquatic life.[23]

The **Regulations Governing State Parks**, which originated more than fifty years ago, are essential to the protection of Park resources and improvements, and to the safety, protection, and general welfare of the visitors and personnel on properties under DNREC jurisdiction.[24] The Rules govern the use of all applicable lands, recreation areas, historic sites, natural areas, nature preserves, conservation easements, marinas, waters, and facilities administered by the Division of Parks and Recreation.[25] With regard to the issue of pre-emption, Rule 2.2 further provides that "No Rule or Regulation herein shall preclude the enforcement of any statute under the Delaware Code." Hunting in accordance with state and federal laws, rules and regulations is permitted under Rule 24.2 in certain areas and at times authorized by

[22] §6001(b)(2).
[23] §6001(c)(3).
[24] 7 Del.Admin.C. §9201-2.1.
[25] 7 Del.Admin.C. §9201-2.2.

the Division. A hunter registration card issued by the Division is required, in addition to a valid Delaware hunting license, for hunting on lands administered by the Division that are opened for hunting. Weapons are governed by Rule 21.1, which reads as follows:

> It shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division, except by those persons lawfully hunting in those areas specifically designated for hunting by the Division, or those with prior written approval of the Director.[26]

The authority of DNREC **law enforcement officers** is conferred under 29 *Del.C.* §8003A. Such officers are responsible for the enforcement of all laws, regulations, rules, permits, licenses, orders, and program requirements of the Department.[27] These officers have police powers similar to those of constables, peace officers, and other police officers, such as powers of investigation, search, seizure, detention, and arrest.[28] Further enforcement authority is conferred by 7 *Del.C.* §4701(a)(8), and set forth in Section 24 of the Rules. DNREC is authorized to employ law enforcement officers for the enforcement of the Division Rules and Regulations.[29] No person may willfully fail or refuse to comply with any lawful order or direction of any Enforcement Officer on lands or waters administered by

[26] 7 Del.Admin.C. §9201-21.1.
[27] 29 *Del. C.* §8003A(a).
[28] §8003A(b).
[29] 7 Del.Admin.C. § 9201-27.1.

the Division.[30,31] These officers thus have broad authority to protect public safety within parks and other lands administered by DNREC.[32]

[30] 7 Del.Admin.C. § 9201-24.4.

[31] The record lacks evidence to support Appellants' claim, OB at 24, that the use of private firearms is necessary because law enforcement officers "may come too late" or may be "unable to intervene"; nor does the record reflect any violent crime problem within State camping facilities, lawns, or parking lots. Likewise, the threat to "helpless" sportsmen from "undomesticated animals", OB at 27, is undocumented, and affords no justification for firearms outside hunting seasons.

[32] Appellants are mistaken, as a matter of law, in claiming that the Regulations "…were not promulgated with the same legislative authority as the General Assembly has [sic]". OB at 22-23. The Regulations were promulgated by the agencies under clear and broad legislative authority, and thus have the full effect of law. In that regard, it is noteworthy that the General Assembly has not seen fit to modify the Regulations by direct statutory action, nor have the powers of the DNREC Secretary or the DDA Secretary to enact such regulations been curtailed, either before or after the 1987 Constitutional Amendment.

ARGUMENT

I. Restricting Firearms Possession in Public Areas Balances Government Regulations Against Private Rights Without Undue Burden in the Interest of Public Safety.

A. Question Presented.

Do Regulations restricting the use of firearms in State Parks and Forests to hunting and recreation, in the interest of public safety, violate the limited Constitutional right to carry guns for purposes of defense?

B. Scope of Review.

Appellants bear the heavy burden of establishing that the challenged Regulations are unconstitutional on their face.[33,34] There is a "strong judicial presumption" in favor of the constitutionality of a legislative enactment.[35] Legislative acts "should not be disturbed except in clear cases, and then only upon weighty considerations."[36]

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[33] *Opinion of the Justices,* 425 A.2d 604, 605 (Del.1981) (upholding legislative delegation of power to State Board of Education for school district reorganization).

[34] An "as applied" constitutional challenge is "a claim that the operation of a statute is unconstitutional in a particular case," in contrast to a "facial challenge," which asserts that "the statute may rarely or never be constitutionally applied." *State v. Griffin*, 2011 WL 2083893 (Del.Super. May 16, 2011) (rejecting Constitutional challenge under Article I, Section 20 of the Delaware Constitution). The Appellants' action seeking a declaratory judgment is a facial challenge to the Regulations.

[35] *Justice v. Gatchell,* 325 A.2d 97, 102 (Del.1974) (denying Constitutional challenge to motor vehicle guest statute).

[36] *Klein v. Nat'l. Pressure Cooker,* 64 A.2d 529, 532 (Del.1949).

Review of regulations is governed by 29 *Del.C.* §10141(e):

> Upon review of regulatory action, the agency action *shall be presumed to be valid* and *the complaining party shall have the burden of proving* either that the action was taken in a *substantially unlawful manner* and that the *complainant suffered prejudice* thereby, or that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise *unlawful*. The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency acted. (emphasis added).

C. Argument.

1. The Strong Government Interest in the Safety of the Public Outweighs the Private Claim to Carry Firearms in Public Places.

The General Assembly, in enacting Article I, Section 20, in 1987, left in place a series of statutes affecting the right to keep and bear arms in Delaware. Given this "careful and nuanced approach" by the legislature, this Court adopted an intermediate scrutiny analysis for purposes of Constitutional challenges, which assigns weight to public safety and other important governmental interests.[37] Intermediate scrutiny seeks to balance potential burdens on fundamental rights against the valid interests of government.[38]

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[37] *Doe v. WHA,* 88 A.2d at 667.

[38] Cases cited by Appellants applying strict scrutiny, e.g. *Bateman v. Perdue,* 881 F.Supp.2d 709 (E.D.N.C. 2012), are inapplicable, due to the lack of a "severe burden" on individual rights. In *Masciandaro,* the Court declined to subject the federal firearm regulation at issue to strict scrutiny, because doing so "…would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to 'prevent[] armed mayhem' in public places, and depriving them of 'a variety of tools for combating that problem.'" *U.S. v. Masciandaro,* 638

In *Heller v. District of Columbia* ("*Heller II*"), the Court explained that "a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify."[39] The Regulations at issue here inarguably impose a lesser burden than the ordinance challenged in *Heller* or the ban struck down by this Court in *Doe v. WHA.* As this Court recognized in G*riffin v. State,*"[a] person's interest in keeping a concealed weapon is strongest when the weapon is in one's home or business and is being used for security," where the "state's interest is weakest" since there is "a relatively minimal threat to public safety."[40] Contrast the serious threat to public safety, recognized by the court below, posed by guns in parks, outside the home or business, where the State's interest is strongest, and the private interest must yield.

To survive intermediate scrutiny, governmental action must serve important governmental objectives, and must be substantially related to the achievement of those objectives.[41] A state's interest in the protection of its citizenry and in public

F.3d 458, 471 (4th Cir. 2011) (quoting *U.S. v. Skoien*, 614 F.3d 638,642 (7th Cir. 2010); *D.C. v. Heller*, 554 U.S. 570,636 (2008)).

[39] *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

[40] G*riffin v. State*, 47 A.3d 487, 491 (Del. 2012).

[41] *Doe v. WHA*, 88 A.3d at 666-667.

safety is not only substantial, but compelling.[42] Intermediate scrutiny does not mean that the challenged law must be the least intrusive means of achieving a substantial government objective, or that there be no burden whatsoever on the individual right in question.[43]

In this declaratory judgment action, the Appellants lack an as-applied scenario, and the Court thus lacks the opportunity to apply intermediate scrutiny to a particular set of facts. The Appellants argue that under any set of facts, their private interest in bringing guns into State Parks and Forests would trump the State's interest in law enforcement, keeping the peace, and public safety. Appellants have presented no set of facts that would give greater weight to their abstract conception of gun rights than to the rights of others to be free from the risk of harm from gunfire in public places.

The Appellants acknowledge that the State protects visitors through law enforcement officers, but contend – without citation to statistics, or even anecdotal accounts – that the officers cannot be relied upon in "emergency situations".[44] They acknowledge the State's public safety obligations, but speculate (without citing any

[42] *Masciandaro*, 638 F.3d at 473 (conviction for carrying a loaded handgun in a motor vehicle within a national park area affirmed); *Schenck v. Pro–Choice Network*, 519 U.S. 357, 376 (1997) (referring to the "significant governmental interest in public safety"); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (commenting on the "Federal Government's compelling interests in public safety").

[43] *Kolbe, supra* at n.13.

[44] OB at 28.

examples) that the Appellee agencies may not be able to provide sufficient security due to limited resources.[45] What are the "confrontations" for which the Appellants demand firearms? Under what circumstances would a DDA or DNREC or Delaware State Police officer "come too late" to prevent an injury or be "unable to intervene"?[46] The Appellants paint a lurid picture to justify their need for an armed defense, but it is pure fiction.[47] The need for private firearms or for the exercise of deadly force in self-defense or defense of others is alleviated, where the State controls access, provides security, and limits guns to hunting and recreational shooting.

The Superior Court found that DDA and DNREC have a legitimate interest in controlling unsafe and disruptive behavior in parks and forests, including the risk of injury or death from gunfire.[48] Appellants concede that "public safety is an

[45] In the Superior Court they complained that the 700 officers (679 State Police officers with statewide jurisdiction and 21 Park positions) authorized by the General Assembly were insufficient to protect the public; but then contended that no amount of increase in force strength would justify the Regulations.

[46] OB at 24.

[47] The Appellants' numbers argument in Superior Court (A143) ignored the relative size of the jurisdictions normally patrolled by DNREC officers, as compared to State Troopers. A total of 21 Park officers covering 26,000 acres means one officer for every **1,238** acres; whereas 679 state troopers covering 1,982 square miles (1,268,480 acres), mean one state trooper for every **1,868** acres of land. And, as noted previously, every one of the 679 Troopers has statewide arrest authority, including Parks and Forests, or one officer for every **37** acres (700 total officers for 26,000 acres). *See* A101.

[48] *Bridgeville*, *supra* at n.4.

important governmental interest".[49] The Regulations are substantially related to the achievement of that objective, without unduly burdening gun owners seeking to hunt or target-shoot. Such action is consistent with the agencies' statutory charge to manage parks and forests, and to protect visitors. As the Superior Court observed, the purported need to use deadly force in self-defense is diminished, when guns are prohibited in public places.

The governmental action here does not burden the right to recreational hunting or shooting, but in fact encourages and facilitates it. Use of firearms in State Parks and Forests is limited, not prohibited. Regulation of guns only on government land is different from banning guns everywhere. Far from the blanket prohibition imagined by Appellants, the challenged Regulations merely limit the time, place, and manner of gun use, and only on State land, in sensitive public places where visitors are welcome.[50] This delicate balance is not broken and does not need to be "fixed" by private intervention.

In *Griffin v. State, supra*, this Court emphasized the importance of the armed defense of the dwelling. In *Doe v. WHA*, that area of interest was extended to

[49] OB at 19.

[50] Appellants' reliance on *Murphy v. Guerrero*, 2016 WL 5508998 (D.N.M.I. Sept. 28, 2016) is misplaced, as the District Court actually upheld three of seven gun restrictions in that case, and cited with approval restrictions on firearms on government property. *Id.* at 5.

common areas such as a laundry or TV room in a public housing facility.[51] Appellants would have this Court compare State Parks and Forests to the public housing building lobby, because both are open to the public and outside the confines of home. But the analogy fails. A State Park or Forest is not an extension of the home, but a place where members of the public may freely – and temporarily – gather as guests, not residents.

As this Court observed in *Doe v. WHA*, a critical consideration is how the government property is being used.[52] The services provided to adults and children in State Parks and Forests, such as swimming, camping, nature education, and recreation, are comparable to those provided in similar State facilities like schools, playgrounds, pools, libraries, museums, colleges, and universities.[53] The services provided to public housing tenants are not typical of those provided by government in a courthouse, a library, a school, college, or university campus - - or a park or forest. For purposes of the right to carry firearms for defense, a State Park or Forest can readily be distinguished from a public housing unit, in that visitors have left the sanctity of the home, and therefore the State may reasonably restrict weapons in the interest of public safety, and provide security through uniformed law enforcement officers, so that those guests are not at risk.

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[51] *Doe v. WHA*, 88 A.3d at 668.
[52] *Id.* at 668.
[53] *See* A071 n.4.

2. The Record is Sufficient to Support Limited and Reasonable Gun Restrictions that Comport with Important Government Interests in Public Safety.

The *amicus* briefs filed in support of guns in parks purport to rely on pseudoscientific commentary to craft a rationale for what amounts to vigilante justice through heavily-armed private citizens. None of this "junk science" was before the Superior Court, and the Appellants should not be permitted to add to the record on appeal. This material should rightly be disregarded by the Court, and should not form a basis for remand. The appeal can be fully resolved based on the record in the Superior Court, including the history of the Regulations. In *Norman v. State*, the Court applied intermediate scrutiny to uphold an open carry prohibition, in a case brought by a criminal defendant convicted of violating the law.[54] The Court noted that "the State is not required to produce evidence in a manner akin to strict scrutiny review," and pointed out that federal courts have upheld gun regulations if they reasonably comport with important governmental interests, even if the government did not justify the restriction with data or statistical studies. As the Florida Court noted, the United States Supreme Court has permitted litigants to justify restrictions by reference to studies, anecdotes, history, consensus, and simple common sense.[55]

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[54] *Norman v. State*, -- So. 3d. --, 2017 WL 823613 (Fla. Mar. 2, 2017).

[55] *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 439-40 (2002) ("A municipality

The current record is equivalent to that before federal courts in comparable (unsuccessful) challenges to gun restrictions. In *Drake v. Filko*,[56] the Court affirmed dismissal of a complaint challenging New Jersey's concealed carry licensing laws, concluding that the laws do not burden conduct within the scope of the Second Amendment, but alternatively, that the laws survive intermediate scrutiny. Similarly, in *Wilson v. Lynch*,[57] the Ninth Circuit affirmed dismissal of a challenge to federal law and ATF policy that prohibited a plaintiff with a medical marijuana card from purchasing firearms. The court found that the plaintiff's Second Amendment rights were burdened, but that the law and policy survived intermediate scrutiny. Finally, in *Fyock v. City of Sunnyvale*,[58] the Court affirmed the denial of preliminary injunction, finding that a municipal law prohibiting possession of large-capacity magazines satisfied intermediate scrutiny. The record here is similar to that before the Court in *Doe v. WHA*, and presents both facts and history sufficient for the Court to apply the law and to affirm the Superior Court.

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considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously."); *National Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15 (D.C. Cir. 2009) (wherein the Court found that Congressional findings need not include "studies, statistics, or empirical evidence" in order to satisfy *strict* scrutiny).

[56] *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014).

[57] *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016), *cert. denied*, 2017 WL 1114979 (March 27, 2017).

[58] *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015).

3. The Longstanding Regulations Governing Firearms in State Parks and Forests Do Not Burden Conduct Protected by the Constitution, and are Presumptively Lawful.

Federal Courts have found that restrictions on firearms in "sensitive places" do not burden constitutional rights, and thus fail to trigger even the intermediate scrutiny analysis in the first place. In *United States v. Dorosan*,[59] the Court held that prohibitions forbidding the carrying of firearms in sensitive places such as government buildings are valid restrictions on the right to bear arms. "Given this usage of the parking lot by the Postal Service as a place of regular government business, it falls under the 'sensitive places' exception recognized by *Heller*."[60] The Second Amendment right does not apply to federal buildings such as post offices, or post office parking lots.[61] In the alternative, such restrictions would readily survive intermediate scrutiny.[62]

Just as certain kinds of federal regulations do not burden rights found under the Second Amendment, longstanding firearms restrictions should be upheld under the Delaware Constitution. In *United States v. Marzzarella*,[63] the Third Circuit held that the best reading of the language in *Heller* deeming certain types of longstanding

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[59] *U.S. v. Dorosan*, 2009 WL 273300 at *1 (E.D. La. Jan. 22, 2009), *aff'd*, 350 Fed. Appx. 874, 875 (5th Cir. 2009).

[60] *U.S. v. Dorosan*, 2009 WL 3294733 (5th Cir. Oct. 14, 2009) (citing *Heller*, 554 U.S. at 626).

[61] *Bonidy v. United States Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015).

[62] *Id.*

[63] *U.S. v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

firearm restrictions to be "presumptively lawful" is that "these longstanding limitations are exceptions to the right to bear arms".[64] The longstanding Regulations providing for hunting and recreation, and otherwise limiting firearms in public places, outside the home, fall outside the scope of Article I, Section 20, and should be upheld.

4. The Scope of the Right to Defense in Public Places under the Delaware Constitution is No Greater than that under the Second Amendment to the United States Constitution.

As this Court observed in *Doe v. WHA*, Article I, Section 20 of the Delaware Constitution is not a mirror image of the Second Amendment.[65] The Delaware provision lacks the emphatic command of the Second Amendment that such rights "shall not be infringed". Rather, the Delaware Constitution defines (and thus limits) the right to "keep and bear arms" in terms of defense, hunting, and recreation. The

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[64] *Id.* at 91; *Accord Commonwealth v. McGowan*, 464 Mass. 232, 238 (Mass. 2013) ("we discern meaning from the Supreme Court's willingness to characterize some longstanding limitations on the right to bear arms, such as the prohibition of the possession of firearms by felons and the mentally ill, and the regulation of the commercial sale of arms, as 'presumptively lawful' without subjecting these laws to heightened scrutiny, or identifying the level of heightened scrutiny that would apply. These laws could be presumptively lawful without such heightened scrutiny only if they fell outside the scope of the Second Amendment and therefore were not subject to heightened scrutiny."); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco & Firearms*, 700 F.3d 185, 196 (5th Cir. 2012) ("a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment" and "would likely be upheld" without needing to apply heightened scrutiny).

[65] *Doe v. WHA*, 88 A.3d. at 662 (quoting *Dorsey v. State*,761 A.2d 807, 814 (Del.2000)).

challenged Regulations specifically provide for hunting and recreation using firearms, and there is no deprivation of those rights. The only issue before the Court is whether the use of gunfire for purposes of defense, outside the home, can be restricted in "sensitive" public places, on State land, in the interest of public safety, as provided by the General Assembly. That is essentially the same issue that the federal courts have encountered, in the wake of the *Heller*[66] and *McDonald*[67] decisions, including specific limits on the use and possession of firearms on government property open to the public. Reading Article I, Section 20 in light of these distinctions, it is apparent that the right conferred, which is not absolute,[68] is limited in much the same way that its federal counterpart has most recently been interpreted by federal courts.

In the context of this appeal, the Delaware Constitution affords no greater rights to Appellants than would the United States Constitution, under the prevailing construction of the Second Amendment. The United States Supreme Court, in *Heller* and *McDonald*, announced a novel, but limited, individual right to armed defense of the home. This Court, of course, is not bound by those cases in interpreting Article I, Section 20.[69] It is worth noting, however, that this Court, in

[66] *Heller*, 554 U.S. 570.
[67] *McDonald v. City of Chicago,* 561 U.S. 742 (2010).
[68] *Doe v. WHA*, 88 A.3d at 667.
[69] *Id.* at 665 (holding that courts should interpret Article I, Section 20 independently from, not coextensively with the Second Amendment).

Doe v. WHA, took essentially the same approach, in its focus on the home (including common areas incorporated into the home) for purposes of analyzing the scope of the protected right to defense, as was taken in *Heller*. Thus, *Heller* and its progeny can be of use to this Court, in evaluating limits on the right to use firearms outside the home, or in upholding laws forbidding the carrying of firearms in "sensitive places" such as schools and government buildings.[70] The Court in *Heller* did not read the Second Amendment to protect the right of citizens to carry arms for any confrontation.[71] The right secured by the Second Amendment is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,"[72] just as Article I, Section 20 is not an absolute right, but rather one that depends on the nature and circumstances of the demand for arms.

5. The Public Interest in Protecting Temporary Overnight Visitors to State Facilities is Greater than Private Gun Rights.

A State Park does not acquire the character of a home when a visitor stays as a temporary guest with the State's permission on rented premises in a public facility. A tent, cabin, berth, or yurt owned on State property and only temporarily occupied by a Park guest is not a private dwelling, and a transitory guest cannot defy

[70] *Heller*, 554 U.S. at 626.
[71] *Id.* at 595.
[72] *Id.* at 626.

Regulations excluding firearms from government facilities shared with others.[73] In *GeorgiaCarry.Org v. Corps of Engineers,*[74] the Court upheld a regulation limiting the possession of loaded weapons on federal property. The Court found that the regulation did not infringe on the right to defense within the home, and that the plaintiff camper could avoid a perceived threat of harm by choosing to recreate elsewhere.[75] The Court relied on cases upholding gun bans on a university campus,[76] and a post office parking lot,[77] as well as laws in Hawaii,[78] and New York,[79] requiring a showing of special need for self-protection, in order to carry a gun.

In addressing the purported Constitutional violation, the Georgia federal court applied intermediate scrutiny, because the regulation (as here) was not a broad act of governance applicable to private property, but rather a managerial action affecting only government-owned lands.[80] The purely voluntary and temporary presence of

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[73] Contrast the residents who were plaintiffs in *Doe v. WHA,* who enjoyed a possessory interest in both their apartments and the common areas adjacent to their dwellings, which were their permanent residences. *Doe v. WHA*, 88 A.3d at 667. 668.

[74] *GeorgiaCarry.Org v. Corps of Engineers,* 38 F.Supp.3d 1365 (N.D.Ga. 2014).

[75] *Id.* at 1374, 1375.

[76] *Digiacinto v. George Mason Univ.,* 704 S.E.2d 365, 370 (Va.2011).

[77] *Dorosan,* 2009 WL 3294733.

[78] *Young v. Hawaii*, 911 F.Supp.2d 972 at 989-990 (D.Hawaii 2012).

[79] *Kachalsky v. Cacace,* 817 F.Supp.2d 235, 240, 264 (S.D.N.Y.2011), *aff'd* 701 F.3d 81 (2d Cir.2012).

[80] *GeorgiaCarry.Org,* 38 F.Supp.3d at 1376 (*citing Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 598 (2008); *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (upholding a law stating that "[e]very person who brings onto or possesses on

the plaintiff on Corps property for recreation placed only a limited burden on his rights. The Court quoted from *Moore v. Madigan*,[81] a case relied on by Appellants, in support: "when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need."[82] Judge Posner, who found insufficient empirical justification for an Illinois law,[83] suggested that a more nuanced approach (as here) would pass Constitutional muster.

In *Masciandaro*,[84] the criminal defendant testified at trial that he carried a machete and a 9mm semiautomatic pistol into a national park for self-defense, because he carried valuables and frequently slept in his car. He claimed a Constitutional right to carry and possess a gun "in case of a confrontation".[85] Moreover, he sought to claim the same right of self-defense when sleeping overnight in his car as that recognized by a divided United States Supreme Court in *Heller*,

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County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor"); *and Masciandaro*, 638 F.3d at 473).

[81] *Moore v. Madigan*, 702 F.2d 933, 940 (7th Cir.2012).

[82] The Court quoted the *Heller* opinion's emphasis on the right to carry guns outside the home "in case of confrontation", giving examples of street crime in Chicago, while cautioning that "a gun is a potential danger to more people if carried in public than just kept in the home". *Id.* at 936, 937.

[83] After extensive discussion of studies with contradictory findings, the Court declined to decide the case based on "casualty counts". *Id.* at 939.

[84] *Masciandaro,* 638 F.3d at 473.

[85] *Id.* at 465.

supra, for purposes of a dwelling. Like this Court in *Doe v. WHA, supra,* the Fourth Circuit found a fundamental right to possess firearms for self-defense within the home. But the Court acknowledged a "considerable degree of uncertainty….as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation."[86] Whereas the right to armed self-defense within the home was thought to be fundamental, "…as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense".[87] Accordingly, the *Masciandaro* Court, applying intermediate scrutiny, held that such regulations would survive, in that they do not unduly burden the right to self-defense outside the home and in public places, where innocent people may be harmed by gunfire, and they surely do advance the substantial government interest in public safety.[88] That same approach would apply to guests of the State sleeping in tents and cabins in Parks and Forests.

In *Jackson v. San Francisco,*[89] the Circuit Court applied to a Second Amendment case the First Amendment principle that reasonable "time, place, or manner" restrictions pose less of a Constitutional burden than an outright

[86] *Masciandaro,* 638 F.3d at 467.
[87] *Id.* at 470.
[88] *Id*.
[89] *Jackson v. San Francisco,* 746 F.3d 953, 961 (9th Cir. 2014) (upholding a municipal handgun storage and ammunition sale ordinance).

prohibition. "[T]he Second Amendment right, like the First Amendment right to freedom of speech, may be subjected to governmental restrictions which survive the appropriate level of scrutiny."[90] The same is true for the qualified right secured by Article I, Section 20 of the Delaware Constitution. The General Assembly was free to regulate the time (hunting seasons), place (parks and forests), and manner (shooting game or target shooting) of gun use, acting in the public interest to avoid violence.

The ability of Appellants to "open carry" firearms is not absolute. In *Norman v. State,* the Florida Supreme Court upheld a ban on the open carry of firearms under the immediate scrutiny analysis, citing the government's "considerable flexibility to regulate gun safety."[91] In *Baker v. Schwarb,*[92] the Court granted qualified immunity to police officers who briefly detained two heavily-armed men walking near a public park. The Court found that the plaintiffs, by their own admission, were "trolling for a confrontation, by displaying their arms in a way that was extraordinary for the neighborhood." [93] The police were justified in stopping and detaining them and briefly seizing their weapons. The same result was reached in *Embody v. Ward,*[94] where a park ranger detained a visitor to a state park dressed in camouflage and

[90] *Id.* at 970.
[91] *Norman*, 2017 WL 823613, at *17.
[92] *Baker v. Schwarb*, 40 F. Supp. 3d 881 (E.D. Mich. 2014).
[93] *Id.* at 890.
[94] *Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012).

armed with a Draco AK-47 pistol slung across his chest. The pistol had an 11.5-inch barrel with a fully loaded, 30-round magazine attached to it. The Court found that the ranger had qualified immunity from a civil rights lawsuit, rejecting the plaintiff's Second Amendment claim, finding that "[n]o court has held that the Second Amendment encompasses a right to bear arms within state parks."[95]

The Appellants assert that they have a "natural", and seemingly unlimited, right to self defense.[96] By referencing firearms, they strongly condone the use of deadly force in defense of themselves and others. This esoteric discussion ignores the concept of "justification" and the distinct limits placed on the exercise of force, including deadly force, by the Delaware Code.[97] Under the Common Law of England and since Colonial times, the use of guns in defense has been limited, and public officers have enforced the law and provided for public safety. If, as is claimed, the Appellants "simply wish to exercise their fundamental right to bear arms within Delaware's existing regulatory scheme"[98], they should not dispute longstanding Regulations designed for their protection that are consistent with the limited right of self-defense defined in the Constitution.

[95] *Id.* at 581.
[96] OB at 15.
[97] 11 *Del.C.* §464.
[98] OB at 22.

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

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

Practice §§14.01, 14.03-14.05 (1988), and cases cited therein. [citations altered to conform to Delaware format][99]

[99] *W. Va. Dept. of Natural Res. v. Cline,* 488 S.E.2d 376, 383 (W.Va. 1997*)*.

II. The DDA and DNREC Regulations Are Consistent with Other State Laws Regulating Guns and Restricting Their Use.

A. Question Presented.

Did the Superior Court err as a matter of law when it determined that no act of the General Assembly preempted the Appellees from enacting the Regulations?[100]

B. Scope of Review.

A trial court may enter judgment on the pleadings "when no material issue of fact exists and the movant is entitled to judgment as a matter of law."[101] Accordingly, a trial court's grant of a motion for judgment on the pleadings is a question of law that this Court reviews *de novo.*[102] When considering the trial court's decision, this Court's review is limited to the "contents of the pleadings"[103] to determine if the trial court committed "legal error in formulating or applying legal precepts."[104]

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[100] *Bridgeville Rifle & Gun Club, Ltd.*, 2016 WL 7428412, at *7.

[101] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993) (citing *Warner Communications, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. 1989); *Fagnani v. Integrity Fin. Corp.*, 167 A.2d 67, 75 (Del. Super. 1960); 5A Wright & Miller, *Federal Practice & Procedure: Civil 2d* §1368 at 518).

[102] *Taylor v. Pontell*, 2010 WL 3432605, at *2 (Del. Sept. 2, 2010) (citing *Desert Equities, Inc.*, 624 A.2d at 1204).

[103] *Desert Equities, Inc.*, 624 A.2d at 1204 (citing *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988); *Republic Steel Corp. v. Pennsylvania Engineering Corp.*, 785 F.2d 174, 177 n.2 (7th Cir. 1986)).

[104] *Id.* (citing *Levinson v. First Delaware Ins. Co.*, 549 A.2d 296, 298 (Del. 1988); *Rohner v. Niemann*, 380 A.2d 549 (Del. 1977)).

C. Argument.

Appellant's Opening Brief argues that the Regulations are explicitly preempted by Article I, Section 20 of the Delaware Constitution and implicitly preempted by State Law.[105] Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[106] Although the Rule provides a narrow exception, this Court has refused to review constitutional arguments raised for the first time on appeal.[107] As a threshold matter, neither the Appellants' Complaint nor their Judgment on the Pleadings briefing below contended that the Delaware Constitution preempted the Regulations, and therefore, this Court should refrain from consideration of those arguments on appeal.

The doctrine of preemption addresses situations in which "the law of a superior sovereign takes precedence over the laws of a lesser sovereign."[108] A statute may preempt a local law or regulation expressly or by implication.[109] Express

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[105] OB at 31.

[106] Supr. Ct. R.7(d).

[107] *Shawe v. Elting*, 2017 WL 563963, at *13 (Del. Feb. 13, 2017) (citing *Cassidy v. Cassidy*, 689 A.2d 1182, 1184–85 (Del. 1997)).

[108] *A.W. Financial Services, S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1121 (Del. 2009).

[109] *Cantinca v. Fontana*, 884 A.2d 468, 473–74 (Del. 2005) (citing *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 654 A.2d 449, 460 (1995)).

preemption is demonstrated by statutory language or legislative history that "*explicitly* provides or demonstrates that the state statute is intended to replace or prevail over any pre-existing laws or ordinances that govern the same subject matter.[110] Implied preemption exists when two laws are inconsistent, and the local regulation hinders the objectives of the state statute.[111] "[C]oncurrent regulation of the same subject matter, without more, does not create a preemption justifying conflict."[112]

The Superior Court correctly found that the Delaware Code does not contain a "comprehensive regulatory scheme" that preempts the Regulations.[113] In their briefs below, Appellants argued that certain sections in Titles 11 and 24[114] occupy the field of firearms, thereby implicitly preempting the Regulations.[115] On appeal,

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[110] *Id.* (citing *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998))(emphasis added).

[111] *Id.* (citing *Hayward v. Gaston*, 542 A.2d 760, 767 (Del.1988); *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998)).

[112] *Id.* (citing *Poynter v. Walling*, 177 A.2d 641, 646 (Del. Super. 1962)).

[113] *Bridgeville Rifle & Gun Club, Ltd.*, 2016 WL 7428412, at *7.

[114] OB at 33-34. (citing the following as the General Assembly's "comprehensive regulatory scheme governing the use and possession of firearms": 24 *Del.C.* §§901-904A; 11 *Del.C.* §§1141, 1141A, 1142, 1444 1448, 1448A; 22 *Del.C.* §111; 9 *Del.C.* §330(c)).

[115] As examples of express preemption, Appellants argued below that the statutes that restrict municipalities and counties from enacting laws that prohibit, restrict, or license the ownership, transfer, possession, or transportation of firearms, except that those governmental entities an regulate the discharge of a firearms. OB at 34.

Appellants cite additional statutes from Titles 7, 10, 11, 24, and 29.[116] The Court should not consider these new statutes raised on appeal. Nonetheless, the additional statutes lend nothing to Appellants' preemption argument, as the statutes are superfluous and lack a nexus to the issue on appeal. In fact, Appellants' list of firearms statutes reads like the results of a Google search of the Delaware Code for the term "firearms," as the relevancy of these statutes to the issue on appeal is tenuous at best. For example, citing the criminal definitions for "menacing" and "reckless endangerment" because the definition includes, but does not require, a deadly weapon or firearm is illogical and unfairly represents those statutes as occupying the field of firearm regulation.

Of more concern, however, the synopses of some of these statutes misrepresent or omit a fair description of the statutes. For example, Appellants cite 11 *Del.C.* §§1441A, 1441B with the following description: "allowing retired police officers to be specially licensed to carry a concealed weapon following retirement" and "extending federal law regarding retired law enforcement officers' ability to carry concealed firearms."[117] But the Appellants omit clear, relevant statutory

[116] OB at 34 n.25.
[117] *Id.*

language that specifically addresses the validity of existing state or local laws that prohibit or restrict the possession of firearms:[118]

> This section shall not be construed to supersede or limit the laws of any state that:(1) Permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or (2) Prohibit or restrict the possession of firearms on any state or local government property, installation, building, base, or *park*.[119]

Appellants also complain that if the Superior Court had considered the statutes that restrict how cities and counties can regulate firearm ownership, transfer, possession, and transportation,[120] according to the principle, *experssio unius est exclusion alterius*, then the Court should have discovered the General Assembly's implied intent to preempt any other government body from regulating firearms.[121] The first flaw in that argument is that a State agency is not analogous or in the same class as a political subdivision, such as a city or county. Following Appellants' argument to its logical conclusion, no governmental body, other than the General Assembly, could prohibit or restrict the possession of firearms on its property, including courts and schools.[122] Second, if the General Assembly intended to limit

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[118] *See also* Appellants' description of 11 *Del.C.* §1444, which omits "bombs, bombshells" from the list of prohibited destructive weapons. OB at 34 n25.

[119] 11 *Del.C.* §1441A(b) and §1441B(b) (emphasis added).

[120] 9 *Del.C.* §330 and 22 *Del.C.* §111.

[121] OB at 32-33.

[122] Section 1457 of Title 11 provides enhanced penalties for certain crimes committed with a firearm in a "Safe School and Recreation Zone," but this statute does not address the school administration's ability to establish a policy prohibiting firearms on school grounds.

the power of the DDA or DNREC, or any other government body, to protect the public safety in public areas by limiting their ability to regulate firearm possession, then it would have done so. Instead, the General Assembly left the Regulations, which have been in effect for decades before and after the constitutional amendment, undisturbed.

The Appellants also claim that the exclusions in Section 1441A, 1441B were modeled on the federal statutes and were not intended to apply to the state statutes. As such, that language should not be read to show that the General Assembly did not intend to supersede state law. Again, if the General Assembly did not intend to maintain these exceptions, the legislators could have stricken that language from the statutes, but they did not. Moreover, the well-settled rules of statutory construction provide that a statute should be construed to "ascertain and give effect to the true intent of the legislature from the language employed."[123] When the language and intent of the statute are clear, the Court does not engage in statutory construction.[124] When the "statute is unambiguous, the plain language of the statute controls."[125] Here the statutes are clear, and the plain, unambiguous language provides that they

[123] *American Ins. Ass'n v. Del. Dept. of Ins.*, 2006 WL 3457623, at *3 (Nov. 29, 2006) (citing *Rubick v. Security Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000)).

[124] *Id.* (citing *Newtowne Village Serv. Corp. v. Newtowne Road Dev. Co.*, 772 A.2d 172, 175-176 (Del.2001)).

[125] *Id.* (citing *Rubick*, 766 A.2d at 18).

do not supersede existing laws that "[p]rohibit or restrict the possession of firearms on any state or local government property, installation, building, base, or *park*."[126]

Appellants further complain that the Superior Court's misapplied *Florida Carry, Inc. v. University of Florida*[127] in concluding that the Regulations are not preempted.[128] Appellants argue that the case is distinguishable because, unlike Delaware, the Florida legislature intended to prohibit firearms on university property, and therefore, the University's ban on firearms in dormitories was consistent with that intent.[129] In fact, the Superior Court cited *Florida Carry* to demonstrate an example of a statute that *expressly* preempts the field of firearm possession: "[T]he Legislature hereby declares that it is occupying the *whole* field of regulation of firearms and ammunition…."[130] The Superior Court contrasted this plain, clear preemption text to the Delaware Code, and correctly found that no Delaware law contained similar language.

There is no Delaware law that expressly or impliedly preempts the Regulations, and they should be upheld. The unrelated collection of statutes that the Appellants have cobbled together do not demonstrate the General Assembly's

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[126] 11 *Del.C.* §1441A(b) and §1441B(b) (emphasis added).

[127] *Florida Carry, Inc. v. University of Florida,* 180 So. 3d 137 (Fla. Dist. Ct. App. 2015).

[128] OB at 30.

[129] OB at 30-31.

[130] *Bridgeville* at *7 (citing Fla. Stat. §790.33) (emphasis added).

implied intent to occupy the field of firearms. The Regulations are not inconsistent, and they do not hinder the objectives of any Delaware statute.[131] The Regulations are an integral, concurrent part of Delaware's regulation of firearms.

[131] *Cantinca*, 884 A.2d at 473 (citing *Poynter v. Walling*, 177 A.2d 641, 646 (Del. Super. 1962)).

III. DDA and DNREC Acted within the Scope of the Authority Granted by the General Assembly to Protect Public Safety in Public Areas.

A. Question Presented.

Did the Superior Court err as a matter of law when it determined that the Appellees had statutory authority to adopt the Regulations?[132]

B. Scope of Review.

A trial court may enter judgment on the pleadings "when no material issue of fact exists and the movant is entitled to judgment as a matter of law."[133] Accordingly, a trial court's grant of a motion for judgment on the pleadings is a question of law that this Court reviews *de novo.*[134] When considering the trial court's decision, this Court's review is limited to the "contents of the pleadings"[135] to determine if the trial court committed "legal error in formulating or applying legal precepts."[136]

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[132] *Bridgeville Rifle & Gun Club, Ltd.*, 2016 WL 7428412, at *7.

[133] *Desert Equities, Inc.*, 624 A.2d at 1205 (Del. 1993) (citing *Warner Communications, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. 1989); *Fagnani v. Integrity Fin. Corp.*, 167 A.2d 67, 75 (Del. Super. 1960); 5A Wright & Miller, *Federal Practice & Procedure: Civil 2d* §1368 at 518).

[134] *Taylor*, 2010 WL 3432605, at *2 (citing *Desert Equities, Inc.*, 624 A.2d at 1204).

[135] *Desert Equities, Inc.*, 624 A.2d at 1204 (Del. 1993) (citing *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988); *Republic Steel Corp. v. Pennsylvania Engineering Corp.*, 785 F.2d 174, 177 n.2 (7th Cir. 1986)).

[136] *Id.* (citing *Levinson v. First Delaware Ins. Co.*, 549 A.2d 296, 298 (Del. 1988); *Rohner v. Niemann*, 380 A.2d 549 (Del. 1977)).

C. Argument.

The Superior Court did not err when it found that DDA's and DNREC's enabling statutes authorized, and encouraged, those agencies to adopt regulations "aimed at addressing and ensuring the safety of State-owned lands."[137] As the Superior Court noted, the General Assembly bestowed DDA with plenary authority in public forestry functions, which included DDA's statutory powers and duties to "devise and promulgate rules and regulations for the enforcement of the state forestry laws and for the protection of forest lands…."[138] Likewise, DNREC has broad statutory authority to "'[m]ake and enforce regulations relating to the protection, care and use of the areas it administers.'"[139]

When the General Assembly grants authority to an administrative agency, that power "should be construed so as to permit the fullest accomplishment of the legislative intent or policy."[140] "An expressed grant of legislative power to an agency carries with it the authority to do all that is reasonably necessary to execute that power."[141] Here, the General Assembly conferred DDA and DNREC with the authority to promulgate regulations related to the protection, care, and use of state

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[137] *Bridgeville Rifle & Gun Club, Ltd.*, 2016 WL 7428412, at *7.
[138] *Id.* (quoting 3 *Del.C.* §§1001, 1011).
[139] *Id.* (quoting 7 *Del.C.* §4701(a)(4)).
[140] *Atlantis I Condominium Ass'n v. Bryson*, 403 A.2d 711, 713 (Del. 1979).
[141] *Dept. of Correction v. Worsham*, 638 A.2d 1104, 1107 (Del. 1994) (citing *Atlantis I Condominium Ass'n*, 403 A.2d at 713; 3 Norman J. Singer, *Sutherland Statutory Construction*, §65.03 (5th ed. 1992)).

forests and parks.[142] That broad grant of authority to protect the lands that they administer includes the corollary interest and duty to protect the people who enjoy those public lands.

The Appellees' public safety interest is not theoretical; it is codified in their enabling statutes. Both DDA and DNREC have statutory authority to employ law enforcement officers with police powers similar to state "constables, peace officer and other police officers."[143] Those DNREC and DDA law enforcement officers have the power to enforce the laws related to state forests and parks.[144] Their authority to establish public safety regulations flows from that statutory law enforcement power. According to their enabling statutes, the Appellees have the power to employ law enforcement personnel to enforce their regulations.[145] In addition, that authority is found in the statutory criminal penalties – fines[146] and imprisonment – that the General Assembly established for violating the regulations.[147]

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[142] 3 *Del.C.* §1011; 7 *Del.C.* §4701(a)(4).

[143] 3 *Del.C.* §1022(a); 29 *Del.C.* §8003A(b).

[144] Although DDA does not current have its own state forest officers, DNREC Fish and Wildlife Agents and state police officers are *ex officio* state forest officers. 3 *Del.C.* §1023.

[145] 3 *Del.C.* §1022; 29 *Del.C.* §8003(13).

[146] 11 *Del.C.* §223(a) (defining a fine as a criminal punishment).

[147] 3 *Del.C.* §1022; 7 *Del.C.* §4702.

DDA and DNREC do not need evidence to show that they have a valid governmental interest in ensuring the safety of the people who are enjoying state forests and parks. It is a legal issue announced in the statutes' plain language.[148] The Appellees' public safety interest also lies in their law enforcement powers, including the authority to promulgate regulations related to the protection, care, and use of state forests and parks, and the power to enforce those laws and regulations through criminal penalties.[149]

The Appellees manifest their valid governmental interest in public safety through their broad regulatory authority to accomplish that legislative goal.[150] As such, the Appellees have the authority to establish regulations that promote public safety. And the Regulations that prohibit the possession of firearms on those lands except during legal hunting seasons are consistent with and further that interest. Any potential burdens on the Appellants' limited right to possess firearms for defense is outweighed by Appellees' valid governmental interest in public safety.[151] Contrary to the Appellants' argument, the Regulations are not a total ban on firearms in state forests and parks. OB at 39. Appellees permit firearms in state forests and parks for

[148] 3 *Del.C.* §§1001, 1011; 7 *Del.C.* §4701(a)(4).
[149] *Id.*
[150] *Atlantis I Condominium Ass'n*, 403 A.2d at 713.
[151] *Doe v. WHA*, 88 A.3d at 666 (citation omitted).

legal hunting, but for public safety reasons, Appellees place reasonable restrictions on that right to bear arms for hunting.[152]

Therefore, the Court should find that the Appellees had the statutory authority to promulgate the firearms Regulations because they are reasonably necessary to accomplish the legislative intent for DDA and DNREC to maintain public safety, and to fulfill their mandate to protect the public lands that they administer.

CONCLUSION

The Delaware Constitution does not preclude the General Assembly from insuring public safety on State property through reasonable restrictions on firearms. The authority delegated to law enforcement to preserve the peace in public places through regulation of guns has been used wisely and well, for over fifty years. Law-abiding citizens have enjoyed hunting and recreational shooting on State lands for generations within sensible limitations as to season, game, weapon, and geography. Regulations on guns in State Parks and Forests have been administered hand in glove with other laws restricting the use and possession of firearms, to promote the safety of all users.

As the Appellants concede, Article I Section 20 allows for a wide variety of limits on the purchase, possession, and use of guns. Outside the confines of the

[152] For safety reasons, Appellees regulate hunting by limiting the type of firearms, method of take, seasons, and hunting areas, *inter alia*. *See generally* 7 Del. Admin. C. §3900; 3 Del. Admin. C. §402.

private dwelling, and particularly in public spaces and on State land, the State may validly place reasonable restrictions on firearms, such as the time, place, and manner of hunting and recreational shooting. In a public place like a courthouse, a school, a library, government offices, a campus, a playground, a campground, or a park, where law enforcement provides security, the State may exclude weapons altogether, in the interest of public safety. Such reasonable measures to protect the public readily withstand intermediate scrutiny.

In stark contrast to the apocalyptic scenario underlying Appellants' lawsuit, over a million visitors enjoy access to public places each year, in comfort and in safety, without any need to arm or defend themselves in terror.[153] Historically, the Appellees have managed to strike a balance between the interest of some visitors in hunting and recreational shooting, and the protection of everyone else from gunfire. The abstract claims of Appellants fail in the face of decades of favorable experience and their inability to show any failure on the part of law enforcement to prevent harm to unarmed visitors.

[153] The Delaware Constitutional Convention of 1791 could not reach agreement over the scope of a provision on firearms due to "concerns over groups of armed men". *Doe v. WHA*, 88 A.3d. at 663. The provision ultimately adopted in 1987 cannot fairly be read to mandate that armed men and women be allowed to openly carry modern firearms without limitation in public places.