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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY; NATHANIEL MCQUEEN, JR., in his official capacity as Cabinet Secretary, Delaware Department of Safety and Homeland Security; and COL. MELISSA ZEBLEY, in her official capacity as superintendent of the Delaware State Police, Appellants/Cross-Appellees, Defendants-Below, v. GAVIN J. BIRNEY; DELAWARE STATE SPORTSMEN'S ASSOCIATION, INC.; and BRIDGEVILLE RIFLE & PISTOL CLUB, LTD., Appellees/Cross-Appellants, Plaintiffs-Below.	No. 412, 2025 Court Below: Superior Court of the State of Delaware C.A. No. K23C-07-019 RLG

CROSS-APPELLANTS' SECOND CORRECTED OPENING BRIEF ON CROSS-APPEAL AND APPELLEES' SECOND CORRECTED ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

The State appealed from the Superior Court's grant of summary judgment in favor of Appellees/Cross-Appellants ("the Challengers"). The trial court ruled that House Bill 451 violated Article I, Section 20 of the Delaware Constitution. *Birney et al. v. Del. Dept. Safety and Homeland Sec.*, C.A. No. K23C-07-019 RLG at 61 (Del. Super. Ct. Oct. 2, 2025) (the "Opinion" or "Op") attached as Exhibit A. HB 451 amended Title 11 of the Delaware Code to impose a prohibition on, and criminalize, the possession of most firearms by adults aged eighteen to twenty ("Young Adults"). B19, (Compl. ¶ 7).[1]

The trial court agreed with the Challengers that HB 451 is unconstitutional. Following cross-motions for summary judgment and several rounds of briefing over a period of about eighteen months, the Superior Court ruled in favor of the Challengers. Op. at 61.[2]

Although the Superior Court concluded that HB 451 violated Article I, Section 20, it evaluated the Challengers' claim under the repudiated intermediate-scrutiny standard rather than the text-and-history analysis required by the United

[1] "B__" as used herein refers to the paginated contents of the Appendix to Cross-Appellants' Opening Brief on Cross-Appeal and Appellee's Answering Brief on Appeal submitted concurrently herewith. "Compl." as used herein refers to the First Amended Complaint for Declaratory Relief filed in this matter.

[2] Challengers respectfully note that trial counsel in this case for the State later announced his position as a law clerk for the Delaware Supreme Court.

States Supreme Court in *N.Y. State Rifle & Pistol Ass'n v. Bruen,* 597 U.S. 1 (2022). Op. at 25-31. The State appealed from the judgment and the Challengers cross-appealed the trial court's application of the wrong standard to reach its correct conclusion.

SUMMARY OF THE ARGUMENT

A. Challengers' Opening Argument on Cross-Appeal

1. The Superior Court correctly held that HB 451 violates Article I, Section 20 of the Delaware Constitution because it denies a fundamental right enshrined in the Delaware Constitution to an entire class of law-abiding citizens—Young Adults. Op. at 61. Although the judgment should be affirmed, this Court should correct the trial court's use of an outdated constitutional standard of review that has been rejected by both the United States Supreme Court and the United States Court of Appeals for the Third Circuit which have established the "floor" of minimum federal constitutional guarantees in Delaware regarding the right to keep and bear arms. Basic principles of federalism recognized in decisions of this Court also prevent the State from providing fewer rights than the minimum level defined by controlling authority in the Third Circuit. The Superior Court applied the wrong analytical framework because the United States Supreme Court in *Bruen* rejected the standard of constitutional review labeled intermediate scrutiny, which is an interest balancing and means-end analysis mistakenly used in the past for Second Amendment cases. Repudiating the widespread errant use of that standard in the past by the various Courts of Appeals for many years, *Bruen* now requires that firearm regulations be evaluated by reference to constitutional text and consistency with historical tradition. The now obsolete

intermediate scrutiny standard provides fewer rights than the standard required by *Bruen* because that old test is more deferential to, and lenient towards, government regulation. Thus, by definition, a test that allows for more regulation of a right equates with a less robust, more restricted right.

2. Applying the required *Bruen* analysis necessitates the conclusion that HB 451 cannot pass constitutional muster. The statute applies to firearms commonly used for lawful purposes by ordinary, law-abiding citizens. The State cannot identify any requisite, relevant historical analogue supporting HB 451's prohibition. Post-*Bruen* decisions, including the Third Circuit's decision in *Lara v. Comm'r Pa. State Police,* 125 F.4th 428 (3d Cir. 2025), further confirm that Young Adults are among "the people" protected by the right to keep and bear arms and that categorical age-based firearm bans lack the necessary historical support--without which the ban cannot be upheld.

B. Challenger's Answers to the State's Arguments on Appeal

1. Denied. If this Court were to conclude that intermediate scrutiny governs this case, the Superior Court correctly applied that discredited test to hold that HB 451 impermissibly infringes the rights of all law-abiding adults in the prohibited age group without regard to individualized judicial determinations, conduct, or training. Op. 48-61. The Superior Court correctly held that at step three of intermediate scrutiny, HB 451's sweeping, class-wide prohibition on the acquisition and possession of common firearms by all law-abiding Young Adults, subject only to narrow, conditional, and discretionary carve-outs, burdens the core right of self-defense more than reasonably necessary. Because the statute fails even under the State's preferred standard, affirmance of the trial court's conclusion is required under either analytical framework.

2. Denied. The Superior Court correctly reviewed the CCDW licensing framework in the context of this case, and found it to be discretionary and that it did not salvage HB 451's unconstitutionality. The trial court did so in order to dispense with the State's argument that the wholly discretionary CCDW exception cleansed the sins of HB 451's infringement on the fundamental rights of Young Adults to keep and bear common arms. It does not.

STATEMENT OF FACTS

A. Preliminary Statement

Cross-Appellants ("the Challengers") agree with the trial court's holding that found a statute restricting the rights of Young Adults to be an unconstitutional ban on the exercise of a fundamental right enshrined in the Delaware Constitution to keep and bear arms for citizens between the ages of 18 and 20 ("Young Adults"). But the wrong standard was applied to reach that holding.

The State agrees with the standard the trial court used but disagrees with its holding. The standard the trial court used to reach its conclusion includes a balancing test that has been expressly rejected by the United States Supreme Court—and recently discredited in a binding decision by the United States Court of Appeals for the Third Circuit on the minimum federal rights required regarding a nearly identical issue presented to this Court in this appeal.

Although the trial court reached the correct conclusion using the wrong standard, in its reimagining of that analysis to reach a different result the State figuratively places its finger on the scale when applying the balancing test, in order to achieve its desired outcome, by failing to fairly address whether a ban on the exercise by Young Adults of a fundamental right enshrined in the Delaware Constitution satisfies the requirement of being the least restrictive means to reach the government's objective. Instead, the State joins with its Amicus Curiae to

employ scare tactics that have no place in serious constitutional analysis, as if they were appealing to the emotions of a jury. Although one unnecessary death is too many, the controlling constitutional standard of review does not include a reliance on selective statistics or tugging at heartstrings.

B. Enactment and Structure of House Bill 451

In June 2022, the Delaware General Assembly enacted HB 451, which amended 11 *Del. C*. §§ 1445 and 1448 and was signed into law on June 30, 2022. As amended, HB 451 prohibits law-abiding Young Adults from purchasing, owning, possessing, or controlling firearms, other than shotguns and muzzle-loading rifles. B19 (Compl. ¶¶ 7-9). The statute applies without regard to criminal history, individualized conduct, or misuse of firearms. *Id*.

HB 451 accomplishes this prohibition by removing the term "adult" from the statute it amends, and replacing it with a new definition of an adult: "a person 21 years of age or older," and also by replacing the term "juvenile" with: "person under the age of 21." B61 – B63 (Compl. at Ex. A ¶1445(a)(3)-(4), ¶1448(a)(5)). As a result, individuals who are otherwise treated as adults under Delaware law are categorically barred from possessing firearms that are commonly used for lawful purposes, by law-abiding adults, solely on the basis of a new definition applicable only to Young Adults. *Id*.

Section 1448(a)(5) of the statute amended by HB 451 contains narrow exemptions permitting firearm possession by Young Adults. B61 – B63 (Compl. at Ex. A, §1448(a)(5)). One of the enumerated exceptions is a person who has a license to carry a concealed deadly weapon ("CCDW") "pursuant to §1441 of this title." B63, (Compl. at Ex. A, §1448(a)(5)(b)(3)). The CCDW exception requires prospective permit holders to comply with a burdensome and discretionary registration and licensing process set forth in 11 *Del. C*. §1441. B29 – 21 (Compl. ¶¶ 42-43, 53-59). Outside the exceptions set forth in §1448(a)(5), HB 451 operates as a complete prohibition on the possession of handguns and other commonly used firearms by ordinary, law-abiding Young Adults.

C. Legislative Findings

The General Assembly cited legislative findings referencing neurological development in Young Adults and generalized concerns regarding judgment and impulse control. B61 (Compl. at Ex. A, Preamble). HB 451 does not distinguish between violent and non-violent individuals and does not require any individualized assessment or judicial finding.

D. The Challengers and the Effect of HB 451

Organizational Challengers—the Delaware State Sportsmen's Association and the Bridgeville Rifle & Pistol Club, Ltd.—are membership organizations whose members include Young Adults. B52 – B53 (Compl. ¶¶ 111-15). For those members,

HB 451 prohibits possession of firearms commonly used for lawful purposes, thereby foreclosing the exercise of the core right of self-defense. This litigation started about three years ago when Challenger Birney was 18. Now that this case has been pending for about three years, after the trial court decision *Birney* recently turned 21. The State has not raised this as an issue either in the trial court or on appeal.

ARGUMENT

CHALLENGERS' OPENING ARGUMENT ON CROSS-APPEAL

I. THE SUPERIOR COURT ERRED BY APPLYING THE INTERMEDIATE SCRUTINY STANDARD RATHER THAN THE TEXT-AND-HISTORY TEST REQUIRED BY *BRUEN*

A. Question Presented

Did the Superior Court err as a matter of law by applying the repudiated intermediate scrutiny standard, rather than the text-and-history analysis required by the United States Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen*, to the Challengers' claims under Article I, Section 20 of the Delaware Constitution? A26-A30 (MSJ at 5-9); B149-B158 (MSJ Reply at 1-10); B322-B325, B338-339 (Supp. Op. Br. at 1-4, 17-18).[3]

B. Standard of Review

This Court independently analyzes the legal issues decided below. This Court reviews questions of law and constitutional claims *de novo* for errors of law. *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 640 (Del. 2017).

[3] "A__" as used herein refers to the paginated contents of the Appendix to Appellants' Opening Brief. As used herein "MSJ" refers to Plaintiffs' Opening Brief in Support of Their Motion for Summary Judgment, "MSJ Reply" refers to Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment, and "Supp. Op. Br." refers to Plaintiffs' Opposition to Defendants' Supplemental Post-Argument Briefing.

C. Merits of the Argument

1. Introduction

The trial court reached the correct result utilizing the wrong test. Notwithstanding recent decisions on point from the United States Supreme Court and the United States Court of Appeals for the Third Circuit, it felt constrained by prior, pre-*Bruen* Delaware Supreme Court precedent that applied intermediate scrutiny to Article I, Section 20 challenges. Op. at 24-25. The use of intermediate scrutiny by pre-*Bruen* decisions of this Court was based on the now discredited prevailing federal circuit court test applied—at that time—to Second Amendment challenges. But *Bruen* rejected intermediate scrutiny.

The Third Circuit recently recognized that its prior application of intermediate scrutiny was wrong and that it now must apply the *Bruen* test to those challenges.[4] *Bruen*'s embrace of an objective test based upon historical tradition, and rejection of an interest-balancing test that provides "no constitutional guarantee at all," *Bruen*, 597 U.S. at 634, raised the minimum level of baseline rights to keep and bear arms guaranteed under the Delaware Constitution, as mandated by the Supremacy Clause and the Article I, Section 20 precedent of this Court. *Bridgeville*, 176 A.3d at 642 (citing Randy J. Holland, *The Delaware State Constitution* 36 (2d ed. 2017) ("The provisions in the federal Bill of Rights set only a minimum level of protection.")));

[4] *See Lara v. Comm'r Pa. State Police*, 125 F.4th 428, 434-35 (3d Cir. 2025).

see also Gannon v. State 704 A.2d 272, 276 (Del. 1998) ("Federal Constitutional standards, however, set only a minimal level of protection.") (citing William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986)).

In *Bridgeville*, buttressing its unanimous *en banc* decision in *Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014), this Court determined that:

> (i) Article I, Section 20 was a broader right than afforded by the Second Amendment. *Bridgeville*, 176 A.3d at 652; *see also Doe*, 88 A.3d at 665 ("On its face, the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside the home, including for hunting and recreation.");
>
> (ii) the principles of federalism mandated that the Second Amendment provides a "floor" of rights, and no state could provide fewer rights. *Bridgeville*, 176 A.3d at 642; and
>
> (iii) applying intermediate scrutiny to establish that "floor" of rights was consistent with the now-rejected standard previously used by the Third Circuit—at the time—and other circuits when evaluating Second Amendment challenges *at that time*. *Id*. at 654-55 ("Our adoption of intermediate scrutiny in *Doe* was consistent with the approach that federal circuits have employed when confronting facial challenges to statutes alleged to impinge on Second

Amendment rights, yet do not qualify as total bans."); *id*. at 656 ("But even assuming intermediate scrutiny applies, the Regulations still fail.")—although this Court also recognized that a reasonable argument could be made that no standard of review was needed to invalidate a total ban. *Id*. at 655-66 ("Given that the Regulations not just infringe — but destroy — the core Section 20 right of self-defense for ordinary citizens, one might legitimately argue that we need not apply any level of scrutiny.").

Since the last time the Delaware Supreme Court directly addressed the reach of Article I, Section 20 in the context of a constitutional challenge, the controlling standard of review for challenging laws that infringe upon the right to bear arms has fundamentally changed.

Bruen now mandates that when reviewing a challenge to a restriction on the right to keep and bear arms under the Second Amendment, the analogue to Article I, Section 20 of the Delaware Constitution, the proper analysis must be "a test rooted in the Second Amendment's text, as informed by history….[The Court] expressly rejected any interest-balancing inquiry akin to intermediate scrutiny." *Bruen,* 597 U.S. at 2.

Applying the *Bruen* test, the Third Circuit in *Lara v. Comm'r Pa. State Police*, 125 F.4th 428 (3d Cir. 2025), recently found unconstitutional state regulations that effectively prohibited Young Adults from keeping and bearing common arms. *Id*. at

445-46 ("Our question is whether the Commissioner has borne his burden of proving that Pennsylvania's restriction on 18-to-20-year-olds' Second Amendment rights is consistent with the principles that underpin founding-era firearm regulations, and the answer to that is no…. [W]e maintain our decision to reverse the District Court's judgment and remand with instructions to enter an injunction forbidding the Commissioner from arresting law-abiding 18-to-20-year-olds who openly carry firearms during a state of emergency declared by the Commonwealth.")

Lara establishes a floor or minimum level of federal rights to keep and bear arms for Young Adults. HB 451 results in Young Adults having fewer rights than the minimum level of rights required by *Lara* under federal law. Thus, HB 451's restrictions result in the rights of Young Adults falling below the "floor" of minimum federal rights mandated by the principles of federalism and recognized in prior Delaware Supreme Court decisions on Article I, Section 20.

Nevertheless, the trial court still chose to apply the outdated intermediate scrutiny test to HB 451, while misconstruing *stare decisis* as it interfaces with the Supremacy Clause. The result was that the Challengers' argument under Article I, Section 20, which this Court has recognized as a broader right than the Second Amendment, was evaluated using an outmoded analysis that was more deferential to the State than the *Bruen* test. Because the intermediate test allows for fewer rights than the *Bruen* test, the former is contrary to controlling authority.

This Court is not constrained by the same purported *stare decisis* concerns that inhibited the trial court. This Court is free to interpret Article I, Section 20's broader rights, as it has in the past, and based on the principles of federalism and the Supremacy Clause, apply the *Bruen* test to uphold the conclusion reached by the trial court in this case.

2. Article I, Section 20 is Broader than the Second Amendment

Article I, Section 20 of the Delaware Constitution codifies the preexisting and natural right of self-defense,[5] and several other related rights. It employs expressly broader text than the Second Amendment of the United States Constitution to do so. It provides that "[a] person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." Del. Const., art. I, § 20.

In *Bridgeville*, this Court conducted a side-by-side comparison of Article I, Section 20 and the Second Amendment, and concluded that the broader text was intentional:

Text of the Second Amendment	**Text of Section 20**
A well regulated Militia, being necessary to the security of a	A person has the right to keep and bear arms

[5] Self-defense is the "core" of the right to keep and bear arms. *See Bridgeville*, 176 A.3d at 655. *Bruen*, 597 U.S. at 71 (citing *Heller*) ("*Heller* found that the Amendment codified a preexisting right and that this right was regarded at the time of the Amendment's adoption as rooted in 'the natural right of resistance and self-preservation.' '[T]he inherent right of self-defense," *Heller* explained, is 'central to the Second Amendment right.'")

free state, the right of the people
to keep and bear arms,
shall not be infringed.

for the defense of self,
family, home and State,
and for hunting and recreational use.

Bridgeville, 176 A.3d at 642.

Article I, Section 20 has been recognized by this Court to provide greater rights than its analogue in the Second Amendment to the United States Constitution which also enshrines the fundamental individual right to keep and bear arms. In *Doe*, nearly a decade before the United States Supreme Court decided *Bruen*, this Court concluded unanimously *en banc*, that, "[o]n its face, the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms *outside the home,* including for *hunting and recreation*." 88 A.3d at 665 (emphasis added).

Three years later, in *Bridgeville*, this Court buttressed its reasoning by emphasizing, "regardless of what the United States Supreme Court decides regarding the Second Amendment, in this State, the text of our Delaware Constitution is clear: the right to keep and bear arms exists outside of the home." 176 A.3d at 652.

When supermajorities of two successive General Assemblies made Article I, Section 20 a part of the Declaration of Rights in the Delaware Constitution in 1987, before *Heller* and *Bruen*, it memorialized Delaware public policy as recognizing the right to keep and bear arms not only as an individual right, but also to defend one's

family, one's home, the State, and for hunting and recreation. This public policy statement was intended to oppose the anti-gun lobby of that era, which had sought to limit the right to keep and bear arms to the militia—and they also argued that if an individual right existed, it did not extend beyond the home. It would not be until decades later that the United States Supreme Court recognized the rights enshrined in the Delaware Constitution, when it rejected the "militia only arguments," *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms[;]"), and later rejected the "home only" faction. *Bruen*, 597 U.S. at 33 ("After all, the Second Amendment guarantees an 'individual right to possess and carry weapons in case of confrontation,' and confrontation can surely take place outside the home.") (internal citations omitted).

Notably, the United States Supreme Court also explained a rare attribute of the right to keep and bear arms that applies to only a very few fundamental civil rights. Specifically, at its core is the right to self-defense, which is a natural right each person is born with. *Id.* at 71 (citing *Heller*).

Because this foundational right at the heart of this appeal is a natural right each person is born with, the government cannot grant something that one already possesses. Rather, the government, through its laws, can merely recognize this pre-existing natural right that every person possesses at birth. This profound argument

can rarely be made in this Court based on such a sacrosanct foundation, but the State trifles with it.

The State belittles this exalted natural right by engaging in a condescending analysis that may be more fitting for a discussion about increasing taxes on cigarettes to reduce the risk of cancer or restricting the sale of alcohol—neither of which involves sacred natural rights.

Consistent with the rulings of the United States Supreme Court, this Court has also recognized the core of the right at issue in this appeal as a preexisting, natural right. *See Bridgeville*, 176 A.3d at 651. Although Article I, § 20 was not ratified until 1987, *Bridgeville* explained that "[t]he right to bear arms, including the right of self-defense, has existed since our State's founding and has always been regarded as an inalienable right." *Id.* at 644.

Doe highlighted that the absence of an explicit Article I, Section 20 precursor in the original Delaware Constitution over two hundred years ago was due to disagreement over the precise language, not due to a failure to recognize that the right to bear arms was fundamental. *Doe*, 88 A.3d at 663 ("In 1791, Delaware delegates to the state constitutional convention were unable to agree on the specific language that would codify in our Declaration of Rights the right to keep and bear arms in Delaware."). This Founding-era tradition is what the General Assembly sought to protect when it passed Article I, Section 20. *Id.* at 664-65 ("The General

Assembly's stated purpose in enacting the constitutional amendment was to 'explicitly protect [] the traditional right to keep and bear arms,' which it defined in the text of the amendment.") (emphasis added) (quoting H.B. 30., 134th Gen. Assem. (Del. 1987), *passed* Jan. 20, 1987).

A survey of Delaware history at the time of the Founding is also instructive. As noted in *Bridgeville*, while not yet expressed through Article I, Section 20, Delaware's first constitution did recognize Delawareans' right to bear arms:

> Article 25 of Delaware's first constitution (enacted on September 20, 1776) provided that, unless otherwise altered by the State's legislature, the common law of England "shall remain in force." By definition, this included Article VII of the 1689 English Bill of Rights — described by the United States Supreme Court as "the predecessor to our Second Amendment" . . . As noted by the United States Supreme Court in *Heller*, this "was clearly an *individual* right, having nothing whatever to do with service in a militia." *Heller* made clear that the Second Amendment protects an inherent right of self-defense.

Bridgeville, 176 A.3d at 646 (internal citations omitted).

In sum, Article I, Section 20 more broadly and robustly articulates the pre-existing and natural individual right also codified in the Second Amendment at the Founding.

3. Federal Law Provides a Floor, or Minimum Level, of Rights Mandating Application of *Bruen* and Striking HB 451

i. The Supremacy Clause Mandates that Article I, Section 20 Cannot Provide Fewer Rights than the Second Amendment

The Supremacy Clause in Article VI of the United States Constitution is the starting point for an analysis of the relationship between the U.S. Constitution and the Delaware State Constitution. It provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

The Supremacy Clause "make[s] clear—in explicit terms—that federal law has primacy over state law, including state constitutions, when there is a conflict between any federal law (constitutional, statutory, or even regulatory) and state law." Randy J. Holland, Stephen R. McAllister, Jeffrey M. Shaman, Jeffry S. Sutton, *State Constitutional Law: The Modern Experience* 91-92 (2010).

It remains a well-established principle of America's system of dual sovereignty that state courts may interpret their own constitutions to provide greater individual rights than the federal constitution—*but not fewer*. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *see also Gannon v. State* 704 A.2d

272, 276 (Del. 1998) ("Federal Constitutional standards, however, set only a minimal level of protection.") (citing William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986)).

Doe and *Bridgeville* recognized and applied this principle to their respective Article I, Section 20 analyses. *Bridgeville*, particularly, reasoned that Article I, Section 20 may provide "broader or additional rights than the federal, constitution, which provides a floor or baseline rights." 176 A.3d at 642 (citing Randy J. Holland, *The Delaware State Constitution* 36 (2d ed. 2017) ("The provisions in the federal Bill of Rights set only a minimum level of protection.")).

ii. The *Bruen* Test Provides More Rights than Intermediate Scrutiny and Therefore Raises the "Federal Floor" of Rights Required Under Article I, Section 20

Bridgeville, like *Doe* before it, when determining the minimum level of protection or constitutional "floor" for the rights at issue, looked to the U.S. Court of Appeals for the Third Circuit to determine that the standard of review—at that time—to analyze the floor was intermediate scrutiny, the prevailing test used by federal circuit courts—at that time—to assess Second Amendment challenges after *Heller*, but before *Bruen* strongly condemned the use of intermediate scrutiny. 176 A.3d at 654-55 ("Our adoption of intermediate scrutiny in *Doe* was consistent with the approach that federal circuits have employed when confronting facial challenges

to statutes alleged to impinge on Second Amendment rights, yet do not qualify as total bans."); *id*. at 656 ("But even assuming intermediate scrutiny applies, the Regulations still fail.").

Bruen has since raised the floor of minimum federal rights guaranteed by the Second Amendment by explicitly prohibiting use of the balancing test inherent in the intermediate scrutiny standard, and instead imposing a much heavier burden on the government to justify infringements on the right to keep and bear arms by requiring an analog in our nation's regulation of firearms at the time of the Founding. *Bruen* instructs that intermediate scrutiny's "interest-balancing" insufficiently protected the individual right to keep and bear arms codified in the Second Amendment.

Heller first rejected interest-balancing because it did not guarantee any Second Amendment rights, asserting that, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. The *Heller* majority's concern with interest balancing was embodied in rejected arguments found in the dissenting opinion of Justice Breyer. In unsuccessfully arguing for the application of an interest-balancing standard that would have upheld the total ban of handguns at issue under that standard, Justice Breyer's dissent first deemed the government's general interest in safety to be "compelling," based largely on deference to the government's claim that it was. *Id.*

at 690 (Breyer, J. dissenting). Next, he argued unsuccessfully that the *Heller* total ban was the least restrictive method of achieving its goal, so long as the government defined its goal as eradicating handguns. *Id*. at 711 (Breyer, J. dissenting). Both arguments were rejected by the High Court's majority decision.

The *Heller* majority directly addressed and rejected Justice Breyer's proposed approach because it did not adequately protect the right to keep and bear arms, reasoning that, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The 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." *Heller*, 554 U.S. at 634 (emphasis in the original).

Despite the *Heller* majority's clear repudiation of an interest balancing test in Second Amendment matters, during the years between *Heller* and *Bruen*, many circuit courts of appeal and state courts across the country misinterpreted *Heller* to endorse a misguided two-step test, the intermediate scrutiny test, that wrongly relied on means-end scrutiny and mirrored the rejected reasoning in Justice Breyer's dissent.

In a recent post-*Bruen* decision, the Third Circuit succinctly summarized this erroneous post-*Heller* development in circuit courts, and the subsequent *Bruen* correction:

> The *Heller* opinion did not apply intermediate or strict scrutiny. In fact, it did not apply means-end scrutiny at all. But in response to Justice Breyer's dissent, the Court noted in passing that the challenged law would be unconstitutional [u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights. Many courts around the country, including this one, overread that passing comment to require a two-step approach in Second Amendment cases, utilizing means-end scrutiny at the second step…. *Bruen* rejected the two-step approach as one step too many.

Range v. AG United States, 69 F.4th 96, 100 (3d Cir. 2023) (*en banc*) (internal citations omitted).

While *Bruen* acknowledged that "[s]tep one of the *predominant* framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history," it reinforced that *Heller* did not support means-end scrutiny in the Second Amendment context. *Bruen*, 597 U.S. at 22 ("*Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny."). Instead, at step two, *Bruen* reiterated the *Heller* mandate, that the government "affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19 (internal citations omitted).

Once again, the majority in *Bruen* explicitly repudiated interest-balancing, and particularly intermediate scrutiny, because it allowed for more restrictions and fewer Second Amendment rights than the U.S. Constitution required, and because it had been wrongly employed by circuit courts post-*Heller*. *Id.* at 23 ("Not only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt."); *see also id*. at 26 ("If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the constitution demands here."); *id*. at 78 (Alito, J. concurring) ("Like the dissent in *Heller*, the real thrust of today's dissent is that guns are bad and that States and local jurisdictions should be free to restrict them essentially as they see fit.").

In his *Bruen* concurrence, Justice Alito reiterated why *Heller* and *Bruen* explicitly rejected intermediate scrutiny, emphasizing that Justice Breyer's twice-

rejected dissents advocated for intermediate scrutiny as a method for justifying virtually any state-enforced restriction on Second Amendment rights[6]:

> My final point concerns the dissent's complaint that the Court relies too heavily on history and should instead approve the sort of "means-end" analysis employed in this case by the Second Circuit...This mode of analysis places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun.

Bruen, 597 U.S. at 76-77 (Alito, J., concurring) (internal citations omitted).

The Supreme Court, therefore, renounced an interest-balancing approach to Second Amendment challenges on the basis that it would allow fewer rights, and more restrictions of rights, than a test based upon history and tradition established in *Heller* and reinforced in *Bruen*. Self-evidently, using the more lenient and less rigorous intermediate scrutiny test would allow the government to more easily restrict the rights at issue—and therefore, impermissibly "lower the floor" of minimum federal rights mandated by this country's highest court as well as the U.S. Court of Appeals for the Third Circuit.

Bruen therefore "raised the floor" for the minimum rights required under federal law and Article I, Section 20, which already articulates a broader right to keep and bear arms than the Second Amendment. This Court must then, at minimum, adopt

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[6] More proof that demonstrates how intermediate scrutiny allows for fewer rights and more restrictions on the fundamental right to keep and bear arms is evidenced by a decision, before *Bruen,* by the Second Circuit which had upheld the law at issue using the old intermediate standard. But the same law was stricken in *Bruen*. *See Kachalsky v. Cty. of Westchester,* 701 F.3d 81, 98 (2d Cir. 2012).

the *Bruen* test to ensure that the Delaware Constitution meets the federal floor of minimum rights required by the Supremacy Clause.

Nevertheless, the trial court in this matter wrongly adopted a weaker test that allows fewer rights than the current federal floor of minimum rights when evaluating a challenge under Article I, Section 20 of the Delaware Constitution.

iii. The Third Circuit Has Established that a Ban on Young Adults Keeping and Bearing Handguns Fails the Test in *Bruen* and Violates the Federal Floor of Minimum Rights

The Third Circuit has already done the work, and has done it well, to explain why laws banning Young Adults from owning common firearms are unconstitutional under the *Bruen* test. In *Lara v. Comm'r Pa. State Police*, 125 F.4th 428 (3d Cir. 2025), young adults aged 18-to-20 challenged a series of Pennsylvania laws that together criminalized them from carrying firearms in public places.[7]

Employing *Bruen*'s two-step analytical approach and rejecting nearly identical arguments that the State makes in this matter, the Third Circuit struck down the Pennsylvania law for failing the *Bruen* test and violating the Second Amendment.

At step one, where a court is charged with determining whether "the Second Amendment's plain text covers an individual's conduct," *Bruen,* at 24, *Lara* held

[7] In an era where there is a trend to de-criminalize many former crimes, especially crimes that are not *malum in se*, the anti-gun lobby wants to pass laws, such as the one at issue, that criminalize much behavior that has been legal since the founding of our country.

that "18 to 20-year-olds are, like other subsets of the American public, presumptively among "the people" to whom Second Amendment rights extend." *Lara*, 125 F.4th at 438.

Lara renounced the argument, also proposed by the State in this matter, that Young Adults were not part of "the people" to whom Second Amendment rights extend, and discredited the argument, also made by the State in this case, that the Young Adults should be denied their fundamental natural rights because they were purportedly not considered adults at the Founding. *Id*. at 436-38.

Lara renounced the State's analysis because (1) it mistakenly applied *Bruen's* second step to its first step, *id*. at 437 ("If, at step one, we were rigidly limited by eighteenth-century conceptual boundaries, 'the people' would consist solely of white, landed men, and that is obviously not the state of the law."); and (2) it argued for a constitutionally inconsistent interpretation of "the people," because the Young Adults are undoubtedly part of "the people" for other constitutionally protected rights. *Id*. ("It is undisputed that 18-to-20-year-olds are among "the people" for other constitutional rights such as the right to vote (U.S. Const. art. I, § 2; *id.* amend. XVII), freedom of speech, the freedom to peaceably assemble and to petition the government (*id.* amend. I), and the right against unreasonable searches and seizures (*id.* amend. IV).").

At step two, where the government bears the burden to provide historical analogues to demonstrate that a law restricting conduct protected by the Second Amendment "is consistent with the Nation's historical tradition of firearm regulation [,]" *Lara* again rejected the government's scant or non-existent proposed analogies, which did not include relevantly similar Founding-era law. *Lara*, 125 F.4th at 443.

Rather, *Lara* held that "Founding-era laws reflect the principle that 18-to-20-year-olds are 'able-bodied men' entitled to exercise the right to bear arms," highlighting the sparse record of Founding Era laws restricting the right juxtaposed with the Second Militia Act, which explicitly armed 18–20-year-olds:

> Against the sparse record of state regulations on 18-to-20-year-olds at the time of the Second Amendment's ratification, we can juxtapose the Second Militia Act . . . The Act required all able-bodied men to enroll in the militia and to arm themselves upon turning 18. Second Militia Act of 1792 § 1, 1 Stat. 271 (1792). That young adults had to serve in the militia indicates that founding-era lawmakers believed those youth could, and indeed should, keep and bear arms.

Id. at 443-44.

The State's proposals for analogous historical regulations in this matter were also rejected by the Third Circuit in *Lara*. There remains no question that the State's ban on the right of the Challengers to keep and bear common arms violates the *Bruen* test, as explained in *Lara,* and therefore cannot meet the minimum federal "floor" of protection required under both the Second Amendment and Article I, Section 20.

II. HB 451 FAILS THE *BRUEN* TEST AND THEREFORE VIOLATES ARTICLE I, SECTION 20

A. Question Presented

Under the standard of analysis required by *Bruen*, does House Bill 451's complete prohibition on the possession of commonly used firearms by law-abiding adults violate Article I, Section 20 of the Delaware Constitution? A34-A54 (MSJ at 13-33), B158-B171 (MSJ Reply at 10-23).

B. Standard of Review

This Court independently analyzes the legal issues decided below.

This Court reviews questions of law and constitutional claims *de novo*, for errors of law. *See supra* Section I.B.

C. Merits of the Argument

1. HB 451 Restricts Conduct Protected by the Second Amendment and Article I, Section 20

In rejecting the subjectivity of "means-end scrutiny" in favor of the objectivity of *Bruen*, the United States Supreme Court mandated that:

> [T]he standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

597 U.S. at 24 (citations omitted).

HB 451 is a law that bans the Challengers, the Young Adults, from owning common firearms. The Second Amendment, and Article I, Section 20, guarantee the right to "keep and bear Arms." U.S. Const., amend. II; Del. Const., art. I, § 20. The Second Amendment defines this right as belonging to "the people." Article I, Section 20 of the Delaware Constitution defines this right as belonging to "persons." In the context of the Second Amendment, this right of "the people" "belongs to all Americans," not "an unspecified subset." *Heller*, 554 U.S. at 580, 581, 592; *Lara*, 125 F.4th at 435-38. *See also Nunn v. State*, 1846 WL 1167, at *10 (Ga. July 1, 1846) ("The right of the whole people, old and young, men, women[,] and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree."). The *Doe* and *Bridgeville* court similarly recognized that Article I, Section 20 rights belonged to "responsible, law-abiding Delawareans." *Bridgeville,* 176 A.3d at 659; *Doe,* 88 A.3d at 665.

2. <u>Statute Defines Young Adults</u>

Importantly for our analysis, the Delaware Legislature, more than one-half century ago, passed a law in 1972 explicitly stating that 18-20-year-olds are guaranteed the rights that all other adult Delawareans enjoy—and it did so nearly two decades *before* Article I, Section 20 was added to the Delaware Constitution.

Section 701 of Title 1 of the Delaware Code establishes that "[a] *person* of the age of 18 years or older on June 16, 1972, and any person who attains the age of 18 years thereafter, shall be deemed to be of full legal age for all purposes whatsoever and shall have the same duties, liabilities, responsibilities, *rights* and legal capacity as persons heretofore acquired at 21 years of age unless otherwise provided." (emphasis added). This alone is dispositive of this aspect of the issue at hand.

HB 451 bans the same group of persons whom the Delaware Code continues to recognize as adults "for all purposes whatsoever," from owning and purchasing virtually all bearable arms. *Bridgeville* recognized that such total bans fell within Article I, Section 20's protections and could not pass constitutional muster. *Bridgeville*, 176 A.3d at 652.

The purchase, ownership and possession of commonly used arms by law-abiding persons for lawful purposes, such as the handguns and long guns banned by HB 451, is conduct which falls within Article I, Section 20, and the Second Amendment's protection of the right to "keep and bear arms." *Bruen*, 597 U.S. at 8 ("In [*District of Columbia* v. *Heller*], and [*McDonald* v. *Chicago*], we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case,

petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self- defense.").

The banned arms are "in common use" for lawful purposes and, therefore, protected by Article I, Section 20, and the Second Amendment's "unqualified command." *See id.* at 47 ("Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today. They are, in fact, 'the quintessential self-defense weapon.'); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[H]andguns—the vast majority of which today are semi-automatic. . . have not traditionally been banned and are in common use by law-abiding citizens.").

The conduct restricted under HB 451 is therefore covered and protected by the plain text of Article I, Section 20 and the Second Amendment.

3. The State Failed to Present Evidence in the Trial Court that HB 451 was Consistent with the Nation's Historical Tradition of Firearm Regulation

Given that Young Adults are part of the "people" and the arms banned are in common use, HB 451 is presumptively unconstitutional unless the State can "justify [the] regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. They cannot do so. The State

cannot satisfy their burden under the *Bruen* test because they cannot "identify a well-established and representative historical analogue to its regulation." *Id*. at 30.

Whether courts should primarily rely on the prevailing understanding of an individual right at the time of the Founding, when the Second Amendment was adopted, or the time of Reconstruction when the Fourteenth Amendment was ratified—was not conclusively determined in *Bruen*, but it was unequivocally and unambiguously decided by the Third Circuit. In *Lara*, the Third Circuit held that the primary focus should be on the time of the Founding. *Lara*, 125 F.4th at 441 ("…the constitutional right to keep and bear arms should be understood according to its public meaning in 1791, as that 'meaning is fixed according to the understandings of those who ratified it[.]'") (quoting *Bruen*, 597 U.S. at 28); *see also id.* at 37 ("[The Court has] generally assumed that the scope of the protection[s] applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.").

In the instant matter, at the trial court, the State failed to establish relevantly similar analogues from the time of the Founding, justifying the wholesale ban that prohibits the possession of common handguns by the Young Adults. The State submitted a report by anti-gun activist Robert J. Spitzer to compile a series of laws purported to be relevantly similar "analogues" to HB 451. They are not. B167-B171 (MSJ Reply at 19-23).

One of the Challengers' experts in the trial court, historian Clayton Cramer, undertook the yeoman's work of sorting through each of the regulations relied on by the State expert's purported analogues. B247-250 (MSJ Reply at 19-21, Ex. E, Part 1, Report of Clayton Cramer at 28, paragraph 139-147.) Cramer found that the State's expert ignored the teachings of *Bruen* and *Lara* about *analogous* regulations--but instead compiled irrelevant laws, that were not analogous, from eras well beyond the Founding. B222-223 (*Id*. at ¶7).

In total, the State's expert cited 109 laws or regulations in his declaration. B247-250 (*Id*. at 28, ¶¶ 139-147). Eight of these were duplicates. Of the 109 laws listed, 94 of them were passed after 1868 and were therefore entirely irrelevant under *Bruen* and *Lara*. (*Id*.) Only one, *Laws, Statutes, Ordinances and Constitutions, Ordained, Made and Established, by the Mayor, Aldermen, and Commonalty, of the City of New York no. 21, §§ 1–6 (John Holt 1763),* was adopted in the period before 1791 and it was only a ban on discharge of firearms within the city for all citizens. It did not regulate transfer to minors, or possession of firearms by minors specifically. B248 (*Id*. at 29, ¶140).

Regarding possession, which is the central issue in HB 451, the seven laws that the State's expert cites that limited, not banned, possession of firearms by "minors" were passed *after* the ratification of the Fourteenth Amendment, B248 (*id*. at 29, ¶¶ 140-141), and according to *Lara* and *Bruen*, come too late and thus are

inapplicable to a proper analysis. *Bruen*, at 34-35; *Lara* at 441 ("We reiterate, for the reasons stated in our earlier opinion, . . . that the constitutional right to keep and bear arms should be understood according to its public meaning in 1791, as that 'meaning is fixed according to the understandings of those who ratified it.'") (internal citations omitted).

While "step two" of the *Bruen* framework places the burden on the State, rather than the Challengers, to justify its regulation with historical analogues, nonetheless the Challengers provided numerous examples of Founding Era militia laws that endorsed the right of Young Adults to bear arms in the trial court. A44-A47, (MSJ at 23-26). Unanimous Founding-era practice was to permit Young Adults to exercise their right to keep and bear arms in the same manner as other adults. *See Lara*, 125 F.4th at 443 ("Against th[e] conspicuously sparse record of state regulations on 18-to-20-year-olds at the time of the Second Amendment's ratification, we can juxtapose the Second Militia Act passed by Congress on May 8, 1792, a mere five months after the Second Amendment was ratified on December 15, 1791.")

In *Heller*, the Supreme Court teaches that "the people" protected by the Second Amendment was not limited to only those in "the militia." *Heller*, 554 U.S. at 650. The Court also explicitly confirmed that "the militia" consisted of a subset of "the people" with Second Amendment rights. *Id*. at 651. Militia laws at the time

of the Founding universally identified as eligible those who were 18 years of age. The Militia Act of 1792 (Uniform Militia Act of 1792) was signed into law by President Washington on May 8, 1792. 1 Stat. 271 (1792). The Act provided:

> That each and every free able-bodied white male citizen of the respective States, resident therein, ***who is or shall be of age of eighteen years, and under the age of forty-five years*** (except as is herein after excepted) shall severally and respectively be enrolled in the militia . . ..

Id.[8] (emphasis added).

The Militia Act, therefore, not only permitted—but required 18-year-olds to keep and bear arms as members of the militia. At the time of the Second Amendment's passage and shortly thereafter, the minimum age for militia service in every state became eighteen. Nearly every state adopted the Militia Act of 1792 by reference and began using its age structure. *See* Clayton E. Cramer, *Colonial Firearm Regulation*, 16 J. FIREARM PUB. POL'Y 1, 8 (2004).

Delaware was no exception. Delaware's first militia statute was passed in 1740 and it required "'all the inhabitants and freemen' aged fifteen to sixty-three to 'provide and keep...a well-fixed firelock or musket,' plus ammunition supplies and

[8] George Washington believed that 18 was the ideal age for militia enrollment. Nearly a decade before he signed the Militia Act of 1792, he wrote to Alexander Hamilton that, "the Citizens of America ... from 18 to 50 Years of Age should be borne on the Militia Rolls" and "so far accustomed to the use of [arms] that the Total strength of the Country might be called forth at a Short Notice on any very interesting Emergency." 26 *The Writings of George Washington* 389 (John C. Fitzpatrick ed., 1938).

cleaning tools." David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L. J. 495, 556 (2019)(quoting 1 Laws of the State of Delaware 175 (1797)). The following year a new law required males from 17 to 50 to enlist in the militia and also required "every Freeholder and taxable Person" to have the same arms as militiamen. *Id*. (citing George H. Ryden, *Delaware—The First State in the Union*, 117, n. 462 (1938) (stating that a 'freeholder' owned real property and that single women could be freeholders)).

Delaware also enacted militia acts in 1778, after the Revolution began, again in 1782, in 1785 and in 1793 after the federal Uniform Militia Act was passed. *Id*. Each of these militia acts included 18-year-olds. *Id*. Like the Uniform Militia Act, Delaware's 1793 act stated that the militia included "each and every free able bodied white male citizen of this state, who is or shall be of the age of eighteen years, and under the age of forty-five years." *Id*. (citing *Laws of the Government of New-Castle, Kent and Sussex Upon Delaware* 171 (1741)).

The State did not and cannot satisfy its burden to demonstrate that this Nation's historical tradition of firearm regulation is consistent with or can justify HB 451's infringement upon the Article I, Section 20 rights of Young Adults in Delaware.

CHALLENGERS' ANSWERING ARGUMENTS ON APPEAL

I. EVEN IF INTERMEDIATE SCRUTINY APPLIES, THE SUPERIOR COURT CORRECTLY HELD HB 451 UNCONSTITUTIONAL

A. Question Presented

Even if the intermediate scrutiny standard were to apply, did the Superior Court properly apply that test to hold that House Bill 451 is unconstitutional under Article I, Section 20 of the Delaware Constitution?[9] A36 (MSJ at 15); B165-B167 (MSJ Reply at 17-19); B332-B338 (Opposition to Supplemental Briefing at 11-16).

B. Standard of Review

This Court independently analyzes the legal issues decided below.

This Court reviews questions of law and constitutional claims *de novo*, for errors of law. *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 640 (Del. 2017).

[9] The answer to each of the State's Questions Presented in its brief is no, as discussed further herein. App. Op. Br. at 18. The Superior Court did not err in balancing the asserted public-safety interest against the substantial burden HB 451 places on the core right of self-defense. Instead, it faithfully applied this Court's intermediate scrutiny framework and concluded that the State failed to show the statute burdens that right no more than reasonably necessary. Nor did the court disregard HB 451's purported self-defense exception. Finally, the Court did not fail to exercise judicial restraint. It adhered to the standard of review it used.

C. Merits of the Argument

If this Court were to conclude that intermediate scrutiny governs this case, the Superior Court correctly applied that standard.[10] The State's appeal rests on a fundamental mischaracterization of the decision below. The Superior Court did not abandon intermediate scrutiny, nor did it impose a *per se* rule against age-based firearm regulation, disregard public-safety interests, or fail to exercise judicial restraint. Instead, it accepted the State's asserted public-safety interest and invalidated HB 451 at step three of the intermediate scrutiny standard because the statute burdens the core right of self-defense more than reasonably necessary. That conclusion reflects faithful application of this Court's framework, not judicial overreach. *See generally Bridgeville* and *Doe*.

HB 451 imposes a sweeping, class-wide prohibition on the acquisition and possession of common firearms by law-abiding Young Adults, subject only to narrow, conditional, and discretionary carve-outs. The Superior Court examined the statute as it operates in practice and concluded that, taken together, those carve-outs do not preserve a sufficiently meaningful ability for Young Adults to exercise the

[10] Much of the brief of amicus curiae Giffords Law Center to Prevent Gun Violence relies on social science, neuroscience, and disputed policy debates outside the record. *See* Brief of Amicus Curiae Giffords Law Center to Prevent Gun Violence at 6–24. As this Court has instructed in addressing similar amicus submissions, however, "[t]hese amici also assert evidence-based arguments which this Court cannot consider given that there is no evidentiary record in the proceeding below." *Bridgeville*, 176 A.3d at 632 n.1.

core right protected by Article I, Section 20. Op. at 4-5, 48-49, 53-60. Intermediate scrutiny does not permit the State to burden a core right protected by Article I, § 20 to such an extent that, in practice, the right cannot be meaningfully exercised, even if the State preserves limited or conditional permissions to engage in isolated aspects of the right. *See Bridgeville*, 176 A.3d at 638 (holding that hunting-only permissions "do[] not fulfill—and cannot substitute for—the people's right to have a firearm for defense of self and family"); *Doe*, 88 A.3d 666–67 (explaining that intermediate scrutiny requires that governmental action "cannot burden the right more than is reasonably necessary," and invalidating a regulation that, despite limited exceptions, burdened the right to bear arms in common areas in practice)).

A statute fails step three, for example, when, instead of recognizing fundamental civil rights, it requires an entire class of law-abiding adults to forgo the core right of self-defense for years at a time based solely on age. *See, e.g., Lara*, 125 F.4th at 446; *see also Heller*, 554 U.S. at 634. As addressed below, the same deficiency characterizes HB 451's exceptions, including discretionary CCDW licensing and post-hoc self-defense provisions, none of which preserves meaningful exercise of the core right to self-defense.

Bridgeville and *Doe* explained that intermediate scrutiny is a structured constitutional inquiry. At its third step, the State bears the burden of demonstrating that the challenged regulation does not burden the protected right more than

reasonably necessary to achieve its objectives. *See Bridgeville*, 176 A.3d at 656. That inquiry presupposes that the regulated right may be meaningfully exercised in practice. Where a statute, by its scope and operation, leaves law-abiding citizens without any realistic avenue to exercise the core right of self-defense as a matter of constitutional entitlement, the State necessarily fails intermediate scrutiny's narrow tailoring requirement.[11]

Like here, the regulation invalidated in *Bridgeville* contained exceptions and limited permissions tied to particular activities, but this Court held that those carve-outs did not preserve meaningful exercise of the right. 176 A.3d at 638 ("The limited ability to have a hunting rifle or shotgun while engaged in a controlled hunt on state park or forest land does not fulfill—and cannot substitute for—the people's right to have a firearm for defense of self and family….").

The dispositive question is not whether a statute contains exceptions in the abstract or on paper, but whether those exceptions preserve a realistic ability for

[11] The State's reliance on a federal restriction on commercial handgun sales to 18–20-year-olds, and on similar age-based laws in other jurisdictions, misses the constitutional inquiry this Court has mandated. Neither federal law nor the practices of other states lessen the burden imposed by HB 451. *See Bridgeville* 176 A.3d at 638, 656. *See also Lara, supra* (recognizing that 18-year-olds have Second Amendment rights, which should invalidate the federal ban in the Third Circuit).

ordinary, law-abiding citizens to exercise the core right in practice. Where they do not, as here, intermediate scrutiny is not satisfied.[12]

The Superior Court followed the intermediate scrutiny framework precisely. It credited the State's asserted public-safety interests, acknowledged the General Assembly's concerns, and resolved the case at step three of the intermediate scrutiny inquiry based on the absence of a showing by the State that the infringement was no more restrictive than necessary to achieve the governmental interest. Op. at 41–45, 48-60. Intermediate scrutiny does not permit courts to continue balancing once the State has failed to carry its burden. It, instead, requires courts to recognize when that burden has not been met.

The State does not appear to contend that the Superior Court failed to perform any of the required three steps of the intermediate scrutiny analysis. Instead, it challenges the weight the court gave to the availability of asserted alternatives. Nothing in the Superior Court's analysis turned on disagreement with the legislature's factual findings.[13] The court accepted the legislature's factual premises

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[12] The State's contention that HB 451's burden is permissible because it ages out, fares no better. Under *Bridgeville*, the intermediate-scrutiny inquiry turns on a statute's practical operation, not on whether the restriction expires after a fixed period of years. 176 A.3d at 638, 656.

[13] The State repeatedly asks this Court to take judicial notice of legislative hearings, statistical reports, and scientific research concerning 18-to-20-year-olds that were not part of the evidentiary record below and were not relied upon by the Superior Court. *See, e.g.,* Appellants' Amended Corrected Opening Brief ("App. Op. Br.") at 9, n.9 (requesting judicial notice of legislative history, committee hearings, floor

and invalidated HB 451 only because those premises did not justify the statute's ban under the governing constitutional standard. What the State characterizes as a failure to balance or defer is, in substance, disagreement with the Superior Court's reasoning that HB 451's exceptions do not preserve meaningful exercise of the right, which is a conclusion that intermediate scrutiny requires courts to reach when the State fails to carry its burden at step three.

The State's reliance on a generalized presumption of constitutionality misapprehends this Court's precedent. Even if a statute ordinarily enjoys a presumption of constitutionality, that presumption yields once a law burdens a core fundamental right. In *Bridgeville*, the Court held that courts "cannot defer to unspecified reasons of unelected officials attempting to justify an infringement on a fundamental right," and that any such presumption "is inconsistent with the intermediate-scrutiny standard employed in *Doe* that places the burden on the State to prove that its challenged regulations pass scrutiny." 176 A.3d at 660.

Finally, although the Superior Court found the "challenged provisions of HB 541 do not survive any level of scrutiny," it did not elevate the standard of review,

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debate recordings, and General Assembly "sourced information" outside the trial record); *id.* at 13, n.10; *id.* at 34-35, n.22, n.23. The State may not repair its failure to carry its burden in the trial court through supplementation of the record on appeal. Delaware Supreme Court Rule 8 does not permit such abuse of a request for judicial notice.

apply strict scrutiny, or rest its decision on an "total ban" theory without exceptions. Op. at 41. It expressly "follow[ed] the same path as *Bridgeville* in applying intermediate scrutiny," and concluded on the record before it that HB 451 fails under that standard. *Id*. Because HB 451 fails even under intermediate scrutiny, the Court need not decide whether a more demanding standard applies. However, a statute that forecloses ordinary, lawful possession of common firearms for self-defense by an entire class of law-abiding adults would necessarily fail under strict scrutiny as well.

For these reasons, and for the additional reasons set forth below, if the Court finds intermediate scrutiny to apply, the Superior Court's judgment should be affirmed.

1. The Self-Defense Safe Harbor Provision Does Not Preserve the Right

The State argues that HB 451 "explicitly protects" the fundamental right to bear arms in self-defense because the statute contains a self-defense safe harbor to the extent that it provides for not prosecuting someone under the age of 21 for possessing or using a prohibited firearm in self-defense. App. Op. Br. at 25-28. That makes no sense. HB 451 makes it illegal to possess a firearm. Assuming compliance with that restriction, someone would need to violate the law in order to possess a handgun to use it for self-defense. Not prosecuting someone for violating the law is not "protecting a fundamental right" that the statute criminalizes.

The State's position is analogous to prohibiting entry into a swimming pool while assuring citizens that, once they are already in the water, they will not be prosecuted for swimming to avoid drowning. That policy does not protect the activity of swimming; it merely tolerates it after the law has been violated. A constitutional right is not meaningfully preserved when it exists only through retrospective forgiveness rather than lawful authorization.

The State's characterization of the Superior Court's analysis as a failure to consider HB 451's self-defense exception is incorrect. The exception was before the court and was evaluated as part of the statute's practical operation. *See* Op. at 4–5 (Holding that "[t]he practical effect of HB 451 prohibits adults between the ages of eighteen and twenty-one from purchasing, or otherwise obtaining, any firearm that falls outside the definition of 'shotgun' or 'muzzle-loading rifle'" after citing §1448(a)(5) and noting it created "several pathways for an eighteen-year-old to be exempted"). Accordingly, the trial court did not ignore the provision.

2. Limiting Young Adults to Shotguns and Other Substitute Weapons Does Not Cure HB 451's Constitutional Defect

HB 451 broadly prohibits law-abiding Young Adults from acquiring or possessing handguns and numerous other common firearms. For ordinary citizens in this age group, the statute eliminates the ability to lawfully possess a handgun for immediate self-defense anywhere, including in the home, directly implicating and substantially undermining the core protection of Article I, Section 20.

The State contends that this burden is cured because Young Adults retain "unfettered" access to shotguns, muzzleloaders, and other weapons. App. Op. Br. at 28. There is no logic in the State's position which argues that Young Adults are too young to be entrusted with a handgun—but the State allows those same persons to purchase, possess, and use shotguns. It does not require citation to authority to observe that a shotgun can be just as deadly as a handgun—if not moreso.

Regardless, the State's argument has been squarely rejected as a matter of federal constitutional law. In *Heller*, the Supreme Court held that a ban on handguns cannot be justified by pointing to the continued availability of other firearms, emphasizing that handguns are the weapons "typically chosen" for lawful self-defense. 554 U.S. at 629 (Holding "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.") That holding establishes a constitutional floor binding on the States: the right to keep and bear arms cannot be reduced to whatever selected weapons the legislature elects to leave available. HB 451's attempt to justify a categorical handgun prohibition by pointing to access to shotguns and other weapons therefore fails not only under Article I, Section 20, but under the governing federal constitutional principle as well. *See id.*

The State also relies on *State v. Robinson,* 251 A.2d 552 (Del.1969), *State v. Rumpff*, 308 A.3d 169 (Del. Super. Ct. 2023)[14] and *United States v. Rahimi*, 602 U.S. 680 (2024), to argue that legislatures may restrict firearm access to protect the public from individuals deemed dangerous or a threat to society. App. Op. Br. at 29-32. The State misapplies those cases to this appeal.

The United States Supreme Court in *Rahimi* required a judicial determination of individualized dangerousness before restricting Second Amendment rights on the basis that an individual was too dangerous to have a firearm. *Rahimi*, 602 at 699-700. (Holding only that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.") The trial court did not impose a *per se* rule favoring handguns, nor did it substitute its policy judgment for that of the General Assembly. Instead, it faithfully applied intermediate scrutiny and correctly concluded, based on the statute's scope and operation, that a law violates Article I, Section 20 when it eliminates access to the arms most commonly chosen for lawful self-defense and replaces them with substitutes that, as a practical and constitutional matter, do not permit meaningful exercise of the core right.

[14] The State's reliance on *Robinson*, *Rumpff*, and 11 *Del. C.* § 1448 fails for the same reason its reliance on *Rahimi* does. Those authorities concern individualized disarmament based on adjudicated dangerousness, such as felony convictions or domestic-violence protection orders, not class-wide prohibitions untethered to any judicial finding of dangerousness.

3. The CCDW Licensing Scheme Does Not Salvage HB 451 and the Trial Court's Analysis Is Not Outcome-Determinative

The State complains about the trial court's analysis of Delaware's CCDW licensing scheme, but it misses the mark. App. Op. Br. at 39-40. The State invoked in the trial court the exception to HB 451 for those with a license to carry a concealed deadly weapon (CCDW) as a purported saving mechanism. But the trial court's analysis of this issue is not outcome determinative. A CCDW analysis is relevant to the HB 451 constitutional analysis only insofar as the State relies on it as an exception to the ban in a last ditch effort to cure HB 451's constitutionally infirm prohibition. Op. at 57 ("The exception for those holding a concealed carry permit does not adequately protect the right to self-defense.").

The constitutionality of HB 451 does not turn on the validity of the licensing scheme for CCDW permits. That exception only applies after one successfully traverses an administrative obstacle course that is discretionary, not inexpensive, complicated—and can take longer than a year if one is fortunate enough to successfully complete the onerous requirements. The CCDW permitting process does not preserve the core right of self-defense. Therefore, it cannot make HB 451 constitutional under intermediate scrutiny.

As this Court has explained, the focus at step three of the intermediate scrutiny inquiry is on the statute's practical operation and whether the regulated class retains a realistic ability to exercise the right in the settings where it is most likely to be

invoked. *Bridgeville*, 176 A.3d at 638 (Explaining that intermediate scrutiny requires courts to assess whether the right can be exercised in a "meaningful" way and whether the State has preserved an "avenue for carrying out Section 20's core purposes, which includes the right of possession of lawful firearms for self-defense . . . ."). Consistent with that framework, the Superior Court examined whether discretionary CCDW licensing could preserve the meaningful exercise of the right burdened by HB 451. After reviewing the structure, operation, and availability of CCDW licensing, the court correctly concluded that it could not. Op. at 60.

The court's conclusion is correct for several independent reasons. First, HB 451 extinguishes the right at the possession stage and replaces constitutional entitlement with discretionary permission. The fundamental right to armed self-defense presupposes lawful possession of a firearm before a threat arises. HB 451 criminalizes possession outright and then points to a discretionary licensing process as a purported cure. That approach does not preserve the right as a constitutional entitlement; it conditions the right to self-defense on official approval. CCDW licensing involves multiple layers of discretion, indeterminate timelines, and significant procedural hurdles. *See* B33-B36 (Compl. ¶¶ 53-59); *see also* Op. at 58-59, App. Op. Br. at n. 27. It is not automatic, it is not immediate, and it is not guaranteed.

A constitutional right cannot be conditioned on discretionary approval, regardless of how efficiently a licensing regime might operate. Intermediate scrutiny does not allow the State to replace a fundamental right with a permission slip. Accordingly, a licensing regime directed at carry rights cannot preserve a right that has already been extinguished at the possession stage.

Second, CCDW licensing regulates concealed carry outside the home, while HB 451 criminalizes possession itself, including in the home. That mismatch is fatal to the State's theory. CCDW governs whether and how a person may carry a concealed weapon in public. HB 451, by contrast, prohibits possession altogether, including possession in the home, a core location for self-defense. *See Doe*, 88 A.3d at 667-68 (Recognizing that the right to keep and bear arms is strongest when "in one's home . . . and . . . for security."). Once possession is criminalized, a discretionary carry license cannot resurrect the right.

Third, the State's CCDW theory impermissibly reverses the constitutional burden at step three of intermediate scrutiny. Intermediate scrutiny asks whether the means chosen burden the right more than reasonably necessary. The State's theory would permit the legislature to impose a sweeping, class-wide prohibition and then shift the burden onto individual citizens to seek discretionary relief. That approach inverts the constitutional framework identified in *Bridgeville* where it is the State's obligation to tailor its regulation so that the right remains meaningfully exercisable.

It is not the citizen's obligation to petition the government for permission to exercise a constitutional right. 176 A3d at 656 ("Under intermediate scrutiny, the Agencies have the burden [of each step of the three step inquiry].").

Fourth, and independently, the practical operation of the CCDW licensing scheme confirms its inadequacy as a saving mechanism. The record before the Superior Court reflected that CCDW licensing involves extensive prerequisites, subjective determinations, and no mandatory timeline for approval. *See* B33-B36 (Compl. ¶ 55); *see also* Op. at 58-59, App. Op. Br. at n. 27.

Even apart from the structural defect inherent in discretionary licensing, CCDW does not function as a realistic or timely avenue for lawful possession by Young Adults subject to HB 451's possession ban. A right that exists only after successfully navigating a lengthy and uncertain administrative process is not meaningfully preserved.

The State further argues that the Superior Court erred by treating the CCDW permitting process as lacking a remedy for denial. App. Op. Br. at 40. Whether denials for a request for a CCDW permit may be appealed is irrelevant to issues in this appeal.

In short, the State's position would collapse intermediate scrutiny into near total deference. Under its theory, once the legislature asserts public safety and leaves open any discretionary pathway, no matter how narrow, delayed, or uncertain, courts

must uphold even categorical prohibitions that extinguish the right in practice. This Court has expressly rejected that approach. *Bridgeville*, 176 A.3d at 637-38, 655-56.

II. THE SUPERIOR COURT DID NOT ERR IN CONSIDERING THE CONSTITUTIONALITY OF DELAWARE'S CONCEALED CARRY LICENSING SCHEME AS RAISED BY THE STATE

A. Questions Presented

Whether the Superior Court erred in concluding that a discretionary public-carry licensing regime cannot constitutionally serve as the State's asserted substitute for the right extinguished by HB 451?[15] B33-B-37 (Amended Complaint at 18-22, ¶¶ 52-61); B330-B331 (Opposition to Supplemental Briefing at 9-10).

B. Standard of Review

This Court independently analyzes the legal issues decided below. This Court reviews questions of law and constitutional claims *de novo*, for errors of law. *See supra* Section I.B. To the extent the State urges this Court to consider the constitutionality of Delaware's CCDW licensing statute as an independent question, that invitation should be declined under Supreme Court Rule 8. Relief from §1441 was not sought as to its enforcement. The court addressed the CCDW licensing scheme only to resolve the State's own defensive argument, and that analysis was

[15] The answer to each of the State's Questions Presented in its brief on this issue is no, as discussed further herein. App. Op. Br. at 41. The Superior Court did not procedurally err by considering Delaware's CCDW licensing scheme. Instead, it addressed CCDW licensing only because the State itself invoked CCDW as a constitutional justification for HB 451. Nor did the court substantively err by concluding that Delaware's CCDW scheme is discretionary and therefore cannot constitutionally serve as a safety valve for a sweeping prohibition on the core right of self-defense.

sufficient to decide the overarching issue before it. *See* Op. at 57 (Addressing Defendants' argument that the CCDW exemption purported to demonstrate that: "HB 451 does not burden the fundamental right to bear arms more than reasonably necessary.") The interests of justice do not require this Court to expand the issues on appeal, particularly where the governing constitutional rule is supplied by *Bruen* and no further proceedings would alter the outcome.

C. Merits of the Argument

The State's argument is based upon a false premise. The Superior Court did not "compound" any flaw in its intermediate-scrutiny analysis by finding Delaware's CCDW licensing scheme discretionary. Rather, the court examined the CCDW statute only because the State itself invoked it as a constitutional justification for HB 451. In concluding that the CCDW licensing scheme operates as a discretionary licensing regime that withers under a *Bruen* analysis, the trial court neither exceeded the issues presented nor deprived the State of briefing. It simply evaluated the statutory structure of the CDDW licensing scheme that was placed before it. Op. at 58-60. Because the trial court's treatment of CCDW was procedurally proper and substantively correct, the State's argument should be rejected.

1. The Superior Court Did Not Err Under *Jones v. State* Because § 1441 Was Considered Only to Respond to the State's Own Justification for HB 451

The State's assertion that the Superior Court bypassed *Jones v. State* by *sua sponte* adjudicating the constitutionality of Delaware's CCDW statute rests on a fundamental mischaracterization of both *Jones* and the decision below.

Ortiz v. State, 869 A2d 285, 291 n.4 (Del. 2005) (*citing Jones v. State*, 745 A.2d 856 (Del. 1999), sets forth a list of non-exclusive criteria that several other states use for "determining whether a provision in the United States Constitution has a meaning identical to a similar provision on the same subject in the state's constitution" and simply notes that "an alleged violation of the Delaware Constitution should include an analysis of one or more of [those criteria]." Contrary to the State's contention, nothing in *Jones* or *Ortiz* requires a court to undertake a constitutional analysis using the criteria set forth in *Jones* to evaluate every statutory provision discussed in the course of resolving a different constitutional challenge.

Section 1441 entered the case solely because the State itself invoked Delaware's CCDW licensing scheme as a justification for HB 451, arguing that HB 451 did not extinguish the right to bear arms because affected individuals could still carry firearms pursuant to a CCDW license. Op. at 57 (trial court responding to the State's arguments). Once the State advanced that argument, the constitutional status of CCDW was ripe for the trial court to address.

The Superior Court examined Delaware's CCDW statute and correctly concluded that "[t]he exercise of a constitutionally-protected right cannot be reliant on a discretionary licensing procedure."[16] Op. at 59-60. The trial court, however, did not purport to enjoin its enforcement or grant relief with respect to it. It went only as far as necessary to reject the State's reliance on it as a defense to HB 451.

In short, neither *Jones* nor *Ortiz* prohibits a court from examining a separate statutory scheme and applying controlling constitutional law when that scheme is raised by the State itself as a justification for another statute.

[16] Although *Bruen* noted in *dicta* that 43 states have a "shall issue" licensing scheme, the High Court did not adjudicate Delaware's CCDW statute. *See Bruen*, 597 U.S. at 13 n.1 ("Three States—Connecticut, Delaware, and Rhode Island—have discretionary criteria but appear to operate like "shall issue" jurisdictions."). *See also Bruen* at n.9 ("… we do not rule out constitutional challenges to shall-issue regimes … .)" The Supreme Court observed that: "As for Delaware, the State has thus far processed 5,680 license applications and renewals in fiscal year 2022 and has denied only 112. *See* Del. Courts, Super. Ct., Carrying Concealed Deadly Weapon (June 9, 2022), https://courts.delaware.gov/forms/download.aspx?ID=125408." *Id*. The *Bruen* Court may have reached a different conclusion about what Delaware's licensing scheme is "like", or not, if they reviewed the statistics today--because the percentage of applications denied has more than doubled since 2022 according to the Superior Court's CCDW statistics on the Court's website at the foregoing link. Notably, whatever can be said about this *dicta* regarding permits to carry a concealed deadly weapon—it says nothing about the materially different concept of requiring a permit before a firearm can be purchased.

2. The Superior Court Correctly Concluded That Delaware's CCDW Process Is Discretionary and Therefore Cannot Justify HB 451

The State contends that the Superior Court erred in finding the CCDW licensing scheme discretionary because the conclusion (a) contradicts the court's own procedural rules in that if a CCDW license application is denied the applicant has a right to a hearing and (b) conflicts with "rulings" in *Bruen* and this Court's "suggestions" in *Bridgeville* and other decisions. App. Op. Br. at 44. It remains passing strange that the State disagrees that *Bruen* applies to the central issue in this appeal, but then tries to school the trial court on how *Bruen* should be applied to a minor, non-dispositive sub-issue in this case.

First, as stated in Section I.3.C above, even assuming that CCDW denials are reviewable, review of discretion does not convert permission into entitlement, does not guarantee approval, and does not permit lawful possession while review is pending. *See, e.g.,* F. Lee Francis, *The Waiting Is the Hardest Part: The Constitutionality of Firearm Waiting Periods*, 129 Dick. L. Rev. 939, 944 (2025) (Demonstrating there is no Founding-Era precedent for firearm waiting periods, and such laws do not pass the *Bruen* test.)

Second, the fact that the CCDW licensing scheme includes some objective criteria does not render it a constitutional "shall issue" regime under *Bruen*.[17] It

[17] Contrary to the State's assertion, nothing in *Bridgeville* states that this Court found, suggested or considered whether the CCDW scheme is constitutional.

should be uncontested by serious observers that *Bruen* did not base its holding or its *ratio decidendi* on a ruling about the constitutionality of Delaware's CCDW statute.[18]

A licensing regime is "shall-issue" only if licensing officials lack authority to deny a license once objective requirements are met. *Bruen*, 597 U.S. at 13-15. Where officials retain authority to approve or deny concealed carry, as is the case here, the regime is "may-issue" for constitutional purposes. *Id.* Because Delaware's CCDW statute conditions public carry on discretionary approval by licensing authorities and does not entitle qualified applicants to a license as of right, the Superior Court correctly recognized that structure as discretionary.

The State's reliance on historical approval rates is also misplaced. App. Op. Br. at 45. The relevant question is whether qualified applicants are entitled to a license as a matter of law, not whether the State has historically exercised its discretion favorably.

[18] The State's position with respect to *Bruen* is internally inconsistent. On the one hand, it contends that *Bruen* should not govern HB 451 and urges this Court to apply intermediate scrutiny instead. On the other hand, it repeatedly invokes *Bruen* to defend Delaware's discretionary CCDW licensing scheme, asserting that it "operates like a shall-issue regime" and citing *Bruen* as purported validation. The State cannot have it both ways.

3. Because the Superior Court Correctly Considered CCDW, Its Intermediate-Scrutiny Analysis Was Not Nullified

The State's final contention that the Superior Court's intermediate-scrutiny analysis collapses because of alleged flaws in its treatment of Delaware's CCDW scheme adds nothing new. Op. App. Br. at 46. It merely is an extension of the same objections raised above and fails for the same reasons.

As explained above, the Superior Court did not err in examining the CCDW scheme, nor did it err in concluding that a discretionary public-carry licensing regime cannot constitutionally serve as the State's asserted safety valve. Because those determinations were correctly applied by the trial court, there is no flaw in the court's intermediate scrutiny analysis.

Regardless, the Superior Court's intermediate scrutiny analysis does not depend on its analysis of the CCDW licensing scheme. The trial court made a self-sustaining conclusion that HB 451 imposes a sweeping, class-wide prohibition on the acquisition and possession of common firearms by law-abiding adults and burdens the core right of self-defense more than reasonably necessary. That conclusion stands regardless of its CCDW analysis. Accordingly, the State's argument provides no independent basis for reversal or remand.

CONCLUSION

The Challengers agree with the conclusion of the trial court that HB 451 violates Article I, Section 20 of the Delaware Constitution, but we have cross-appealed to explain why controlling authority mandates that the standard of review used below should have been different. That is, the correct analysis required to protect the minimum level, or floor, of rights guaranteed by the United States Constitution, and established by the United States Supreme Court in *Bruen* and the United States Court of Appeals for the Third Circuit in *Lara,* demands a different test for constitutional analysis for the rights at issue in this appeal.

Namely, applying the correct standard for this Court's *de novo* analysis will ensure that the rights afforded by the Delaware Constitution do not fall below the floor of minimum rights guaranteed by the U.S. Constitution as interpreted by *Bruen* and *Lara.*

If, however, this Court determines that the standard of review repudiated by controlling authority that establishes the floor of minimum federal rights should still apply to this appeal on issues of state law, then we respectfully request that this Court still uphold the trial court's analysis as well as its conclusion.

In sum, apart from the nuances of the reasoning employed by the trial court as discussed above, this Court should affirm the trial court's holding.

Respectfully submitted,

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