



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,)

No. 412, 2025

Appellants/Cross-Appellees,)
Defendants-Below,)

Court Below: Superior Court
of the State of Delaware
C.A. No. K23C-07-019 RLG

v.)

GAVIN J. BIRNEY; DELAWARE STATE)
SPORTSMEN’S ASSOCIATION, INC.;)
and BRIDGEVILLE RIFLE & PISTOL)
CLUB, LTD.,)

Appellees / Cross-Appellants,)
Plaintiffs-Below.)

**CORRECTED CROSS-APPELLANT’S REPLY BRIEF
ON CROSS-APPEAL**

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**APPELLEES/CROSS APPELLANTS (“CHALLENGERS”) REPLY
ARGUMENT ON CROSS-APPEAL**

INTRODUCTION

The central issue in this cross-appeal is whether the trial court— notwithstanding its ultimate conclusion being correct—applied the wrong reasoning. Namely, the court below applied reasoning that has been repudiated by controlling authority interpreting the right to keep and bear arms as applied to Article I, Section 20 of the Delaware Constitution, which is this State’s analogue to the Second Amendment to the United States Constitution.

The United States Supreme Court in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), and in *United States v. Rahimi*, 602 U.S. 680 (2024), authoritatively instructed that the proper interpretation of the Second Amendment requires a two-part test—invalidating the “intermediate scrutiny” test used by appellate courts after *D.C. v. Heller*, 554 U.S. 570 (2008).

The United States Court of Appeals for the Third Circuit recognized that the intermediate scrutiny test was no longer good law when analyzing restrictions on the right to keep and bear arms. *Lara v. Comm’r Pa. State Police*, 125 F.4th 428, 434 (3d Cir. 2025).

Bruen’s two-part test allows for greater rights than the intermediate scrutiny test because it makes it more difficult for the government to carry its burden to justify a restriction on the right to keep and bear arms—for example, by not allowing a court

to defer to—or give any weight to—the purported governmental interests asserted. *Bruen*, 597 U.S. at 26-27. Likewise, *Bruen* removes from the third branch of government the ability to uphold a restriction based on one court’s view that the government’s alleged interests, or legislative decisions, outweigh the individual rights recognized by the Bill of Rights.

This Court in *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632 (2017), applied intermediate scrutiny to its analysis of Article I, Section 20, because it relied on the now-rejected standard used by the Third Circuit—at that time—when *Bridgeville* was decided. But the Third Circuit now recognizes that *Bruen* prevents the use of the intermediate scrutiny test in a Second Amendment analysis. *Lara*, 125 F.4th at 434.

Likewise, this Court must acknowledge the new controlling standard for minimum federal rights by applying the *Bruen* test when construing the minimum rights allowed by Delaware’s analogue to the Second Amendment.

I. THE *BRUEN* TEXT-AND-HISTORY FRAMEWORK MUST BE APPLIED.

The State argues that because Challengers “chose to bring this action in state court alleging a violation of Section 20” (Appellant’s Reply & Cross App. Answering Br. (“Appellant’s Br.”) at 24), the Second Amendment and the Supremacy Clause of the United States Constitution have no place in the matter. Their position flouts the United States Supreme Court decision in *Bruen* and the Third Circuit’s decision in *Lara* regarding the minimum federal rights afforded to Delawareans related to keeping and bearing arms.

Although there is no Second Amendment claim asserted in this case, the United States Supreme Court held in *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010), that “the Second Amendment right is fully applicable to the States” through the Fourteenth Amendment, and confirmed in *Bruen*, 597 U.S. at 37, that the Second Amendment right to keep and bear has the same scope against both federal and state governments. This Court has previously ruled that the Second Amendment provides the minimum baseline, or floor, of rights which states may not fall below. *Bridgeville*, 176 A.3d at 642 (holding that federal constitution “provides a floor or baseline rights.”).

Application of the minimum federal rights under the Second Amendment as a floor does not mean, however, that the state must engage in a lockstep system or that Challengers argue for “prospective lockstepping” as the State contends.

Appellant’s Br. at 28. States remain free to provide greater protection under their own constitutions—but they cannot provide less protection than the federal constitutional floor demands.¹ *Bridgeville*, 176 A.3d at 653.

The Supreme Court’s *Bruen* decision provides the Second Amendment baseline that States cannot fall below. That floor of rights is to be determined by analyzing the historical tradition of firearm regulation, not intermediate scrutiny. *Bruen*, 597 U.S. at 37.

There is no support in controlling authority for the State’s argument that *Bruen* “does not create a test that is now the ‘floor’” and, instead, “simply applies a different test or methodology.” Appellant’s Br. at 26.

A. *Bruen* Provides More Rights Than Intermediate Scrutiny.

Intermediate scrutiny is less protective of rights than the standard mandated by *Bruen*, as Challengers have argued. *See* Challengers’ Answering Br. & Cross App. Opening Br., D.I. 29 (“Challengers’ Br.”) at 21-27. For example, *Bruen*, after recognizing that intermediate scrutiny required judges to “make difficult empirical

¹ The State contends that Challengers “concede that Section 20 interpretations are not dependent on Second Amendment cases” by relying on *Bridgeville*, 176 A.3d at 652. Appellant’s Br. at 24 -25. Not so. The Court in *Bridgeville* recognized that, in the context of the right to bear arms outside the home, including for hunting and recreation, Section 20 is intentionally broader than the Second Amendment.

judgments” about “the costs and benefits of firearms restrictions,” especially given their “lack [of] expertise” in the field, concluded:

[i]f 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.

597 U.S. at 26.

B. The *Lara* Decision Provides Authoritative Guidance in Delaware That Firearm Bans on Adults Ages 18-to-20 are Unconstitutional Under *Bruen*.

The framework established by *Bruen*, which this Court must recognize as the minimum federal level of rights, has already been applied to firearm restrictions on adults from ages 18-to-20 by the Third Circuit in *Lara*, which found such restrictions unconstitutional. The State argues that this Court may ignore this authority.

The State claims without support that *Lara* is distinguishable because it involves a Pennsylvania statute and the Second Amendment, whereas this appeal involves a Delaware statute and “the applicable law is Delaware’s.” Appellant’s Br. at 25-26. The State is wrong.

The statute in *Lara*, as in this case, involves a ban on adults from ages 18-to-20, making the issue in the two cases almost identical. That *Lara* involved a number of Pennsylvania laws is not a meaningful basis to ignore it.

The Second Amendment applies to the states. Courts must interpret state law consistent with the federal floor established by the Second Amendment. The Third Circuit’s analysis provides authoritative guidance in this context, leaving no principled basis for a contrary conclusion under the Supremacy Clause.² *See* Challengers’ Br. at 20-21. Indeed, this Court looked to the Third Circuit to determine the applicable standard of review, at the time, when considering prior constitutional challenges in 2017. *See Bridgeville*, 176 A.3d at 654-55.

C. The Discredited Intermediate Scrutiny Standard Does Not Apply.

The Second Amendment establishes a minimum level of federal constitutional rights. State law cannot provide fewer rights. *Bridgeville*, 176 A.3d at 653. *Bruen* defines that minimum level or floor by evaluating firearm regulations according to historical tradition rather than means-end or intermediate scrutiny. The Third Circuit in *Lara* applied *Bruen* to a nearly identical restriction on the rights of adults ages 18-to-20.

² U.S. Const. art. VI.

II. CHALLENGERS HAVE STANDING TO CHALLENGE HB 451.

A. The State Waived Its Standing Argument.

The State’s argument that Challengers lack standing to challenge HB 451 has been waived. Delaware law teaches that standing objections directed at *specific plaintiffs*, rather than at the court’s power to grant relief to *any plaintiff*, are challenges governed by Superior Court Rules of Civil Procedure Rule 12(b)(6). *See Appriva S’holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1284–85 (Del. 2007) (holding where a party is not arguing that the court lacks the authority to grant the relief requested to any plaintiff (i.e., lacks subject matter jurisdiction), but rather is arguing that the court cannot grant relief to these particular plaintiffs, the motion is more properly decided under Rule 12(b)(6) [rather than Rule 12(b)(1)] because the plaintiff has failed to plead a necessary element of a cognizable claim, not because the court does not have jurisdiction.); *see also Albence v. Mennella*, 320 A.3d 212, 220–21 (Del. 2024).

The State’s standing argument is governed by Rule 12(b)(6) because it targets whether the Court may grant the relief requested by the parties in this case—and not that the Court lacks jurisdiction to hear claims asserted by any plaintiff. Because the State raised its standing claim for the first time on appeal in its Opposition Brief, three years after this case was filed, its standing claim is untimely and has been waived. This Court has held such objections must be raised timely in the trial court

or they are forfeited. *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 269–71 (Del. 2022) (refusing to entertain standing objections that were raised for the first time in a reply brief).

B. The State’s Reliance on *Emps.* Is Misplaced Because That Case Involved a True Rule 12(b)(1) Jurisdictional Defect.

The State’s reliance on *Emps. Ins. Co. of Wausau v. First State Orthopaedics, P.A.*, 312 A.3d 597, 612 (Del. 2024), is unavailing. Appellant’s Br. at 29. In *Emps.*, the defendant had ceased engaging in the challenged conduct *before the complaint was filed*. *Id.* at 603-04. As a result, there was no live controversy at the outset of the case, and the court lacked subject matter jurisdiction to grant relief to anyone. *Id.* That defect eliminated jurisdiction altogether and therefore constituted a classic Rule 12(b)(1) standing problem. That is, *Emps.* involved a standing challenge that went to the court’s subject-matter jurisdiction over *any plaintiff*, not merely the entitlement of particular plaintiffs.

The instant matter is fundamentally different from *Emps.* The State does not argue that it ceased enforcing HB 451 before the complaint was filed, nor does it contend that no plaintiff could ever have standing to challenge the statute. To the contrary, the State’s argument is expressly limited to asserting that *these particular plaintiffs* lack standing. Under *Albence* and *Appriva*, that type of challenge does not deprive the Court of jurisdiction; it is a Rule 12(b)(6) merits argument directed at the sufficiency of the claims.

Because the State’s standing challenge does not implicate the court’s authority to grant relief to any Challenger, it is not a Rule 12(b)(1) jurisdictional objection like the one addressed in *Emps.* Instead, it is a waivable Rule 12(b)(6) defense that the State failed to raise in a timely manner. *Emps.* is therefore inapposite and does not salvage the State’s forfeited standing argument.

C. The Delaware State Sportsmen’s Association and Bridgeville Rifle and Pistol Club Have Standing.

The State argues that the Delaware State Sportsmen’s Association and the Bridgeville Rifle and Pistol Club (“Organizational Challengers”) lack standing because organizational standing requires proof that at least one member has standing, and Challengers submitted no declarations or other credible evidence identifying such a member, thereby failing to carry their burden.³ Appellant’s Br. at 30-31. Not so.

Delaware law recognizes that an organization may establish standing either by satisfying the well-settled organizational standing test articulated in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, or by asserting injury to its own interests. 636 A.2d 892, 902-905 (Del. 1994). The State failed to create any genuine

³ The State also asserts that Challenger Birney does not have standing because he acquired a CCDW permit and is currently 21 years-old. Challengers have previously notified this Court that Challenger Birney recently turned 21 and they no longer rely on him as a party for this Appeal. Challengers’ Br. at 9; Opp’n to Mot. to Remand, D.I. 38, at 2 n.2.

dispute of material fact that Challengers did not meet these test at summary judgment.

Under *Oceanport*, an organization has standing to sue on behalf of its members if “1) the interests to be protected by the suit are germane to the organization’s purpose; and 2) neither the claim asserted nor the relief requested requires the participation of individual members; and 3) the organization’s members would otherwise have standing.” *Id.* at 902.

An organization also may assert claims on its behalf satisfying the test known as the *Data Processing* test, which the U.S. Supreme Court developed in *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970), under which “standing is conferred where there is ‘1) a claim of injury in fact; and 2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute[.]’” *Id.* at 903 (citation omitted).

The State failed to create a genuine factual dispute that the Delaware State Sportsmen’s Association exists to preserve and defend the constitutional rights of its members to keep and bear arms, and that the Bridgeville Rifle and Pistol Club was formed to provide a venue for the lawful exercise of those same rights through training and competitive shooting. App B24-25 ¶¶ 29-30. The interests asserted in this litigation, challenging restrictions on firearm possession, are plainly germane to those organizational purposes.

Challengers sought declaratory and injunctive relief only, such that no individualized member participation is required. App B54-B58. Further, prior Delaware decisions involving these organizations allowed them to pursue similar claims. *See Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 662 (Del. 2017); *Delaware State Sportsmen’s Ass’n v. Garvin*, 196 A.3d 1254, 1264 (Del. Super. Ct. 2018); *Delaware State Sportsmen’s Ass’n v. Garvin*, No. CV K19C-11-001 NEP, Tr. Order, at 3-6 (Del. Super. Ct. Feb. 14, 2020) (trial court denied motion to dismiss based on standing of same organizational plaintiffs in the instant matter, based only on allegations in complaint) (Ex. B); *Delaware State Sportsmen's Ass’n v. Garvin*, WL 6813997, at *4 (Del. Super. Ct. Nov. 18, 2020). The State never challenged the fact that the organizations represent thousands of members including “members between the ages of 18 and 20 years-old.” App B24-B25 ¶¶ 29-30.

The State failed to create a genuine dispute of material fact that Organizational Challengers did not show: (1) an injury in fact; (2) that the interest sought to be protected is arguably within the zone of interests protected or regulated by the statute or constitutional provision at issue. *Oceanport Indus., Inc.*, 636 A.2d at 903. HB 451 impairs Organizational Challengers’ ability to carry out their core missions on behalf of their members, restricts how their members may lawfully possess firearms, and interferes with their organizational activities. Those undisputed facts establish injury in fact and place Challengers squarely within the zone of interests protected by the

constitutional guarantees they invoke establishing their standing. *See Delaware State Sportsmen's Ass'n v. Garvin*, No. CV K19C-11-001 NEP, Tr. Order, at 3-6 (Del. Super. Ct. Feb. 14, 2020) (Ex. B). *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-19 (2014) (noting that a corporation may challenge constitutionality of certain provisions of Patient Protection and Affordable Care Act).

Accordingly, no declaration or additional evidentiary evidence were required because the State failed to create any genuine dispute of material fact as to standing.

III. CHALLENGERS HAVE STANDING TO CROSS-APPEAL.

The State contends that Challengers lack standing to cross-appeal because a prevailing party generally may not appeal a favorable judgment, and neither recognized exception applies because Challengers received all the relief they sought and the judgment contains no collateral adverse ruling with preclusive effect. Appellant’s Br. at 31 (citing *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000)). Authority is to the contrary.

Hercules provides the general rule that “the prevailing party may not appeal a decision in its favor” recognizing two exceptions that: (a) a prevailing party is grieved and may appeal “if that party did not receive all of the relief that was sought,” or (b) if the judgment “includes a collateral adverse ruling that can serve as a basis for the bars of res judicata, collateral estoppel, or law of the case in the same or other litigation.” *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000) (citations omitted). Under *Hercules*, the exception of “the law of the case in the same or other litigation” applies to this appeal.

The law-of-the-case doctrine applies when a court has resolved a legal issue that is likely to arise again in the same litigation, functioning as a form of intra-litigation *stare decisis*. *Delaware Dep’t of Nat. Res. & Env’t Control v. Food & Water Watch*, 246 A.3d 1134, 1138–39 (Del. 2021). Although the Court declined

to apply the doctrine in *Food & Water Watch* because the case would necessarily be over regardless of the outcome on appeal, *id.*, that reasoning does not apply here.

This case presents the opposite circumstances. In its merits decision, the Superior Court expressly resolved a threshold constitutional question: that challenges under Article I, Section 20 are governed by intermediate scrutiny, not *Bruen*'s text-and-history framework. That determination was not *dicta* or surplus reasoning. It was a necessary legal holding that governed the Superior Court's evaluation of constitutionality and, absent reversal, will govern all further proceedings in this case—and other related litigation on the same issue.

If this Court reverses the Superior Court's ruling of unconstitutionality, the choice of analytical framework will directly control how the case proceeds on remand. Accordingly, unlike *Food & Water Watch*, the legal issue presented on appeal is not one that becomes irrelevant once judgment is entered, but one that has continuing operative effect. The law-of-the-case doctrine therefore applies. Compare with *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 37–40, 43 (Del. 2005) (holding that law of the case required adherence to an earlier-adopted analytical framework and interest rate determination and constrained later courts from substituting a different methodology absent a clear showing of error or injustice).

At the Superior Court, Challengers argued that *New York State Rifle & Pistol Ass'n v. Bruen* supplanted intermediate scrutiny with a more protective

historical-tradition test and that Delaware courts were required to adopt that framework when adjudicating claims under Article I, Section 20. App A27-29. Challengers further asserted that because Delaware may not afford fewer rights than the United States Constitution, continued application of intermediate scrutiny impermissibly lowered the constitutional “floor.” App A29-30.

The Superior Court rejected that argument, opining that neither *Bruen*, nor *Rahimi*, establishes that a history-and-tradition inquiry is categorically less demanding than intermediate scrutiny. Opinion (D.I. 29, Ex. A) at *9-10. Not true. The Superior Court further held that, regardless of the characterization of *Bruen*, it lacked authority to discard binding Delaware Supreme Court precedent in favor of current federal doctrine. *Id.* at *10.

Clarifying whether intermediate scrutiny or *Bruen*’s text-and-history test applies will determine not only the disposition of this appeal, but the framework that governs future cases with the same issues as well as all further proceedings in this litigation. Resolving this issue will promote consistency, finality, and orderly adjudication.

Delaware law recognizes that a prevailing party may appeal where a judgment includes a legal determination that adversely affects that party’s rights or has continuing preclusive consequences. *See Hercules Inc.*, 783 A.2d at 1277. The Superior Court’s rejection of *Bruen* and adoption of intermediate scrutiny materially

recognizes fewer rights than Challengers are entitled to, and allows incorrect standards to be applied to future claims in future cases by Challengers with similar issues.

IV. CHALLENGERS' FACIAL CLAIM DOES NOT FAIL AS A MATTER OF LAW.

A. The State Waived The Argument That Challengers' Facial Claim Fails As A Matter Of Law.

The State waived its ability to argue that HB 451 is constitutional in some of its applications, defeating a facial challenge as a matter of law because it failed to raise this argument at the trial court level or in its opening brief in this appeal.⁴ Pursuant to Supreme Court Rule 8, “[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.” In *Russell v. State*, this Court explained that the exception embedded within Rule 8 “is extremely limited and invokes the plain error standard of review.” 5 A.3d 622, 627 (Del. 2010).

The record fails to reveal an indication that the State argued at the trial court level that HB 451 is constitutional in some of its applications defeating a facial challenge as a matter of law. Its failure is underscored by the State’s failure to raise this argument in its opening brief filed in this Court.

⁴ As the State recognizes, a challenge to the constitutionality of a statute can be both facial and as applied, which is the case here. Appellant’s Br. at 32 n.12; *see also* App B56 ¶¶ 126-28. The State has not argued that Challengers’ “as applied” claim fails.

This Court has explained that an appellant must address issues on appeal in its opening brief, but “[i]f an appellant fails to comply with these requirements on a particular issue, the appellant has abandoned that issue on appeal irrespective of how well the issue was preserved at trial.” *Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242 (Del. 2004); *Bako Pathology LP*, 288 A.3d at 270 n.73 (holding that a party waived an argument that was raised for the first time in their reply brief on cross-appeal and was not raised in their opening brief on appeal). The State failed to raise its argument that HB 451 is constitutional in some of its application in its opening brief. Thus, the State waived this argument.

B. The CCDW Licensing Scheme Does Not Demonstrate That HB 451 Is Valid.

The State argues that HB 451 has constitutional applications because HB 451’s CCDW exemption “effectively preserves an avenue for 18-to-20-year-olds to exercise Section 20 rights.” Appellant’s Br. at 32-34. It does not. First, as the Superior Court correctly held, the CCDW licensing scheme is not a circumstance under which the statute would be valid because it does not preserve an avenue for carrying out Section 20’s core purpose of self-defense due to the CCDW statute itself being discretionary. *See* Challengers’ Br. at 49-53 and 56-59. Second, the CCDW licensing scheme is an exception to HB 451. A statute’s inclusion of an exception does not equate to the statute being constitutional in some of its application. *See Bridgeville*, 176 A.3d at 638-39 (holding that regulations that ban firearms, with

exceptions for only a limited class of persons to exercise a fraction of their right to possess firearms for self-defense, were unconstitutional). Accordingly, Challengers' constitutional arguments on an as-applied basis do not fail as a matter of law.

V. HB 451 IS UNCONSTITUTIONAL UNDER *BRUEN*.

A. Challengers Are Not An Excluded Class For Purposes Of the Second Amendment Since 18-20-Year-Olds Are Part of “The People”.

The State opens its *Bruen* analysis by half-heartedly arguing that 18-to-20-year-olds are an “excluded class” because *Rahimi* stated that “firearms regulations have included provisions barring people from misusing weapons to harm or menace others....” Appellant’s Br. at 36. Not so. The State is misinterpreting *Rahimi* and confusing the *Bruen* test. *Rahimi* concluded 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.” *Rahimi*, 602 U.S. at 702 (emphasis added). It did so at step two of *Bruen*, through analogical reasoning regarding the historical tradition of firearms regulation, not by excluding at step one of the test anyone from “the people” imbued with the protections provided by the plain text of the Second Amendment. *Rahimi*, 602 U.S. at 700.

Next, the State appears to argue that “categorical bans” are always permissible, particularly as to “presumptively dangerous citizens.” Appellant’s Br. at 36. Leaving aside that the State has analogized all 18-to-20-year-olds in the State of Delaware to individuals determined by a court to pose a credible threat to the physical safety of others, this argument is contrary to the teaching of *Heller*, *Bruen*, and *Lara*.

Heller held that “the people...refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Heller*, 554 U.S. at 580 (citation omitted). *Bruen* reiterated that the Second Amendment “guaranteed to 'all Americans' the right to bear commonly used arms in public subject to reasonable, well-defined restrictions.” *Bruen*, 597 U.S. at 70. *Lara* drew upon *Heller* and *Bruen* to rightly conclude “that 18-20-year-olds are . . . presumptively among ‘the people’ to whom Second Amendment rights extend.” *Lara*, 125 F.4th at 438.

In the context of Delaware’s Article I, Section 20, this Court in *Doe* and *Bridgeville* twice recognized that Article I, Section 20 rights belonged to “responsible, law-abiding Delawareans.” *Bridgeville*, 176 A.3d at 659; *Doe v. Wilmington Housing Authority*, 88 A.3d at 654, 665 (Del. 2014),

The Delaware Legislature also recognized via Section 701 of Title 1 of the Delaware Code—passed many years before Article I, Section 20—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). The inquiry should end there.

B. HB 451 Has No Support in The Nation’s Historical Tradition of Firearm Regulation.

At the second step of a *Bruen* analysis the government has the burden to identify a "founding-era" historical analogue to HB 451. *Lara*, 125 F.4th at 434 (citing *Bruen*, 597 U.S. at 24-27). The State’s purported analogues fall woefully short of meeting this intentionally heavy burden.

1. Infancy Doctrine

The State first relies on the fact that 18-to-20-year-olds were minors at the founding. Appellant’s Br. at 37-38. However, the State does not provide evidence that minors were not permitted, because they were minors, to carry firearms.

The evidence is to the contrary. “Founding-era laws reflect the principle that 18-20-year-olds are ‘able-bodied men’ entitled to exercise the right to bear arms.” *Lara*, 125 F.4th at 441; *see also* Decl. of F. Lee Francis at 99; App B177-78, Tab 4; Decl. of Clayton Cramer (Spitzer) ¶¶ 207-250, App B270-314, Tab 7.

2. Founding Era Law and Militia Law as Analogues

The State fails to identify a true analogue to HB 451 in a single founding era law that would prohibit 18-to-20-year-olds from possessing firearms.

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, passed by Congress on May 8, 1792, a mere five months after the Second Amendment was ratified on December 15, 1791. The Act required all able-bodied

men to enroll in the militia and to arm themselves upon turning 18. That young adults had to serve in the militia indicates that founding-era lawmakers believed those persons could, and indeed should, keep and bear arms. *Lara*, 125 F.4th at 443-44.

Confusingly, the State argues that the Militia Act of 1792 and other militia acts that required 18-to-20-year-olds to acquire firearms is evidence that the common law supports their position. They argue that the statutes exist because otherwise 18-to-20-year-olds were forbidden from owning firearms. Appellant’s Br. at 39. There is no valid support for that position. *See* Decl. of Clayton Cramer (Rivas) at ¶¶ 13-18, App B209-211, Tab 5 (summarizing founding era state militia laws arming 18 year-olds).

3. Surety Laws

In arguing for surety laws as an analogue to HB 451, the State misreads *Bruen* and particularly *Rahimi*. The Supreme Court explained its rejection of surety laws in general in *Bruen* and its limited acceptance of them in *Rahimi* based on the unusual facts of *Rahimi* as follows:

In *Bruen*, we explained that the surety laws were not a proper historical analogue for New York’s gun licensing regime. What distinguished the regimes, we observed, was that the surety laws ‘presumed that individuals had a right to . . . carry,’ whereas New York’s law effectively presumed that no citizen had such a right, absent a special need.

Rahimi, 602 U.S. at 699-700.

Rahimi therefore reiterated *Bruen*'s holding that surety laws were “not a historical analogue for a broad prohibitory regime,” and only clarified that they could be an appropriate analogue for a narrow regime. *Id.* HB 451 is a broad prohibitory regime that presumes that 18-to-20-year-olds do not have a right to obtain or possess common firearms.

4. University Firearm Restrictions

The State next invokes firearms restrictions on college campuses in the 1700s and 1800s as analogues. First, these “school procedural rules are not laws subject to constitutional limitations.” *Worth v. Jacobson*, 108 F.4th 677, 695 (8th Cir. 2024) The State’s argument also acknowledges, but ignores the import of the fact that universities had guardianship authority *in loco parentis*. *Id.* at 696; *see also*, Decl. of F. Lee Francis (Cornell) at ¶ 40, App B193, Tab 4; Decl. of Clayton Cramer (Spitzer) at ¶ 7, ¶¶ 251-265, App B222-23, Tab 6, B314-320, Tab 7. In fact, “[u]niversities had many practices that if compelled by the government, would have violated students' constitutional rights.....” *Id.* (citing University Church in Yale, Yale University, <https://church.yale.edu/history> (explaining that until 1927, chapel attendance was mandatory); *see also*, Decl. of Clayton Cramer at ¶¶ 258-264, App B318-320, Tab 7. This policy was also unsurprising, given the very young age of many of the students at those schools at that time.

5. Vagrancy Law

The State's reliance on vagrancy laws is not reasonable. The gist of its argument is that vagrancy laws are analogues to HB 451 because those laws attempted to stop crime and disarmed individuals because they put them in prison, separating them from whatever guns they may have owned. Appellant's Br. at 42. This would only make sense if this Court views all 18-to-20-year-olds as vagrants.

6. Reconstruction Era Laws

The State closes by relying on purported analogues from around the reconstruction and post-reconstruction eras. Appellant's Br. at 43-45. As a threshold matter these analogues fail because they are untethered from any similar founding era restriction. *Bruen*, 597 U.S. at 36 ("post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.") (internal citations omitted); *id.* (emphasis in original) (citing *Heller*, 554 U.S. at 614) ("As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'")

Lara also rejected laws during these periods as analogues. *See Lara*, 125 F.4th at 441("That is precisely the problem here: Founding-era laws reflect the principle that 18-to-20-year-olds are 'able-bodied men' entitled to exercise the right to bear

arms, while the Commissioner relies on laws enacted at least 50 years after the ratification of the Second Amendment to argue the exact opposite.”) (internal citations omitted).

Second, as Challengers’ expert Clayton Cramer meticulously outlined in the trial court, the laws the State cites from reconstruction largely do not stand for the principle that 18-to-20-year-olds can be wholly disarmed. Decl. of Clayton Cramer at ¶¶139-147, App B247-250, Tab 6. For example, the State relies on an 1812 Delaware statute applying to *all citizens* and prohibiting the firing of weapons within town limits. Appellant’s Br. at 44 (emphasis added).

CONCLUSION

This brief explains why the trial court reached the correct conclusion—but applied the wrong reasoning.

The Supremacy Clause of the United States Constitution and controlling decisions of this Court require that Delawareans be afforded no less than the minimum rights guaranteed by the United States Constitution as interpreted by controlling federal court decisions. The United States Court of Appeals for the Third Circuit has established the minimum level of rights under federal law for adults between the ages of 18-to-20.

Because the Third Circuit recently ruled that those adults enjoy all the rights recognized by the Second Amendment, that minimum level of fundamental civil rights must also be recognized under the analogue to the Second Amendment: Article I, Section 20 of the Delaware Constitution—which is governed by the standard announced by the United States Supreme Court in *Bruen* because that test allows for more rights than the discredited, formerly-used intermediate scrutiny test.

In sum, the conclusion of the trial court should be affirmed—but based on the reasoning required to be applied pursuant to controlling authority.

Respectfully submitted,

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