



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANE DOE and CHARLES BOONE,)
)
Plaintiffs Below,)
Appellants,)
) No. 403, 2013
v.)
) Certification of Questions of Law
WILMINGTON HOUSING) from the United States Court of
AUTHORITY and FREDERICK S.) Appeals for the Third Circuit
PURNELL, SR., in his capacity as)
Executive Director of Wilmington) No. 12-3433
Housing Authority,)
)
Defendants Below,)
Appellees.)

APPELLEES' SECOND AMENDED ANSWERING BRIEF

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Barry M. Willoughby, Esq. (No. 1016)
Lauren E.M. Russell, Esq. (No. 5366)
Rodney Square
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6666; (302) 576-3255
Facsimile: (302) 576-3345; (302) 576-3750
Email: bwilloughby@ycst.com;
lrussell@ycst.com

*Attorneys for Appellees Wilmington Housing
Authority and Frederick S. Purnell, Sr.*

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NATURE OF PROCEEDINGS

This matter arises from a challenge to a lease provision established by Wilmington Housing Authority (“WHA”), addressing the possession and use of firearms on WHA property. Suit was first filed in the Delaware Court of Chancery, in May 2010. C.A. No. 5521-CC. Appellees and Defendants-below, WHA and Frederick S. Purnell, Sr. (collectively, “Defendants”) removed the case to the U.S. District Court for the District of Delaware. C.A. No. 10-cv-4773-LPS.

The parties conducted discovery, and filed cross-motions for summary judgment. The District Court issued its Opinion and Order, granting Defendants’ motion and denying Plaintiffs’ motion, on July 27, 2012 (the “District Court Opinion”). (A0002.)

Plaintiffs Jane Doe and Charles Boone (collectively “Plaintiffs”) appealed the District Court Opinion to the U.S. Court of Appeals for the Third Circuit, raising only questions of state law. On appeal, Plaintiffs requested that the Third Circuit certify two questions of law to this Court, relating to the construction and application of Article I, § 20 (“Section 20”) of the Constitution of the State of Delaware (the “1987 Constitution”). The Third Circuit granted that request, and this Court accepted certification by Order dated July 30, 2013. (D.I. 3.)

This is Defendants’ Answering Brief, addressing the questions certified to this Court by the Third Circuit.

SUMMARY OF THE ARGUMENT

1. For purposes of the case at bar, the provisions of Section 20 and the Second Amendment to the U.S. Constitution are co-extensive. The Court should therefore be guided in its analysis by persuasive federal precedent.

2. The question of whether Defendants' actions are preempted by State law is not properly before this Court on certification. However, even if it were, Delaware law does not reflect an intent, either express or implied, by the General Assembly to preempt WHA's lease-making authority.

3. The lease provisions at issue in this case are consistent with the terms of Section 20, whether analyzed under this Court's precedent in *Griffin v. State*, or under a more traditional intermediate- or strict-scrutiny constitutional analysis. At all times, Defendants were motivated by a sincere desire to institute the most limited restrictions upon residents' rights to keep and bear arms, consistent with their duty to maintain a safe public housing community.

STATEMENT OF FACTS

WHA was created by statute, for the purpose of providing low cost, affordable housing in the City of Wilmington. 31 *Del. C.* §§ 4302; 4304. For many years WHA's Lease and Grievance Procedure (the "WHA Lease") prohibited the possession or use of firearms on WHA property.

I. Institution of the Revised Policy Currently at Issue

On June 28, 2010, the U.S. Supreme Court issued its ruling in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), holding for the first time that the Second Amendment was applicable to the states through the Due Process Clause of the Fourteenth Amendment. In response to the Court's holding, WHA Executive Director Purnell immediately suspended operation of the then-existing provisions of the WHA Lease governing firearms. (A0111, ¶ 25; A0306-07, ¶ 30.) WHA then immediately undertook the process of reviewing the WHA Lease and adopting a legally compliant firearms policy.

The U.S. Department of Housing and Urban Development ("HUD") requires that public housing authorities provide a 30-day period for public comment prior to amending a public housing lease. 24 C.F.R. § 966.3. With the advice of counsel, WHA drafted a proposed revision to the WHA Lease, and gave notice of a public hearing on the proposed policy. (A0256; A0313-14; A0320.)

WHA held the public hearing on October 14, 2010. Although this matter was then pending before the District Court, neither Plaintiffs nor their counsel attended the public hearing or submitted any written comment about the proposed policy. (A0317-18; A0321-23.) WHA also notified *Amicus Curiae* the National Rifle Association of America, Inc. (the “NRA”) about the public hearing. The NRA similarly refused to participate or to submit written comments to the proposed policy. (A0315-16; A0321-23; A0663.)

In response to comments made at the public hearing, WHA’s Board of Commissioners (the “Board”) conferred and modified the proposed policy. (A0421-22; A0425-26; A0664-66.) On October 25, 2010, the Board adopted the WHA Firearms and Weapons Policy (the “Revised Policy”), thereby amending the terms of the WHA Lease. (A0363-66.)

II. The Provisions of the Revised Policy

The Revised Policy permits residents to possess weapons in their residences and to use them for the purpose of self-defense. At issue, in this litigation, are two provisions limiting the possession and use of firearms in common areas, and permitting WHA to inspect firearms licenses:

The resident, members of the resident’s household, and guests: . . .

3. Shall not display or carry a firearm or other weapon in any common area, except where the firearm or other weapon is being transported to or from the

resident's unit, or is being used in self-defense [the "Common Areas Provision"].

4. Shall have available for inspection a copy of any permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm or other weapon, including a license to carry a concealed weapon as required by 11 *Del. C.* § 1441, upon request, when there is reasonable cause to believe that the law or this Policy has been violated [the "Reasonable Cause Provision"].

(A0365.)

A. The Common Areas Provision

The Common Areas Provision generally prohibits the possession or display of firearms in common areas. There is an exception that allows residents to transport firearms into and out of the building. (A0365-66.) In the course of such transportation, a resident may use a firearm in self-defense. *District Court Opinion*, 880 F. Supp. 2d 513, 533 (D. Del. 2012) ("Nor does the Common Area Provision entirely prohibit residents from possessing, or using for self-defense, firearms even in the common areas, although it restricts such possession and use to the times in which a resident is transporting a firearm to or from his or her unit."). Any other possession or use of firearms in common areas is expressly prohibited.

(A0365.)

In crafting the Revised Policy, the possession and display of weapons in the community rooms was one of WHA's primary concerns. (A0427.) The community rooms include communal entertainment facilities such as large-screen

television sets and other appliances. Testimony of the Board members shows that WHA was concerned for the safety and welfare of residents because of the risk of accidental or intentional shootings, and the alarm caused by having weapons displayed in the community room. (A0369; A0374; A0406; A0412-13; A0417; A0427.)

B. The Reasonable Cause Provision

The Revised Policy also requires residents to follow all applicable federal and state laws with respect to ownership and possession of firearms, and to exercise reasonable care in the possession and use of guns and ammunition. The Reasonable Cause Provision of the Revised Policy permits WHA to ask for a copy of a resident's license to carry a concealed deadly weapon ("CCDW") when there is reasonable cause to believe that the resident has violated the Revised Policy or the law. (A0365-66.)

During discovery in the U.S. District Court, Plaintiffs Doe and Boone testified that they did not have a problem with any of the restrictions set forth in the Revised Policy. (A0382-86; A0683-86.) Doe specifically testified that she agreed that residents would likely be alarmed by the presence of weapons in common areas. (A0676-77.) Plaintiffs' testimony is consistent with the concerns of the Board members, who unanimously voted to adopt the Revised Policy. (A0363-66.)

III. The Questions Certified to this Court

As noted in the Third Circuit's certification request, the District Court found that the Revised Policy passed muster under both the Second Amendment and Section 20 of the 1987 Constitution. (D.I. 1 at 5.) Plaintiffs' appeal to the Third Circuit, however, raised only state law issues. (*Id.*) The Third Circuit certified the following two questions to this Court:

(1) Whether, under Article I, § 20 of the Delaware Constitution, a public housing agency such as the WHA may adopt a policy prohibiting its residents, household members, and guests from displaying or carrying a firearm or other weapon in a common area, except when the firearm or other weapon is being transported to or from a resident's housing unit or is being used in self-defense.

(2) Whether, under Article I, § 20 of the Delaware Constitution, a public housing agency such as the WHA may require its residents, household members, and guests to have available for inspection a copy of any permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm or other weapon, including a license to carry a concealed weapon, as required by 11 *Del. C.* § 1441, on request, when there is reasonable cause to believe that the law or policies have been violated.

(D.I. 1.) These are the only matters before this Court on certification.

ARGUMENT

I. For Purposes of This Case, the Rights Protected by Section 20 Are Coextensive with Those Protected by the Second Amendment

A. Question Presented

Whether, under the facts as presented in this case, the provisions of Section 20 of the 1987 Constitution are coextensive with the protections of the Second Amendment to the U.S. Constitution.

B. Scope of Review

Questions of law, certified to this Court, are reviewed *de novo*. *Lambrecht v. O’Neal*, 3 A.3d 277 (Del. 2010) (citing *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993)) *abrogated on other grounds* by *Lambrecht v. O’Neal*, 3 A.3d 277 (Del. 2010).

C. Merits of the Argument

Section 20 provides that a citizen may “keep and bear arm for the defense of self, family, home, and State, and for hunting and recreational uses.” Notably, this provision was adopted in 1987, at a time when the Second Amendment was inapplicable to the states. *See, e.g., U.S. v. Cruikshank*, 92 U.S. 542, 553 (1976). *Amici Curiae* 16 Members of the Delaware General Assembly (“16 Members”) argue that the adoption of Section 20 was part of a deliberate effort by the NRA to legislatively incorporate the Second Amendment to the states in light of the then-existing federal precedent. (D.I. 26 at 5-7.) It is therefore

reasonable to conclude that Section 20 has the same purpose and meaning as the Second Amendment.

Plaintiffs nevertheless contend that Section 20 provides far broader rights than the Second Amendment. They argue that Section 20 should be subject to a different analysis than that applied by the federal courts in reviewing challenges under the Second Amendment. While it is true that the language of Section 20 is not identical to the Second Amendment, under the facts of this case, there are no material differences between Section 20 and the Second Amendment.¹

1. Because Neither Hunting nor the Recreational Use of Firearms Is in Issue in This Case, Section 20 and the Second Amendment Should Be Construed as Coextensive

The heart of the matter before the Court is the extent of the rights afforded by Section 20. Plaintiffs argue that Section 20 provides tenants with a near absolute right to bear arms outside of the rental unit and in the common areas of a public housing facility. The Board, through the adoption of the Revised Policy, however, has determined that the interest of the community as a whole is best served through balanced regulation of firearms on its property.

In requesting certification, the Third Circuit noted that this case is a matter of first impression in Delaware. As such, there is no precedent addressing

¹ The Second Amendment to the U.S. Constitution provides that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

the scope of the rights afforded by Section 20 under circumstances similar to those at bar. Justice Holland has noted that the reference in Section 20 to hunting and recreational uses “*appear[s]* to afford greater protections” than the Second Amendment, but the Court has not had occasion to formally consider that question. Randy J. Holland, *The Delaware Constitution: A Reference Guide*, 67 (2002) (emphasis added). (A0649-50.) There is no claim in this case, however, that residents should be permitted to possess or use firearms on WHA property for hunting or recreational purposes. Indeed, the only right Plaintiffs have asserted is their interest in self-defense in common areas.

The remaining provisions of Section 20, which entitle Plaintiffs to “keep and bear arms for the defense of self, family, home and State,” are textually similar to the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). As Plaintiffs note, the House Bill adopting the 1987 Constitution notes that the purpose of Section 20 was to “protect [] the traditional lawful right to keep and bear arms.” (D.I. 6 at 7.) It is therefore reasonable to construe the provisions in parity.

Plaintiffs’ arguments, made in reliance on Delaware case law, are unpersuasive. This Court’s past precedent does not require that Section 20 be construed more broadly than the Second Amendment. Instead, the applicable authorities show that this Court acts with deliberation in determining whether state

and federal rights are similar, and then applies persuasive precedent appropriately. *Compare Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000) with *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011). *See also Turnbull v. Fink*, 668 A.2d 1370, 1379 (Del. 1995). Delaware law does not preclude reference to persuasive federal precedent.

The extent of the rights protected by the Second Amendment was addressed by the U.S. Supreme Court in *Heller*. The *Heller* Court did not find Second Amendment guarantees to be absolute. Instead, the Court found that there were many limitations. *See, e.g.*, 554 U.S. at 626 (“Like most rights, the right secured by the Second Amendment is not unlimited. . . . [C]ourts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”). *Heller* emphasized the Second Amendment’s protection of the right to bear arms in the “hearth and home,” distinguishing the home from public spaces. *Id.* at 635.

Plaintiffs’ contention that the District Court somehow included common areas within the hearth and home is without merit. The District Court’s reference to similarities between certain common areas in an apartment building and the private home does not change the Court’s explicit holding, which recognizes that common areas are distinguishable from a resident’s rental unit.

District Court Opinion, 880 F. Supp. 2d at 529 (expressly holding that common areas are not part of the “hearth and home”).

Plaintiffs’ reliance on this Court’s decision in *Griffin v. State*, 47 A.3d 487 (Del. 2012) (“*Griffin II*”) is similarly unavailing. The Court’s analysis of where one “lives” in that case related to a traditional home, and has no application to the common areas at issue in this matter. *Id.* at 489. In fact, the Court’s decision in *Griffin II* supports the position adopted by the District Court—that there is a difference between the extent of an individual’s constitutional rights inside and outside of the home. *Compare id.* at 491 (finding a constitutional right to carry a concealed deadly weapon in the home) with *Smith v. State*, 882 A.2d 762 (Del. 2005) (holding that Section 20 does not create a right to carry concealed outside the home). This Court’s holding in *Griffin II* is further consistent with the public-private distinction made by the U.S. Supreme Court in *Heller*. 554 U.S. at 628 (noting that the right to self-defense is “most acute” in the home).

In light of the foregoing, there is no legislative or other support for the proposition that this Court should adopt the interpretation that Plaintiffs and *Amici* advance, namely that Section 20 should be construed in near absolute terms to prohibit reasonable restrictions on firearms when the government is acting in its capacity as a landlord and not a sovereign.

WHA properties include various community spaces such as daycare facilities, libraries, and community rooms that play host to many of WHA's most vulnerable residents: the elderly and children. (A0370-73.) Common areas are not tantamount to a tenant's residential unit. Common areas are not spaces in which a tenant enjoys exclusive rights of occupancy to the exclusion of others. They should therefore be distinguished from a tenant's rental unit, where the interest in self-defense is most acute. *Heller*, 554 U.S. at 628.

In this case WHA, acting through the Board, adopted a carefully crafted and balanced policy, which was designed to preserve residents' rights to keep and bear arms in their home for self-defense, while at the same time protecting others from death, injury, or alarm occasioned by the presence of firearms in common areas. The members of the Board, appointed by the Governor of Delaware, the Mayor of Wilmington, and the New Castle County Executive, have the right and duty to establish policies for the benefit and protection of all WHA residents. 31 *Del. C.* §§ 4302; 4304.

2. WHA, Acting as a Landlord Rather than a Sovereign, Is Entitled to Adopt Reasonable Policies for the Protection of Residents

Notably, this case involves a public agency acting as a landlord, and not as a sovereign. It is well established that the capacity in which a government acts is directly related to the level of constitutional scrutiny applied to its actions.

This simply stands to reason. For example, the government's right to regulate speech as a sovereign is much more limited than its rights in other contexts.

Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (“the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”). Indeed, government agencies acting as employers and educators are routinely held to lower standards of scrutiny when they place limitations upon the exercise of First and Fourth Amendment rights. *See, e.g., Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *O’Connor v. Ortega*, 480 U.S. 709 (1987). The same principles should apply here.

In the case at bar, WHA is acting as a landlord in providing public housing to residents. This role necessarily requires the Board to exercise reasonable discretion in determining what is best for the residents of its facilities. Accordingly this Court should find that, in connection with the facts of this case, WHA is granted greater discretion, and the rights protected by Section 20 are coextensive with those protected by the Second Amendment.

II. The Question of Preemption Was Not Certified to this Court, and Is Not Applicable to the Establishment of Lease Provisions

A. Questions Presented

Whether the question of preemption is properly before the Court.

Whether Delaware law expressly or impliedly preempts WHA's authority to develop and implement the Revised Policy.

B. Scope of Review

Questions of law, certified to this Court, are reviewed *de novo*.

Lambrecht, 3 A.3d 277 (citing *Rales*, 634 A.2d at 931).

C. Merits of the Argument

Before both the District Court and the Third Circuit, Plaintiffs have argued that WHA's establishment of the Revised Policy is preempted by state law. That question was not, however, certified to this Court. (D.I. 3.) *See also Shellburne, Inc. v. Roberts*, 224 A.2d 250, 255 (Del. 1966) (limiting the Court's inquiry to those matters "within the scope of this certification").

Certification of questions of law to this Court is regulated by Article IV, § 11(8) of the 1987 Constitution, and Supreme Court Rule 41. Since the Third Circuit did not certify the preemption question to this Court and the Court's Order granting certification did not accept certification of this issue, Defendants

respectfully request that this Court decline to address the issue and disregard Plaintiffs' argument on this front.²

If the Court elects to address this question, for the following reasons this Court should rule that Delaware law does not preempt WHA's lease-making authority, as exercised to establish the Revised Policy.

1. The Principles of Preemption Do Not Limit WHA's Authority to Establish the Revised Policy

The theory of preemption is inapplicable in this case. "Preemption refers to circumstances where the law of a superior sovereign takes precedence over the laws of a lesser sovereign." *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1121 (Del. 2009). WHA is not a political subdivision: it does not have the authority to engage in any legislative activity. *Wilmington Hous. Auth. v. Williamson*, 228 A.2d 782, 787 (Del. 1967) *superseded on other grounds by Fiat Motors of N. Am. v. Wilmington*, 498 A.2d 1062 (Del. 1985). Instead, the issue in this case is WHA's legal authority to establish lease provisions and policies applicable to its premises.

WHA is unaware of—and Plaintiffs fail to cite—any Delaware precedent holding that the principles of preemption apply to rental policies adopted

² Defendants similarly ask that the Court disregard the brief submitted by *Amici Curiae* 16 Members to the extent it addresses the issue of preemption. (D.I. 26, Argument II.) Further, 16 Members are not authorized to speak on behalf of the sixty-two members of the Delaware General Assembly as to their intent in enacting Delaware's firearms preemption statutes.

by public housing authorities. The distinction between legislative and lease-making authority is emphasized by the preemption statutes cited by Plaintiffs, which prohibit *county and municipal governments* from enacting *laws, regulations, or ordinances* governing firearms. 22 *Del. C.* § 111, 9 *Del. C.* § 330(c) (emphasis added) (collectively, the “Preemption Statutes”).

The Preemption Statutes prohibit local governments from acting as sovereigns to establish laws that are different from, or inconsistent with, state statute. Surely Plaintiffs do not contend that municipal governments acting, in their capacity as employers, may not adopt policies that restrict employees from having firearms in the workplace. Yet, such a conclusion is the logical extension of Plaintiffs’ preemption arguments.

Here, of course, WHA is not a sovereign at all. It does not enact laws. Instead, WHA is a landlord that has adopted a policy applicable to tenants. The Delaware Code gives WHA broad discretion to engage in lease-making activities, which is precisely what it has done in establishing the Revised Policy. 31 *Del. C.* § 4308(a)(3); *Williamson*, 228 A.2d at 786 (discussing the “extensive powers . . . conferred upon” a housing authority under Ch. 43); *State v. Wilmington Hous. Auth.*, No. N92-02-1177, 1993 Del. Super. LEXIS 43, at *5 (Del. Super. Ct. Feb. 10, 1993) (same). It is, therefore, not subject to preemption.

2. Delaware Law Does Not Expressly Preempt WHA's Lease-Making Authority

As the District Court correctly identified, in reliance on established Delaware law, WHA is a state agency. *Williamson*, 228 A.2d at 787. It is not a municipality or a county. It is not, therefore, subject to express preemption under Delaware law. 22 *Del. C.* § 111; 9 *Del. C.* § 330(c); *District Court Opinion*, 880 F. Supp. 2d at 539-40.

Plaintiffs rely on a decision issued by the Supreme Judicial Court of Maine to support their position to the contrary. *Doe v. Portland Hous. Auth.*, 656 A.2d 1200 (Me. 1995). However, Plaintiffs fail to acknowledge that the court in that case concluded that the Portland Housing Authority was a political subdivision under Maine law, and therefore directly governed by the applicable preemption statute. *Id.* at 1204. The language of the preemption statute was also broader than Delaware law, prohibiting the enactment of any **rule** pertaining to firearms. 25 Me. Rev. Stat. § 2011. Further, that case turned on the question of whether a resolution was preempted—the underlying lease provision was only declared unlawful as a result of the invalidity of preceding quasi-legislative activity. Thus, *Portland Housing Authority* is completely distinguishable.

Plaintiffs further assert that the Preemption Statutes are “entitled to be viewed as an extension of” the principles protected by Section 20, and that they should therefore be read broadly. Plaintiffs rely on nothing more than the temporal

proximity between the enactment of the Preemption Statutes in 1985 and 1986, and the adoption of the 1987 Constitution. The time elapsed between these legislative acts is not suggestive of any intent to preempt WHA's lease-making authority, and should not be construed as such.

3. Delaware Law Does Not Reflect the General Assembly's Intent to Impliedly Preempt WHA's Lease-Making Authority

In the absence of express preemption, Delaware recognizes a strong presumption against implied preemption. *Lacy v. G.D. Searle & Co.*, No. 83C-SE-123, 1988 Del. Super. LEXIS 205, at *12 (Del. Super. Ct. June 22, 1988). "In Delaware, the State and its political subdivisions are permitted to enact similar provisions and regulations, so long as the two regulations do not conflict." *Cantina v. Fontana*, 884 A.2d 468, 473 (Del. 2005). An entity's actions will only be considered in conflict, and therefore impliedly preempted, where they "hinder the objectives of the state statute." *Id.*

WHA's actions in effecting the Revised Policy do not conflict with the State's regulation of firearms. Those provisions in the Delaware Code addressing firearms fall into two categories: professional regulations governing firearms dealers (Title 24), and criminal provisions (Title 11). Neither has any relation to WHA's authority to impose lease provisions (Title 31). Nor is the effect of state legislation hindered by WHA's efforts to impose reasonable restrictions

upon the possession and use of firearms by its tenants. *C.f. Hayward v. Gaston*, 542 A.2d 760, 767 (Del. 1988) (holding that county zoning ordinance, limiting location of residential treatment centers, did not conflict with state law authorizing creation of the centers). Consequently, there is no basis on which to conclude that the General Assembly intended to preempt WHA's lease-making authority by passing laws located in far-flung portions of the Delaware Code unrelated to public housing. *See, e.g., Cantinca*, 844 A.2d at 474 ("concurrent regulation of the same subject matter, without more, does not create a preemption justifying conflict").

III. The Revised Policy Is Narrowly Tailored to Advance WHA's Compelling Interests in the Safety of Its Tenants

A. Question Presented

Whether Section 20 prohibits WHA from adopting the Common Area Provision or the Reasonable Cause Provision under either (1) the test articulated by the Wisconsin Supreme Court in *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003) and adopted by this Court in *Griffin II*, or (2) the intermediate scrutiny analysis applied in the District Court Opinion to Plaintiffs' Second Amendment claims. 880 F. Supp. 2d at 534 ("In the Court's view, this case presents exactly the type of situation that merits the application of intermediate scrutiny").

B. Scope of Review

Questions of law, certified to this Court, are reviewed *de novo*. *Lambrecht*, 3 A.3d 277 (citing *Rales*, 634 A.2d at 931).

C. Merits of the Argument

As a preliminary matter, the applicability of the *Hamdan* analysis to the facts of this case is questionable. In both *Hamdan* and *Griffin II*, the question before the court was an as-applied challenge to a concealed-carry statute bearing criminal sanctions. By contrast, this case involves the adoption of a lease policy. The sanction for violation of the policy is, at most, the eviction of the tenant, not his or her incarceration. Moreover, the imposition of any sanction for a violation of WHA's policy is subject to full the protections of due process: a tenant accused

of violating the Revised Policy has the panoply of rights afforded under Delaware landlord-tenant law, including a jury trial. 25 Del. C. § 5713. Accordingly, there is no concern that tenants are subject to arbitrary action as a result of the alleged violation of the Revised Policy or any other provision of the WHA Lease.

In addition, the test adopted by this Court in *Griffin II* is not easily transferable to the review of a lease provision:

First, the court must compare the strength of the state’s interest in public safety with the individual’s interest in carrying a concealed weapon. Second, if the individual interest outweighs the state interest, the court must determine, “whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute.” Third, the individual must be carrying the concealed weapon for a lawful purpose.

Griffin II, 47 A.3d at 490-91.³

The case at bar deals with a challenge to a lease provision that is wholly unrelated to the State’s concealed-carry statute. Indeed, it is undisputed that Delaware is an “open carry” state. Without the adoption of the Revised Policy, residents could openly carry firearms anywhere on WHA premises without invoking any aspect of the State’s CCDW statute. The *Hamdan* test would, therefore, require significant clarification before application to other challenges

³ Plaintiffs argue that the Court’s adoption of the *Hamdan* test is evidence that the Section 20 must be read more broadly than the Second Amendment. (D.I. 6 at 8.) A review of the parties’ briefing before this Court in *Griffin II*, however, reveals that they did not raise the question of applying the federal courts’ Second Amendment analysis to the question at bar. No inference can be drawn from the Court’s failure to discuss an issue that was not raised.

brought under Section 20. Accordingly, Defendants urge the Court to adopt the intermediate scrutiny standard applied by every federal court to have considered the issue. *See, e.g., U.S. v. Marzarella*, 614 F.3d 85, 99 (3d Cir. 2010); *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1116-17 (S.D. Cal. 2010) (addressing a survey of Second Amendment case law).

1. The Revised Policy Survives Application of the *Hamdan* Analysis

Notwithstanding Defendants' view that the *Hamdan* test should not be applied to this case, absent substantial modification, the Revised Policy nevertheless survives review under the *Hamdan* analysis.

Under the first prong of the *Hamdan* analysis, the Court must determine whether Plaintiffs' interest in carrying a firearm in common areas outweighs WHA's interest in public safety. It is undisputed that WHA has a compelling interest in the safety and welfare of its residents, and that this interest actually motivated the adoption of the Revised Policy. (D.I. 6 at 17; A0365.) Nonetheless, Plaintiffs assert, as they did before the District Court, that WHA must produce "actual evidence" of its interest. The District Court Opinion, as well as decisions from other courts, have rejected this argument. *District Court Opinion*, 880 F. Supp. 2d at 536 ("Although more is not needed, the parties, and *amicus*, also cite statistics to support their competing conclusions"); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008) ("[a] state need not go beyond the demands

of common sense to show that a statute promises directly to advance an identified government interest.”) (citing *Burson v. Freeman*, 504 U.S. 191, 211(1992))
abrogated on other grounds by Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

Indeed, dictates of common sense inform the decision maker that firearms can be deadly weapons, and that their accidental discharge may have serious or fatal consequences. Likewise, the mere presence of firearms in common areas will cause alarm. Plaintiff Doe testified that she would be concerned by the open carry of firearms in common areas for that very reason. (A0676-78.) And, of course, as discussed below, Plaintiffs’ statistics about the benefits of open carry of guns present just one side of the story. Advocates on the other side can and do cite strings of articles and publications supporting the dangers inherent in the increased presence of firearms.⁴ In short, those charged with the responsibility of overseeing WHA and similar agencies ought to have the ability to adopt reasonable, carefully drafted limitations, such as the Revised Policy.

This Court recognized, in *Griffin II*, that there is a need for balance between individual rights and public safety. The balance shifts to public safety outside the home. 47 A.3d at 491. As the Court noted, while an individual’s right

⁴ Notably, *Amicus Curiae Pink Pistols* (the “Pink Pistols”), citing to what they allege to be the Centers for Disease Control’s definitive review of all studies addressing the correlation between firearms and violence, are able to assert nothing more than the fact that further research is required before policy recommendations can be made as to the risks associated with public carry of firearms. (D.I. 28 at 16.)

to possess and use a weapon inside the home will generally outweigh public safety concerns, that balance shifts immediately when others are at risk. *Id.* (noting that public safety outweighed the individual’s right to carry a concealed weapon in the home when police entered the home and the individual’s “carrying a weapon could have represented a serious threat to both the police and his girlfriend”).

There are risks inherent in the possession of a firearm in any location, but the risks of harm are significantly amplified in common areas, where residents and guests are present. When a gun owner’s right to bear arms comes into conflict with an individual’s right to be free from fear of accidental injury, the State’s interest in public safety must outweigh the individual’s right. *Id.* (“At that point, the balance between his interest in carrying a concealed weapon in his home and the State’s interest in public safety shifted in favor of the State.”)

Because WHA’s interest in public safety outweighs individual residents’ rights to bear arms in common areas, the Court need not address the second two prongs of the *Hamdan* analysis. As discussed above, the second prongs of the test are not applicable outside of the concealed-carry context. Nonetheless, if the Court elects to adapt the remainder of the *Hamdan* test to the facts of this case, Defendants believe that it is clear that Plaintiffs’ right to self-defense in common areas is preserved, although in a more limited fashion in light of the heightened risk to others. *District Court Opinion*, 880 F. Supp. 2d at 533

(“Nor does the Common Area Provision entirely prohibit residents from possessing, or using for self-defense, firearms even in the common areas, although it restricts such possession and use to the times in which a resident is transporting a firearm to or from his or her unit.”).

2. The Revised Policy Is Similarly Lawful Under a Traditional Constitutional Analysis

As noted above, a traditional constitutional analysis lends itself more effectively to issues of the type presented here. This Court has, in the past, applied such analyses. *See, e.g., Turnbull*, 668 A.2d at 1379 (discussing the standards of strict, intermediate, and rational basis review).

a. Intermediate Scrutiny Is Appropriate in Light of Persuasive Precedent and the Facts of the Case

Those courts adopting this approach have established a two-part inquiry. *See, e.g. Marzzarella*, 614 F.3d at 89; *Peterson v. Martinez*, 707 F.3d 1197, 1218 (10th Cir. 2013) (“Several other circuits have adopted this two-step, sliding-scale approach with respect to Second Amendment scrutiny since *Heller* was decided”) (citing cases). Under the two-part analysis, the Court must first determine whether the challenged conduct imposes a burden on conduct falling within the scope of the plaintiff’s constitutional rights. Second, if the conduct imposes a burden, the Court must evaluate the restriction under “some form of means-end scrutiny.” *Marzzarella*, 614 F.3d at 89. This analysis is understood to

require the application of intermediate scrutiny in all cases except those imposing a complete ban on the possession of firearms. *Id.* at 96-97.

Applying this analysis, the Revised Policy must be upheld because it advances a compelling governmental interest, and is narrowly tailored so that it does not unduly burden Plaintiffs' rights. *District Court Opinion*, 880 F. Supp. 2d at 539. As discussed above, Defendants were motivated by compelling governmental interests in designing the Revised Policy. Among those interests are the constitutional rights of Plaintiffs, and the health, welfare and safety of all WHA residents, staff, and the general public who access WHA's properties. (A0365.) Defendants were also driven by the unique circumstances of many WHA properties, which include various community spaces such as daycare facilities, libraries, and community rooms. (A0370-73.)

Plaintiffs' contention, that "WHA has suggested no principled basis for limiting" the possession of firearms in common areas is simply inaccurate.⁶ (D.I. 6 at 19.) The Revised Policy itself expressly provides that its terms were drafted with the intention of protecting the safety and individual rights of all WHA tenants. (A0365.) Indeed, Plaintiffs have conceded that WHA has a compelling interest in the safety of its premises and those using them. (D.I. 6 at 26.)

⁶ Nor is Defendants' interest "unidentified," as maintained by *Amici* Law Enforcement Legal Defense Fund, *et al.* ("LELDF").

In crafting the Common Areas Provision, Defendants considered all of these issues, including the concerns of WHA residents as expressed at the October 14, 2010 Public Hearing. (A0256; A0363-65.) The result is a narrowly tailored policy that effectively protects the rights and interests of **all** WHA residents, including Plaintiffs.

To ensure Plaintiffs' Section 20 rights to self-defense, the Revised Policy permits the possession of firearms in a tenant's residence and their use for self-defense. In common areas, however, the Board determined that the balance of interests shifts from the individual's right to possession and use of firearms to protecting the safety of all residents. Common areas are those where Plaintiffs' right to possess a weapon are most likely to come into conflict with others' rights to be safe from accidental or intentional firearm violence. Moreover, it is in these areas that the very presence of a gun is most likely to alarm residents and their guests, such as grandchildren. Consequently, under the Revised Policy, weapons may only be possessed in common areas to the extent they are being transported to and from a tenant's unit, and may only be used in common areas to the extent they are used in self-defense. *District Court Opinion*, 880 F. Supp. 2d at 533.

Thus, the Revised Policy is carefully tailored to permit Plaintiffs to exercise their Section 20 rights, while simultaneously preserving the rights and safety of others. The solution proposed by Plaintiffs—that Defendants should not

be permitted to impose any lease restrictions more extensive than State law—sacrifices the rights of the many for those of the few. No WHA resident should be forced to be subject to increased risk of harm from firearms in common areas.

Plaintiffs only address the Reasonable Cause Provision in passing, noting that if the Common Area Provision is struck down, the Reasonable Cause Provision must fall as well. (D.I. 6 at 12, n12; 30, n.26.) However, the same considerations support the constitutionality of both provisions. As noted, WHA has a compelling interest in the safety of its residents, including their compliance with the provisions of the WHA Lease and laws relating to the possession and use of firearms. The Reasonable Cause Provision is merely a mechanism by which WHA may satisfy those interests. Contrary to Plaintiffs' implications, the Reasonable Cause Provision is not tantamount to a Fourth Amendment search. Because WHA is acting as a landlord, it has greater discretion in such areas, particularly where tenants are notified by policy that they have no reasonable expectation of privacy if they violate the Revised Policy or the law. *C.f. O'Connor*, 480 U.S. 709 (refusing to impose a probable cause standard for workplace searches due to the special needs of public employers).

b. Application of Strict Scrutiny Is Not Supported by Relevant Case Law

While contending that Section 20 is broader than the Second Amendment, Plaintiffs and *Amici* cite heavily to the Seventh Circuit's decision in

Moore v. Madigan, addressing the scope of the Second Amendment. 702 F.3d 933 (7th Cir. 2012). The Court should reject the Seventh Circuit’s approach in *Moore* for several reasons. As a preliminary matter, *Moore* addresses a wholesale ban on the possession of firearms in public, a completely distinguishable circumstance from the limited restrictions in common areas imposed under the Revised Policy. Indeed, the Seventh Circuit noted that the ordinance at issue in *Moore* was “the most restrictive gun law of any of the 50 states.” *Id.* at 941. Further the ban was adopted in government’s role as a sovereign, not as a landlord.

Moving past the factual distinctions, *Moore* adopts a holding that reaches significantly beyond the principles articulated in *Heller*. With the exception of the Seventh Circuit, no court has addressed the question of whether the Second Amendment guarantees a right to bear arms outside the home, preferring to leave that question for the U.S. Supreme Court. *See, e.g., Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013) (reversing the trial court’s “*trailblazing pronouncement* that the Second Amendment right to keep and bear arms for the purpose of self-defense extends outside the home”) (emphasis added).

In addition, Plaintiffs’ argument that “*Heller* forecloses the application of mere intermediate scrutiny” is fundamentally flawed, as those courts to review challenges under the Second Amendment have either declined to identify a specific level of scrutiny, or have applied intermediate scrutiny. *Compare* (D.I. 6

at 32) *with Peruta*, 758 F. Supp. 2d at 1116-17. *See also Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013) (applying intermediate scrutiny); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (same); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (same); *U.S. v. Chester*, 514 Fed. App'x 393, 394 (4th Cir. 2013) (same); *NRA of Am., Inc. v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (7th Cir. 2011) (noting that the court had previously applied intermediate scrutiny); *U.S. v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010).

Nor should the Court apply heightened scrutiny in reliance on distinctions between the text of Section 20 and the Second Amendment. For all of the reasons discussed above, under the circumstances presented in this case, Section 20 and the Second Amendment are coextensive.

3. The Revised Policy Would Survive Strict Scrutiny, if Applied

Nevertheless, for the same reasons that the Revised Policy as a whole survives intermediate scrutiny, it would also survive strict scrutiny. As noted, *supra*, there is no dispute that WHA has a compelling interest in protecting the safety and welfare of its residents. In order to survive strict scrutiny, the Common Area Provision and the Revised Policy must be narrowly tailored to effectuate that compelling state interest. *Marzzarella*, 614 F.3d at 97 n.14. As discussed, the Revised Policy as a whole is narrowly tailored, allowing residents to possess

firearms in their units and to use them in self-defense in common areas when going to or from their homes. The additional limits imposed on possession and use of firearms in common areas are narrowly tailored to protect the health and safety of other residents.

4. *Amici Curiae*'s Arguments that WHA Residents Would be Safer with Unrestricted, Open Carry of Firearms Anywhere on WHA Property Are Without Merit

Five *Amici Curiae* (collectively, "*Amici*") urge this Court to declare the Common Area Provision unconstitutional because they believe that increased gun ownership and possession reduces the risk of gun crimes.⁷ For every article cited by *Amici*, there is an article correlating gun violence with increased possession of firearms.⁸ *See, e.g.,* Charles C. Branas, *et al., Investigating the Link*

⁷ Plaintiffs and *Amici* continue to cite to a study of crime in public housing performed by HUD. The study in question has nothing to do with the question of whether unrestricted possession and use of weapons would reduce crime, let alone, result in increased safety for residents. The Board is responsible for the oversight of WHA's facilities. They are entitled to make the reasonable judgment that the Revised Policy is in the best interests of the residents.

Amicus Pink Pistols' brief also demonstrates a fundamental misunderstanding of gun possession laws in Delaware. Contrary to their assertion, Delaware does not require licensing for open carry of firearms. There is, therefore, no basis to conclude that residents carrying firearms in common areas will be trained in, or exercise, reasonable precautions to avoid injury to others. (D.I. 28 at 10.) Indeed, *Amicus* LELDF recognize the inherent danger posed by the possession of firearms by the general public. (D.I. 24 at 14; 17.)

⁸ Plaintiffs' and *Amicus* Pink Pistols' continued reliance on the research of John R. Lott is curious, as Defendants have repeatedly pointed out that the research performed by Mr. Lott has been plagued by allegations that he falsified the data underlying his conclusions. Robert J. Spitzer, *Historical Approach: Why History Matters: Saul Cornell's Second Amendment and the Consequences of Law Reviews*, 1 Alb. Gov't L. Rev. 312, 348 (2008) ("Another researcher on gun control, economist John Lott, was charged with inventing poll data regarding the frequency with which citizens used guns to protect themselves. Lott's humiliation escalated when he admitted inventing a fictional defender, 'Mary Rosh,' whose comments appeared widely on the

Between Gun Possession and Gun Assault, 99 Amer. J. Pub. Health 2034, 4 (2009) (concluding that individuals in possession of a firearm are significantly more likely to be shot during an assault); *District Court Opinion*, 880 F. Supp. 2d at 536. It is the Board—not Plaintiffs or *Amici*—that is charged with that responsibility and that is in the best position to implement policies to address Plaintiffs’ concerns. It defies credulity to argue that the Board could not consider the inherent dangers associated with the presence of firearms in the common areas of public housing communities in deciding what policy should be adopted.

The Revised Policy was the result of careful consideration by WHA’s administrators and the Board. It was subject to a public comment period, during which WHA expressly invited comments from external organizations including the NRA, which flatly refused to participate. At all times, Defendants sought to balance the rights of gun owners with other users of common areas. While the NRA alleges that gun owners must “hunker down in their units” under the terms of the Revised Policy, this is plainly not so. (D.I. 27.) All residents have the same right to use the common areas, and are subject to the same restrictions. Indeed, without the Revised Policy, those who do not wish to expose themselves to alarm

Internet extolling his work and criticizing his detractors.”). *See also* Kevin P. LaTulip, Jr., *Review of More Guns, Less Crime*, 4 J. Health Care L. & Pol’y 147, 154-57 (2000) (discussing flaws in Lott’s methodology).

and the risk of accidental shootings would have to avoid common areas.⁹ Plaintiffs should not be allowed to override the Board's considered judgment that common areas should be free of firearms.

It bears emphasis that the Revised Policy is wholly distinguishable from the flat bans addressed by the U.S. Supreme Court in *Heller* and the Seventh Circuit in *Madigan*. Under the Revised Policy, there is a clear right to the possession of firearms in a tenant's unit, and the use of those weapons in self-defense. Those restrictions imposed by the Revised Policy are in recognition of the undeniable reality that common areas are the places where the rights of gun owners and non-owners come most directly into conflict. The manner in which those rights are balanced is a question best answered by those who are responsible for their oversight, subject to the intermediate scrutiny analysis described above.

⁹ *Amicus* LELDF's argument regarding the enforcement of the Revised Policy is curious. (D.I. 24 at 7-9.) As a preliminary matter, Defendants are not aware of any call having been made—under this policy or the previous policy—regarding the use or possession of firearms on WHA property where no crime was committed. Moreover, as with all WHA lease provisions, enforcement falls to WHA staff, not the police. As noted above, WHA residents have the same due process rights as all other tenants in Delaware in the event the Authority determines that eviction is appropriate for the violation of a tenant's lease.

CONCLUSION

For the reasons set forth in this brief, Appellees respectfully request that the Court hold that Article I, § 20 of the Constitution of the State of Delaware permits Wilmington Housing Authority to implement lease provisions imposing reasonable restrictions on the possession and use of firearms, in the form of the Revised Policy.

Respectfully Submitted,

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Barry M Willoughby

Barry M. Willoughby, Esq. (No. 1016)

Lauren E.M. Russell, Esq. (No. 5366)

Rodney Square

1000 North King Street

Wilmington, DE 19801

Telephone: (302) 571-6666; (302) 576-3255

Facsimile: (302) 576-3345; (302) 576-3750

Email: bwilloughby@ycst.com;

lrussell@ycst.com

*Attorneys for Appellees Wilmington Housing
Authority and Frederick S. Purnell, Sr.*

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