



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**BRIEF OF AMICUS CURIAE MEMBERS OF
THE DELAWARE GENERAL ASSEMBLY
IN SUPPORT OF PLAINTIFFS BELOW, APPELLANTS**

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**STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF
AUTHORITY OF *AMICI CURIAE***

Amici are sitting members of the Delaware General Assembly (the “General Assembly”).¹ As members of the General Assembly, they have sworn to “uphold and defend the Constitutions” of the United States and Delaware.² The obligations of that oath include expressing their positions on the importance of Delaware laws being faithfully observed and not impermissibly modified, extended, or altered. This is particularly important where statutory law preempts the actions of administrative agencies or when those agencies have taken actions beyond the scope of the authority delegated to them by the General Assembly. *Amici* believe that, as members of the General Assembly, their positions as expressed herein will be useful and valuable to this Court in resolving the important issues raised in the above-captioned action.

SUMMARY OF ARGUMENT

Regulatory agencies are statutory creatures that, by the grace of the General Assembly, may promulgate and enforce regulations within their delegated sphere of authority. The constitutionality of this regime – lawmaking by unelected agency officials – is premised, among others, on the fact that an agency cannot take actions that are preempted by the General Assembly or outside of the scope of their

¹ A full list of *Amici* is attached hereto as Exhibit A.

² Del. Const. art. XIV, § 1.

delegated authority. The statutory boundary of an agency's authority is particularly important where the regulated conduct implicates, and criminalizes, express constitutional rights. These are not empty platitudes, but rather, necessary edicts to be followed to ensure the constitutional exercise of legislative power. Thus, when an agency promulgates regulations in violation of either of these edicts, those regulations must be struck down.

That is what has occurred in this case. The Delaware Department of Natural Resources and Environmental Control ("DNREC") and the Delaware Department of Agriculture ("DOA") (DNREC and DOA collectively, with their respective Secretaries, the "Agencies") have overstepped their mandate by issuing and enforcing regulations³ that state law preempts and that are outside of the scope of authority the General Assembly delegated to them. Indeed, the Agencies can point to no statute granting them the authority that they purport to wield – prohibiting the possession of firearms in State Parks, effectively impermissibly prohibiting and criminalizing constitutionally and statutorily protected conduct. The Superior Court's opinion should be reversed.

³ Specifically, 7 *Del. Admin. Code* § 9201-21.1 and 3 *Del. Admin. Code* § 402-8.8 (collectively, the "Regulations").

ARGUMENT

I. ARTICLE I, SECTION 20 OF THE DELAWARE CONSTITUTION RECOGNIZES AND PROTECTS THE BROAD RIGHT OF DELAWARE CITIZENS TO BEAR ARMS OUTSIDE OF THE HOME

Article I, Section 20 of the Delaware Constitution (“Section 20”) recognizes and protects 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. This protection is broader even than that of the Second Amendment of the United States Constitution. *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 665 (Del. 2014) (“[o]n its face, [Section 20] is intentionally broader than the Second Amendment”). Significantly, the protections under Section 20 “are not limited to the home.” *Id.* Indeed, this Court has recognized “Delaware’s long tradition of allowing responsible, law-abiding citizens *to keep and bear arms outside of the home . . .*” *Id.* (emphasis added). The baseline, therefore, is that responsible, law-abiding citizens are permitted to bear arms outside of the home. This fundamental right may be curtailed only if the State can show that its regulatory action serves “important governmental objectives” and is “substantially related to the achievement” of those objectives. *Id.* at 666 (internal alteration omitted).

II. THE GENERAL ASSEMBLY HAS PREEMPTED THE AGENCIES FROM REGULATING FIREARMS

The General Assembly has legislated a comprehensive statutory scheme regarding firearms, the objective of which is to strike a balance between recognizing the fundamental right protected by Section 20 and assuring the safe and responsible practice of that right. To that end, the General Assembly has regulated the when, who, and how of possessing a firearm.⁴

The intent to make a statute exclusive of any regulation may be express or implied. *Cantina v. Fontana*, 884 A.2d 468, 473–74 (Del. 2005) (internal quotation marks and citations omitted). This Court has explained that “[e]xpress exclusivity intent exists where the statutory text or legislative history explicitly provides or demonstrates that the state statute is intended to replace or prevail over any pre-existing laws or ordinances that govern the same subject matter.” *Id.* Whereas implied exclusivity “may be found where the two regulations are inconsistent; for example, where a state statute prohibits an act that is permitted by a local ordinance. To be inconsistent by implication, however, the local ordinance must hinder the objectives of the state statute.” *Id.*

⁴ See Appellant’s Opening Brief, at pp. 21-22, 30 & 34, n.25 (citing Delaware’s comprehensive statutory scheme regarding firearms).

In analyzing this issue, the Superior Court misinterpreted the existence of the express preemptions in statutes prohibiting counties and municipalities from enacting laws or regulations relating to firearms.⁵ Specifically, the court posited that had the General Assembly wanted to include the Agencies in a similar express prohibition, “it would have been able to do so” *Bridgeville*, 2016 WL 7428412, at *6. That hypothesis, however, improperly conflates administrative agencies with “separate and distinct” local governments.⁶ *Id.* Indeed, as a creature of the State, an agency may only act within the confines of the legislative act creating it. *See Diamond State Liquors v. Delaware Liquor Comm’n*, 75 A.2d 248, 253 (Del. Gen. Sess. 1950). Expressly preempting an administrative agency from engaging in acts that it never had authority to conduct is, of course, unnecessary.⁷

⁵ *See Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 2016 WL 7428412, at *6 (Del. Super. Dec. 23, 2016) (“*Bridgeville*”) (referring to and discussing 22 *Del. C.* § 111 (relating to municipal governments) and 9 *Del. C.* § 330(c) (relating to county governments)). The Superior Court also misinterpreted the terms “laws of any state” as a basis for finding that no comprehensive scheme existed. *Id.* (addressing 11 *Del. C.* §§ 1441A, 1441B). The court, however, neglected to note that the language it relied upon was merely copied directly from federal law as part of Delaware’s adoption of that law. *See* 18 U.S.C. §§ 926B, 926C.

⁶ The Superior Court expressly recognized the distinction between local governments and state agencies, yet conflated them all the same. *Id.* (noting that the Agencies “are, in fact, arms of the State and not separate and distinct legal entities”).

⁷ The General Assembly recognizes that agencies can be impliedly granted authority under certain circumstances; however, any implied grant of power must still remain within the confines of the enabling legislation and should be narrowly

A contrary rule would obligate the General Assembly to engage in the wasteful expenditure of time and resources in order to legislate express preemptions, in addition to the enabling legislation, for all of its agencies. Thus, there is no need for an express statute preempting the Agencies' Regulations where, as detailed below, the General Assembly never delegated that authority in the first place.⁸

The extensive statutory scheme regulating firearms also impliedly preempts the Regulations. *See, e.g., Shea v. Matassa*, 918 A.2d 1090, 1092 (Del. 2007) (the General Assembly “clearly announced its intent to occupy exclusively the field of policy making in that subject area” when it regulated that area heavily); *see also Gebrekidan v. City of Clarkston*, 784 S.E.2d 373, 376–77 (Ga. 2016) (“the General Assembly speaks through its silence as well as its words; the broad scope and reticulated nature of the statutory scheme indicate that the legislature meant not only to preclude local regulation of the various particular matters to which the general law directly speaks, *but also to leave unregulated by local law the matters*

recognized, particularly if the exercise of that implied power results in the criminalization of otherwise constitutionally and statutorily protected conduct.

⁸ Contrast, the narrow grant of authority to the Agencies with, for example, the broad grant of authority to the Town of Dewey Beach to exercise “all powers which, under the Constitution of the State of Delaware, it would be competent for this Charter to specifically enumerate.” *Jimmy's Grille of Dewey Beach, LLC v. Town of Dewey Beach*, 2013 WL 6667377, at *5 (Del. Ch. Dec. 17, 2013) (internal alteration omitted).

left unregulated in the interstices of the general law.”) (emphasis added). Indeed, the General Assembly has legislated comprehensive statutes detailing the when, how, and who may possess and carry a firearm, concealed or otherwise, of which, the Regulations are in direct conflict. While comprehensive, the legislation strikes an important balance between protecting the right to bear arms⁹ and the need for reasonable restrictions and obligations to be imposed on citizens in exercising that right. Under the broad statutory scheme, Delaware provides, among others, the sole, extensive, and explicit circumstances under which an individual may be permitted to carry a concealed deadly weapon.¹⁰ Indeed, pursuant to Sections 1441 and 1448 of Title 11, lawfully licensed individuals are broadly permitted to carry a concealed firearm for their personal protection. The General Assembly, however, has also legislated express restrictions on when and where an individual may possess a firearm, concealed or otherwise. For example, Section 1457 of Title 11 lists where individuals, even those with licenses to carry concealed firearms, are

⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (“it is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense.”) (internal alteration omitted); *Doe*, 88 A.3d at 665.

¹⁰ See 11 *Del. C.* §§ 1441, 1442, 1448. Delaware also maintains many other restrictions regarding the right of its citizens to keep and bear arms. See, e.g., 11 *Del. C.* § 1457 (prohibiting possession of a firearm in a Safe School and Recreation Zone); 24 *Del. C.* § 903 (prohibiting certain sales); 11 *Del. C.* § 1444 (restriction on sale, use, and possession of certain firearms).

prohibited from possessing a firearm. Those locations are explicitly defined in the statute to include “any building, structure, athletic field, sports stadium or real property owned . . . by any public or private school. . . .” (11 *Del. C.* § 1457(c)(1)) and “[a]ny building or structure owned . . . by any county or municipality, or by the State, or by any board, agency, commission, department, corporation or other entity thereof, or by any private organization, which is utilized as a recreation center, athletic field or sports stadium” (§ 1457(c)(3)). Accordingly, Section 1457, when read with Section 1441 and Section 20, demonstrates the General Assembly’s objective of providing a narrow set of explicit locations where a responsible, law-abiding individual may not exercise their constitutional and statutory rights to bear arms.

Significant in this narrow set of locations is that, as recognized by the court below, “the General Assembly is capable of drafting, and enacting, language” regarding the regulations on firearm possession. *Bridgeville*, 2016 WL 7428412, at *6; *see also Univ. of Delaware v. New Castle Cty. Dep’t of Fin.*, 891 A.2d 202, 206 (Del. Super. Feb. 1, 2006), *aff’d*, 903 A.2d 323 (Del. 2006) (had the General Assembly wanted to include language in an amendment to the Constitution, it easily could have). Notably absent from Section 1457 is any mention of parks. That is, of course, because the General Assembly easily could have, but chose not to, include parks in the locations that citizens are prohibited from possessing

firearms.¹¹ *Pot-Nets Coveside Homeowners Ass’n v. Tunnell Companies, L.P.* provides a useful illustration outside of the politically charged realm of firearms. 2015 WL 3430089, at *3 (Del. Super. May 26, 2015). There, it was acknowledged that the Superior Court’s jurisdiction could be expanded or contracted by the General Assembly and, like the broad baseline of Section 20, “absent a statute to the contrary . . . it is presumed [the] Superior Court has jurisdiction to hear any dispute of law.” *Id.* However, if the General Assembly “expressly assigns [the] Superior Court jurisdiction over a particular case or controversy, ***but is silent as to others*** arising from the very same statute, it would appear, based on the maxim of *expressio unis est exclusio alterius*, ***the General Assembly ‘was aware of the omission and intended it.’***” *Id.* (emphasis added). Significantly, the “Superior Court does not have jurisdiction over matters not expressed in a legislative act *when such act specifically states what issues the Court may address.*” *Id.* (emphasis added). Here, by not including parks in the express prohibition of Section 1457, the General Assembly deemed parks, along with all other locations

¹¹ The court below, however, ignored this principle in the legislative context – ignoring the omission of Section 1457 – in favor of applying the same principle to allow an impermissible expansion of the Agencies’ delegated authority – finding significance in the absence of an express preemption similar to Section 111 of Title 22. *See Bridgeville*, 2016 WL 7428412, at *6 (assuming that the General Assembly could have enacted legislation similar to 22 *Del. C.* § 111 and 9 *Del. C.* § 330(c)).

not specifically addressed therein, to be among the locations that the safe and lawful possession of a firearm was appropriate (*i.e.*, the baseline of Section 20 applies). *Id.*; *see also Terex Corporation v. Southern Track & Pump, Inc.*, 117 A.3d 537, 547 (Del. 2015) (because a statute was “silent as to how to price inventory that is not ‘new, unused, undamaged, and complete,’ it is logical to infer that the General Assembly did not intend for such inventory to be included in the repurchase requirement” of that statute). Thus, when considering the statutory scheme in light of the rights Section 20 protects, the General Assembly’s legislation preempts the field.

Moreover, where a statute and regulation conflict, the statute “must always prevail.” *Cantinca*, 884 A.2d at 473; *see also State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d 128, 135 (Ohio 2015) (it is a classic conflict where a “local ordinance restricts an activity which a state license permits”). Even assuming that the Agencies hold the authority to regulate in this area, which, for the reasons discussed below they do not, the Agencies’ conduct is not parallel with the General Assembly’s statutory scheme, but rather, directly contrary to both the constitutional and statutory rights of Delaware citizens.¹² The right to bear arms is

¹² *Doe*, 88 A.3d at 665-66 (detailing the recognition and protection of rights under Section 20).

a natural right, which extends beyond the home.¹³ The baseline, therefore, is the right of responsible, law-abiding individuals to bear arms, including locations outside the home. That broad right, while limited to a degree by the reasonable legislation of the General Assembly, is otherwise permitted by the statutory scheme. As discussed, with the exception of certain locations, the General Assembly permits lawful individuals to possess firearms throughout Delaware. Rather than conform to this statutory scheme, the Regulations *criminalize* what otherwise would be lawful conduct. *See State v. Retowski*, 175 A. 325, 328 (Gen. Sess. 1934) (if “the paramount necessity exists to denounce acts done every day by innocent citizens as criminal offenses, that necessity ***should be expressly declared by the legislature, and not by a rule adopted and promulgated under a power given to make administrative rules***”) (emphasis added). The Regulations, therefore, expressly prohibit what Section 1441, and Section 20, would otherwise permit. *See State ex rel. Morrison*, 37 N.E.3d at 135. There cannot, therefore, be any serious dispute that the Regulations conflict with the Section 20’s and General Assembly’s protection and regulation of the right to lawfully possess firearms. Therefore, the Regulation “must yield.”¹⁴ *Univ. of Delaware*, 891 A.2d at 206.

¹³ *See Heller*, 554 U.S. at 594; *Doe*, 88 A.3d at 665.

¹⁴ This standard recognizes the different footing an agency has with the General Assembly. For example, when faced with competing statutes, this Court has long required that courts harmonize the legislation when possible. *See Hamilton v.*

III. THE AGENCIES' REGULATIONS ARE BEYOND THE SCOPE OF THEIR DELEGATED AUTHORITY

Administrative agencies are statutory creatures that exist only through the General Assembly's power and discretion to delegate. The power to delegate is based on "necessity brought about by the increasing demands made upon legislative bodies by the growing complexity of human activities." *Retowski*, 175 A. at 326 (recognizing that "there are many things necessary to wise and useful legislation which cannot be known to the legislature and, therefore, must be determined outside the legislative hall").¹⁵ The General Assembly may, "in enacting a law . . . expressly authorize an administrative body, *within definite limits*, to provide rules and regulations for the complete operation and enforcement of the law within its express general purpose." *Id.* (emphasis added). It is, therefore, well-settled that "[a]dministrators should not have unguided and uncontrolled discretionary power to govern as they see fit." *Atlantis I Condo. Ass'n v. Bryson*, 403 A.2d 711, 713 (Del. 1979); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[i]t is axiomatic that an administrative

State, 285 A.2d 807, 809 (Del. 1971). Conflicts arising from a regulatory action, however, are not afforded similar deference.

¹⁵ Notably, the expertise of an agency that would otherwise justify the delegation of authority does not apply here. First, the General Assembly, as discussed, affirmatively regulates firearms, undercutting any need for agency expertise, and second, the Agencies' expertise is in forestry, among others, but not in firearms.

agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); *Retowski*, 175 A. at 327 (“[i]mplied authority . . . to repeal, extend or modify a law may not lawfully be inferred from authority to enforce it”); *Bd. of Assessment Review of New Castle Cty. v. Silverbrook Cemetery Co.*, 378 A.2d 619, 622 (Del. 1977) (explaining that the “delegation of [the power to repeal statutes] by a senior legislative body to a junior legislative body is too rare to be founded upon implication.”).

Because administrative agencies are creatures of limited power, when an agency acts outside of its delegated scope of authority, that action is void. *See New Castle Cnty. Council v. BC Dev. Associates*, 567 A.2d 1271, 1275 (Del. 1989) (it is “axiomatic that delegated power may be exercised only in accordance with the terms of its delegation”); *Cartanza v. Delaware Dept. of Natural Resources and Environmental Control*, 2008 WL 4682653, at *8 (Del. Ch. Oct. 10, 2008) (where DNREC exceeded the authority delegated to it, its actions were void); *State v. Amalfitano*, 1993 WL 603340, at *4 (Del. Super. Apr. 5, 1993) (“An administrative agency may not exercise power which exceeds that granted by the legislation from which it arose”); *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 742 (Del. Super. 1962) (citations omitted) (agency's actions will not be sustained if its actions are not justified under the statute creating the agency). This is not an empty platitude, but rather, a necessary edict to follow to ensure that

unelected agency officials do not impermissibly infringe on the rights of individuals.

Here, DNREC has been delegated the authority to carry out only specific enumerated acts¹⁶ and the ability to “[m]ake and enforce regulations relating to the protection, care and use of the areas it administers” – nowhere in that mandate is the express or implied authority to regulate firearms.¹⁷ 7 *Del. C.* § 4701(a)(4); *see also* 29 *Del. C.* §§ 8001, 8003. DOA likewise is delegated the authority for only certain enumerated conduct. *See* 3 *Del. C.* § 101. For the purposes of this action, DOA was granted authority specific to the “direction of all forest interests and all matters pertaining to forestry and woodlands within the State.” 3 *Del. C.* § 1011. Like the enabling legislation for DNREC, the authority to regulate firearms cannot be found in the legislation that created DOA. Of course, no need for delegation

¹⁶ For example, the right to “[s]elect and acquire . . . such lands as are desirable to be utilized chiefly for recreation, and to develop and maintain such areas” and “[e]stablish and collect such user charges, which shall approximate and reasonably reflect all costs necessary to defray the expenses of the Department for the use of the facilities and services it provides in areas it administers.” *See* 7 *Del. C.* §§ 4701(a)(1), (5)(A).

¹⁷ Notably, the Agencies have themselves recognized the narrow scope of their authority. For example, DNREC specifically recognizes that it may “adopt *only those minimal Rules and Regulations that are essential* to the protection of Park resources and improvements thereto and to the safety, protection and general welfare of the visitors and personnel on properties under its jurisdiction.” 7 *Del. Admin. C.* § 9201-2.1 (emphasis added). The Regulations are neither minimal nor essential to DNREC’s duties.

exists because the possession and use of firearms is already extensively governed by a comprehensive statutory scheme.

In addition to limiting the areas that the Agencies could regulate by specifically enumerating the Agencies' authority, the General Assembly proactively curtailed the regulatory power of the Agencies. Specifically, the General Assembly prohibited the Agencies from promulgating regulations that would "extend, modify or conflict with any law of [Delaware] or the reasonable implications thereof." *See 3 Del. C. § 101(3); 7 Del. C. § 6010(a)*. By regulating and criminalizing conduct that otherwise would be permissible – and even licensed in the case of concealed carrying of a firearm – the Regulations conflict with the statutory scheme adopted by the General Assembly and the Agencies impermissibly modified and extended that statutory scheme.

The Regulations raise another important and concerning issue. It has been long recognized that when criminal liability attaches to an administrative regulation, special care must be taken to ensure that the agency action "falls within the scope of the authority conferred." *Retowski*, 175 A. at 327. Indeed, this Court holds an important role in ensuring that should "necessity exist[] to denounce acts done by every day innocent citizens as criminal acts, ***that necessity should be expressly declared by the legislature.***" *Id.* (emphasis added). No necessity was expressly declared by the General Assembly in the enabling statutes of the

Agencies. Rather, the Agencies criminalize what otherwise would be permissible and lawful activity. *See Univ. of Delaware*, 891 A.2d at 202 (explaining that an inferior legislative body cannot impose restrictions that result in the forfeiture of rights expressly conferred in a state statute). Indeed, the Regulations would subject otherwise lawful citizens to arrest, fines, and even potential imprisonment.¹⁸ The Court should therefore give close scrutiny to the Regulations and, for the reasons discussed, find that they are outside of the scope of authority delegated to the Agencies.¹⁹

A final, but significant issue, is that because the right to bear arms is a natural right recognized and protected by Section 20, absent an *express* delegation of authority, the General Assembly is the proper body to regulate firearms, not unelected members of administrative agencies. *See Ortiz v. Commonwealth*, 681

¹⁸ *See 7 Del. C. § 4702, 7 Del. Admin. Code § 9201-25* (stating fines and imprisonment for unclassified misdemeanors); *3 Del. Admin. Code 402-10* (detailing potential fines). While *Amici* recognize that the Agencies are permitted to enforce violations of their regulations, those regulations must be created within the bounds of the Agencies' scope of authority. A contrary result would allow for the unguided and uncontrolled criminalization of lawful behavior by unelected officials.

¹⁹ While the General Assembly assumes that the Agencies acted with good intentions, they may not adopt regulations outside of the scope of their delegated authority or contrary to statutory law. *See Cartanza*, 2008 WL 4682653, at *8 (holding that where DNREC exceeded its authority delegated to it, its actions were void).

A.2d 152, 156 (Pa. 1996) (constitutional right to bear arms is a matter of “statewide concern,” and therefore, “the General Assembly, not city councils, is the proper forum for the imposition of such regulation”).

CONCLUSION

For the reasons given above, *Amici* respectfully submit that the General Assembly’s legislation preempts the challenged Regulations and the Agencies’ actions are beyond the scope of their authority. The Superior Court’s opinion should be reversed.

Respectfully submitted,

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