



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
RDN; ROGER T. BOYCE, SR.; and the
DELAWARE STATE SPORTSMEN'S
ASSOCIATION,

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.

No. 15, 2017

Appeal from the Superior Court
of the State of Delaware
C.A. No. S16C-06-018 THG

APPELLANTS' AMENDED OPENING BRIEF

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NATURE OF PROCEEDINGS

This case challenges an unlawful ban on the exercise of a fundamental right safeguarded by the Delaware Constitution. Plaintiffs Below/Appellants¹ (the “Sportsmen”) initiated this matter to seek a preliminary injunction to prohibit Defendants Below/Appellees² (collectively the “Agencies”) from enforcing regulations that unconstitutionally proscribe the Sportsmen’s right to keep and bear arms for defense of self, family, and home, as well as for hunting and recreation pursuant to Article I, Section 20 of the Delaware Constitution.

Specifically, the Delaware Department of Natural Resources and Environmental Control (“DNREC”), prohibits the possession of firearms in State Parks.³ *See 7 Del. Admin. C. § 9201-21, ¶ 21.1.* Similarly, the Delaware Department of Agriculture (“DOA”), prohibits firearms on State Forest lands, with a narrow

¹ Plaintiffs Below/Appellants include Bridgeville Rifle & Pistol Club, Ltd.; Mark Hester; John R. Sylvester; Marshall Kenneth Watkins; Barbara Boyce, DHSc, RDN; Roger T. Boyce, Sr.; and the Delaware State Sportsmen’s Association.

² Defendants Below/Appellees include David Small, Secretary of the Delaware Department of Natural Resources and Environmental Control; the Delaware Department of Natural Resources and Environmental Control; Ed Kee, Secretary of the Delaware Department of Agriculture; and the Delaware Department of Agriculture.

³ This ban covers expensive cabins that can be rented at State Parks for weeks at a time to house families.

exception for limited hunting. 3 *Del. Admin. C.* § 402-8.0, ¶ 8.8. The DNREC and DOA regulations at issue are collectively referred to as the “Regulations.”

In enacting the Regulations, the Agencies trifle with the right to self-defense, which the United States Supreme Court has recognized to be so fundamental that the United States Constitution did not actually grant it; rather, the United States Supreme Court recognized that the right to self-defense, which is at the core of the right to bear arms, was a pre-existing right granted at birth.⁴ *See District of Columbia v. Heller*, 554 U.S. 570, 594 (2008). This fundamental constitutional right is also enshrined in Article I, Section 20 of the Delaware Constitution, which this Court rejuvenated in a unanimous *en banc* opinion, as Delaware’s broader version of the Second Amendment of the United States Constitution. *See Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014).

On June 10, 2016, the Sportsmen filed a complaint for declaratory relief in the Delaware Superior Court, alleging that the Regulations are unconstitutional. (A005–

⁴ The Agencies can accurately be described as opposing the Sportsmen’s civil rights. Federal courts have recognized that the right to bear arms is a basic civil right. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2600 (2012) (“protected civil rights, such as the right to bear arms or vote in elections.”); *DuPont v. Nashua Police Dept.*, 113 A.3d 239, 247 (N.H. 2015), *cert. denied*, 133 S.Ct. 533 (2015) (“Second Amendment right to keep and bear arms is a civil right”). Plaintiff Below/Appellant Delaware State Sportsmen’s Association has been Delaware’s affiliate of the National Rifle Association since 1968. *See* www.dssa.us (last visited February 22, 2017). The National Rifle Association is America’s longest-standing civil rights group, founded in 1871. *See* <https://home.nra.org/about-the-nra/> (last visited February 22, 2017).

A021).⁵ In initiating this matter, the Sportsmen sought to vindicate their fundamental, constitutionally guaranteed rights to keep and bear arms without fear of arrest or fines, within the confines of the existing limitations contained within the comprehensive statutory framework imposed by the Legislature, which already restricts those rights statewide.⁶

Both parties filed cross-motions for judgment on the pleadings. (A027–A192). The Sportsmen raised three core issues:

- Whether the Regulations, which ban firearms in State Parks and Forests, violate Article I, Section 20 of the Delaware Constitution.
- Whether the Regulations are preempted: (1) explicitly by their direct conflict with State law; (2) implicitly by the Legislature’s express ban on the regulation of firearms by counties and municipalities; or (3) implicitly by the comprehensive regulatory scheme enacted by the Legislature.

⁵ This action was originally brought in the Delaware Court of Chancery to seek a preliminary injunction, but that court dismissed the case without prejudice for lack of equitable jurisdiction. (A021–A023).

⁶ The comprehensive restrictions imposed by the Legislature on the right to keep and to bear arms are not at issue in this matter. They provide existing limits on the use of firearms in State Parks and Forests. *See* 24 *Del. C.* §§ 901, 902, 903, 904, 904A, 905; 11 *Del. C.* §§ 1441, 1441A, 1442, 1444, 1448, 1448A. As the foregoing statutes demonstrate, it is not correct, as the Agencies assert, that the Sportsmen “seek the Court’s endorsement of an unlimited right to carry firearms of their choosing within State Parks and Forests at any time.” (A035). At issue is a complete abolition of the right to possess and carry arms in State Parks and Forests, both of which the Legislature already restricts.

- Whether Defendants exceeded their statutory authority in enacting the Regulations.

The trial court did not hear oral argument on the parties' cross-motions for judgment on the pleadings. However, both the Sportsmen and the Agencies supplemented the lower court record, in response to the trial court's inquiry, with additional information regarding the legislative history of the Regulations.⁷ (A194–A469).

On December 23, 2016, the trial court denied the Sportsmen's Motion for Judgment on the Pleadings, and granted the Agencies' counter-motion. *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 2016 WL 7428412 (Del. Super. Ct. Dec. 23, 2016) (Ex. 1). The trial court wrongly determined that: (1) the Regulations do not violate Article I, Section 20 of the Delaware Constitution; (2) Delaware law does not

⁷ The lower court incorrectly quoted the Sportsmen in their description of the legislative history of the Regulations at issue. The Sportsmen's submission to the trial court stated that: "Our understanding of the historical changes to the relevant regulations is as follows:..." (A448). The lower court, however, attributed the following incomplete sentence to the Sportsmen: "[T]he historical changes to the relevant regulations is [sic] as follows:..." *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 2016 WL 7428412, at *2 (Del. Super. Ct. Dec. 23, 2016) (Ex. 1 at 2). The trial court did not make clear that by only quoting a fragment of the whole original sentence, it had altered the subject of the aforementioned sentence, but not the verb tense. The trial court wrongly inserted a "[sic]" notation, making it appear that the Sportsmen had used incorrect grammar in their submission to the trial court, when they had not.

preempt the Regulations; and (3) the Agencies did not exceed the statutory scope of their authority in enacting and enforcing the Regulations. (*Id.*).

The Sportsmen respectfully submit that the lower court's conclusions constitute legal error. Therefore, the Sportsmen respectfully request that this Court reverse the trial court's decision.

SUMMARY OF ARGUMENT

1. The Regulations, which ban the exercise of the right to keep and bear arms in State Parks and Forests, violate Article I, Section 20 of the Delaware Constitution (“Section 20”). Specifically, the Regulations are in direct opposition to the fundamental guarantee of 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. Neither Section 20 nor any statutory provisions regulating firearms prohibit the lawful possession of firearms within Delaware State Parks or State Forests.⁸ Importantly, the Delaware Supreme Court unanimously clarified in *Doe* that by its express terms Section 20 recognizes a right to bear arms outside of the home. 88 A.3d at 665 (“[T]he scope of the protections [that Article I, Section 20]

⁸ The geographical limitations on the lawful possession of firearms enacted by the Delaware General Assembly in Title 11 of the Delaware Code are discussed in 11 *Del. C.* § 1457 – Possession of a Weapon in a Safe School Zone. That statute does not apply here. Also, the General Assembly, at 22 *Del. C.* § 111, recently gave municipal governments, effective August 17, 2015, the limited and narrowly circumscribed power to adopt ordinances regulating the possession of firearms, ammunition, components of firearms, or explosives in police stations and municipal buildings. Section 111, however, states that “[a]n ordinance adopted by a municipal government shall not prevent the following in municipal buildings or police stations: “... (6) carrying firearms and ammunition by persons who hold a valid license pursuant to either § 1441 or § 1441A of Title 11 of this Code so long as the firearm remains concealed except for inadvertent display or for self-defense or defense of others....” Because the General Assembly specifically excluded from the allowable limitations in § 111 those persons properly authorized to carry concealed firearms pursuant to 11 *Del. C.* §§ 1441 or 1441A, this new statute does not support the Agencies’ arguments.

provides *are not limited to the home.*”) (emphasis added). The Court explained: “[T]he Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms *outside of the home*, including for hunting and recreation.” *Id.* (emphasis added).

2. Section 20 and State law preempt the Regulations. The Agencies—entities beneath the General Assembly in terms of legislative authority—are prohibited from adopting rules and regulations that “extend, modify, or conflict with any law of [the State of Delaware] or the reasonable implications thereof.” *See 7 Del. C. § 6010(a); 3 Del. C. § 101(3)*. Yet, the Regulations prohibiting the lawful possession of firearms within State Parks and Forest lands *conflict with, modify and extend existing laws* of the State of Delaware, specifically Section 20.

3. Moreover, the Agencies exceeded the limited authority granted to them by the Legislature in enacting the Regulations. The adoption of the challenged Regulations is outside the scope and powers conferred upon the Agencies by the General Assembly. Neither Agency has the authority to deprive Delaware residents or State Park and Forest visitors of firearms for lawful protection. DNREC, under § 6001 of Title 7 of the Delaware Code, has the power and authority to adopt regulations which best serve the interests of the public, consistent with reasonable and beneficial use of the State’s resources, and the adequate supplies of such resources for domestic, industrial, power, agricultural, recreational and other

beneficial use. *See also 7 Del. C. § 4701(a)(4)* (DNREC may “enforce regulations relating to the protection, care and use of the areas it administers...”). DOA has the similarly limited power to, *inter alia*, “devise and promulgate rules and regulations for the enforcement of state forestry laws and for the protection of forest lands....” *3 Del. C. § 1011*. The power to regulate the possession and carrying of firearms for self-defense or other constitutional purposes was never conferred upon or delegated to the Agencies by the Delaware General Assembly.

STATEMENT OF FACTS

The Sportsmen seek to enjoin the Agencies from continuing to breach fundamental constitutional rights, consecrated in the Delaware Constitution, by banning the Sportsmen, and others similarly situated, from exercising their right to lawfully possess and carry firearms in State Parks and State Forests.

The Parties

Plaintiff Below/Appellant Bridgeville Rifle & Pistol Club, Ltd. (“Bridgeville”) is a private organization based in Bridgeville, Delaware. (A005–A021, ¶ 1).

Plaintiff Below/Appellant Mark Hester is a member of Bridgeville, and resides in Kent County, Delaware. (*Id.* at ¶ 2). He is retired from the City of Dover Police Department, and holds a “surf fishing vehicle permit” pursuant to § 9201-9.0 of Chapter 7 of the Delaware Administrative Code, which allows him to fish at the Delaware State Park beaches.⁹ (*Id.* at ¶ 12). But for the Agencies’ Regulations, Hester would exercise his right to carry a concealed weapon at Delaware State Park beaches. (*Id.*).

Plaintiff Below/Appellant John R. Sylvester is a member of Bridgeville, participates in rifle shooting competitions, and but for the Agencies’ Regulations, he

⁹ The Complaint refers to § 9201-10.0, but the regulation regarding surf fishing licenses was subsequently changed, and is now found at § 9201-9.0.

would avail himself of camping facilities in State Parks or State Forests in Sussex County while attending competitions at Bridgeville that extend for more than one day. (*Id.* at ¶¶ 3, 13).

Plaintiff Below/Appellant Marshall Kenneth Watkins is a member of the Delaware State Sportsmen's Association, and he is licensed to carry a concealed deadly weapon in Delaware pursuant to § 1441 of Title 11 of the Delaware Code. (*Id.* at ¶¶ 4, 14).

Plaintiffs Below/Appellants Barbara Boyce and Roger Boyce are both members of the Delaware State Sportsmen's Association, and they are lawfully licensed to carry concealed firearms in the States of Delaware, Pennsylvania and Florida. (*Id.* at ¶¶ 5, 6, 15). The Boyces are avid bicyclists, and but for the Agencies' Regulations, they would exercise their rights to possess firearms while cycling in Delaware's State Parks and State Forests. (*Id.* at ¶ 15).

The Delaware State Sportsmen's Association is a statewide organization that promotes and protects the interests of gun owners in and around Delaware. (*Id.* at ¶¶ 7, 16).¹⁰

The Regulations

DNREC prohibits the possession of firearms upon any lands or waters

¹⁰ The lower court recognized that the individual Plaintiffs Below/Appellants are responsible gun owners. *See Bridgeville*, 2016 WL 7428412, at *5 (Ex. 1 at 4).

administered by the Division of Parks and Recreation of the Department of Natural Resources and Environmental Control. *See 7 Del. Admin C. § 9201-21.0, ¶ 21.1.* Specifically, the DNREC Regulation provides: “It shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots, or archery equipment upon lands or waters administered by the Division, except with prior written approval of the Director.”¹¹ *Id.* “Division” is defined at § 9201-1.0 as the “Division of Parks and Recreation of the Department of Natural Resources and Environmental Control.” *7 Del. Admin C. § 9201-1.0.*

Similarly, DOA prohibits the lawful possession of firearms within State Forest lands, except when being used for legal hunting purposes. *See 3 Del. Admin. C. § 402-8.0, ¶ 8.8.* (“Firearms are allowed for legal hunting only and are otherwise

¹¹ The lower court explained that the current DNREC regulation at issue is a total ban on firearms in State Parks:

When Plaintiffs filed their complaint in the Court of Chancery, this regulation read: “It shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division [of Parks and Recreation], except *by those persons lawfully hunting in those areas specifically designated for hunting by the Division, or those with prior written approval of the Director.*” The emphasized language was removed, effective April 1, 2016, and prior to Plaintiffs filing their complaint with this Court.

Bridgeville, 2016 WL 7428412, at *2 n.7 (Ex. 1 at 6). Although the trial court was correct that the italicized language was removed from the statute, the trial court’s explanation was not complete, as the italicized language was replaced with the following qualifier quoted herein: “except with prior written approval of the Director.”

prohibited on State Forest lands.”).

The Regulations, which prohibit the lawful possession of firearms, are in direct conflict with the Delaware Constitution, which extends the fundamental right to keep and bear arms for defense of self, home, and family, as well as for hunting and recreational use. DEL. CONST. art. I, § 20. But for the Regulations adopted by the Agencies, the Sportsmen would exercise their State constitutional rights to keep and bear firearms within Delaware State Parks and State Forests.

ARGUMENT

I. The Regulations, Which Ban the Exercise of the Right to Keep and Bear Arms in State Parks and Forests, Violate Article I, Section 20 of the Delaware Constitution

A. Question Presented

Whether the Regulations, which ban the exercise of the right to keep and bear arms in State Parks and Forests, violate Article I, Section 20 of the Delaware Constitution. This question regarding Section 20’s constitutionality was preserved, as it was presented to the trial court below. (Ex. 1; A138–A156).

B. Standard of Review

“Questions of law and constitutional claims are decided *de novo*.” *Doe*, 88 A.3d at 661; *see also Taylor v. Pontell*, 2010 WL 3432605, at *2 (Del. Jul. 13, 2010) (“Our review of the trial court’s grant of a motion for judgment on the pleadings presents a question of law which we review *de novo*.”). Therefore, this Court independently analyzes the legal issues decided by the trial court.

C. Merits of Argument

1. Legislative Background of Article I, Section 20

Pursuant to Section 20: “A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.” DEL. CONST. art. I, § 20. This constitutional imperative delineates both the rights to keep and to bear arms. Delaware has a long tradition of allowing responsible, law-abiding

citizens to keep and bear arms outside the home. *Doe*, 88 A.3d at 663.¹² The trial court recognized that the Sportsmen are responsible gun owners. *See Bridgeville*, 2016 WL 7428412, at *5 (Ex. 1 at 4).

Section 20 was added to the Delaware Constitution in 1987 to “explicitly protect[] the traditional lawful right to keep and bear arms.” H.B. 554, 133rd Gen. Assemb. (Del. 1986); H.B. 30, 134th Gen. Assemb. (Del. 1987) (A475–A476). At the founding of our State, “Delaware citizens understood that the ‘right of self-preservation’ permitted a citizen to ‘repe[] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Doe*, 88 A.3d at 663 (quoting *Heller*, 554 U.S. at 595). An individual’s right to bear arms was “understood to be an individual right protecting against both public and private violence.” *Id.* (quoting *Heller*, 554 U.S. at 594). “By including the right to keep and bear arms in the Delaware Constitution, the General Assembly has recognized this right as fundamental.” *Id.* at 664 (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973)).

¹² The *Doe* Court outlined Delaware’s long history, dating back to the Revolution, of allowing responsible citizens to carry and use firearms. Despite disagreement over the actual language of legislation, the *Doe* Court noted that even back in the 1700’s, there was an apparent consensus among the delegates on an individual’s right to bear arms for self-defense in Delaware. *See* 88 A.3d at 663–64 (citing Dan M. Peterson & Stephen P. Halbrook, *A Revolution in Second Amendment Law*, DEL. L., Winter 2011/2012, at 12, 15).

As the trial court recognized, “[o]n its face, [Section 20] is intentionally broader than the Second Amendment and protects the right to bear arms outside the home, including for hunting and recreation.” *Bridgeville*, 2016 WL 7428412, at *3 (quoting *Doe*, 88 A.3d at 665) (Ex. 1 at 3). “Section 20 specifically provides for the defense of self and family *in addition* to the home.” *Doe*, 88 A.3d at 665. (emphasis in original).

Although Section 20 provides greater rights than the Second Amendment, cases discussing the lesser protection provided by the Second Amendment may be instructive for historical purposes and for describing the *minimum* level of rights guaranteed. For example, the United States Supreme Court’s decision in *Heller* illuminates several important features of the right to bear arms as guaranteed by the Second Amendment, including that the right to bear arms, which recognizes at its core, the right to self-defense, is a natural right with which each person is born. 554 U.S. at 594 (“[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defen[s]e.”). Additionally, the United States Supreme Court recognized that the right to bear arms extends beyond the home, even if the need for defense of self and family is most “acute” inside the home. *See McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010) (citing *Heller*, 554 U.S. at 679); *see also Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (the Seventh Circuit reasoned: “Both *Heller* and *McDonald* do

say that ‘the need for defense of self, family, and property is *most* acute’ in the home, but that doesn’t mean it is not acute outside the home.”) (internal citation omitted) (emphasis in original)). Indeed, the Seventh Circuit interprets *Heller* to mean that the Second Amendment (which is more limited than Section 20) “‘guarantee[s] the individual right to possess and carry weapons [outside the home] in case of confrontation.’” *Moore*, 702 F.3d at 936 (quoting *Heller*, 554 U.S. at 592).

Although the Delaware Constitution provides for the fundamental right to keep and bear arms, DNREC’s Regulation is a *total* ban on firearm possession. *See* 7 *Del. Admin. C.* § 9201-21.0, ¶ 21.1.¹³ DOA’s Regulation similarly bans possessing and bearing firearms to protect one’s self, family, and home, notwithstanding a provision allowing firearms for a limited time during the year for hunting purposes only. *See* 3 *Del. Admin. C.* § 402-8.0, ¶ 8.8. Because the Regulations violate the fundamental right to possess and bear firearms for multiple purposes, the Regulations are unconstitutional.

2. The Agencies Cannot Meet Their Burden of Proof to Satisfy Intermediate Scrutiny Where They Infringe Upon—and Ban—a Fundamental Right.

Heightened scrutiny applies where, as here, the Regulations infringe upon a fundamental right. *Doe*, 88 A.3d at 666. Specifically, pursuant to *Doe*, intermediate

¹³ 7 *Del. Admin. C.* § 9201-21.0, ¶ 21.3 provides a limited exception to the total ban for hunting purposes only, similar to the unconstitutional DOA Regulation.

scrutiny applies to the Agencies' ban on the exercise of constitutional rights at issue in this case. *Id.* at 667.

To survive intermediate scrutiny, the Agencies must establish that the Regulations “serve important governmental objectives and [are] substantially related to [the] achievement of those objectives. [The Agencies] cannot burden the right more than is reasonably necessary to ensure that the asserted objective is met.” *Id.* at 666–67. Furthermore, because DNREC’s Regulation is a complete ban and, for most of the year, so too is DOA’s Regulation, the Agencies’ actions should be scrutinized more closely. *See Ezell v. City of Chicago*, 2017 WL 203542, at *3 (7th Cir. Jan. 18, 2017) (citing *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (“Severe burdens on the core right of armed defense require a very strong public-interest justification and a close means-end fit; lesser burdens, and burdens on activity lying closer to the margins of the right, are more easily justified”); *Bateman v. Berdue*, 881 F. Supp. 2d 709, 715 (E.D.N.C. 2012) (quoting *U.S. v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010)) (“A severe burden on the core Second Amendment right of armed self-defense should require strong justification.”).

The Agencies have the burden of showing that the Regulations are constitutional. *Doe*, 88 A.3d at 666. Although the Agencies continually assert that the Sportsmen have not conclusively proven that firearms are essential to self-defense, the Agencies incorrectly rely on an inverted understanding of the burden in

this case. (A035–A036, A049–A050, A068–A070, A101–A106, A114). The Sportsmen need not prove that the Regulations do not meet intermediate scrutiny; that burden rests solely with the Agencies. Thus, the Agencies must establish that the Regulations further their stated goals of increasing public safety, not the Sportsmen.¹⁴

The U.S. District Court for the Northern Mariana Islands recently explained: “Laws that eviscerate the right [to bear arms]—such as the handgun bans struck down in [the Supreme Court’s] *Heller I*¹⁵ and *McDonald*¹⁶ [opinions]—are irredeemable regardless of how compelling a state’s interest may be.” *Murphy v. Guerrero*, 2016 WL 5508998, at *5 (D.N. Mar. I. Sept. 28, 2016) (citing *Heller*, 554 U.S. at 636) (interpreting the Second Amendment and finding that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table”). Accordingly, onerous regulations, like those at issue, which ignore the right to bear arms in large open places, “[are] unconstitutional regardless of the level of scrutiny applied, and the Court must strike [them] down.” *See id.* at *21 (striking down

¹⁴ Moreover, the Agencies seek to rekindle a debate on public policy that was decided when Section 20 was adopted.

¹⁵ *District of Columbia v. Heller*, 554 U.S. 570 (2008)

¹⁶ *McDonald v. Chicago*, 561 U.S. 742 (2010).

complete ban on carrying firearm in transport, as the Second Amendment secures a right to self-defense in public).

In the present action, there is no dispute that public safety is an important governmental interest, but the Agencies cannot arbitrarily impose unlimited restrictions on fundamental liberties by invoking the talisman of public safety. Because the Regulations are not substantially related to protecting that interest, and nothing in the record supports the Agencies' burden, the Regulations are constitutionally infirm. That is, there is not a sufficiently close "means-end fit."

The Regulations go further than regulating mere use—they prohibit possession entirely. Therefore, as this Court recently ruled, the Agencies must show more than a "general safety concern." *Doe*, 88 A.3d at 667. Despite this Court's guidance, the Agencies offered nothing more than a "general safety concern" for their hope that State Parks and Forests are safer with a gun ban in place. *Cf. Moore*, 702 F.3d at 937 (citing Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 Am. J. Prev. Med. 40, 59 (2005) (identifying inconclusive correlation between firearms regulation and violence)).

In *Moore v. Madigan*, Judge Posner, relying on empirical data, found that laws prohibiting carrying guns outside the home had little impact on public safety in states (such as Delaware) that utilize a permit system for public carry. *Id.* at 938–39. Yet, the lower court in the instant action accepted—without analysis—the Agencies'

unsupported aspiration that the Regulations substantially further the goal of public safety.

In *Ezell v. City of Chicago*, the Seventh Circuit explained last month that the city provided no evidentiary support for its general claims that a ban on shooting ranges in Chicago would protect public safety. 2017 WL 203542, at *2 (7th Cir. Jan. 18, 2017). The city could not defend its regulations with “shoddy data or reasoning,” but rather the evidence must fairly support its rationale. *Id.* at *7. Thus, the city’s reliance on speculation or generalized assertions was not enough to carry its burden. *See generally id.*

A similar analysis was employed in *Murphy v. Guerrero*, where the court found that the Commonwealth’s firearm registration provision did not pass intermediate scrutiny. 2016 WL 5508998, at *9. Specifically, “the registration provision...[did] not prevent dangerous individuals from getting their hands on firearms or otherwise safeguard public safety, and so [it] [did] not further the Commonwealth’s stated goals” of public safety. *Id.*

Similarly, in this appeal, because there is no evidence in the record that the Regulations make State Parks and Forests safer, the Agencies have failed to meet their burden of establishing a substantial relationship between the Regulations and their stated goals. Because there is no basis to support an adequate means-end fit, the Agencies fail the test of intermediate scrutiny.

Moreover, the Agencies' assertions cannot be reconciled with existing Delaware law permitting both open carry and licensed concealed carry in public places throughout the majority of the State of Delaware. The Legislature has not found possession and carrying of firearms in a majority of the public space throughout the State to be a risk to public safety.

Why, then, would a law-abiding citizen carrying a firearm in a State Park or Forest present a safety concern, but would not present a safety concern in the majority of other public places around the State where the constitutional right to possess arms, and the natural right to self-defense, are respected? She would not.

Despite the Agencies' argument to the contrary, the Sportsmen are not asking for "unfettered," "unregulated" use of firearms, but instead, they seek to exercise the fundamental right to possess and carry firearms for protection of self, home, and family, subject to the existing comprehensive statutory scheme limiting their use. *Bridgeville*, 2016 WL 7428412, at *3, *5 (referring to the Agencies' incorrect allegation that the Sportsmen seek unregulated, unfettered use of firearms) (Ex. 1 at 2-4).

It remains illegal to improperly possess and use firearms anywhere in the State. *See Doe*, 88 A.3d at 667 n.59 (citing 11 *Del. C.* § 1444 (prohibiting the possession of a firearm silencer, sawed-off shotgun, machine gun, or any other firearm or weapon adaptable for use as a machine gun); § 1448 (prohibiting the

possession and purchase of deadly weapons by persons prohibited); § 1459 (prohibiting the possession of a weapon with an obliterated serial number)).¹⁷ The Sportsmen simply wish to exercise their fundamental right to bear arms within Delaware’s existing regulatory scheme.

While the Agencies allege that the Sportsmen are attempting to “pick and choose which laws governing firearms they wish to obey,” the Agencies are mistaken. (A107). As the Sportsmen have repeatedly underscored, they are not challenging the firearms-related statutes enacted by the General Assembly. Instead,

¹⁷ See also 24 *Del. C.* §§ 901, 902, 903, 904, 905 (regulating the sale of firearms) 24 *Del. C.* § 1321 (prohibiting security guards from carrying firearms without proper licensing); 9 *Del. C.* § 330 (prohibiting counties from regulating firearms); 22 *Del. C.* § 111 (prohibiting municipalities from regulating firearms); 11 *Del. C.* § 1441 (allowing retired police officers to be specially licensed to carry a concealed weapon following retirement); 11 *Del. C.* §§ 1441A, 1441B (extending federal law regarding retired law enforcement officers’ ability to carry concealed firearms); 11 *Del. C.* § 1442 (prohibiting a non-law enforcement officer to conceal any firearm without a license); 11 *Del. C.* § 1460 (prohibiting possession of a firearm in a public place while under the influence); 11 *Del. C.* § 602 (prohibiting display of a firearm with the intent to place another in fear of imminent physical injury); 11 *Del. C.* § 603 (prohibiting guardians from allowing possession or purchase of a firearm by a juvenile); 7 *Del. C.* § 1707 (prohibiting the training of hunting dogs while carrying a firearm); 10 *Del. C.* §§ 2703, 2806 (regulating the possession of firearms by constables); 10 *Del. C.* § 9224 (requiring drug testing for Justice of the Peace employees permitted to carry firearms); 10 *Del. C.* § 1045 (allowing court to order temporary relinquishment/ban on possession of firearms in connection with a protective order); 29 *Del. C.* § 9005 (requiring training for officers of Department of Services for Children, Youth and Their Families who carry firearms at work).

the Sportsmen object to the Regulations, which were not promulgated with the same legislative authority as the General Assembly has.

In an attempt to explain its conclusion that the Regulations are substantially related to protecting public safety, the lower court opined that “[t]o ban slingshots and archery but to allow firearms defies logic.” *See Bridgeville*, 2016 WL 7428412, at *5 (Ex. 1 at 4). That conclusion is not supported by sound constitutional analysis. The ban on those uncommon means of self-defense is irrelevant to the constitutional inquiry in this case. There is no fundamental right to possess slingshots and archery equipment under Section 20.¹⁸ Thus, a ban on slingshots and archery equipment does not form any appropriate part of a syllogism to support the violation of Section 20 by imposing a ban on firearms.

¹⁸ Courts have interpreted “arms” for constitutional purposes as limited to those that would be used in civilized warfare or commonly for personal self-defense. *See Heller*, 554 U.S. at 624–25 (the term “arms” under the Second Amendment includes weapons “typically possessed by law-abiding citizens for lawful purposes,” and protection does not extend to uncommon weapons that are both dangerous and unusual); *Caetano v. Massachusetts*, 136 S.Ct. 1027, 2013 (2016) (Alito, J., concurring) (citing *Heller*, 554 U.S. at 625, 627) (same); *State v. Kessler*, 614 P.2d 94 (Or. 1980) (Oregon’s equivalent of the Second Amendment intends for “arms” to include the hand-carried weapons commonly used by individuals for personal defense). The leading law dictionary also defines the “right to bear arms” as “[t]he constitutional right of persons to own firearms.” BLACK’S LAW DICTIONARY, “Right to Bear Arms” (10th ed. 2014). Archery equipment and slingshots do not fit that definition.

Additionally, the lower court's unsupported assertion that there is no need for self-defense if no one is permitted to possess guns, assumes that criminals and unlawful gun owners will adhere to the Regulations. *See id.* The flaw in that position is demonstrated by the truism that criminals do not comply with the law.

More importantly, this Court in *Doe* rejected the lower court's view. This Court recognized that the fundamental right to bear arms entitles Delaware citizens to defend themselves without waiting for law enforcement, who may come too late, if at all. 88 A.3d at 663 (the right permits “a citizen to ‘repe[l] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’”) (quoting *Heller*, 554 U.S. at 594, 595)). Members of the United States Supreme Court reiterated the same reasoning in a recent concurring opinion. *See Caetano*, 136 S.Ct. at 1028–33 (recognizing the need for self-defense when law enforcement is unable to intervene).

The Regulations prevent citizens from defending themselves against criminals, for example, when renting a cabin to live with their families in State Parks during the summer. Those cabins are every bit analogous to a home, however short-lived, in which residents have a right to protect themselves from intruders.

In *Doe*, a ban on firearms in common areas of public housing, such as outdoor lawns and parking lots, as well as lobbies and laundry rooms, was ruled by this Court to be an unconstitutional infringement on the right to possess and bear arms. 88

A.3d at 657–58. Lawful possession of a firearm in one’s home was conceded in *Doe*. *See id.* at 667 (the alleged safety concerns also exist in the “interior locations [of apartments] where the WHA concedes it cannot restrict the possession of firearms for self-defense”). The fundamental right to protect one’s self and family in and around one’s home remains important regarding the State Park cabins and related dwellings available for individuals and families to rent and reside in for a substantial weekly fee.¹⁹ Just as the State provides temporary housing in State Parks, the government also provided the housing involved in this Court’s *Doe* decision, which struck down similar regulations that violated Section 20.²⁰ *See id.* at 658–59. The same result should be reached here due to the availability of home-like rental cabins, tents, and yurts in State Parks.

¹⁹ A cottage for a week during the peak period at the Delaware Seashore State Park costs \$1,900. *See Cottages at Indian River Marina*, DELAWARE STATE PARKS, <http://www.destateparks.com/camping/cottages/rates.asp> (last visited February 21, 2017). Those high-priced temporary homes likely exceed the cost of apartments provided by the housing authority in *Doe*, which cannot be subject to a ban on firearms. *See Doe*, 88 A.3d at 668–69; *see also Camping, Cabins & Cottages*, DELAWARE STATE PARKS, <http://www.destateparks.com/camping/index.asp> (last visited February 21, 2017). The required minimum stay of one week in a cabin during peak season at Cape Henlopen State Park would cost a Delaware resident over \$800. *See Camping at Cape Henlopen*, DELAWARE STATE PARKS, <http://www.destateparks.com/camping/cape-henlopen/index.asp> (last visited February 21, 2017).

²⁰ The regulation struck down by this Court in *Doe* provided that residents and their guests: “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.” 88 A.3d at 659.

The Agencies argue that cabins, yurts, and camping sites, where individuals and families may sleep and reside, are not akin to homes because visitors are subject to rules and regulations that govern the State Parks during their stay. This argument fails to recognize that any renter, including those in *Doe* who live in public housing, is subject to the rules and restrictions imposed by his or her landlord. Yet, as in *Doe*, that the Agencies are acting as landlords does not mean that they are entitled to restrict the fundamental right to keep and bear arms for defense of self, home, and family. *See* 88 A.3d at 668.²¹

To the contrary, based on *Doe*, the now-settled Delaware law is that a ban on the right to keep and bear arms in government-provided housing and related common

²¹ This Court explained in *Doe*:

Nor is the [regulation at issue] sustainable under intermediate scrutiny because the WHA owns the property and is a landlord. WHA contends that it is acting as a landlord and not as a sovereign. We recognize that where the government is a proprietor or employer, it has a legitimate interest in controlling unsafe or disruptive behavior on its property. But WHA has conceded that after *McDonald*, as a landlord it may not adopt a total ban of firearms. Thus, occupying the status of government landlord, alone and without more, does not control. How the property is used must also be considered. Public housing is “a home as well as a government building....The individual’s need for defense of self, family, and home in an apartment building is the same whether the property is owned privately or by the government.

88 A.3d at 668 (internal quotations and citations omitted).

areas violates Section 20. *See id.* The mere incantation of the words “public safety” does not cure constitutional infirmity.

The right to bear arms includes, at its core, the right to self-defense. *See Heller*, 554 U.S. at 594. *Heller* established the Second Amendment’s “guarantee” of “the individual right to possess and carry weapons in case of confrontation,” which extends to “self-defense and hunting.” *Id.* at 592, 599. The need for self-defense certainly exists in State Parks and Forests where individuals and families may stay and sleep in expensive cabins, or camp, hike, and hunt in the presence of undomesticated animals and, potentially, criminals. The Agencies cannot justify their efforts to make the Sportsmen helpless to protect their families.

Some hypothetical firearm regulations could pass muster in some cases, such as a measured prohibition in offices where government employees work and conduct government business. *See Doe*, 88 A.3d at 668–69. That is not the case here.

State Parks and Forests do not equate to government office settings. State Parks and Forests are made up of vast open spaces and roads. “Sensitive areas,” such as courts and post offices, are confined, easily controlled discrete areas. Parks are sprawling and open to wildlife and others through more than one single entry. In fact, DNREC “manages nearly 100,000 acres of lands for outdoor recreation, fish and wildlife habitat. Those lands hold hundreds of buildings,...[and] nearly 500

miles of roads and trails....” David Small, *Finding a Fair Balance Is Not Easily Done*, THE NEWS J., May 28, 2016, at 9A (A471).²²

Although the Legislature can ban firearms in “sensitive places” and some government buildings, the sprawling landscape of State Parks and Forests are not “sensitive areas,” nor are they areas where conventional government business is conducted. *See Moore*, 702 F.3d at 947–48. If State Parks and Forests are “sensitive areas” for purposes of Section 20, then every outdoor space could be mislabeled as a “sensitive area.”

This Court observed in *Doe* that typical government business is not conducted in the common areas of public housing projects where the government’s services include providing housing and maintaining the grounds and buildings for the residents. 88 A.3d at 669. Just as in *Doe*, where the government’s activities included cutting the grass and providing a home for families, the Agencies provide temporary seasonal housing, as well as landscaping services that are typically provided by the private sector. *Id.* at 668.

²² As detailed in the briefing submitted to the trial court below, the Sportsmen explained that according to a 2010 State report:

Delaware had only 21 park rangers to cover the entire state. When compared to the number of state troopers statewide, 679, and the expanse of State Parks and Forests, visitors to State Parks and Forests cannot rely solely on assistance from the State in emergency situations. (A143) (citing OFFICE OF MGMT. & BUDGET STATISTICAL ANALYSIS CTR., DOC. No. 10-028 100302, CRIME IN DELAWARE 2003–2008 AN ANALYSIS OF DELAWARE CRIME (April 2010)) (A473–A474).

Because State Parks and Forests are not sensitive areas, and there is no evidence in the record to support that the Regulations substantially further the interests of public safety, the Agencies have failed to meet their burden to withstand intermediate scrutiny review.

II. Article I, Section 20 of the Delaware Constitution and State Law Preempt the Regulations

A. Question Presented

Whether the Regulations are preempted: (1) expressly, by their direct conflict with State law; (2) implicitly by the Legislature’s express ban on the regulation of firearms by counties and municipalities; or (3) implicitly by the comprehensive regulatory scheme enacted by the Legislature. The question of whether the Regulations are preempted was preserved, as it was presented to the trial court below. (Ex. 1; A157–A162).

B. Scope of Review

Questions of law and constitutional claims are decided *de novo*.” *Doe*, 88 A.3d at 661; *see also Taylor*, 2010 WL 3432605, at *2 (“Our review of the trial court’s grant of a motion for judgment on the pleadings presents a question of law which we review *de novo*.”). Therefore, this Court independently analyzes the legal issues decided by the trial court.

C. Merits of Argument

1. Delaware Law Expressly Preempts the Regulations

Express preemption occurs where the statute or legislative history provide that the statute is intended to prevail over laws or ordinances that govern the same subject matter. *Bridgeville*, 2016 WL 7428412, at *5 (quoting *Cantina v. Fontana*, 884 A.2d 468, 473–74 (Del. 2005)) (Ex. 1 at 5).

In enacting Section 20, the House intended to “explicitly protect[] the traditional lawful right to keep and bear arms.” H.B. 554, 133rd Gen. Assemb. (Del. 1986); H.B. 30, 134th Gen. Assemb. (Del. 1987) (A475–A476).²³

In furtherance of such intent, Delaware explicitly prohibits DNREC and DOA from adopting rules and regulations that “extend, modify, or conflict with any law of [the State of Delaware] or the reasonable implications thereof.” 7 *Del. C.* § 6010; 3 *Del. C.* § 101(3). The Regulations do just that.

The lower court relies upon a misapplication of *Florida Carry, Inc. v. University of Florida* in concluding there is no preemption in this case. *Bridgeville*, 2016 WL 7428412, at *7 (citing 180 So. 3d 137 (Fla. Dist. Ct. App. 2015)) (Ex. 1 at 5–6). That case is distinguishable. In *Florida Carry*, the court found that the Florida Legislature intended to prohibit firearms on university property, so the university’s ban on firearms in dormitories was consistent with that intent. 180 So. 3d at 144–45. Conversely, in the present action, the Delaware Legislature has never expressed

²³ Following Section 20, in Article I, is the statement: “WE DECLARE THAT EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED. DEL. CONST. art. I (end) (full capitalization in original). Justice Randy J. Holland has explained that:

The [quoted] reserve clause...appears literally to mean either that no change to the rest of the constitution which restricted an Article I right could be made without changing the altered portion of Article I or, more dramatically, that Article I could not be amended at all.

Randy J. Holland, *The Delaware Constitution of 1987: The First One Hundred Years* 79 n. 23 (1997) (A483–A484).

an intent to condone a total ban on the possession of arms in State Parks and Forests. State Parks and Forests are not like schools, universities, or similar “sensitive areas.” Therefore, because the Regulations “extend, modify, or conflict with” Section 20, in contravention of State law, the Regulations are preempted.

2. The Regulations are Implicitly Preempted by the Legislature’s Express Ban on the Regulation of Firearms by Counties and Municipalities

The General Assembly explicitly legislated that the municipal and county governments shall enact no law, ordinance, or regulation prohibiting the possession or transportation of firearms. 22 *Del. C.* § 111; 9 *Del. C.* § 330(c). Although the Agencies are not municipalities or county governments, because the specified governmental entities precluded from prohibiting the possession of firearms are beneath the Legislature, it remains reasonable to conclude that other governmental subdivisions with less legislative power or authority than the Legislature, and which are beneath the Legislature in terms of legislative authority and the governmental hierarchy, are precluded from the same actions. *See generally Christiana Care Health Servs. v. Palomino*, 74 A.3d 627, 632 (Del. 2013) (Delaware Department of Labor regulation conflicted with the Delaware Code, and therefore, it impermissibly abridged claimant’s right under the statute).

The Regulations do not stand on the same footing as legislation enacted by the General Assembly, and the Regulations do not constitute the “law of the state”

equal to a statute. *See id.* (finding that when a regulation and statute conflict, the statute must prevail). Thus, the State has evidenced an intent to preempt the contradictory Regulations.

The negative-implication canon of statutory construction known as the “expression of one thing implies the exclusion of others,” provides guidance in this case to the extent that an understanding of the canon clarifies when it does *not* apply. The Latin version of the canon is: *expressio unius est exclusio alterius*. The doctrine applies only when

the *unius*...can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved. Common sense often suggests when this is or is not so. The sign outside a restaurant “No Dogs Allowed” cannot be thought to mean that no other creatures are excluded—as if pet monkeys, potbellied pigs, and baby elephants might be quite welcome. Dogs are specifically addressed because they are the animals that customers are most likely to bring in....

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) (emphasis in original) (A483).²⁴

Likewise, in the instant appeal, the Legislature specifically excluded Delaware municipal authorities and counties from regulating firearms. Those entities were specifically addressed because they are the governmental bodies most likely to legislate on this topic, but those entities should not be considered a complete

²⁴ The trial court failed to acknowledge this canon and its exception, or address it as part of the Sportsmen’s complete preemption argument.

or exclusive list of governmental entities prohibited. Rather, a rational person can reasonably infer that the Legislature intended to prevent the regulation of firearms by any “lesser governmental body” beneath the General Assembly in the legislative hierarchy based on the foregoing canon.

In explaining another canon of statutory construction regarding implied repeal, Justice Antonin Scalia and his co-author explained in their treatise that: “When a statute specifically permits what an earlier statute prohibited, or prohibits what is permitted, the earlier statute is (no doubt about it) implicitly repealed.” *Id.* at 327 (A484). An implied repeal of the prior act may occur where the two provisions are in irreconcilable conflict. *See id.* at 328 (quoting *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936)).

The lower court acknowledged that “[t]he Regulations had been in existence for quite some time, in one form or another, prior to the adoption of Delaware’s version of the Second Amendment to the United States Constitution in 1987.” *Bridgeville*, 2016 WL 7428412, at *2 (Ex. 1 at 2). The Agencies also assert that the core of the Regulations has been in place for over 50 years. (A043). There is no dispute that the substance of the bans at issue was in place before Delaware adopted Section 20, guaranteeing—after 1987—Delaware’s citizens the fundamental right to keep and bear arms. Because the Regulations eviscerate that right, and are in

irreconcilable conflict with that right, the State's later adoption of Section 20 is an implicit repeal of the Regulations based on a well-established legal canon.²⁵

3. The Regulations are Implicitly Preempted by Delaware's Comprehensive Regulatory Scheme

The General Assembly has enacted a comprehensive regulatory scheme regarding firearms, and the total ban conflicts with that scheme.²⁶ For example, as this Court recognized in *Doe*, through § 1441 of Title 11 of the Delaware Code,

²⁵ The lower court did not address this canon either.

²⁶ *See* 24 *Del. C.* §§ 901, 902, 903, 904, 905 (regulating the sale of firearms) 24 *Del. C.* § 1321 (prohibiting security guards from carrying firearms without proper licensing); 9 *Del. C.* § 330 (prohibiting counties from regulating firearms); 22 *Del. C.* § 111 (prohibiting municipalities from regulating firearms); 11 *Del. C.* § 1441 (allowing retired police officers to be specially licensed to carry a concealed weapon following retirement); 11 *Del. C.* §§ 1441A, 1441B (extending federal law found at 18 U.S.C. §§ 926B and 926C regarding retired law enforcement officers' ability to carry concealed firearms); 11 *Del. C.* § 1442 (prohibiting a non-law enforcement officer to conceal any firearm without a license); 11 *Del. C.* § 1444 (prohibiting the possession of a firearm silencer, sawed-off shotgun, machine gun, or any other firearm or weapon adaptable for use as a machine gun); 11 *Del. C.* § 1448 (prohibiting the possession and purchase of deadly weapons by persons prohibited); 11 *Del. C.* § 1459 (prohibiting the possession of a weapon with an obliterated serial number); 11 *Del. C.* § 1460 (prohibiting possession of a firearm in a public place while under the influence); 11 *Del. C.* § 602 (prohibiting display of a firearm with the intent to place another in fear of imminent physical injury); 11 *Del. C.* § 603 (prohibiting guardians from allowing possession or purchase of a firearm by a juvenile); 7 *Del. C.* § 1707 (prohibiting the training of hunting dogs while carrying a firearm); 10 *Del. C.* §§ 2703, 2806 (regulating the possession of firearms by constables); 10 *Del. C.* § 9224 (requiring drug testing for Justice of the Peace employees permitted to carry firearms); 10 *Del. C.* § 1045 (allowing court to order temporary relinquishment/ban on possession of firearms in connection with a protective order); 29 *Del. C.* § 9005 (requiring training for officers of Department of Services for Children, Youth and Their Families who carry firearms at work).

Delaware explicitly exempts current and retired police officers from the State's concealed-carry license requirements because of the special trust Delaware places in these individuals. 88 A.3d at 668 n.62. Yet, the Regulations also ban these officers from possessing and bearing firearms in State Parks and Forests. Thus, the Regulations are inconsistent with Delaware statutes providing law enforcement officers with an even broader right to keep and bear arms for protection. *See Cantinca*, 884 A.2d at 473–74 (implied preemption occurs where regulations conflict with statutes).

The lower court opined that Delaware's manifold firearms-related statutes do not comprise a "comprehensive regulatory scheme." *Bridgeville*, 2016 WL 7428412, at *6 (Ex. 1 at 5). The trial court relies on a misinterpretation of §§ 1441A and 1441B of Title 11 of the Delaware Code. Sections 1441A and 1441B contain language borrowed from federal statutes subjecting those sections to the "laws of any state" that "[p]rohibit or restrict the possession of firearms on any state or local government property...." *Id.* The lower court misread those borrowed federal provisions to mean that if the General Assembly viewed its regulatory scheme as comprehensive, it would not need to specify that §§ 1441A and 1441B are subject to contrary state laws. *See id.* The lower court's analysis is flawed.

In its finding that there exists no comprehensive regulatory scheme evocative of implied preemption, the lower court discusses only §§ 1441A and 1441B.

Sections 1441A and 1441B, however, repeat the federal law found at 18 U.S.C. §§ 926B and 926C regarding retired law enforcement officers' ability to carry concealed firearms. The role of §§ 1441A and 1441B as part of an overall comprehensive statutory scheme must be read with the necessary understanding that the text of those statutes has its genesis in the United States Code. The language from §§ 926B and 926C (incorporated into §§ 1441A and 1441B) indicates merely that when Congress passed §§ 926B and 926C, the federal government did not intend to supersede state law to the contrary in any of the fifty states that adopted that language, as Delaware did in §§ 1441A and 1441B.

That Delaware adopted federal statutes, which are subject to state law regulating firearms on state government property,²⁷ does not mean that Delaware does not view its own statutory scheme as comprehensive. The borrowed federal language has no bearing on whether the General Assembly intended the statutes that it wrote itself to constitute a comprehensive regulatory scheme.

Moreover, there is no evidence that Delaware intended to prevent any challenge to other state firearms regulations in adopting those two federal statutes, which extend broader firearms-related rights to law enforcement individuals. The lower court's view that the federal language borrowed by Delaware is evidence of

²⁷ By federal permission, this is contrary to the typical Supremacy Clause priority given to federal law.

the Delaware General Assembly’s intent as to other Delaware statutes remains perplexing. The language borrowed from the federal statutes cannot be self-evident proof that Delaware does not have a comprehensive regulatory scheme regarding firearms.

Still more, the language from §§ 1441A and 1441B²⁸ that the lower court quotes in support of its analysis is not found in the text of other Delaware statutes, such as § 1441, which is an original Delaware statute. Like §§ 1441A and 1441B, § 1441 is also a provision of Delaware law regarding law enforcement officers’ ability to carry firearms. It makes sense that § 1441 omits the federal language subjecting it to the “laws of any state,” as the text of § 1441 was drafted by the Delaware Legislature, not by the federal government. Regardless, nothing in §§ 1441A and 1441B means that the General Assembly did not intend to enact a comprehensive regulatory scheme regarding the possession of firearms.

Ultimately, the fact remains that the Regulations “hinder the objectives of the state statute[s]” and Section 20, which provides that the right to keep and bear arms is fundamental. *Id.* at *5 (quoting *Cantina*, 884 A.2d at 473–74) (Ex. 1 at 5). Therefore, Delaware law preempts the Regulations, which extinguish the right to possess and use firearms while in State Parks and Forests.

²⁸ The lower court correctly quotes §§ 1441A and 1441B, but the quoted language is not found in § 1441, which similarly applies to law enforcement officers.

III. The Agencies Exceeded Their Authority in Enacting the Regulations

A. Question Presented

Whether the Agencies exceeded their authority in enacting the Regulations. This question was preserved, as it was presented to the trial court below. (Ex. 1; A162–A165).

B. Scope of Review

Questions of law and constitutional claims are decided *de novo*.” *Doe*, 88 A.3d at 661; *see also Taylor*, 2010 WL 3432605, at *2 (“Our review of the trial court’s grant of a motion for judgment on the pleadings presents a question of law which we review *de novo*.”). Therefore, this Court independently analyzes the legal issues decided by the trial court.

C. Merits of Argument

1. DNREC Exceeded the Scope of its Authority in Enacting the Ban on Firearms in State Parks

Delaware has granted DNREC the authority to “[m]ake and enforce regulations relating to the protection, care and use of the areas it administers.” 7 *Del. C.* § 4701(a)(4).²⁹ However, DNREC may not promulgate rules and regulations that are “inconsistent with the laws of this State.” 29 *Del. C.* § 8003(7).

²⁹ The Agencies wrongly assert that the Sportsmen rely only on 7 *Del. C.* § 6001 as the sole basis for its regulatory authority. (A041). Like the Agencies, the Sportsmen also cite to 7 *Del. C.* § 4701(a)(4).

That DNREC may enforce regulations related to the protection, care, and use of the areas it administers does not imply that the agency has authority to enact a total ban on the constitutionally protected right to bear arms. For the reasons discussed in Part II, *supra*, the DNREC Regulation is “inconsistent with the laws of this State,” specifically, Section 20. As discussed at Part I, *supra*, DNREC has not carried its burden to show that a total firearms ban furthers that purpose.

In support of DNREC’s argument that it has implied authority to ban firearms, DNREC argues that it cannot protect visitors if it cannot regulate firearms. (A042). DNREC argues, by extension, that if it did not have such implied authority, it would also be prohibited from regulating open fires and vehicles to protect public safety. (*Id.*). Not so. There is no fundamental constitutional right to build a fire or drive a vehicle. Also, there is nothing in the record to support the Agencies’ burden of establishing their public safety argument, even if they did have authority to completely ban the possession of firearms in State Parks.

As the lower court correctly notes, the DNREC Regulations Governing State Parks provide that “[i]t shall be the intent and purpose of [DNREC] to 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.* § 9201-2.0, ¶ 2.1 (emphasis added). DNREC’s fatal flaw is exposed by the

observation that a total ban is not a minimal regulation on possession or carrying firearms, and there is no record support for the argument that the Regulations are essential to the safety of visitors.

2. DOA Exceeded the Scope of its Authority in Enacting the Ban on Firearms in State Forests

The lower court correctly quotes the statute providing that the DOA “shall...devise and promulgate rules and regulations for the enforcement of the state forestry laws and for the protection of forest lands....” 3 *Del. C.* § 1011.³⁰ As with DNREC, though, DOA may not establish rules or regulations that are “inconsistent with the laws of this State.” 29 *Del. C.* § 8103(8).

DOA may enforce regulations related to the protection of State Forest lands, but that does not imply that the agency has authority to enact a ban on the constitutionally protected right to bear arms. For the reasons previously discussed, the Regulation is “inconsistent with the laws of this State,” specifically, Section 20. Even if DOA is able to enact rules that promote the safety of its visitors, there is no evidence in the record that the firearm ban furthers that purpose.

Additionally, the DOA Regulation does not further the DOA’s expressed intent to enact regulations to “ensure that the[] publicly owned lands are conserved,

³⁰ The Agencies wrongly assert that the Sportsmen cite only to 3 *Del. C.* § 101(3) as the sole basis of the DOA’s regulatory authority. (A041). Like the Agencies, the Sportsmen also refer to 3 *Del. C.* § 1011.

protected, and maintained for the benefit of all.” 3 *Del. Admin. C.* § 402-2.0, ¶ 2.1. Instead, DOA claims it enacted the ban at issue for public safety and conservation purposes. Although the DOA State Forest Regulations (not the Legislature) provide for the ability to regulate State Forest lands for conservation and public safety purposes, there is no record evidence that outlawing firearms—used to protect one’s self and family—is substantially related to protecting public safety or conservation efforts. *See id.*; *see also* § 402-5.0, ¶ 5.1. Therefore, DOA exceeded the scope of its authority in enacting the ban on firearms in State Forests.

CONCLUSION

For the foregoing reasons, the Sportsmen respectfully request that this Court find that the challenged Regulations impermissibly restrict the Sportsmen's right to possess and bear arms in violation of Article I, Section 20 of the Delaware Constitution. Furthermore, this Court should rule that the Agencies exceeded their statutory authority in enacting the Regulations, which have been preempted by the General Assembly. Thus, the Sportsmen respectfully request that this Court reverse the trial court, and enjoin the Agencies from enforcing the Regulations.

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