



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL)
CLUB, LTD.; MARK HESTER;)
JOHN R. SYLVESTER;)
MARSHALL KENNETH WATKINS;)
BARBARA BOYCE;)
ROBERT 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.)

C.A. No. 15, 2017

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

**CORRECTED BRIEF OF THE NATIONAL RIFLE ASSOCIATION
OF AMERICA, INC., AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS BELOW, APPELLANTS, AND REVERSAL**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. There Is No Evidence of a Link Between Carrying Firearms in Public and Higher Levels of Violent Crime.....	6
II. There Is No Evidence of a Link Between Firearms Carriage and Higher Levels of Accidental Shooting	14
III. Lawful Firearm Carriage Benefits Public Safety	17
CONCLUSION.....	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bridgeville Rifle & Pistol Club, Ltd. v. Small</i> , 2016 WL 7428412 (Del. Super. Ct. Dec. 23, 2016)	4
<i>City of Cincinnati v. Discovery Network, Inc.</i> , 507 U.S. 410 (1993)	17
<i>Doe v. Wilmington Hous. Auth.</i> , 88 A.3d 654 (Del. 2014).....	3, 4, 15
<i>Heller v. District of Columbia</i> , 801 F.3d 264 (D.C. Cir. 2015).....	15
<i>Moore v. Madigan</i> , 702 F.3d 933 (7th Cir. 2012)	8, 14, 18, 22
<i>United States v. Masciandaro</i> , 638 F.3d 458 (4th Cir. 2011).....	15
<i>United States v. Parker</i> , 919 F. Supp. 2d 1072 (E.D. Cal. 2013).....	16
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	3, 10
<i>Warden v. Nickels</i> , 697 F. Supp. 2d 1221 (W.D. Wash. 2010)	16
<i>Whole Woman’s Health v. Hellerstedt</i> , 136 S. Ct. 2292 (2016).....	10
 <u>Statutes</u>	
DEL. CONST. art. 1 § 20	3
TEX. GOV’T CODE § 411.172(a)(2)	12
 <u>Other</u>	
Abhay Aneja, <i>et al.</i> , <i>The Impact of Right to Carry Laws and the NRC Report</i> (Dec. 1, 2014) (unpublished manuscript), <i>available at</i> http://goo.gl/UOzB9H	7, 9
Active License/Certified Instructor Counts as of December 31, 2015, TEXAS DEPARTMENT OF PUBLIC SAFETY, https://goo.gl/ay1XC6	12
CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1767).....	10
Charles C. Branas, <i>et al.</i> , <i>Investigating the Link Between Gun Possession</i> <i>and Gun Assault</i> , 99 AM. J. PUB. HEALTH 2034 (2009)	22

Clayton E. Cramer, <i>Violence Policy Center’s Concealed Carry Killers: Less Than It Appears</i> , https://goo.gl/g3dGHq	12, 13
<i>Concealed Carry Killers</i> , http://concealedcarrykillers.org/	6
<i>Concealed Weapon or Firearm License Summary Report, Oct. 1, 1987 –April 30, 2017</i> , FLORIDA DEPARTMENT OF AGRICULTURE & CONSUMER SERVS., DIVISION OF LICENSING, http://goo.gl/yFzIwv	12
<i>Conviction Rates for Handgun License Holders, Reporting Period: 01/01/2015–12/31/2015</i> , TEXAS DEPARTMENT OF PUBLIC SAFETY, https://goo.gl/zXUk8K	11
David B. Kopel, <i>Pretend “Gun-Free” School Zones: A Deadly Legal Fiction</i> , 42 CONN. L. REV. 515 (2009)	12
David B. Mustard, Comment, in <i>EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE</i> 330 (Jens Ludwig and Philp J. Cook eds. 2003).....	10, 11
<i>Estimates of the Population by Age, Sex, and Race/Ethnicity for July 1, 2015 for State of Texas</i> , TEXAS DEMOGRAPHIC CENTER, https://goo.gl/wHe8MW	12
Eugene Volokh, “ <i>Guns Did Not Protect Those Who Possessed Them from Being Shot in an Assault</i> ”, THE VOLOKH CONSPIRACY (Oct. 5, 2009), https://goo.gl/gjqflL	21, 22
EVERYTOWN FOR GUN SAFETY, <i>INNOCENTS LOST: A YEAR OF UNINTENTIONAL CHILD GUN DEATHS</i> (2014), https://goo.gl/yY2z4k	14, 15
FIREARMS AND VIOLENCE: A CRITICAL REVIEW (Charles F. Wellford, et al., eds., 2004).....	6, 7, 8, 19
GARY KLECK & DON B. KATES, <i>ARMED: NEW PERSPECTIVES ON GUN CONTROL</i> (2001)	18, 19, 20
Gary Kleck, Comments on Aneja et al. (2014) (Oct. 7, 2015) (unpublished manuscript), available at http://goo.gl/9JeuLk	9
GARY KLECK, <i>TARGETING GUNS: FIREARMS AND THEIR CONTROL</i> (2006)	18, 20, 21

H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors*, NATIONAL CENTER FOR POLICY ANALYSIS (2000), <http://goo.gl/1Ebwpb> 11

NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE (Alan I. Leshner et al. eds., 2010), <https://goo.gl/BtVX2d>..... 15

Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041 (2009) 7, 10, 11

Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40 (2005), <http://goo.gl/zOpJFL> 7, 14

Ryan Foley, et al., *Chronicle of Agony: Gun Accidents Kill at Least 1 Kid Every Other Day*, USA TODAY (Oct. 14, 2016), <https://goo.gl/ITcEhl> 14

INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. (“NRA”) is America’s foremost and oldest defender of Second Amendment rights. Founded in 1871, the NRA today has approximately five million members, and its programs reach millions more. The NRA is America’s leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA’s membership includes Delaware residents. The NRA has a strong interest in this case because the rights of Delaware NRA members are infringed by the State’s prohibition of the right to bear arms for self-defense in state parks and forests. The NRA files this brief pursuant to Rule 28 and by leave of this Court.

SUMMARY OF ARGUMENT

The regulations at issue in this appeal ban the possession of arms for defensive purposes in state parks and forests (“Regulations”). They infringe the fundamental right to bear arms for self-defense, which is recognized in Article I of Delaware’s Constitution. Appellees (“Agencies”) therefore bear a heavy burden to demonstrate that the Regulations are substantially related to a specific interest in promoting public safety.

They have made no effort to meet this burden. Instead, they have asserted a generalized interest in public safety and have relied on discredited and inadequate assumptions to do the rest of their work. The Law Center to Prevent Gun Violence (“Law Center”) has submitted an amicus brief that attempts to fill the evidentiary gaps left by the Agencies. The Law Center’s evidence, however, is highly flawed.

This brief explains why the Law Center’s evidence is inadequate to meet the Agencies’ burden. Firearms and firearm owners are not threats to public safety as the Law Center attempts to portray them: Firearms are not linked to higher rates of violent crime, firearm owners have not been shown to have violent propensities, and carrying firearms has not been shown to lead to higher rates of firearms accidents. The evidence for the conclusions the Agencies are required to prove simply does not exist.

ARGUMENT

Article I, Section 20 of Delaware’s Constitution safeguards “the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.” The regulations at issue in this appeal—which categorically ban the possession of arms for defensive purposes in state parks and forests—infringe on this right. This Court has recognized that Section 20 “is intentionally broader than the Second Amendment and protects the right to bear arms outside the home”; indeed, it “specifically provides for the defense of self and family *in addition to* the home.” *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 665 (Del. 2014). By prohibiting the possession of firearms for these purposes outside the home, the Regulations deprive individuals of a right that this State’s Constitution protects as “fundamental.” *Id.* at 664.

The Regulations are therefore, at a minimum, subject to a form of heightened scrutiny, under which, the Agencies bear the burden to establish that the Regulations “serve important governmental objectives and [are] substantially related to [the] achievement of those objectives.” *Id.* at 666–67 (second alteration in original). “The burden of justification is demanding and it rests entirely on the State.” *United States v. Virginia*, 518 U.S. 515, 533 (1996).¹ As Plaintiffs-Appellants point out, the

¹ Although the right at issue here arises under the Delaware Constitution, and the right to bear arms guaranteed by the Delaware Constitution differs in several

Agencies cannot meet that burden. Appellants’ Opening Br. at 17–26 (Feb. 23, 2017).

In fact, they have made little effort to do so, nor did the Court below hold them to their burden. Instead, both the Agencies and the Court invoked a generalized interest in “public safety” and a conclusory—and unfounded—speculation that fewer guns means less crime. *See Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 2016 WL 7428412, at *4–*5 (Del. Super. Ct. Dec. 23, 2016); A047–48, A053. Such reasoning is inadequate; not only is it unsound, but the reasoning is constitutionally invalid. If such reasoning sufficed, the fundamental right recognized by Delaware’s Constitution would be illusory.

Having assumed their conclusion, the Agencies make no effort to defend their (false) premise that fewer guns means less crime. *See Appellees’ Corrected Answering Br.* at 20–21, 34–35 (May 5, 2017) (“Appellees Br.”); *see also id.* at 24 (arguing that the evidence in the record is sufficient to meet the Agencies’ burden but not identifying that evidence). They are aided only by an amicus brief. The brief, submitted on behalf of the Law Center, supplies the record’s first shreds of evidence purportedly showing a connection between lawful carriage of firearms and

respects from the federal right, this Court has nevertheless found federal models of scrutiny instructive in the past. *See Doe*, 88 A.3d at 666–67.

a threat to public safety. This new evidence is deeply flawed and inadequate to meet the Agencies' constitutional burden in this case.

I. There Is No Evidence of a Link Between Carrying Firearms in Public and Higher Levels of Violent Crime

In a bid to justify the Regulations, the Law Center endeavors to establish a link between the carrying of firearms in public and violent crime. Its efforts are unavailing.

1. The debate over gun control has become so impassioned that it is often hard to sort legitimate social-scientific research from junk science.² But in 2004, the National Academy of Sciences' National Research Council ("NRC") conducted an exhaustive review of the *entire body* of social-scientific literature on firearms regulation in an effort to sort the wheat from the chaff and determine what inferences could be safely drawn from the current research. As the Law Center itself acknowledges, Amicus Br. of the Law Ctr. at 13 & n.18 (May 5, 2017) ("Law Center Br."), the NRC concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F.

² Some sorting, however, is easy. For example, the Law Center relies prominently on a webpage maintained by the Violence Policy Center ("VPC"), *Concealed Carry Killers*, <http://concealedcarrykillers.org/> (along with the PDF to which it links, the "VPC Webpage"), which it says shows over 900 firearm fatalities perpetrated by concealed-carry permit holders within the past decade. Law Center Br. at 17. The "Concealed Carry Killers" webpage—which is not, and makes no attempt to be, a scientific study but is rather a collection of "vignettes" of "concealed carry incidents" that are "taken primarily from news reports," VPC Webpage—is vitiated by obvious errors. *See infra* at 12–13.

Wellford et al. eds., 2004). A systematic study conducted by the Centers for Disease Control (“CDC”) similarly concluded that “[f]urther research is needed to assess the effects of shall issue laws on violence.” Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 54 (2005), <http://goo.gl/zOpJFL>.

Nothing has changed since these literature reviews were conducted. Indeed, the principal study relied upon by the Law Center, a 2014 article by law Professor John Donohue III, *explicitly reaffirmed* the NRC’s judgment that the existing evidence is not sufficient to show *any causal link* between laws regulating public carrying of firearms and crime rates. Abhay Aneja et al., *The Impact of Right to Carry Laws and the NRC Report* 80 (Dec. 1, 2014) (unpublished manuscript), *available at* <http://goo.gl/UOzB9H> (“Donohue Study”). Other scholars who, like Donohue, are friendly to the cause of gun control have likewise been unable to establish this link. For example, Professor Philip J. Cook and his co-authors concluded that, “[b]ased on available empirical data . . . we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.” Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009).

Similarly, Judge Posner, one of the most empirically inclined judges in the nation, conducted a thorough review of the evidence in striking down Illinois's carry ban and concluded that "[t]he theoretical and empirical evidence . . . is inconclusive" and insufficient to survive anything stricter than rational basis review. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Even the Law Center is forced to acknowledge the inherent limitations of the data on which it relies. Law Center Br. at 9 n.4.

The Law Center nevertheless seeks to establish the link between carriage and violent crime by pointing to two studies: the aforementioned Donohue Study, and an outdated study by Professor Mark Duggan.³ The Duggan study is easily set aside. That study was carefully taken into account by the NRC when it reached its conclusion that the body of academic literature did not support a causal link between concealed carriage laws and violent crime. FIREARMS AND VIOLENCE, *supra*, at 120–150. In any event, its results are inapposite, as any reported increase in violence resulted from increased gun *ownership*, not carriage. *See Moore*, 702 F.3d at 938 (finding Duggan's study not to support laws regulating carriage for this reason).

³ Significantly, the Law Center spends more time attacking a study by John Lott showing that concealed carriage is correlated with reduced crime rates than building its own affirmative case. But even if laws that permit greater carriage have not been shown to decrease crime, there is no persuasive evidence that they *increase* crime—and that is the proposition the Agencies must support.

The centerpiece of the Law Center’s case is the 2014 Donohue study. *See* Law Center Br. at 12. As already noted, that study explicitly reaffirmed the NRC’s conclusion that “ ‘with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates.’ ” Donohue Study at 79–80. The authors nevertheless suggest that their preferred more-guns-more-violence hypothesis might be good enough for government work even if it does not meet the academy’s strict standards, *id.* at 80, but a leading expert has concluded that the Donohue study is “misguided,” “should be of no interest to anyone with a serious interest in the effects of gun control laws on violence,” and “does not provide any serious basis for reversing [the] conclusion” of “[b]etter studies . . . find[ing] that [right-to-carry] laws do not affect crime rates” Gary Kleck, Comments on Aneja et al. (2014) 17 (Oct. 7, 2015) (unpublished manuscript), *available at* <http://goo.gl/9JeuLk>. As just one illustration of the serious methodological flaws in the Donohue study, one of its statistically strongest findings was a positive correlation between the adoption of right-to-carry laws and larceny—a crime that, by definition, does not involve a firearm. *Id.* at 5. In addition, Donohue fails to control for variations in right-to-carry laws that might also affect crime rates. A more fundamental weakness of the Donohue Study’s analysis is that it fails to document or articulate the mechanism through which higher violent crime rates would result from permitting carriage of firearms. *See id.* at 6–10.

The Law Center’s discredited and inconclusive collection of research provides no support for the Agencies’ “demanding” burden of showing that its law is “substantially related to the achievement” of their interest in public safety. *Virginia*, 518 U.S. at 533. The lack of evidence that a law banning the carrying of firearms advances public safety should not be surprising because, as criminologists have long recognized, such laws are likely to make law-abiding citizens less safe by “disarming those only who are not disposed to commit the crime which the laws mean to prevent.” CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 161 (1767). The U.S. Supreme Court has recognized a similar principle in the abortion context: “Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced” to change their conduct “by a new overlay of regulations.” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313–14 (2016).

2. Unable to establish a causal link between firearm carriage and violent crime, the Law Center resorts to casting aspersions on firearm carry licensees as a group, attempting to create the impression that they are more prone to violence than the general population.

As it happens, available scientific evidence demonstrates that firearm carriage licensees are a disproportionately law-abiding group, which is not surprising given the steps typically necessary to obtain a carry permit. For example, gun control proponent Cook has acknowledged that “[t]he available data about permit

holders . . . imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders.” Cook et al., *supra*, at 1082; *see also* David B. Mustard, Comment, *in* EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 330 (Jens Ludwig and Philp J. Cook eds. 2003) (“[M]any years of evidence across different states and time periods overwhelmingly rejects . . . claims” “that permit holders will use their guns to commit crimes instead of using their guns for self-defense.”).

These observations are based on experience in many States. For example, researchers found that “concealed carry licensees [in Texas] had arrest rates far lower than the general population for every category of crime.” H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors* 1, NATIONAL CENTER FOR POLICY ANALYSIS (2000), <http://goo.gl/1Ebwpb>. Indeed, in 2015 carry licensees in Texas were approximately *20 times* less likely to be convicted of a crime than the average Texan. Of the 43,924 convictions of individuals aged 21 and older in Texas in 2015, only 108 (less than 0.25%) of the convictions were of handgun license holders. *Conviction Rates for Handgun License Holders, Reporting Period: 01/01/2015–12/31/2015*, TEXAS DEPARTMENT OF PUBLIC SAFETY, <https://goo.gl/zXUk8K>. By contrast, in that year, handgun license holders represented over 3% of Texas’s *total* population, and approximately 5% of

individuals aged 21 and older.⁴ Similarly, Florida has issued more than 3.5 million concealed carry licenses since 1987 and has revoked less than 0.5% of them for any reason, many of which have nothing to do with misuse of a firearm. *See Concealed Weapon or Firearm License Summary Report, Oct. 1, 1987 –April 30, 2017*, FLORIDA DEPARTMENT OF AGRICULTURE & CONSUMER SERVS., DIVISION OF LICENSING, <http://goo.gl/yFzIwv>. A wealth of data from other states similarly shows that concealed carry license holders as a group are “much more law-abiding than the general population.” David B. Kopel, *Pretend “Gun-Free” School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 572 (2009); *id.* at 564–69.

In the face of this powerful data, the only “evidence” the Law Center musters is a non-scientific website that merely collects anecdotal accounts of possible firearm misuse by carry licensees. There is no scientific discipline to the collection, which has at times included accounts of individuals who are not confirmed licensees, who have been acquitted of the crimes with which they were charged or were never charged at all, or whose cases are still pending. Clayton E. Cramer, *Violence Policy*

⁴ *See Active License/Certified Instructor Counts as of December 31, 2015*, TEXAS DEPARTMENT OF PUBLIC SAFETY, <https://goo.gl/ay1XC6> (937,419 active license holders); *Estimates of the Population by Age, Sex, and Race/Ethnicity for July 1, 2015 for State of Texas*, TEXAS DEMOGRAPHIC CENTER, <https://goo.gl/wHe8MW> (projecting 27,469,114 as the population of Texas in 2015). In Texas, one must be at least 21 years of age to obtain a license, TEX. GOV’T CODE § 411.172(a)(2), meaning that all of the 937,419 active license holders are presumptively greater than 21 years of age, whereas only approximately 19 million of Texas’s total population is over 21.

Center's Concealed Carry Killers: Less Than It Appears, <https://goo.gl/g3dGHq>. In a report rife with flaws, the most relevant here is that VPC's tally contains a significant number of incidents that do not speak at all to the comparative likelihood of concealed-carry permit holders to engage in public firearm violence. To take just two examples, the VPC includes (as of May 29, 2017—the page is continually updated): (i) *well over* 100 non-suicide killings that appear to have taken place in *the gun-owner's home*, some without a gun, where the possession of a public carry permit is entirely irrelevant, and (ii) over 300 “vignettes” describing suicides, most of which do not even indicate that a firearm was used in the suicide. In short, the VPCs “tally” of so-called “Concealed Carry Killers” lacks any methodological rigor.

II. There Is No Evidence of a Link Between Firearms Carriage and Higher Levels of Accidental Shooting

Next, the Law Center appeals to “common sense” for the proposition that more firearms will result in more unintentional shootings. Law Center Br. at 18. No evidence, however, has been found to support a link between a higher incidence of lawful carriage and a higher incidence of firearms accidents. This is not for lack of trying: Some have hypothesized that “the presence of more firearms increases rates of unintended and intended injury in interpersonal confrontations,” but researchers have found no sufficient data to support this hypothesis. Hahn et al., *supra*, at 53; *see also Moore*, 702 F.3d at 939 (“[B]ecause fewer than 3 percent of gun-related deaths are from accidents, and because Illinois allows the use of guns in hunting and target shooting, the law cannot plausibly be defended on the ground that it reduces the accidental death rate, unless it could be shown that allowing guns to be carried in public causes gun ownership to increase, and we have seen that there is no evidence of that.” (citation omitted)). The sources the Law Center cites do not support this correlation and in fact suggest that accidental shootings occur most often *in the home*, not in the public places to which the Regulations apply.⁵ Indeed,

⁵ See Ryan Foley, et al., *Chronicle of Agony: Gun Accidents Kill at Least 1 Kid Every Other Day*, USA TODAY (Oct. 14, 2016), <https://goo.gl/ITcEhl> (“[Accidental shootings] most often happen at the children’s home.”); EVERYTOWN FOR GUN SAFETY, INNOCENTS LOST: A YEAR OF UNINTENTIONAL CHILD GUN DEATHS 3 (2014), <https://goo.gl/yY2z4k> (“About two-thirds of these unintended deaths—65 percent—took place in a home or vehicle that belonged to the victim’s

although licensed carriage of firearms has increased over the past two decades, there has been a steady decline in firearms accidents. See NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 31 (Alan I. Leshner et al. eds., 2010), <https://goo.gl/BtVX2d>.

In any event, this sort of “more guns must mean more violence” rhetoric is plainly inadequate to satisfy the Agencies’ burden under intermediate scrutiny. In fact, this Court rejected precisely the same argument in *Doe*:

WHA argues that an accidental discharge of a firearm may have serious fatal consequences and that dangers inhere in the increased presence of firearms. But these same concerns would also apply to the area within any apartment—interior locations where the WHA concedes it cannot restrict the possession of firearms for self-defense. The Revised Policy does more than proscribe the unsafe *use* of a firearm. It also prohibits *possession* in the public housing common areas except where the firearm is being transported to or from an apartment. In this context, WHA must show more than a general safety concern and it has not done so.

88 A.3d at 667; see also *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015) (rejecting a similar argument on the ground that “taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home.”).⁶

family Another 19 percent took place in the home of a relative or friend of the victim.”); Law Center Br. at 18 n.37 (“Accidental shootings unfold in large part in familial settings”).

⁶ The Fourth Circuit’s reasoning in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), to the extent it conflicts with this Court’s decision in *Doe*, must be rejected. At any rate, the prohibition at issue in *Masciandaro* was narrower than prohibition at issue here because it barred loaded firearms only within *vehicles* in national parks. See *id.* at 473. The Law Center’s other cases are even less apt.

The same analysis holds here: Even if the Agencies could establish a link between carriage and an increase in public firearms accidents—which they cannot—that correlation, without more, could not justify a categorical deprivation of the fundamental right to possess firearms for self-defense. Indeed, if it could, that right would be emptied of all meaning.

United States v. Parker, 919 F. Supp. 2d 1072, 1084 (E.D. Cal. 2013), does not even mention the risk of accidental shootings. And the court in *Warden v. Nickels*, 697 F. Supp. 2d 1221, 1227 (W.D. Wash. 2010), was applying far less demanding rational basis review to an *Equal Protection Clause* challenge, having held under then-binding circuit precedent that the Second Amendment did not apply to states.

III. Lawful Firearm Carriage Benefits Public Safety

The Law Center also argues that the carriage of firearms does not increase public safety. But, even if this were true (and it is not), this would not mean that the carriage of firearms *harms* public safety. It is this latter principle that the Agencies must establish to justify the Regulations. Commercial newspaper racks probably do not contribute to public safety, but that does not mean that banning them is “substantially related” to the achievement of public safety. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).⁷

The Law Center’s decision to lead with this non sequitur is telling: Rather than acknowledging that the Agencies have the burden of proving that the ban is necessary to protect public safety, the Law Center repeatedly seeks to shift the burden to Plaintiffs to establish that firearm carriage is necessary to protect public safety. Yet, the Delaware Constitution has already established that the right to keep and bear firearms is a fundamental right. That judgment is not subject to second-guessing on policy grounds, much less those the Law Center proposes.

In any event, unlike the link between firearm carriage and increased violence or accidents, the link between firearm carriage and increased public safety through

⁷ For that reason, it matters little whether evidence establishing that public carriage benefits public safety was in the record below. *See Appellees’ Br.* at 23. It is, however, significant that the Agencies failed to submit any evidence supporting the fit between the Regulations and public safety.

the defensive use of firearms finds support in credible scientific evidence. Contrary to the Law Center’s assertions, the use of firearms by law-abiding citizens for self-defense is very common and frequently effective. Millions of Americans each year successfully use firearms to fend off assailants, thieves, home-invaders, or other criminals. *See* GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 150–51 (2006); *see* Amicus Br. of Pink Pistols at 8–11 (Mar. 2, 2017); Amicus Br. of Law Enforcement Legal Defense Fund at 17–21 (Mar. 2, 2017). Indeed, after reviewing the available evidence, Judge Posner concluded that, to the extent that it supported any conclusion, the evidence suggested that “a right to carry firearms in public may promote self-defense.” *Moore*, 702 F.3d at 942.

1. The Law Center begins by asserting that the use of firearms for self-defense is rare. In doing so, it seeks to refute a study by leading firearms expert Gary Kleck that shows the opposite. The data on which the Law Center relies to cast doubt on Kleck’s conclusions, however, comes from a survey that is itself methodologically flawed. The National Crime Victimization Survey (“NCVS”) does not directly ask people about defensive gun use, and there is a laundry list of other reasons to believe that defensive gun uses would be underreported in the NCVS.⁸ As Professor Kleck

⁸ “[I]n order for respondents to report a defensive gun use in the NCVS, they must be willing to confess, to an employee of the federal government, gathering information for the law enforcement branch of that government, to having committed a serious crime, and to do so in the context of a

sums it up, “[i]t is hard to imagine survey conditions less congenial for gaining meaningful estimates of defensive gun use frequency.” KLECK & KATES, *supra* note 8, at 236.

It is unsurprising, then, that the NCVS reports significantly lower rates of defensive gun use than other surveys. As the NRC explains, “at least 19 other surveys have resulted in estimated numbers of defensive gun uses that are similar (i.e., statistically indistinguishable) to the results found[] by Kleck and Gertz,” while “[n]o other surveys have found numbers consistent with the NCVS.” FIREARMS AND VIOLENCE, *supra*, at 103.

Despite the fact that the results of Kleck’s study have been replicated so many times, the Law Center contends that they are implausible because the number of incidents of defensive gun use in Kleck’s study exceed in some instances the number of reported crimes in a given year. *See* Law Center Br. at 11. But as Kleck himself has explained, this discrepancy is not surprising, given that individuals who engage in defensive gun use have little incentive to report the incident to the police and may, in some instances, have strong reasons not to (i.e., if they possess the firearm illegally). KLECK & KATES, *supra*, at 226; *see also id.* at 229. In fact, there is good

nonanonymous interview, by volunteering the information in response to a general question that does not even directly ask about gun use.”

See GARY KLECK & DON B. KATES, ARMED: NEW PERSPECTIVES ON GUN CONTROL 236 (2001); *see generally id.* at 232–36.

reason to believe that, even in the twenty surveys suggesting that firearms are frequently used for self-defense, incidents of defensive gun use are likely to be underreported. *Id.* at 227, 267–68.

2. The Law Center next argues that the use of firearms for self-defense does not make a person safer. But the weight of the evidence suggests otherwise. “Robbery and assault victims who used a gun to resist were less likely to be attacked or to suffer an injury than those who used any other methods of self-protection or those who did not resist at all.” KLECK, TARGETING GUNS, *supra*, at 171. Similarly, “rape victims using armed resistance were less likely to have the rape attempt completed against them than victims using any other mode of resistance.” *Id.* at 175. “[V]ictim resistance with a gun almost never provokes the criminal into inflicting either fatal or nonfatal violence.” *Id.* at 174.

In fact, to prevent completion of a crime it is usually necessary only for the intended victim to display the firearm rather than pull the trigger. The National Self-Defense Survey found that defenders simply needed to brandish their firearms the vast majority of the time, and only a small percentage of respondents reported wounding their attacker. KLECK & KATES, *supra*, at 317–18. Fewer than one in a thousand defensive gun uses results in a criminal being killed. KLECK, TARGETING GUNS, *supra*, at 178. Indeed, the concern that a target may be armed often causes criminals to forego even attempting crimes. According to survey data, 43% of

violent criminals report that they have in at least one instance during their careers decided not to commit a crime as intended because they believed the victim was armed. *Id.* at 180.

While some anti-gun commentators suggest that the possession of self-defense arms does more harm than good because criminals can forcibly disarm their victims and use their own firearms against them, data from the U.S. Bureau of Justice Statistics indicate that, in confrontations with criminals, 99% of victims maintain control of their firearms. KLECK, TARGETING GUNS, *supra*, at 168–69. And even the 1% of defensive gun uses that result in criminals taking firearms away from defenders is probably an overestimate, because it includes, for example, instances where a burglar leaving a home with a victim’s weapon is confronted by the victim wielding a second firearm. *Id.* at 169.

Against this evidence, the Law Center cites a statistic that people who carry firearms are four times more likely to be shot in an assault. Law Center Br. at 12. Even taking this statistic at face value, it proves nothing and is a classic example of reverse causation. It very well could be that the people who carry are the people who are at a greater risk of getting shot in the first place.

By way of analogy, we don’t suggest that pacemakers cause heart attacks, or don’t protect against heart attacks, just because we find a correlation between the presence of pacemaker and the incidence of heart attacks. Obviously, people might get pacemakers precisely because they’re at risk of heart attacks. Well, people might get guns precisely because they’re at risk of attack.

Eugene Volokh, “*Guns Did Not Protect Those Who Possessed Them from Being Shot in an Assault*”, THE VOLOKH CONSPIRACY (Oct. 5, 2009), <https://goo.gl/gjqlfL>; *see Moore*, 702 F.3d at 939 (criticizing this and similar studies on this ground).

In any event, the correlation itself is highly suspect, as the study in question was subject to another significant limitation: underreporting of gun possession. It is easy to imagine why individuals in the study might be unwilling to acknowledge carrying a firearm—not least if they were not licensed to do so. *Id.* As the study itself acknowledged, a mere 1% underreporting—assuming charitably that it is spread equally across the case and control groups—renders most of the study’s results statistically insignificant. Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2036 (2009).

CONCLUSION

For these reasons, amicus curiae NRA respectfully submits that the Regulations are unconstitutional.

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