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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF

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Summary of Arguments in Response to WHA's Answering Brief

1. The Revised Policy is unconstitutional under Article I, § 20 of the Delaware Constitution because it unlawfully infringes on Residents' right to "keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use"—rights that are broader than provided by the Second Amendment of the United States Constitution as interpreted by the federal courts.

2. If any test is used, this Court should utilize a modified *Hamdan* test as opposed to the federal levels of scrutiny, to analyze the constitutionality of the Revised Policy under Article I, § 20 because the Revised Policy's virtual ban on carrying and using firearms in the common areas of WHA violates Article I, § 20. If, however, this Court implements the federal levels of scrutiny, strict scrutiny should apply.

3. The protective scope of Article I, § 20 does not depend on whether WHA implemented the WHA Policies as a landlord or a sovereign.

4. The issue of whether WHA is preempted from regulating in the field of firearms is implicitly, inherently, and necessarily incorporated in the United States Court of Appeals for the Third Circuit's questions to this Court asking whether a public housing agency ***may adopt*** the Common Area Provision, and whether a public housing agency ***may require*** one to produce a license or permit to carry a firearm under the Reasonable Cause Provision.

I. This Court Should Not Analyze Article I, § 20 in a Piecemeal Manner that Segregates the Right to Self-Defense from the Right to Bear Arms to Defend Family and State, for Hunting and for Recreational Purposes

WHA's depiction of the Revised Policy is less than fully forthright, to the extent that it implies that Residents are always permitted to use a firearm in self-defense in the common areas, when in truth, the Revised Policy only permits the use of a firearm for the purpose of self-defense during the ephemeral moments when a resident is transporting that firearm to or from the resident's unit. (Appellees' Answering Brief ("AB") at 4; Revised Policy, ¶ 3).

Contrary to WHA's argument, under the Revised Policy, Residents cannot carry a firearm for self-defense—openly or concealed—in the common areas unless they happen to be transporting the firearm to or from their apartment (which implies a limitation to hallways, entrances, exits, sidewalks, and parking lots), when the need for self-defense arises.[1] In sum, WHA argues that Residents should be guaranteed the right to self-defense as provided in § 20 only in limited circumstances, i.e., inside their units or during the fleeting occasions when transporting a firearm to or from their units. Describing these restrictions as allowing one to exercise the right to self-defense, as WHA does, is hyperbole.

Next, WHA argues, this Court should only consider the limited portion of

[1] Moreover, WHA does not acknowledge that the transitory ability to use a firearm in the prohibitively circumscribed manner permitted by the Revised Policy, assumes unreasonably that the Residents' firearm will be available outside of a carrying case, and loaded, while being transported, so that it would be available in the split-second it is needed for self-defense.

§ 20 that refers to self-defense, and should ignore all the remaining textual provisions of § 20, which provide the right to bear arms for defense of family, State, and for hunting and recreational purposes. This argument ignores well-settled canons of statutory interpretation, which dictate that a statute be construed as a whole. *Rogers v. State*, 457 A.2d 727, 732 (Del. 1983) ("The object of statutory construction is to give a sensible and practical meaning to the statute as a whole in order that it may be applied in future cases without difficulty. . . .") (citation omitted); *see also Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013).

Read as a whole, § 20 provides a right that is markedly broader than the right afforded by the Second Amendment.[2] Rules of construction support the view that the General Assembly was not only aware of the right provided by the Second Amendment, but also the case law interpreting the Second Amendment, which, at the time § 20 was adopted into the Delaware Constitution, stated that the Second Amendment was not applicable to the states. (*Amicus* General Assembly Br. at 6). More importantly, however, the General Assembly was aware that the Second Amendment's language, for the most part, was limited to defense, and did not expressly protect the right to keep and bear arms for hunting or recreational use.

[2] Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 46.5 (Nov. 2012) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. . . . It has also been held that the court will not only consider the particular statute in question, but also the entire legislative scheme of which it is a part.").

(*Id.* at 4, 7). The General Assembly's decision not to use the language of the Second Amendment for § 20 must be underscored; and the inclusion of additional enumerated protections evidences the legislative intent that § 20 expressly provide for more and broader rights than does the Second Amendment.

Confining § 20 to the right to self-defense and ignoring the other enumerated provisions of § 20, as WHA would have this Court do, vitiates the legislative intent behind the enactment of this constitutional provision, and ignores the plain textual differences between § 20 and the Second Amendment. Such a reading would limit the usefulness of this Court's analysis in future cases concerning the scope of § 20, and would unnecessarily limit the application of this Court's analysis on an important public policy issue of first impression in Delaware.

Moreover, the rights to keep and bear arms for hunting and recreational use are as much at issue in this matter as the right to keep and bear arms for defense of self, family, home, and State. These enumerated rights clarify that the protections afforded by §20 are not limited to ***inside*** the home because activities like hunting can only be done ***outside*** the home.

WHA misconstrues the crux of the U.S. Supreme Court's holding in *Heller* that individual self-defense is the central component of the right to bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). Instead, WHA focuses on the U.S. Supreme Court's holding that the right to self-defense is "most acute"

in the home; however, that holding also recognizes that the right to self-defense is also acute—just to a lesser degree—outside the home. *Id.* at 628. Subsequent to *Heller*, at least two courts have decided that the Second Amendment, which does not include the express right to keep and bear arms for hunting and recreation as § 20 does, guarantees the right to keep and bear arms outside of the home. *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012); *Illinois v. Aguilar*, 2013 WL 5080118, at * 5 (Ill. Sept. 12, 2013).

WHA describes Delaware jurisprudence as "holding that Section 20 does not create a right to carry concealed outside the home," but the case law is more nuanced. (AB at 12 (citing *Smith v. State*, 882 A.2d 762 (Del. 2005) (table))). In *Smith*, this Court explained that the defendant, who did not have a license to carry a concealed deadly weapon, and was a "person prohibited" from obtaining such a license, was found in his van (not his home) carrying a loaded gun. *Id.* at * 2. This Court held in *Smith* that although § 20 confirms the constitutional right to keep and bear arms, Sections 1441 and 1442 validly prohibit the exercise of that right without a license to do so.[3] *Id.* at * 8. *Smith* did not hold, as WHA contends, that § 20 does not confer any rights outside of the home.[4]

[3] Residents do not challenge existing Delaware law that requires a permit to carry a concealed weapon outside the home. Rather, Residents do not believe WHA is authorized to impose additional requirements beyond the existing comprehensive statutory scheme, simply because Residents are too poor to afford non-subsidized housing.

[4] Moreover, the *Smith* case may benefit from being revisited in light of the more recent analysis in *Griffin II* and *Heller*, as well as in *Moore v. Madigan*.

II. This Court Has Not Yet Considered the Constitutionality of a Policy That Prohibits, as Opposed to Regulates, a Fundamental Right Based in the Bill of Rights

A. Delaware Does Not Utilize the Federal Levels of Scrutiny to Construe State Constitutional Provisions

In the few cases where Delaware courts have interpreted § 20, they looked to precedent from sister states—not from the federal courts. *See Griffin v. State*, 47 A.3d 487, 490 (Del. 2012) ("*Griffin II*") (comparing § 20 to analogous constitutional provisions of other states, but not to the Second Amendment); *see generally Christopher v. Sussex Cnty.*, 2013 WL 5517070, at * 5-6 (Del. Oct. 7, 2013) (considering the law of New Hampshire in analysis of Delaware Constitution). In *Griffin II*, this Court considered whether 11 DEL. C. §1442, the Delaware statute prohibiting the carrying of a concealed deadly weapon without a license, permitted Griffin to carry a concealed deadly weapon in his home without a license in light of the broad protections of § 20 of the Delaware Constitution.[5] *Griffin II*, 47 A.3d at 488.

Rather than looking to federal precedent, this Court looked to the decisional case law from Wisconsin for an appropriate test to analyze the constitutionality of § 1442's restriction on the rights guaranteed by § 20. *Id.* at 490-91 (citing *Wisconsin v. Hamdan*, 665 N.W. 2d 785 (Wis. 2003)).

[5] While the Legislature may regulate whether bearing arms may be open or concealed, it cannot ban the right: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Alabama v. Reid*, 1 Ala. 612, 616-17 (1840).

This Court's approach in *Griffin II* is consistent with the argument that Delaware courts do not view § 20 as coextensive with the Second Amendment.[6] As further support for the position that § 20 is not coextensive with the Second Amendment, at the time the General Assembly adopted § 20, the prevailing federal case law in the Third Circuit was that "[the Second A]mendment, unlike those [amendments] providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power." *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).[7]

WHA's argument that "Section 20 has the same purpose and meaning as the Second Amendment," is based on the faulty premise that in 1987, the General Assembly predicted that—over twenty years later—the U.S. Supreme Court would reverse course and hold that the Second Amendment was applicable to the states. (AB at 9). If WHA is correct, § 20 is superfluous.

But those who adopted § 20 were not prophets and did not intend to delegate to federal courts in the future the correct interpretation of § 20 for Delawareans.

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[6] Section 20 was added to the Delaware Constitution in 1987, and according to the synopses of the House Bills, was intended to "explicitly protect[] the traditional lawful right to keep and bear arms." H.B. 554, 133rd Gen. Assemb. (Del. 1986) (Ex. A); H.B. 30, 134th Gen. Assemb. (Del. 1987) (Ex. B).

[7] The original sources cited by the court in *Tot* failed to support that assertion. *See* Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 189-91 (1984).

Nor should this Court so rely on its federal counterparts to construe Delaware-specific rights.

B. This Court Used the *Hamdan* Test to Analyze Whether a Statutory Restriction on the Right to Carry a Concealed Weapon was Constitutional Under § 20

This Court utilized the *Hamdan* test to analyze the constitutionality of a statutory restriction on the right to carry a concealed weapon in the home under § 20. As explained in *Griffin II*, the *Hamdan* test employs a three-part analysis as follows:

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

Griffin II, 47 A.3d at 490-91.[8]

This test was applied in both *Hamdan* and *Griffin II* to the issue of whether a statutory ***restriction*** on carrying a concealed weapon was constitutional, not to whether a ***total ban*** on carrying a weapon—concealed or openly—was constitutional. The distinction is material. A near total ban of a fundamental right,

[8] WHA argues against application of *Hamdan* and *Griffin II*, on the basis that those cases involved criminal sanctions, while "[t]he sanction for violation of the [lease] policy is, at most, the eviction of the tenant, not his or her incarceration." AB at 21. In minimizing Residents' possible eviction, WHA ignores that homelessness may be a far greater punishment than a criminal conviction for elderly and impoverished residents. Even incarceration would provide housing authority residents with a roof over their heads, meals, and a public defender to enforce their constitutional rights.

which is the issue here, should be considered *per se* unconstitutional, or at a minimum, subject to a heightened standard.

Amicus Curiae The Brady Center erroneously argues that the *Hamdan* test is, in essence, a "reasonable regulation test"—a less stringent standard than the District Court applied at the trial court level.[9] (*Amicus* Brady Br. at 9). However, the federal courts have expressly rejected that standard for analyzing the constitutionality of fundamentally protected rights like those at issue here. *See Heller*, 554 U.S. at 629 n.27 (rejecting arguments that would "allow state and local governments to enact any gun control law that they deem to be reasonable" in the Second Amendment context). As noted, the practical net effect of the Revised Policy is to ban the carrying and use of firearms in the common areas of WHA, and a policy that prohibits a fundamental right cannot be considered reasonable.

C. This Court May Use the *Hamdan* Test to Analyze Whether a Total Ban on the Right to Carry a Weapon is Constitutional Under § 20

Where a challenged policy effectively bans, as opposed to merely restricts, a fundamental right, if any test is used, a stricter standard than the *Hamdan* test may be appropriate. However, under the circumstances presented here, where the Legislature has already determined that an individual's right to bear arms outweighs the state's interest in safety (the first prong of the *Hamdan* test), the

[9] Residents observe that this Court did not describe the *Hamdan* test as a mere "reasonable regulation" test in its application of that test in *Griffin II*.

Court need only analyze the second and third prongs of the *Hamdan* test.

Pursuant to the *Hamdan* test, the Court first compares WHA's stated interest in safety with Residents' interest in carrying, and constitutional right to carry, a gun for the lawful purpose of self-defense and other purposes in § 20. The General Assembly, however, already performed this balancing analysis when it enacted a comprehensive statutory scheme to regulate the concealed carriage of weapons through a licensing requirement. Because two successive General Assemblies by a two-thirds majority, already balanced the individual versus public interests and other public policy concerns such as safety, and concluded that the individual right to bear arms for six enumerated purposes was important enough that it should be exalted as a fundamental right enshrined in the Delaware Bill of Rights, the Court need not conduct a further balancing inquiry.

Next, under *Hamdan*, because Residents' constitutional right outweighs WHA's interest in safety, the Court must determine whether Residents are able to exercise their right to keep and bear arms under § 20 in the common areas of WHA in an alternative manner without violating the Revised Policy.[10] The answer is no.

The third prong is whether the right is being exercised for a lawful purpose. A lawful purpose is the only purpose for which Residents seek to exercise that

[10] Residents posit that there is no way to carry a concealed firearm in the WHA common areas without violating the Revised Policy unless they are transporting the weapon to or from their individual units, which is tantamount to a complete ban. By comparison, how meaningful would the right to free speech be if it could only be exercised while entering or exiting the building?

right, which includes compliance with the comprehensive regulations the Legislature already imposes on that exercise.

Applying the *Hamdan* test to the virtual ban on a fundamental constitutional right will ensure that the intent of two General Assemblies to provide broader protections than the Second Amendment is judicially recognized. Further, this test avoids application of the federal levels of scrutiny that were not developed for defining the scope of § 20 of the Delaware Constitution, which was intended to provide broader rights than the Second Amendment.

D. The Revised Policy Is Unconstitutional Under Any Level of Federal Scrutiny

WHA argues in favor of this Court's adoption of a level of scrutiny analysis used by the federal courts in cases involving equal protection under the Fourteenth Amendment of the U.S. Constitution. (AB at 26-31). That would be a mistake.

Relying on *Turnbull v. Fink*, WHA implies that this Court ***has*** used this equal protection analysis for Delaware constitutional challenges, but Residents read that case differently. 668 A.2d 1370 (Del. 1995). In *Turnbull*, after holding that the challenged Delaware law at issue was valid under the Delaware Constitution, this Court also applied a federal equal protection analysis to determine whether that law was constitutional under the U.S. Constitution. *Id.* at 1379. The Court did not use the equal protection analysis for the state constitutional issues. Indeed, the Delaware Constitution does not even contain an

analog to the Fourteenth Amendment's Equal Protection Clause.

While Residents do not believe that this Court should adopt federal standards to analyze the constitutionality of the Revised Policy, if federal precedent is relied upon, *Heller*, which establishes a minimum threshold of protection, supports a finding that the Revised Policy is unconstitutional:

> Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster.

Heller, 554 U.S. at 628-29 (footnotes and citations omitted). Indeed, in *McDonald v. City of Chicago*, the U.S. Supreme Court referred to the "central holding in *Heller*: that the Second Amendment protects a personal right to ***keep and bear arms for lawful purposes, most notably for self-defense*** within the home." 130 S. Ct. 3020, 3044 (2010) (emphasis added).

The Revised Policy, which prohibits Residents from carrying a firearm for the lawful purpose of self-defense in parts of a residential complex,[11] fails constitutional muster under any level of scrutiny.

1. Strict Scrutiny

If, however, this Court determines that strict scrutiny applies, WHA must demonstrate that the Revised Policy is narrowly tailored to effectuate a compelling

[11] *See Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513, 532 (D. Del. 2012) (recognizing "the 'common areas' are also part of Plaintiffs' residences. The laundry rooms and TV rooms, for instance, are like similar rooms that are typically found in private residences.").

state interest. *Turnbull*, 668 A.2d at 1379. WHA has not met that burden because WHA did not tailor its Revised Policy at all. Narrow tailoring may have limited those areas where firearms are banned, for example, to the manager's office. The virtual total ban on firearms in WHA's common areas, which include the open yard, hallways, and parking lots, is not narrowly tailored.

WHA argues that "the Revised Policy is wholly distinguishable from the flat bans addressed by the U.S. Supreme Court in *Heller* and the Seventh Circuit in *Madigan*."[12] (AB at 34). To the contrary, the policy at issue in *Madigan* was uncannily similar to the WHA Revised Policy, and prohibited the carrying of a firearm with only limited "exceptions for a person . . . in his home (but if it's an apartment, only there and not in the apartment building's common areas) . . . ." *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012). There was also an exception for the "right to transport weapons from place to place." *Id.* at 953 (Williams, J., dissenting). The Revised Policy imposes the same prohibitions (*see* AB at 28), and should likewise be found to be constitutionally infirm.

2. Intermediate Scrutiny

If this Court does not consider the right to bear arms to be a fundamental, constitutionally protected right subject to strict scrutiny, and implements

[12] Further, WHA unsuitably analogizes this case with multiple cases involving felons and the right to have a gun with an obliterated serial number. AB at 22, 26-27. Residents, however, only seek to protect the fundamental constitutional rights of law-abiding citizens who agree to be bound by existing laws—and not additional arbitrary rules imposed only on those who need subsidized housing.

intermediate scrutiny, the Revised Policy still cannot survive. Applying intermediate scrutiny would ignore that the right at issue in this case—the right to bear arms under the Delaware Constitution—is a fundamental right that (under the federal standard) requires "the more rigorous 'strict scrutiny' test . . . ." *Turnbull*, 668 A.2d at 1379 ("[W]here the state action infringes upon a 'fundamental right' . . . , the more rigorous 'strict scrutiny' test will be applied.").

Intermediate scrutiny requires WHA to establish a reasonable fit between its asserted significant, substantial, or important governmental interest and the Revised Policy.[13] *Marzzarella*, 614 F.3d at 98. The governmental interest here is safety; however, WHA has not established that its ban on firearms in the common areas is a "reasonable fit" compared to its interest in safety.

Critically, WHA neglected to rely on any data to inform its decision as to whether the Revised Policy would achieve any safety objective at the time it adopted the Revised Policy. Further, statistical data indicates that the Revised Policy actually makes Residents **less** safe, debunking WHA's alleged rationale for implementing a firearms ban in violation of Residents' constitutional rights.[14]

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[13] WHA incorrectly identifies the intermediate scrutiny standard as follows: "the Revised Policy must be upheld because it advances a compelling governmental interest, and is narrowly tailored…." AB at 27. This is the federal standard for strict scrutiny, not intermediate scrutiny. *United States v. Marzzarella*, 614 F.3d 85, 97 n.14 (3d Cir. 2010) ("Strict scrutiny asks whether the law is narrowly tailored to serve a compelling government interest.").

[14] The United States Department of Housing and Urban Development (HUD) does not take any position on guns in public housing authorities. *See* Jamie Wershbale, *The Second Amendment under a Government Landlord: Is There a Right to Keep and Bear Legal [Fire]arms in Public*

III. WHA is Preempted from Implementing the Revised Policy

The Third Circuit certified two questions to this Court, specifically asking whether a public housing agency may adopt and implement policies concerning the possession and use of firearms. Inherent in these questions is the issue of whether a public housing agency has the authority to adopt and implement such policies. Therefore, the preemption issue is properly before this Court on certification.

A. Delaware's Comprehensive Regulatory Scheme Covering Firearm Possession, Use, and Licensing Preempts WHA's Ability to Adopt the Revised Policy

WHA's Revised Policy, which restricts the possession and use of firearms beyond what is permitted by Delaware statutory law, is preempted. Not even the Legislature can impose a virtual ban on the rights provided by § 20 (absent a constitutional amendment), so it remains axiomatic that the Legislature could not delegate the power to virtually eviscerate these rights to WHA. (*See Amicus* General Assembly Br. at 11).

There is no question that WHA is a government entity. Housing authorities in Delaware are creatures of statute that have limited, circumscribed powers that are specifically enumerated. 31 DEL. C. §§ 4301, *et seq.* Housing authorities are not empowered to regulate in the field of firearms.[15] *See Doe v. Portland Hous.*

Housing, 84 ST. JOHNS L. REV. 995, 1013-18 (Summer 2010) (explaining that "[a]t present, HUD does not have an official position either for or against tenant possession of legal firearms in public housing….").

[15] *Amicus* The Brady Center, however, compares the Revised Policy to a statute. Brady Br. at 9.

Auth., 656 A.2d 1200, 1203 (Me. 1995) (invalidating a lease provision banning firearms in public housing in Maine).

Residents rely on *Portland Housing* in their Opening Brief because that case is strikingly similar to the instant case, and not "completely distinguishable" as asserted by WHA. (AB at 19). The preemption statute at issue in that case precluded "political subdivisions" from regulating in the field of firearms, but the statute did not explicitly identify housing authorities as political subdivisions. *Id.* at 1201-02 (citing 25 M.R.S.A. § 2011). However, the court held that the public housing authority was a political subdivision and was preempted from regulating in the field of firearms. *Id.* at 1203-04.

Delaware's preemption statutes prohibit "municipalities" and "county governments" from attempting to regulate within the field of firearms. 22 DEL. C. § 111; 9 DEL. C. § 330(c). WHA is not expressly included or excluded from these categories.[16] Further, these preemption statutes were enacted or revised at about the same time as § 20, supporting the argument that the General Assembly intended to preempt lesser state actors, like housing authorities, from firearms regulation.[17]

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[16] Although the Delaware preemption statutes do not use the term "political subdivision" like the Maine preemption statute, it is significant that this Court in *Cantinca v. Fontana*, 884 A.2d 468, 473 (Del. 2005), expressly held that "political subdivisions" are preempted from enacting provisions that conflict with state law.

[17] *See* 65 Del. Laws ch. 133 (1985), *codified at* 9 DEL. C. § 330(c); 65 Del. Laws ch. 278 (1986), codified at 22 DEL. C. § 111. Further, the relationship between preemption and § 20 is far more

WHA inappropriately compares housing authorities with government employers for the purpose of rebutting preemption. (AB at 17). This argument is wrong because the "home" is special—a conclusion that has been settled by the United States Supreme Court and this Court. *See Heller*, 554 U.S. at 635 ("[The Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of ***hearth and home***."); *Griffin II*, 47 A.3d at 491 (finding interest in self-defense most important in the home).

B. WHA's Status as a Landlord or a Sovereign Is Immaterial

Just as in its preemption argument, WHA again compares housing authorities with government employers for the purpose of establishing a "government-as-proprietor" argument. (AB at 14-15, 29). At times, in federal First Amendment jurisprudence, where the government serves as a landlord or employer, it is subject to a lesser standard than where it serves in a regulatory or lawmaking capacity. *See, e.g., Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). Relying on cases where a lesser level of scrutiny applies to government employers,[18] WHA contends that this federal "government-as-proprietor" doctrine, which has never been applied in the Second Amendment context, should apply in this case to ensure WHA is subject to some lesser level of

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than one of temporal proximity. Prohibiting localities from infringing on the right to keep and bear arms ensures a common scheme of regulation for the entire state that helps to secure the right.

[18] The cases relied on by WHA do not involve the restriction of a fundamental constitutional right to protect oneself against violent crime.

scrutiny. (AB at 14-15, 29). Residents are **not** employees of WHA, however.

The "government-as-proprietor" doctrine has not been embraced by the courts in Second Amendment challenges, and there are sound reasons not to extend the doctrine wholesale to § 20 challenges. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, 56 UCLA L. REV. 1443, 1533 (2009) (suggesting that applying the government-as-proprietor doctrine to firearms regulations promulgated by public housing authorities may be inappropriate because: "Public housing might be treated specially, because it is a home as well as a government building, or because it is the sort of government benefit that is unusually important to those who use it."). This is especially true where the government (as a landlord) is depriving a law abiding citizen of her fundamental right to use a lawfully possessed firearm in self-defense in the common areas of her residential building.

WHA argues that the Revised Policy is not law, and therefore, "WHA is not a sovereign at all." (AB at 18). But the Revised Policy is every bit as coercive as a law, because it is enforced by evicting a tenant who has no other place to live. For a person who cannot otherwise afford housing, that is the penalty of homelessness —a penalty that is harsher than any sentence a court could impose for violation of the law relating to carrying firearms.

IV. The Reasonable Cause Provision is Unconstitutional

The singular effect of the Reasonable Cause Provision in the Revised Policy, which allows any WHA employee to request any WHA resident suspected of carrying a concealed weapon to produce a valid firearms license, is to ensure compliance with the Common Area Provision. If the Common Area Provision is struck down as unconstitutional, the constitutionality of the Reasonable Cause Provision becomes moot.

Considered wholly separate from the Common Area Provision, however, the Reasonable Cause Provision is unconstitutional under Article I, § 6 of the Delaware Constitution, which prohibits the unreasonable search or seizure of any person by an agent of the government.[19] DEL. CONST. art. I, § 6 ("Searches and seizures").

Under Delaware law, "[t]o conduct an investigatory stop, an officer must have reasonable suspicion that the individual detained is engaged in or is about to be engaged in ***criminal activity***."[20] *Roy v. State*, 62 A.3d 1183, 1187 (Del. 2012) (emphasis added). If this Court determines that WHA employees are state agents, a WHA employee's demand for the production of a resident's firearms license

[19] Under the Reasonable Cause Provision, a resident's refusal to produce a valid firearms license could result in a resident's eviction from WHA. WHA's eviction of a resident, ultimately would be considered government action to deny a governmental benefit, and would require due process.

[20] The Reasonable Cause Provision does not require a WHA employee to have a reasonable suspicion that a resident is engaged in or about to engage in criminal activity before detaining a resident to demand production of a valid firearms license. Therefore, the Reasonable Cause Provision permits the unlawful detention of WHA residents and is *per se* unconstitutional.

without a reasonable suspicion of criminal activity, would be an unlawful investigatory stop under Article I, § 6 of the Delaware Constitution.

Such a confrontation is fraught with risks—creating more safety issues that WHA professes to eschew.[21] Further, not all WHA employees are trained to identify reasonably suspicious activity; nor are WHA employees permitted, under the guise of state authority, to unlawfully confront WHA residents.

Conclusion

For these reasons, Residents Jane Doe and Charles Boone respectfully request that this Honorable Court respond to the Third Circuit's certified questions by finding that the Wilmington Housing Authority's Revised Policy is not lawful and violates Article I, § 20 of the Delaware Constitution.

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[21] In response to WHA's attacks on John Lott, a respected scholar in the field of economics and gun-related violence (AB at 32-33 n.8), Residents refer the Court to the *amici* briefs and the authorities cited therein that reach the same conclusions as Mr. Lott. *See, e.g., Amicus* NRA Br. at 16-17.