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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF AMICI CURIAE, DELAWARE STATE SPORTMENS ASSOCIATION, INC. AND BRIDGEVILLE RIFLE AND PISTOL CLUB, LTD., IN SUPPORT OF JANE DOE AND CHARLES BOONE, PLAINTIFFS BELOW, APPELLANTS, AND FURTHER IN SUPPORT OF AN ANSWER OF "NO" TO THE FIRST CERTIFIED QUESTION

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

Identity: Amici Curiae, Delaware State Sportmens Association, Inc. ("DSSA") and Bridgeville Rifle And Pistol Club, Ltd. ("Bridgeville"), are both private Delaware incorporated clubs dedicated to promotion of hunting, recreational shooting and the safe and lawful ownership, possession and use of firearms. DSSA has more than 600 members; and Bridgeville has more than 1,000 members and it operates a shooting range facility at Bridgeville, Delaware. DSSA is an independent State Affiliate of the National Rifle Association.

Interest: Hunting and recreational shooting cannot take place without the possession and movement of uncased and loaded firearms outside the home. The clubs' members are therefore personally and directly affected by and vitally interested in Delaware's Bill of Rights which at Article I, § 20 of the Constitution guarantees and protects their hunting and recreational shooting activities. And they are therefore vitally interested in the judicial treatment of any governmental action (such as Wilmington Housing Authority's Common Area Policy) which is seen to impair or infringe the rights of hunters and recreational shooters. The clubs' members stand to be personally and directly affected by any judicial interpretations defining the application and scope of Delaware's constitutional guarantees and protections for hunters and recreational shooters. Because both

clubs' members are firearms shooters, they also typically rely on their firearms to one degree or another for the protection of themselves, their families and their homes; and so they are personally and directly affected by and interested as well in all judicial interpretations of the constitutional guarantees and protections affecting their rights to keep and bear arms outside the home.

Source of Authority: The clubs' members have therefore collectively joined together, acting by and through their respective clubs' Boards of Directors and undersigned counsel, to offer this Court an amicus brief reflecting their interests and their opinions (a) as to the proper application of Article I, § 20 of the Delaware Constitution to the Common Area Policy adopted by Wilmington Housing Authority, and (b) that the Common Area Policy is unconstitutional on its face.

On August 18, 2013, DSSA's Board of Directors enacted a Resolution authorizing and directing its officers to take action to ensure that DSSA will take part in this proceeding as Amicus Curiae and will file this submission. On August 26, 2013, Bridgeville's Board of Directors enacted a Resolution authorizing and directing its officers to take action to ensure that Bridgeville will take part in this proceeding as Amicus Curiae and will file this submission.

SUMMARY OF ARGUMENT

1. Article I, § 20 of the Delaware Constitution of 1897 embodies a broad policy which guarantees persons a right to carry firearms openly outside the home.

2. Wilmington Housing Authority, by its Common Area Policy, prohibits a wide range of activities protected by Article I, § 20.

3. Wilmington Housing Authority cannot sustain its Common Area Policy by claiming to act as a private landlord and proprietor of its rental units.

4. Wilmington Housing Authority cannot sustain its Common Area Policy by claiming to have enacted that Policy in the exercise by it of lawful authority in the form of Title 31 of the Delaware Code, Chapter 43, delegated to it legislatively by the Delaware General Assembly.

5. Wilmington Housing Authority cannot sustain its Common Area Policy by claiming that all the common areas are sensitive places from which the Court should exclude the protections guaranteed by Delaware's Bill of Rights at Article I, § 20.

6. Wilmington Housing Authority cannot sustain its Common Area Policy by claiming that its constitutionality should be judged on a case by case basis, as applied to the facts of each case, thereby postponing its demise.

Instead, its Common Area Policy, on account of its infirmities, should be adjudged unconstitutional on its face, and therefore void.

7. Article I, § 20 disallows the Wilmington Housing Authority from adopting its Common Area Policy prohibiting its residents, household members, and guests from displaying or carrying a firearm or other weapon in a common area, except when the firearm or other weapon is being transported to or from a resident's housing unit or is being used in self defense.

ARGUMENT

ARTICLE I, § 20 OF THE DELAWARE CONSTITUTION, EMBODIES A BROAD POLICY OF OPEN CARRY FOR FIREARMS OUTSIDE THE HOME WHICH DISALLOWS A PUBLIC HOUSING AGENCY SUCH AS THE WILMINGTON HOUSING AUTHORITY FROM ADOPTING A POLICY PROHIBITING ITS RESIDENTS, HOUSEHOLD MEMBERS, AND GUESTS FROM DISPLAYING OR CARRYING A FIREARM OR OTHER WEAPON IN A COMMON AREA, EXCEPT WHEN THE FIREARM OR OTHER WEAPON IS BEING TRANSPORTED TO OR FROM A RESIDENT'S HOUSING UNIT OR IS BEING USED IN SELF DEFENSE.

The Delaware Constitution of 1897 guarantees a personal right to bear arms outside the home:

> *"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

Hunting and recreational activities typically take place only outside the home, so the guarantee of the Delaware Constitution can clearly be understood to extend beyond the home. Indeed, the term *"bear arms"* implies a right to carry arms outside the home for each of the six purposes enumerated in Article 1, § 20:

> *" * * *. The right to "bear" as distinct from the right to "keep" arms is unlikely to refer to the home. To speak of "bearing" arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home."*
> Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012) Rehearing en Banc Den. at Moore v. Madigan, 708 F.3d 901 (7th Cir. 2013)

The Illinois Supreme Court applied that Moore, *supra*, analysis to strike down that State's Aggravated Unlawful Use of Weapons statute:

> *"After reviewing these two lines of authority – the Illinois cases holding that section 24-1.6(a)(1), (a)(3)(A) is constitutional, and the Seventh Circuit's decision holding that it is not – we are convinced that the Seventh Circuit's analysis is the correct one. As the Seventh Circuit correctly noted, neither Heller nor McDonald expressly limits the second amendment's protections to the home. On the contrary, both decisions contain language strongly suggesting if not outright confirming that the second amendment right to keep and bear arms extends beyond the home. Moreover, if Heller means what it says, and "individual self-defense" is indeed "the central component" of the second amendment right to keep and bear arms (Heller, 554 U.S. at 599), then it would make little sense to restrict that right to the home, as "[c]onfrontations are not limited to the home." Moore, 702 F.3d at 935-36. Indeed, Heller itself recognizes as much when it states that "the right to have arms * * * was by the time of the founding understood to be an individual right protecting against both public and private violence." (Emphasis added.) Heller, 554 U.S. at 593-94."*
> People v. Aguilar, No. 2013 IL 112116, 2013 WL 5080118 (Ill. September 12, 2013) (Exhibit 1)

Moreover, in applying Delaware's Article I, § 20, this Court expressly approved and adopted the analysis by the Wisconsin Supreme Court in State v. Hamdan, 665 N.W.2d 785 (Wisc. 2003), which applied its State constitution to invalidate Wisconsin's conceal carry statute as applied to a business owner who kept a concealed handgun in his store, Griffin v. State, 47 A.3d 487 (Del. 2012). That Wisconsin constitutional provision quoted in Griffin, *Id*., 47 A.3d at FN7, page 490, is substantially similar to Delaware's Article I, § 20. Because that store was presumably not contained within the owner's home, this Court by approving the Hamdan, *supra*, analysis, appears to have expressed recognition that Article I, § 20 can apply to possession of firearms outside the home.

What is more, there are only two ways in which firearms outside the home can be possessed, and those are either openly or concealed. But this Court has already determined that Article I, § 20 does not guarantee a right to keep or bear concealed firearms in public, Smith v. State, 882 A.2d 762 (Del. 2005) (Table) 2005 WL 2149410 (Del. August 17, 2005). It follows therefore that if Article I, § 20 is to have any application at all to possession of a firearm in public, it must apply to open carry. Or, to state the argument even more expansively, if Article I, § 20 is to have any meaning at all, it must apply to open carry.

With that introduction, we can next examine the Common Area Policy of Wilmington Housing Authority ("WHA") which provides that residents, household members, and guests:

> *"3. Shall not display or carry a firearm or other weapon in any common area, except where the firearm or other weapon is being transported to or from the resident's unit, or is being used in self-defense."*

The following examples demonstrate the broad range of activities prohibited by that Policy:

A. Resident housewives gather together to sit in the TV room, a common area, to socialize, and to cut and peel potatoes for dinner. That they do with their kitchen knives, brought for that purpose. Such knives are *"deadly weapons"*, Griffin v. State, 47 A.3d 487, 489 (Del. 2012); and they also are *"arms"* within the guarantees provided by Article I, § 20, Griffin, *supra,* 47 A.3d at 491 (Del. 2012).

Yet those housewives have violated the WHA Common Area Policy which expressly applies to *"a firearm or other weapon"*.

B. A resident bulls-eye competition shooter returns from a gun shop carrying his newly purchased target pistol in its case and he encounters his wife, seated in a common area on the housing grounds. He sits down to join her and to discuss the events of their day. Article I, § 20 guarantees a *"right to keep and bear arms for . . . recreational use"*. Even so, once the resident sits to join his wife, the pistol is no longer in the course of being transported to his apartment; and it is unloaded and therefore incapable of use for self-defense -- so he has therefore violated the Common Area Policy.

C. An unidentified predator has been spotted in the neighborhood trying to force young children into his car. A resident, worried about the safety of her 8 year old grandson, has in her possession a small revolver as she watches over him while he plays on the housing grounds. Article I, § 20 expressly guarantees the *"right to keep and bear arms for the defense of . . . family, . . ."*, yet that grandmother has violated the Common Area Policy which permits possession of a firearm only for self-defense.

D. Residents prepare for a hunting trip, sitting together on the housing grounds, talking and cleaning their shotguns. Although Article I, § 20 guarantees a *"right to keep and bear arms for . . .hunting"*, they have violated the Common

Area Policy.

None of those activities is per se unlawful either in public areas that are outside the WHA grounds or inside the residents' own apartments. But WHA claims the right to prohibit those otherwise lawful activities from the common areas which occupy the space between the residents' apartment units and the public areas outside. Those activities are not unlawful because there are no laws generally prohibiting them. Also, they may be protected both inside the home and outside in public areas by the Second Amendment to the United States Constitution, Moore v. Madigan, 702 F.3d 933 (7th Cir., 2012), Reh en Banc Den 708 F.3d 901 (7th Cir., 2013). It may be noteworthy that in striking down as unconstitutional the Illinois statute which prohibited carrying a loaded gun that was accessible, Moore pointed out that the statute made an exception for a person only *"in his home (but if it's an apartment, only there and not in the apartment building's common areas)"*, Moore, Id. 702 F.3d at 934.

But WHA's Common Area Policy prohibits those lawful activities in all its common areas, even where those activities are encompassed within the express guarantees of the Delaware Constitution at Article I, § 20. Yet nothing in the text or in the history of Article I, § 20 suggests an intent to limit the scope of its application in any way that would support the Common Area Policy.

A. WHA does not act a a Private Landlord and Proprietor of its Rental Units

WHA may seek to defend its Common Area Policy by claiming to act not as a government, but as a private landlord in its role as the proprietor of its rental units. But WHA was long ago determined to be a State agency, Wilmington Housing Authority v. Williamson, 228 A.2d 782 (Del. 1967); and all its common areas are public property:

> **§ 4312. Property as public property.**
> All property, both real and personal, acquired, owned, leased, rented, or operated by an authority is deemed public property for public use.
> 31 Del.C. § 4312

B. WHA Cannot Claim Legislative Authority to Override Constitutional Guarantees.

WHA may seek to defend its Common Area Policy by claiming legislative authority through Title 31 of the Delaware Code, Chapter 43. However, the General Assembly itself is without power to enact a statute that would deny citizens their rights to keep and bear arms guaranteed by the Delaware Bill of Rights at Article I, § 20:

> *"WE DECLARE THAT EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED."*
> Del.Const. art. I, Reserve Clause

That Reserve Clause means that the provisions of Article I which is the Bill of Rights are reserved out of the general powers of government and that the General Assembly cannot undo those protections guaranteed in Article I, simply by

enacting legislation in the exercise of its general powers, State v. Bender, 293 A.2d 551 (Del. 1972). But if the General Assembly itself is without power to deny citizens (including the WHA residents, household members and guests) their rights to keep and bear arms guaranteed by the Delaware Constitution at Article I, § 20, then it should follow that the General Assembly could not possibly delegate powers that it does not have to a State agency such as WHA, to deny those same rights, State v. McBride, 477 A.2d 174, 184 (Del. 1984).

C. The Common Areas are not Sensitive Places that the Court should Shield from the Protections of Delaware's Bill of Rights, Article I, § 20

WHA may seek to defend its Common Area Policy by urging this Court to adopt the "sensitive places" exception to the Second Amendment, which originated in the U.S. Supreme Court with the Heller case:

> *" * * *. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.FN26*
>
> *FN26. We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.*
> District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008):

There are difficulties in applying that "sensitive places" standard because Heller,

without offering any greater guidance, told us only that "sensitive places" are locations that are like schools and government buildings. The developing case law tells us that the sensitivity of a government facility may depend upon the nature, intensity and extent of the government work done there, Bonidy v. United States Postal Service, -- F.Supp.2d --, 2013 WL 3448130 (D.Colo. July 9, 2013) (Exhibit 2). Or, as acknowledged in an earlier stage of this case in the U.S. District Court of Delaware:

> *" * * *. The government business done in the common areas does not appear to be of the same extent or nature as that done in schools, post offices and courthouses. The common areas do not appear, from the record, to be places where the general public at large gathers."*
> Doe v. Wilmington Housing Authority, 880 F.Supp.2d 513, 532 (D.Del. 2012).

The "sensitivity" of a place is qualitative rather than quantitative, measuring sensitivity is inexact, and judging sensitivity can be problematic. For example, sensitivity of the WHA's common areas was discussed extensively in the U.S. District Court, Doe v. Wilmington Housing Authority, 880 F.Supp.2d 513, 525-32 (D.Del. 2012). However, after extensive discussion the District Court cited the factual uncertainties and the need for caution in deciding against trying to determine whether or not the WHA common areas were "sensitive places" within Second Amendment jurisprudence. In like fashion, the Fourth Circuit discussed "sensitive places", explained its ambiguity, and decided against determining

whether or not the location in question was a sensitive place, in United States v. Masciandaro, 638 F.3d 458, 468 and 471-73 (4th Cir. 2011) 1. That alone, i.e. the difficulty in applying the "sensitive places" standard, may offer a persuasive reason not to choose to incorporate the Federal "sensitive places" doctrine into Delaware constitutional law. In exercising their Article I, § 20 constitutional rights, Delaware citizens, including residents of public housing, cannot be faulted for wanting and expecting certainty and predictability from the laws which govern them – and especially when faced with the possibilities of losing their homes or their liberties.

D. The Constitutionality of WHA's Common Area Policy Should Not be Judged on a Case by Case Basis, as Applied to the Facts of Each Case

WHA may seek to defend its Common Area Policy by urging this Court to apply the same Hamdan analysis that it applied in Griffin v. State, *supra*. However, Griffin, *supra*, involved a constitutional challenge to Delaware's conceal carry statute *as applied* to Mr. Griffin. The second part of that Hamdan analysis inquires into whether or not there was a reasonable alternative to the prohibited conduct, Griffin, *Id*. 47 A.3d at 491, and such an inquiry is always made in the context of a specific set of facts. Such a Hamdan analysis necessarily applies to the unique facts and circumstances of a case in which specific prohibited conduct

1 See Court's Opinion at page 468 and the Concurring Opinion at pages 471-73, both of which Opinions declined to decide the possible application of "sensitive places".

by a person has been alleged. By contrast, this Court now has before it certified questions of law from the Court of Appeals and a record almost bare of facts.

Another distinction to be drawn is that in Griffin, *supra*, the Court dealt with the application of a generally valid statute under circumstances where Mr. Griffin's constitutional rights might have been violated – whereas WHA's Common Area Policy is invalid at its inception because, as demonstrated above, it prohibits on its face so much conduct that is constitutionally protected:

> *"A statute is unconstitutionally overbroad if it "does not aim specifically at evils within the allowable area of government control, but sweeps within its ambit other activities that constitute an exercise of protected expressive or associational rights." * * *.*
> *"Where a statute is challenged for overbreadth, the threshold inquiry is whether the statutory reach encompasses a substantial category of constitutionally protected conduct. If not, the statute is not constitutionally overbroad."*
> Wien v. State, 882 A.2d 183, 186-87 (Del. 2005)

See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982).

Although a statute that is constitutionally overbroad will be stricken as void on its face most typically when it affects First Amendment rights, both the U.S. Supreme Court and this Court have invalidated overbroad statutes that did not affect First Amendment rights, State v. Wien, 2004 WL 2830892 (Del.Super. May

19, 2004) (Exhibit 3), affirmed Wien v. State, 882 A.2d 183 (Del. 2005). And that was precisely what the U.S. Supreme Court did where Second Amendment rights were affected, in District of Columbia v. Heller, *supra.*

Moreover, the WHA residents ought not to be relegated to case by case analyses and determinations of the constitutionality of the Common Area Policy as applied. It seems unfair to the residents, typically elderly and poor, to burden them with the ongoing costs and risks of numerous lawsuits such as would be required to define the boundaries, if any there are, of the constitutionality of the Common Area Policy as applied. Those risks of litigation include eviction and the loss of their homes. It seems unfair to expose the residents to those risks because much of the infirmity of the Common Area Policy stems from the fact that WHA placed the same blanket ban on all parts of the common areas, although some common areas like laundry rooms and TV rooms were clearly part of the residences, Doe, *Id.* 880 F.Supp.2d 532. Other common areas were administrative offices where government work may be said to be done, Id. at 531; and it is possible that firearms could have been regulated in the WHA administrative offices consistent with Article I, § 20 if the record were to show the requisite nature, intensity and extent of government work done there. But residents in other common areas, such as the laundry rooms and TV rooms that were part of the residences, clearly could not have been properly subjected to the restrictions contained in the Common Area

Policy. As this Court wrote:

> *" * * *. A person's interest in keeping a concealed weapon is strongest when the weapon is in one's home or business and is being used for security. The state's interest is weakest in those circumstances because the concealed weapon presents a relatively minimal threat to public safety. Thus, the balance weighed in favor of Hamdan's constitutional right. * *."*
> Griffin v. State, 47 A.3d 487, 491 (Del. 2012)

It is not that the State is without any interest in avoiding events where a person, sitting in his own personal living room, may take a gun and shoot his guest sitting across from him, or where he may shoot a passerby on the street who he sees through his apartment window, or where he may may shoot through the ceiling above to express his displeasure with his noisy upstairs neighbor. It is that the threat to public safety is relatively minimal, whereas on the other hand the person's need to be secure in his own home against home invasions and other threats becomes most compelling, Griffin, *Id*. at 491. So, too, in the laundry area and the TV room and other like areas, the threat to public safety is relatively minimal but the resident's interest in security is strong. Because WHA disregarded its residents' strong needs for security in those parts of the common areas that are clearly a part of their living areas, it would be unfair for them to be subjected to the rigors and ordeals of case by case determinations in the courts, to define the constitutional boundaries, if any there are, of the Common Area Policy as applied. By creating its Common Area Policy to apply indiscriminately, everywhere in the

common areas, regardless of how like or how unlike the location was to a sensitive place, it seems that WHA created an inescapable violation of its residents' Article I, § 20 rights. It follows that WHA's Common Area Policy should be determined to be unconstitutional on its face, as violating Article I, § 20 of the Bill of Rights in the Delaware Constitution.

CONCLUSION

Based on the foregoing, Amici Curiae, Delaware State Sportmens Association, Inc. and Bridgeville Rifle And Pistol Club, Ltd., pray that this Court will report to the United States Court of Appeals for the Third Circuit that Article I, § 20 of the Delaware Constitution disallows the WHA from prohibiting its residents, household members, and guests from displaying or carrying a firearm or other weapon in a common area, except when the firearm or other weapon is being transported to or from a resident's housing unit or is being used in self defense.

Respectfully submitted,

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