



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

**BRIEF OF 16 MEMBERS OF THE DELAWARE GENERAL ASSEMBLY
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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Dated: September 20, 2013

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

Amici listed in the Appendix to this brief are sitting members of the Delaware General Assembly. As such, *amici* are sworn to “uphold and defend the Constitutions” of the United States and Delaware. See Del. Const. art. XIV § 1. *Amici* believe this obligation extends to expressing their views, as members of a coequal branch of government, on the interpretation of constitutional provisions enacted by the General Assembly. *Amici* further believe that the views of members of the General Assembly, as informed by their experience in the legislative process, will be useful to this Court in resolving the important issues raised in the certified questions.

SUMMARY OF ARGUMENT

The certified questions in this case¹ require the Court to determine the scope of Article I, Section 20 of the Delaware Constitution.

Today's Delaware Constitution, like both of its immediate predecessors, says that "Through divine goodness, all people have by nature, the rights of ... enjoying and defending life and liberty, [and] of acquiring and protecting reputation and property ..." *See* Del. Const., Preamble (1897); *accord*, Del. Const., Preamble (1831); Del. Const., Preamble (1792). The General Assembly sought to protect one means of "defending life and liberty" and of "protecting ... property" by enacting Article I, Section 20. Textually, the specific enumeration of aspects of the right to arms in Section 20 makes clear that it should be read more broadly than the Second Amendment to the United States Constitution. In addition, the enactment of Section 20 occurred against the background of federal

¹ "(a) Whether, under Article I, §20 of the Delaware Constitution, a public housing agency such as the WHA may adopt 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.

"(b) Whether, under Article I, §20 of the Delaware Constitution, a public housing agency such as the WHA may require its residents, household members, and guests to have available for inspection a copy of any permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm or other weapon, including a license to carry a concealed weapon, as required by Del. Code Ann. tit. 11, §1441, on request, when there is reasonable cause to believe that the law or policies have been violated."

court decisions that had essentially nullified the Second Amendment—a situation that the General Assembly could not have intended to replicate.

Furthermore, the General Assembly enacted Section 20 against the background of Delaware’s history of firearm regulation and the state’s ongoing modern-day debate over the appropriate scope of state-versus-local firearms regulation. All of these factors show the General Assembly’s intent to provide broad protections for citizens’ rights, coupled with limitations on the powers of local entities to restrict those rights.

Finally, the General Assembly granted housing authorities no authority to regulate firearms. Indeed, the policy expressed in Delaware’s state firearms preemption statute, as in similar statutes of sister states, strongly supports Appellants’ argument that the Wilmington Housing Authority is forbidden from regulating firearms on its property.

Amici therefore believe the answer to both certified questions is “No.”

ARGUMENT

I. Article I, Section 20 should be read more broadly than the Second Amendment.

A. The text of Section 20 is both expressly and implicitly broader than the Second Amendment.

It should be unnecessary to go beyond the words of Section 20, because “Delaware courts have consistently followed the ‘plain meaning rule’ for construction of statutes or the Delaware Constitution.” *Turnbull v. Fink*, 668 A.2d 1370, 1378 (Del. 1995). Section 20 states that “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.” This language protects no fewer than 12 distinct but interrelated rights: the right to keep arms for six enumerated purposes and the right to bear arms for six specifically enumerated purposes—in contrast to interpretations of the Second Amendment to date, which have, at least primarily, only addressed the right to arms for defense. *See District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). *See also* Randy J. Holland, *The Delaware State Constitution* 67 (2002) (noting that the General Assembly “did not take [Section 20’s] text verbatim from the Second Amendment” and that “[t]he textual differences ... appear to afford greater protections under the Delaware Constitution than the protections of the Second Amendment.”).

Further, the legislature meant to indicate that Section 20 protects a fundamental right by placing the provision in Delaware’s Bill of Rights, which is descended from (though not identical to) Delaware’s 1776 Declaration of Rights and Fundamental Rules. (Emphasis added). *See Gannon v. State*, 704 A.2d 272, 277 (Del. 1998). And the amendment process itself—requiring passage of a provision by a two-thirds vote in each house, in each of two consecutive General Assemblies, *see* Del. Const. art. XVI, § 1—involves the legislative exercise of “a very special power” that “reflect[s] the mind and will of the people.” Holland, *Delaware State Constitution* at 68.

B. The legal context in which Section 20 was adopted makes clear that it was intended to provide broader protection than the Second Amendment.

The General Assembly “is presumed to be aware of existing law.” *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 239 n.13 (Del. 1982). Section 20 was enacted against a backdrop of federal court decisions holding that the Second Amendment provided no protection for individual rights, did not apply to actions by the states, or both. For example, at the time Article 20 was passed, the Third Circuit had held that the Second Amendment “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). The courts in sister states had adopted similar views. *See, e.g., Burton v. Sills*, 248 A.2d 521, 526-27 (N.J. 1968); *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967); *City of East Cleveland v. Scales*, 460 N.E.2d 1126, 1130 n.6 (Ohio App. 8th Dist. 1983). It would have been nonsensical for the General Assembly to amend the state constitution to protect itself from “federal power,” especially if the Second Amendment already provided such protection.

Likewise, the General Assembly acted against the backdrop of federal and state decisions holding “that the second amendment does not apply to the states.” *See Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982); *see also State v. Friel*, 508 A.2d 123, 125 (Me. 1986) (Second Amendment “operates as a restraint solely upon the power of the national government”); *Masters v. State*, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985) (“[t]he Second Amendment simply does not apply to the states or their subdivisions”). Again, even if these had been correct readings of the Second Amendment, the General Assembly could not have meant to adopt them. A provision of the Delaware Bill of Rights must protect against actions by the state of Delaware, or it protects against nothing.

Indeed, supporters of adding Section 20, such as the National Rifle Association, expressly tied their advocacy of the second leg of the amendment process to then-current court rulings “that the Second Amendment is not binding

on the states.” See Tom Greer, *NRA pushes amendment*, News-Journal, April 15, 1987, at B-5. The legislature’s goal in adding Section 20, contrary to the holdings of several federal courts, was to recognize that the right to keep and bear arms, for the enumerated purposes, was a fundamental right guaranteed to all Delawareans and thus “prevent ‘the banning and/or confiscation of firearms from law-abiding citizens.’” See Nancy Kesler, *State foresees another shoot-out on gun control*, News-Journal, Oct. 3, 1988, at A1.

This strongly suggests that rather than tracking the meaning of the federal provision, the General Assembly intended to follow the states that had made clear that their state constitutional provisions on the right to keep and bear arms were to be read more broadly than the Second Amendment. See, e.g., *State v. Rupe*, P.2d 571, 596 (Wash. 1984) (finding Washington constitutional provision “facially broader than the Second Amendment”); *State v. Kessler*, 614 P.2d 94, 95 (1980) (noting that the “second amendment has not yet been held to apply to state limitations” but striking down ban on billy clubs under state right-to-arms provision). Even critics of Section 20 read it as providing stronger protection against restrictive firearms regulation than the then-prevalent view in the federal courts. For example, a year after the provision’s enactment, a newspaper account paraphrased then-Attorney General Charles M. Oberly III as expressing a concern

that Section 20 was “an impediment to passing more restrictive legislation.” *See Kesler, supra*, at A1.

C. The historical context in which Section 20 was adopted makes the General Assembly’s broad intent clear.

As noted by Appellants, *see* Appellants’ Br. at 19, the General Assembly’s enactment of Section 20 was a step in our nation’s gradual removal of firearms restrictions either directly discriminating or disparately affecting disadvantaged populations.

Delaware’s history on this issue was tragic, but not atypical. An 18th century law provided for the whipping of any slave who possessed any sort of arms “without his master’s special licence.” An Act for the Trial of Negroes, Ch. 43, 1 *Laws of the State of Delaware, 1700-1797*, at 104 (1797). A later statute denied gun ownership to free blacks unless they obtained a special license. An act to prevent the use of fire arms by free negroes and free mulattoes, Ch. 176, 8 Del. Laws (1830-35) 208 (1841). The licensing provision was repealed during the Civil War, and the penalties increased. An Act in relation to free negroes and mullatoes, § 7, Ch. 305, Mar. 18, 1863, 12 Del. Laws 332 (1865). Even in the 20th century, handgun dealers were required to record not only the color of the purchaser, but also “the names and addresses of at least two freeholders resident in

the County wherein the sale is made, who shall positively identify the purchaser before the sale can be made” An act to amend Chapter 6 of the Revised Code, Ch. 28, April 10, 1919, in 30 Del. Laws 35 (1919). The requirement for identification by freeholders was not repealed until the federal courts invalidated it just a few years before the enactment of Section 20. *See* An Act to amend Chapter 9, Title 24 of the Delaware Code, Ch. 406, in 61 Del. Laws, pt. 2, 1085 (1978). As the Third Circuit explained, “For Delaware to assume that only citizens with the wealth and/or interest in owning real property are capable of participating in the regulatory functions of [the handgun purchase statute] is simply not rational.” *Hetherington v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1158-59 (3d Cir. 1981).

Fortunately, these chapters in Delaware legal history have long since ended. Unfortunately, the housing authorities treat residents in a similar manner. That treatment is wholly inconsistent with Section 20. The disparate impact on minorities is clear, as approximately 89 percent of heads of household living in Delaware public housing are black. *See* “Resident Characteristics Report,” *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/systems/pic/50058/rcr (query results saved Sept. 10, 2013).

II. The Wilmington Housing Authority’s policies are preempted by state law.

A. The General Assembly granted the WHA no authority to regulate firearms.

The Wilmington Housing Authority is a creature of the General Assembly, which has given the WHA only limited powers. Nothing in the provisions of law establishing the WHA gave it any power to regulate firearm ownership, possession or use. While Delaware housing authorities are authorized to exercise powers that are “necessary or appropriate” to “engage in low-rent housing,” 31 Del. C. § 4302, and all powers that are “necessary or convenient” to carry out the provisions of the authorizing chapter, 31 Del. C. § 4308(a), the specific grants of authority throughout the chapter enumerate only those powers related to the financing, siting, construction, and leasing of housing. *Id.*; *see generally* 31 Del. C. ch. 43. The specific grant should therefore be read as authorizing only those actions necessary to engage in such activity, consistent with the “rule of statutory construction that specific provisions should prevail over general provisions.” *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 901 (Del. 1994). By contrast, reading these clauses as broadly as the WHA seeks, to include a form of police power over residents’ right to arms, would give the WHA itself the unlimited scope to determine its own powers, contrary to this Court’s doctrine

that agencies’ “powers are limited to those conferred by the Legislature.” *Pub. Serv. Comm’n v. Diamond State Tel. Co.*, 468 A.2d 1285, 1300 (Del. 1983).

It is not “necessary,” “appropriate,” or “convenient” for the WHA to regulate firearms within its properties. The inappropriate or hazardous use of firearms at WHA properties is already regulated—as it is throughout Delaware—by a comprehensive set of laws regulating the possession, transfer, and use of firearms. Appellants’ Br. at 11. Among the laws passed by the General Assembly that address the same concerns as the WHA’s restrictions are those requiring licenses to carry concealed weapons (11 Del. C. §§ 1441, 1441A, 1442); prohibiting certain persons from owning, using or purchasing firearms (11 Del. C. § 1448); and requiring criminal background checks prior to the transfer of firearms (11 Del. C. § 1448A). This Court has called it “axiomatic that delegated power may be exercised only in accordance with the terms of its delegation.” *New Castle Cnty. Council v. BC Dev. Associates*, 567 A.2d 1271, 1275 (Del. 1989). The enactment of such a thorough system of firearms regulation, enforced by law enforcement agencies and the criminal courts, indicates that the General Assembly has not delegated any power to the WHA to engage in similar regulation.

B. The General Assembly has expressly preempted any authority to regulate firearms now claimed by the WHA

Further refuting the WHA's claim of authority to regulate firearms is the General Assembly's enactment of a pair of preemption laws during the same period of time in which it enacted Article I Section 20. In 1985, the General Assembly prohibited most county regulation of "the ownership, transfer, possession or transportation of firearms or components of firearms or ammunition." H.B. 66, 65 Del. Laws ch. 133 (1985), *codified at* 9 Del. C. § 330(c). The following year, the General Assembly enacted parallel language similarly prohibiting such regulation by municipalities. H.B. 430, 65 Del. Laws ch. 278 (1985), *codified at* 22 Del. C. § 111.

The history of these laws makes clear that they were intended to prohibit local firearms restrictions. Senate President Pro Tem Richard S. Cordrey "said he supported [the municipal preemption provision] because without it, the state might be leaving open the door to gun control." Senator Cordrey added, "People in my area are very opposed in most cases to gun control." Eileen Gilligan, *Ban on local gun laws sent to governor*, News-Journal, May 28, 1986, at B1. The bills were also clearly passed in response to the handgun ban that had recently been upheld by the Seventh Circuit in *Quilici*, 695 F.2d 261. The National Rifle Association sent a mailing to members in Delaware advocating for passage of the 1985 county preemption bill, urging supporters to contact lawmakers in order to "STOP

‘MORTON GROVE’ HANDGUN BANS IN DELAWARE.” *See* Letter from Michael J. Lashbrook, Director, State & Local Affairs, National Rifle Association Institute for Legislative Action, June 28, 1985. The strength of the preemption provisions is shown by the General Assembly’s later amendment of the municipal preemption statute so that Wilmington could regulate paintball guns. *See* HB 439, 74 Del. Laws c. 280 (2004), *codified at* 22 Del. C. § 111.

C. Since the right to bear arms is constitutionally guaranteed, regulations should be imposed by the legislature, not by a public housing authority

Since the right to keep and bear arms is guaranteed by Article 20, the General Assembly, not public housing authorities, is the proper body to regulate firearms.

Other states with constitutional guarantees of the right to bear arms have taken this approach. The Maine Constitution provides: “Every citizen has a right to keep and bear arms and this right shall never be questioned.” Me. Const., Art. I, § 16. *Doe v. Portland Housing Authority*, 656 A.2d 1200, 1203 (Me. 1995), holding that a state preemption law “was enacted to reinforce the [right-to-bear arms] amendment and to ensure uniformity in the regulation of guns,” invalidated a municipal ordinance banning firearms in public housing.

Similarly, *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (1996), held that an ordinance restricting certain firearms was preempted by state law as a matter of statewide concern. Pennsylvania’s Constitution guarantees “[t]he right of the citizens to bear arms in defense of themselves.” Pa. Const. art. 1 § 21. Therefore, “[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern,” and “the General Assembly, not city councils, is the proper forum for the imposition of such regulation.” *Ortiz*, 681 A.2d at 156. *See also City of Portland v. Lodi*, 767 P.2d 108, 110 (Ore. 1989) (invalidating a local restriction on the basis that “the statutory policy has been to preserve broadly the right to bear arms”). Even courts in California, which has no arms guarantee in its constitution, have held that “state laws allowing private citizens to possess handguns for self-protection and other lawful purposes” were unlawfully displaced by a local handgun ordinance. *Fiscal v. City & County of San Francisco*, 70 Cal. Rptr.3d 324, 334 (Cal. Ct. App. 2008). The California Court of Appeal’s reasoning nearly mirrored the language of Section 20:

These laws of statewide application reflect the Legislature’s balancing of interests—on the one side the interest of the general public to be protected from the criminal misuse of firearms, on the other, *the interests of law-abiding citizens to be able to purchase and use firearms to deter crime, to help police fight crime*, to defend themselves, and for hunting and certain recreational purposes. If every city and county were able to opt out of the statutory regime simply by passing a local ordinance, the statewide goal of uniform regulation of handgun possession, licensing, and sales would surely be frustrated.

Id. at 341 (emphasis added). The same may be said for inconsistent restrictions imposed by public housing authorities.² To hold otherwise would assume a legislative intent to abdicate its law making responsibility, in the regulation of a fundamental right, to the non-elected WHA.

CONCLUSION

In sum, the General Assembly has sought to strongly protect the constitutional right to bear arms and to enact a general scheme of regulation, including preemption of restrictions imposed below the state level, in order to protect public safety without violating that right. The plain language and historical background of Article I, Section 20; of the WHA's authorizing acts; and of the state firearms preemption statute and overall scheme of firearms regulation, all make clear that Section 20 should be read broadly, and the WHA's powers should be read narrowly, in order to protect that right. Therefore, the answer to both certified questions should be "No."

² Before the Third Circuit, the WHA argued that its restrictions are merely contractual provisions. *See Appellees' Answering Br., Doe v. Wilmington Hous. Auth.*, No. 12-3433 (3d Cir.), at 39. If so, given the General Assembly's strong expressions of public policy protecting the right to arms, the restrictions should be held to be void as contrary to that policy. *See PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1067 (Del. 2011).

APPENDIX: LIST OF *AMICI*

Senate Minority Leader F. Gary Simpson

Senator Colin R.J.M. Bonini

Senator Bruce C. Ennis

Senator Gerald W. Hocker

Senator David G. Lawson

Senator Brian Pettyjohn

Senator Robert L. Venables, Sr.

House Minority Leader Daniel B. Short

Representative John C. Atkins

Representative Ruth Briggs-King

Representative William J. Carson

Representative Harvey R. Kenton

Representative Harold J. Peterman

Representative Michael Ramone

Representative Stephen T. Smyk

Representative Jeffrey N. Spiegelman