IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.'S AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS BELOW, APPELLANTS

Charles J. Cooper
David H. Thompson
Peter A. Patterson
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600

Of Counsel

Gerald I.H. Street, Esquire
Delaware Bar No. 340
STREET & ELLIS, P.A.
426 South State Street
Post Office Box 1366
Dover, Delaware 19901
302-735-8400

Attorney for National Rifle Association of America, Inc.

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INTEREST OF AMICUS

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. The NRA is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in this case because it has a strong interest in protecting the right of its members and other law-abiding Americans to carry firearms to defend themselves. The WHA's carry ban infringes this right by broadly prohibiting residents of public housing from carrying firearms in common areas. And judicial acceptance of the policy would pose a broader threat to the right to bear arms, for its purported justifications could be used to curtail the right to carry firearms in other "public" locations. Pursuant to Rule 28 of the Rules of this Court, the NRA states that its authority to file this brief is this Court's leave.

ARGUMENT

SUMMARY

The right to keep and bear arms "is especially important for women and members of other groups that may be especially vulnerable to violent crime." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3049 (2010) (plurality). Residents of public housing are "especially vulnerable to gun violence." U.S. DEP'T OF HOUS. & URBAN DEV., IN THE CROSSFIRE: THE IMPACT OF GUN VIOLENCE ON

PUBLIC HOUSING COMMUNITIES 2 (2000), www.ncjrs.gov/pdffiles1/nij/181158.pdf. Indeed, residents of public housing have been found to be "over twice as likely to suffer from firearm-related victimization as other members of the population." *Id*.

Perversely, the Wilmington Housing Authority ("WHA") has decided to make this group of citizens even more vulnerable. Under the WHA's Firearms and Weapons Policy, which is incorporated into residents' lease agreements, residents, members of their households, and guests are prohibited from "carry[ing] 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." Violation of this policy is "grounds for immediate Lease termination and eviction."

Thus, WHA residents who wish to carry a firearm—or any other weapon, for that matter—to protect themselves must hunker down in their units and step outside only on their way to exiting the complex. The moment they step out of their units to use their facility's common areas, the WHA's policy prohibits them carrying a firearm for their defense. This policy flatly contradicts Article I, Section 20 of the Delaware Constitution, which guarantees that a "person has the right to keep and bear arms for the defense of self, family, home and State."

This is true even if the common areas of a public housing facility are deemed public spaces rather than parts of private residences. For, as this brief will demonstrate, the right to keep and bear arms is not limited to the home. This

conclusion flows not only from the text of the Delaware Constitution but also from the United States Supreme Court's pathmarking decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). While the parties dispute whether Section 20 provides *broader* protection than the Second Amendment, not even the WHA suggests that the Section 20 right to keep and bear arms is *narrower* than the corresponding Second Amendment right. *See* Appellees' Answering Br. at 22, No. 12-3433 (3d Cir. Nov. 26, 2012) ("WHA Br.") (arguing that "the facts in this case do not implicate any material differences between Section 20 and the Second Amendment"). And there would have been little reason to add Section 20 to the Delaware Constitution in 1987 unless it was understood to provide at least as much protection as the Second Amendment. It is thus appropriate for this Court to look to *Heller* and *McDonald* for guidance in establishing Section 20's *minimum* protection. And that protection manifestly is not limited to the home.

I. The Plain Text of Section 20 Demonstrates that the Right To Bear Arms Is Not Limited to the Home.

Both Section 20 and the Second Amendment protect the right "to keep *and bear* arms." (Emphasis added.) The explicit guarantee of the right to "bear" arms would mean little if it did not protect the right to "bear" arms outside the home where they are "kept." The most fundamental canons of construction forbid any interpretation that would relegate this language to the status of mere surplusage.

See, e.g., *Wright v. United States*, 302 U.S. 583, 588 (1938). As the Seventh Circuit has held,

> [t]he 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).

Of course, Section 20 is more specific than the Second Amendment: it protects "the right to keep and bear arms *for the defense of self, family, home and State*." (Emphasis added.) Section 20, in other words, expressly protects the right to bear arms for defense of self *in addition to* the right to bear arms for defense of home. It is thus abundantly clear from the text of Section 20 that the right to carry a firearm for self-defense cannot be limited to the home.

II. Individual Self-Defense is at the Core of the Right To Bear Arms.

The district court suggested that the WHA's ban on residents carrying firearms in common areas falls outside of the right to bear arms' "core" protection because residents remain free to use arms in defense of "hearth and home." *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513, 529 (D. Del. 2012). But *Heller* and *McDonald* make clear that the core of the right to bear arms consists of a *purpose*, not a *place*: lawful self-defense. *See, e.g.*, *Heller*, 554 U.S. at 599 ("individual self-defense . . . was the *central component* of the right [to keep and bear arms]

itself"); *id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment right"); *id.* at 630 (recognizing "core lawful purpose of self-defense"); *McDonald*, 130 S. Ct. at 3036 ("[I]n *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right."). This connection between the right to bear arms and self-defense is explicit in Section 20 which, again, expressly declares that "[a] person has the right to keep and bear arms *for the defense of self* . . . ." (Emphasis added.)

Because individual self-defense is at the core of the right to bear arms, and because the need for self-defense may arise outside the home, it necessarily follows that the right to bear arms is not limited to the home. For this reason the Seventh Circuit viewed *Heller* and *McDonald* as settling the question of whether the right to bear arms extends beyond the home: "The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942. "To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id*. at 937.

The right to defend oneself in public has deep roots in our legal tradition. At common law, it was recognized that there is "no Reason why a Person, who without Provocation, is assaulted by another *in any Place whatsoever*, in such a Manner as plainly shews an Intent to murder him, . . . may not justify killing such

an Assailant." 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 72 (1716) (emphasis added); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *184 (1769) (At common law, the "right of preventive defence" could be "legally exercise[d]" whenever "certain and immediate suffering would be the consequence of waiting for the assistance of the law."). By the late 17th century, the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for their security." *Rex v. Knight*, (1686) 90 Eng. Rep. 330 (K.B.). A century later, Edward Christian, a law professor at Cambridge, published an edition of Blackstone's Commentaries in which he noted that "every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game." 2 WILLIAM BLACKSTONE, COMMENTARIES *411-12 n.2 (Christian ed., 1794).

This view is amply reflected in the early history of this Nation. For example, even in defending the British soldiers who were charged with murder in the Boston Massacre, John Adams recognized that "every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770, in* 6 MASTERPIECES OF ELOQUENCE 2569, 2578 (Mayo Williamson Hazeltine et al. eds., 1905). Judge St. George Tucker observed that, "[i]n many parts of the United

States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 BLACKSTONE, COMMENTARIES App. 19 (St. George Tucker ed., 1803). George Washington rode between Alexandria and Mount Vernon with pistols holstered to his horse's saddle, "[a]s was then the custom." BENJAMIN OGLE TAYLOE, IN MEMORIAM 95 (1872). Thomas Jefferson advised his nephew to "[l]et your gun . . . be the constant companion of your walks." *See* 1 THE WRITINGS OF THOMAS JEFFERSON 398 (letter of August 19, 1785) (H. A. Washington ed., 1853). "[A]bout half the colonies had laws *requiring* arms-carrying in certain circumstances," such as when traveling or attending church. *See* NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., FIREARMS LAW & THE SECOND AMENDMENT 106-08 (2012) (emphasis added). Given the threats faced by early Americans, "a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore*, 702 F.3d at 936.

Of course, a right to defend oneself from violent attack is not a vestige of the past. In this State, for example, "[t]he use of force upon or toward another person is justifiable when the defendant believes that such force is immediately necessary for the purpose of protecting the defendant against the use of unlawful force by the other person on the present occasion." 11 DEL. CRIM. CODE § 464(a). And a

person generally may carry a firearm in public for self-defense so long as it is carried openly; concealed carry of a handgun is not prohibited but, unlike open carry, requires a license. *See* 11 DEL. CRIM. CODE §§ 1441-42. Even the WHA's policy recognizes the validity of using force for self-defense, as there is an exception to the ban on carrying firearms for firearms "being used in self-defense." The problem is that this exception is impossible to utilize in situations in which the policy prohibits a firearm from being carried—if a person is not carrying a firearm, he obviously will not be able to use one for self defense.

III. The Need for Self-Defense is Particularly Acute in Public Housing Facilities.

Heller reasoned that the "need for defense of self, family, and property is most acute" in the home. 554 U.S. at 628. "[B]ut that doesn't mean it is not acute outside the home. *Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home . . . ." *Moore*, 702 F.3d at 935-36.

And even if the need for self-defense is generally most acute in the home, that is not always the case. As the Seventh Circuit reasoned,

> a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside.

Id. at 937.

The WHA's policy disarms citizens who are particularly vulnerable. As explained above, residents of public housing have been found to be "over twice as likely to suffer from firearm-related victimization as other members of the population." U.S. DEP'T OF HOUS. & URBAN DEV., IN THE CROSSFIRE at 2 (emphasis omitted). And surely this threat is at least as great in common areas as it is in individual units where residents at least can lock their doors and windows.

Furthermore, "[c]rime statistics . . . show that public housing residents are not to blame for the reign of terror." Press Briefing by the Vice President, Secretary Henry Cisernos, Secretary Lloyd Bentsen, Attorney General Janet Reno and Director of Drug Policy Lee Brown (Feb. 4, 1994) (Cisernos), *at* www.presidency.ucsb.edu/ws/index.php?pid=59790; *see also id.* ("The executive director for the New Haven, Connecticut Housing Authority reports . . . that . . . 85 percent of those arrested on public housing authority property do not live there. And the police in Cincinnati, Ohio, report that 77 percent of the people arrested in public housing authority crime are nonresidents."); *id.* ("What we see in housing projects is a lot of crime that's committed not by people who live there, but by outsiders.") (Bentsen); Barbara Webster & Edward F. Connors, *The Police, Drugs, and Public Housing*, NAT'L INST. OF JUSTICE RESEARCH IN BRIEF, June 1992, at 1 ("Many housing authority officials say that nonresidents of these developments are responsible for most of the drug trafficking and crime in their facilities."); *Daniel*

v. City of Tampa, 38 F.3d 546, 548 n.2 (11th Cir. 1994) ("Nearly 90% of those arrested on [Tampa] Housing Authority property are non-residents."); *Brown v. Dayton Metro. Hous. Auth.*, No. C-3-93-037, 1993 WL 1367433, at * 14 (S.D. Ohio Aug. 26, 1993) (noting complaints "that between ninety and ninety-nine percent of those selling drugs were not residents of the site").

These statistics should not be surprising in light of the fact that residents of public housing are carefully screened. Public housing authorities are required to exclude certain criminal offenders, including illegal drug users. *See* 24 C.F.R. § 960.204. They are required to "deny admission to any applicant whose habits and practices may be expected to have a detrimental effect on other tenants or on the project environment." Public Hous. Occupancy Handbook 4-1(a)(1), *at* www.hud.gov/offices/adm/hudclips/handbooks/pihh/74651/74651c4PIHH.pdf. And residents' leases are required to "provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants . . . shall be cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(6).

The WHA's policy thus prohibits the screened, law-abiding residents of public housing from carrying a firearm (or any other weapon) in common areas to defend themselves from the crime to which they are disproportionately subject and that typically is not committed by residents but by outsiders. This is perverse, and it flies in the face of *Heller*'s recognition that the right to bear arms is especially

important in places where the need to exercise lawful self-defense may be particularly acute. Indeed, it is surely an understatement that "restricting the rights of legal residents to possess guns will not alleviate crime in public housing and, indeed, may deprive law-abiding residents of the protection of a firearm." Lloyd L. Hicks, *Guns in Public Housing*, 4 J. AFFORDABLE HOUS. & CMTY. DEV. L. 153, 154 (1995). And the WHA's ban is an exemplar of the tendency of gun-control laws to "discriminate against those poor and minority citizens who must rely on such arms to defend themselves from criminal activity to a much greater degree than affluent citizens living in safer and better protected communities." Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 68 (1991).

IV. The WHA's Ban on Carrying Firearms in Common Areas Violates Section 20.

1. In light of the foregoing, this Court should strike down the WHA's ban on carrying firearms in common areas as flatly and categorically unconstitutional. This is the approach the United States Supreme Court took in *Heller*, which struck down the District of Columbia's handgun ban without applying any tiers of scrutiny analysis that would have given D.C. an opportunity to justify the ban. As the Court explained, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. And following *Heller*, the Seventh Circuit and the

Supreme Court of Illinois have taken this approach in striking down Illinois's "flat ban on carrying ready-to-use guns outside the home." *Moore*, 702 F.3d at 940; *see id.* at 941 (Court's "analysis [was] not based on degrees of scrutiny"); *id.* at 939 (recognizing that "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts"); *People v. Aguilar*, 2013 IL 112116, ¶ 22 (Ill. Sept. 12, 2013). Like the Second Amendment, Section 20 expressly protects the right to bear arms, and this Court should categorically strike down a restriction that runs directly counter to that guarantee.

2. The WHA argues that rather than applying *Heller*'s categorical approach, this Court should adopt the federal intermediate scrutiny standard to review the WHA's ban on carrying firearms. *See* WHA Br. 28. Applying intermediate scrutiny, however, is flatly inconsistent with *Heller*, which rejected the "interest-balancing" approach advocated by Justice Breyer in dissent, *Heller*, 554 U.S. at 634-35, an approach that Justice Breyer drew from "First Amendment cases applying intermediate scrutiny," *id.* at 704 (Breyer, J., dissenting). It is unfortunately the case that in the wake of *Heller* many courts reviewing Second Amendment claims "have employed intermediate scrutiny." WHA Br. 25. Even a former Brady Center attorney points out that "adopting an intermediate scrutiny test" for Second Amendment claims "effectively embrace[s] the sort of interest-balancing approach" that the Supreme Court "condemned" in *Heller*. Allen

Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012). *See also Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as . . . intermediate scrutiny."); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting) ("Judge Kavanaugh is correct . . . ."), *opinion withdrawn and superseded on reh'g on other grounds by* 682 F.3d 361.

Of course, not all lower courts have applied intermediate scrutiny to Second Amendment claims—the Seventh Circuit, for example, did not in *Moore*—and many courts that have applied intermediate scrutiny in particular cases have not purported to hold that intermediate scrutiny applies to *all* Second Amendment claims. In the very case that the WHA cites for the proposition that "the Third Circuit went on to find that intermediate scrutiny was appropriate in reviewing Second Amendment cases," WHA Br. 25, the Third Circuit expressly left open the possibility that "strict scrutiny may apply to particular Second Amendment challenges." *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010).

Given the severe burden on the right to bear arms imposed by the WHA's ban, to the extent a level of scrutiny applies in this case, that level should be strict. The WHA's case for a more relaxed standard rests principally on the fact that

public housing facilities are "government property." WHA Br. 30. *Heller*, to be sure, stated that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* (alteration in original) (quoting *Heller*, 554 U.S. at 626-27). But the Court surely had traditional "government buildings" such as courthouses in mind, not public housing facilities. *Cf. United States v. Dorosan*, 350 F. App'x 874, 875 (5th Cir. 2009) (finding a postal service parking lot a "sensitive place[]" because it was "a place of regular government business").

The WHA also insists that the government "enjoys broader discretion where it is acting as a landlord rather than as a legislative body." WHA Br. 30. But in operating a public housing facility, the WHA is not only acting as a landlord but is also administering a government-benefit program that provides subsidized housing to economically less fortunate members of society. And the United States Supreme Court has

> said in a variety of contexts that the government may not deny a benefit to a person because he exercises a constitutional right. . . . Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.

Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013) (citations omitted) (internal quotation marks omitted). The WHA's carry ban thus should not be subject to lesser judicial scrutiny on account of its being imposed

indirectly via a condition on receiving a government benefit rather than directly through legislation. *Cf. McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332, 335 (2d Cir. 1981) (applying strict scrutiny to strike down public housing rule for violating freedom of association).

3. At any rate, this Court ultimately need not decide the level-of-review issue because the WHA's ban on carrying firearms cannot satisfy even the intermediate scrutiny approach the WHA argues should apply. Under intermediate scrutiny, the WHA must show that the carry ban is "substantially related to the achievement of [important governmental] objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996). "The burden of justification is demanding and it rests entirely on the" WHA. *Id*. at 533.

The WHA has come nowhere near meeting this burden. According to the WHA, "common sense will suffice" to support its carry ban because "the presence of firearms increases the risk of firearms-related injuries and their absence decreases that risk." WHA Br. 35. This assertion fails on multiple levels.

First, it assumes that the carry ban will actually have an appreciable effect on "the presence of firearms" in the hands of violent criminals. But it is unlikely that criminal predators will concern themselves with the WHA's ban. As the influential criminologist Cesare Beccaria put it, in a passage copied by Thomas Jefferson into his personal quotation book, laws forbidding the

> wear[ing] [of] arms[] disarm[] those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? . . . [Such a law] certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder . . . .

See Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To "Bear Arms,"* 49 L. & CONTEMP. PROBS. 151, 154 (1986). Of course, the situation is even worse here given that the WHA's policy is embodied in a lease provision that cannot even purport to bind the outsiders who commit most of the crime in public housing facilities.

Second, it myopically focuses on "firearms-related injuries," rather than the incidence of violence generally. Even in the wholly unlikely event that violent predators who are not bound by a WHA lease decide to stop carrying weapons, those predators will still have a physical advantage over "vulnerable residents" such as the "elderly," WHA Br. 32, and they will be emboldened with the knowledge that law-abiding residents have been disarmed. Little is gained if offenders commit the same crimes without firearms as they would have with them. Indeed, since there are "lower injury rates in incidents where offenders are armed with guns," GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 225 (1997), such substitution could actually lead to an increase in the incidence of injuries suffered by crime victims.

Third, the notion that allowing law-abiding residents to carry firearms will "increase[] the risk of firearms-related injuries" cannot be maintained under intermediate scrutiny. As the Seventh Circuit concluded after reviewing the relevant scholarly literature in *Moore*, "the net effect on crime rates in general and murder rates in particular of allowing the carriage of guns in public is uncertain both as a matter of theory and empirically" and "[t]he theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense." 702 F.3d at 937, 942. Illinois could provide no "more than merely a rational basis for believing" that its ban on public carry was "justified by an increase in public safety," *id*. at 942, and the same is true of the WHA and its ban on carrying firearms in common areas.

CONCLUSION

Article I, Section 20 of the Delaware Constitution expressly protects the right to "bear arms for the defense of self." Because the need for self-defense extends beyond the home, the right to carry a firearm necessarily does as well. And because residents of public housing facilities are "especially vulnerable to violent crime," it is "especially important" that their right to bear arms be respected. *McDonald*, 130 S. Ct. at 3049 (plurality). The WHA's policy fails to do so and should be struck down. Indeed, disarming those most in need of a means

to protect themselves cannot be squared with common sense, much less the fundamental right to bear arms.

Dated: September 19, 2013

Respectfully submitted,

Charles J. Cooper
David H. Thompson
Peter A. Patterson
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600

Of Counsel

/s/ Gerald I.H. Street
Gerald I.H. Street, Esquire
Delaware Bar No. 340
STREET & ELLIS, P.A.
426 South State Street
Post Office Box 1366
Dover, Delaware 19901
302-735-8400

Attorney for National Rifle Association of America, Inc.