IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE, DHSc, RDN; ROGER T. BOYCE, SR.; and the DELAWARE STATE SPORTSMEN'S ASSOCIATION, Plaintiffs, v. DAVID SMALL, SECRETARY OF THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; ED KEE, SECRETARY OF DELAWARE DEPARTMENT OF AGRICULTURE; and DELAWARE DEPARTMENT OF AGRICULTURE, Defendants.	C.A. No. 11832-VCG

PLAINTIFFS' COMBINED OPENING BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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I. Introduction

Plaintiffs Bridgeville Rifle & Pistol Club, Ltd.; Mark Hester; John R. Sylvester; Marshall Kenneth Watkins; Barbara Boyce, DHSc, RDN; Roger T. Boyce, Sr.; and the Delaware State Sportsmen's Association (collectively referred to as the "Sportsmen"), initiated this matter to seek preliminary and permanent injunctive relief prohibiting Defendants David Small, Secretary of the Delaware Department of Natural Resources and Environmental Control, the Delaware Department of Natural Resources and Environmental Control ("DNREC"), Ed Kee, Secretary of the Delaware Department of Agriculture, and the Delaware Department of Agriculture ("DOA") (collectively referred to as "Defendants") from enforcing regulations promulgated by the DOA and DNREC that unconstitutionally prohibit Sportsmen's right to keep and bear arms for defense of self and family, and for recreation pursuant to Article I, § 20 of the Delaware Constitution.

Defendants casually trifle with a right that the United States Supreme Court has recognized to be so fundamental that the United States Constitution did not actually grant that right – rather it recognized the right to self-defense and to bear arms as a pre-existing right granted at birth.[1] *District of Columbia v. Heller*, 554

[1] Defendants can accurately be described as opposing Sportsmen's civil rights. Federal courts have recognized that the right to bear arms is a basic civil right. *See*,

U.S. 570, 594 (2008).

These fundamental constitutional rights are also enshrined in Article I, § 20 of the Delaware Constitution, which the unanimous *en banc* Delaware Supreme Court recently rejuvenated as Delaware's broader version of the Second Amendment in *Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014).

Defendants fail to acknowledge cases that recognize the deprivation of a constitutionally guaranteed right to constitute an irreparable harm. Sportsmen have already alleged that but for the Defendants' regulations, they would exercise their right to possess and carry a firearm in State Parks and State Forests. The law is settled that Sportsmen are not required to suffer harm, be arrested for violating the law, or allege impending death or serious bodily harm requiring self-defense to sufficiently state a claim that Defendants' regulations prevent them from exercising their fundamental, constitutionally guaranteed rights.

Likewise, Sportsmen are not required to justify their need or a reason for

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e.g., *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2600, 183 L.Ed.2d 450, 489 (2012) ("protected civil rights, such as the right to bear arms or vote in elections."); *DuPont v. Nashua Police Dept*., 113 A.3d 239, 247 (N.H. 2015), *cert. denied*, 133 S.Ct. 533 (2015) ("Second Amendment right to keep and bear arms is a civil right"). Plaintiff Delaware State Sportsmen's Association has been Delaware's NRA State Association since 1968. *See* www.dssa.us. The National Rifle Association is America's longest-standing civil rights group, founded in 1871. *See* https://home.nra.org/about-the-nra/.

possessing a firearm, or show harm from being deprived of the right, when Article I, § 20 already established the public policy of this state to allow them to do so without such a showing. By way of comparison, Defendants' argument would be as absurd as if they were to suggest that, before challenging a restriction on their right to free speech or freedom of religion, citizens must first demonstrate a need for free speech, or demonstrate a "tangible" harm from a regulation prohibiting the freedom of religion.

Defendants present Sportsmen with a "Morton's Fork."[2] They seek to force Sportsmen to choose between two equally unappealing alternatives: deny themselves the benefits offered by State Parks and Forests, or deny themselves their natural rights, recognized by the Delaware Constitution, to exercise their entitlement to self-defense in State Parks and Forests (and risk arrest if they attempt to exercise that right). The Delaware Constitution does not allow Defendants to impose such a dilemma on Sportsmen.

Sportsmen seek to exercise their fundamental, constitutionally guaranteed rights without fear of arrest or fines, and within the confines of the existing

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[2] *See Hermelin v. K-V Pharmaceutical Co.*, 54 A.3d 1093, n. 19 (Del. Ch. 2012) (Plaintiff's predicament was "a "Morton's Fork": a choice between two equally undesirable alternatives.").

comprehensive statutory framework imposed by the legislature that already limits those rights.[3]

DNREC regulation 9201.24.3 prohibits the possession of firearms upon any lands or waters administered by the Division of Parks and Recreation of the Department of Natural Resources and Environmental Control. Also, 3 Del. Admin. Code § 8.8, (together with DNREC regulation 9201.24.3, the "Regulations") adopted by the DOA, prohibits firearms on State Forest lands, with a narrow exception for legal hunting.

Defendants do not squarely address, either in the formally enumerated questions presented in their opening brief, or elsewhere in their opening brief, whether the Regulations at issue violate Article I, Section 20 of the Delaware Constitution. To the extent they do address that core issue, it appears to be mixed in with discussion of other topics. Defendants agree that the Regulations at issue

[3] The comprehensive restrictions imposed by the legislature on the right to keep and to bear arms are not at issue in this matter. They provide existing limits on the use of firearms in State Parks and Forests. *See, e.g.,* 24 *Del. C.* §§ 901, 902, 903, 904, 904A; 11 *Del. C.* §§ 1441, 1441A, 1442, 1444, 1448, 1448A. As the foregoing statutes demonstrate, it is not correct, as Defendants assert, that "Plaintiffs seek the Court's endorsement of an unlimited right to carry firearms of their choosing within State Parks and Forests at any time." Op. Br. at 3. At issue is a complete abolition of the right to possess arms as well as to carry arms in State Parks and Forests, both of which the legislature already restricts extensively.

prohibit Sportsmen from possessing or carrying firearms in State Parks and State Forests, except for limited hunting use at designated times and locations by license, but still assert that the Regulations were properly enacted. No enabling statute on which DNREC and DOA allegedly rely for their power to impose Regulations can authorize Defendants to eviscerate Sportsmen's constitutional rights.

II. Nature and Stage of the Proceeding

On December 22, 2015, Sportsmen filed their complaint, seeking injunctive and declaratory relief, and alleging that the Regulations at issue are unconstitutional. (D.I. 1). Sportsmen then filed a Motion for Preliminary Injunction on December 28, 2015, (D.I. 3) and a Motion to Expedite the next day. (D.I. 4).

On January 5, 2016, this Court held a teleconference to address the pending motions and scheduling issues. The Court suggested that the parties submit a stipulated record[4] and make cross motions for judgment on the pleadings. (Transcript of teleconference at 5) (D.I. 18). Sportsmen's Motion for Preliminary Injunction was not addressed; rather, the Court agreed to address all issues and the merits with "alacrity" through cross-motions for judgment on the pleadings. *Id*.

Defendants filed a Motion to Dismiss on January 12, 2016 (D.I. 17), and an Answer to the complaint, with affirmative defenses, on February 4, 2016. (D.I. 20). Defendants filed an Opening Brief in support of their Motion to Dismiss and their Motion for Judgment on the Pleadings on February 5, 2016. (D.I. 22).

A second teleconference with the Court was held on February 10, 2016. (D.I.

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[4] Attached as Exhibit A is an excerpt listing each allegation in the complaint that was admitted by Defendants in their answer. The Defendants are unwilling to enter into a stipulation of uncontested facts.

24). At that teleconference, the Court discussed the procedural issues arising from Defendants filing both a Motion to Dismiss and a Motion for Judgment on the Pleadings. The Court converted the Defendants' Motion to Dismiss to a Motion for Judgment on the Pleadings by incorporating Defendants' arguments in support of their Motion to Dismiss into the arguments supporting their pending Motion for Judgment on the Pleadings. *Id*.

This is Sportsmen's Combined Opening Brief in Support of their Cross-Motion for Judgment on the Pleadings and Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings.[5]

[5] The Court's email of January 11, 2016, confirms that the Court considers the Cross-Motions for Judgment on the Pleadings to have been made orally. Thus, no separate motion is submitted herewith.

III. Statement of Facts

Sportsmen seek to enjoin Defendants from continuing to breach fundamental constitutional rights enshrined in Article I, Section 20 of the Delaware Constitution and recently recognized by a unanimous *en banc* opinion of the Delaware Supreme Court in *Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014), by prohibiting Sportsmen, and others similarly situated, from possessing and carrying firearms in State Parks and State Forests.

The Parties

Plaintiff Bridgeville Rifle & Pistol Club, Ltd. ("Bridgeville") is a private organization based in Bridgeville, Delaware. Compl. ¶ 1. Many of Bridgeville's members are licensed to carry concealed deadly weapons pursuant to 11 *Del. C.* § 1441 and/or § 1441A. *Id*. at ¶¶ 1, 11.

Plaintiff Mark Hester is a member of Bridgeville, and resides in Kent County, Delaware. *Id*. at ¶¶ 2, 12. He is retired from the City of Dover Police Department, and is licensed to carry a concealed weapon pursuant to §§ 1441 and 1441B of Title 11 of the Delaware Code. *Id*. at ¶¶ 2, 12. Plaintiff Hester also holds a "surf fishing vehicle permit" pursuant to 7 Del. Admin. Code § 9201.10, which allows him to fish at the Delaware State Park beaches. *Id*. at ¶¶ 12. But for Defendants' Regulations, Hester would exercise his right to carry a concealed weapon at Delaware State Park

beaches. *Id*.

Plaintiff John R. Sylvester is a member of Bridgeville, participates in rifle shooting competitions, and but for Defendants' Regulations, would avail himself of camping facilities in Sussex County State Parks or State Forests while attending competitions at Bridgeville that extend for more than one day. *Id*. at ¶¶ 3, 13.

Plaintiff Marshall Kenneth Watkins is a member of the Delaware State Sportsmen's Association, and is licensed to carry a concealed deadly weapon in Delaware pursuant to 11 *Del. C.* § 1441. *Id*. at ¶¶ 4, 14. But for certain Regulations issued by Defendants, discussed below, Watkins would exercise his right to carry a concealed weapon during pre-season scouting of state-owned hunting lands. *Id*. at ¶ 14.

Plaintiffs Barbara Boyce and Roger Boyce are both members of the Delaware State Sportsmen's Association, and are lawfully licensed to carry concealed firearms in the States of Delaware, Pennsylvania and Florida. *Id.* at ¶¶ 5, 6, 15. The Boyces are avid bicyclists, and but for Defendants' Regulations, would exercise their right to possess firearms while cycling in Delaware's State Parks and State Forests. *Id*. at ¶ 15.

Delaware State Sportsmen's Association is an organization that promotes and protects the interests of gun owners in and around Delaware. *Id*. at ¶ 16.

The individual Plaintiffs are responsible, law-abiding citizens, who are permitted, under 11 *Del. C.* §§ 1441, 1441A, and/or 1441B, to carry concealed weapons. *Id*. at ¶¶ 12, 14, 15.

Campsites for tents and campers, cabins and yurts, which are similar to cabins, are available for rental by members of the public at the Delaware State Parks. *See* http://www.destateparks.com/camping/index.asp.

Regulations at Issue

DNREC regulation 9201.24.3 prohibits the possession of firearms upon any lands or waters administered by the Division of Parks and Recreation of the Department of Natural Resources and Environmental Control. Compl. ¶ 25. 3 Del. Admin. Code § 8.8, adopted by the DOA, prohibits firearms on State Forest lands, with a narrow exception for legal hunting. *Id*. at ¶ 31.

DNREC Regulation 9201.24.3 states, "[i]t shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division, except by those persons lawfully hunting in those areas specifically designated by the Division, or those with prior written approval of the Director." *Id*. at ¶ 25. "Division" is defined in 7 Del. Admin. Code § 9201.1 as the "Division of Parks and Recreation of the Department of Natural Resources and Environmental Control." *Id*.

Similarly, under 3 Del. Admin. Code § 8.8, the DOA prohibits the lawful possession of firearms within State Forest Lands, except when being used for legal hunting purposes ("[f]irearms are allowed for legal hunting only and are otherwise prohibited on State Forest Lands."). Compl. ¶ 31. Both State agencies are prohibited from adopting rules and regulations that "extend, modify, or conflict with any law of [the State of Delaware] or the reasonable implications thereof." *See* 7 *Del. C.* § 6010; 3 *Del. C.* § 101(3). Compl. ¶¶ 29, 30.

Both regulations prohibiting the lawful possession of firearms within Delaware State Parks and State Forest lands, respectively, *conflict with, modify and extend existing laws of* the State of Delaware. Specifically, the Regulations conflict with Article I, § 20 of the Constitution of the State of Delaware, which provides, "[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." Compl. ¶ 17.

Neither Article I, § 20, nor statutory provisions regulating firearms, prohibit the lawful possession of firearms within Delaware State Parks or State Forests.[6]

[6] The only geographical limitations on the lawful possession of firearms enacted by the Delaware General Assembly in Title 11 of the Delaware Code are discussed in 11 *Del. C.* § 1457 – Possession of a Weapon in a Safe School Zone. That statute does not apply here. Also, the General Assembly, at 22 *Del. C.* § 111, recently gave municipal governments, effective August 17, 2015, the limited and narrowly circumscribed power to adopt ordinances regulating the possession of firearms, ammunition, components of firearms, or explosives in police stations and municipal

Importantly, the Delaware Supreme Court unanimously clarified that, by its express terms, Article I, § 20 recognizes a right to bear arms outside of the home. *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 665 (Del. 2014) ("the scope of the protections [Article I, Section 20] provides *are not limited to the home*") (emphasis added).

Specifically, the Court explained, "the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside of the home, including for hunting and recreation. Section 20 specifically provides for the defense of self and family *in addition to* the home." *Id.* (emphasis in original).

Furthermore, the adoption of the challenged Regulations is outside of the scope and powers conferred upon Defendants by the Delaware General Assembly. Neither Defendant has the authority to deprive Delaware residents of firearms for lawful protection contrary to the State statutory scheme or the Delaware

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buildings. Section 111, however, specifically states that "[a]n ordinance adopted by a municipal government shall not prevent the following in municipal buildings or police stations: "… (6) carrying firearms and ammunition by persons who hold a valid license pursuant to either § 1441 or § 1441A of Title 11 of this Code so long as the firearm remains concealed except for inadvertent display or for self-defense or defense of others …." Because the General Assembly specifically excluded from the allowable limitations in § 111 those persons properly authorized to carry concealed firearms pursuant to 11 *Del. C.* §§ 1441 or 1441A, this new statute does not help Defendants. It provides a recent example of the legislature's ability to expressly and specifically restrict possession and carrying of firearms.

Constitution. Defendant DNREC, under 7 *Del. C.* § 6001, has the power and authority to adopt regulations which best serve the interests of the public, consistent with reasonable and beneficial use of the State's resources, and the adequate supplies of such resources for the domestic, industrial, power, agricultural, recreational and other beneficial use. *See also* 7 *Del. C.* § 4701(a)(4). Defendant DOA has the power to, *inter alia*, "…devise and promulgate rules and regulations for the enforcement of state forestry laws and for the protection of forest lands …." 29 *Del. C.* § 8101. The power to regulate the possession of firearms was never conferred upon Defendants by the Delaware General Assembly. But for the aforementioned Regulations adopted by Defendants, Sportsmen would exercise their state constitutional rights to keep and bear firearms within Delaware State Parks and State Forest Lands.

IV. Questions Presented

1. Do the Regulations Violate Article I, Section 20 of the Delaware Constitution?

2. Are the Regulations Preempted?

3. Have Defendants Exceeded the Scope of their Authority in Promulgating the Regulations?

4. Is Subject Matter Jurisdiction Appropriate in This Court?

V. Argument

A. The Regulations are unconstitutional.

1. The Regulations violate Article I, Section 20 of the Delaware Constitution.

Defendants' Regulations forbidding the lawful possession of firearms infringe upon Sportsmen's rights to keep and bear arms within Delaware State Parks and State Forests as guaranteed by Article I, § 20 of the Delaware Constitution. Article I, § 20 provides: "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."

The right to keep arms and the right to bear arms are two distinct rights. The Regulations are invalid, as they explicitly ban the right to "bear arms" for defensive purposes – and simply to possess arms, contrary to Article I, § 20.

Defendants make policy arguments that are long on rhetoric, but short on citation to authority or legal analysis. They argue the pros and cons of public policy issues that have already been decided by the Delaware legislature when it adopted Article I, § 20 in 1987, and by the people when the Second Amendment to the United States Constitution was adopted in 1791.[7] Article I, § 20, according to the synopsis

[7] "For as the Constitution does not derive its force from the convention which framed it, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most

of the House Bill by which it was enacted, was added to the Delaware Constitution in 1987 to "explicitly protect[] the traditional lawful right to keep and bear arms."[8] H.B. 554, 133rd Gen. Assemb. (Del. 1986); H.B. 30, 134th Gen. Assemb. (Del. 1987).

As Justice Antonin Scalia wrote in the seminal United States Supreme Court opinion in *Heller*: "Undoubtedly some think that the Second Amendment is outmoded . . . That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." 554 U.S. at 636.

Delaware historically has relished its sovereignty to afford greater rights and protections than provided by the Federal Constitution. *See State v. Ranken*, 25 A.3d 845, 855 (Del. Super. 2010) (recognizing that "Delaware has a history of expanding and jealously guarding the rights of its citizens in different areas of constitutional

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obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." *People v. Smith*, 733 N.W.2d 351, 354-55 (Mich. 2007) (quoting Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (Little, Brown, & Co., 1886), at 81). *See* Randy J. Holland, ed., *The Delaware Constitution of 1897: The First One Hundred Years* at 8 (1997) (ultimate power to form constitution is derived from the people).

[8] Notably, following § 20 is the statement: "WE DECLARE THAT EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED." DEL. CONST. art. I (end) (full capitalization in original). *See generally* Holland, *supra*, n. 6, at 79, nn. 23–24 (discussing various interpretations of the foregoing statement).

law"). Although Article I, § 20 provides greater rights than the Second Amendment, cases discussing the lesser protection provided by the Second Amendment may also be instructive for historical purposes and for describing the *minimum* level of rights guaranteed. The *Heller* decision illuminates several important features of the right to bear arms as guaranteed by the Second Amendment. First, *Heller* acknowledges that the right to bear arms recognizes, at its core, the right to self-defense. 554 U.S. at 594. *Heller* also teaches that the right to bear arms is a natural right that each person is born with, and that the United States Constitution did not guarantee that right, but instead recognized the right to bear arms as a pre-existing natural right. *Id*. ("it is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense.").

The right to self-defense extends beyond the home

After the *Heller* decision, *McDonald v. City of Chicago*, 560 U.S. 742 (2010), clarified that "'the need for defense of self, family, and property is most acute' in the home," thereby acknowledging that the right to bear arms extends beyond the home, although to a lesser degree.[9] 560 U.S. at 744 (citing *Heller*, 554 U.S. at 679);

[9] It warrants noting that campsites for tents or campers, cabins and yurts (similar to cabins) are available for rental by members of the public at the Delaware State Parks. *See* http://www.destateparks.com/camping/index.asp. Federal courts have struck down regulations prohibiting firearms in tents on land under the authority of the Army Corps of Engineers. *See Morris v. U.S. Army Corps of Engineers*, 990 F.

see also Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012) (Seventh Circuit reasoned that: "Both *Heller* and *McDonald* do say that 'the need for defense of self, family, and property is most acute' in the home, but that doesn't mean it is not acute outside the home.") (citation omitted). Indeed, the Seventh Circuit interprets *Heller* to mean that the Second Amendment (which is more limited than Article I, § 20) "confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942.

The Second Amendment, even as interpreted in *Heller* and *McDonald*, is more narrow in scope than Article I, § 20, but cases construing the Second Amendment are helpful to establish a baseline, below which Article I, § 20 cannot descend. Even when construing the more limited scope of the Second Amendment, Judge Posner reasoned in *Moore* that: "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of

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Supp. 2d 1082 (D. Idaho 2014). The same result should be reached here due to the availability of home-like tents, campers, rental cabins and yurts in State Parks. The right to mere possession in these "homes away from home" also applies to boats that can be used at State Parks. A widely recognized scholar whose Second Amendment writings have been cited by the United States Supreme Court, Stephen Halbrook, refers to the *Morris* decision as reasoning that: "Banning a possession of a gun in a tent was likened to banning one in the home, requiring strict scrutiny." Stephen P. Halbrook, *Firearms Law Desk Book* § 1:13 (2015).

confrontation.'" *Moore*, 702 F.3d at 936 (quoting *Heller*, 554 U.S. at 592).[10]

While § 20 does not allow for an absolute and unfettered right, by its express terms it extends to areas outside of the home. "Section 20 specifically provides for the defense of self and family *in addition to* the home." *Doe*, 88 A.3d at 665 (emphasis in original). In *Doe*, the high court ruled that the right to bear arms extended to the common areas of a public housing authority, which were open to the public, and struck down a regulation that restricted the right to carry firearms to the confines of a resident's apartment. *Doe*, 88 A.3d at 668-9.

The Court also recognized the right to "open carry" based on Article I, Section 20 of the Delaware Constitution. *Doe*, 88 A.3d at 663. Defendants' Regulations by definition conflict with the Supreme Court's recognition of a right to "open carry."

The need for self-defense may arise outside the home, while jogging or bicycling in State Parks. As Justice Scalia noted in *Heller*: "Confrontations are not

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[10] Defendants rely upon the pre-*Heller* decision in *State ex rel. West Virginia Div. of Nat. Resources v. Cline*, 200 W.Va. 101 (1997), but ignore the overruling effect on that case of both *Heller* and the recent Fourth Circuit (which includes West Virginia) decisions in *Kolbe v. Maryland*, -- F.3d --, 2016 WL 425829 (Feb. 4, 2016) (applying strict scrutiny) and *U.S. v. Robinson*, -- F.3d --, 2016 WL 714968 (4th Cir. Feb. 23, 2016) (recognizing the right to carry a weapon in a vehicle.). Defendants cite to several cases from other jurisdictions that involve facts that bear no similarity to those involved in this case. To the extent that they rely on other state constitutions or federal cases that pre-date *Heller*, they have no bearing on this case.

limited to the home." *Heller*, 554 U.S. at 592. Delaware's State Forests and State Parks are vast, and, naturally, parts of them are remote. Defendants' Regulations effectively eliminate Sportsmen's ability to defend themselves with a firearm, and force them to wait for assistance to arrive in the form of a police officer or state park employee.[11] Defendants may attempt to provide security at State Parks and Forests, but their resources are not unlimited, and assistance may not be as readily available as Defendants would have this Court believe.

As the Delaware Supreme Court recognized in *Doe*, a citizen must be permitted to defend himself "when the intervention of society in his behalf, may be too late to prevent an injury." *Doe*, 88 A.3d at 663. Sportsmen should not be left at the mercy of others simply because Defendants have enacted Regulations that are both unconstitutional and outside the scope of the authority designated to them by the Delaware legislature.

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[11] According to the April 2010 report by the Office of Management and Budget Statistical Analysis Center, "Crime In Delaware 2003-2008 An Analysis of Delaware Crime", State of Delaware Document number 10-0208 100302, Delaware had only 21 park rangers to cover the entire state. When compared to the number of state troopers statewide, 679, and the expanse of State Parks and Forests, visitors to State Parks and Forests cannot rely solely on assistance from the State in emergency situations. (Even if the number of security personnel has increased from the date of this report, no amount of increase justifies the unconstitutional Regulations.)

The Delaware Constitution provides for the right to bear arms for hunting and recreation in addition to self-defense

The Delaware Supreme Court's unanimous *en banc* decision in *Doe* recognized the broad scope of this fundamental right when it explained that: "the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside the home, including for hunting and recreation." *Doe*, 88 A.3d at 665.

Defendants conflate the right in Article I, § 20 to bear arms for the separate purpose of "recreation" and for "hunting," as opposed to what Defendants refer to as "recreational hunting." *See, e.g.*, Op. Br. at 4-6, 9, 17, 18, 20, 23, 25-30, 33. Defendants' brief fails to recognize them as separate constitutional rights. Sportsmen's complaint refers to their enjoyment of the shooting sports at shooting tournaments for recreation, apart from hunting. Complaint ¶¶ 11, 13. Defendants' Regulations interfere with this recreational pursuit, which is separate from hunting. Section 20 requires both rights to be honored. "To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." *Lake Cty. v. Rollins*, 130 U.S. 662, 670, 9 S. Ct. 651, 652 (1889). Defendants' position ignores Section 20.

When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright v. U.S.*, 302 U.S. 583, 588 (1938). *See also Kelo v. City of New London, Conn.*, 545 U.S. 469,496 (2005). Thus, Sportsmen's right to possess and carry arms for recreation is separate from the exercise of that right for hunting.

2. The regulations fail when subjected to intermediate scrutiny.

The Delaware Supreme Court in *Doe* determined that, "[a]lthough the right to bear arms under the Delaware Declaration of Rights is a fundamental right, . . . it is not absolute." *Doe,* 88 A.3d at 667. Because the General Assembly left in place a series of statutes regulating the right to bear arms, an intermediate scrutiny analysis is appropriate when considering firearm restrictions. *Id*.

"Where heightened scrutiny applies, the State has the burden of showing that the state action is constitutional." *Id*. at 666. Defendants therefore have the burden of showing that their adoption of the Regulations passes intermediate scrutiny; that is, that the Regulations have an important governmental objective and are substantially related to the achievement of those objectives. *Id*. (citing *Turnbull v. Fink*, 668 A.2d 1370, 1379 (Del. 1995)).

"The governmental action cannot burden the right more than is reasonably

necessary to ensure that the asserted governmental objective is met." *Id*. at 666-667. Here, as in *Doe*, the regulations at issue prohibit the mere possession of a firearm. The Court in *Doe*, held that such a restriction was "overbroad and burden[ed] the right to bear arms more than is reasonably necessary" and that it "functionally disallowe[ed] armed self-defense." *Id*. at 668. As the Regulations here also prohibit mere possession of a firearm in State Parks and Forests, the result here should be the same.

Moreover, the legislature already performed the balancing of state and individual interests in their comprehensive regulatory scheme, including the rigorous requirements for a license to carry a concealed deadly weapon pursuant to 11 *Del. C.* §§ 1441, 1441A or 1442.

Notably, the Court in *Doe* underscored that the provision at issue in that case would restrict even active and retired police officers from carrying firearms. *Doe*, 88 A.3d at 668. The Court expressly stated that "Delaware law places special trust in active and retired police officers to carry concealed weapons. Active police and peace officers are exempted from the concealed-carry license requirements and may carry a firearm while on or off duty. Further, retired police officers may be specially licensed to carry a concealed weapon following their retirement." *Id*. The Regulations at issue here similarly dispossess active and retired police officers of

their right to carry firearms. Indeed, Plaintiff Mark Hester is a retired police officer, and is prevented from carrying his firearm at Delaware State Park beaches by the regulation promulgated by DNREC.

Defendants fail to satisfy their burden.

The state's interest must be bolstered by actual evidence. *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1011 (3d Cir. 1993) (requiring probative evidence to support stated interest). But Defendants have set forth no evidence whatsoever. The rhetoric and policy debates argued by Defendants have long ago been decided contrary to their position. They provide no foundation for the Court to determine that the Regulations are substantially related to the achievement of their state objectives.

Nowhere in their Opening Brief do Defendants describe how they can satisfy their burden of proof. Nor do they explain how the contested Regulations impose no greater restriction than necessary.

Defendants cite no authority to support their uninformed and unconstitutional argument that "private possession of firearms is inconsistent with, and contrary to, preserving public safety." Op. Br. at 22. Defendants' erroneous statement and failed public policy proposal was rejected by Article I, § 20, and its death knell was sounded in *Heller* and *Doe.* Defendants' unsupportable rhetoric and lack of

evidence prohibit them from carrying their burden of proof. Defendants provide nothing more than amorphous safety concerns and discredited scare tactics that do not satisfy their burden of proof.

Defendants also fail to acknowledge existing case law recognizing that transporting weapons[12] is part of the right to bear arms. Defendants assert that Sportsmen are "free to camp and rent a cottage, so long as they leave their firearms behind, with the exception of recreational hunting seasons." Op. Br. at 4. It is unclear where Defendants think Sportsmen would leave their firearms if they are traveling to participate in shooting competitions. Defendants' requirement that Sportsmen "leave their firearms behind" necessarily deprives them of the right to bear arms by depriving them of the recognized right to transport them.[13] Constitutional rights cannot be abridged in a designated location "on the plea that it may be exercised in some other place." *Ezell*, 651 F.3d 684, 697 (7th Cir. 2011)

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[12] *State v. Diciccio*, 105 A.3d 165, 197 (Conn. 2014) (transporting weapons between residences protected under Second Amendment).

[13] At some point a right can be so restricted as to be tantamount to a destruction or an outright ban of the right. One court observed many years ago that: "A statute which, under the pretense 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 defense, would be clearly unconstitutional." *Alabama v. Reid*, 1 Ala. 612, 616-17 (1840).

(quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981)).

Defendants' safety arguments are unavailing

As the Court indicated in *Doe*, Defendants "must show more than a general safety concern" to satisfy their burden. *Id*. at 667. Defendants in *Doe* also argued that the policy in that case was adopted for the protection of its residents. But the Delaware Supreme Court rejected general unsubstantiated safety arguments.

Defendants' amorphous expressions of concern for safety, without support from statistical analysis, logic, or legal authority, should not be given any weight. As one constitutional law scholar recently wrote:

> The notion of upholding an infringement on a constitutionally protected right because the infringement might soothe the irrational fears of some portion of the populace is a novel one. If taken seriously, it might have significant application beyond the jurisprudence of the Second Amendment. It is easy, at least, to imagine other rights whose infringement might reduce the irrational fears of some sectors of the populace, though I had thought that our abandonment of Jim Crow had put that approach behind us.

Glenn Harlan Reynolds, *Second Amendment Limitations* (forthcoming in GEORGETOWN J. LAW AND PUB. POL., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727790).

Moreover, there is no convincing evidence that gun control regulations, such as the Regulations at issue here, reduce criminal violence. *See Moore*, 702 F.3d at 937 (citing Robert Hahn, et al., *Firearms Laws and the Reduction of Violence: A*

Systematic Review, 28 AM. J. PREV. MED. 40, 59 (2005) (identifying inconclusive correlation between firearms regulation and violence)).

To the contrary, the *Moore* Court, relying on empirical data, found that laws that prohibit gun carrying outside the home have little impact on public safety in states that utilize a permit system for public carry, like Delaware. *Moore*, 702 F.3d at 938. Further, the evidence available "is consistent with concluding that a right to carry firearms in public may promote self-defense." *Moore*, 702 F.3d at 942.

While there is scant data available to justify firearm restrictions, there is evidence to prove that there is a negative correlation between gun ownership and crime. One recent study found that restrictions on the carrying of concealed weapons tended to lead to higher murder rates at the state level. Mark Gius, *An examination of the effects of concealed weapons laws and assault weapons bans on state-level murder rates*, Applied Economics Letters, 21:4, 265-267 (2014) (copy included in Compendium). *See also* Don B. Kates and Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide,* 30 HARVARD J. LAW AND PUB. POL. 649, 660–61 (2007) (study concludes that more gun control does not lead to lower death rates or less violent crime).[14] Even public health experts who zealously advocate handgun

[14] The history of gun control in the United States often coincides with the history of discrimination against minorities or those marginalized by society. For example, in

controls have concluded—in the wake of *Heller*—that the empirical evidence suggests that there would be "'relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.'" *Moore*, 702 F.3d at 938 (quoting Philip J. Cook, Jens Ludwig, & Adam M. Samaha, *Gun Control After* Heller: *Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009)).

It is notable that, although the Second Amendment provides lesser protection than that provided by Article I, § 20, federal law allows the carrying of firearms in *national* parks. *See* 36 C.F.R. § 2.4. It follows that the Regulations should be stricken under the greater protection of Article I, § 20.

Defendants mischaracterize Griffin *and* Doe.

Defendants rely primarily upon *Griffin v. State*, 47 A.3d 487 (Del. 2012), and

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his concurrence to the Supreme Court's decision in the *McDonald* opinion, Justice Clarence Thomas quoted Frederick Douglass as stating that: "The black man has never had the right either to keep or bear arms," which would be remedied by adoption of the Fourteenth Amendment. 130 S.Ct. at 3083 (Thomas, J., concurring). *See generally* An Act in Relation to Free Negroes and Mullatoes, §7, Ch. 305, Mar. 18, 1863, in 12 Del. Laws 332 (1863) (referring to an enactment which provided that "free negroes and free mullatoes are prohibited from owning or having in their possession, a gun, pistol, sword, or any warlike instrument . . .").

wrongly refer to holdings in *Doe* as *dicta*. Op. Br. at 18-26. In *Griffin*, the Delaware Supreme Court did not, as Defendants assert, uphold Griffin's conviction for carrying a concealed deadly weapon. Op. Br. at 19.

Instead, the Court did the exact opposite: it reversed and remanded for further consideration of the question of whether Griffin had disclosed to police that he had a knife in his pants when he was handcuffed (unable to remove the knife from his pants) and involuntarily removed from his home. *Griffin*, 47 A.3d at 491-492. The Court's opinion was limited to the right to a concealed weapon inside one's home when being arrested. Defendants' assertions to the contrary (including the incorrect statement in their brief that the weapon in *Griffin* was a gun) are wrong. *See* Op. Br. at 19.

Defendants similarly misstate the holdings in *Doe*. Defendants egregiously err when they state, at page 21 of their brief, that it was *dicta* for the Court in *Doe* to recognize the right to bear arms outside the home – when that was the central issue in the case that was addressed. *See Doe*, 88 A.3d at 668. Delaware's high court was interpreting Article I, § 20, to resolve whether Delawareans had a right to bear arms outside the home. Indeed, that was the precise issue the Supreme Court accepted upon certification by the United States Court of Appeals for the Third Circuit. *Id*. at 657-658.

Doe also recognized, contrary to Defendants' reference to the case, a distinction between the type of government buildings that provide government services, such as a courthouse, and other government property where traditional government services are not provided. *Doe*, 88 A.3d at 668. The governmental agency involved in *Doe* was responsible for "maintaining the grounds and buildings for the residents" – not for providing traditional governmental services. *Id.* The same is true in this case. Maintaining parks and campgrounds is not a traditional government service such that a ban on firearms would be warranted.

Doe does not, as Defendants allege, stand for the position that wherever state employees work, all firearms can be banned. Defendants do not, and cannot, quote any language in *Doe* that supports that argument. Op. Br. at 22.

Defendants similarly cite no authority for their position that the right to bear arms does not exist outside the home where, as in public places, the State provides security. Taken to its logical conclusion, that argument would mean that the right to bear arms would be abrogated on every city sidewalk where the police department provides protection. Contrary to Defendants' assertions, *Doe's* ruling was not *dicta* to the extent that it ruled that a ban on firearms in a common area, *open to the public and outside the confines of one's apartment*, violated the right enshrined in Article I, § 20 to bear arms outside one's home. *Doe*, 88 A.3d at 668. That was the central

holding and the primary issue certified to the Supreme Court by the United States Court of Appeals for the Third Circuit. *Doe v. Wilmington Hous. Auth.*, No. 12-3433 (3d Cir. July 18, 2013) (copy included in Compendium).

As in the *Doe* case, the Regulations at issue here "infringe[] the fundamental right of responsible, law-abiding citizens to keep and bear arms for the defense of self, family, and home." *Doe*, 88 A.3d at 668. Because there is no justification for Defendants' Regulations, Sportsmen's fundamental constitutional rights outweigh Defendants' unsubstantiated interest in imposing excessive and ineffective firearm restrictions.

B. Defendants' regulations are preempted by existing Delaware law.

The restrictions on the lawful possession and use of firearms imposed by DNREC Regulation 9201.24.2 and 3 Del. Admin. Code § 8.8 are inconsistent with and preempted by the comprehensive regulatory scheme promulgated by the Delaware General Assembly. *See Cantinca v. Fontana*, 884 A.2d 468, 473 n.23 (Del. 2005) (holding that preemption may be evidenced, inter alia, "where the legislature has enacted a comprehensive regulatory scheme in such a manner as to demonstrate a legislative intention that the field is preempted by state law") (quotations omitted). *See generally Capital Area Dist. Library v. Michigan Open Carry, Inc.*, 826 N.W.2d 736, 738 (Mich. Ct. App. 2012) ("Our court has held that,

in light of MCL 123.1102, state law *completely occupies* the field of firearm regulation to the exclusion of local units of government.") (emphasis in the original).

The Delaware General Assembly has enacted a comprehensive regulatory scheme governing the use and possession of firearms, including, but not limited to, the following regulations: a licensing requirement (24 *Del. C.* §§ 901, 902); prohibition of sales to minors or intoxicated persons (24 *Del. C.* § 903); requiring record keeping and criminal history checks (24 *Del. C.* §§ 904, 904A); requiring a license to carry a concealed weapon (11 *Del. C.* §§ 1441, 1441A, 1442); restrictions on the sale, use, and possession of sawed-off shotguns and machine guns (11 *Del. C.* § 1444); prohibiting certain persons from owning, using or purchasing firearms (11 *Del. C.* § 1448); and requiring a criminal background check prior to purchase/sale of a firearm (11 *Del. C.* § 1448A).

The Regulations at issue in this action prohibit law-abiding citizens from exercising their right to carry a firearm for self-defense in a public park. Such regulations restrict the use and possession of firearms to a significantly greater degree than does this regulatory scheme, and should be invalidated accordingly. There is a significant difference between the General Assembly enacting criminal laws regulating firearms (which it has done), and an agency such as DNREC or DOA usurping the legislative prerogative to do so.

In addition, it should be noted that the Delaware General Assembly has expressly preempted municipalities and counties from regulating firearm possession. Section 111 of Title 22 of the Delaware Code provides, in pertinent part: "The municipal governments shall enact no law, ordinance or regulation prohibiting, restricting or licensing the ownership, transfer, possession or transportation of firearms or components of firearms or ammunition except that the discharge of a firearm may be regulated." 22 *Del. C.* § 111. Moreover, Section 330(c) of Title 9 provides, in pertinent part: "The county governments shall enact no law or regulation prohibiting, restricting or licensing the ownership, transfer, possession or transportation of firearms or components of firearms or ammunition except that the discharge of a firearm may be regulated; provided any law, ordinance or regulation incorporates the justification defenses as found in Title 11 of the Delaware Code." 9 *Del. C.* § 330(c). Although neither DNREC nor the DOA are municipal or county governments, it makes little sense to suggest that the General Assembly intended to allow these agencies to restrict fundamental constitutional rights that cities and counties cannot lawfully restrict. Similarly, by comparison, under Federal Administrative law, administrative agencies have only the authority granted to them by statute. For example, the EPA is a federal agency – a creature of statute. It has no constitutional or common law existence of authority, but only that authority

conferred upon it by Congress. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). *See also Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). In addition, the legislature knows how to draft legislation prohibiting carrying firearms in certain places. *See* 11 *Del. C.* §1457. The fact that they did not do that for State Parks demonstrates that they want people to have the ability to exercise their rights there.

Likewise, when the legislature amended 22 *Del. C.* § 330 (county preemption) and 9 *Del. C.* § 111 (municipal preemption) to allow a ban of open carry in sensitive areas, it did *not* prohibit those with a permit to carry a concealed weapon from possession in those areas. Thus, the legislature knows when to allow limits on Article I, § 20, but has not done so for State Parks.

Defendants conflate preemption by occupying the field and preemption by direct conflict. Op. Br. at 29-33. One of the flaws in their argument is in their assertion that, to challenge the Regulations, Sportsmen must also challenge 11 *Del. C.* § 1457, on the purported grounds that, as it is a geographic restriction on firearms, it must also be invalid. Op. Br. at 33. Defendants' argument, which cites to no authority for support, is misplaced.

Sportsmen are not arguing that the *legislature* cannot act to impose proper

restrictions on firearms. Sportsmen argue that DNREC and DOA cannot do so. The authority of DNREC and DOA, creatures of statute, to impose regulations restricting the right to bear arms, is a materially different than the ability of a legislature to pass a statute. Defendants' "goose and gander" argument lacks any citation to any source of authority and is devoid of logic.

Defendants make the bewildering statement that: "The challenged regulations are likewise compatible with the limited privilege to carry concealed weapons, granted to law enforcement officers, former officers, and those able to qualify for permits." Op. Br. at 35. That is expressly contrary to the Defendants' assertions in their Answer and elsewhere in their Opening Brief. Certain of the Sportsmen have a license to carry a concealed deadly weapon, and Plaintiff Mark Hester is a retired police officer. How can Defendants argue that the regulations are compatible with the requirements for carrying a concealed deadly weapon when they have expressly stated that Sportsmen, including those holding a license to carry a concealed deadly weapon, are forbidden from bringing a firearm into a State Park or State Forest? Furthermore, there is no basis for Defendants' assertion that permitting firearms in State Parks and Forests would interfere with the ability of "law enforcement officers to keep the peace on public lands and in public places." Op. Br. at 36.

In sum, there is no support for the position that the General Assembly would have expected or allowed DNREC or the DOA to develop their own firearms regulations, given its comprehensive regulatory scheme governing the use and possession of firearms, and its prohibition against municipalities and county governments from regulating in this field.

C. Defendants exceeded the scope of their authority.

Defendants have no authority to adopt or enforce regulations that deprive Sportsmen of firearms for lawful protection contrary to the State statutory scheme. *See* 29 *Del. C.* § 8001 (establishing DNREC); 29 *Del. C.* § 8101 (establishing DOA).

As administrative agencies, Defendants DNREC and DOA have limited powers, and may only act within the scope of authority delineated by the statutes creating them.[15] *See Wilmington Vitamin & Cosmetic Corp. v. Tigue,* 183 A.2d 731, 740 (Del. Super. 1962) (citations omitted) (agency's actions will not be sustained if

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[15] *See State v. Amalfitano,* 1993 Del. Super. LEXIS 474, at *4 (Apr. 5, 1993) ("An administrative agency may not exercise power which exceeds that granted by the legislation from which it arose."); *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989) ("[I]t is axiomatic that delegated power may be exercised only in accordance with the terms of its delegation."); *Farmers for Fairness v. Kent County*, 940 A.2d 947, 956 n.43 (Del. Ch. 2008) ("[W]hen one legislative body having superior authority -- such as the General Assembly – has required that another legislative body -- such as the Kent County Levy Court -- follow certain procedures, the court must do its duty and enforce the requirements imposed on the latter's lawmaking authority.").

its actions are not justified under the statute creating the agency); *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 654 (Del. Super. 1973) ("The powers of an administrative agency must be exercised in accordance with the statute conferring power upon it. An agency's authority to act depends upon compliance with the procedural provisions laid down in the statute.").

Unable to cite any specific statutory provision granting them the power to regulate firearms, Defendants argue instead that such power is implied through broad language in various statutes. *See* Op. Br., at 15-16 ("[T]he State Park statute grants DNREC the broad authority to: 'Make and enforce regulations relating to the protection, care and use of the areas it administers. . . .' 7 *Del. C.* § 4701(a)(4)."); *Id.*, at 16 ("[L]ike DNREC, the General Assembly has granted [the Department of Agriculture] broad authority to establish rules 'for the enforcement of the state forestry laws and for the protection of forest lands. . .' 3 *Del. C.* § 1011."); *Id.* ("Implicit in this broad grant of authority to manage public lands is the authority to establish rules to protect public safety. Without such authority, these state agencies could not establish rules for the 'safety, protection and general welfare of the visitors and personnel on properties under its jurisdiction.' 7 Del. Admin. C. § 9201-2.1."). Defendants also argue that without a broad reading of these statutes, Defendants

would be unable to establish basic rules regulating activities such as hunting, fishing and swimming. *Id.*

Defendants' arguments are unavailing for several reasons. First, the legislature's delegation of authority to establish rules relating to activities such as fishing and swimming on park grounds is vastly distinct from a delegation of authority to establish rules limiting fundamental constitutional rights such as the right to bear arms. Nothing in DNREC's governing statutes give it the power to make rules in an area where the legislature has demonstrated its exclusive intent to regulate the field. *See* 29 *Del. C.* §§ 8001; 8003 (establishing DNREC and enumerating its powers). The same holds true for the DOA. *See* 29 *Del. C.* §§ 8101; 8103 (establishing DOA and enumerating its powers). Neither DNREC's, nor DOA's, authority allows either agency to prohibit the lawful possession of firearms in Delaware State Parks or State Forest Lands.

In fact, both Defendants are specifically prohibited from implementing rules or regulations that "*extend, modify or conflict with any law of [the State of Delaware] or the reasonable implications thereof.*" *See* 3 *Del. C.* § 101(3) (legislature's designation of power to DOA) (emphasis added); 7 *Del. C.* § 6001 (legislature's findings, policy and purpose on conservation, natural resources and environmental control). Regulations that specifically prohibit law-abiding citizens from exercising

their constitutional right to carry firearms for self-defense plainly conflict, or at minimum, modify without permission the laws of the State of Delaware. Such regulations are therefore invalid.

D. Subject matter jurisdiction is appropriate in this court.

The Court of Chancery has jurisdiction over a case where a plaintiff: "(1) invokes an equitable right; or (2) requests an equitable remedy where there is no adequate remedy at law." *Doe v. Coupe*, 2015 Del. Ch. LEXIS 187, at *4 (July 14, 2015) (citing *Israel Disc. Bank of N. Y. v. First State Depository Co.*, 2012 Del. Ch. LEXIS 226, 2012 WL 4459802, at *4 (Sept. 27, 2012), *aff'd*, 86 A.3d 1118 (Del. 2014)). A prayer for injunctive relief is sufficient to invoke equitable jurisdiction. Donald J. Wolfe and Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 2.03(b)(2) (2015).

This Court has subject matter jurisdiction over this action because Sportsmen filed this case to seek both preliminary and permanent injunctive relief; remedies that are not available in the Superior Court. In opposition, Defendants makes a series of inapposite arguments. First, they argue that "the true nature of Plaintiffs' requested relief is a declaratory judgment that the Defendants' regulations violate the State constitution and state law," which, according to Defendants, is "an abstract claim which is under the exclusive jurisdiction of the Superior Court." (Op. Br. at

9). In addition, because an award of declaratory relief would suffice, according to Defendants, there is no need for an equitable remedy, and thus, jurisdiction in this Court is lacking. Both of Defendants' positions are flawed and have previously been rejected by this Court in other cases.

1. The mere fact that Sportsmen seek declaratory relief does not divest this Court of subject matter jurisdiction.

In their Brief, Defendants incorrectly assert that claims for declaratory relief are under the "exclusive jurisdiction of the Superior Court." (Op. Br. at 9). The Declaratory Judgment act, codified at 10 *Del. C.* § 6501, provides:

> Except where the Constitution of this State provides otherwise, courts of record within their respective jurisdictions shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree. 10 *Del. C.* § 6501.

As this Court recently observed, "the Declaratory Judgment Act cannot and does not divest [the Court of Chancery] or any court of subject matter jurisdiction as to a particular case, if such jurisdiction would be proper according to traditional principles for determining that issue." *Coupe*, 2015 Del. Ch. LEXIS 187, at *9 (citing *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 591 (Del. 1970)); *Diebold*, 267 A.2d at 591 ("While it is conceivable that, under §

6501, [Plaintiff] may have brought a declaratory judgment action in the Superior Court for a construction of the Loan Agreement, and that, for practical purposes, such action may have furnished an adequate remedy, it does not follow that the creation of such remedy by § 6501 divested the Chancery Court of the traditional jurisdiction we have found it possessed in this case.") (citing *DuPont v. DuPont*, 85 A.2d 729-30) (Del. 1951)).

Thus, the fact that Sportsmen seek declaratory relief does not require them to file their action in Superior Court, especially where, as here, Sportsmen seek equitable relief that is not available at law.

2. Sportsmen seek equitable relief that is not available at law.

Sportsmen filed this suit to seek preliminary and permanent injunctive relief that would prevent Defendants from depriving them of their constitutional right to carry firearms. In their Opening Brief, Defendants argue that the "true nature" of the relief sought is merely a declaration that the disputed Regulations are invalid, and that such a claim could be brought in Superior Court (Op. Br., at 9-11). Although Defendants are correct that Sportsmen could have sought a mere declaration (without more) that the Regulations are invalid by filing in Superior Court, that fact does not mean that jurisdiction in this Court is lacking. The recent

case of *Doe v. Coupe*, 2015 Del. Ch. LEXIS 187 (July 14, 2015), supports the jurisdiction of this Court in this case.

In *Doe v. Coupe*, the plaintiffs, who were convicted sex offenders, brought suit against the Commissioner of the Department of Corrections, seeking an order that would preliminarily and permanently enjoin the State from continuing to require that the plaintiffs wear GPS monitor ankle bracelets. 2015 Del. Ch. LEXIS, at *3. Similar to the Sportsmen in the present action, the *Doe v, Coupe* plaintiffs also sought a declaration that 11 *Del. C.* § 4121(u) (the "GPS Monitoring Statute") was unconstitutional on its face and as applied to the plaintiffs. *Id.*

As here, the State argued that jurisdiction in the Court of Chancery was lacking as the plaintiffs could seek declaratory relief in the Superior Court. The state's argument failed. Although the Court agreed that "a declaratory judgment in Superior Court that the GPS-monitoring statute was unconstitutional, coupled with Defendant's presumed adherence to such a ruling, might provide an adequate remedy at law in comparison to a permanent injunction[,]" the Court observed that such a result does not mean that jurisdiction in the Court of Chancery was lacking. 2015 Del. Ch. LEXIS 187, at *11.

Instead, such a result only meant that the plaintiffs could have brought suit in *either* court. *Id.* at *9-10 ("Our law does not support Defendant's attempt to use the

Declaratory Judgment Act as a means to deprive this Court of subject matter jurisdiction over a case in which Plaintiffs truly seek equitable relief.") (citations omitted). So too, Sportsmen seek equitable rights; namely, an order preventing Defendants from infringing their constitutional rights.

Defendants' position is also flawed because Sportsmen (like the plaintiffs in *Coupe*) filed suit in order to seek preliminary as well as permanent injunctive relief. This fact was relevant in *Coupe*, as the Court correctly observed that the Superior Court would be unable to "provide the equivalent of a preliminary injunction." 2015 Del. Ch. LEXIS 187, at *11. Because the Court held that the plaintiffs' claim was at least "colorable," the Court held there was not an "adequate and equivalent remedy at law." *Id.* at *12.

This analysis is applicable here. Sportsmen filed in Chancery so they could ask for a preliminary injunction, and in lieu of briefing that motion, the parties instead agreed on a schedule for dispositive motions to include any arguments that would have been made in a motion for preliminary injunction.[16] Although

[16] In *Coupe*, the procedural posture was substantially the same as here. There was no motion for preliminary injunction pending in that case either. Instead, the plaintiffs merely noted in their Answering Brief in Opposition to Defendant's Motion to Dismiss that "[u]nless the parties can agree on interim relief or a schedule permitting prompt final resolution, Plaintiffs will request a preliminary injunction.") (*See* 2015 Del. Ch. LEXIS 187, C.A. No. 10983-VCP, Tr. ID 57411736, at 14). It

Defendants argued at length that there is no need for permanent injunctive relief, Defendants glossed over Sportsmen's demand for preliminary injunctive relief. The closest Defendants come to addressing the issue is their unfounded and untrue argument that the harm alleged in the Complaint is "merely conjectural," and thus, not irreparable. (*See* Op. Br., at 9-10) ("Plaintiffs' Complaint fails to allege any actual harm sustained, let alone irreparable harm attributable to the Defendants, that require this Court's action").

Defendants' conclusion remains flawed. Well-settled law provides that a deprivation of constitutional rights constitutes irreparable harm. *See Norfolk Southern Corp. v. Oberly*, 594 F. Supp. 514, 522 (D. Del. 1984) (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689 (1976); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971)). Indeed, the *Oberly* court stated that "deprivation [of first amendment] rights even for minimal periods of time constitutes irreparable injury." *Id*. (citing *Constructors Ass'n of Western Pennsylvania v. Kreps*, 753 F.2d 811 (3d Cir. 1978)). *See also Ezell*, 651 F.3d at 699; 11A Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further

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does not appear that a motion for preliminary injunction was ever filed in that action.

showing of irreparable injury is necessary.").

That principle, enunciated in *Oberly*, remains true, even though the facts in that case, as Defendants note, can be distinguished. *Oberly* involved a commerce clause claim, not a claim arising from a violation of Second Amendment rights or other rights guaranteed by the Bill of Rights. The *Oberly* court compared the commerce clause claim made in that case, where strictly monetary harm was alleged, to other claims arising from a deprivation of constitutional rights that *can* constitute irreparable harm. *Oberly*, 594 F. Supp. At 522. The court noted that the "Supreme Court and the Third Circuit have recognized that a violation of constitutional rights, even for a minimal period of time, can constitute irreparable injury." *Id*.

Moreover, contrary to Defendants' assertions, Sportsmen have pled that "but for" the unlawful Regulations, they *would* (not might) exercise their right to carry firearms within Delaware State Parks and State Forest Lands. Thus, the harm alleged is not merely hypothetical. To the extent Defendants believe that Sportsmen need to actually expose themselves to arrest in order to demonstrate irreparable, imminent harm, such a position is not supported by the law. *Ezell v. City of Chicago*, 651 F.3d 684, 695 (7th Cir. 2011) ("The plaintiffs need not violate the Ordinance and risk prosecution in order to challenge it.").

3. The court is not being asked to "adjudicate and enforce Delaware's criminal statutes."

The Court of Chancery has "historically . . . been careful not to interject itself into the law enforcement functions that properly fall within the jurisdiction of Delaware's courts of law." *Coupe*, 2015 Del. Ch. LEXIS 187, at *16. Defendants argue that this Court should decline jurisdiction over this matter because to do otherwise "risks the usurpation of the Superior Court's authority to adjudicate and enforce Delaware's criminal statutes." (Op. Br., at 13) (citations and internal quotations omitted).

Defendants' contention is unsupported by authority. This action does not interfere with any criminal prosecution. This Court rejected the very same argument in *Coupe*, noting that the plaintiffs' status as parolees in that case did not convert their civil action into an "active criminal" one. *Id.*

VI. Conclusion

For these reasons, Sportsmen respectfully request that this Honorable Court find that the challenged Regulations promulgated by Defendants impermissibly restrict Sportsmen's right to possess and bear arms, and, therefore, violate Article I, § 20 of the Delaware Constitution. Thus, Defendants should be permanently enjoined from enforcing their unconstitutional Regulations.

ECKERT SEAMANS CHERIN
& MELLOTT, LLC

/s/ Francis G.X. Pileggi
Francis G.X. Pileggi (DE No. 2624)
Gary W. Lipkin (DE No. 4044)
Aimee M. Czachorowski (DE No. 4670)
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
302-574-7400
fpileggi@eckertseamans.com
glipkin@eckertseamans.com
aczachorowski@eckertseamans.com

Attorneys for Bridgeville Rifle & Pistol Club, Ltd., Mark Hester, John R. Sylvester, Kenneth Watkins, Barbara Boyce, DHSc, RDN, Roger T. Boyce, Sr., and the Delaware State Sportsmen's Association

Dated: March 3, 2016

Exhibit A

EXCERPTS OF ADMISSIONS
CONTAINED IN DEFENDANTS' ANSWER TO THE COMPLAINT

8. Defendant David Small is the Secretary of DNREC. Defendant DNREC is an agency of the State of Delaware, established by 29 *Del. C.* § 8001, and which derives its powers from, *inter alia*, Title 7, Chapter 60 of the Delaware Code. The office of the Secretary of the Department of Natural Resources and Environmental Control is located at 89 Kings Highway, Dover, Delaware 19901.

ANSWER: Admitted.

9. Defendant Ed Kee is the Secretary of the Department of Agriculture. Defendant Department of Agriculture is an agency of the State of Delaware that was established pursuant to 29 Del. C. § 8101. The office of the Secretary of the Department of Agriculture is located at 2320 South DuPont Highway, Dover, Delaware 19901.

ANSWER: Admitted.

11. Bridgeville conducts rifle and pistol sporting competitions, and those who participate often seek to camp at Trapp Pond State Park or rent a cottage at Sea Shore State Park. However, they are prohibited from using those facilities while carrying or transporting in their vehicle those firearms that they will be using in the competition. Many of Bridgeville's members are licensed to carry concealed deadly weapons pursuant to 11 *Del. C.* § 1441 and/or § 1441A, and, but for the regulations

discussed below, would exercise their right to carry a concealed deadly weapon when visiting State Parks, State Wildlife areas and/or State Forests.

ANSWER: Denied as alleged. The Defendants have no jurisdiction over private recreational events taking place on private property, and have not sought to enforce the challenged State laws in such locations. Admitted that the Plaintiffs, like other citizens, may not carry or transport firearms into State Parks or facilities, other than designated weapons during hunting seasons. Denied that any of the Plaintiffs is licensed to carry a concealed weapon within a State Wildlife Area or a State Forest.

19. In addition to the Constitutional rights set forth above, the Delaware General Assembly has enacted a comprehensive regulatory scheme governing the use and possession of firearms.

ANSWER: Denied as alleged. Admitted only that that the General Assembly has enacted statutes governing the use and possession of firearms.

25. DNREC regulation 9201.24.3 states, "[i]t shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots or archery equipment upon any lands or waters administered by the Division, except by those persons lawfully hunting in those areas specifically designed for hunting by the Division, or those with prior written approval of the Director." "Division" is

defined in 7 Del. Admin. Code 9201.1 as the "Division of Parks and Recreation of the Department of Natural Resources and Environmental Control."

ANSWER: Admitted.

26. Violators of the rules and regulations promulgated by the "Department of Natural Resources and Environmental Control, Division of Parks and Recreation, shall be fined not less than $25.00 nor more than $250.00 and costs for each offense, or imprisoned not more than thirty (30) days, or both. For each subsequent like offense, he/she shall be fined not less than $50.00 nor more than $500.00." 7 Del. Admin. Code. 9201.28.1.[1]

ANSWER: Admitted. By way of further answer, the General Assembly has recently approved revisions to the cited penalty provisions and the authority of DNREC to administer law enforcement in State Parks.[2]

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[1] It is noteworthy that firearms are permitted in national parks despite the Second Amendment to the United States Constitution providing a more narrowly prescribed right to bear arms. *See* 36 C.F.R. § 2.4.

[2] To the extent that federal regulation of firearms in parks may differ from regulations approved by the General Assembly, it is neither "noteworthy" nor supportive of the Plaintiff's argument under the Delaware Constitution. Congress unquestionably has the power to prohibit firearms on federal land in public places controlled by the federal government, just as the General Assembly acted with full authority to enable DDA and DNREC to regulate recreational hunting and the use and possession of firearms on State land.

31. Under 3 Del. Admin. Code 8.8, adopted by the Department of Agriculture, "[f]irearms are allowed for legal hunting only and are otherwise prohibited on State Forest Lands."

ANSWER: Admitted that Rule 8.8 reads in part as quoted.

See 3 Del.Admin.Code Ch. 402.

32. Violations of the State Forest Regulations adopted by the Department of Agriculture are unclassified misdemeanors and are punishable by fines ranging from $25 to $500. *See* 3 Del. Admin. Code 10.2.

ANSWER: Admitted. *See* 3 Del.Admin.Code Ch. 402.

34. At all relevant times, Defendants acted under, and seek to act under, the color of law of the State of Delaware.

ANSWER: Admitted.

46. A clear controversy exists between Plaintiffs and Defendants as to whether Defendants' regulations forbidding the possession of firearms within Delaware State Parks and State Forest Lands are unlawful.

ANSWER: Admitted.

47. The controversy involves the rights or other legal relations of the Plaintiffs and this action is asserted against persons and entities who have an interest in contesting the claim, and have contested the claims.

ANSWER: Admitted.

48. The controversy is between parties whose interests are real and adverse, and the issues involved are ripe for judicial determination.

ANSWER: Admitted that the issues are ripe for determination. Denied that this Court has subject matter jurisdiction to issue a declaratory judgment or to afford injunctive relief.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE, DHSc, RDN; ROGER T. BOYCE, SR.; and the DELAWARE STATE SPORTSMEN'S ASSOCIATION, Plaintiffs, v. DAVID SMALL, SECRETARY OF THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; ED KEE, SECRETARY OF DELAWARE DEPARTMENT OF AGRICULTURE; and DELAWARE DEPARTMENT OF AGRICULTURE, Defendants.	C.A. No. 11832-VCG

[PROPOSED] ORDER

This _____ day of _____, 2016, upon consideration of Plaintiffs' Cross-Motion for Judgment on the Pleadings and any response thereto, it is hereby ORDERED that Plaintiffs' Motion is GRANTED.

_____
Vice Chancellor Sam Glasscock III

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; MARK HESTER; JOHN R. SYLVESTER; MARSHALL KENNETH WATKINS; BARBARA BOYCE, DHSc, RDN; ROGER T. BOYCE, SR.; and the DELAWARE STATE SPORTSMEN'S ASSOCIATION, Plaintiffs, v. DAVID SMALL, SECRETARY OF THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; ED KEE, SECRETARY OF DELAWARE DEPARTMENT OF AGRICULTURE; and DELAWARE DEPARTMENT OF AGRICULTURE, Defendants.	C.A. No. 11832-VCG

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Ct. Ch. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2013.

2. This brief complies with the type-volume limitation of Ct. Ch. R. 171(f)(1) because it contains 10450 words, which were counted by Microsoft Word 2013.

/s/ Aimee M. Czachorowski
Aimee M. Czachorowski (Bar No. 4670)

Dated: March 3, 2016

CERTIFICATE OF SERVICE

I, Aimee M. Czachorowski, Esquire, hereby certify that on this 3rd day of March, 2016, I caused a true and correct copy of Plaintiffs' Combined Opening Brief in Support of Their Cross-Motion for Judgment on the Pleadings and Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings to be served upon the following counsel of record via File&ServeXpress:

Ralph K. Durstein, III, Esquire
Devera B. Scott, Esquire
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904

Attorneys for the Defendants

/s/ Aimee M. Czachorowski
Aimee M. Czachorowski (Bar No. 4670)