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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

JANE DOE and CHARLES BOONE,
Plaintiffs,
v.
WILMINGTON HOUSING AUTHORITY,
and FREDERICK S. PURNELL, SR.,
Defendants.

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NO. 10-473 (LPS)

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Wilmington, Delaware
Friday, July 15, 2011
ORAL ARGUMENT HEARING

BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

APPEARANCES:

ECKERT SEAMANS CHERIN & MELLOTT, LLC
BY: FRANCIS G.X. PILEGGI, ESQ., and
JILL K. AGRO, ESQ.

Counsel for Plaintiffs

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
BY: BARRY M. WILLOUGHBY, ESQ., and
LAUREN E. MOAK, ESQ.

Counsel for Defendants

Brian P. Gaffigan
Registered Merit Reporter

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P R O C E E D I N G S

(REPORTER'S NOTE: The following hearing was held in open court, beginning at 10:03 a.m.)

THE COURT: Good morning, everyone.

(The attorneys respond, "good morning, your Honor.")

THE COURT: Let's begin by having you note your appearances on the record, please.

MR. PILEGGI: Francis Pileggi for the plaintiff, your Honor; and my colleague, Jill Agro.

THE COURT: Welcome.

MR. WILLOUGHBY: Your Honor, Barry Willoughby for both defendants; and my associate, Lauren Moak.

If I may, if I could introduce Mr. Fred Purnell, the executive director, a defendant in his official capacity. He is back in the courtroom. We also have two summer interns from the Brady Center, Jeffrey Golimowski, and Sarah Piazza who are here to watch the arguments today. Thank you, your Honor.

THE COURT: Thank you very much.

Have you all conferred about how you would like to proceed? There are multiple motions, and there is the Brady Center, although I don't know that they have counsel here today. Have you all talked about how you would like to proceed?

1 MR. WILLOUGHBY: We have not, your Honor. I
2 assume the plaintiffs would go first because they're the
3 plaintiffs, but I would be happy to go first, if the Court
4 would prefer.

5 MR. PILEGGI: I would assume since we're the
6 plaintiffs, we would go first, but we can toss a coin or
7 however your Honor wants to do it.

8 THE COURT: No, no. I'm fine with the
9 plaintiffs going first to be heard on all of the issues, and
10 then defendants, but since you are both moving parties, I'll
11 give you each a chance to rebut one another, which, by my
12 count, Mr. Willoughby will have the last word. Okay?

13 MR. PILEGGI: That's fine with me, your Honor.

14 THE COURT: Then you may proceed.

15 MR. PILEGGI: Thank you.

16 May it please the Court, your Honor, my name is
17 Francis Pileggi. I represent the plaintiffs.

18 This is a civil rights case, your Honor,
19 prohibiting the plaintiffs from keeping a firearm for
20 self-defense in their residential building, what amounts to
21 a deprivation of their Second Amendment rights and their
22 rights under the Delaware Constitution.

23 The United States Supreme Court recently said in
24 McDonald, "Our central holding in Heller was that the Second
25 Amendment protects a personal right to keep and bear arms

1 for lawful purposes; most notably, for self-defense within
2 the home."

3 The Supreme Court said that the Second Amendment
4 codified pre-existing rights to keep and bear arms for
5 self-defense. There are very few rights that are so basic and
6 natural that the Constitution codified them instead of
7 granting them. It's a privilege for me to be advocating for
8 the poorest minorities in our society, to seek protection for
9 their rights that are so basic and fundamental that they're
10 considered natural rights according to the U.S. Supreme Court,
11 that the Constitution did not grant and simply codified. Of
12 all the many rights in the Constitution, and the perhaps
13 millions of state and federal statutes, case law and ordinances,
14 there are very few laws or rights in our country that enjoy
15 such an exalted position.

16 According to the U.S. Supreme Court, in order to
17 understand the American jurisprudence regarding the Second
18 Amendment, it's necessary and helpful, as the Court did in
19 Heller, to refer to the post-Civil War efforts in the South
20 to restrict Second Amendment rights. The Fourteenth
21 Amendment was passed in part to address the declaration by
22 Southern states during Reconstruction of the Second Amendment
23 rights of freed slaves.

24 We're not in any way suggesting that the WHA has
25 any motive similar to the Southern states during Reconstruction.

1 What we suggest is that there is a similar net result here,
2 that the poorest minorities that are least able to defend
3 themselves are being deprived of their natural right of
4 self-defense.

5 About two months ago in State v Griffin, the
6 Delaware Superior Court said that, "If the constitutional
7 right to keep and bear arms for security is to mean
8 anything, it must, as a general matter, permit a person to
9 possess, carry and sometimes conceal arms to maintain the
10 security of his private residence."

11 Your Honor, in this case, I realized that the
12 original policy that the Wilmington Housing Authority had
13 that prohibited the possession of any firearms in any homes
14 or their residences has been amended, but the only record in
15 this case is that the defendants have continued to deny in
16 filings with the Court, even after the McDonald decision,
17 they have continued to deny their original policies were
18 unconstitutional. So I would like to address briefly,
19 because I think it's fairly simple, why the original
20 policies violate the federal and state constitutions.

21 THE COURT: I will let you do that, but I'm
22 unclear on whether it has been conceded it is unconstitutional
23 or not. There are places in your briefs where you say it is
24 concededly unconstitutional, but I am not sure where they have
25 conceded it, and then you also argue they have not conceded

1 it. What is your view on whether they have conceded it is not
2 constitutional?

3 MR. PILEGGI: Thank you, your Honor. They have
4 filed -- and I can provide the exact dates, but for now, I
5 will just refer to them without the dates.

6 After the McDonald case was decided, we filed an
7 amended complaint alleging again that the original policies
8 were unconstitutional. They filed an answer denying, even
9 after McDonald, denying that the original policies were
10 unconstitutional.

11 They later amended their policies. We filed a
12 second amended complaint, and the second amended complaint
13 was still, of course, after McDonald. They again denied
14 that their original policies were unconstitutional.

15 So as far as their pleadings, my understanding
16 is, in terms of the answer to our complaint, that they have
17 denied any unconstitutionality.

18 Mr. Willoughby is more articulate than I am, and
19 he will explain his position, but as I understand his position
20 in the briefs, they said that because they changed the policy,
21 it doesn't need to be ruled on. So maybe "conceding" is not
22 the correct word, it's not as accurate. If we said they
23 conceded that they were unconstitutional, that might be
24 inappropriate. It might not be the most accurate way to
25 describe their position.

1 There might be some ambiguity, and maybe that is
2 the right word to use, because in their pleadings in answer
3 to our complaint, they denied unconstitutionality. In their
4 briefs, they might suggest otherwise.

5 THE COURT: They have repeatedly stated that
6 they have no intention of reinstating the old policy. Why
7 isn't that good enough?

8 MR. PILEGGI: Well, your Honor, I think it's not
9 good enough for at least three reasons. The first is that
10 is not binding. I don't think we should be required to take
11 their word for it. We're not doubting their word, but it's
12 a public institution. Next week or next month or next year,
13 they could have a new board of commissioners, they could
14 have a new executive director, and there is nothing binding
15 that new director or the new board from adopting another
16 policy that they continue to say was not -- they continue to
17 deny was unconstitutional. So there is nothing prohibiting
18 them from reverting back to their original policies if all
19 we have to rely on is their word. They refused to enter
20 into a stipulation.

21 There have been cases across the country, for
22 example, in New Orleans, where there was a statute that was
23 held to be unconstitutional, and the mayor said, well, I
24 just won't enforce it. In that case, it's not a reported
25 decision, but there was a stipulation where the parties

1 entered into a stipulation that the Court signed off on saying,
2 okay, now it's official, so next week or next year you can't
3 decide that you will enforce it or you will revert back.

4 So the short answer, your Honor, is there is no
5 protection. We have no protection to stop them from, next
6 week or next year, going back to the original policy, in
7 which case we would have to spend the time and money to come
8 back into a court again to prevent them from enforcing the
9 original policy.

10 THE COURT: Well, that is where I was going to
11 go next. How is that an undue burden? As I understand it,
12 under HUD regulations, it would take a minimum of 30 days
13 for them to adopt the old policy, were they to try to do
14 that. The court is still here. Presumably, you could run
15 in and file a new suit. Let's assume that this one is over
16 with. Why is that not sufficient protection for your client?

17 MR. PILEGGI: Well, because it requires an
18 additional expenditure of time and money that I respectfully
19 suggest would be a waste not only of judicial resources but
20 a waste of our resources to have to tee up, so to speak, the
21 same issue that is now before the Court.

22 I understand why there is an argument that it
23 might be moot, but there are exceptions to the concept of
24 mootness. Two things: First, it's a matter of public
25 importance. I think this is a matter of public importance.

1 We're dealing with a core fundamental right. Secondly, if
2 there is a possibility that the challenged behavior will
3 be repeated. There is at least a possibility that the
4 challenged behavior will be repeated if there is nothing
5 from this Court or otherwise that restricts the defendants
6 in the future from reverting back to the old policy.

7 THE COURT: Well, you mentioned judicial economy.
8 That is something I have to be concerned with. I'm concerned
9 that if I rule on the constitutionality of a policy that has
10 been repealed, and that the policy maker says that it has no
11 intention of reinstating, merely on the fact that there is a
12 possibility that those things could change, the Court could
13 become overwhelmed with what are effectively requests for
14 advisory opinions about policies that aren't actually in
15 place. Can you help me not be afraid of that?

16 MR. PILEGGI: Your Honor, I certainly respect
17 that concern. I understand the Court is very busy and
18 should not about spending time deciding issues that it
19 doesn't need to decide, but there is case law and there are
20 policies that address similar situations where someone sued
21 and, after the lawsuit, the defendant changed their position
22 and argued that the Court no longer needed to decide the issue.

23 There are at least two or three different policies
24 that the courts have recognized where the Court can still make
25 a decision:

1 That is, if it is a matter of public importance.

2 This is certainly a matter of public importance.

3 If it is a situation where the challenged
4 conduct can reoccur.

5 There are also situations where, for example,
6 here, in a perfect world, I suppose, the defendants would
7 agree to stipulate, but for some reason the defendants have
8 refused to stipulate on the record that they are not going
9 to revert back to their old policy.

10 There are cases where, in similar situations,
11 the defendant has changed its position in response to a
12 lawsuit but the Court has still ruled on.

13 I certainly respect your Honor's concern that
14 it doesn't want to decide an issue that it doesn't need to
15 decide, but for the reasons I have explained, I think if
16 nothing else, an independent basis to do that would be
17 because it's a matter of public importance that could find
18 us back here again in the future. I think it would be less
19 wasteful of judicial resources and our resources if we had a
20 decision on an issue that is teed up now instead of filing a
21 complaint at some point in the future which would have to be
22 briefed again and argued again.

23 THE COURT: You wanted to explain to me why the
24 old policy is unconstitutional. It's well set out in your
25 briefs.

1 MR. PILEGGI: Well, I can skip over that if you
2 like.

3 THE COURT: Why don't you address standing,
4 because there is a concern there.

5 MR. PILEGGI: Your Honor, as far as standing,
6 there are a couple of points that I would like to highlight.

7 First, I'd like to refer the Court, and I can
8 give my argument without referring to it, but I'd like to
9 supplement the argument by referring to a decision last week
10 by the U.S. Court of Appeals in the Seventh Circuit.

11 I have copies of the decision, if you would
12 like, but the name of the case is Ezell v City of Chicago,
13 which involved a standing issue in connection with the
14 Second Amendment. That's why I thought it would be helpful
15 to bring it up in addition to what we have in our briefs.

16 In that case, the Court described it as a
17 pre-enforcement challenge, which is what we have here
18 because they haven't enforced the new policy, so it's a
19 pre-enforcement challenge. In the Ezell case, the Court
20 said, "There is no need for the plaintiffs to violate the
21 policies in order to challenge them."

22 In that case, it involved a statute, and the
23 Court said, "The very existence of a statute implies a
24 threat to prosecute, so pre-enforcement challenges are
25 proper because of probability of future injury counts as

1 an injury for purposes of standing. And when a matter
2 involves threatened action by the government, the law does
3 not require a plaintiff to expose himself to liability
4 before bringing suit to challenge the basis for the threat."

5 So I think one of the arguments by the
6 defendants is at least threefold:

7 That as far as standing goes, we haven't been
8 evicted so why can we challenge it.

9 The second is that we haven't been injured yet,
10 so why should we have standing if we haven't been injured.

11 There are a couple other arguments. One is that
12 you need a permit in order to carry a gun in the common area.
13 I think in the Ezell case, the argument that the Court --
14 well, it is not an argument, but the decision and the
15 reasoning of the Court was that you do not have to actually
16 do everything that is necessary to violate a statute or a
17 restriction in order to have standing to challenge them.
18 That is the argument that we are making here.

19 There is also something that I am sure your
20 Honor has heard called the Doctrine of Futility. Here,
21 even if the plaintiffs had a permit to carry a firearm in a
22 common area, it would be a futile act because they would be
23 risking eviction. Because they're in, by definition, low
24 income housing, if they're evicted, the likelihood is they
25 will be homeless, so it's a very big risk to take, to go

1 through the process of getting a permit and then violating
2 this policy and being evicted in order to have standing. So
3 as I understand the case law that is summarized not only in
4 Ezell but in the case we cite in our brief, it's not necessary
5 to have actually violated a challenged restriction in order
6 to have standing.

7 THE COURT: But is it necessary to actually
8 subjectively be opposed to the policy? If so, is the
9 record before me satisfactory to show that your clients are
10 actually opposed to this policy?

11 MR. PILEGGI: Your Honor, I think that the best
12 answer to that question is that the clients have authorized
13 us to challenge the policy. During the deposition of both
14 of the parties, there was some, for lack of a better word,
15 ambiguity about their position on this policy, but I think
16 a fair reading and the specific passages of the deposition
17 that we quoted was that the defendants wanted the right,
18 wanted the ability to exercise the right to carry a gun in
19 the common areas.

20 I understand that the deposition isn't a model
21 of clarity, but the plaintiffs in this case did not have the
22 benefit of a lot of formal education. It was not difficult
23 to, for lack of a better word, confuse them about what their
24 position was on the policy, but I don't think it should
25 prohibit their rights to challenge the constitutionality of

1 a policy because they aren't the most articulate and they
2 weren't able to express their position on the constitutionality
3 of a policy in the deposition by a very skillful lawyer.

4 THE COURT: What about Ms. Doe's affidavit or
5 subsequent affidavit that is being challenged as a sham?

6 MR. PILEGGI: That is a good point, your Honor.
7 Let me address it in three major ways.

8 My understanding of the concept of a sham
9 affidavit in the context of a motion for summary judgment
10 is when it is presented by someone who wants to prevent the
11 summary judgment from being decided. We filed the motion
12 for summary judgment. We would like the Court to decide the
13 motions for summary judgment. We didn't present the affidavit
14 for purposes of avoiding summary judgment. We didn't present
15 the affidavit for purposes of creating a fact. We don't think
16 that the affidavit prevents the entering of a summary judgment
17 motion.

18 If there is an issue about whether she owns a
19 gun, there is case law that says only one plaintiff needs to
20 have standing. There are two plaintiffs here. There is no
21 question that Mr. Boone owns a gun. One way to deal with
22 that, your Honor, since there is no question that Mr. Boone
23 owns a gun, we only need one of the plaintiffs to have
24 standing in terms of a gun in our view.

25 The bottom line is it doesn't fall into the

1 category of a sham affidavit because it's not preventing the
2 Court from proceeding with ruling on the summary judgment
3 motions.

4 If your Honor wants me to address the issue
5 between the difference in the affidavit and the deposition,
6 I'd be happy to do that.

7 THE COURT: Yes, why don't you do that. And
8 also clarify, I think it's clear, but your challenge is just
9 to paragraphs 3 and 4 now of the new policy I'm talking
10 about. You challenged the entirety of the old policy, but
11 in the new policy it's just paragraphs 3 and 4.

12 MR. PILEGGI: That's correct, your Honor.
13 Paragraph 3 prohibits using a gun, prohibits carrying a gun
14 in the common area unless you happen to be walking through.
15 Paragraph 4 allows a WHA employee to require from a resident
16 proof of the right to carry a gun.

17 THE COURT: And you claim that both of them are
18 unconstitutional under the Second Amendment and the Delaware
19 Constitution?

20 MR. PILEGGI: Yes, your Honor. Paragraph number
21 4 is a little trickier, but the short answer is yes because
22 it restricts the right under the Second Amendment and the
23 Delaware Constitution.

24 THE COURT: Then do address --

25 MR. PILEGGI: The deposition?

1 THE COURT: -- the affidavit of the deposition.

2 MR. PILEGGI: Your Honor, first of all, let me
3 address it in categories. First of all, we were correcting
4 a factual inaccuracy in the deposition. The reason why it
5 wasn't corrected during the deposition is because, quite
6 frankly, the deponent was afraid if she admitted she had a
7 gun, she would be subject to eviction.

8 Now, I realize that at the time shortly before
9 the deposition was taken, they had changed the policy, but
10 this is someone who, if she were evicted, would be homeless.
11 In the past, they had told her if she owned a gun, she would
12 be evicted.

13 In the past, they had also -- I'm try to use my
14 words carefully. They had also given her a hard time for
15 expressing her displeasure with their policy about guns. The
16 third or fourth person in command at the WHA came to her door
17 and basically interrogated her as you would for a person
18 charged with some crime. They made out a written statement
19 and asked her to sign it. And they had additionally charged
20 her -- started to charge her for costs that they had never
21 previously charged her for.

22 So this person, Jane Doe, was very concerned
23 based on prior behavior about whether she would be evicted
24 for admitting that she owned a gun.

25 This is a person who, in the 1960s, actually was

1 marching with Martin Luther King when she was jailed for
2 expressing her rights. So she has, in my view, a valid
3 concern about whether or not, by saying that she had a gun,
4 she was going to be treated fairly.

5 Now, there is no excuse for her not saying on
6 the record that she had a gun, but I'm convinced that it
7 couldn't have been corrected there because I actually had to
8 do a lot of work to convince her that she had to correct the
9 record. I don't think it could have been corrected during
10 the deposition.

11 THE COURT: As I understood the affidavit, she is
12 saying that she currently owns a gun, but it is not, at least
13 at the time of the affidavit, in her unit here in Delaware.
14 It is with a relative in another state. Is that correct?

15 MR. PILEGGI: That is correct.

16 THE COURT: And that was the state of affairs as
17 of the time of her deposition as well.

18 MR. PILEGGI: Correct.

19 THE COURT: But yet you're acknowledging that
20 her testimony and her deposition was untruthful to the extent
21 she denied owning a gun, but to the extent she testified she
22 did not have a gun in her unit at WHA, that was truthful
23 testimony.

24 MR. PILEGGI: Correct.

25 THE COURT: Okay.

1 MR. PILEGGI: So we're not condoning the fact
2 that she was not accurate. I am just trying to explain why
3 she said what she said and why it took a lot of work on my
4 part to require her to correct the record.

5 THE COURT: The alleged retaliation with
6 respect to the new fees that she had been billed for, did
7 that all happen after the deposition or does that predate
8 the deposition?

9 MR. PILEGGI: That predates the deposition, but
10 it all occurred after she became vocal about, complaining
11 about the policy under the original policy.

12 THE COURT: But I think she testified at the
13 deposition that she had not been retaliated against in any
14 way.

15 MR. PILEGGI: Well, your Honor, I know the
16 deposition is not a model of clarity, but whether she used
17 the word "retaliate" or not, the deposition makes clear that
18 they came to her apartment, and after she expressed her
19 objections about the original policy, they made her come
20 down to the office, and they asked her a lot of questions,
21 and actually someone at the WHA wrote out a statement and
22 asked her to sign it. She is not very well educated, so
23 whether or not she understood everything she was signing, I
24 don't know. They also started to charge her for things --
25 and this is someone on a very limited income -- charge her

1 for things that they had not previously charged her for
2 before she started complaining.

3 Now, is that just a coincidence? I don't know.
4 She had been living there for several years and they weren't
5 charging her for storage. Now, all of a sudden, they start
6 charging her for storage.

7 Now, is that retaliation? For someone who is
8 running the risk of being homeless if she is evicted, that
9 is not something that gives you a lot of confidence that
10 the landlord is going to be treating you fairly. So it is
11 somewhat subtle, it is not as overt as threatening her but
12 it is behavior that is not typical and just happened to
13 occur after she started expressing herself.

14 THE COURT: If I find Doe does not have standing
15 and only Boone does, does that limit the scope of your
16 challenge to the one facility and not the other?

17 MR. PILEGGI: Well, your Honor, if you find
18 that Boone has standing for the reasons we explained in our
19 brief, I think that the Court can still rule. He still has
20 standing for the Court to rule that the policies weren't
21 constitutional. So even if, for whatever reason, Jane Doe
22 does not have standing, it is our position it is sufficient
23 for the Court to find that Boone has standing. So whatever
24 the issue is about the affidavit compared to the deposition,
25 I don't think it is a fatal flaw in terms of standing for

1 the whole case.

2 THE COURT: Why don't you move on to the
3 constitutionality of the new policy.

4 MR. PILEGGI: With the new policy, your Honor,
5 again, we're focusing on the two parts of the new policy
6 that prohibit the carrying of firearms in a common area.
7 The way the new policy is written is somewhat contradictory
8 or inconsistent.

9 In their depositions, the defendants acknowledged
10 that under the new policy, one cannot sit or stand or lounge
11 in a common area. Let's use the example of a TV room. They
12 cannot sit or stand in the TV room while in possession of a
13 firearm. They can only be in possession of a firearm if
14 they're walking through a common room to or from their
15 apartment.

16 To the extent that it prohibits someone from
17 carrying a firearm in a common area, that is a violation of
18 the Second Amendment and Section 20, Article 1 of the
19 Delaware State Constitution.

20 To explain that, I'll focus on first the U.S.
21 Supreme Court decisions in Heller. Heller did not limit the
22 core right to possess firearms for self-defense to the home.
23 It said that right is most notably for self-defense in the
24 home but did not limit it to the home. The Heller court
25 recognize the right to bear arms for purposes other than

1 self-defense in the home and for other lawful purposes even
2 if they might not have been as notable as self-defense in
3 the home.

4 It's clear that the WHA conditioned the provision
5 of public housing on the surrender of a constitutional right.

6 Your Honor, in connection with whether or not
7 the new policy is constitutional, the question arises what
8 standard of scrutiny applies, whether it's strict scrutiny
9 or intermediate scrutiny. In the Heller decision, the Court
10 said that because there was a complete prohibition in the
11 statute that that case was challenging that under no
12 standard of review could the statute be upheld.

13 So to the extent that the common area provision
14 prohibits the possession of firearms while sitting or
15 standing in the common area, the argument can be made that
16 under no standard of review is that policy constitutional.

17 If the Court decides to use a strict scrutiny
18 standard which would apply if the lease provision for the
19 common area policy is severely limiting the possession
20 of firearms, then the Court has to find that there is a
21 compelling state interest and that the provision is narrowly
22 tailored.

23 We will concede that there is a compelling state
24 interest in safety. That is the stated goal. But there are
25 other means to provide the same results without infringing

1 on Second Amendment rights.

2 We use the example of the San Francisco Housing
3 Authority case where they had a similar provision that
4 prohibited all firearms in all of their housing. They
5 changed the policy to simply require that the residents
6 comply with all applicable federal and state law, which is a
7 fairly extensive and comprehensive framework of state and
8 federal laws that applies to residents, and they left it there.

9 If the WHA followed that example and just
10 required their residents to comply with all applicable
11 federal and state law and regulations, then we wouldn't be
12 here today. The WHA went further and imposed additional
13 restrictions that are not imposed by federal and state law.
14 For that reason, our position is that it is not narrowly
15 tailored, so it does not satisfy the strict scrutiny test
16 because there are other means to provide the same results.

17 THE COURT: If they had stopped and just
18 followed federal, state and local law, what practical
19 difference would that make for a resident in the common area?
20 That is, do you concede you would still need a concealed
21 weapon license to carry your gun in the common area?

22 MR. PILEGGI: Yes, your Honor. So the
23 difference is that if they stopped as the San Francisco
24 Housing Authority did, and just required --

25 THE COURT: Basically, paragraph 1 of the new

1 policy.

2 MR. PILEGGI: Right. If they stopped there,
3 then we would not be here today, and a resident would have
4 to have a permit to sit or stand or lounge in the common areas.

5 THE COURT: So by conceding that, though, aren't
6 you conceding that the common area is not part of the home
7 or hearth of the individual residents?

8 MR. PILEGGI: Well, that is only not part of the
9 hearth, but because it is a residential building and the
10 homes for these people, I think one could argue it is not
11 just the confines of their apartment, it is the whole
12 residential building.

13 But I acknowledge and agree that once they
14 stepped outside of their apartment, I think in going to the
15 common area, I think at that point they would need a permit
16 as you would if you were in any other common area. But I
17 don't think the residential building conceptually should be
18 treated in the same way as if they were in Rodney Square or
19 out in a public place. I mean it is their residential
20 building. However, I acknowledge they would still need a
21 permit if they were in the common area.

22 THE COURT: The common areas in the two
23 buildings that the two plaintiffs live in are not identical;
24 correct?

25 MR. PILEGGI: Correct, your Honor.

1 THE COURT: Might it be that there is a
2 material factual dispute and the Court needs to get into
3 the nitty-gritty details of what actually happens in the
4 particular parts of the common area of each of these
5 buildings?

6 MR. PILEGGI: Well, your Honor, I think that
7 that's a possible approach, but I'm not aware of any -- even
8 though the depositions of the commissioners created some lack
9 of precision about exactly what the common area was, I don't
10 think there is a dispute about whether or not the restrictions
11 under paragraph 3 of the new policy are unconstitutional and
12 whether or not it would have been constitutional or preferable
13 that they just stopped at paragraph 1.

14 So the question in my view is not whether there
15 is a precise contour of what the common area is; in the
16 Southbridge area, it's different than what it is in the
17 Park View area; but the question is whether WHA should be
18 regulated more so than the existing framework of state and
19 federal laws. So whether there is a dispute about what
20 the common area is in the Park View as opposed to what the
21 common area is in the Southbridge apartments, the point is
22 they shouldn't be regulating at all the common areas to the
23 extent that it is more extensive than what already exists
24 under the federal and state framework of gun control.

25 THE COURT: Address the defendants' argument

1 that the common area is a sensitive place in which the
2 government has an extra ability to regulate.

3 MR. PILEGGI: Your Honor, I will refer to
4 certain cases that address that, but before I do, I will
5 just address the conceptual approach that we acknowledge
6 there are certain sensitive areas where the government is a
7 landlord, such as the courthouse, such as the post office,
8 which are public places which are appropriate for the
9 government to restrict things like Second Amendment rights.

10 But this is a situation where there is no case
11 law or regulation that I'm aware of that describes a
12 federal housing project or a building that is financed and
13 is considered a public housing building, treats that as a
14 sensitive area. I think someone's home or residential
15 building should not be treated in the same way as a school
16 or a courthouse or a post office where the public at large
17 is doing the government's business as opposed to a home
18 where someone lives.

19 To the contrary, I think there are statutes and
20 regulations which I'm happy to refer to that do describe
21 sensitive areas and do not include, in those definitions of
22 sensitive areas, housing, residences. For example, there
23 is a federal statute that talks about restricting certain
24 activities in school zones. There are other statutes that
25 refer to sensitive areas about post offices.

1 The U.S. Department of Housing and Urban
2 Development, by the way, does not have an official position
3 on the possession of firearms in public housing developments.

4 There are cases which specifically refer to
5 schools and post offices and courthouses as sensitive places,
6 unlike homes. So we acknowledge Your Honor, that there are
7 situations where governments are landlords and there are
8 sensitive places. I'm not aware of any authority that regards
9 a house or a residence that should be categorized in the same
10 way as a post office or a courthouse.

11 I don't know if your Honor has ever been to
12 Southbridge, but since we're talking about sensitive areas,
13 I will quickly refer to the way it is laid out. In essence,
14 it is similar to townhomes, facing each other, and there
15 is a plaza in between them. So if you didn't know it was
16 public housing, it looks like any other housing development.

17 Why that would be considered a sensitive area in
18 the same way a courthouse or a post office or a legislative
19 hall in Dover would be, I don't think there is a rational
20 explanation for why you would lump all of those places into
21 the same category.

22 THE COURT: If it was private housing, completely
23 owned and run by private entities, they could have whatever
24 gun restriction policies they wanted, couldn't they?

25 MR. PILEGGI: Your Honor, that's a good question.

1 We certainly wouldn't be able to file a Section 1983 action
2 against them because they wouldn't be a government actor, but
3 you raised a good point.

4 I don't know if that was your Honor's point, but
5 if I can mention quickly in response. My understanding is
6 there are certain houses where they just look like private
7 homes and the WHA provides rental assistance for them.

8 The other actual thing that I should emphasize,
9 your Honor, is one of the buildings involved in this case,
10 the Park View, isn't even owned by the government. It is
11 acknowledged in the pleadings that it is privately owned but
12 it is managed by the WHA. I think I should have responded
13 initially to your Honor's question of sensitive areas that it
14 doesn't even apply to the Park View because the government
15 is not even a landlord of the Park View, it is a manager.

16 Because it is a manager, there is plenty of
17 authority for the position they are still treated as a
18 government actor because they manage it and they are the ones
19 who determine what the policies are for the residents. But
20 to the extent there is an argument that the government, as
21 landlord, should be able to restrict certain rights because it
22 is a sensitive area, that shouldn't apply to the Park View.

23 THE COURT: If that is the case, then do not we
24 have to answer the question whether a private landlord has
25 the ability to, let's say, completely forbid firearms on

1 their private property?

2 MR. PILEGGI: Except, your Honor -- I am happy
3 to answer that question, but as a preface to the question,
4 I am not sure that is an issue in this case because the
5 private landlord is not the entity that is making the
6 decision to prevent firearms, it is the WHA, and, in its
7 sole discretion, is making the decision to restrict firearms.

8 So I am happy to address it if your Honor wants
9 me to, but in this particular situation, and the facts in
10 this case, the private landlord is not making the decision
11 to restrict firearms. It is the WHA as a manager of the
12 building that is making that decision.

13 THE COURT: Well, then if that is the case, it
14 seems to me I have to potentially decide, if it is a sensitive
15 area, if the government is the one making the decision and the
16 government is arguing it is a sensitive area.

17 MR. PILEGGI: Well, I would never want to suggest
18 what your Honor can and cannot decide, but my understanding of
19 the cases that talk about the government as a landlord talk
20 about the government as the landlord that owns the building.
21 Now, maybe it is a distinction without a difference, but it
22 is my understanding -- I haven't seen a case that talks
23 about categorizing a building as a sensitive area where the
24 government is simply the manager of a property as opposed to
25 the owner of the property.

1 Now, maybe that is too subtle a distinction, but
2 I don't think it is an issue that was raised. I am happy
3 to do supplemental briefing on it, but I do not think that
4 issue was raised in any of the briefs about whether or not
5 this should be treated as if a private landowner is
6 restricting.

7 THE COURT: Put aside all those distinctions
8 for the moment. Address the idea that, as in the First
9 Amendment context, where there can be situations where there
10 are reasonable time, place and manner restrictions exercised
11 with the First Amendment. Why should the same regime not
12 govern here with respect to reasonable time, place and
13 manner restrictions on Second Amendment rights?

14 MR. PILEGGI: Your Honor, the best answer I have
15 for that question goes to the nature of this right. This
16 is more than just a time, place or manner restriction in
17 terms of the common area. It is a complete prohibition in
18 terms of allowing a resident to either sit or stand or
19 lounge in a common area. So it is more than just a time,
20 place or manner restriction. In our view, it should be
21 treated as a complete prohibition in terms of exercising the
22 rights in that common area. So it is not, in our view, just
23 regulating. It is more than just regulating the time,
24 manner and place.

25 Your Honor, I was going address the Delaware

1 State Constitution and preemption arguments.

2 THE COURT: That's fine.

3 MR. PILEGGI: Article 1, Section 20 of the
4 Delaware Constitution provides that a person has the right
5 to keep and bear arms for the defense of self, family, home
6 and state and for hunting and recreational use.

7 Notably, after this case was filed but before
8 the U.S. Supreme Court decision in McDonald, defendant
9 Purnell actually stated in an e-mail to all the Delaware
10 Housing Authority commissioners that the existing gun
11 policies would have to be changed to comply with Delaware
12 state law. This was even before the McDonald case.

13 I know that in their papers, they argue that
14 once the U.S. Supreme Court decision in McDonald was handed
15 down, they changed their policy. But our position all
16 along in this case has been that before McDonald was even
17 decided, there was a separate and independent state law
18 basis to invalidate their original policies. There is still
19 a separate and independent state constitutional basis and
20 state statutory basis to defeat their new policies. They
21 acknowledge that in an e-mail that was circulated, and we
22 attached to our papers, before the McDonald decision was
23 even handed down.

24 I don't know if it's an irony or not, but if you
25 look at the wording of Article 1, Section 20 of the Delaware

1 Constitution, the wording is actually much broader than the
2 Second Amendment because it talks about the right to defend
3 not just oneself but one's family and the state and for
4 hunting and recreational use. Unless your house is very
5 big, you are probably not going to be hunting inside your
6 house. So the language, just on its face, is very much
7 broader than the Second Amendment.

8 THE COURT: Although the Second Amendment
9 does not expressly limit itself to self-defense, so in that
10 regard, maybe it is narrower.

11 MR. PILEGGI: That is possible. I mean that is
12 a good point. I wouldn't disagree with you, your Honor.

13 But the point I was going to make was that so far
14 at least, the U.S. Supreme Court has interpreted the Second
15 Amendment more broadly than the Delaware courts have inter-
16 preted the analog in Section 20. So if you are just looking
17 at the wording on the face of the Delaware Constitution, it
18 seems to be broader than the wording of the Second Amendment.

19 Then when you look at the case law, the U.S.
20 Supreme Court has interpreted the Second Amendment in a way
21 that seems broader than the actual words of the amendment.
22 The Delaware Constitution so far has not been interpreted
23 as broadly, although two months ago, the Superior Court in
24 State v Griffin has said, "Delaware courts have recognized
25 that Article 1, Section 20's protections are more explicit

1 and extensive than many other state counterparts."

2 I'm not trying to confuse things even more, but
3 Delaware is one of those states that actually allows for open
4 carry, which is probably another issue that the Court does not
5 want to get into today, but there are also restrictions on how
6 you can openly carry a firearm.

7 So the point I wanted to make was even though the
8 state case law in Delaware has not developed the interpretation
9 of Section 20 as robustly as the U.S. Supreme Court has
10 interpreted the Second Amendment, there is a separate and
11 independent basis for us to challenge the constitutionality.

12 THE COURT: You do agree, though, that the
13 Second Amendment decisions are at least instructive in
14 understanding the scope of the Delaware constitutional
15 provision?

16 MR. PILEGGI: Yes, absolutely. I'm sure your
17 Honor knows this better than I do. The U.S. Supreme Court's
18 interpretation of the Second Amendment right sort of
19 establishes a minimum. So the state constitution, of course,
20 can grant more rights, but I do not think it is permissible
21 for the state to detract from or to provide fewer rights than
22 the Second Amendment.

23 THE COURT: That open carry, which if I don't
24 have to I won't get into, but I just want to make sure.
25 That you had said earlier I believe that you concede that

1 some sort of permit is necessary to carry the firearm in
2 the common areas of the WHA properties. What you have just
3 mentioned about Delaware being open carry law, that is the
4 not inconsistent with what you conceded earlier, is it?

5 MR. PILEGGI: I don't think it is inconsistent,
6 although I recognize there is a tension there because under
7 Delaware law, you need a permit to carry a concealed deadly
8 weapon. There is also another part of Delaware law that
9 says that you do not need -- that you can openly carry a
10 gun, but there are restrictions on when and how and where
11 you can openly carry.

12 So I am not here to try to create issues. I am
13 just acknowledging that looking at both of those provisions
14 and the law, there seems to be a tension. But I do not
15 request the Court to resolve that tension, and I am not
16 trying to create additional issues for the Court.

17 I just want to mention in passing there is a
18 cite in one of our footnotes in the briefs. I just thought
19 it was helpful to acknowledge that there is that other
20 provision in the Delaware statute.

21 THE COURT: Why don't you go on to preemption
22 then.

23 MR. PILEGGI: Your Honor, the Delaware General
24 Assembly has developed a very comprehensive regulatory
25 scheme regarding gun control. In fact, just this week with

1 the Delaware General Assembly -- well, just this week, the
2 governor signed gun legislation that the Delaware General
3 Assembly recently passed. That is just another example of
4 the almost annual effort of the Delaware General Assembly to
5 update and to continue to develop their comprehensive
6 regulatory scheme about gun regulation.

7 The Delaware General Assembly specifically
8 preempted municipal or county regulations regarding firearms.
9 Although they do not specifically mention the Wilmington
10 Housing Authority, there is no, in our view, reasonable
11 explanation for why the General Assembly would prohibit
12 counties and municipalities from entering the field and
13 regulating firearms but allow housing authorities to do so.

14 If the General Assembly preempts the field,
15 the intent is not to allow anyone other than the General
16 Assembly to regulate this area. It would not make much
17 sense if the General Assembly wanted to preempt the field
18 and prohibit anyone else from regulating an area except for
19 housing authorities. That is just inconsistent with the
20 whole concept of preempting a field.

21 There is case law in Delaware that treats the
22 Wilmington Housing Authority, in particular, as a state
23 agency. So based on that analogy, if the position of
24 Wilmington Housing Authority prevails, presumably not only
25 any housing authority but any state agency could decide

1 that they wanted to implement regulations and restrictions
2 regarding gun control that were supplemental to or different
3 than what the Delaware General Assembly decided is going to
4 be part of their whole comprehensive framework.

5 It does not have to be inconsistent in order to
6 be contrary to the preemption doctrine because they decided
7 they want to be the only players in this field. They do not
8 want anyone else on the field other than them. And so even
9 though the statute doesn't specifically exempt or preempt
10 the Housing Authority like it does counties and municipalities,
11 it certainly would be inconsistent to allow WHA to do so.

12 That sort of ties in to our argument that WHA has
13 exceeded its authority because it is a creature of statute.
14 It was created by state statute, and it would be inconsistent
15 to interpret one part of the state statute inconsistently
16 with another part of it. If one part of the state statute
17 says this field is preempted, it would be inconsistent
18 to interpret another part of the state statute that created
19 the WHA to be inconsistent with that.

20 If defendants are correct that there is no remedy
21 for the plaintiffs where authority has exceeded its statutory
22 power and infringed on plaintiffs' core constitutional rights,
23 what avenue would one have to vindicate rights that are
24 violated when a statutory creature exceeds its statutory
25 authority.

1 It is not quite the same as preemption but it is
2 related to the extent that the Wilmington Housing Authority
3 only has the authority to do what the statute that created
4 it allows it to do. The statute that created it does not
5 say anything about regulated firearms.

6 Your Honor, I would like to just quickly say
7 something about paragraph 4 of the policy that talks about
8 reasonable cause. We refer to it as the reasonable cause
9 provision that requires residents of WHA facilities to have
10 available for inspection upon request any weapons permit or
11 license when there is reasonable cause to believe that the
12 law or the new policy has been violated.

13 So what this policy has done is it has basically
14 given law enforcement authorities to private citizens like
15 WHA employees. I am not aware of any other situation where
16 a private citizen can require of another private citizen
17 proof of the right to exercise a certain privilege.

18 For example, would a private person be entitled
19 to ask for a driver's license as a condition to allow
20 someone to drive? I am not aware of a situation similar to
21 this where, in a private residence, another private citizen
22 can ask someone for proof of their right to exercise a
23 certain privilege.

24 THE COURT: But you do not believe a private
25 landlord could ask the tenant of a unit in a private

1 apartment building, you shall meet the burden for the gun
2 that you have here in your unit?

3 MR. PILEGGI: That is a good question. That is
4 one that wasn't briefed, and I am happy to do a supplemental
5 brief on it, but I certainly wouldn't be able to file a 1983
6 action against the landlord.

7 Whether or not a private landlord would be
8 allowed to force an individual to show proof of his right to
9 exercise that particular privilege, I am not aware of any
10 authority, but we have not briefed that issue. I would be
11 happy to address it in a supplemental filing, if you want.

12 Your Honor, I think the only issue we have not
13 discussed yet is the declaratory judgment issue. I will
14 just briefly refer to that as maybe being a distinction
15 without a difference.

16 Section 6501 clearly entitles -- "entitles" is
17 not the right word. It clearly provides the Court with the
18 power to declare rights and provides a cause of action where
19 there is an actual controversy between the parties.

20 Section 6501 says, "No action or proceeding
21 shall be open to objection on the ground that a declaratory
22 judgment or decree is prayed for."

23 So whether it is described as an alternative
24 form of relief or cause of action, I am not sure it is
25 productive to spend a lot of time on drawing the line

1 between those two statuses, those two categories. The
2 statute clearly allows us to ask for declaratory judgment.
3 Whether that is a cause of action or a form of relief, I am
4 not sure it is useful to spend a lot of time to -- unless
5 the Court wants me to -- to make that distinction.

6 THE COURT: No, that's fine.

7 MR. PILEGGI: Unless there is anything else,
8 your Honor, I think those are the highlights.

9 THE COURT: I will give you a chance on rebuttal.

10 MR. PILEGGI: Thank you very much.

11 THE COURT: Let's hear from Mr. Willoughby.

12 MR. WILLOUGHBY: Thank you, your Honor. Good
13 morning.

14 May it please the Court, as I have already
15 been introduced, I am Barry Willoughby. I represent the
16 defendants in this case, WHA and Frederick Purnell who is
17 joined in his official capacity only.

18 Your Honor, this is a case of first impression
19 in this court and really around the country.

20 The question presented is whether or not a
21 public housing authority is going to be in a situation where
22 it can impose reasonable time, place and manner restrictions
23 on weapons in public housing authorities in the context
24 where they are effectively the landlord.

25 The ramifications of this case go well beyond here

1 in Wilmington. They really are on a litigation nationwide
2 basis. I am not aware of any other case where we had this
3 issue come up.

4 From our perspective, the plaintiffs are taking a
5 very extreme position to say that the Housing Authority, in a
6 role of landlord, cannot impose some kind of a reasonable
7 time, place and manner restriction, as is common in other
8 constitutional rights, such as the First Amendment. It seems
9 to be a very, very extreme position to say we are limited only
10 to what the state law is in the state where the authority is.
11 It is really beyond the scope of reasonableness in our view.

12 We look at this case from a constitutional
13 standpoint on two different levels. The first is, your Honor
14 referred to earlier in the discussion, whether or not the
15 Housing Authority common areas are a sensitive place under
16 the doctrine announced in Heller.

17 Heller was a very limited decision, as the Court
18 is aware. It was a 5 to 4 decision, deeply divided court.
19 It made clear that at least the core right is the right to
20 have a gun in the home for purposes of self-defense, and
21 most cases have not gone much beyond that.

22 Given the fact it's a 5 to 4 decision, I think
23 there is serious doubt whether or not Heller will be expanded
24 beyond, though. Certainly, I would not argue it is something
25 like a right to go hunting. The Court has indicated that

1 certainly is something they would consider within a number
2 of rights under the Second Amendment; but in terms of a
3 situation like this, I do not think there is any authority
4 to go beyond self-defense in the home.

5 So the starting point for us is, is there an
6 impingement on the Second Amendment at all? Our answer is
7 no.

8 If you look at these common areas, these are
9 television rooms, there are day-care centers, there are
10 administrative offices. There are any number of different
11 kinds of facilities that are open to residents generally, in
12 some cases to the public, that are totally distinct from
13 the residents' right to have a weapon in their own personal
14 unit, which we treat as being in the home.

15 If you look at the cases that have been developing
16 after Heller around the country, I think they all support
17 the view that the Sensitive Area Doctrine would apply to the
18 Housing Authority. If you look at the George Mason University
19 case in the State of Virginia, the Virginia Supreme Court said
20 that; in very similar circumstances really, that the right
21 to regulate weapons in areas where students and others may
22 congregate; they were particularly vulnerable in those
23 situations, same thing in the classroom; that is a sensitive
24 area. Therefore, it is completely outside the scope of the
25 whole Second Amendment regime.

1 That is not unlike the First Amendment area where
2 we have got this distinction between protected and unprotected
3 speech. We have an area, for example, pornography is purely
4 unprotected by the First Amendment. We're trying to predict
5 where the Court will go, but if you look at that regime, I
6 think you would say that the Court has laid out an area that
7 this is just not a Second Amendment issue. That is our first
8 position.

9 If you look at some of the other cases, there
10 is a case where the Park Service, for example, prosecuted
11 someone for having a weapon on the premises. That decision
12 says plainly that is a sensitive area. People congregate
13 like they do in the common areas of the WHA. The need for
14 the Park Service in that case and for WHA in this circumstance
15 to regulate is paramount. It is an important governmental
16 interest.

17 I think if you look at those cases that are out
18 there, I think that consistently you are seeing that areas
19 like this are considered sensitive areas and really completely
20 outside the Second Amendment regime.

21 THE COURT: Is it undisputed that all of what we
22 referred to as the common area in both buildings that are at
23 issue here are areas where people congregate?

24 MR. WILLOUGHBY: Yes. There are hallways, for
25 example. I don't know if they would congregate, but you are

1 going from the entrance of the building to your unit. That
2 is a common area.

3 We have been very careful in our policy to say
4 that a resident could take their weapon from outside and
5 vice versa and, if necessary, they could use it if there was
6 a confrontation where that became appropriate. So whether
7 that would be a congregation area or not, it is certainly an
8 area open to residents generally, not just the particular
9 resident who has the weapon.

10 THE COURT: I am just trying to understand what
11 in your view is the defining characteristic of a sensitive
12 area. You seem to emphasize the congregating.

13 MR. WILLOUGHBY: Yes.

14 THE COURT: Is it that it is open to others?

15 MR. WILLOUGHBY: Yes, it is an area where
16 residents and their guests -- first of all, the residents
17 are elderly and disabled in many cases. They have guests
18 who are children and grandchildren. So, for example,
19 the television rooms, the community rooms where people
20 congregate, certainly, that would be a sensitive area that
21 would be outside the entire regime of the Second Amendment.

22 There are laundry rooms. There are day-care
23 facilities. There are administrative offices down the
24 street here where the WHA staff works. So there are any
25 number of different areas like that.

1 But I think if you look at the cases like the
2 Postal Service case and the National Parks case and the
3 George Mason University case where you are dealing with
4 the university, all of those would suggest that where the
5 entity, the government entity is doing business or the
6 patrons, so to speak, are congregating would be considered
7 sensitive areas who are completely outside of this whole
8 Second Amendment doctrine.

9 THE COURT: Has any court addressed or identified
10 something that is not a sensitive area?

11 MR. WILLOUGHBY: I don't think so, your Honor.
12 What I found in reading the cases is, quite frankly, the
13 courts tend to do an either/or analysis, in all the cases I
14 have read, except for the GMU case where they just stopped
15 and said it is a sensitive area and that is the end of the
16 analysis. The other cases have said we are not really sure.
17 We think it is a sensitive area, but even if it is not, it
18 passes the intermediate scrutiny. So there is not a lot of
19 authority on that except for the George Mason University
20 case where the Court just basically stops with the analysis
21 on the university being a sensitive area.

22 The Postal case, I have to go back and look at
23 it. I think they did the either/or analysis there. They
24 may have stopped with the sensitive area analysis there as
25 well.

1 THE COURT: On the idea of stopping in
2 Marzzarella, the Third Circuit opinion, it seems the Third
3 Circuit is cautioning expressly District Courts from finding
4 that the Second Amendment does not apply to certain areas.
5 Are not you inviting me to do something that the Third Circuit
6 has told me I should not do?

7 MR. WILLOUGHBY: I certainly would not do that,
8 your Honor. But I think it goes more to what I was saying
9 in doing an either/or analysis because the case law is
10 developing. I'm not sure if the GMU case came after the
11 Marzzarella case or not, but certainly the courts have been
12 cautious in saying we think it is a sensitive area, but even
13 if it is not, it passes intermediate scrutiny. I would
14 agree that is the approach most courts have taken.

15 Before I forget, I want to clear one point that
16 was raised on the Southbridge area. Mr. Pileggi is correct,
17 it is like a townhome setup. That courtyard he is referring,
18 though, is not owned by the WHA. That is City of Wilmington
19 property. It is in the deposition of Ms. Spellman and others.
20 We do not contend that is a common area. We do not enforce
21 the policy there. So we want to make that very clear.

22 THE COURT: I take it from the fact that you are
23 also moving for summary judgment, you don't think that the
24 Court needs to or has before it material factual disputes
25 over what is a common area, what isn't, and what the

1 differences among the various common areas are?

2 MR. WILLOUGHBY: I do not believe so, your
3 Honor. I think the record is fully developed. I am not
4 sure the testimony would add anything to what the Court has,
5 so we are not contending there is a factual dispute there.

6 To move on to the Marzzarella issue and the
7 intermediate scrutiny standard. The courts that have looked
8 at the issue have really adopted, Marzzarella in particular
9 has adopted what I referred to earlier, the First Amendment
10 case law as being a model to apply to the Second Amendment.
11 It's a natural analogy. Marzzarella specifically adopts it.

12 Basically, it says that there are all kind of
13 levels of scrutiny in the First Amendment. The content ban,
14 for example, is going to be given a strict scrutiny, but
15 other kinds of restrictions, like reasonable time, place and
16 manner, are generally set forth as intermediate standards
17 for any type of means and tests.

18 That is the regimen we think would be applied
19 here if the Court did not find the authority to be a
20 sensitive area or the Court made an alternative finding.
21 That simply requires there be a reasonable connection
22 between the goals of the policy and the ends of the policy.
23 Certainly, there are reasonable goals of safety here. If
24 you look at the other decisions I referred to, you know, the
25 University case, the Postal Service case, the National Park

1 case, all of those recognize that safety is a valid concern.
2 So that was the goal.

3 We were very, very cautious and very careful
4 about trying to protect what we thought was the core right
5 of the Second Amendment, and that is the right to have the
6 weapon in the home. So we wrote the policy in a very
7 informed way. That is, to protect the resident's formal
8 right to have a weapon in their home for self-defense, but
9 to ensure safety for everyone else, including elderly
10 residents, disabled, children, and others who may be
11 visiting there.

12 The restriction under Marzzarella and other
13 cases does not have to be the least restricted measure here.
14 It only has to bear a reasonable relation in the end. I
15 think certainly here, we have adopted a very middle of the
16 road type of policy. We have been very careful to try to
17 preserve Second Amendment rights where they apply but also
18 to protect our residents and others from potential
19 accidental injury or personal violence.

20 One of the things that struck me -- and it goes
21 kind of with the standing issue -- is that both plaintiffs
22 basically agree with all provisions of the policy. Mr. Boone,
23 outright in his deposition, down the line. I asked him very
24 carefully each provision of the policy, and in each case, he
25 agreed it was appropriate.

1 Ms. Doe, who has since submitted an affidavit we
2 consider to be a sham, the only issue she had was whether
3 she could carry a concealed deadly weapon in a common area.
4 She agreed -- and it is clear in the testimony because I
5 asked her several times -- that the display of a weapon in
6 the community room would cause alarm to other people, and
7 she would not want to see that. So the only right that she
8 claims, if any, is that she should be allowed to carry a
9 concealed deadly weapon in the community room.

10 The problem with that is that she had never
11 applied for a license. She does not have such a license,
12 and just saying, I'm entitled to, that I could get a
13 license, does not suffice. That is like me saying, if I get
14 stopped by a police officer on the highway and I don't have
15 a license: Well, I could have one if I wanted it. Well,
16 that does not apply. I think that she really does not have
17 standing to challenge that issue.

18 Really, when that is put aside, both plaintiffs,
19 everything that the Housing Authority has done, I think it
20 is important for two reasons: One, standing certainly.
21 Secondly, it shows the reasonableness of our policy. Here
22 are two individuals that they, quite frankly, went out and
23 sort of found to be the plaintiffs, and neither of them,
24 when they are actually seeing the policy, has any serious
25 problems with what we are doing.

1 So I think it is very important. I think it
2 ties both to standing and to the issue of the means/end test
3 that shows that public safety alarm, that sort of thing.

4 THE COURT: They are both subject to eviction,
5 though, if they don't comply. Why does not that create
6 enough of a dispute?

7 MR. WILLOUGHBY: If they do not comply with the
8 policy?

9 THE COURT: With the policy.

10 MR. WILLOUGHBY: Sure. Anyone would be. I do
11 not contend that they would have to actually test the policy
12 by brazening violating it in order to have standing. That
13 is not what we are arguing. We are saying if you look at
14 those two individuals, neither opposes the policy.

15 THE COURT: Well, this may be splitting the
16 metaphysical hairs. I don't know. They sued you. They
17 persisted in the lawsuit even after you took their
18 deposition. You have the declaration now from Ms. Doe.

19 I am not sure, in order to have standing, you
20 have to in your mind subjectively be opposed to something.
21 Your actions may speak louder than the your inner, deepest
22 thoughts.

23 How do I find that there is no injury to them
24 just because they told you, hey, it is a reasonable policy.
25 I might not be opposed to it, but I am suing you over it

1 anyway.

2 MR. WILLOUGHBY: Well, neither of them has
3 requested, for example, the right to have a concealed deadly
4 weapon in Ms. Doe's case, or another weapon, unconcealed, in
5 Mr. Boone's case. So they have not ever raised the issue
6 with us at any time as being something that is material to
7 them.

8 I do not want to get into an approach where I
9 am sounding like I am attacking the plaintiffs and their
10 supporters, but I think when you look at deposition
11 testimony, the Court cannot leave its common sense behind.
12 It shows that the NRA was out there recruiting these people.
13 I do not think they were very well informed about what they
14 were signing up for. When we took their depositions and
15 they were confronted with the policy, with the exception of
16 Ms. Doe having a complaint about the concealed deadly weapon
17 piece, they agreed with the policy.

18 So I think that that certainly goes to standing.
19 I do not know that that it would deprive the Court in a
20 constitutional sense. The Court has discretion whether or
21 not these are the right plaintiffs, but it certainly seems
22 to me someone who does not, in fact, oppose the policy
23 should not be the person challenging it in court.

24 So I think I put it out there; and I think it
25 is not just standing, though. I think where I started with

1 before I got a little sidetracked, it really goes to the
2 point that this is a narrowly tailored, reasonable policy.
3 Plaintiffs themselves have indicate in their depositions
4 they agreed with the purpose of safety behind it.

5 THE COURT: You do some employment law.

6 MR. WILLOUGHBY: Yes.

7 THE COURT: In the employment context, if you
8 depose the plaintiff, and the plaintiff says I did not
9 disagree with my firing but I am not going to drop the
10 lawsuit, I can see how that comes in on the merits, but
11 would your argument be the plaintiff does not have standing
12 because he or she thinks they were fired legitimately?

13 MR. WILLOUGHBY: I would think so. I would not
14 think there would be any material fact in dispute about
15 whether the firing was, in fact, illegal. There have to be
16 grounds on which they are challenging the suit. If they
17 concede that the stated grounds were not a pretext and they
18 were appropriately fired, I do not know how that gets beyond
19 summary judgment.

20 THE COURT: It may not get beyond summary
21 judgment on the merits, but I am not sure that the plaintiff
22 lacks standing.

23 MR. WILLOUGHBY: Understood. I do not know what
24 the answer is. I sort of digress with that because I wanted
25 to cover the standing point. I think it is a serious issue,

1 and I think there are reasons to doubt whether these two
2 plaintiffs are really subjectively challenging this because
3 of the way they were frankly recruited to be plaintiffs in
4 the case.

5 So I think from that perspective, certainly,
6 that is another issue for the Court to consider, but really
7 the point that I wanted to make was that there is no need
8 for any kind of statistical analysis of violence, that has
9 been argued by the plaintiffs.

10 I think that all the cases, going back to the
11 George Mason University case, the Park Service case, all
12 of those, the Postal Service case, they all say that the
13 entities' understanding and fear what could happen with
14 weapons on their property is a legitimate concern and does
15 not need to be backed up by any type of statistical study
16 to support. It is an obvious kind of concern, and the
17 plaintiffs themselves agreed with that. But I do not think
18 there is a whole lot of basis for them to say we have not
19 had a reasonable relationship or reasonable fit between what
20 the policy and goals are.

21 THE COURT: Well, there is obviously a factual
22 dispute between one side that says greater gun possession
23 and ownership will lead to reduced crime and reduced
24 violence, and the other side says the opposite, more gun
25 ownership will lead to greater crime and more violence. Is

1 that a material factual dispute that this Court needs to
2 resolve?

3 MR. WILLOUGHBY: My point is it is not material.
4 I think based on those cases, that is not a material point.
5 The test is, on the intermediate scrutiny, it has to be a
6 reasonable fit to the end goal. It has to be the least
7 restrictive alternative, for example. So, yes, there is a
8 factual dispute there. I do not think it makes any
9 difference.

10 Really, a lot of that factual dispute is really
11 information the NRA has developed to support their cause. I
12 am not sure it makes any difference in terms of the ultimate
13 policies that are being able to be adopted by various
14 entities around the country.

15 THE COURT: Let's talk about the very specifics
16 of the policy in paragraph 3 because you are facing the
17 argument that it is absurd and nonsensical. That basically
18 nothing is added by the phrase "self-defense." I want to
19 understand what is the position of the WHA. Does the
20 addition of the word "self-defense" do anything to broaden
21 the scope of the right to carry a weapon?

22 MR. WILLOUGHBY: That was added, your Honor,
23 because of the concern we wanted to make sure we could not
24 be challenged in having a resident say I have a right to
25 have a gun in my unit but you won't let me take it to or

1 from, or you won't let me take ammunition to or from my
2 unit.

3 What we are saying is if you are enroute from
4 the outside or another location, certainly, you have to have
5 the right to -- if you are going to have a right to have the
6 weapon in your unit, you have to have the right to transport it.

7 But I think Mr. Pileggi is correct, the testimony
8 shows that with respect to common areas, for example, the TV
9 room, you cannot go lounge around the room with your weapon.

10 That raises another important point that I think
11 he is wrong about. That is, he suggests that there has to
12 be a permit of some kind to have a weapon in that common
13 area. That is not Delaware law. Delaware has very limited
14 restrictions. That is only if you are concealing a weapon.
15 But if you want to take your gun out and carry with it with
16 you and slide it down the table in the community room, that
17 is lawful under Delaware law, and that is why we need to,
18 and have a right to, regulate, on the premises, weapons.

19 It certainly is true. You can walk down the
20 street at Rodney Square openly carrying a weapon.

21 THE COURT: And you do not need an open carry
22 permit?

23 MR. WILLOUGHBY: I do not think there is such a
24 thing. I think the only thing there is, is a concealed
25 deadly weapon permit. So I do think that is a real critical

1 difference. That was frankly one thing we were very concerned
2 about when we developed the policy the potential for alarm to
3 residents: the potential for accidental discharge, potential
4 for there to be a fight and somebody has a weapon available,
5 bystanders could be injured. So I think it is a very
6 important distinction.

7 That language perhaps could have been written
8 more clearly, but it was intended to make clear that we are
9 not trying to backdoor restrictions. Frankly, I think in
10 the Heller case, the District of Columbia was trying to do a
11 backdoor way to support its law by saying if you do have a
12 gun in your home, it has got to be disassembled or there has
13 to be a lock of some type on it. We want to be very clear
14 we are not doing that. We are not trying to find some
15 backdoor way to take away a person's right to have a weapon
16 in their home for self-defense purposes.

17 THE COURT: What are you doing, though, after
18 paragraph 3, after the comma in that last phrase, "or is
19 being used in self-defense." What, if anything, does that
20 add?

21 MR. WILLOUGHBY: That came out in the testimony
22 that if you are transporting the weapon to or from, going
23 inside or outside the building, that kind of thing, you have
24 your weapon on you because you have got to take it when you
25 leave. If you were to be assaulted during that time, we

1 would not contend you could not use your weapon at that point.

2 THE COURT: But other than that, that is all
3 that is added.

4 MR. WILLOUGHBY: That is what is intended. Yes,
5 your Honor. That's correct.

6 THE COURT: Okay.

7 MR. WILLOUGHBY: Now, with respect to paragraph
8 4, I think it is a reasonable provision, your Honor. It
9 does not give an unlimited right for a Housing Authority
10 representative to ask an individual for a permit, CCD,
11 concealed deadly weapon permit. It only comes up if, and
12 when, there is to be some kind of a situation where there
13 is a reasonable grounds for that request to be made.

14 I think it is important to point out that WHA,
15 like any landlord, is subject to the Delaware housing. You
16 do not just willy-nilly evict somebody, get the sheriff to
17 pick up the stuff and go. You have to go through the
18 process in the Justice of the Peace Court. There is a
19 hearing. Certainly, the reasonableness could be challenged
20 there as well as any other basis. There is due process.
21 There is an appeal to the Superior Court which may be de
22 novo. I would have to check, but I think it is de novo, but
23 certainly though there is more than adequate due process if
24 the concern is some type of arbitrary selecting people out.

25 The policy is very clear there has to be some

1 type of reasonable basis to believe, in fact, there has
2 been a violation of policy. I cannot, quite frankly,
3 understand why that is an issue but that is something that
4 they have raised.

5 I did want to address, if I could for a few
6 minutes, the mootness argument.

7 I think the original policies are moot. They were
8 adopted and in effect at a time when the Second Amendment did
9 not apply to the Housing Authority. Immediately, the Court
10 will recall that we had -- the case started in Chancery Court.
11 We moved it to Federal Court. We had a status conference, and
12 we basically stayed the case pending the decision of McDonald.

13 Immediately upon McDonald, we suspended the
14 policies both at the Housing Authority, at Park View. They
15 have never been enforced in the past. There never has
16 been an occasion in the past where there was a need for it
17 to be enforced, so there has not been an injury in factoring
18 in the circumstances in which it has been necessary to raise
19 the policy.

20 We represented on the record, I think your Honor
21 asked me at one of the earlier conferences, to put in our
22 answer so that there is not question about, that we are, in
23 fact, saying we are not enforcing the policy. We have a
24 judicial representation to that effect. I think we have
25 said that. I think we made very clear we have no intention

1 of reinstituting that policy.

2 As the Court pointed out, we have to go through
3 the HUD process. They are going to have plenty of time to
4 raise the issue if they really, for some reason, somebody
5 tried to change it at a future date.

6 So I think it is definitely a moot point with
7 respect to the original policies. I do not think there is
8 any case law to the contrary.

9 They cited in the reply brief the case from
10 Florida, the U.S. Supreme court, where the City of
11 Jacksonville adopted a new minority set-aside ordinance
12 while the one at the Supreme Court was being challenged.
13 The Court said in that circumstance, the voluntary cessation
14 of the practice did not make the case moot. But there, they
15 replaced one policy that was the Court ultimately found was
16 a violation of the Fourteenth Amendment. There was another
17 one that was a violation of the Fourteenth Amendment.

18 Here, again, if the Court finds that we have a
19 reasonable time, place and manner right, and that we have
20 appropriately adopted a new policy, it would be pretty
21 ironic decision to reach back and say the Court is now going
22 to have to rule hypothetically on a policy that has been
23 withdrawn and that the defendant says is not going to be
24 reinstituted. So here is a very important distinction, and
25 I do not see there is any basis to go forward with claims on

1 the original policy.

2 Now, if the Court found against us on the new
3 policy, would that be an issue for the Court to consider on
4 remedy? I would say it probably would be, but unless there
5 is a new violation under the new policy, it is certainly a
6 moot point and should not be gone into as a hypothetical
7 type of issue.

8 THE COURT: Has your client conceded that the
9 old policy is unconstitutional?

10 MR. WILLOUGHBY: My client is relying on me,
11 your Honor. Here my view on that. I think under the
12 current law, post-McDonald law -- this is my opinion -- it
13 probably would be a violation of the Second Amendment to say
14 no weapons in your unit for a self-defense. I think it
15 would be a strained argument to say a that a public housing
16 resident who is treating his apartment as his home would not
17 have that Second Amendment right. That is really part of
18 where we came from when we developed this policy.

19 The fact is, however, that the Second Amendment
20 did not apply to the states. In fact, I know the Supreme
21 Court went a different way in its analysis when three prior
22 Supreme Court cases affirmatively ruled that the Second
23 Amendment did not apply to the Housing Authority.

24 So I don't know how you could reach back and say
25 that at a prior time, that would have been a violation of

1 the constitution. I would say, as I said before, if we try
2 to adopt that policy now, my personal opinion would be that
3 it would be a violation of the Second Amendment to say you
4 cannot have a weapon in your home for self-defense.

5 THE COURT: Is not Mr. Pileggi right that you
6 may not the lawyer a year from now, the board at WHA may
7 turn over. The issues are fully briefed. Clearly, it is in
8 front of me. Why should not the Court just go ahead and
9 declare that the old policy is, and was, unconstitutional?

10 MR. WILLOUGHBY: Well, first of all, then the
11 Court has to decide whether or not it was unconstitutional
12 at a time when the constitution did not apply to the entity
13 and decide those kind of issues unnecessarily. We have
14 briefed that, but why should the Court go back and look at
15 those kind of issues, particularly when there has never been
16 any enforcement of the policy.

17 Even back before the history of the Housing
18 Authority, they never evicted somebody for a violation of the
19 old policy. They never threatened anybody. The plaintiffs
20 came forward and asked for a weapon, and they made very clear,
21 going forward, they are not going to enforce it.

22 So the Court has got some knotty issues to deal
23 with if it wants to reach back and look at the original
24 policy at a time when the Second Amendment did not apply to
25 the Housing Authority.

1 It seems to me from a practical standpoint,
2 given the representations we made and given the practical
3 realities, this is not a circumstance where the Housing
4 Authority just kind of pulled the light switches and said we
5 have a new policy. There was this whole process to go
6 through.

7 The plaintiffs had more than ample opportunity to
8 come back to court and say this is a violation of the law, if
9 that were to occur, which I think is purely speculative and
10 purely hypothetical because there is no indication that it is
11 ever going to be the case.

12 THE COURT: Is the mootness argument the same
13 with respect to the Delaware Constitution, which, of course,
14 did not need to be incorporated.

15 MR. WILLOUGHBY: The only difference would be
16 then the Court would have to decide, is there a difference in
17 scope between the two, the Second Amendment and the Delaware
18 constitutional provision, and how that might apply in this
19 circumstance. The Court would be reaching into deciding
20 whether or not, under the Delaware Constitution, that right
21 would apply to a weapon anywhere on the premises. That,
22 again, seems to me to be a purely hypothetical situation given
23 the circumstance and given the representations that we have
24 made, but that is correct that with respect to that one issue,
25 the Court would not have to go back and decide effectively,

1 given the law was different before, would it somehow apply
2 retroactively.

3 Your Honor, with respect to the other issues on
4 the state court level, we do view the Delaware constitution as
5 being the same as the federal Second Amendment right. There
6 is not any material difference in the language.

7 The state constitution refers to recreational
8 hunting uses. I am sure hoping the plaintiffs are not saying
9 they want to have weapons within the Housing Authority for
10 recreational and hunting purposes. I don't think that makes
11 any sense. But if you look at the Second Amendment, for
12 example, the Heller decision and certainly others, there is
13 certainly an implication that something like hunting would be
14 implicitly included in the Second Amendment.

15 So we see them as being the same scope. There
16 is no prior authority in Delaware, obviously. There is the
17 Virginia Supreme Court case and the GMU case where the Court
18 confronted that issue where the Court said, okay, if you are
19 looking at the original 13 states, it dealt with kind of a
20 pre-existing right. The right to bear arms was something
21 that was being preserved by the Second Amendment, and this
22 is really coextensive, at least the Court found with respect
23 to the Virginia statute, and I would urge the Court to say
24 that is the same thing here in Delaware.

25 With respect to preemption, your Honor, I am

1 frankly a little bit of a loss to follow the argument. The
2 statute they are relying on refers explicitly to counties
3 and municipalities. This is a state agency. It is not
4 passing a law. It is adopting a policy, its premises.

5 Certainly, the Delaware General Assembly knows
6 how to enact a law, if it wants to, that says that public
7 housing authority cannot regulate anything with respect to
8 weapons. So I do not see that as being a real legitimate
9 argument. I think it is pretty of a stretch. There is
10 nothing explicitly or implicitly about that statute that
11 would lead one to conclude the General Assembly to take
12 away the right of the landlord effectively to regulate the
13 property in a reasonable way.

14 In fact, if you look at the arguments that are
15 being made on the other side, there is this reference to all
16 these statutes that are being referred to that regulate
17 guns, none of which affects that open carry issue we talked
18 about, but most of which are criminal statutes.

19 Certainly, that shows the General Assembly knows
20 how to enact laws that deal with guns. If they were going
21 to take away the rights regulating guns in their premises,
22 they know how to do it and they did not. So I do not think
23 it is a very compelling argument.

24 I am trying to think of the other issues, on
25 the state front, if there is anything I missed. The

1 declaratory judgment issue I think is, I think we are
2 probably in agreement. We just want to make it clear that
3 is not an independent cause of action. Certainly, if there
4 is another violation, the Court has the authority to enter a
5 judgment on a declaratory basis.

6 THE COURT: I got into some questions with
7 Mr. Pileggi about the rights of the private landlord,
8 whether the Constitution essentially would apply. It came
9 up also in the context of the challenged paragraph 4. Could
10 you address that?

11 MR. WILLOUGHBY: Well, first of all, the Second
12 Amendment is like any other constitutional right. It requires
13 state action or it does not apply. The First Amendment, any
14 other constitutional right, there must be state action. So a
15 private landlord is free to do whatever it chooses on its
16 property. The Second Amendment simply does not apply.

17 Whether the state constitution would go into
18 that, I think that it would not. I do not think there is
19 any indication that provision would be applied as against a
20 private entity, but that issue has not really been raised.

21 We conceded that the Park View is managed by the
22 Housing Authority, and that constitutes state action. I
23 looked very hard at that issue when it came up, and I looked
24 at the state action cases, and we were convinced that
25 because, as the Court pointed out, the Housing Authority

1 was responsible for developing its policies, even though it
2 is managing on behalf of other investors, it is the one who
3 is determining the policies and has the right under the
4 agreements between the parties to do that. That we consider
5 that to be state action. We did not want to try to raise
6 that issue and suggest that was something that was beyond
7 the Court's reach for that reason.

8 I think, as the Court pointed out, there are
9 certain inconsistencies on the plaintiffs' behalf if they
10 try to say it is not state actions, it is purely private
11 conduct, because then at least the Second Amendment has a
12 new application and the Court has to decide does the
13 Delaware Constitution have any application.

14 On the issue with respect to paragraph 4, again,
15 it is a very limited provision. There has to be some
16 reasonable basis for the Housing Authority representative to
17 ask to look at the permit. There has to be some kind of an
18 actual reasonable basis the policy has been violated. It
19 sounded to me like if there was an accident on the Housing
20 Authority premises that they were investigating, they wanted
21 to see if their tenants, in fact, had driver licenses, if
22 they were to get into an accident.

23 If there were reaction taken on that, as I said,
24 again, the Housing Authority does not convict someone
25 without due process. The statute is very clear you go

1 through the state landlord/tenant code, and the judge would
2 have to independently view whether or not there was a
3 reasonable basis for the request to see the license or
4 permit.

5 THE COURT: Is it your belief that a private
6 landlord could require their private tenants to show a gun
7 permit or license?

8 MR. WILLOUGHBY: Yes, a private landlord could
9 say no weapons at all. Certainly, if they wanted to go to
10 the point that you can have a weapon if you had a permit,
11 certainly they would have that right. They are not restricted.

12 THE COURT: Is there anything else?

13 MR. WILLOUGHBY: Nothing else unless the Court
14 has any other questions.

15 THE COURT: No, you have answered them. I will
16 give you a chance to respond to anything new Mr. Pileggi
17 says, if you wish.

18 MR. WILLOUGHBY: Thank you, your Honor.

19 THE COURT: Mr. Pileggi.

20 MR. PILEGGI: Thank you very much, your Honor.
21 I will just try to briefly rebut some of the things
22 Mr. Willoughby said instead of adding anything new.

23 Mr. Willoughby referred to the Heller decision
24 as a 5- 4 decision. I do not think it is entitled to less
25 weight just because it is a close vote. It was also

1 affirmed by the McDonald decision.

2 If I may, I would like to quote from a specific
3 page of the McDonald decision. It is page 14 on the Lexis.
4 I would be happy to submit but because it is on the Lexis
5 version, it might not be easy to identify the specific page.

6 But the McDonald decision confirmed that the
7 central component of the Second Amendment right in Heller
8 was self-defense. It did not say the central component was
9 self-defense in the home.

10 I know Mr. Willoughby suggested Heller is
11 limited to self-defense in the home, but I think a careful
12 reading not only of Heller but the explanation of Heller,
13 McDonald, emphasizes that the self-defense right is not
14 limited to the home.

15 Again, in McDonald, the Court refers to citizens
16 being permitted to use handguns for the core lawful purpose
17 of self-defense, period. It doesn't say for the purpose of
18 self-defense in the home.

19 I'll give you the quote for that one. It says,
20 "We concluded in Heller that citizens must be permitted to
21 use handguns for the core lawful purpose of self-defense,
22 period." Quoting Heller at 128 Supreme Court 2783.

23 So I think a careful reading of Heller and
24 McDonald does not support the position that the Supreme
25 Court only recognized the right of self-defense for the

1 home.

2 Mr. Willoughby referred to the George Mason
3 University case, and a case involving the National Park. I
4 don't think Heller should be put into the same category as
5 National Parks or of public universities, and I didn't hear
6 my friend refer to any authority that categorized any public
7 housing authority or public housing buildings as sensitive
8 areas. I do not think there is any controlling authority
9 out there that would categorize them that way.

10 The Seventh Circuit last week in the Ezell case
11 made it clear that it was not necessary to violate a policy
12 to have standing and that the allegation of the constitutional
13 violation was sufficient.

14 The Court in Ezell also talked about the
15 intermediate test. In order to establish the intermediate
16 test, there has to be some empirical evidence that supports
17 the restriction. The only basis for the restriction in this
18 case that the defendants testified to was common sense. They
19 said it was common sense that this policy was appropriate; and
20 the Ezell case made it clear that isn't enough. You have to
21 actually have some empirical evidence.

22 I know that we referred to in our briefs specific
23 parts of the deposition that suggest that it is not entirely
24 clear that the defendants were enamored with the policy, but
25 I think the appropriate reliance should be on the legal

1 arguments for whether or not they are constitutional and not
2 whether or not the depositions of the plaintiffs had
3 particular problems with some aspect of the policy.

4 THE COURT: I know we have all least excerpts of
5 the depositions. Do we have the complete transcripts of Doe
6 and Boone?

7 MR. PILEGGI: I'm not sure if the complete
8 transcripts were filed, but I would be happy to submit the
9 complete transcripts.

10 THE COURT: We will talk about that when we are
11 done.

12 MR. PILEGGI: As far as the open carry law, your
13 Honor, that really wasn't addressed in the papers. We cited
14 to a footnote.

15 I am not going to disagree with Mr. Willoughby
16 if he thinks the Delaware state law allows someone to carry
17 a gun openly in the common area. I would invite him to test
18 that out to see if it works. But my suggestion is that if
19 you carried an open gun down the streets of Wilmington, it
20 might not be as simple as that. But I would be very happy
21 to submit supplemental briefing on that if the Court thinks
22 that is an issue about the tension between the open carry
23 rights and whether or not a permit is needed, but I do not
24 think that was briefed. I think it is an interesting issue,
25 though, and I am not here to present an argument on it, one

1 way or another.

2 I am going to try not to repeat things that have
3 already been discussed. I just want to quickly follow-up on
4 something Mr. Willoughby said, that the policies were never
5 enforced.

6 The law that we have cited indicates that it is
7 not necessary for an unconstitutional policy to be enforced
8 in order for it to be challenged. For example, if there
9 were a policy that prohibited the freedom of religion, I do
10 not think it would be necessary for them to enforce the
11 policy before someone could challenge it.

12 THE COURT: But it is undisputed on this record
13 that it was not enforced.

14 MR. PILEGGI: It was not enforced against our
15 clients. I do not know if -- I do not have any evidence,
16 and there is no evidence in the record, that anyone was ever
17 evicted because of a violation of the policy, but cases we
18 have cited say it does not need to be enforced in order to
19 challenge it.

20 We with cited the State Constitutional Law
21 Treatise by Justice Holland that suggests that the Delaware
22 state constitutional provision regarding bearing arms does
23 go beyond the Second Amendment. The decision by the
24 Superior Court a few months ago in State v Griffin describes
25 the state constitutional provision as much more specific and

1 broader than most other constitutional provisions.

2 In going over my notes, I want to make sure I do
3 not repeat things that I already discussed. I think that
4 covers it. Thank you very much.

5 THE COURT: Let me just ask you just as sort of
6 housekeeping. We still have pending on our docket several
7 motions that were filed by you last summer or maybe even
8 further back than that. There was a motion to expedite,
9 motion for preliminary injunction, a motion for partial
10 summary judgment. Are all of those moot at this point?

11 MR. PILEGGI: Your Honor, all of those are
12 moot. I think as you will recall, at various stages of the
13 process, various stages of the procedural history of this
14 case, the Court stayed the action. During the pendency of
15 the stay -- I don't know if that sounds right. During the
16 stay, different developments made those motions moot. So,
17 yes, your Honor, the current motion for summary judgment
18 encompasses those.

19 THE COURT: The two cross motions.

20 MR. PILEGGI: Yes.

21 THE COURT: Okay. Well, we will be denying
22 those motions as moot.

23 Is there anything else?

24 MR. PILEGGI: That is all, your Honor. Thank
25 you.

1 THE COURT: Mr. Willoughby, is there anything
2 you wish to add?

3 MR. WILLOUGHBY: Just briefly.

4 There is in the record an affidavit of
5 Mr. Purnell, Frederick Purnell, dealing with the issue of
6 the enforcement of the policy. He states in his affidavit
7 that during his tenure, which goes back to 2001, I believe,
8 he has never been forced to evict anyone. So I think there
9 is at least in the record, as far as back as 2001.

10 I did not address the scope of the Housing
11 Authority's role. My associate, Ms. Moak pointed out I had
12 skipped that. Again, looking at the statute, the Housing
13 Authority has a very broad authority to do anything it needs
14 to do to regulate its business. Certainly, there is no
15 suggestion in any of the Delaware Code that the Authority
16 could not pass reasonable rules and regulations in connection
17 with its lease provisions.

18 For example, under their approach, if you had a
19 provision that said you could not have a gas grill on your
20 balcony because we think it is unsafe, they would say that
21 is beyond your authority. Well, again, I think the statute
22 is very clear the Housing Authority has broad authority to
23 institute any of those kind of regulations. The question
24 is whether or not this regulation is constitutional. It is
25 not really whether they have the authority to adopt it.

1 So that is all I wanted to say on that unless
2 the Court had some questions.

3 I would add with respect to the depositions, I
4 think it would be a good idea for the Court to have the full
5 transcripts. I would suggest that these are videotaped
6 depositions, so I would suggest we also send the videotapes
7 to the Court because there have been allegations that the
8 witnesses were confused. I don't think they were. I think
9 the videotape will show that.

10 There is an allegation Ms. Doe is not well
11 educated. She has two years of college. I think she is an
12 articulate, strong person. I think that comes through in
13 the deposition. I think it would be good to have the actual
14 videos sent over to the Court.

15 That is all I have, your Honor.

16 THE COURT: Thank you.

17 Mr. Pileggi.

18 MR. PILEGGI: Your Honor, I just wanted to
19 remind the Court that Ms. Doe's deposition is under seal for
20 attorneys' eyes only, so I am not sure if we file with the
21 Court how we would keep it under attorneys' eyes only.

22 THE COURT: Well, that can be done with the
23 assistance of my staff.

24 MR. PILEGGI: I just wanted to clarify that.
25 Thank you.

1 THE COURT: Thank you.

2 Let me just say a few things in way of
3 housekeeping. I do want to have the submission of the
4 complete transcripts of the Boone and Doe depositions as
5 well as the videotapes. To make it easy, just submit them
6 together as a package and do it all as an under seal filing.
7 You can coordinate with my deputy if you have any questions
8 how to do that because I am not modifying the protective
9 order that is in place.

10 There have been a lot of offers of supplemental
11 briefing. I do not want much additional from you. You have
12 very thoroughly briefed all the issues, but I would like
13 your assistance in understanding there is a dispute as to
14 what the law is with respect to open carry and concealed
15 carry and whether any permitting or not is required, and
16 that would be under state and local and federal law,
17 whatever applied at the Wilmington Housing Authority.

18 Before we get to the policy, what is the status
19 in the common area as to whether you need any kind of permit
20 or not to carry a firearm, either concealed or openly, and
21 if either side thinks that that legal regime has any impact
22 on the legal issues the Court has to decide.

23 I'm directing you to meet and confer on that.
24 At least most of that, you ought to be able to agree on what
25 the law actually is right now. If either side needs to add

1 a little bit of argument to what the law is, I'm fine with
2 that, but what I would want you to do is work cooperatively,
3 get me a joint letter that sets all that out, and let's get
4 that in to me by next Friday.

5 Are there any questions about that, Mr. Pileggi?

6 MR. PILEGGI: None, your Honor. Thank you.

7 THE COURT: Mr. Willoughby?

8 MR. WILLOUGHBY: No, your Honor.

9 THE COURT: Other than that, I'm not looking for
10 any supplemental briefing. If I want anything else, I will
11 reach out to you and let you know. Okay?

12 Is there anything further we need to discuss,
13 Mr. Pileggi?

14 MR. PILEGGI: No, your Honor.

15 THE COURT: Mr. Willoughby?

16 MR. WILLOUGHBY: No, your Honor.

17 THE COURT: Thank you all very much.

18 (Hearing ends at 11:45 a.m.)

19

20 I hereby certify the foregoing is a true and accurate
21 transcript from my stenographic notes in the proceeding.

22

/s Brian P. Gaffigan
Official Court Reporter
U. S. District Court

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