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March 6, 2023

VIA CM/ECF

The Honorable Richard G. Andrews
United States District Court
For the District of Delaware
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, Delaware 19801

Re: *Del. State Sportsmen's Ass'n, Inc., et al. v. Del. Dep't of Safety and Homeland Sec., et al.; Gabriel Gray, et al. v. Kathy Jennings, et al., C.A. No. 22-cv-951-RGA (Consolidated)*

Dear Judge Andrews:

Pursuant to the Court's direction at the argument held on February 24, 2023, we write on behalf of all parties regarding presenting a certified question to the Delaware Supreme Court in connection with the above-referenced action. Specifically, the Court asked that the parties confer and propose a question that—if the Court were to certify a question to the Supreme Court—addresses the treatment of Delaware statutes 11 *Del. C.* §§ 1464-1467 (“HB 450”) and 11 *Del. C.* §§ 1441, 1468-1469A (“SS 1 for SB 6”) under the Delaware Constitution. The parties have conferred as Your Honor requested but have not reached an agreement regarding the formulation of a proposed certified question. Accordingly, each party presents their respective positions and proposed questions below for the Court's consideration.

Before responding to the Court's request, the parties wish to advise the Court that since the February 24, 2023 hearing, a question has arisen concerning the Court's authority to grant injunctive relief based upon the claim in the lawsuit filed by the DSSA Plaintiffs under Article I, Section 20 of the Delaware Constitution. The relevant authority includes *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (an instruction by a federal court to state officials on how to conform their conduct to state law “conflicts directly with the principles of federalism that underlie the Eleventh Amendment”), *Doe v. Pennsylvania Bd. of Prob. & Parole*, 513 F.3d 95, 103 (3d Cir. 2008) (“[F]ederal courts do not have subject matter jurisdiction to enjoin state officials on the basis of state law.”) (citing *Pennhurst*), *Artway v. Att’y Gen. of State of N.J.*, 81 F.3d 1235, 1269 n.33 (3d Cir. 1996) (“We almost certainly cannot grant [plaintiff]’s requested relief— an injunction against state officials from enforcing [state] law—on this basis.”) (citing *Pennhurst*); and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 948 F.

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Supp. 400, 414 (D.N.J. 1996), *aff'd*, 131 F.3d 353 (3d Cir. 1997), *aff'd*, 527 U.S. 666 (1999) (“The Eleventh Amendment defense sufficiently ‘partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.’”) (*quoting Florida Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982)).

The DSSA Plaintiffs wanted to bring this subject to the Court’s attention, but have not yet done a comprehensive analysis of the issue.

The parties agree that the above issue regarding the Delaware constitutional claims does not affect the Court’s jurisdiction to grant injunctive relief with respect to Plaintiffs’ Second Amendment claims, although they disagree on Plaintiffs’ entitlement to that relief.

With respect to the Court’s request at the February 24, 2023 hearing, the parties’ positions are set forth below.

Plaintiffs’ Position and Proposed Question

Plaintiffs maintain that certification of a question to the Delaware Supreme Court is unnecessary and should not delay resolution of their motions for the entry of preliminary injunctive relief. Additionally, the *Gray* Plaintiffs did not assert any claim arising under the Delaware Constitution at all and submit that they will be prejudiced by any delay associated with resolving a claim they did not assert. To the extent the Court is inclined to certify a question of state law to the Delaware Supreme Court, Plaintiffs propose the following language:

Given that a state cannot provide fewer constitutional rights than the U.S. Constitution provides, does the United States Supreme Court’s decision in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), which held that the intermediate scrutiny standard of review was “one step too many” for purposes of reviewing statutes that infringe on rights guaranteed by the Second Amendment to the U.S. Constitution, require that the intermediate scrutiny standard used in *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014), *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632 (Del. 2017), and *Del. State Sportsmen’s Ass’n v. Garvin*, 196 A.3d 1254 (Del. Super. Ct. Oct. 11, 2018), be replaced with the test announced in *Bruen* for purposes of establishing the minimum constitutional guarantees protected by the Delaware Constitution in the context of a challenge to a Delaware statute based on infringement of the right to keep and bear arms?

Defendants’ Position and Proposed Question

Defendants defer to the preference of the Court regarding whether and when to certify a question to the Delaware Supreme Court. To the extent that the Court elects to certify a question, Defendants propose the following question for certification:

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Whether the United States Supreme Court’s decision *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) affects Delaware’s previously established use of intermediate scrutiny to evaluate regulations challenged under Article I, § 20 of the Delaware Constitution?

Defendants agree with Plaintiffs that any certification of a question to the Delaware Supreme Court should not delay resolution of the Second Amendment issues raised in the motions for preliminary injunction.

Procedure for Certification of a Question to the Delaware Supreme Court

Under Delaware Supreme Court Rule 41, “a United States District Court . . . may, on motion or *sua sponte*, certify to [the Delaware Supreme Court] for decision a question . . . of law if there is an important and urgent reason for an immediate determination of such question or questions by this Court and the certifying court or entity has not decided the question or questions in the matter.” Most relevant to this action, the Delaware Supreme Court will accept certification of “question[s] of law [that] relate[] to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the [Delaware Supreme] Court.” *Id.*

The procedure for presenting a certified question to the Delaware Supreme Court is as follows:

- (i) *Certification by trial court.* A judge of the certifying court shall sign and file with the clerk of that court a certification substantially in the form set forth in Official Form K;
- (ii) *Filing by trial court.* The clerk of that court shall, within 5 days of the filing of such certification, file with the Clerk of this Court 6 certified copies of the certification and 6 true and correct copies of such of the following papers as may have been filed below:
 - (A) Petition. Any Petition for Certification;
 - (B) Response. Any response to the Petition for Certification; and
 - (C) Stipulation of facts. Any stipulation of facts with respect to the Certification.

Del. Sup. Ct. R. 41(c). Copies of Delaware Supreme Court Rule 41 and Official Form K (referenced above) are enclosed for the Court’s convenience.

The parties are available at the convenience of the Court to address questions or provide further information.

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Respectfully submitted,

/s/ Caneel Radinson-Blasucci

Caneel Radinson-Blasucci (#6574)

cc: All Counsel of Record (via CM/ECF)

West's Delaware Code Annotated
Delaware Rules of Court
Rules of the Supreme Court
Official Forms

Sup.Ct.Rules, Form K

FORM K. CERTIFICATE OF QUESTIONS OF LAW [RULE 41]

Currentness

IN THE ___[1]___ COURT OF THE STATE OF DELAWARE
IN AND FOR ___[2]___ COUNTY

or

IN THE ___[3]___ COURT OF THE STATE OF ___[4]___

or

IN THE SUPREME COURT OF THE UNITED STATES

or

IN THE UNITED STATES COURT OF APPEAL
FOR THE ___[5]___ CIRCUIT

or

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ___[6]___

_____[7]_____,)

)

Plaintiff,)

No. _____[9]_____

)

v.)

)

_____[8]_____,)

)

Defendant,)

CERTIFICATION OF QUESTIONS OF LAW

This _____ day of _____, ____, the Court having found that:

(1) The nature and state of the proceedings are: ___[10]___.

(2) The following facts are undisputed: ___[11]___.

(3) The questions of law set forth below should be certified to the Supreme Court of the State of Delaware for the following reasons: ___[12]___.

(4) The important and urgent reasons for an immediate determination by the Supreme Court of the question certified are ___[13]___.

(5) If certification is accepted, it is recommended that ___[14]___ be appellant for purposes of the caption on any filings in the Supreme Court of Delaware and that ___[15]___ be appellee for purposes of the caption on any filing in the Supreme Court of Delaware with respect to the questions certified.

NOW, THEREFORE, IT IS ORDERED that the following questions of law are certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 41 of the Supreme Court: ___[16]___.

Dated: _____

Judge

Insertions to Official Form K:

[1] Lower court.

[2] County in which lower court sits.

[3] Highest appellate court.

[4] State.

[5] Circuit.

[6] State.

[7] Plaintiff's name.

[8] Defendant's name.

[9] Case number.

[10] Nature and state of the proceedings in the lower court.

[11] Undisputed facts.

[12] Questions of law.

[13] Reasons for immediate determination by Supreme Court.

[14] Party who should proceed as the appellant.

[15] Party who should proceed as the appellee.

[16] Questions of law certified to the Supreme Court.

[17] List of counsel for the parties.

Credits

[General revision of forms amended effective April 1, 1999.]

Sup.Ct.Rules, Form K, DE R S CT Form K

All state and local court rules are current with amendments received through February 1, 2023. Some rules may be more current, see credits for details.

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West's Delaware Code Annotated
Delaware Rules of Court
Rules of the Supreme Court
Part IV. Other Proceedings

Sup.Ct.Rules, Rule 41

RULE 41. CERTIFICATION OF QUESTIONS OF LAW

Currentness

(a) Who may certify.

(i) *Delaware courts.* Other Delaware courts may, on motion or sua sponte, certify to this Court for decision a question or questions of law arising in any case before it prior to the entry of final judgment if there is an important and urgent reason for an immediate determination of such question or questions by this Court and the certifying court has not decided the question or questions in the case.

(ii) *Other entities.* The Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, a United States Bankruptcy Court, the United States Securities and Exchange Commission, the Highest Appellate Court of any other State, the Highest Appellate Court of any foreign country, or any foreign governmental agency regulating the public issuance or trading of securities may, on motion or sua sponte, certify to this Court for decision a question or questions of law arising in any matter before it prior to the entry of final judgment or decision if there is an important and urgent reason for an immediate determination of such question or questions by this Court and the certifying court or entity has not decided the question or questions in the matter.

(b) Requirements for Accepting a Certification. Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified. A certification will not be accepted if facts material to the issue certified are in dispute. A certificate shall state with particularity the important and urgent reasons for an immediate determination by this Court of the question certified. Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:

(i) *Original question of law.* The question of law is of first instance in this State;

(ii) *Conflicting decisions.* The decisions of the trial courts are conflicting upon the question of law;

(iii) *Unsettled question.* The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.

(c) Procedure for certification. The procedure for certification shall be as follows:

(i) *Certification by trial court.* A judge of the certifying court shall sign and file with the clerk of that court a certification substantially in the form set forth in Official Form K;

(ii) *Filing by trial court.* The clerk of that court shall, within 5 days of the filing of such certification, file with the Clerk of this Court 6 certified copies of the certification and 6 true and correct copies of such of the following papers as may have been filed below:

(A) Petition. Any Petition for Certification;

(B) Response. Any response to the Petition for Certification; and

(C) Stipulation of facts. Any stipulation of facts with respect to the Certification;

(iii) *Clerk of the Supreme Court.* Upon the receipt of such copies, the Clerk of this Court shall forthwith docket the proceeding on certification in the same manner as other cases are docketed, shall deliver to each of the Justices 1 copy of the certification and any accompanying papers and shall send written notice to the parties of the filing of such proceeding;

(iv) *Action Upon Certification.* After docketing and unless otherwise ordered, this Court shall thereupon and without further argument determine whether to accept or refuse the certification. If refused, a certified copy of the order shall be sent to the certifying court and a copy thereof sent to each counsel. If accepted, the proceeding on certification shall be considered to have been duly instituted, and the Clerk shall send written notice thereof to the parties. The certification as filed shall constitute the record;

(v) *Procedure Upon Acceptance.* From the date of acceptance of certification further proceedings shall be governed by these Rules. Briefs shall be filed in the order recommended by the certifying court in the certification, unless the Court, at the time of approving the certification, shall designate a different order. In any event, insofar as time for filing is concerned, the party or parties required to file the first brief shall be considered the appellant and the other party or parties shall be considered appellee. The caption for papers filed in this Court after acceptance of certification by this Court shall reflect such relationship among the parties.

Credits

[Amended effective May 15, 2007; October 15, 2013; July 21, 2015.]

Editors' Notes

COMMITTEE COMMENTARY

Reference: Former Rule 20. See [Del. Const., art. IV, § 11\(9\)](#).

1984 COMMENTARY

The 1984 amendment implements the amendment of [Article IV, § 11, subsection \(9\) of the Delaware Constitution](#) enacted June 30, 1983 permitting the Supreme Court to accept questions of law certified to the Court by the United States District Court for the District of Delaware.

Sup.Ct.Rules, Rule 41, DE R S CT Rule 41

All state and local court rules are current with amendments received through February 1, 2023. Some rules may be more current, see credits for details.

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