VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

VIRGINIA CITIZENS DEFENSE LEAGUE, et al.,

Plaintiffs,

v. **Case No. CL24-0074**

THE CITY OF ROANOKE, et al.,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' CORRECTED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION[1]

[1] Plaintiffs do not respond here to the *Amicus* Briefs proposed on behalf of Defendants, as the Court has not yet ruled on the *Amici*'s request.

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I. PLAINTIFFS FACE ONGOING IRREPARABLE HARM.

A. Plaintiffs Exercised Reasonable Diligence.

Defendants' first argument against granting a temporary injunction is that Plaintiffs fail to meet the irreparable-harm factor of the four-prong preliminary-injunction test outlined in *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Defendants argue that there is no irreparable harm because "Plaintiffs' years-long delay in bringing this action plainly reveals a lack of reasonable diligence." Opposition ("Opp.") at 6. Defendants also claim that this Court should view the "unnecessary, three-years long delay" when considering the balance-of-equities factor as well. *Id.* at 32. Defendants claim that Plaintiffs did virtually nothing for "almost three years," but Defendants are wrong on both the facts and the law.

On the facts, Plaintiffs have not engaged in any unnecessary delay. Shortly after the General Assembly enacted Va. Code § 15.2-915(E), several Virginia municipalities adopted restrictions prohibiting the carrying of firearms in public parks. Shortly thereafter, the Organizational Plaintiffs and other individuals brought suit against the City of Winchester for its newly minted ban on carrying in parks. *See Stickley v. City of Winchester*, 110 Va. Cir. 300 (Winchester 2022). Plaintiffs' limited resources and issues of judicial efficiency make it unreasonable to challenge every municipality's carrying-in-parks ban simultaneously, including Roanoke's.

While the Winchester case was pending, the U.S Supreme Court issued its decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), in June 2022. That decision upended the judge-empowering balancing tests for considering Second Amendment challenges that had permeated the lower federal courts, including the Fourth Circuit.

Then, on September 27, 2022, the Winchester Circuit Court issued a "preliminary injunction" against Winchester's public parks carry ban. Shortly thereafter, Plaintiffs' counsel sent a letter to Roanoke, which Defendants themselves mention and include as Exhibit C to their Brief in Opposition. Plaintiffs' letter sought to have Roanoke repeal its public parks carry ban to avoid the need for litigation.

Defendants wholly failed to mention their letter in response, sent on December 28, 2022 and attached as Exhibit "A," which noted that the *Stickley* case was set for trial in July 2023, and that "Roanoke is going to wait until the *Stickley* case is concluded," and that after *Stickley*, "the City will take the appropriate action necessary to ensure that it is in compliance with the law." Ex. "A."

It was not until mid-September 2023 that a decision on the final portions of the *Stickley* matter was issued. Ultimately, no decision was rendered on the constitutionality of Winchester's ban on firearms in City buildings and community centers, but the remaining portions of the case concluded with Winchester, after having been enjoined from enforcing the parks and permitted events portions of its Ordinance, electing to revise its code to remove these very prohibitions. Unfortunately, Roanoke ultimately refused to take "appropriate action" to remove its ban despite the Winchester decision. Plaintiffs' challenge to Roanoke was filed just over *three months after resolution* in Winchester. Furthermore, Plaintiffs filed their Motion for Temporary Injunction only slightly over a month after they filed their Complaint. Far from the "years-long delay" claimed by Defendants, Plaintiffs exercised due diligence in pursuing the temporary injunction.

Defendants' legal arguments fare no better. Defendants first cite *Benisek v. Lamone*, 585 U.S. 155 (2018), in which plaintiffs sought a preliminary injunction against a congressional redistricting map *six years* after the map was adopted. Similarly, Defendants cite *LaFave v.*

County of Fairfax, 2023 Va. Cir. LEXIS 203 (Fairfax Cnty. June 23, 2023), for the proposition that "delay in seeking relief suggests that it's not necessary." Opp. at 6. Indeed, in *LaFave*, as that court noted, the plaintiffs had delayed *after* filing their complaint: "plaintiffs waited to seek a preliminary injunction until January 2023, two years after the suit was originally filed and only eight months before the current trial date." *LaFave*, 2023 Va. Cir. LEXIS 203, at *19-20. Similarly, in *Rullan v. Goden*, 2023 U.S. Dist. LEXIS 73508 (D. Md. Apr. 26, 2023), the plaintiff did not exercise due diligence during the pendency of the case: "the record suggests the delay 'largely arose' from a circumstance within Rullan's control – namely, Rullan's silence for more than a year after the court requested a status report in the related case." *Id.* at *5. Unlike *LaFave* and *Rullan*, here Plaintiffs filed their Motion for Temporary Injunction just slightly over a month after their Complaint, and within a reasonable time after conclusion of the *Stickley* matter, given Roanoke's written representation and then subsequent inaction.

Furthermore, contrary to Defendants' current claims, they never "contend[ed] that the delay resulted in any prejudice to [their] interests." *Candle Factory, Inc. v. Trade Assocs. Grp.*, 23 F. App'x 134, 139 (4th Cir. 2001). The Fourth Circuit in *Candle Factory* rejected a claim that a one-year delay defeated an irreparable injury claim: "delay ... does not as a matter of law preclude a finding by the court of irreparable harm." *Id.*

Finally, three other Virginia Circuit Court cases have concluded that a violation of Article I, § 13 causes irreparable harm, citing the U.S. Supreme Court's decision in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), which held that in the preliminary injunction context, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See Stickley*, 110 Va. Cir. at 326; *Elhert v. Settle*, 105 Va. Cir. 326, 338 (Lynchburg 2020); *Lynchburg Range & Training, LLC v. Northam*, 105 Va. Cir. 159, 164 (Lynchburg 2020).

Thus, if the Court finds that Plaintiffs are likely to succeed on the merits, *i.e.*, that Roanoke's ban violates Article I, § 13, then the irreparable harm factor is met as well.

B. Defendants Failed to Moot Plaintiffs' Challenge to the Permitted Events Provision.

Defendants correctly cite the truism that courts cannot "issue advisory opinions on moot questions." Opp. at 7 (quoting *Godlove v. Rothstein*, 300 Va. 437, 439 (2022)). However, Defendants then incorrectly assert that the Permitted Events Provision ("PEP") of Roanoke's Ordinance is moot because on February 5, 2024, after being sued, the City Council withdrew the provision – for the time being. *Id.* In support, Defendants proffer the declaration of Roanoke Police Chief Scott Booth, who states that the Council withdrew the PEP because of "resource constraints," and that he does not "anticipate those resource constraints abating in the foreseeable future." *Id.* Accordingly, Defendants argue, the case is moot as to the PEP challenge. However, there are two exceptions to the mootness doctrine, "capable of repetition yet avoiding review" and voluntary cessation, both of which apply here.

1. Roanoke's PEP Ban Is "Capable of Repetition Yet Evading Review," and Thus Is Not Moot.

Booth's opinions are not sufficient to moot the issue. As both the U.S. and Virginia Supreme Courts have made clear, "[i]f the underlying dispute is capable of repetition, yet evading review, it is not moot." *Daily Press, Inc. v. Commonwealth*, 285 Va. 447, 452 (2013) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980)).

Booth was not responsible for imposing the PEP restrictions, was not responsible for withdrawing them, and would not be responsible for future reimposition. Rather, it is the City Council, whose viewpoints on the matter are conspicuously absent from Defendants' filings, that enacted the PEP originally and could enact it again at any point in the future.

Indeed, Plaintiffs' concerns about reimposition are not unfounded. Shortly after being sued, during their February 5, 2024 meeting, the City Council rescinded the PEP restrictions, but in doing so, took great pains to clarify that the removal of the PEP restrictions was not permanent. In presenting the proposed amendment to the Council, City Attorney Tim Spencer, who is also defending the City in this matter, stated:

> First of all, the recommended amendments are not made because we believe our current ordinance is not legal or constitutional. In fact, just the opposite. We believe our current ordinance as drafted is legal and constitutional. This is just to address the logistical issue that we have on enforcement of permitted events given the large number of those events, especially in the summer, and dealing with things such as 5Ks and parades....[2]

Councilman Luke Priddy responded: "Just want to reiterate the point from this morning that we also discussed earlier regarding logistical reasons for why we're making this update and that we will continue to evaluate what we might need to change logistically in order to maybe **reenact this at some point**."[3]

Spencer replied:

> Correct, and if Council so deems appropriate to **add back certain permitted events** where it might not be all of them; for example ... if Council decides that "we'll put up the signage for parades, that we believe that parades are a place that families should feel safe from having those with firearms nearby," then Council can indeed adopt that belief from a legal standpoint....[4]

Clearly, the goal of restricting Article I, § 13 rights at permitted and unpermitted events is still on the City Council's radar, and the Council fully believes it has authority to reimpose the provision at any time. Furthermore, the Council conveniently became concerned with their enforcement ability only *after* being sued, and could reverse their position after this case ends. Therefore, this case is completely unlike *Va. Mfrs. Ass'n v. Northam*, on which Defendants rely, a

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[2] *Roanoke City Council Meeting*, Facebook (Feb. 5, 2024), https://tinyurl.com/4uvxahm9, at 2:59:40-3:00:13.
[3] *Id.* at 3:00:52-3:01:06 (emphasis added).
[4] *Id.* at 3:01:07-3:01-38 (emphasis added).

case in which the court found "[t]here is **no reasonable expectation** that the same complaining party [will] be subject to the same action again." *Va. Mfrs. Ass'n v. Northam*, 74 Va. App. 1, 19 (2021) (emphasis added) (internal quotation omitted). Here, based on the explicit on-the-record discussion the City Council engaged in, there is *exactly* such reasonable expectation that Plaintiffs will be subjected to the same restriction in the future, which would require Plaintiffs to file another suit and again involve this Court's assistance. Thus, the "capable of repetition" exception to mootness applies.

2. *Roanoke's PEP Ban Falls Under the "Voluntary Cessation of Illegal Activity" Doctrine, and Thus Is Not Moot.*

Virginia's courts recognize that, "as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" *Harrisonburg Rockingham Soc. Servs. Dist. v. Shifflett*, 2005 Va. App. LEXIS 280, at *10 (July 19, 2005) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). Defendants give only a passing mention to the "voluntary cessation" exception. Opp. at 8. But Defendants have the burden to defeat the exception, and it is a heavy one. The voluntary cessation doctrine

> traces to the principle that a party should not be able to evade judicial review ... by temporarily altering questionable behavior. Accordingly, a civil action does not become moot when a defendant voluntarily ceases its allegedly improper behavior, if there is a **reasonable chance** that the behavior will resume. And to avoid the litigation tactics at which the exception is aimed, we apply a stringent standard in assessing whether there is a reasonable chance of recurrence: A defendant claiming mootness based on the voluntary cessation of a challenged practice **must show that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.** [*Eden, LLC v. Justice*, 36 F.4th 166, 170-71 (4th Cir. 2022) (emphases added) (citations and internal quotations omitted).]

The U.S. Supreme Court has likewise stated that "a defendant claiming that its voluntary compliance moots a case bears the **formidable burden** of showing that it is **absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth,*

Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) (emphases added). A case "might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189. That is clearly not the case here.

Here, although the City has voluntarily ceased the unconstitutional PEP restrictions, the case is wholly dissimilar from *Eden, LLC*, which Defendants cite as support. There, the Fourth Circuit considered a challenge to a COVID executive order issued by West Virginia Governor Jim Justice, requiring all "non-essential" businesses to close. By the time the case reached hearing before the Fourth Circuit, Justice's executive order had been repealed for more than a year. The court found it was "'entirely speculative' to assert that the Governor suddenly will see a need to reinstate COVID-19 restrictions 'that have not been in place for more than a year.'" *Eden, LLC*, 36 F.4th at 171. Governor Justice had further stated that due to the advent of a COVID vaccine, he believed the chances of reimposing business shutdowns were "remote." *Id.*

Similar to *Eden, LLC*, Defendants cite *Tolle v. Northam*, 2021 U.S. Dist. LEXIS 143758, at *11 (E.D. Va. July 29, 2021), for the proposition that "voluntary cessation d[oes] not apply when the defendant withdrew its guidance because of changed circumstances and not with the aim of avoiding judgment in court." Opp. at 8. The *Tolle* case also involved COVID-19 emergency measures which had since been modified and canceled by the time the court heard the matter.

Unlike the canceled emergency responses considered in *Tolle* and *Eden, LLC*, here Defendants' timing should be viewed with skepticism. Despite Roanoke's averment that it would make appropriate changes after watching what happened in the *Stickley* matter, for several months the City refused to take such action, requiring this suit to be filed, only to discover "enforcement" difficulties while formulating a defense.

Finally, *Tolle* does not even support what Defendants claim. Rather, *Tolle*, like *Eden, LLC*, simply teaches that when a regulation is imposed to deal with a bona fide sudden emergency, and the emergency is over, it is easier than normal for a defendant to meet its "formidable" burden to show that the offending conduct will not recur. As detailed via their briefing and declarations, Defendants have an ongoing concern for violence, and desire to deal with this concern by limiting the ability of civilians to carry firearms. Thus, unlike COVID-19, which has largely resolved, the challenge of criminal activity and related violence is ongoing. Neither *Eden, LLC* nor *Tolle* is of any help to Defendants, and they utterly fail to meet their "formidable burden" to prove that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR ARTICLE I, § 13 CLAIM.

A. Roanoke Failed to Demonstrate Its City Parks Are "Sensitive Places" or That Its Ordinance Is Constitutional Without the Need to Provide Historical Analogues.

In Section II.A. of its Opposition, Defendants assert that according to the *Heller*, *Bruen*, and *DiGiacinto*[5] decisions: (i) Roanoke City parks are "sensitive places," where guns may be banned, and (ii) the challenged Ordinance is *per se* constitutional without the need to require Defendants to demonstrate any historical analogues for the carry ban in parks. Opp. at 10-13. Neither assertion is supportable from these authorities.

Taking these cases in order, the only statement by the *Heller* Court on the topic was to make clear that "nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as **schools** and **government buildings**...." *Heller*, 554 U.S. at 626 (emphases added). When a court clarifies the scope of its decision by stating

[5] *District of Columbia v. Heller*, 554 U.S. 570 (2008); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127 (2011).

that it does not reach an issue, that limitation on its scope certainly does not constitute an omnibus validation of all sorts of laws not being challenged or evaluated. Indeed, to avoid exactly this result, the *Heller* Court was explicit that their decision did not "clarify the entire field" and that with respect to all of the exceptions mentioned (such as so-called "sensitive places"), "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id.* at 635. Nevertheless, Defendants present the *Heller* Court's limitation on its holding to be a blanket approval of any law whatsoever restricting carrying, claiming that *Heller* conclusively held: "[t]he government may 'forbid[] the carrying of firearms in sensitive places such as schools and government buildings.'" Opp. at 10. (As discussed *infra*, Roanoke City Parks are entirely unlike "schools and government buildings.")

More recently, in *Bruen*, the Court commented on "*Heller*'s discussion of ... 'laws forbidding the carrying of firearms in sensitive places such as **schools** and government **buildings**.'" *Bruen*, 597 U.S. at 30 (emphases added). The Court stated:

> the historical record yields relatively **few** 18th- and 19th-century "sensitive places" where weapons were altogether prohibited – *e.g.*, **legislative assemblies, polling places, and courthouses**.... We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And **courts can use analogies** to those **historical** regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible. [*Bruen*, 597 U.S. at 30 (emphases added).]

There, the *Bruen* Court rejected several of Roanoke's arguments. First, although *Bruen* clarified its list of presumptive sensitive places beyond that in *Heller*, there is not the slightest indication that it extended beyond certain government-function buildings. Second, *Bruen* anticipated and required that to analyze newly claimed sensitive places, courts would evaluate "historical"

analogues presented by the government to rule on the merits of any new governmental restriction on the right to keep and bear arms.

In fact, in *Bruen*, the Court went on to reject an argument made by New York that "sensitive places" included "all places of public congregation that are not isolated from law enforcement," which the Court warned "defines the category of 'sensitive places' far too broadly." *Bruen*, 597 U.S. at 31. Similarly, Defendants' claim that a public park is a sensitive place simply because it is government-owned also defines that category far too broadly. If government ownership is to be the defining characteristic of a "sensitive place," then there will be no carrying permissible on the streets and sidewalks of any jurisdiction. Defendants forget that, as stated in *Heller* and repeated in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), "individual self-defense is 'the *central component* of the Second Amendment right.'" *Bruen*, 597 U.S. at 29.

Defendants also cite *DiGiacinto* as supportive. *DiGiacinto* was decided in 2011, after *Heller* but before *Bruen*. Roanoke asserts that under *DiGiacinto*:

> [t]he Supreme Court of Virginia has previously employed the federal sensitive places analysis for Section 13 [and] [u]nder this analysis, the sole role for this Court is to determine if a location is a "sensitive place." Additional **historical analysis is not required**. [Opp. at 10 (emphasis added).]

Thus, it appears Defendants are asking this Court to make a subjective decision, untethered to the meaning of Article I, § 13, as to whether it feels that a park is a "sensitive place," without defining that term, and using no articulated standard whatsoever. The Virginia Supreme Court most certainly did not conduct its analysis in that fashion.

Rather, even without the benefit of guidance from *Bruen*, the Virginia Supreme Court began its analysis by reviewing the "sensitive places such as **schools** and government buildings" language from both *Heller* and *McDonald*. *DiGiacinto*, 281 Va. at 134, 135 (emphasis added).

From this starting point, it explained that GMU is "an educational institution" and concluded that "[t]he fact that GMU is a **school** and that its buildings are owned by the government indicates that GMU is a 'sensitive place.'" *Id.* at 136 (emphasis added).

Using language that substantially undermines Roanoke's defense here, the Virginia Supreme Court then stated that a university is a sensitive place because it is **"[u]like a public street or park...."** *Id.* (emphasis added). Further, the Court noted that the challenged regulation, 8 VAC § 35-60-20, "allows individuals to lawfully carry firearms on the **open grounds** of GMU's campus." *Id.* at 133 (emphasis added). Thus, while Defendants assert that "Roanoke's city parks are 'sensitive places'" (Opp. at 10), the Virginia Supreme Court suggests the opposite – that a school is a "sensitive place" for the very reason that it is "[u]nlike a public ... park."

Defendants' reliance on *LaFave* is of little assistance. The Fairfax Circuit Court in *LaFave* reviewed the decision of the Winchester Circuit Court in *Stickley*, and found it to be "virtually identical" and "analogous to this case," but "not dispositive." *LaFave*, 2023 Va. Cir. LEXIS 203, at *10, *11. (Of course, the same is true here, where *LaFave* is not controlling.) Even though Roanoke's Opposition relies on *LaFave*, as discussed *infra*, that case did not employ the approach urged by Defendants here – one where the City would have no duty to show historical analogues, and the court could simply make a free-floating, arbitrary declaration that Roanoke City parks are "sensitive places." Rather, in *LaFave*, the Fairfax Circuit Court applied the *Bruen* standard, which Plaintiffs urge here, and ruled that "plaintiffs have established that the first prong [of *Bruen*] has been met [and] the burden now shifts to the defendants to establish whether the ordinance in this case is consistent with ... Virginia's historical tradition of firearms regulation...." *Id.* at *13. The *LaFave* court also departed from Defendants' position when it stated, in denying a "preliminary injunction," that "[t]he Court in this opinion does not

need to analyze or reach the issue of whether the county parks fall within the sensitive places doctrine." *Id.* at *18.

Roanoke's Opposition then seeks to explain that its parks are special – first, because they are near schools where school activities can take place. Assuming that to be true, the Roanoke Ordinance is redundant to Va. Code § 18.2-308.1, which independently prohibits possession of a firearm not just on the property of any "public, private, or religious preschool, elementary, middle, or high school" but, in addition, on "that portion of any property open to the public and then exclusively used for school-sponsored functions or extracurricular activities while such functions or activities are taking place...." Likewise, Defendants complain of the fact that Roanoke parks "host recreational centers and after-school programs," but this too is misleading, because they neglect to mention that these very recreation centers are separately off-limits due to the unchallenged subsection (c) of their Ordinance, banning firearms in "any recreation or community center operated by the City."

Defendants next claim that Roanoke's parks are special because "gun violence has impacted the parks." Opp. at 12. Ironically, however, Defendants' declarations describe their cited shooting as having occurred on November 8, 2023, during the time that Roanoke's gun-ban Ordinance was in place. From this we can conclude that the challenged Ordinance did absolutely nothing to prevent that shooting. Moreover, in telling that story, Defendants actually make an important point for Plaintiffs. Shootings are committed by lawless people, and last November, one lawless person in Roanoke demonstrated that he neither respected nor abided by Roanoke's Ordinance banning firearms in parks. The law-abiding suffered as a result.

Indeed, as with all such laws, the only people who are disarmed by the Roanoke Ordinance are honest, responsible citizens. Sadly, Roanoke is not concerned that when the law-

abiding citizens of Roanoke are disarmed by virtue of this Ordinance, criminals will know that the victim they target will be unarmed. It would be much better for the residents of Roanoke if the policy preferences of those currently in control of its City government are subordinated to the People's God-given constitutional right to "bear arms" to defend themselves against crime in public parks.

B. Article I, § 13 Protects an Individual Right.

Defendants next rehash a repeatedly debunked legal theory to claim that the Virginia constitutional protection for arms confers only a collective right upon *the government* and not *its people*. *See* Opp. at 13-16. Unsurprisingly, Defendants fail to cite even a single Virginia court to support this radical departure from historical tradition and constitutional precedent. Instead, they claim the collective-rights theory remains viable in Virginia, despite its federal repudiation in *Heller*, because the Virginia Supreme Court did not answer the question directly in *DiGiacinto*. *See* Opp. at 13. This argument fails for several reasons.

First, Defendants make no attempt to reconcile *DiGiacinto*'s "hold[ing] that ... Article I, § 13 of the Constitution of Virginia is co-extensive with ... the Second Amendment of the United States Constitution, concerning **all** issues in the instant case," with their absolutist claim that "the Virginia constitution confers a collective, rather than individual, right with respect to bearing arms." *DiGiacinto*, 281 Va. at 134 (emphasis added); Opp. at 13. Indeed, by the time *DiGiacinto* held *at least some* co-extensivity with the Second Amendment with respect to public carry, *Heller*'s individual-rights course-correction already had occurred. In other words, the Virginia Supreme Court already *has held* Article I, § 13 to protect an individual right in *at least* one context. To claim otherwise – that this provision protects "a collective[] rather than individual[] right" as a general matter (Opp. at 13) – is flatly incorrect.

Second, and more importantly, Defendants' collective-rights theory is utterly incoherent as applied to Virginia for the same linguistic and historical reasons already explained in *Heller*:

> The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, **"Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."** Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose.
>
> ....
>
> Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.

Heller, 554 U.S. at 577, 592 (emphasis added) (citations omitted). Indeed, *Heller* and *DiGiacinto* already laid Defendants' textual and historical revisionism to rest, and they cannot relitigate it now.

Third, Defendants fail to grapple with the inconvenient fact that the § 13 right is enumerated in Article I of Virginia's Constitution, which overwhelmingly concerns itself with *individual* rights, such as the rights to free speech and freedom of religion, criminal procedural protections, and suffrage. *See* Va. Const. art. I, §§ 12, 16, 8, 6. And for all their reliance on § 13's title as a limitation on its meaning (Opp. at 14), Defendants ignore the basic canons of construction that "laws dealing with the same subject" – individual rights – "should if possible be interpreted harmoniously," and that "express provisions in the body of an act cannot be controlled or restrained by the title or preamble." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 252 (2012); *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 563 (1892).

Fourth, Defendants' collective-rights theory likewise violates the "Presumption Against Change in Common Law," which provides that a text "will be construed to alter the common law

only when that disposition is clear." Scalia & Garner, *supra*, at 318. As *Heller* explained, the right to keep and bear arms was "widely understood" to be a *pre-existing* (*i.e.*, common-law) right which the Founders simply codified rather than created out of thin air. *Heller*, 554 U.S. at 592; *see also* Compl. ¶48 ("exist[ing] with or without its documentary recognition"). Absent a "clear" indication that the 1971 modernization sought to undo the common law, Defendants fail to meet their burden. On the contrary, the record confirms that the § 13 modernization sought to *preserve* the common law and "guarantee that which is already guaranteed there [in the Second Amendment]." Compl. ¶54.

Finally, despite urging reliance on *LaFave* throughout their briefing, Defendants fail to acknowledge that ***even LaFave*** forcefully repudiated their collective-rights theory: "An examination of the legislative history surrounding the enactment of Article 1 Section 13 makes clear that the Virginia General Assembly meant for the plain text of Article 1 Section 13 to incorporate the right to bear arms in the Virginia Constitution, and that said right was to cover individual conduct, and not as the defendant suggests, a mere militia right. Therefore, this Court finds that the *Bruen* analysis should apply." *LaFave*, 2023 Va. Cir. LEXIS 203, at *12. Left with no text, no history, and no judicial precedent on which to rely, Defendants' theory is nothing more than a request to overrule the U.S. and Virginia Supreme Courts. Their remaining arguments are similarly unavailing.

1. Defendants Cannot Argue "Unique Meaning."

Defendants next place great reliance on a linguistic difference between the Second Amendment and § 13, claiming that the inclusion of the word "therefore" prior to the recognition of the right "of the people" in the Virginia Constitution is intended only "to modify the previous phrase concerning a "well regulated militia." Opp. at 14. But *Heller* already rejected

Defendants' construction, having restated the Second Amendment in a similar "if, then" format without changing its meaning: "The Amendment could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'" *Heller*, 554 U.S. at 577. Insertion of "therefore" between the prefatory and operative clauses likewise "does not limit the latter grammatically, but rather announces a purpose." *Id.*

This "modif[ication],"[6] as Defendants put it (Opp. at 14), merely adds clarity – that while one purpose of the right may be to support the militia, the right itself is, "therefore," inherent in "the people." Indeed, if the right were a collective right granted only to "the militia," this addition would have only served to confuse. *See* Scalia & Garner, *supra*, at 174 (Under the surplusage canon, "every word and every provision is to be given effect.... None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). Since its inception in 1776, Virginia's Constitution has contained language guaranteeing "a well regulated militia, composed of the body of the people, trained to arms...." Va. Declaration of Rights § XIII (1776). Thus, the additional clarity provided would be wholly unnecessary if designed only to insist upon a right to militia service, which the Constitution already contained, and which would have made the addition entirely redundant. Likewise, Defendants do not explain why § 13 did not simply guarantee 'the right *of the militia* to keep and bear arms,' if their theory were to be accepted. Yet it is a basic textual canon that "[a] word or phrase is presumed to bear the same meaning throughout a text; *a material variation in terms suggests a variation in meaning*." Scalia & Garner, *supra*, at 170 (emphasis added). The addition of "the people" clarifies who enjoys the right.

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[6] *But see Modify*, Dictionary.com, https://tinyurl.com/mpt4faks (last visited May 28, 2024) ("to change somewhat the form or qualities of; alter partially; amend").

Even more confounding is Defendants' reliance on Delegate Harrell's representation during the debate that the drafters used a "comma [] rather than the semicolon [because] [t]he clause creates no additional rights." Opp. at 15. The inclusion of new language noting the right "of the people" did not confer any *new* right, because it simply clarified the guarantee of a pre-existing right to arms that *the people* always enjoyed in Virginia. Indeed, Delegate Slaughter of Culpeper explained that the additional language "confirms the historical parallel between the Articles of the Virginia Constitution and the Second Amendment to the Constitution of the United States," while Senator Bateman received affirmation when he queried whether the only purpose of the amendment is to "guarantee that which is already there?" Proceedings and Debates of the House of Delegates on Constitutional Revision 775 (Apr. 2, 1969) ("House Debates"); Proceedings and Debates of the Senate on Constitutional Revision 392 (Apr. 3, 1969) ("Senate Debates"). And as Senator Barnes, one of the amendment's proponents, explained, "[c]ertainly, one of the chief guarantees for freedom under any government, no matter how popular and respected, is the right of *the citizen* to keep and bear arms." Senate Debates at 392 (emphasis added).

Defendants next claim § 13 is a "military guarantee," citing Senator Howell, although failing to note that Senator Howell was in the minority who opposed the 1971 modernization, apparently in part because he disagreed with the right it recognized. Opp. at 14. More poignant, however, is the fact that many Founders in the 1700s likely would have also viewed § 13 as a military guarantee, albeit one that necessitated a right of the people to be armed. *See Heller*, 554 U.S. at 597-98 ("There are many reasons why the militia was thought to be 'necessary to the security of a free State.' ... [W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."). Indeed, contemporaneous commentaries

evince a preoccupation with ensuring the citizenry would be of equal match to the government's standing army as a failsafe against despotism. American lexicographer and federalist Noah Webster wrote: "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, *and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States*." Noah Webster, An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held at Philadelphia 32 (Prichard & Hall 1787) (emphasis added). Alexander Hamilton agreed, expressing similarly that an "army can never be formidable to the liberties of the people while there is a large body of citizens, *little if at all inferior to them in discipline and the use of arms*, who stand ready to defend their own rights and those of their fellow-citizens." The Federalist No. 29 at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Much to the revulsion of those who distrust an armed citizenry,[7] the whole point of the militia guarantee is to ensure parity of weapons between the free citizen and the government infantryman. This understanding persisted well into the 19th century, and only recently have modern academics sought to change the right's meaning. *See Heller*, 554 U.S. at 625 (observing that purportedly 'military' and 'civilian' weapons were "one and the same"); *see also Arnold v. Kotek*, 2023 Ore. Cir. LEXIS 3887, at *9-10 (Or. Cir. Ct. Harney Cnty. Nov. 24, 2023) ("The court finds, and all the experts agree, there was no clear distinction between private and military use at the time of statehood [in 1859]."). Defendants' contrary interpretation simply denies text and history.

[7] Professor A.E. Dick Howard, one of Defendants' authorities, described the U.S. Supreme Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), as "disconcerting" in that it "could be read to imply that a citizen has a right to possess any weapon which could be shown to be an effective military weapon." A.E. Dick Howard, Commentaries on the Constitution of Virginia 277 (1974). The Framers were not so disconcerted.

2. The 1971 Amendment Was Intended to Ensure Virginia's Constitution Was Co-Extensive with the Federal Constitution.

Defendants posit that § 13 must be understood according to what they describe as the prevailing understanding of the Second Amendment in the 1970s, a collective right. Opp. at 15-16. In reaching this conclusion, they cite a 1993 Virginia Attorney General Opinion which interpreted both the federal Constitution, and Virginia's Constitution, as conferring only a collective right. *Id.* at 16. But as noted above, this interpretation of the Constitution has been dispositively dismissed as erroneous by the U.S. Supreme Court, and in any case, Attorney General opinions merely constitute "legal advice" in Virginia and "are not binding on the courts."[8] Moreover, while true that, in the 1970s, some judges wrongly understood the Second Amendment as conferring only a collective right, there is no evidence that this is how *the people* of Virginia understood the protection, who "overwhelmingly voted to ratify" with 71.8 percent voting in favor.[9] And why would they have? Virginians historically have enjoyed an individual ability to possess arms, in part, because it has "been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." *Heller*, 554 U.S. at 592.

Despite its erroneous legal conclusion, the 1993 Attorney General opinion rightly noted that the § 13 update was to "conform the Virginia Constitution to the Second Amendment." Letter to S. Vance Wilkins, Jr., 1993 Virginia Attorney General Reports and Opinions, at 14 (1993). Likewise, Delegate Harrell, one of the proponents of the 1971 modernization, explained that far from being surplusage regarding a collective militia right, the added text was to ensure that "our Constitution could not be in derogation of the federal Constitution." House Debates at

[8] *Official Opinions*, Off. of Att'y Gen., https://tinyurl.com/ycwh5vac (last visited May 28, 2024).
[9] *The 1971 Constitution: Real Change Made in the Lives of Virginians*, Libr. of Va., https://tinyurl.com/2p8xp869 (last visited May 28, 2024).

473-74. In discussing another contemporaneous amendment to the Constitution, Delegate Gibson similarly noted that "[t]he Constitutional Revision Commission has said in a number of cases that their effort was to make our Bill of Rights stand on its own feet, so that Virginia Citizens could rely on the provisions of our Bill of Rights and our courts, and not have to go to the federal constitution and the federal bill of rights and the federal courts." *Id.* at 477. Even Virginia Supreme Court Justice McCullough has explained that, with respect to § 13, "[t]he purpose of this change, constitutional debates reveal, was to align the Virginia Constitution with an individual rights reading of the Second Amendment."[10] Consistent with this concept, the 1968 Virginia Commission on Constitutional Revision stated:

> [t]hat most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is ... no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating **the basic safeguards of the people's liberties**, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts. [*Report of the Commission on Constitutional Revision*, p. 86 (1969) (emphasis added).]

Therefore, the clear legislative intent behind the 1971 modernization was that the Second Amendment and Article I, § 13 are to provide at least equal, co-extensive protection.

Yet, now that it is inconvenient to their efforts to disarm the residents of Roanoke, Defendants would have this Court undo this co-equal constitutional protection and hold that § 13 protects far less than the Second Amendment. Of course, Defendants' request is one that would relegate § 13 to a second-class right, contravening the Supreme Court's repeated warnings against such disparate constitutional treatment. *See Bruen*, 597 U.S. at 70.

Defendants point to portions of the 1971 debate regarding the ability of the government to implement constitutional firearms regulations. Opp. at 15. But Defendants' very own

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[10] Stephen R. McCullough, *Article 1 Section 13 of the Virginia Constitution: Of Militias and an Individual Right to Bear Arms*, 48 Rich. L. Rev. 215, 230-31 (2013).

quotation belies their present argument, as one Delegate assured parity with the scope of federal regulation. *See id.* ("This will not do anything more than what has been done on the federal level."). Yet Defendants seek to disarm the law-abiding in public places, leaving them at the mercy of criminal elements who simply ignore the Roanoke Ordinance. *See* Boas Decl. ¶14 (admitting that a criminal shooting occurred *after* the Ordinance had gone into effect). Indeed, central to Defendants' argument is that Virginians simply *have no individual rights* whatsoever to keep and bear arms in self-defense under their own Constitution, presumably including no right to keep a handgun in the home, as addressed by *Heller*.

C. The "Means-Ends" Test Has Been Abrogated by the Supreme Court and Was Never Adopted by Virginia Courts.

Defendants spuriously urge this Court to apply a "means-ends" interest-balancing test to assess the constitutionality of the Ordinance, in brazen defiance of the unequivocal rejection of such tests for right-to-bear-arms challenges by the U.S. Supreme Court. Simply put, the "means-ends" test previously used by some federal appeals courts has *never* been adopted by Virginia courts, even prior to its express repudiation in *Bruen*. There, the U.S. Supreme Court explained:

> In the years since [*Heller and McDonald*], the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. [*Bruen*, 597 U.S. at 17.]

The U.S. Supreme Court's prior decisions in *Heller* and *McDonald* likewise rejected the application of any "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller*, 554 U.S. at 634.

Indeed, no Virginia court – even before the *Bruen* decision – has ever adopted or applied a "means-ends" test to evaluate the constitutionality of a firearm regulation. Defendants' brief acknowledges this reality, citing *Prekker v. Commonwealth*, 66 Va. App. 103, 117 (2016), and noting that the Court of Appeals of Virginia expressly declined to adopt the "means-ends" test previously posited by the Fourth Circuit Court of Appeals. Opp. at 17. Next, Defendants cite two additional Virginia cases which they are also forced to acknowledge did not involve the right to keep and bear arms, before finally latching onto a series of pre-*Bruen* federal cases. In short, the "means-ends" test that Defendants seek to resurrect post-*Bruen* was never the law in Virginia to begin with, even before it was dispositively rejected at the federal level.

Defendants finally attempt to justify broad infringements on an enumerated constitutional right, claiming that a small number of hotheaded parents allegedly cannot behave themselves at a Little League baseball game. Far from assisting Defendants, however, common sense dictates that such dangers simply underscore the need to allow responsible people to carry firearms to protect themselves and others (including children) from the dangers of belligerent adults (aptly described by Defendants' declarations) who plague Roanoke's residents and police force. Apparently other laws and Roanoke's Code of Conduct[11] are ineffective at preventing such issues.

Fortunately, the Court need not wade into such messy empirical and policy arguments, as they are wholly irrelevant to the analysis mandated by *Bruen*. There, the U.S. Supreme Court made clear that courts shouldn't struggle with "difficult empirical judgments regarding firearm

[11] Included among threats which result in suspension of various terms from Roanoke parks are: "Acting in an unsportsmanlike or inappropriate manner before, during or after a scheduled game or practice; Verbal threats or harassment made by a player, spectator or game personnel proceeding, [sic] during or following a game; Physical violence towards a player, coach, spectator, scorekeeper or official proceeding, [sic] during or following a game." *Conduct Policies*, Roanoke Cnty. Parks & Recreation, https://tinyurl.com/4stnm2hm (last visited May 28, 2024).

regulations" because while "judicial deference to legislative interest balancing is understandable – and, elsewhere, appropriate – it is not deference that the Constitution demands here." *Bruen*, 597 U.S. at 26. Put another way, "*Bruen* leaves no room for doubt: text and history, not a means-end analysis, now define the controlling Second Amendment inquiry." *Atkinson v. Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023).

D. The Roanoke Ordinance Is Atextual, Ahistorical, and Therefore Unconstitutional.

Try as they might to denigrate the appropriate Article I, § 13 standard of review, Defendants ultimately proceed to an "[a]lternative" *Bruen* argument, claiming that the Ordinance comports with a 'long history and tradition' of regulation. Yet at the outset, Defendants misstate *Bruen*'s standard, insisting that the "test has two parts" despite the Supreme Court's clear repudiation of any "two-step approach" as having "one step too many." Opp. at 19; *Bruen*, 597 U.S. at 19. Plaintiffs do not raise this point to quibble. Rather, Defendants' error betrays a fundamental misunderstanding of *Bruen*'s approach, which never endorsed a textual analysis as any significant analytical 'step' or hurdle to bar a challenger's claim. *See Bruen*, 597 U.S. at 31-33. Properly understood, the textual analysis is a simple subject-matter qualifier: Are we talking about a weapon regulation, or not? Clearly, a prohibition on public carry infringes on the text of the Second Amendment (and Article I, § 13).

Yet Defendants' misunderstanding permeates the rest of their *Bruen* argument, as evidenced by their stunning initial claim that Article I, § 13 (and by extension, the Second Amendment) simply has *nothing to say* about a ban on public carry *as a textual matter*. Like their later historical argument, this inappropriate textual theory fails for several reasons.

1. A Prohibition on "Bear[ing] Arms" Obviously Implicates Article I, § 13's Plain Text, Which Protects the Right to ... "Bear Arms."

Defendants begin their analysis not by proffering evidence of a historical tradition, but by positing that "the plain text of Section 13 does not cover the bearing of arms in public parks" whatsoever. Opp. at 20. In other words, Defendants insist that 'each and every location where one wishes to carry must be enumerated, or else it is unprotected.' But *Heller* and *Bruen* already rejected precisely this sort of hyper-precision argumentation, as it proves too much. Indeed, neither the Second Amendment nor Article I, § 13 mention *the home*, yet *Heller* unequivocally held that a prohibition extending to the home "fail[s] constitutional muster." *Heller*, 554 U.S. at 629. Likewise, neither the Second Amendment nor Article I, § 13 mention *public places*, yet *Bruen* unequivocally held that the "plain text ... presumptively guarantees ... a right to 'bear' arms in public for self-defense." *Bruen*, 597 U.S. at 33; *see also id.* at 32 ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms. ... To confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections."); *id.* at 33 (citation omitted) ("Many Americans hazard greater danger outside the home than in it. The text of the Second Amendment reflects that reality."); *accord* Compl. ¶39 n.9 (reporting on a violent attack in a Roanoke park); Boas Decl. ¶14 ("On November 8, 2023, ... gunshots were fired in Eureka Park."). Consequently, it is enough, as Plaintiffs already explained, that Plaintiffs belong to "the people" and wish to "bear" (carry) "Arms" (handguns) in public. Compl. ¶70; MTI at 10-11. At the textual subject-matter filter, the precise public location is inapposite. This Court should reject Defendants' attempt to complicate something the *Bruen* Court addressed in just five short paragraphs. *See Bruen*, 597 U.S. at 31-33.[12]

[12] Moreover, apparently lost on Defendants is the maxim that "[c]onstitutional rights ... implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment). Carrying in public *places* effectuates the general right to *public carry*.

But should this Court need any further confirmation that Defendants have wandered far afield, *Heller* and *Bruen*'s textual presumptions bear emphasis. Under Defendants' theory, if the text does not protect carry in public parks because these locations are not literally "cover[ed]" (Opp. at 20), then that means the text does not presumptively extend to all public locations, subject only to those limitations supported by historical tradition. But this construction defies the textual presumptions the Court already extended to "the people," "Arms," *and public carry*. Indeed, rather than insisting on enumeration of all the individuals who might enjoy the right to keep and bear arms (*e.g.*, citizens, non-citizens, the law-abiding, misdemeanants, felons), the Court simply observed that "[w]e start ... with a strong presumption that the Second Amendment right ... belongs to all Americans." *Heller*, 554 U.S. at 581. Likewise, rather than limiting which "Arms" enjoy textual (and therefore presumptive) protection at the outset, the Court simply declared that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582; *cf. Bruen*, 597 U.S. at 28 (noting "we [then] use history to determine which modern 'arms' are protected by the Second Amendment"). And just as how "[n]othing in the Second Amendment's text draws a home/public distinction," nothing in the text distinguishes between public places. *Bruen*, 597 U.S. at 32. For this reason, the Court has described the right as a "*general right* to publicly carry arms for self-defense." *Id.* at 31 (emphasis added). General rules are subject to exceptions, not the other way around. Plaintiffs' textual showing is not just consonant with *Heller* and *Bruen* – it tracks those cases exactly.

Compounding their error, Defendants then claim 'no harm, no foul' because "the Parks Ordinance only impacts small and discrete geographic areas," and in any case, Plaintiffs

"preserve an undiminished right of self-defense by not entering those places." Opp. at 20.[13] But, as Defendants' citations to two repudiated interest-balancing cases make clear, Defendants simply invite the very analysis into "the severity of the law's burden on th[e] right" that *Heller* and *Bruen* rejected. *Bruen*, 597 U.S. at 18. Yet more importantly, *Heller* already made clear that "[i]t is no answer to say ... that it is permissible to ban the possession of handguns" in one respect, "so long as" other avenues remain "allowed." *Heller*, 554 U.S. at 629. In other words, Defendants do not get to dictate just how Plaintiffs exercise their enumerated rights.[14] If Defendants wish to impose restrictions on public carry, they must comport with historical tradition.

Finally, Defendants seek to distinguish *Bruen* by claiming that "Roanoke's Park Ordinance only regulates[15] the carrying of guns in distinct geographic areas – not in the jurisdiction as a whole." Opp. at 20. But once more, Defendants contravene *Bruen*, which already found "no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department." *Bruen*, 597 U.S. at 31. Of course, Manhattan is just one place "[with]in the jurisdiction as a whole." Defendants make no attempt to reconcile their contrived distinction with *Bruen* – nor can they.

2. Defendants Misrepresent Their Historical Burden.

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[13] Applying that logic, Plaintiffs face no "[]diminished right of self-defense" if they simply stay home all day with their guns, upon their prohibition in all public places.

[14] For this reason, Defendants' demurrer that Plaintiffs still may carry other "personal safety devices" like "pepper spray" also fails. Opp. at 2 n.1. Of course, criminals do not limit themselves to pepper spray, yet Defendants are keen to subject Plaintiffs to their idea of 'safe' self-defense implements. Of course, criminals continue to carry firearms, irrespective of "sensitive place" laws, and they *use* them, irrespective of homicide laws. *See* Boas Decl. ¶14.

[15] Despite Roanoke calling its Ordinance a "regulation," it actually amounts to a total ban on carry in parks.

Defendants must proffer "distinctly similar" historical evidence and not merely that which is "relevantly similar" in their estimation. *See* Compl. ¶77; MTI at 11. Yet Defendants insist that they need only *analogize* to support their Ordinance. *See* Opp. at 21. In so doing, not only do Defendants utterly fail to engage with Plaintiffs' methodological arguments, but they also prove that "he who writes the resolved clause wins the debate,"[16] as Defendants subtly seek to relieve themselves of the heavier burden that *Bruen* requires here.

Indeed, *Bruen* recognized a difference between laws purporting to address "a general societal problem that has persisted since the 18th century" and those "implicating unprecedented societal concerns or dramatic technological changes." *Bruen*, 597 U.S. at 26, 27. The former requires a more stringent showing of "a distinctly similar historical regulation" – one that addressed the historically persistent societal issue through materially identical means. *Id.* at 26. For instance, *Heller* "exemplifie[d] this kind of straightforward historical inquiry." *Id.* at 27. Purporting to address the societal problem of urban violence, the District of Columbia flatly banned the possession of handguns within the home. *See generally Heller*, 554 U.S. 570. Surveying the "founding-era historical precedent," the *Heller* Court concluded that the Founders *never* employed such a flat ban, despite the fact that they "could have" if they had believed such a measure would have comported with the Second Amendment. *Bruen*, 597 U.S. at 27. Accordingly, past practice informed present understanding, and "the lack of a distinctly similar historical regulation addressing that problem [wa]s relevant evidence that the challenged regulation [wa]s inconsistent with the Second Amendment." *Id.* at 26. Importantly, *Heller* applied this "straightforward" approach regardless of modern handguns' proliferation, increased capacity, and greater lethality over Founding-era counterparts. In other words, these features

[16] M. Stanton Evans.

were *not* the sort of "unprecedented societal concerns" or "dramatic technological changes" warranting a departure from seeking *distinct similarity*. *Id.* at 27.

In contrast, *Bruen* contemplated future challenges to laws purporting to address societal issues "that were unimaginable at the founding." *Id.* at 28. *Because direct comparisons would be impossible* in these cases, *Bruen* noted that the "historical inquiry that courts must conduct will often involve reasoning by analogy," and that this analogical reasoning will require analysis of a purported analogue's "revelant[] similar[ity]" to the uniquely modern challenged regulation. *Id.*; *id.* at 29. In these analogical cases, *Bruen* identified "at least two metrics" to guide relevant-similarity analysis – "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. In other words, the mechanisms and motivations underlying a purported analogue must align with a modern regulation to clear the hurdle of relevancy.[17] *See, e.g.*, *id.* at 55 (rejecting surety statutes as not analogous to a ban on public carry because they "targeted only those threatening to do harm" and not all people (a different 'how')).

Based on these precedents, Plaintiffs explained that "the public carry of firearms in [Roanoke parks] implicates no 'unprecedented societal concerns or dramatic technological changes' that would warrant a loosening in analytical stringency." Compl. ¶77. Indeed, "the Founders had public land and attended public events just as we do today." *Id.* Because Defendants failed to show a Founding-era tradition of banning carry on public parkland, greens, or other such spaces, the historical analysis ends here.[18] Defendants cannot shoehorn laws

[17] Of course, the analogue still must be "well-established and representative," *id.* at 30, meaning "it is consistent with the Nation's historical tradition of firearm regulation," and not a mere "outlier[]." *Id.* at 24, 65.

[18] Moreover, Defendants make no attempt to address Plaintiffs' contrary historical showing of a robust tradition of public carry in these very locations. *See* MTI at 12. Nor do Defendants grapple with any of Plaintiffs' federal cases, which almost uniformly hold firearm prohibitions in public parks to be atextual, ahistorical, and therefore unconstitutional.

having nothing to do with banning public carry in these locations under the pretext of needing to "analogize."

3. Because Article I, § 13's Modernization Created No New Right, 1971 Is an Erroneous Temporal Focal Point.

While Defendants rightly observe that "courts should look to the understanding of the people who ratified [a constitutional] provision," they then claim that the proper analytical time period "remains open" federally, and that for Virginia, it should be 1971. Opp. at 22. Defendants are wrong on both claims.

First, while the *Bruen* Court saw no need to opine on a question which had not been presented, the methodology used there already forecloses principal reliance on any time period other than the Founding. *See, e.g.*, *Bruen*, 597 U.S. at 37 (noting "we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791"); *id.* ("19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established.'"); *id.* at 36 (noting that "because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources'"). Founding-era primacy, with 19th-century and subsequent history playing a secondary, merely confirmatory role, is no new concept. Indeed, the Court has employed this methodology in interpreting all manner of other enumerated rights. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (First Amendment Establishment Clause); *Virginia v. Moore*, 553 U.S. 164, 168 (2008) (Fourth Amendment); *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (Eighth Amendment); *Gamble v. United States*, 139 S. Ct. 1960, 1965-66 (2019) (Fifth Amendment); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020) (Sixth Amendment); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S.

Ct. 2246, 2258-59 (2020) ("[A] tradition [that] arose in the second half of the 19th century ... cannot by itself establish an early American tradition."). Contrary to Defendants' suggestion that Reconstruction still may be "the proper date" federally, Opp. at 22, the cases support no such proposition.

Likewise, Defendants' vague reference to *Bruen* "indicat[ing] that history from other time periods may also provide insight into the meaning of the Second Amendment *in certain contexts*" mischaracterizes *Bruen*'s holding. Opp. at 22 n.8 (emphasis added). Of course, Defendants fail to identify those "contexts" – perhaps for good reason. *Bruen* made clear that "19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established.'" *Bruen*, 597 U.S. at 37. Accordingly, subsequent history can only confirm the longevity of a tradition existing at the Founding, but it cannot fabricate a tradition on its own. *See Espinoza*, 140 S. Ct. at 2258-59.

And second, Defendants attack a strawman by citing *LaFave* to claim that it would "make[] no sense" to analyze § 13 according to 1791, the operative Second Amendment date. Opp. at 22. But here, Plaintiffs never argued 1791 specifically, but rather the Founding generally, when Virginia joined the Union and codified the pre-existing right in 1776. *See* Compl. ¶72; *see also* Section II.B., *supra* (explaining why the 1970s fail to inform the meaning of Virginians' pre-existing right to keep and bear arms).[19]

4. There Is No Historical Tradition to Support the Ordinance, No Matter the Date.

a. Defendants Fail to Prove a Tradition Even in 1971.

[19] Indeed, if Virginia had adopted a right to keep and bear arms *for the very first time* in 1971, one would think that would be notable enough for Virginia's own government to note publicly in an online summary of the 1971 amendments. Instead, Virginia failed to even mention § 13's modernization. *See Discover*, Libr. of Va., https://tinyurl.com/2pbufs5b (last visited May 28, 2024).

Defendants proclaim the virtues of Dillon's Rule, the government's police power, and two nonbinding legal opinion letters discussing hypothetical ordinances, before they finally identify what they purport to be 'historic twins' to the Ordinance:

> (1) a 1971 Virginia law allowing counties to prohibit the *discharge* of firearms in urban areas; (2) a 1936 prohibition on firearms in state parks; (3) a 1964 Roanoke ordinance prohibiting *minors* from carrying in public *generally*; (4) a 1953 Alexandria ordinance prohibiting "unauthorized persons" from carrying in public *generally*; (5) a 1910 Staunton ordinance prohibiting "[a]ll persons" from carrying firearms within its park; (6) an 1899 Norfolk ordinance prohibiting the *discharge* of firearms within its park; and (7) unnamed "local and state governments" prohibiting public carry in parks outside of Virginia. *See* Opp. at 23-25 & n.12.

Even with the benefit of Defendants' preferred historical time period, these laws fail to establish the widespread tradition that *Bruen* requires.

First, the 1971 Virginia urban-discharge law is no "*twin*" as Defendants claim, much less a relevantly similar *analogue* to Roanoke's total ban. Opp. at 25. Indeed, this urban-discharge law has a twin with a near-identical modern restriction codified at Va. Code § 18.2-280, which restricts willfully discharging firearms in public places.

And even if analogues were permissible in this case (they are not, *see* Section II.D.2., *supra*), this law fails *Bruen*'s "how" metric by reaching only the discharge of firearms, and not their mere possession. Moreover, this law did not extend to all parks, but rather only those urban locations which a county "*may* provide." Opp. at 24 (emphasis added). This law clearly did not "impose a comparable burden on the right of armed self-defense." *Bruen*, 597 U.S. at 29. Finally, because this law simply allowed counties to enact prohibitions, there is no telling how

many counties actually did so, or how many declined to do so, or for what reason.[20] Defendants do not say, yet it was their burden.

Second, the 1936 Virginia state-parks prohibition also fails *Bruen*'s "how." Despite appearing similar to the Ordinance's parks prohibition at first glance, the 1936 law's enforcement mechanism pales in comparison to the Ordinance's criminal penalties. *See Heller*, 554 U.S. at 633-34 (analyzing disparate criminal penalties is a valid analogical tool); *see also id.* ("Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him."). Indeed, while violations of the Ordinance constitute Class 1 misdemeanors punishable by up to a year's imprisonment, a fine of up to $2,500, or both (Compl. ¶20), the 1936 law provided a comparable slap on the wrist – park personnel were instructed to "secure the cooperation of the public by *courteous explanation* ... but should it become necessary to enforce regulations when courteous methods have failed, *firmness* is expected."[21] In other words, the 1936 law was utterly toothless, perhaps enforceable via trespass only after a park visitor refused to leave. This sort of enforcement would not have discouraged public carry to the same degree that the Ordinance does now. *See Heller*, 554 U.S. at 633-34. Moreover, Defendants offer no evidence that the 1936 law ever *was* enforced to any appreciable degree. *See Bruen*, 597 U.S. at 58 ("Besides, respondents offer little evidence that authorities ever enforced surety laws."). To the contrary, enforcement is no longer possible, as the state-park prohibitions on concealed and open carry were lifted in 2002 and 2012, respectively.[22] *See id.* at 69 (rejecting "transitory" laws as "deserv[ing] little weight").

[20] For example, perhaps some counties viewed the prohibition as unconstitutional.
[21] III Digest of Laws Relating to State Parks 396 (1936), https://tinyurl.com/57teehsd (emphases added).
[22] *VCDL Accomplishments*, Va. Citizens Def. League, https://tinyurl.com/2s42pa3a (last visited May 28, 2024).

Third, the 1964 Roanoke ordinance fails *Bruen*'s "how" because it prohibited only minors from carrying in public generally. Plaintiffs are *not* minors, as evidenced by their eligibility to possess firearms and valid Virginia Concealed Handgun Permits. Compl. ¶¶6-8. Accordingly, the 1964 ordinance is both too narrow (reaching only a subset of the population, which cannot even possess firearms) but also too broad (reaching all public carry, not just in parks). Finally, preventing youth violence ostensibly poses a different "why" than the Ordinance's more general purported rationale.

Fourth, the 1953 Alexandria ordinance similarly fails *Bruen*'s "how" because it also reached all public carry, this time by any "unauthorized person." Defendants do not offer any evidence as to how one might have become "unauthorized," or what that term even meant (*e.g.*, prohibited persons, non-licensees). But to the extent this ordinance simply prohibited all public carry, it would have been unconstitutional under *Bruen*. *See also Bruen*, 597 U.S. at 69 (analogues ultimately "held unconstitutional" are unavailing).

Fifth, the 1910 Staunton ordinance appears to be Defendants' sole historical law matching the Ordinance's "how" and "why." See Opp. at 25 n.12 ("All persons are forbidden ... to carry firearms ... within [the park]."). But this ordinance is, by definition, an outlier, as the Court "doubt[ed] that *three* colonial regulations could suffice to show a tradition of public-carry regulation," much less *one* regulation here. *Bruen*, 597 U.S. at 46; *see also id.* at 67 ("Put simply, these western restrictions were irrelevant to more than 99% of the American population."). Indeed, an ordinance affecting just one city cannot represent a Virginian tradition as to prohibiting carry in public parks. Finally, the penalty for a violation was a fine of "not less than one nor more than twenty-five dollars for each offence," with subsequent offenses subject to

a heightened minimum fine[23] – not at all comparable to the Roanoke Ordinance's much more severe discouragement of public carry.

Sixth, the 1899 Norfolk ordinance fails *Bruen*'s "how" for a similar reason as the 1971 discharge law discussed above – it prohibited *discharge* within parks, and not mere possession. *See* Opp. at 25 n.12.

Seventh, Defendants claim "Virginia was not alone" in passing these sorts of restrictions. *Id.* at 25. Not only do Defendants fail to identify any laws they may have had in mind, but none of these laws would even be relevant in illuminating the scope of a *Virginia* constitutional right. *See Bruen*, 597 U.S. at 60 ("Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden.").

All told, Defendants offer only *one* ordinance from *one* Virginia city matching the Roanoke Ordinance. This is no evidence of a historical tradition under *Bruen*, even in 1971.

b. Defendants Fail to Prove a Founding-Era Tradition.

Defendants begin by citing an out-of-circuit case for the conclusory proposition that "there is 'a well-established and representative tradition of regulating firearms in public forums and quintessentially crowded places....'" Opp. at 26 (quoting *Antonyuk v. Chiumento*, 89 F.4th 271, 356 (2d Cir. 2023) (petition for certiorari pending)). But this claim ignores *Bruen*'s warning that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly." *Bruen*, 597 U.S. at 31. Defendants' purported analogues fare no better.

First, Defendants point to 1633, 1680, and 1723 Virginia laws banning the sale of firearms to Indians and prohibiting "any negroe," "other slave," "mulatto, or Indian" from

[23] The Code of the City of Staunton, Virginia § 160, at 119 (1910), https://tinyurl.com/yh6c7bsj.

possessing firearms, respectively. Opp. at 26 n.13. How these racist laws bear any resemblance to a prohibition on *public carry in parks* is anyone's guess.

Second, Defendants offer a 1655 Virginia law prohibiting the discharge of firearms "at drinkeing." Opp. at 27 n.14. This might be relevant if Plaintiffs were challenging Va. Code § 18.2-308.012 (prohibiting carrying in a public place while intoxicated), but Plaintiffs are not challenging a firearm regulation concerning intoxication.

Third, Defendants cite the 1328 Statute of Northampton for an apparent prohibition of "rid[ing] armed" in "Fairs" and "Markets." Opp. at 27. But "English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution," and the Statute of Northampton "obviously did not contemplate handguns, given they did not appear in Europe until about the mid-1500s." *Bruen*, 597 U.S. at 35, 41. Moreover, Defendants note that the Statute "'particularly prohibited' the 'offence of riding or going armed, with dangerous or unusual weapons.'" Opp. at 27 n.15. But as the Court already observed, "[w]hatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today. ... Thus, even if these colonial laws prohibited the carrying of handguns[,] ... they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Bruen*, 597 U.S. at 47.

Fourth, while accusing the *Bruen* Court of failing to properly *understand* the Statute of Northampton, Defendants draw attention to 1403 and 1534 English laws criminalizing affrays[24] and the possession of medieval weapons, respectively. Opp. at 27 n.16. How these laws bear any resemblance to a targeted prohibition on public carry in parks, Defendants leave unanswered.

[24] Defined as "a fight in a public place that disturbs the peace." *Affray*, Merriam-Webster, https://tinyurl.com/2s4zphnc (last visited May 28, 2024).

Finally, Defendants call attention to Virginia's 1786 enactment "Forbidding and Punishing Affrays." Opp. at 28. But Defendants conveniently omit a crucial element – the statute only punished going armed "*in terror of the Country*," which might be a relevant analogue to Virginia's modern prohibition on brandishing, but not Roanoke's park ban, which reaches *all* carry, not just that which causes "terror." *Bruen*, 597 U.S. at 49 (emphasis added); *see also id.* at 50 ("requir[ing] something more than merely carrying a firearm in public").

At bottom, Defendants point to not one Founding-era law prohibiting the simple possession of firearms in public parks, or any place remotely analogous. Such failure is dispositive, and no amount of analogical obscurantism can compensate. Accordingly, the Ordinance is flatly unconstitutional.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH IN PLAINTIFFS' FAVOR.

Putting to work their intentional obfuscation of *Bruen*'s holdings, Defendants ask this Court to interest-balance – exactly what the *Bruen* majority repudiated. *Bruen*, 597 U.S. at 22. Claiming that "[t]here is a significant public interest in reducing the risk of gun violence in places where vulnerable populations are found" and relying on declarations positing that "carrying guns increases rates of gun violence," what Defendants truly seek is to undo the constitutional protection for firearms, essentially bemoaning that 'guns are bad.' Opp. at 31.[25]

In advancing this plainly anti-self-defense position, Defendants purport "to preserve the public's ability to use the democratic process to set rules for public property" and ensure "law enforcement's ability to effectively protect its citizens." *Id.* But no one has a legitimate interest

[25] Indeed, under Defendants' theory, it is difficult to imagine a gun-rights case where temporary injunctive relief would *ever* be appropriate, as *some*one, *some*where, *might* commit a crime with a gun, at *some* time. But this Court need not indulge such speculation, as it is not the law. *See* MTI at 13-15.

in passing unconstitutional laws,[26] and "[t]he duty of a law enforcement officer to preserve peace and arrest lawbreakers is one which the officer owes to the public generally, rather than to particular individuals, and the breach of such duty creates no liability on the part of the officer to an individual who is damaged as a result of the officer's failure to perform his duty." *Whitaker v. Estate of Highsmith*, 12 Va. Cir. 490, 494 (Henrico Cnty. 1982). In other words, Plaintiffs are very much on their own in Roanoke parks, and their personal defense is *their* responsibility. Yet the age-old maxim that 'when seconds count, the police are minutes away' remains true, and Defendants have deprived Plaintiffs of the most effective, popular, and constitutionally protected means of defending themselves. *See Heller*, 554 U.S. at 629 ("[H]andguns are the most popular weapon chosen by Americans for self-defense...."). Accordingly, Plaintiffs suffer much greater harm absent relief than whatever entirely speculative and 'democratic' harms Defendants purport to face should an injunction issue.

Finally, Defendants' arguments against the equitable factors ignore one of the most important utilities of a constitution, which is to protect as sacred even rights that might be politically unpopular. Indeed, "[t]he right to keep and bear arms ... is not the only constitutional right that has controversial public safety implications," yet the Constitution protects it all the same. *McDonald*, 561 U.S. at 783. Likewise, "[w]ithout promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *W. Va. State Bd. of Educ. v Barnette*, 319 U.S. 624, 636-37 (1943). And as *Bruen* noted, "[a]

[26] *See* MTI at 14-15 (collecting cases).

constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Bruen*, 597 U.S. at 23.

Here, despite Defendants' apparent belief that firearms are troublesome, no matter in whose hands, Plaintiffs nonetheless have a constitutionally protected right to carry their weapons for self-protection. Far from sitting on their rights, Plaintiffs gave Roanoke time to do what it said prior to suit and to adjust the Ordinance to conform with *Stickley*. Unfortunately, with City inaction and continued danger in parks, *as evidenced by Defendants' own declarations*, Plaintiffs were forced to bring suit to vindicate their rights. *See* Boas Decl. ¶14 (explaining that, even after Roanoke's Ordinance was in effect, "[o]n November 8, 2023, the program was forced to go on lockdown after gunshots were fired in Eureka Park").

For the aforementioned reasons, with ongoing danger to Plaintiffs, who wish to carry the best tools to protect themselves in Roanoke parks, and with recognition that the Ordinance has not stopped criminal behavior in parks, the balance of equities and public interest weigh overwhelmingly in Plaintiffs' favor.

IV. THE ORGANIZATIONAL PLAINTIFFS HAVE STANDING.

Although Defendants' brief does not seek dismissal of the Organizational Plaintiffs (GOA, GOF, and VCDL), footnote 2 of Defendants' brief questions whether the Organizational Plaintiffs have standing in this case.

The Organizational Plaintiffs have representational standing in this case to advance the interests of their members in the City of Roanoke and throughout Virginia, as they easily meet the three-prong test for representational standing set forth in *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977), and adopted by the Court of Appeals of Virginia. As a general matter, "[t]he point of standing is to ensure that the person who asserts a position has a

substantial legal right to do so and that his rights will be affected by the disposition of the case." *Cupp v. Bd. of Supervisors of Fairfax Cnty.*, 227 Va. 580, 589 (1984). Further, a litigant has standing if he has a "sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Id.*

In a line of cases dating back to at least 2000, the Court of Appeals has expressly concluded that broad "representational standing does lie in the Commonwealth." *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd.*, 56 Va. App. 546, 549-50 (2010); *see also Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd.*, 46 Va. App. 104, 112, 114 (2005) (noting that "[f]ederal courts have long recognized representational standing," and adopting the "three-prong test for associational standing" developed in *Hunt*). Under the *Hunt* test adopted by the Court of Appeals of Virginia, a party asserting representational standing must show that (a) at least one of the organization's members would otherwise have standing to sue in their own right, (b) the interests the organization seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit. *See* 46 Va. App. at 114.

The Organizational Plaintiffs easily clear the first two hurdles, as their pleadings and affidavits establish that they have members affected by the challenged Ordinance, and their organizational purposes are germane to protecting the right to carry firearms. As to the third prong, the Organizational Plaintiffs have a named member participating (*see* Affidavit of Plaintiff Maynard Keller, Jr.) and their own affidavits affirm that they have many other affected members. Regardless, the claims asserted and relief requested do not require any particular member to participate, as the case seeks a blanket declaration that the challenged provisions of the Ordinance are unconstitutional, along with injunctive relief as to all persons.

In addition to recognition from the Court of Appeals, multiple circuit courts in Virginia have also recently recognized representational standing in similar declaratory judgment cases. The Office of the Attorney General of Virginia unsuccessfully raised the same arguments now made by Defendants, against the same Organizational Plaintiffs, in *Wilson v. Settle*, No. CL20-582 (Lynchburg Cir. Ct.), at multiple stages of the proceedings, in a case seeking similar declaratory and injunctive relief against an unconstitutional firearm regulation. The Lynchburg Circuit Court consistently held that these same Organizational Plaintiffs had standing to represent the interests of their members, and most recently denied the Attorney General's motion for partial summary judgment with respect to standing by order entered on March 8, 2024, following full briefing and argument by the parties. *See* Order, Exhibit "B."

Furthermore, in 2018, the Norfolk Circuit Court concluded that "an organization [] has standing to seek relief as long as at least one [affected person] is a member" of the organization. *Freemason St. Area Ass'n v. City of Norfolk*, 100 Va. Cir. 172, 181 (Norfolk 2018). There, the suit underlying the request for preliminary relief was a petition for declaratory judgment. The court explained, "[a] plaintiff has standing to bring a declaratory judgment proceeding if he has 'a justiciable interest' in the subject matter of the litigation, either in his own right or in a representative capacity." *Id.* at 180 (quoting *Bd. of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 223 (1981)). Under Virginia's Declaratory Judgment Act, the Court has the power to issue declaratory judgments in "cases of actual controversy" and in "instances of actual antagonistic assertion and denial of right." Va. Code § 8.01-184. This statute is remedial and is to be "liberally interpreted and administered with a view to making the courts more serviceable to the people." *Id.* § 8.01-191.

Finally, even should this Court determine representational standing is lacking, the Organizational Plaintiffs separately have *organizational* standing in this unique matter. Recently, the Richmond Circuit Court explained that "an organization has 'direct' or 'individual' standing when the organization itself suffers injury." *Va. Student Power Network v. City of Richmond*, 107 Va. Cir. 137, 142 (Richmond 2021) (citing *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013)). The affidavits from both VCDL and GOA/GOF establish that these organizations benefit from gatherings in City parks, unless their members are told they cannot carry firearms. *See* GOA/GOF Affidavit of Erich Pratt ¶¶14-18; VCDL Affidavit of Philip Van Cleave ¶¶14, 16-18. Here, with Roanoke banning firearms in parks, both organizations are deprived of an affordable meeting place that their members would actually use. Because these Organizational Plaintiffs suffer harm directly, they have organizational standing to bring this challenge.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Temporary Injunction.

Respectfully Submitted,

PLAINTIFFS

BY: 

COUNSEL

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CERTIFICATE OF SERVICE

In accordance with Va. Code § 8.01-629, the undersigned certifies that, on May 28, 2024, a true and accurate copy of the foregoing Reply to Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Injunction was mailed to the following address:

VIA FIRST CLASS MAIL POSTAGE PREPAID TO:

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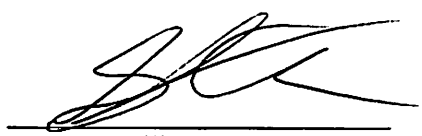

Date: 5/28/24

Gilbert Ambler
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Exhibit "A"

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December 28, 2022

Gilbert J. Ambler, Esquire
Ambler Law Offices, LLC
20 S. Braddock Street
Winchester, VA 22601

Re: Your letter dated November 30, 2022 regarding
Roanoke City Code Sec. 24-2.1 – Prohibition of Firearms on City Property

Dear Mr. Ambler:

I am in receipt of your letter dated November 30, 2022 regarding the City of Roanoke's ordinance prohibiting firearms on certain City properties. I appreciate you alerting me to the decision made by the Circuit Court for the City of Winchester in *Stickley v. City of Winchester*. I have reviewed the Circuit Court's opinion granting a preliminary injunction. I note that this case is currently set for a two-day trial on July 12-13, 2023. After conferring with my client and given the status of this case, the City of Roanoke is going to wait until the *Stickley* case is concluded prior to taking any formal action. It is our intent that once a final decision is reached in the *Stickley* case, the City will take the appropriate action necessary to ensure that it is in compliance with the law.

Should you have any questions or wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,

Timothy R. Spencer
City Attorney

TRS/lsc
c: Hon. Sherman P. Lea, Sr., Mayor
Robert Cowell, Jr., City Manager

Exhibit "B"

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

RAUL WILSON, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CL20-582
	)	
COLONEL GARY T. SETTLE, in his Official Capacity as Superintendent of the Virginia State Police,	)	
	)	
Defendant.	)	
	)	

ORDER

On February 21, 2024, the Parties, by counsel, came before the Court to be heard on Defendant's Motion for Partial Summary Judgment. Upon consideration of the pleadings and memoranda of the parties, the arguments of counsel and the record herein, for the reasons set forth by the Court on the record, it is hereby ADJUDGED and ORDERED that:

1. Defendant's Motion for Partial Summary Judgment is GRANTED in part against Plaintiffs Wilson and Lowman insofar as they no longer have standing to pursue any claim before this Court specifically pertaining to private handgun sellers and/or buyers who are between the ages of 18 and 20 years old. For avoidance of doubt, the claims of Plaintiffs Wilson and Lowman as to the constitutionality of the challenged Act generally, under Article I, § 13 of the Constitution of Virginia, remain pending before the Court.

2. Defendant's Motion for Partial Summary Judgment is DENIED in part as the Court finds that Plaintiffs Gun Owners of America, Inc., Gun Owners Foundation, and Virginia Citizens Defense League ("Organizational Plaintiffs") have representational standing to pursue

all claims remaining before the Court.

3. The Temporary Injunction previously ordered by this Court (pertaining to purchases and sales of handguns for purchasers aged 18-20 years) is hereby extended such that it will remain in place until the conclusion of this matter, or until such time the Court may dissolve, or otherwise modify, the Temporary Injunction by further order.

Entered: 3/8/24

F. Patrick Yeatts, Judge

Seen and objected to as to the individual Plaintiffs, for the reasons set forth in the record:

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Counsel for Plaintiffs

SEEN AND OBJECTED TO: For the reasons set forth in Defendant's pleadings, briefings, oral argument, and in objections to previous orders entered in this matter:

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A TRUE COPY – TESTE
K. Todd Swisher, Clerk
BY _____, DC
Electronic Certification Made
Pursuant to § 17.1-258.3:2