VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

MARK STICKLEY, et al.,

Plaintiffs,

v. **Case No. CL21-206**

THE CITY OF WINCHESTER, et al.,

Defendants.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

This Supplemental Memorandum is filed pursuant to emailed instructions from the Court on June 29, 2022 asking "whether or not the ordinances are constitutional in light of Bruen ... assuming ... the Virginia General Assembly intended Article I Section 13 of the Virginia Constitution to grant the same rights as the Second Amendment."

INTRODUCTION

Under a novel grant of authority from Va. Code § 15.2-915(E), the City of Winchester adopted City Code § 16-34 (hereinafter "the Ordinance") in 2021 to forbid the peaceable possession, carrying, and transportation of firearms and ammunition in a wide range of public places not traditionally considered to be "sensitive." Plaintiffs filed suit soon after, challenging the constitutionality of select provisions of the Ordinance under the Virginia Constitution's Bill of Rights. At that time, Plaintiffs urged this Court to reject judicially-created "interest balancing" tests and instead analyze their Article I, Section 13 claim using the "text, history, and tradition" method of review adopted in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See* Compl. ¶¶ 69–72.

Since then, the U.S. Supreme Court expressly reaffirmed the "text, history, and tradition" framework in *New York State Rifle & Pistol Ass'n v. Bruen* as the only appropriate method to review Second Amendment challenges, expressly rejecting other proposed "levels of scrutiny" and "balancing tests."[1] Additionally, the City recently has all but acknowledged that portions of the challenged Ordinance are at least vague, requiring amendment.[2] Plaintiffs urge this Court to apply the *Heller-Bruen* test in this case, which is designed to seek out the "authorial intent" of the framers of a constitutional provision, and apply it to a modern law. Although this case rests on Plaintiffs' challenge based on Virginia Constitution Article I, Section 13, the same methodology is the best available approach, preserving fidelity to the text and intent of those who ratified it, rather than "empowering" judges (*Heller* at 634) to sanction infringements they believe are justified. Under this test, Defendants are unable to meet their heavy burden of justifying the Ordinance's restrictions via the constitutional text, its context, or through a historical showing of direct or analogous regulation. Under the Virginia Constitution, the challenged Ordinance provisions are plainly invalid.

I. CONSTITUTIONAL BACKGROUND

As amended in 1971, Article I, Section 13 of the Virginia Constitution now reads, in pertinent part, that "therefore, the right of the people to keep and bear arms shall not be infringed . . . ." The Virginia Supreme Court has previously analyzed Article I, Section 13 and determined that the Virginia constitution provides no lesser rights than the Second Amendment. *Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 134, 704 S.E.2d 365, 369 (2011).

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[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843, 2022 U.S. LEXIS 3055, at *20–21 (June 23, 2022).

[2] *Compare* Brian Brehm, *City Council Considering Changes to Winchester's Gun Ban*, WINCHESTER STAR (June 29, 2022), https://bit.ly/3NJUVYG (emphasis added) (reporting that at a recent City Council meeting, City Attorney Melisa Michelsen "said lifting the ban at permitted events would *eliminate any confusion* citizens may have about when and where they can carry concealed firearms in Winchester"), *with* May 25, 2022 Hr'g Tr. at 49:1–50:8 (argument by Counsel for Defendants) ("I would disagree with their argument that that section is vague. . . . They say well, it's difficult to determine, quote, what would otherwise require a permit, end quote. No, it's not.").

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).]

See also Richmond Newspapers, Inc. v. Com., 222 Va. 574, 281 S.E.2d 915 (1981)

Therefore, although *Bruen*'s analysis and holdings involved the Second and Fourteenth Amendments, 2022 U.S. LEXIS 3055, at *13, *Bruen* demonstrates how another court interprets Second Amendment language highly similar to Article I, Section 13.[3]

II. STANDARD OF REVIEW

Bruen reaffirms *Heller*'s rejection of judicial interest balancing. Specifically, *Bruen* rejects the contrived two-step interest balancing test implemented by most federal courts of appeals in *Heller*'s wake:

> *Heller* and *McDonald* expressly 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.'" We declined to engage in means-end scrutiny because "[t]he very enumeration of the right takes out of the hands of government—even

[3] However, it should be understood, and Plaintiffs reiterate their allegations in ¶¶ 63 and 65 of the Complaint, that they do not bring this action under the Second Amendment of the United States Constitution, and their analysis of cases arising under the Second Amendment is presented solely to allow this Court to see how other courts have resolved similar issues involving similar text. Plaintiffs do not seek any determination by the Court, of any aspect of this case, under the Second Amendment to the U.S. Constitution, but when discussing the right to keep and bear arms, lay a claim only under Article I, § 13 of the Constitution of Virginia. However, interpretations of the Second Amendment's similar language by other courts is certainly persuasive. A January 13, 1993 Virginia Attorney General legal opinion concluded that it is "clear that the 'right to bear arms' language of Article I, § 13 ... tracks the Second Amendment ... and ... judicial interpretation of the Second Amendment thus applies equally to Article I, § 13." 1993 Report of the Attorney General at 16 (Jan. 13, 1993). Likewise, the Supreme Court of Virginia has more recently noted that "provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning," concluding that the state provision "is coextensive with the rights provided by the Second Amendment ... concerning all issues in the instant case." *Id.* at *133.

> the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." We then concluded: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."

Id. at *27–28 (alteration in original) (citations omitted). Indeed, "[t]he Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* at *31 (citation omitted). These principles may have been written in the context of the Second Amendment, but they reflect the proper approach to take in interpreting and applying all constitutional protections, including Article I, Section 13.

Because the application of intermediate—and even *strict*—scrutiny is an impermissible usurpation of the People's foundational interest balancing, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at *23. That inquiry proceeds as follows:

> [W]hen 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. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at *20–21 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Under this test, initial analysis of the operative constitutional amendment's text requires an examination of whether 1) Plaintiffs are part of "the people" protected by the amendment, 2) the weapons in question are in fact "arms" protected by the amendment, and 3) the regulated conduct falls under the activities "keep and bear." *See id.* at *39–41; VA. CONST. art. I, § 13. First, the individual plaintiffs here are U.S. citizens, and part of the polity. Second, in cases

where handguns are subjected to regulation, courts routinely find them to be "arms," because they are "the quintessential self-defense weapon," and they easily meet the standard of being "typically possessed by law-abiding citizens for lawful purposes" or "in common use," without any need for further analysis. *See Heller*, 554 U.S. at 625–27, 629; *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Bruen*, 2022 U.S. LEXIS 3055, at *39 (citation omitted) ("It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects. Nor does any party dispute that handguns are weapons 'in common use' today for self-defense."). Third, the plaintiffs in this case seek to "bear" arms in public, clearly a protected activity. *See Heller* at 584 ("[a]t the time of the founding, as now, to 'bear' meant to 'carry,' ... 'upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.'"); *Bruen* at *6 (explicitly holding that the "definition of 'bear' naturally encompasses public carry.").

As Plaintiffs have shown that their conduct falls under Article I, Section 13's plain text, Defendants bear the burden of justifying their regulation by "affirmatively prov[ing] that [the] firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 2022 U.S. LEXIS 3055, at *23. In placing this burden on the government, this test "requires courts to assess whether modern firearms regulations are consistent with" the operative constitutional amendment's "text and historical understanding," *id.* at *31–32, meaning courts must examine the *original public understanding* of the right when it was adopted. *See id.* at *42 (quoting *Heller*, 554 U.S. at 634–35) ("[W]hen it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*'"). In doing so,

courts must consider whether the challenged regulation finds constitutional support from directly related or analogous historical regulation from that time, which would evidence adoption-era acceptance of the regulation as not infringing on the pre-existing right to keep and bear arms. *See id.* at *32–39. In assessing the propriety of historical analogues, if any, *Heller* and *McDonald* guide courts with "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at *36.

III. GOVERNING PRINCIPLES

Prior to applying the "text, history, and tradition" test to Plaintiffs' Article I, Section 13 claim, several key observations and holdings from *Bruen* are persuasive. First, the Second and Fourteenth Amendments unequivocally "protect an individual's right to carry a handgun for self-defense outside the home," *id.* at *13, and "individual self-defense is 'the *central component*' of the . . . right" to keep and bear arms. *Id.* at *36 (quoting *McDonald*, 561 U.S. at 767). Next, there is some historical tradition of governmental attenuation of the *manner* of public carry—particularly where the government is exercising the authority of a proprietor, such as at a courthouse or a jail, secure locations devoted to a specific governmental purpose—but public carry of arms cannot be prohibited altogether in any place simply because it is owned, controlled, or managed by the government. *See id.* at *74–75. Finally, a "sensitive place" is not just any "place[] where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." *Id.* at *38. In fact, the *Bruen* Court categorically rejected New York's attempt 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." *Id.* at *38–39. Rather, the "sensitive places" doctrine, though relatively undeveloped during the

ratification era, nevertheless has a quite narrow application.[4] As the *Bruen* Court underscored, "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. Respondents' argument would in effect exempt cities from the *Second Amendment* and would eviscerate the general right to publicly carry arms for self-defense." *Id.* at *38.

At a *minimum*, Article I, Section 13 guarantees the right of the average, law-abiding person to carry a handgun in public for self-defense, and certainly that extends to ordinary, nonsensitive public places where people congregate. Winchester cannot choose to prohibit carrying handguns in nonsensitive public places like city parks, recreation centers, and public events.

IV. APPLICATION

1. Plain-Text Presumption

Plaintiffs' restricted conduct easily earns a presumption of constitutional protection under Article I, Section 13's plain text. Plaintiffs belong to the "people" contemplated by the amendment—they are law-abiding individual citizens and businesses (comprised of individuals) with valid Virginia Concealed Handgun Permits who live in, work in, or otherwise frequent Winchester. *See* Compl. ¶¶ 7–11. The "arms" they seek to carry in areas restricted by the Ordinance are undoubtedly "arms" within the meaning of Article I, Section 13—handguns are not only in common use but are specifically permitted by Virginia's carry licensing scheme. *See Bruen*, 2022 U.S. LEXIS 3055, at *39; Va. Code § 18.2-308.01. Finally, Plaintiffs' regulated conduct—carrying common firearms in public for self-defense and other lawful purposes—falls squarely within the amendment's plain text. *See Bruen*, 2022 U.S. LEXIS 3055, at *40

[4] Plaintiffs have not at this time challenged Winchester Code § 16-34(a)(1) concerning government buildings. *See* Compl. ¶ 1.

("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms. . . . Th[e] definition of 'bear' naturally encompasses public carry. . . To confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections."). *Compare* U.S. CONST. amend II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."), *with* VA. CONST. art. I, § 13 ("That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed . . . .").

2. Historical Justification

Having made their showing of presumptive constitutional protection, bolstered by the principles drawn from *Bruen*, Plaintiffs bear no further burden in defending their conduct as constitutionally protected. Rather, Defendants bear the burden of justifying the Ordinance's constitutionality by identifying a historical tradition of restricting the people's rights to carry arms for self-defense in city parks, recreation centers, and public events altogether. Of course, there is no such tradition and no available analogue to warrant such an onerous restriction—only unambiguous language to the contrary from the Virginia Supreme Court. *See DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011) (emphasis added) ("Further, the statutory structure establishing GMU is indicative of the General Assembly's recognition that it is a sensitive place, and it is also consistent with the traditional understanding of a university. *Unlike a public street or park, a university traditionally has not been open to the general public* . . . .").

Despite the heavy burden of justification being on Defendants, Plaintiffs would be remiss without turning this Court's attention to Virginia's longstanding tradition of respecting the right

to keep and bear arms in nonsensitive public places. Because "not all history is created equal," *Bruen*, 2022 U.S. LEXIS 3055, at *42, an examination of the original public understanding of Article I, Section 13 must focus on the leadup to and adoption of the Virginia Bill of Rights. However, the interplay between historical regulations and the amendment since then is instructive, as is the amendment's most recent revision in 1971, when the General Assembly added the clause, "therefore, the right of the people to keep and bear arms shall not be infringed."[5]

The pre-existing, natural right to keep and bear arms has never been construed in Virginia to permit outright bans on the carrying of firearms in public areas like parks and social gatherings. On the contrary, Virginians have enjoyed a perpetual, "written guarantee of a right to arms" since the early 1600s,[6] predating even their English counterparts across the Atlantic: "Although the English who lived in England had no written guarantee of arms rights until 1689, the Virginians had their guarantees from the start: to bring arms for their use and defense, and to import arms for 'defence or otherwise'—such as hunting." Kopel & Greenlee, *supra* note 5, at 228 n.100. In fact, early Virginians were *mandated* to carry arms in certain public places. *Id.* at 232 nn.108–09 (citing a 1623 statute "providing '[t]hat no man go or send abroad without a sufficient partie will armed,'" 1632 statutes "providing that 'ALL men that are fittinge to beare armes, shall bringe their pieces to the church,'" and that "masters of every family shall bring with them to church on Sundays one fixed and serviceable gun with sufficient powder and shott," as well as subsequent 1643 and 1676 statutes echoing the same requirement for churchgoers).

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[5] Stephen P. Halbrook, *The Right to Bear Arms in the Virginia Constitution and the Second Amendment: Historical Development and Precedent in Virginia and the Fourth Circuit*, 8 LIBERTY UNIV. L. REV. 619, 619 (2014).

[6] David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 227 (2018).

The 18th century saw the codification of a right to keep and bear arms in the Virginia Declaration of Rights of 1776, which provided "[t]hat a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state." Halbrook, *supra* note 4, at 620. The Declaration of Rights did not qualify the right as inapplicable in certain commonly traversed public places; it was unequivocally broad in its locational protection. *See id.* Instead, early Virginians understood the right to public carry to be inapplicable in cases of deliberate terrorism; 1736 and 1786 laws respectively provided that "a constable 'may take away Arms from such who ride, or go, offensively armed, in Terror of the People'" and that people were forbidden to "go nor ride armed by night or by day, in fairs or markets, or in other places, in terror of the Country." Kopel & Greenlee, *supra* note 5, at 240. Today's mothers who wish to carry concealed firearms to protect their children at Winchester parks are a far cry from "terroristic" and "offensive" marauders. *See* Compl. ¶¶ 39–43. Little—if any—evidence exists "showing that, in the early 18th century or after, the mere public carrying of a handgun would terrify people. In fact, the opposite seems to have been true," as "there is little evidence of an early American practice of regulating public carry by the general public" anywhere. *Bruen*, 2022 U.S. LEXIS 3055, at *56–57.

Aside from what amounted to early anti-terrorism laws, carry restrictions in 18th-century Virginia did not categorically prohibit the carrying of arms in areas like those in Winchester, but instead channeled the racism of the era to prohibit slaves from keeping or bearing weapons altogether, "under penalty of 39 lashes." Halbrook, *supra* note 4, at 623. Even free African Americans faced onerous restrictions, limited to owning only "one gun, powder and shot." *Id.* The oppression of African Americans would continue into the Reconstruction era and beyond, when slave code enforcement eventually made way for onerous pistol taxes, which

disproportionately targeted minorities and those of modest means. *Id.* at 623–25. Such taxes would later be ruled unconstitutional. *Id.* at 625.

It was not until 1838, well after the Founding era, that Virginia enacted a general prohibition on the carrying of concealed weapons: "'If a free person, habitually, carry about his person hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, he shall be fined fifty dollars. The informer shall have one half of such fine.' Law enforcement officers were not exempt . . . ." *Id.* at 623. However, not even this restriction was location-dependent, and it left the right to open carry undisturbed.

Historically in Virginia, the only categorical prohibitions on carrying arms in any manner were targeted against African Americans. Should Winchester attempt to justify a categorical prohibition of carrying arms only in select public areas today, the only historical justification available would be a twisted and selective reapplication of the slave codes against all citizens within the bounds of city parks, recreation centers, and public events. The Ordinance and its enabling statute have no precedent in Virginia and are repugnant to Article I, Section 13.

Prior to the 1971 constitutional amendment and in response to concerns over repeated encroachments on the right to keep and bear arms, the General Assembly passed a resolution condemning any future attempts to curtail what it characterized as "the right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States . . . which . . . is an inalienable part of our citizens' heritage in this State." Halbrook, *supra* note 4, at 627. In stark contrast to the legislative priorities of today, the General Assembly "[r]esolved . . . that any action taken by the General Assembly of Virginia to interfere with this right would strike at the basic liberty of our citizens" and "that no agency of this State or of any political subdivision should be given any power or seek any power which would prohibit the purchase or possession

of firearms by any citizen of good standing for the purpose of personal defense." *Id.* Personal defense, of course, is not limited to just within the home:

> Moreover, confining the right to "bear" arms to the home would make little sense given that self-defense is "the *central component* of the [Second Amendment] right itself." After all, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," and confrontation can surely take place outside the home.
>
> Although we remarked in *Heller* that the need for armed self-defense is perhaps "most acute" in the home, we did not suggest that the need was insignificant elsewhere. Many Americans hazard greater danger outside the home than in it.

Bruen, 2022 U.S. LEXIS 3055, at *40–41 (alteration in original) (citations omitted).

When it came time to debate amendments to the Virginia Constitution, "Senator M. M. Long explained that the proposal would protect 'the sportsmen of this State,' that the right 'is guaranteed to the citizens by the second amendment,'" while another Senator marveled that the language concerning the right "to keep and bear arms" had not already been included. Halbrook, *supra* note 4, at 627–28. As Virginia Supreme Court Justice McCullough noted, "[t]he purpose of this change, constitutional debates reveal, was to align the Virginia Constitution with an individual rights reading of the Second Amendment."[7] Further, "[d]uring both the House and the Senate debates . . . legislators questioning this change received assurances by proponents of the change that the added language would not" upend existing legislation. McCullough, *supra* note 6, at 231–32. The Senate's adoption of the amendment was decisive; it passed "by a vote of thirty-one in favor to one opposed." *Id.* at 231.

With a pattern of unequivocal legislative intent that the Second Amendment and Article I, Section 13 are practically synonymous, "the people of Virginia overwhelmingly voted to ratify"

[7] 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).

the amendments with 71.8 percent voting in favor.[8] In the intervening years since the 1971 amendment, even individual-rights skeptics acknowledged that "the Virginia guarantee would protect the same rights as the Second Amendment," differing only as to whether this synonymity contemplated individual or collective rights, which has since been settled. Halbrook, *supra* note 4, at 628–29; *see Heller*, 554 U.S. at 592. Consequently, the 1971 amendment served only to acknowledge the broad protection guaranteed by Article I, Section 13 as *at least* equivalent to that of the Second Amendment; its adoption did not mark a sea change in interpretation or fundamentally disturb the pre-existing original public understanding of the rights protected.

V. CONCLUSION

The approach used by the U.S. Supreme Court to ascertain the original public meaning of the Second Amendment would be the best approach for this Court to use to ascertain the original public meaning of Article I, Section 13. Under that approach, neither the Winchester City Ordinance nor the state's enabling statute can stand.

[8] *The 1971 Constitution: Real Change Made in the Lives of Virginians*, LIBR. OF VA., https://bit.ly/3ycPb3C (last visited July 8, 2022).

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, as well as emailed on this 12th day of July, 2022 to:

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