IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

MARK STICKLEY, et al.,

Plaintiffs,

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

CITY OF WINCHESTER, et al.,

Defendants.

OPINION

On May 25, 2022, the parties were before the Court for arguments regarding Plaintiffs' request for a preliminary injunction. After the United States Supreme Court's ruling in New York States Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022), this Court held supplemental arguments, on August 4, 2022, regarding the impact of that ruling on the parties' positions in this case. At both hearings, the Plaintiffs were represented by Gilbert Ambler, Esq. and the Defendants were represented Heather K. Bardot, Esq. Both counsels argued their respective positions. After oral argument, the Court took the matter under advisement to issue this Opinion.

I. RELEVANT FACTS

On April 22, 2020, the General Assembly of Virginia amended and reenacted Virginia Code § 15.2-915. The amended statute included the following language:

> E. Notwithstanding the provisions of this section, a locality may adopt an ordinance that prohibits the possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof (i) in any building, or part thereof, owned or used by such locality, or by any authority or local governmental entity created or controlled by the locality, for governmental purposes; (ii) in any public park owned or operated by the locality, or by any

authority or local governmental entity created or controlled by the locality; (iii) in any recreation or community center facility operated by the locality, or by any authority or local governmental entity created or controlled by the locality; or (iv) in any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit. In buildings that are not owned by a locality, or by any authority or local governmental entity created or controlled by the locality, such ordinance shall apply only to the part of the building that is being used for a governmental purpose and when such building, or part thereof, is being used for a governmental purpose.

Any such ordinance may include security measures that are designed to reasonably prevent the unauthorized access of such buildings, parks, recreation or community center facilities, or public streets, roads, alleys, or sidewalks or public rights-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit by a person with any firearms, ammunition, or components or combination thereof, such as the use of metal detectors and increased use of security personnel.

The provisions of this subsection shall not apply to the activities of (i) a Senior Reserve Officers' Training Corps program operated at a public or private institution of higher education in accordance with the provisions of 10 U.S.C. § 2101 et seq. or (ii) any intercollegiate athletics program operated by a public or private institution of higher education and governed by the National Collegiate Athletic Association or any club sports team recognized by a public or private institution of higher education where the sport engaged in by such program or team involves the use of a firearm. Such activities shall follow strict guidelines developed by such institutions for these activities and shall be conducted under the supervision of staff officials of such institutions.

F. Notice of any ordinance adopted pursuant to subsection E shall be posted (i) at all entrances of any building, or part thereof, owned or used by the locality, or by any authority or local governmental entity created or controlled by the locality, for governmental purposes; (ii) at all entrances of any public park owned or operated by the locality, or by any authority or local governmental entity created or controlled by the locality; (iii) at all entrances of any recreation or community center facilities operated by the locality, or by any authority or local governmental entity created or controlled by the locality; and (iv) at all entrances or other appropriate places of ingress and egress to any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.

In response to the amendment to Virginia Code § 15.2-915, on February 9, 2021, the City of Winchester (hereinafter "City") amended Chapter 16 of the Winchester City Code. The

amendment created Section 16-34 and prohibited possessing, carrying, or transporting firearms in certain public places. The enacted Section is as follows:

> (a) It shall be unlawful for any person to possess, carry, or transport a firearm, ammunition, components or combination thereof in any of the following locations:
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> > (1) Any building, or part thereof, owned or used by the City, or by any authority or local governmental entity created or controlled by the City, for governmental purposes;
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> > (2) Any public park owned or operated by the City, or by any authority or local governmental entity created or controlled by the City;
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> > (3) Any recreation or community center facility operated by the City, or by any authority or local governmental entity created or controlled by the City;
> >
> > (4) In any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by, or is adjacent to, a permitted event, or an event that would otherwise require a permit.
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> (b) In any buildings that are not owned by the City or by any authority or local governmental entity created or controlled by the City, this section shall apply only to the part of the building that is being used for a governmental purpose and when such building, or part thereof, is being used for a governmental purpose.
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> (c) The provisions of this section shall not apply to the following:
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> > (1) Military personnel acting within the scope of their official duties;
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> > (2) Sworn law-enforcement personnel;
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> > (3) Private security personnel contracted or employed by the City or by any authority or local governmental entity created or controlled by the City when any of them are present in buildings owned or used by the City;
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> > (4) Museums displaying firearms and the personnel and volunteers of museums or living history re-enactors and interpreters, who possess firearms that are not loaded with projectiles, when such persons are participating in, or traveling to-and-from, historical perspective events that involve the display or demonstrations of such firearms;
> >
> > (5) A Senior Reserve Officers' Training Corps (SROTC) program operated at a public or private institution of higher education in accordance with the provisions of 10 U.S.C. § 2101 et seq., or any intercollegiate athletics program operated by a public or private institution of higher education and governed by the National Collegiate Athletic Association or any club sports team recognized by a public or private institution of higher

education where the sport engaged in by such program or team involves the use of a firearm. Such activities shall follow strict guidelines developed by such institutions for these activities and shall be conducted under the supervision of staff officials of such institutions.

(d) The City may implement security measures that are designed to reasonably prevent the unauthorized access of such locations outlined within this section by a person with any firearms, ammunition, or components or combination thereof, including, without limitation, the use of metal detectors and increased use of security personnel.

(e) Notice of the restrictions provided within this section shall be posted at all applicable locations in accordance with Code of Virginia § 15.2-915(F).

(f) A person found to violate any subsection of subsection 16-34(a) or (b) shall be guilty of a Class 1 misdemeanor.

Section 16-34(a)-(f).

The Plaintiffs seek a preliminary injunction to prevent the City from enforcing Sections 16-34(a)(2), 16-34(a)(3) and 16-34(a)(4) of the Winchester City Code (hereinafter "Sections 16-34(a)(2), (3) and (4)"). As the basis for the preliminary injunction, the Plaintiffs assert that the contested portions of the Winchester City Code violate Article I, Section 13 of the Constitution of Virginia, Article I, Section 11 of the Constitution of Virginia, and Article I, Section 12 of the Constitution of Virginia.

Furthermore, intertwined in the Plaintiffs' Complaint and arguments, they appear to argue that Sections 16-34(a)(2), (3) and (4) are unconstitutional both "as-applied" and facially. The Virginia Supreme Court has stated that a plaintiff "can only mount a successful facial challenge to a statute by showing first that the statute in question is unconstitutional as applied to him and that the statute in question would not be constitutional in any context." Toghill v. Commonwealth, 289 Va. 220, 228 (2015). This matter is addressed further below in the analysis regarding the specific Sections of the Winchester City Code at issue in this case.

This Opinion will first address several procedural issues raised by the Defendants as to whether the Court can even consider granting a preliminary injunction. After addressing those issues, the Court will examine each of the Plaintiffs' constitutional arguments. Based on the examination of those arguments and relevant case law, the Court will determine whether it is appropriate to issue a preliminary injunction to prevent enforcement, by the Defendants, of Sections 16-34(a)(2), (3) and (4).

II. PROCEDURAL ARGUMENTS

During oral argument and in the briefs, the Defendants proffer several procedural arguments as to why the Court cannot consider granting a preliminary injunction. Their first argument is that injunctive relief is not an available remedy to stop enforcement of a criminal statute. Additionally, the Defendants argue that it is not proper for the Court to decide the constitutionality of Sections 16-34(a)(2), (3) and (4) because the Plaintiffs did not also challenge the constitutionality of Virginia Code § 15.2-915. These issues are addressed, in turn, below.

A. Criminal Statutes and the Availability of Injunctive Relief as a Remedy to Stop Enforcement of the Statute

The requirements for a court to grant a preliminary injunction are addressed in greater detail below. However, the Defendants argue that, procedurally, injunctive relief is not appropriate in cases involving criminal statutes.[1] In response, the Plaintiffs' assert that when the constitutionality of a criminal statute it at issue a court has the authority to grant injunctive relief.

[1] The Defendants also argue that Plaintiffs' challenge to Section 16-34 is inappropriate because the law in Virginia prohibits a court from providing declaratory relief to restrain enforcement of criminal laws. For this proposition, they cite Daniels v. Mobley, 737 S.E.2d 899 (2013). However, that holding was concerning a plaintiff seeking a declaratory judgment that a certain activity did not violate the statute due to an interpretation of a word within the statute. See Mobley, 737 S.E.2d at 899-900. The plaintiffs, in Mobley, also challenged the criminal statute as being unconstitutionally vague. Regarding this issue, the Virginia Supreme Court held that "a challenge to the constitutionality of a statute based upon United States law or self-executing provisions of the Virginia Constitution; such a request for declaratory judgment presents a justiciable controversy. See DiGiacinto v. Rector & Visitors of

It is clear that "[a] mandatory injunction will not be granted upon a preliminary hearing except in cases of strong and imperious necessity, where the right to the injunction is clear." Virginia Railway Co. v. Echols, 117 Va. 182, 184 (1915). Generally, the established rule is that a court should not enjoin officials from enforcing criminal laws or prevent them from performing their official duties. Vegas Time Assoc., Inc. v. Granfield, 12 Va. Cir. 223, *1 (Fairfax 1998) (citing 42 AM. JR. 2D, Injunctions, 181). However, the one "exception to the general rule that equity will not enjoin enforcement of the criminal law is if the statute sought to be enforced is unconstitutional and void, and its enforcement would result in great and immediate irreparable injury to property rights if enforcement were not enjoined." Id. at *2 (citing D. & W., Inc. v. City of Charlotte, 151 S.E.2d, 241, 245 (1966)). Furthermore, the court, in Vegas Time, noted that "given the decision in Yoder v. Givens, 179 Va. 229 (1942), this Court is of the opinion that the principles enunciated in D. & W. would be embraced by our own Supreme Court." Vegas Time Assoc., Inc., 12 Va. Cir. at *2. The Virginia Supreme Court held, in Yoder v. Givens, 179 Va. 229, 235 (1942), that "[w]hile equity may be employed, if necessary, for preservation of property rights which are *imperiled by the unauthorized or unconstitutional exercise of power*, it will not undertake to prevent an officer of the executive department of the government from performing an official act which he is required by law to perform." (emphasis added)

In D. & W., Inc. v. City of Charlotte, 151 S.E.2d 241, 242 (1966), the plaintiffs sought to enjoin government agents of North Carolina from enforcing the Turlington Act (hereinafter the "Act") as amended by the Alcoholic Beverage Control Act of 1937. The plaintiffs' alleged that

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George Mason Univ., 281 Va. 127, 137 (2011). Thus, the circuit court had jurisdiction to consider Daniels' facial challenge to the constitutionality of Code § 18.2–328." Id. at 901; see also Steffel v. Thompson, 415 U.S. 452, 459 (1974) (holding that the Federal Declaratory Judgment Act does not require "that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.") Therefore, the Defendants' argument fails because a party can seek a declaratory judgment when they are challenging the constitutionality of a criminal statute.

the enforcement would interfere with their individual liberty and deprive them of their rights to earn a livelihood under the North Carolina Constitution. See D. & W., 151 S.E.2 at 243. At issue was whether, due to the government's interpretation of the Act, the law prohibited restaurant customers from bringing in small quantities of tax paid whiskey to the restaurant for the customer's own use. See id. at 245. The Defendants argued, on appeal, that it was improper for the trial court to grant the injunction because equity should not interfere with the enforcement of a criminal law. See id. at 244-45. The Supreme Court of North Carolina acknowledge that the general rule is "[e]quity will not restrain the enforcement of a criminal statute or regulatory ordinance providing a penalty for its violation; it may be challenged and tested only by way of defense to criminal prosecution thereon." See id. at 245. However, the Court noted one exception when the "statute or ordinance itself is void, its enforcement will be restrained where there is no adequate remedy at law and such action is necessary to protect property and *fundamental human rights which are guaranteed by the constitution.*" See id. at 245 (emphasis added). Furthermore, the Court held that a plaintiff may never test, by injunction, the constitutionality of a statute unless he can allege and show "that its enforcement will cause him individually to suffer a personal, direct, and irreparable injury to some *constitutional right.*" See id. (emphasis added).

Ultimately, the Court, in D. & W., found that the trial judge was incorrect to grant the injunction. See id. 245-46. The reasoning was because the plaintiffs did not meet the exception to the general rule. See id. at 245. The exception was not met because the plaintiffs did not allege that they had a constitutional right to provide a place for their customers to consume liquor. See id. Additionally, their constitutional right to earn a living, under the North Carolina Constitution, by engaging in the restaurant business was not infringed upon by the Act. See id.

at 246. Likewise, in Vegas Time, which cites D. & W., the Fairfax County Circuit Court held that a court should not issue an injunction concerning the enforcement of a criminal statute unless it meets the exception to the general rule. See Vegas Time, 12 Va. Cir. at *2. In Vegas Time, the plaintiffs argued that the defendants' erroneous *interpretation* of a statute would cause irreparable injury by way of lost profits and business opportunities. See id. at *1. The plaintiffs, in Vegas Time, did not challenge whether the statute was unconstitutional and void. The reasoning and rules in D. & W. and Vegas Time appear to be consistent with the United States Supreme Court's view of equity jurisdiction and criminal statutes in Terrace v. Thompson, 263 U.S. 197 (1923). "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the federal Constitution wherever it is essential in order to effectually protect property rights and the *rights of persons* against injuries otherwise irremediable; and in such a case a person, who is an officer of the state clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity." Terrance, 263 U.S. at 214 (emphasis added).

In this case, the Plaintiffs are challenging the Winchester City Code by stating that it violates several sections of the Constitution of Virginia. They alleged that they face irreparable injury if the criminal statute is enforced against them. The cases support the rule that one can seek an injunction enjoining the enforcement of a criminal statute when it is unconstitutional, and its enforcement would result in immediate irreparable harm. Vegas Time, D. & W., and Terrance all support this exception to the general rule. While the courts in D. & W. and Vegas Time did not enjoin the enforcement of the regulation and statute, the facts of those case differ from this case. In both of those cases, the plaintiffs' allegations were not grounded in

fundamental constitutional rights. See Vegas Time, 12 Va. Cir. at *1 (plaintiffs alleged that "based on an erroneous *interpretation* of 18.2-325" the law enforcement officials would cause irreparable injury by way of lost profits and business opportunities) (emphasis added); see also D. & W., 151 S.E.2d. at 245 (the plaintiffs did not assert that they had a constitutional right to provide patrons a place to drink alcohol. They only asserted that the law should be *interpreted* to allow customers to bring a small quantity of tax paid liquor into a restaurant). In this case, however, the Plaintiffs do not allege that they will suffer harm due to an improper interpretation of the statute. Instead, they argue that the criminal statute is unconstitutional, and, if the criminal statute is enforced, they will suffer irreparable harm. Therefore, this Court recognizes, as the circuit court did in Vegas Time, that injunctive relief is a potential remedy for these Plaintiffs because they meet the exception to the general rule.

B. Challenging the Constitutionality of a Local Ordinance without also Challenging the Enabling Statute Passed by the General Assembly

The Defendants argue that the Court should not grant the preliminary injunction because the Plaintiffs have not alleged a constitutional challenge to the enabling statute. Specifically, the Plaintiffs did not include, in their prayer for relief, that the Court should deem Virginia Code § 15.2-915 unconstitutional. As outlined above, on April 22, 2020, the General Assembly of Virginia amended and reenacted Virginia Code § 15.2-915. This statute grants localities the ability to restrict firearms in various locations within a locality. In response, on February 9, 2021, the City amended Chapter 16 of the Winchester City Code to add Section 16-34 which prohibits firearms in certain locations. In response to the Defendants' argument, the Plaintiffs assert that it is unnecessary to attack Virginia Code § 15.2-915 because it is the Winchester City Code that creates the offense that is punishable as a misdemeanor.

"The Dillon Rule provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable." City of Richmond v. Conference Club of Richmond, Virginia, Inc., 239 Va. 77, 79 (1990) (citations omitted). The Virginia Supreme Court first recognized the Dillon Rule in City of Winchester v. Redmond, 93 Va. 711, 714 (1896) (holding that a municipal corporation possesses and can exercise on those powers expressly granted by the legislature or those necessarily or fairly implied in or incident to those powers expressly granted). A municipal corporation's charter contains the powers delegated to it by the legislature and these "conferred powers are exercised by the council of the city, the legislative branch of its government." Southern Ry. Co. v. City of Danville, 175 Va. 300, 305 (1940). In City of Danville, the Virginia Supreme Court also noted that a city council acts as a legislative body and the ordinances passed by the council have the force of laws passed by the legislature of the state. See id. at 305-06 (citing Taylor v. Carondelet, 22 Mo. 105 (1855) and Wragg v. Penn, 94 Ill. 19 (1879)). "The word 'ordinance' denominating the act of a city council simply distinguishes it from the word 'law', which applies to an act of the State legislature. As a term of municipal law, it is equivalent to either 'law' or 'statute' as a term of state legislative action and carries with it by natural, if not necessary, implication the usual incidents of such action. Both ordinances and laws are acts of a deliberative, representative and legislative body. An ordinance, duly enacted, has the force and effect of law. It is a law." City of Danville, 175 Va. at 306.

Virginia Code § 15.2-915 is the enabling statute passed by the General Assembly which confers powers to a locality to restrict firearms in certain outlined locations. In accordance with Dillon's Rule, the City amended Chapter 16 of the Winchester City Code to prohibit firearms in

locations that they were authorized to do so under Virginia Code § 15.2-915. Since Section 16-34 of the Winchester City Code was duly enacted by the City, it has the force and effect of a law. Furthermore, Section 16-34 establishes a criminal penalty if an individual violates the Section.

It appears to be an issue of first impression, in Virginia, as to whether a plaintiff, when challenging the constitutionality of a locality's ordinance, must also challenge the enabling statute passed by the General Assembly. A review of the case law does not reveal any cases regarding this specific issue. However, logic dictates that it is unnecessary for a plaintiff to also challenge the enabling statute. Virginia Code § 15.2-915 is just an express grant of authority, allowing a locality to determine whether they desire to prohibit the conduct the statute grants them authority to prohibit. It is the City's ordinance that *creates* the prohibition and criminalizes the conduct. The allowed prohibitions, in Virginia Code § 15.2-915, have no effect until a locally elected body passes an ordinance reflecting the grant of power provided to them under the statute. The Defendants argue that the Plaintiffs must challenge Virginia Code § 15.2-915. However, Virginia Code § 15.2-915 does not, by itself, prohibit or criminalize any conduct. There is nothing to challenge because, until a locality adopts an ordinance authorized by Virginia Code § 15.2-915, there is no potential harm to an individual caused by Virginia Code § 15.2-915. The law, that may infringe upon an individual's constitutional rights, does not come into existence until the locality passes an ordinance. Specifically, in this case, Sections 16-34(a)(2), (3) and (4).

For these reasons, it is not fatal to the Plaintiffs' case that they did not also challenge the constitutionality of Virginia Code § 15.2-915. They are challenging a duly enacted ordinance that is the law in the City of Winchester. This ordinance creates the prohibitions regarding possessing firearms in certain locations and establishes a penalty for such a violation. It is the

enacted ordinance that, due to the restrictions and penalties, may infringe on the Plaintiffs' constitutional rights.

III. PRELIMINARY INJUNCTION AND THE CONSTITUTIONAL CHALLENGES

In this case, the Plaintiffs request that the Court enter a preliminary injunction prohibiting the enforcement of Sections 16-34(a)(2), (3) and (4). "The granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 61 (2008). The Virginia Supreme Court has yet to adopt a specific criterion for the entry of a preliminary injunction. However, it is generally accepted that, when determining whether to grant a preliminary injunction, a plaintiff must demonstrate the (1) likelihood of success on the merits, (2) whether a plaintiff will likely suffer irreparable harm if the injunction is not granted, (3) whether the balance of equities tips in plaintiff's favor, and (4) a showing that the injunction would not be adverse to the public interest. See The Real Trust About Obama, Inc. v. FEC, 575 F.3d 342, 346 (4th Cir. 2009) (citing Winter v. NRDC, Inc., 555 U.S. 7, 21 (2008)). Numerous circuit courts, in Virginia, have adopted the rule that a plaintiff must meet all four criteria outlined above to obtain a preliminary injunction. See Young v. Northam, 107 Va. Cir. 2801, *5 (Culpeper 2021); Dillon v. Northam, 105 Va. Cir. 402, *4 (Virginia Beach 2020); Ducard v. Lazy Creek, 99 Va. Cir. 449, *2 (Madison 2018); Freemason Street v. City of Norfolk, 100 Va. Cir. 172, *6 (Norfolk 2018); Wings L.L.C. v. Capitol Leather LLC, 88 Va. Cir. 83, *3 (Fairfax 2014). Therefore, the Plaintiffs' request for a preliminary injunction, based on their constitutional challenges to Sections 16-34(a)(2), (3) and (4), must meet the four criteria for them to prevail.

ARTICLE I, § 13 OF THE CONSTITUTION OF VIRGINIA CHALLENGE

Before analyzing whether the four requirements for a preliminary injunction are met regarding Plaintiffs' constitutional challenge that Sections 16-34(a)(2), (3) and (4) violate Article I, Section 13 of the Constitution of Virginia, the Court must determine what rule of law is applicable. Clearly, any matter regarding the potential infringement on an individual's right to bear arms is complex. Therefore, it is necessary to first exam the history of Article I, Section 13. Next, the question must be answered as to whether Article I, Section 13 is co-extensive with the Second Amendment to the United States Constitution. Then, if Article I, Section 13 is co-extensive, what rule of law is the test to determine whether Sections 16-34(a)(2), (3) and (4) infringe on the Plaintiffs' constitutional rights.

A. History of Article I, Section 13 of the Constitution of Virginia

In 1776, Article I, Section 13 of the Constitution of Virginia was adopted as part of the Virginia Declaration of Rights. It stated, as follows:

> 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; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military be under strict subordination to, and governed by, the civil power.

VA. DECLARATION OF RIGHTS § XIII (1776). Article I, Section 13 predated the ratification, by Virginia, of the United States Constitution on June 25, 1788. Interestingly, as Virginia ratified the United States Constitution, Virginia also asked that Congress adopted a Bill of Rights. Virginia requested that the federal Congress establish "a Declaration or Bill of Rights asserting and securing from Encroachment the essential and unalienable rights of the people..." 10 The Documentary History of the Ratification of the Constitution of Virginia 1551 (1993). One of the twenty requested Declarations or Bill or Rights was as follows:

> *That the people have a right to keep and bear arms*: 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. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to and governed by the civil power.

Id. at 1553 (emphasis added). This request, by Virginia, to the federal Congress for inclusion in a federal Bill of Rights, has similar language to Article 1, Section 13 of the Constitution of Virginia, as adopted in 1776. However, while Article I, Section 13, at that time, did not include "[t]hat the people have a right to keep and bear arms", the delegates, at the Virginia Ratifying Convention for the federal Constitution, thought that the language was important enough to request it in a federal Bill of Rights.[2] Several years later, on December 15, 1791, ratification of the federal Bill of Rights occurred which enshrined the first ten Amendments to the United States Constitution. Included in the federal Bill of Rights was the Second Amendment, which states that "[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." Significantly, the language the Virginia delegates suggested regarding individuals having the right to keep and bear arms was included in the Second Amendment.

While the Virginia delegates requested that the federal Bill of Rights include language specifically stating "[t]hat the people have a right to keep and bear arms", it took almost two centuries for similar language to be included in Article I, Section 13 of the Constitution of Virginia. From 1969 to 1971, the Virginia General Assembly engaged in a comprehensive revision of the Constitution of Virginia. See The Constitution of Virginia: Report of the Commission on Constitutional Revision (1969). Interestingly, amending Article I, Section 13

[2] In a law review article, Justice McCullough, describes portions of the debate of the Virginia delegates during the Virginia Ratifying Convention. See Article I Section 13 of the Virginia Constitution: Of Militias and an Individual Right to Bear Arms, 48 U. Rich. L. Rev. 215, 225-228 (2013).

was not mentioned by the committee tasked with suggesting changes to the Virginia Constitution. Instead, the House of Delegates and Senate, on their own initiative, debated and amended Article I, Section 13 to read as follows:

> 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*; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

(emphasis added to reflect amended language). It is curious that it took almost two centuries for Article I, Section 13 to include language that the Virginia delegates, in 1788, suggested to Congress that the federal Bill of Rights should include. While there may not be an explicit answer as to why the phrase was not included earlier, the House of Delegates and Senate debates clearly demonstrate the General Assembly's intent as to why Article I, Section 13 was amended in 1971.

On April 2-3, 1969, the House of Delegates held a floor debate regarding the proposed change to Article I, Section 13 – which would eventually become effective in 1971. See Proceedings and Debates of the House of Delegates and Senate on Constitutional Revision (April 2-3, 1969). During this floor debate, the Delegates discussed the proposed revision to the Virginia Constitution and the Second Amendment to the federal Constitution:

> Delegate Durland: Would the gentleman tell me what rights are not being infringed or what rights he envisions might be infringed, requiring the explicit statement in the Constitution at this time?
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> Delegate Harrell: This merely puts into the Constitution of Virginia what is in the Constitution of the United States, to which, of course, we are all subject. Certainly our Constitution could not be in derogation of the federal Constitution.
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> Delegate Durland: Then do you not think that perhaps the Dalton amendment may be repetitive, duplicitous, or redundant since that also would be in the first phrase already in the Constitution as written by George Mason
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> Delegate Harrell: I do not see that there would be any conflict. Whatever other statements are in the Bill of Rights, this merely states something that has been a right and merely puts into the Virginia Constitution what is in the federal Constitution.

Proceedings and Debates of the House of Delegates on Constitutional Revision 473-74 (April 2, 1969). As evidenced by the floor debate, the House of Delegates desired to align Article I, Section 13 with the Second Amendment. Likewise, the Senate had the following similar discussion:

> Senator Barnes: Mr. President and gentleman of the Senate, I dare say that not a person on this floor at the time we opened this session realized that theses words ("therefore, the right of the people to keep and bear arms shall not be infringed.") were not in our state Constitution.
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> Senator Bateman: Senator Barnes, it is the intent or purpose of this amendment to do anything other than what is done or protected by the safeguards of the second amendment to the Constitution of the United States?
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> Senator Barnes: No, sir, the purpose is identical.
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> Senator Bateman: And the purpose only to guarantee that which is already guaranteed there?
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> Senator Barnes: That is right
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> Senator Bateman: ...Is it the sole purpose of the proponents of the amendment to realign the language of our Bill of Rights on this subject with the language and the purpose and the same protections as are in the second amendment to the Constitution of the United States?
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> Senator Long: Yes.

Proceedings and Debates of the Senate on Constitutional Revision 392-94 (April 3, 1969). Like the House of Delegates, the Senate believed the amendment to Article I, Section 13 would track those rights already guaranteed under the Second Amendment to the United States Constitution.

Additionally, the House of Delegates and Senate also discussed the following regarding prior and future gun legislation:

(House of Delegates)

Delegate Galland: ...It was apparent consensus of the committee that this language had no effect upon the right of the Commonwealth or its local subdivisions to enact reasonable gun legislation. Would you assure me once more that this is the fact?

Delegate Harrell: I will for the record. There is no question of the constitutionality of such controls. That has been established under the federal Constitution. There are certain federal controls with reference to firearms.

Delegate Durland: I am concerned about the specifics of your last answer. Will the gentleman assure me that within the context of his previous statement that preventive legislation affecting gun control will not be prohibited by this language? For example, legislation that would come before the fact, such as licensing and registration, rather than after the fact?

Delegate Harrell: It would be my judgement and opinion that what the gentleman referes to would not be prohibited. This is language which comes from the Second Amendment to the Constitution of the United States; and as the gentleman well knows, there are many federal statutes which have some effect on firearms. This will not do anything more on the State level than has been done on the federal level.

Proceedings and Debates of the House of Delegates on Constitutional Revision 473 (April 2, 1969).

(Senate)

Senator Bateman: Would I then be correct that the purpose of this amendment would not be to embarrass any existing constitutional rights or prerogatives of local or state governing bodies to regulate or control the possession and ownership of firearms?

Senator Barnes: I do not think so. But I would like to yield the floor to Senator Long who has had sixty years of practice law. I think he can answer the questions better than I can.

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> Senator Bateman: And it has no purpose of limiting or diminishing or adversely affecting any existing power of any political body or entity to regulate or control the possession and use of firearms by the people?
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> Senator Long: No, sir.
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> Proceedings and Debates of the Senate on Constitutional Revision 392 and 394 (April 3, 1969).

It is evident, by the House of Delegates and Senate floor debates, that the delegates and senators intended, regarding firearm legislation, to track that which was already allowed under the Second Amendment to the United States Constitution. While it may have taken almost two centuries for Virginia to include language concerning an individual's right to bear arms in the Virginia Constitution, it was clearly added to align Article I, Section 13 with the Second Amendment. The House of Delegates and Senate explicitly stated that the amendment would not change the rights of individuals to bear arms or the ability of the government to pass reasonable restrictions that the Second Amendment did not already grant and allow.

B. Article I, Section 13 – Co-extensive with the Second Amendment

Based on the history of Article I, Section 13 outlined above, and the intent of the General Assembly evidenced by the floor debates, this Court holds that the rights guaranteed under Article I, Section 13 are co-extensive with those guaranteed under the Second Amendment to the United States Constitution. It was evident, in Virginia's recent history, when the General Assembly amended Article I, Section 13, that they were assuring Virginians that their own Constitution explicitly provided the same rights to them guaranteed under the federal Constitution. Using the foundation that Article I, Section 13 is co-extensive with the rights provided by the Second Amendment, the next several pages will outline the analytical framework that this Court will use to determine whether Sections 16-34(a)(2), (3) and (4) violate Article I, Section 13 of the Constitution of Virginia.

The Defendants argue that the Court should not evaluate the validity of the City's firearm restrictions by reference to the historical background leading to the enactment of the Second Amendment. Instead, the Defendants assert that the Court should only look at the historical background of firearm restrictions when Article I, Section 13 was amended in 1971. As detailed below, the Defendants' argument fails for several reasons.

Since 1776, the only opportunity the Virginia Supreme Court had to address Article I, Section 13 was in DiGiacinto v. Rector and Visitors of George Mason University, 281 Va. 127 (2011). DiGiacinto concerned whether a regulation restricting possession of a firearm at George Mason University's (hereinafter "GMU") facilities or at university events was unconstitutional under Article I, Section 13. DiGiacinto, 281 Va. at 136. As will be discussed in greater detail below, the Virginia Supreme Court held that "GMU is a sensitive place" and that the regulation was constitutional because it restricted "weapons only in those places where people congregate and are most vulnerable – inside campus buildings and at campus events." Id. at 136-37. Prior to reaching that holding, the Court noted

> that the protection of the right to bear arms expressed in Article I, Section 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution, concerning all issues in this instant case. Thus, for the purpose of this opinion, we analyze DiGiacinto's state constitutional rights and his federal constitutional rights concurrently.

Id. at 134. The Court then looked to United States Supreme Court cases interpreting the Second Amendment and their application to the regulation challenged under Article I, Section 13 of the Constitution of Virginia. See id. at 134-37.

This Court recognizes, as Defendants stated in their brief, that the Virginia Supreme Court, in DiGiacinto, limited, to the specific issues of that case, its holding that Article I, Section 13 is co-extensive with the Second Amendment. However, the language used by the Virginia

Supreme Court is important to this Court's analysis of the issues in this case. "[T]he Virginia General Assembly incorporated the specific language of the Second Amendment – 'the right of the people to keep and bear arms shall not be infringed' – into the existing framework of Article I, Section 13 of the Constitution of Virginia." Id. at 133 (citing 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 273 (1974)). The Court noted that the language of Article I, Section 13, regarding the right to bear arms, is basically identical to the rights found in the Second Amendment. See id. Furthermore, the Court opined that "[t]his Court has stated that provisions of the Constitution of Virginia that are substantially similar to those in the United States Constitution will be afforded the same meaning." Id. at 134 (citing Shivaee v. Commonwealth, 270 Va. 112, 119 (2005); Habel v. Industrial Development Authority, 241 Va. 96, 100 (1991)). The Virginia Supreme Court's statements, in DiGiacinto, concerning the rights guaranteed under Article I, Section 13 being co-extensive with those of the Second Amendment, reflects the intent of the General Assembly, as outlined above, when they passed the amendment to Article I, Section 13.

Not only is it apparent that the General Assembly intended the rights guaranteed by the amendment to be co-extensive with the Second Amendment, Article I, Section 13 cannot provide less rights than the rights inherent under the Second Amendment. The Second Amendment is contained in the federal Bill of Rights. In early American jurisprudence, the United States Supreme Court took the view that the federal Bill of Rights originally applied only to the federal government. See Barron v. City of Baltimore, 32 U.S. 243, 250-51 (1833) (holding that "[w]e are of opinion, that the provision in the Fifth amendment to the constitution...is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."). However, in 1868, the Fourteenth Amendment to

the United States Constitution was ratified.[3] Over the next century, the Doctrine of Incorporation began to slowly evolve concerning whether the federal Bill of Rights, due to the Fourteenth Amendment, was applicable to the States.[4]

In 2010, the United States Supreme Court decided McDonald v. City of Chicago, 561 U.S. 742 (2010). This was a landmark decision because it was the first case that incorporated the Second Amendment to the States by way of the Fourteenth Amendment. In holding that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to have a firearm for home defense, recognized in District of Columbia v. Heller, 554 U.S. 570 (2008), the Court stated that "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States." McDonald, 561 U.S. at 791. Moreover, recently, the United States Supreme Court, in New York States Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022), which will be discussed in more detail below, held that "consistent with Heller and McDonald, the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." Additionally, the Court noted, in Bruen, that "New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second." Id. at 2137. The

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[3] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST., amend. XIV.

[4] Gitlow v. New York, 268 U.S. 652 (1925) (Freedom of Speech); Near v. Minnesota, 283 U.S. 697 (Freedom of the Press); Dejonge v. Oregon, 299 U.S. 353 (1937) (Right to Assembly and Petition); Hamilton v. Regents of University of California, 293 U.S. 245 (1934) (Free Exercise of Religion); Everson v. Board of Education, 330 U.S. 1 (1947) (Establishment of Religion); Mapp v. Ohio, 367 U.S. 643 (1961) (Freedom from unreasonable search and seizure); Aguilar v. Texas, 378 U.S. 108 (1964) (Requirements in a warrant); Benton v. Maryland, 395 U.S. 784 (1969) (Double Jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (Right against Self-Incrimination); Klopfer v. North Carolina, 386 U.S. 213 (1967) (Right to a Speedy Trial); In re Oliver, 333 U.S. 257 (1948) (Right to a Public Trial); Parker v. Gladden, 385 U.S. 363 (1966) (Right to an Impartial Jury); Pointer v. Texas, 380 U.S. 400 (1965) (Right to Confront Hostile Witness); Washington v. Texas, 388 U.S. 14 (1967) (Right to Confront Favorable Witness); Gideon v. Wainwright, 372 U.S. 335 (1963) (Right to Counsel); Schilb v. Kuebel, 404 U.S. 357 (1971) (Protection against excessive bail); Robinson v. California, 370 U.S. 660 (1962) (Protection against cruel and unusual punishment).

holdings in both McDonald and Bruen clearly state that the right to carry a firearm for self-defense, guaranteed under the Second Amendment, is equally applicable to the States under the Fourteenth Amendment.

The Amendments within the federal Bill of Rights, incorporated explicitly by the United States Supreme Court, are applicable to the States. States can still establish protections for civil liberties through state statutes or state constitutional amendments. However, due to the Fourteenth Amendment and the Doctrine of Incorporation, when federal principles conflict with a state statute or state constitution, the federal fundamental rights incapsulated in the incorporated Amendment apply. Essentially, with those federal Bill of Rights incorporated under the Fourteenth Amendment, a bare minimum or "floor" is established as to the level of protection of civil liberties. While a state's civil liberty protections can exceed those incorporated under the Fourteenth Amendment, those protections cannot provide less rights than those afforded under the incorporated Amendments of the federal Bill of Rights.

For the reasons outlined above, the Court cannot examine Article I, Section 13 of the Constitution of Virginia, and the constitutionality of Sections 16-34(a)(2), (3) and (4) in a vacuum. The Plaintiffs challenge the ordinance on the ground that it violates Article I, Section 13. The floor debates of the House of Delegates and Senate demonstrate that the General Assembly believed, in 1969, that the amendment to Article I, Section 13 provided the same rights as the Second Amendment. Furthermore, the Virginia Supreme Court acknowledged, in DiGiacinto, that the rights in Article I, Section 13 and the Second Amendment are co-extensive – at least to that matter. See DiGiacinto, 281 Va. at 133. Additionally, the Fourteenth Amendment incorporates the Second Amendment to the States. Therefore, Article I, Section 13 of the Constitution of Virginia is, at the very least, co-extensive with the Second Amendment as to the

enumerated rights guaranteed by the Second Amendment. As a result, it is appropriate for this Court to examine Second Amendment jurisprudence to determine whether the provisions of Sections 16-34(a)(2), (3) and (4) violate Article I, Section 13.[5]

C. *New York State Rifle & Pistol Association, Inc. v. Bruen* and the Second Amendment

For many years, the United States Supreme Court avoided making a sweeping ruling on how courts should interpret the Second Amendment. It was not until District of Columbia v. Heller, 554 U.S. 570 (2008), that the Court issued a detailed opinion analyzing the Second Amendment and gun restrictions. In Heller, after a thorough discussion of the Second Amendment, the Court held that the government cannot ban the possession of firearms in an individual's home because the Second and Fourteenth Amendments allow an individual to possess and bear arms for self-defense. See Heller, 554 U.S. at 635. While this was a landmark case, the lower courts were still left with little guidance as to how to balance firearm restrictions outside the home with an individual's rights under the Second and Fourteenth Amendments. As a result, courts around the country applied the strict scrutiny test when a "core" Second Amendment right was burdened and the intermediate scrutiny test when it was unclear whether the restriction affected a "core" Second Amendment right. See e.g., Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017); Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2nd Cir. 2012).

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[5] In other circumstances, courts have concluded that protections under the Constitution of Virginia are co-extensive with the federal Constitution. Regarding a due process claim, the Virginia Supreme Court stated, in Shivaee v. Commonwealth, 270 Va. 112, 119 (2005), that "[b]ecause the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." (citing Morrisette v. Commonwealth, 264 Va. 386, 394, 569 S.E.2d 47, 53 (2002); Willis v. Mullett, 263 Va. 653, 657, 561 S.E.2d 705, 708 (2002)). Furthermore, in Vlaming v. West Point School Board, 480 F.Supp.3d 711, 719 (2020), the Federal Court for the Eastern District of Virginia stated that "[t]he free speech and due process clauses under the Virginia Constitution are coextensive with the U.S. Constitution. Those protections under the Virginia Constitution, therefore, do not extend beyond the scope of the protections under the U.S. Constitution. Further, courts apply the same analysis to both federal and Virginia constitutional claims even though the claims arise under different sources of constitutional law. Accordingly, courts may look to federal constitutional law when deciding Virginia constitutional claims." (citations omitted).

This year, the Court finally spoke, in New York States Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022), and provided lower courts guidance on how to evaluate and decide cases where firearm regulations may or may not infringe on an individual's Second and Fourteenth Amendment rights.

Bruen concerned whether New York's requirement that an applicant for a concealed weapons license must demonstrate a special need to carry a concealed firearm for self-defense – the "proper cause" requirement – violated the Second and Fourteenth Amendments. Bruen, 142 S. Ct. at 2122. In deciding this issue, the United States Supreme Court declined to adopt the two-step approach utilized by the lower courts. Bruen, 142 S. Ct. at 2126. This two-step process analyzed Second Amendment challenges by combining history with means-end scrutiny. See id. Instead, the Court held the following:

> [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. Through this holding, the Court established a two-step process where a court must first examine whether the Second Amendment's plain text covers an individual's conduct. If the Second Amendment's plain text covers an individual's conduct, then the burden shifts to the government to prove that the regulation "is consistent with this Nation's historical tradition of firearm regulation." Id. at 2135. "Only if [the government can] carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct." Id. Applying this analytical process, the Court, in Bruen, first held that the plain text of the Second

Amendment guarantees an individual's right to bear arms in public for self-defense. See id. Then, the Court discussed a detailed history of firearm regulations, in the United States, and held that New York did not demonstrate that the proper-cause requirement was a regulation consistent with the historical tradition of firearm regulation in the United States. See id. at 2136-56.

This Court must follow the approach, in Bruen, in determining whether the provisions of Sections 16-34(a)(2), (3) and (4) violate Article I, Section 13 of the Constitution of Virginia. As outlined above, the Fourteenth Amendment incorporates the Second Amendment to the States. Therefore, Bruen is applicable because Article I, Section 13 is co-extensive with the Second Amendment as to the enumerated rights guaranteed by the Second Amendment. Since the holding in Bruen controls, this Court will use the United States Supreme Court's analytical framework to determine whether Sections 16-34(a)(2), (3) and (4) infringe on the Plaintiffs' constitutional rights.

D. Plaintiffs' Likelihood of Success on the Merits

To determine the likelihood of success on the merits, the two-step process outlined in Bruen is applicable. The first determination that a court must make is whether the "Second Amendment's plain text covers an individual's conduct..." Bruen, 142 S. Ct. at 2126. If the plain text covers the individual's conduct, then "the Constitution presumptively protects that conduct." Id. Therefore, the first question to answer is whether the Plaintiffs' conduct, in this case, is protected by the Second Amendment's plain text.

Plaintiff Stickley, in his Affidavit, states that he owns a business on the Winchester downtown mall. See Stickley Affidavit, ¶ 1. He is a lawful owner of a firearm and has a concealed handgun permit. See id. at ¶ 3. Plaintiff Stickley states that at times he fears for his

safety and carries a firearm in public to protect himself and his employee. See id. at ¶ 4. Plaintiff Wilkerson lawfully owns a firearm and has a concealed handgun permit. See Wilkerson Affidavit, ¶ 2. She carries her firearm, in public, to protect her and her family when going to Winchester city parks, recreation centers and while shopping. See id. at ¶¶ 3,4, 8 and 9. Plaintiff Angel lawfully owns a firearm and has a concealed handgun permit. See Angel Affidavit, ¶3. He carries his firearm to city parks and permitted events, located in Winchester, for self-defense. See id. at ¶¶ 4 and 8. Plaintiff Nuckles lawfully owns firearms and has a concealed handgun permit. See Nuckles Affidavit, ¶ 3. She runs a food truck business. See id. at ¶ 2. As part of that business, she positions her food truck at permitted events and public parks. See id. at ¶ 7. Due to the nature of her business, she often has large sums of money. See id. at ¶ 4. Plaintiff Nuckles carries a firearm in public to defend herself and her customers. See id. at ¶ 9.

The proposed course of conduct, by the Plaintiffs, is to publicly carry firearms for self-defense. This is similar to the proposed conduct of the plaintiffs in Bruen. See Bruen, 142 S. Ct. at 2134 ("[w]e therefore turn to whether the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct — carrying handguns publicly for self-defense."). The United States Supreme Court, in Bruen, stated that "[a]s we explained in Heller, the 'textual elements' of the Second Amendment's operative clause – 'the right of the people to keep and bear Arms, shall not be infringed' – 'guarantee the individual right to possess and carry weapons in case of confrontation.'" Id. (quoting Heller, 554 U.S. 570, 592 (2008)). Bruen notes that the right to "bear arms", as confirmed in Heller, "refers to the right to 'wear, bear, or 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.'" Id. (quoting Heller, 554 U.S. at 584). While Heller involved whether an individual could possess a firearm in their home

for self-defense, "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.'" Id. at 2135 (quoting Heller, 554 U.S. at 599). The text of the Second Amendment reflects that confrontation can occur outside of the home. See id. Therefore, the plain text of the Second Amendment presumptively guarantees a right to "bear" arms in public for self-defense. See id.

Likewise, the Plaintiffs, in this case, desire to carry firearms, for self-defense, at public events, public parks and recreational centers. In accordance with Bruen, this course of conduct is presumptively protected by the text of the Second Amendment. Like the Second Amendment, Article I, Section 13 of the Constitution of Virginia states that "the right of the people to keep and *bear* arms shall not be infringed..." (emphasis added). As outlined above, the rights guaranteed under the Second Amendment and Article I, Section 13 are co-extensive. Therefore, just as under the Second Amendment, the Plaintiffs' right to carry firearms in public for self-defense is presumptively protected under Article I, Section 13. Since that right is presumptively protected, under the second step of Bruen, the burden shifts to the Defendants to prove that the regulation "is consistent with this Nation's historical tradition of firearm regulation." Bruen, 142 S. Ct. at 2135.

To meet the burden of proving that the prohibitions in Sections 16-34(a)(2), (3) and (4) are consistent with the Nation's historical tradition of firearm regulation, the Defendants argue that the Court should evaluate the constitutionality of Section 16-34 by considering the historical tradition as it existed when the General Assembly amended Article I, Section 13. The Defendants assert that it was not until 1971 that Virginians adopted the right to keep and bear arms. Therefore, according to the Defendants, the Court should approach the analysis of historical tradition from the perspective of the adopters in 1971. To support their argument, the

Defendants provide excerpts from the House of Delegates and Senate debate concerning amended Article I, Section 13. Additionally, they provide an example that Virginia had prohibited firearms in Virginia State Parks from at least 1965 to 2012.

The Defendants' argument regarding the relevant time period that the Court should consider the historical tradition of firearm regulation fails. As outlined, in detail above, both McDonald and Bruen clearly state that the right to carry a firearm for self-defense, guaranteed under the Second Amendment, is equally applicable to the States under the Fourteenth Amendment. Therefore, Bruen establishes the framework that is applicable to the States through the Fourteenth Amendment regarding relevant times in our Nation's history to consider the historical tradition of firearm regulations. The Second Amendment was adopted in 1791 and the Fourteenth Amendment in 1868. The United States Supreme Court pegs those dates as time periods where a court should examine the historical tradition of firearm regulation because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry." Bruen, 142 S. Ct. at 2138. As a result, the examination of firearm regulations during these time periods provides the measuring stick to determine whether the prohibitions in Sections 16-34(a)(2), (3) and (4) satisfy the second step of the Bruen analysis.

Sections 16-34(a)(2), (3) and (4) generally prohibits possessing or carrying a firearm in any public park, recreation, or community center, or at or adjacent to a public event. This Opinion will first address whether the prohibition of carrying or possessing a firearm in any public park or at or adjacent to a public event is consistent with the Nation's historical tradition of firearm regulation. To perform this analysis, as instructed in Bruen, the Court must look at firearm regulations leading up to the periods of 1791 and 1868.

The United States Supreme Court, in Bruen, provides a detailed history of English and colonial laws regarding firearm regulation leading up to the passage, in 1791, of the Second Amendment. See Bruen, 142 S. Ct. at 2138-45. While applicable to this case, it is unnecessary for this Opinion to recite, in total, the United States Supreme Court's commentary regarding early firearm regulations. However, this Court will highlight several observations made by the United States Supreme Court that are applicable to the facts of this case.

The United States Supreme Court discussed the English Statute of Northampton and its transformation through English history. See Bruen, 142 S. Ct. at 2139-42. The Statute of Northampton prohibited coming "before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure." 2 Edw. 3 c. 3 (1328). The United States Supreme Court noted, as time progressed in England, the meaning of this statute evolved to mean being armed with evil intent or malice. See Bruen, 142 S. Ct. at 2141 (citing Rex v. Sir John Knight, 1 Comb. 38, 39, 90 Eng. Rep. 330 (K. B. 1686), where Chief Judge Herbert held that a person's conduct "will come within the Act where the crime shall appear to be *malo animo*."). Furthermore, the United States Supreme Court opined that in the decades leading up to America's founding English law did not create an obstacle to public carry for self-defense. See Bruen, 142 S. Ct. at 2142 (citing Sergeant William Hawkins, in his 1716 treatise, 1 Pleas of the Crown 136, confirming that "no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People.").

In the early stages of the formation of the United States and around the passage of the Second Amendment, the only statutory restrictions on publicly carrying a firearm followed the evolution of English law that public carry was only prohibited when there was an evil intent. See e.g., Collection of All Such Acts of the General Assembly of Virginia, ch 21, p. 33 (1794) (a 1786 Virginia statute stated that "no man, great nor small, [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country."); Laws of the Commonwealth of Massachusetts, 1795 Mass. Acts and Laws, ch. 2, p. 436 (criminalizing "all affrayers, rioter, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth."); 1801 Tenn. Acts pp. 260-61 (a person could not "publicly ride or go armed to the terror of the people or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person."). These early statutes are significant because they demonstrate that the prohibitions on public carry of firearms concerned the use or display of them to create fear amongst the people. After its extensive review of early firearm regulations, the United States Supreme Court noted that "in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry." Bruen, 142 S. Ct. at 2145. Additionally, the Court examined the history of gun regulation prior to the enactment, in 1868, of the Fourteenth Amendment and observed that "even during Reconstruction the right to keep and bear arms had limits. But those limits were consistent with a right of the public to *peaceably* carry handguns for self-defense." Id. at 2152 (emphasis added).

As outlined above, there is no historical basis to permit broad prohibitions on public carry. Sections 16-34(a)(2) and (4) ban firearms in public parks and at public events. The

Defendants present no significant examples that these restrictions are consistent with the Nation's historical tradition of firearm regulation. The only regulation they provided was that firearms were prohibited in the Virginia State Park system from at least 1965 until 2012. First, this time period is not the relevant time period dictated by Bruen for a court to review whether the restrictions are consistent with the historical tradition of firearm regulation. Secondly, as noted above, early Virginia statutes allowed public carry in fairs and markets and other places if it was not with bad intent. The burden is on the Defendants to demonstrate that the firearm restrictions are consistent with historical tradition. This burden is not met and, in fact, the relevant historical period both in Virginia and the United States demonstrates that citizens could carry in public if they were not doing so to cause terror – malice or bad intent.

In analyzing whether the Plaintiffs are likely to succeed on the merits, this Opinion should not forgo answering the question of whether public parks and permitted and non-permitted events are considered "sensitive places." The United States Supreme Court, in Heller, held that nothing in their opinion should cast doubt on the "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings..." Heller, 554 U.S. at 626. The Court, in Bruen, acknowledged Heller and the "longstanding" laws prohibiting firearms in schools and government buildings, and noted that while the "historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited – e.g., legislative assemblies, polling places, courthouses – we are also aware of no disputes regarding the lawfulness of such prohibitions." Bruen, 142 S. Ct. at 2133 (citing D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. 205, 229–236, 244–247 (2018)). The United States Supreme Court noted that, due to historical traditions, they could assume that government building, schools, legislative assemblies, polling places, and

courthouses are "sensitive places" where the government could, consistent with the Second Amendment, prohibit carrying firearms. See id. Furthermore, when determining whether a location is a "sensitive place" a court "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." Id.

The United States Supreme Court acknowledged, in Bruen, that when determining whether a firearm regulation is consistent with the historical tradition of firearm restrictions, "analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin." Bruen, 142 S. Ct. at 2133. "[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." Id. The Defendants present no evidence or argument that the restrictions in Sections 16-34(a)(2) and (4) are analogous to historical firearms restrictions regarding "sensitive places." Furthermore, this Court notes that restricting firearms in public parks and permitted and non-permitted events taking place in a "public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public" are not analogous to "longstanding" firearm restrictions at government buildings, schools, courthouses, polling places or legislative assemblies. See Sections 16-34(a)(2) and (4). Sections 16-34(a)(2) and (4) restrict firearms in open, publicly accessible areas. These areas differ from the "sensitive places" listed in Heller and Bruen. The "sensitive places" outlined in those cases are confined, mostly enclosed areas, where individuals congregate, and government business takes place. Even the Virginia Supreme Court, in DiGiacinto v. George Mason University, 281 Va. 127, 135-36 (2011), noted a distinction between a public street or park and the school buildings at George Mason University when they decided that the campus buildings were

"sensitive places." Additionally, as outlined above, early firearm laws in Virginia and the United States demonstrated that citizens could generally carry in public places, fairs, and markets if the did not do so with bad intent. Therefore, the locations outlined in Section 16-34(a)(2) and (4) are not "sensitive places" within the historical context of firearm regulations.

Sections 16-34(a)(2) and (4) violate an individual's rights under the Second and Fourteenth Amendments, co-extensive with Article 1, § 13 of the Constitution of Virginia. However, the Plaintiffs are unlikely to succeed with their constitutional challenge to Section 16-34(a)(3). This Section prohibits firearms at "[a]ny recreation or community center facility operated by the City, or by any authority or local governmental entity created or controlled by the City." Section 16-34(a)(3). It is this Court's belief that this prohibition is analogous to historical firearm restrictions regarding "sensitive places." As outlined above, in Heller and discussed in Bruen, there have been "longstanding" firearm restrictions in "sensitive places" such as government buildings, schools, courthouses, polling places and legislative bodies. Like many of these places, the recreation or community centers are government facilities. Additionally, many individuals generally congregate in these enclosed areas. Moreover, like schools, numerous children are present inside the recreation or community centers. For these reasons, a clear analogy can be drawn between the recreation and community centers and those "sensitive places" the United States Supreme Court mentioned as being appropriate based on the historical analysis of firearm restrictions. Additionally, restricting firearms at recreation and community centers is, arguably, consistent with the rational the Virginia Supreme Court used, in DiGiacinto, upholding firearm prohibitions inside the buildings at George Mason University.

As to Sections 16-34(a)(2) and (4), for the reasons stated above, they are unconstitutional both "as applied" to the Plaintiffs and facially. The Plaintiffs must first demonstrate that the

Sections are unconstitutional "as applied" to them. See Toghill v. Commonwealth, 289 Va. 220, 228 (2015). Based on their affidavits and the analysis above, it is clear that Sections 16-34(a)(2) and (4) are unconstitutional "as applied." Since the Plaintiffs demonstrated that the Sections are unconstitutional "as applied," the question becomes whether 16-34(a)(2) and (4) would be constitutional in any context. See Toghill, 289 at 228. Sections 16-34(a)(2) and (4) strictly prohibit guns in parks and at permitted events or events that should otherwise be permitted. For the reasons stated above, all citizens are affected by these portions of the Winchester City Code. The wording of these Sections prevents all citizens from exercising their right to carry a firearm in public for self-defense. There are no situations were Sections 16-34(a)(2) and (4) would be constitutional in any context. The Sections create a broad ban on all citizens that infringe on their constitutional rights under the Second and Fourteenth Amendments, co-extensive with Article 1, § 13 of the Constitution of Virginia

Therefore, the Plaintiffs have met the first prong of the test for a preliminary injunction regarding Sections 16-34(a)(2) and (4). For the reasons stated above, they will likely succeed on the merits regarding the constitutional challenge to those two Sections. However, the Plaintiffs, at this time, are unlikely to succeed with regard to a finding that 16-34(a)(3) is unconstitutional.

E. A Constitutional Violation and Irreparable Harm

The second prong the Plaintiffs must establish is that the Plaintiffs will likely suffer irreparable harm if the court does not grant the injunction. Additionally, it is generally understood that "the temporary violation of a constitutional right itself is enough to establish irreparable harm." Lynchburg Range & Training, LLC v. Northam, 105 Va. Cir. 159, *4 (Lynchburg 2020) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976), where the United States Supreme Court noted that "the loss of First Amendment freedoms, for even minimal periods of

time, unquestionably constitutes irreparable injury."); see also Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978) (holding that "violations of First Amendment rights are per se irreparable injury."); Dillon v. Northam, 105 Va. Cir. 402, *8 (Virginia Beach 2020) (while finding no constitutional violation, the circuit court stated that it "acknowledges that Plaintiffs could satisfy the irreparable injury prong by demonstrating that a failure to grant a temporary injunction would lead to a violation of their constitutional rights."). As held above, Sections 16-34(a)(2) and (4) violate Article I, § 13 of the Constitution of Virginia. The Plaintiffs' constitutional rights are being infringed by prohibiting their ability to lawfully carry firearms in the restricted areas outlined in Sections16-34(a)(2) and (4). Therefore, the violation of their constitutional rights satisfies the irreparable harm prong required for a preliminary injunction.

F. A Constitutional Violation and the Balance of the Equities

The third prong to satisfy, for a preliminary injunction, is that the Plaintiffs must demonstrate that the balance of equities tip in their favor. "In other words, the Plaintiffs must demonstrate that the harm to them before the trial on the merits without the requested relief is greater than the harm to the [City] during the same time period with the requested relief." Dillon v. Northam, 105 Va. Cir. 402. *11 (Virginia Beach 2020). As noted above, violations of constitutional rights, even temporary, constitute an irreparable harm. In this case, the City restricted firearms in certain locations where residents were previously able to carry. Furthermore, based on the analysis regarding the likelihood of success, the prohibitions in Sections 16-34(a)(2) and (4) violate the Second and Fourteenth Amendments to the United States Constitution and Article I, § 13 of the Constitution of Virginia. Constitutional rights are fundamental guarantees for every citizen. The government must not infringe on these guarantees. Therefore, the balance of the equities tip in favor of the Plaintiffs when the

protection of constitutional rights is at issue. The Plaintiffs' constitutional rights must be preserved pending trial, especially, as discussed above, they are likely to succeed on the merits.

G. A Constitutional Violation and the Public Interest

The final prong the Plaintiffs must satisfy to obtain a preliminary injunction is that the injunction would not be adverse to the public interest. This case concerns a fundamental constitutional right. Sections 16-34(a)(2) and (4) prohibit an individual's constitutional right, as outlined above, to publicly carry a firearm for self-defense. Legal scholar and former General Court of Virginia Judge, St. George Tucker, who was one of the Winchester judges after the founding of our country "called the right to keep and bear arms the 'true palladium of liberty,' and he called the right of self-defense the 'first law of nature.'" Lynchburg Range & Training, LLC, 105 Va. Cr. 159, *5 (Lynchburg 2020) (quoting 1 Blackstone's Commentaries, With Notes of Reference to the Constitution and Laws of the General Government of the United States and of the Commonwealth of Virginia, App. 300 (1803)). "[T]he public interest favors enjoining a constitutional violation, not allowing the unconstitutional application of a statute to perpetuate." Elhert v. Settle, 105 Va. Cir. 544, *9 (Lynchburg 2020). Therefore, it is not adverse to the public interest to grant a preliminary injunction in order to preserve a constitutional right pending trial.

To conclude, with respect to Sections 16-34(a)(2) and (4), the Plaintiffs satisfy the four criteria required for a preliminary injunction. Therefore, a preliminary injunction is granted to cease enforcement, by the City, of Sections 16-34(a)(2) and (4). However, for the reasons stated above, a preliminary injunction is not granted as to enforcement of Section 16-34(a)(3).

ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA CHALLENGE

The relevant portion to this case of Article I, Section 11 of the Constitution of Virginia states "[t]hat no person shall be deprived of his life, liberty, or property without due process of law." All Plaintiffs assert that Section 16-34(a)(4) violates the Due Process Clause of Article I, Section 11. Specifically, Section 16-34(a)(4) states that a person cannot possess a firearm "[i]n any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by, or is adjacent to, a permitted event, or an event that would otherwise require a permit." As this Court held above, this provision of the Winchester City Code is unconstitutional because it infringes on an individual's right to publicly bear arms for self-defense. However, this Court will briefly address Section 16-34(a)(4) and whether it violates Article I, Section 11 of the Constitution of Virginia because the Affidavit of Andrew Williams, acting for Plaintiff Stonewall Arms, LLC, only sets forth facts to support a void-for-vagueness challenge.[6] See Stonewall Arms, LLC Affidavit, ¶¶ 1-7. Plaintiff Stonewall Arms is a corporate entity so, unlike the other Plaintiffs, the Affidavit does not assert facts related to a violation of an individual's right to bear arms.

As detailed below, the Court only needs to address the likelihood of success prong in relation to Plaintiffs' argument that Section 16-34(a)(4) violates Article I, Section 11 of the Constitution of Virginia. The Virginia Supreme Court has made clear that "[b]ecause the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." Shivaee v. Commonwealth, 270 Va. 112, 119 (2005) (citing Morrisette v. Commonwealth, 264 Va. 386, 394, 569 S.E.2d 47, 53

[6] It should also be noted that Plaintiff Stickley also asserts facts, in his Affidavit, to support a void for vagueness challenge to 16-34(a)(4). See Stickley Affidavit, ¶¶ 5-7.

(2002); Willis v. Mullett, 263 Va. 653, 657, 561 S.E.2d 705, 708 (2002)). The void-for-vagueness doctrine is "implicit in due process principles..." Roberts v. State Bar, 296 Va. 105, 124 (2018). The two due process interests that the void-for-vagueness doctrine protects requires (1) that any law provides a person of ordinary intelligence a reasonable opportunity to know what is forbidden and (2) prevents arbitrary and discriminatory enforcement by requiring that the statute provide explicit standards to those who enforce them. Tijan v. Commonwealth, 46 Va. App. 698, 707-08 (2005) (citing Parker v. Commonwealth, 24 Va. App. 681, 687 (1997)); see also Beckles v. United States, 137 S. Ct. 886, 892 (2017) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983), for the holding that a criminal statute must have sufficient definiteness to understand the prohibited conduct and prevent arbitrary enforcement.). Basically, a penal statute must give fair notice to individuals and not, due to its language, promote discriminatory enforcement that results in arbitrary arrests. See Flannery v. City of Norfolk, 216 Va. 362, 366 (1975).

In this case, the Plaintiffs point to some troubling language in Section 16-34(a)(4). The Plaintiffs argue that the italicized language below creates a penal statute that is void-for-vagueness:

> In any public street, road, alley, or sidewalk or public right-of-way or *any other place of whatever nature* that is open to the public and is being used by, or is *adjacent* to, a permitted event, or an event *that would otherwise require a permit.*

Section 16-34(a)(4) (emphasis added). However, Section 16-34(a)(4) must also be read in conjunction with Section 16-34(e) which states that "[n]otice of the restrictions provided within this section shall be posted at all applicable locations in accordance with Code of Virginia § 15.2-915(F)." Virginia Code § 15.2-915(F) states that "[n]otice of any ordinance adopted pursuant to subsection E shall be posted...at all entrances or other appropriate places of ingress

and egress to any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." Therefore, using signage, the City must provide notice to citizens of where the firearm restricted areas are during permitted events and events that would otherwise require a permit.

Arguably, reading Section 16-34(a)(4) in conjunction with Section 16-34(e) cures the void-for-vagueness issue. During permitted events and events that would otherwise require a permit, the City is mandated to provide notice as to the prohibited areas. As a result, a person of ordinary intelligence would know where they are not allowed to carry firearms. Additionally, law enforcement would not arbitrarily enforce the restrictions because the notices would establish a set area where the conduct is prohibited. If notice is not provided by the City through signage, whether it be a permitted event or event that should otherwise be permitted, pursuant to Section 16-34(e), then an individual may have an "as-applied" due process challenge when charged with a violation of Section 16-34(a)(4). However, at this point, based on the facts before the Court, Plaintiffs Stonewall Arms and Stickley are not likely to succeed on the merits regarding their due process challenge under Article I, Section 11 of the Constitution of Virginia. Section 16-34(e) of the Winchester City Code provides the mechanism for the city to provide notice of the restricted areas in Section 16-34(a)(4).

The Court does note Plaintiffs' arguments regarding the City potentially erecting permanent signage in certain areas stating the prohibitions under Section 16-34(a)(4). If this were to occur, the void-for-vagueness argument may become applicable. In that case, issues could arise, based on the language of Section 16-34(a)(4), as to whether a citizen has notice that *at a specific time* a gathering of people are in an area for a permitted event or an event that would

otherwise require a permit. However, that issue is not before the Court. There was no evidence, at the preliminary injunction hearing, that the City has erected permanent signage outlining the prohibitions in Section 16-34(a)(4).

Therefore, as to Plaintiffs Stonewall Arms and Stickley, a preliminary injunction for a violation of Article I, Section 11 of the Constitution of Virginia is denied. It is not necessary to analyze the other three requirements for a preliminary injunction regarding this constitutional challenge. However, as outlined in a previous Section of this Opinion, Section 16-34(a)(4) is unconstitutional pursuant to Second and Fourteenth Amendments, co-extensive with Article 1, § 13 of the Constitution of Virginia.

ARTICLE I, SECTION 12 OF THE VIRGINIA CONSTITUTION CHALLENGE

The Plaintiffs also argue that Section 16-34 violates their freedom of speech and right to assemble guaranteed under Article I, Section 12 of the Constitution of Virginia. Specifically, the evidence before the Court, at the preliminary injunction hearing, is the affidavit of Plaintiff Brandon Angel. He stated, under oath, that he was active in organizing Second Amendment rallies and desires to carry his firearm at future rallies. See Angel Affidavit, ¶ 5. However, as outlined above, the Court held that Sections 16-34(a)(2) and (4) were unconstitutional because they infringed on an individual's right to publicly bear arms for self-defense. Sections 16-34(a)(2) and (4) address carrying firearms in public parks and at permitted and nonpermitted events. These are the locations where the rallies and demonstrations desired by Plaintiff Angel would take place. While the preliminary injunction was denied as to Section 16-34(a)(3), Plaintiff Angel does not state, in the Affidavit, that he intends to have Second Amendment rallies at recreational or community centers. Therefore, the Court does not need to address, at this time,

the arguments concerning a potential violation of Article I, Section 12 of the Constitution of Virginia.

IV. CONCLUSION

To conclude, Sections 16-34(a)(2) and (4) violate an individual's rights guaranteed under Article I, Section 13 of the Constitution of Virginia. These rights are guaranteed to the citizens of this Commonwealth co-extensively with the Second and Fourteenth Amendments to the United States Constitution. Therefore, the Court grants the preliminary injunction regarding the enforcement, by the Defendants, of Sections 16-34(a)(2) and (4). However, the Court denies, for the reasons stated above, the preliminary injunction as to Section 16-34(a)(3). Furthermore, the Court finds, based on the evidence and argument presented at the preliminary injunction hearing, that Section 16-34(a)(4) does not violate Article I, Section 11 of the Constitution of Virginia. Lastly, the Court declines to render a decision, at this time, regarding whether Section 16-34 violates freedom of assembly and speech guaranteed under Article I, Section 12 of the Constitution of Virginia. The Court will prepare an Order reflecting the rulings in this Opinion. Furthermore, the Clerk is directed to send copies of this Opinion to counsel of record.