IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
28TH JUDICIAL DISTRICT, GIBSON COUNTY

STEPHEN L. HUGHES, DUNCAN O'MARA, ELAINE KEHEL, GUN OWNERS OF AMERICA, INC., and GUN OWNERS FOUNDATION,	)	
Plaintiffs,	)	
v.	)	No. 24475
BILL LEE, in his official capacity as the Governor for the State of Tennessee, et al.,	)	Chancellor Mansfield, Chief Judge Judge Burk Judge Rice
Defendants.	)	

PLAINTIFFS' REPLY IN OPPOSITION TO STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. Defendants Misstate the Operation of Tennessee Law.

Consider a hypothetical law providing that, each time a person speaks in public, they are subject to arrest and prosecution. If a person wishes to avoid a conviction for this offense, they either must decline to speak publicly at all, or they must show that their speech was constitutionally protected at trial. And upon release, the person risks reoffending the very next time they open their mouth in public – and every time thereafter. Indeed, each utterance risks detention, arrest, and prosecution, and each acquittal is limited to its facts. One could hardly call such a regime "friendly" to the freedom of speech. But at least it is a hypothetical.

Not so for the "right" to publicly carry a firearm in Tennessee. Indeed, Tenn. Code Ann. § 39-17-1307(a) provides that "[a] person commits an offense who carries, with the intent to go armed, a firearm or a club." In Tennessee the right to "bear arms" in public is a criminal offense. Against this general rule, the statute sets an "exception" for individuals exercising constitutional rights. *Id.* § 39-17-1307(g). But under Tennessee law, the accused must prove an exception at trial "by a preponderance of the evidence." *Id.* § 39-11-202(b)(2). Tenn. Code Ann. § 39-17-1311(a) likewise prohibits "go[ing] armed" with firearms[1] in public parks and other recreational areas. And it too sets a general rule against public carry, subject to limited exceptions all of which are structured as defenses to the criminal offense. For example, possession of a recognized state issued permit to carry a handgun allows the citizen a defense to the criminal offense but to only a

[1] Tennessee's statute regarding public parks prohibits only possession of "any weapon prohibited by § 39-17-1302(a). § 39-17-1311(a). However, Tennessee's Attorney General expansively construes the statute to prohibit the "possession of *other types of weapons* on recreational property owned or operated by state, county, or municipal governments at any time the person's conduct does not strictly conform to the requirements of [Subsection (b)]." Tennessee Attorney General Opinion 18-04 (January 31, 2018) (emphasis added).

subset of these prohibited recreational locations. *Id.* § 39-17-1311(b)(1)(I). Thus, by their plain text, these statutes criminalize public carry as a general rule and relegate the constitutional right to bear arms to mere defenses that may be available at trial for the criminal offense.

Defendants characterize the Tennessee regime quite differently. They claim – despite the clear language of the statutes – that the "going armed" statute "does not apply to law-abiding adults carrying a handgun," and only reaches conduct "with the intent of frightening others." State Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support of State Defendants' Cross Motion for Summary Judgment ("XMSJ") at 2, 4. But the statute plainly *does* apply to the law-abiding, as it authorizes their stop, detention, citation, arrest, and prosecution. And as for the purported intent element Defendants claim, there is none in the statute, which authorizes arrest for *everyone* carrying a gun in *every* circumstance. Defendants likewise claim that Tennessee's "guns in parks" statute "exempts vast swaths of people, including permit holders." *Id.* at 2. But again, not from stop, detention, citation, arrest, and prosecution. Tennessee's "broad statutory carveouts" and "drastically narrowed … impact" which Defendants laud (*id.* at 3) are nothing more than 'lipstick on a pig.'

Despite Tennessee's onerous and outlier criminalization of "bearing arms," Defendants insist that "Tennessee is one of the most gun-friendly States in the history of the Nation, especially when it comes to allowing guns in public parks." *Id.* But they cite nothing more than their own declarants for this proposition, purported "experts" in historical gun laws.[2] But if Tennessee's

[2] Yet even with their "expert" help, Defendants have failed to compile a historical record which justifies either statute. Defendants seem to admit as much, offering this Court the future opportunity "to review the historical documents cited in the expert reports that are not otherwise included...." *Id.* at 3 n.1. But it was Defendants' opportunity to bear their historical burden, and neither Plaintiffs nor this Court are "obliged to sift the historical materials" on Defendants' behalf. Thus, to the extent that Defendants have not bothered to provide the Court (or Plaintiffs) with the

outlier prohibition[3] is so "friendly," it is difficult to imagine what they would consider to be "unfriendly." No one would claim that a flat ban on speaking in public was constitutional, so long as it contained "broad statutory carveouts" that the citizen is forced to demonstrate as defenses which could be used to avoid a finding of guilt at trial. Nor is such a regime permissible here. Indeed, "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022).

B. Defendants Misstate the Historical Framework.

Defendants do not dispute the applicability of the U.S. Supreme Court's textual and historical standard for constitutional challenges to firearm regulations. Indeed, Defendants rightly observe that *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), "spell out how to determine if a state law infringes on th[e] right" to keep and bear arms. XMSJ at 10. Defendants also agree that, despite the difference in wording between the Second Amendment and Article I, Section 26,[4] "courts have never construed this clause as placing greater limits on the right to keep and bear arms than the Second Amendment."

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historical sources their "experts" promise exist, this Court should decline to consider such purported analogues.

[3] Tennessee's statutory scheme is truly an anomaly. Plaintiffs are aware of only two other purportedly "constitutional carry" states (Utah and Oklahoma) that entirely criminalize public carry of arms, only to create a purported "exception" on the back end.

[4] Article I, Section 26 of the Tennessee Constitution provides "[t]hat the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Of course, the Second Amendment does not authorize infringements for crime-prevention purposes, and Tennessee's Constitution cannot afford its citizens fewer protections with regard to the right to keep and bear arms than the United States' Constitution. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Thus, to the extent that the State Constitutional clause portending to authorize the Legislature the discretion to regulate the wearing of arms in order to prevent crime could be read to conflict with the "right to bear arms," then that language was rendered inoperable by the Supreme Court in *McDonald*.

Id. at 9 n.7. Accordingly, Article I, Section 26 cannot protect fewer rights or to a lesser extent than the Second Amendment, and thus Second Amendment standards guide the minimum degree of protection which Article I, Section 26 must afford.

But despite the parties' agreement on these key issues, Defendants make a number of errors in describing the governing constitutional standard, evincing a fundamental misunderstanding of the Supreme Court's precedents and tainting the remainder of their cross-motion. First, Defendants claim that "the *Bruen* Court created a new two-step process for evaluating gun restrictions." *Id.* at 10. But *Bruen* did no such thing. On the contrary, in repudiating the "popular test that allowed courts to engage in a means-end scrutiny of firearm laws," *id.*, *Bruen* observed that, "[d]espite the popularity of this two-step approach, *it is one step too many*." *Bruen*, 597 U.S. at 19 (emphasis added). *Bruen*'s standard therefore is a *one-step* test "rooted in the Second Amendment's text, as informed by history," *id.*, consistent with its methodology in *District of Columbia v. Heller*, 554 U.S. 570 (2008).[5] Properly understood, a court's textual analysis is nothing more than a subject-matter qualifier which subjects *all* "firearm regulation[s]" to historical scrutiny. *Bruen*, 597 U.S. at 17. Phrased differently, "when the Government regulates arms-bearing conduct, … it bears the burden to 'justify its regulation.'" *Rahimi*, 602 U.S. at 691. Because Tenn. Code Ann. §§ 39-17-1307(a) and 39-17-1311 regulate "arms-bearing conduct," Defendants "must demonstrate" consistency "with this Nation's historical tradition of firearm regulation," and they cannot shirk their historical burden. *Bruen*, 597 U.S. at 17.

Second, Defendants correctly observe that *Bruen* "requires courts to analogize the challenged law to restrictions that existed *in or around 1791* when the Second Amendment was

[5] *See, e.g.*, *United States v. Goodson*, 2023 U.S. Dist. LEXIS 224772, at *2 (E.D. Mich. Dec. 18, 2023) (recognizing "*Bruen*'s one-step test").

ratified." XMSJ at 10 (emphasis added). Had they stopped there, such language would have accurately described the Supreme Court's Founding-era focus. But Defendants then assert that "[c]ourts may also look to post-ratification restrictions that existed in or around 1868 when the Fourteenth Amendment was adopted *if* the post-ratification restrictions were '*widespread, and unchallenged*.'" *Id.* (emphases added) (quoting *Bruen*, 597 U.S. at 36). But *Bruen* made no such 'if, then' statement. On the contrary, *Bruen*'s full quotation states the *exact opposite* of what Defendants claim: "where a governmental practice has been open, widespread, and unchallenged *since the early days of the Republic*, the practice should guide our interpretation of an ambiguous constitutional provision." *Bruen*, 597 U.S. at 36 (emphasis added). Thus, rather than endorsing some sort of a Reconstruction-era popularity veto on the Second Amendment, *Bruen* made clear that "19th-century evidence [i]s 'treated as *mere confirmation* of what the Court thought had already been established.'" *Id.* at 37 (emphasis added).

Indeed, "post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, [and] they do not provide as much insight into its original meaning as earlier sources.'" *Id.* at 36. Accordingly, the Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* at 37. A meaning that is "pegged" to 1791 cannot "also" fluctuate based on interpretations nearly 80 years later. *See also id.* at 83 (Barrett, J., concurring) ("today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights."). Rather, historical evidence from after the Founding can only *confirm* a Founding-era tradition, but it cannot *create* one anew. Thus, "laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or

alter that text." *Id.* at 36 (majority opinion); *see also Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 482 (2020) (rejecting historical evidence from "more than 30 States" which "arose in the second half of the 19th century" because "[s]uch a development, of course, cannot by itself establish an early American tradition").

Finally, Defendants cite *Rahimi*'s clarification that the "appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." XMSJ at 11. Importantly, *Rahimi*'s reference to historical "principles" is no license for courts to frame analogical inquiries however they want. Indeed, framing historical regulations' overarching principle too *broadly* as merely "regulating firearms" generally (*id.* at 21) or protecting "vulnerable populations" (*id.* at 27) would "risk[] endorsing outliers that our ancestors would never have accepted." *Bruen*, 597 U.S. at 30. Thus, "a court must be careful not to read a principle at such a high level of generality that it waters down the right." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).[6] The level of specificity of *Rahimi*'s stated historical principle is instructive: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Id.* at 690 (majority opinion). Thus, "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 698. Vague appeals to "vulnerable populations" or the most general authority to "regulat[e] firearms" will not do.

C. Tenn. Code Ann. § 39-17-1307(a) Violates Article I, Section 26 Because There Is No Historical Tradition of Relegating the Enumerated Right to Public Carry to an "Affirmative Defense."

[6] "For instance, a green truck and a green hat are relevantly similar if one's metric is 'things that are green.' They are not relevantly similar if the applicable metric is 'things you can wear.'" *Bruen*, 597 U.S. at 29 (citation omitted).

Defendants attempt to justify the constitutionality of Tenn. Code Ann. § 39-17-1307(a), which provides that "[a] person commits an offense who carries, with the intent to go armed, a firearm or a club." But at no point do they proffer historical analogues as *Bruen* requires. Instead, Defendants cite a repudiated interest-balancing decision to claim the statute is facially constitutional. Then, they draw this Court's attention to four purportedly constitutional applications of the statute, concluding that Plaintiffs therefore cannot mount a successful facial challenge. But each of Defendants' hypotheticals involves a *different* provision of Tennessee law that is not at issue here. And in any case, the Supreme Court's precedents already rejected Defendants' strained logic. Left with no historical showing at summary judgment, Defendants have utterly failed to bear their historical burden, and Tenn. Code Ann. § 39-17-1307(a) is unconstitutional under Article I, Section 26.

1. Defendants' Reliance on a Repudiated Interest-Balancing Decision Defies *Heller*, *Bruen*, and *Rahimi*.

Immediately after citing the Supreme Court's governing textual and historical standard, Defendants point this Court to a pre-*Bruen* interest-balancing decision in apparent support of Tenn. Code Ann. § 39-17-1307(a)'s constitutionality. *See* XMSJ at 12 (citing *Embody v. Cooper*, 2013 Tenn. App. LEXIS 343 (Tenn. Ct. App. May 22, 2013)). Characterizing this unpublished and repudiated decision as nevertheless "unfavorable precedent" for Plaintiffs and apparently "persuasive authority" for this Court, Defendants rely on *Embody* for three propositions. None is availing.

First, Defendants claim the statute is constitutional because it is "*not even a genuine prohibition* on the carrying of firearms, as there are numerous defenses to the law." *Id.* (emphasis added). But "nothing in … *Heller* suggested that a law must rise to the level of the absolute prohibition" to be unconstitutional. *Jackson v. City & County of San Francisco*, 576 U.S. 1013,

1016 (2015) (Thomas, J., dissenting from denial of certiorari). Nor is a firearm regulation immune from review merely because it criminalizes conduct which a criminal defendant ultimately may show was protected after all. On the contrary, all "firearm regulation[s]" are subject to historical review – not just 'genuine prohibitions' of Second Amendment rights – whatever that might mean. *Bruen*, 597 U.S. at 17. As an eight-Justice majority later stated in *Rahimi*, "*when* the Government regulates *arms-bearing conduct*, … *it bears the burden* to 'justify its regulation.'" *Rahimi*, 602 U.S. at 691 (emphases added). Defendants never attempt to grapple with *Rahimi*'s broad language. Indeed, a regulation of "go[ing] armed" is *precisely* a regulation of "arms-bearing conduct." Tenn. Code Ann. § 39-17-1307(a); *Rahimi*, 602 U.S. at 691. That was what *Bruen* was all about. *Bruen*, 597 U.S. at 32 ("carrying handguns publicly for self-defense").

Second, Defendants claim the statute "does not implicate core Second Amendment rights." XMSJ at 12. But "the Second Amendment guarantees a general right to public carry," and the statute creates a complete *prohibition* of not only public carry throughout the state but also carry on one's own property and in one's own home. *Bruen*, 597 U.S. at 33. This certainly *implicates* "the Second Amendment's 'unqualified command'" that "the right to keep and bear Arms, shall not be infringed." *Id.* at 17; U.S. Const. amend. II. Moreover, the notion of "core" and apparently *other* non-core, lesser-protected Second Amendment rights has no basis in constitutional text. *See* U.S. Const. amend. II; Tenn. Const. art. I, § 26. Nor did such a notion survive *Bruen*, which repudiated discussion of "core" rights as a quintessentially "second step" analysis which was "one step too many." *Bruen*, 597 U.S. at 18, 19. And in any case, a statute prohibiting the carrying, "with the intent to go armed, a firearm" necessarily implicates "individual self-defense," which is "'the *central component*' of the Second Amendment right." Tenn. Code Ann. § 39-17-1307(a); *Bruen*, 597 U.S. at 29.

And third, Defendants claim *Embody* "recognizes the General Assembly's power under the Tennessee Constitution to regulate the carrying of firearms to prevent crime." XMSJ at 12. But just three pages prior, Defendants admitted that "courts have never construed [Article I, Section 26] as placing greater limits on the right to keep and bear arms than the Second Amendment." *Id.* at 9 n.7. It is therefore unclear what point Defendants are trying to make. To the extent Defendants interpret Article I, Section 26's additional clause to authorize legislation *not* authorized by the Second Amendment, that language would be rendered inoperative. *See Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988) (recognizing being "bound by the interpretations of the … United States Constitution to the extent that they establish a minimum level of protection"). And if "these two provisions were 'intended to guard the *same* right'" after all, XMSJ at 9, Defendants' sudden reliance on language *unique* to Article I, Section 26 makes even less sense now.

2. Defendants' "Unprotected Weapons" Argument Falls Flat.

Defendants next claim that, because "[t]he Going Armed statute can be constitutionally applied to prohibit the carrying of dangerous and unusual weapons that are not constitutionally protected," the statute "can be constitutionally applied." XMSJ at 13. But under this strained logic and its subsequent iterations throughout Defendants' briefing, no facial constitutional challenge could *ever* succeed. Consider a law subjecting all public speech to a general prohibition. Under Defendants' logic, a facial challenge would *fail* because, for example, one "cannot yell 'Fire' in a crowded theater,"[7] one ostensibly constitutional application of the law. The same would be true in a challenge to a blanket authorization of warrantless home and vehicle searches for contraband. Defendants' logic would be that, because *some* of the homes and vehicles searched no doubt will be of persons on probation from jail, who do not possess full Fourth Amendment rights, then the

[7] *Bridges v. California*, 314 U.S. 252, 296 (1941) (Frankfurter, J., dissenting).

statute has *at least some* constitutional application and no facial challenge can succeed. This sort of argument is as absurd as it is untenable.

Defendants first cite the statute's coverage of "weapons[] like machine guns, bombs, and grenades" in support of their novel theory, because these weapons apparently "do not enjoy constitutional protections." XMSJ at 13. But at no point do Defendants cite a decision of a state or federal Tennessee court, the Sixth Circuit, or the U.S. Supreme Court to support the notion that any of these types of weapons is *not* constitutionally protected. Defendants admit as much in a footnote, conceding that their smattering of citations from "other jurisdictions are not binding on this Court." *Id.* at 14 n.8. But aside from failing to cite any authority which actually binds this Court, Defendants' argument fails for three additional reasons.

Second, Defendants' purportedly unprotected weapons already are regulated under a separate statute, which reaches simple possession. *See* Tenn. Code Ann. § 39-17-1302 (regulating the possession of "machine gun[s]" and "explosive[s]"). Plaintiffs have not challenged that statute in this litigation. A finding of facial unconstitutionality as to Tenn. Code Ann. § 39-17-1307(a) would not affect the "carr[ying], with the intent to go armed," of those independently prohibited weapons, as Tenn. Code Ann. § 39-17-1302's broader regulation of *possession* would remain operative.

Third, Defendants are flatly incorrect that their red-herring weapons are "not covered by the constitution's 'plain text[]'" in the first place. XMSJ at 14. On the contrary, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. Thus, "we use history to determine which modern 'arms' are protected by the Second Amendment." *Bruen*, 597 U.S. at 28. In other words, if a weapon is *bearable* (as machineguns and grenades certainly are), it is at

least *presumably* covered by the Constitution's plain text. *See, e.g.*, *United States v. Morgan*, 2024 U.S. Dist. LEXIS 152562, at *5 (D. Kan. Aug. 26, 2024) (holding a "machinegun and Glock switch are bearable arms within the plain text of the Second Amendment"); Order, *United States v. Brown*, No. 3:23-cr-00123-CWR-ASH (S.D. Miss. Jan. 29, 2025), ECF No. 28 (same). And whether such weapons ultimately are found to be protected "Arms" is a historical question to be resolved under *Bruen*'s historical framework. Defendants never square their "plain text" argument with *Heller* or *Bruen*.

And fourth, Defendants fundamentally misunderstand the facial challenge at play. *Heller* facially invalidated a District of Columbia ban on the possession of handguns in the home, even though some individuals ultimately may be banned from possessing handguns by falling within a historically supported category of persons prohibited from possessing firearms. *See Heller*, 554 U.S. 570; *see, e.g.*, 18 U.S.C. § 922(g)(5) (prohibiting illegal aliens from possessing firearms). So too did *Bruen* facially invalidate New York's "may-issue" public carry licensing regime, even though some individuals likewise may be prohibited from possessing firearms consistent with historical tradition. *See Bruen*, 597 U.S. 1. Ultimately, the Court struck these respective prohibitions facially because they were *ahistorical*. Indeed, *Heller* concerned "a flat ban on the possession of handguns in the home," and because no historical analogue "was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional." *Id.* at 27. Likewise, "[n]one of the[] historical limitations on the right to bear arms approach[ed] New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose." *Id.* at 60. Accordingly, the proper historical question is whether the Founders ever prohibited the mere carrying of firearms, "with the intent to go armed," thereby relegating the right to public carry to an affirmative defense to be

raised at trial. Because the very notion of turning the right on its head is ahistorical, the statute may be and must be facially invalidated.

3. *Bruen* Already Rejected Defendants' "Sensitive Places" Argument.

Defendants next advance the same facial-challenge argument with respect to "sensitive places" – that, because guns may be prohibited in *some* places, Plaintiffs cannot facially challenge a statute banning guns in *all* places. XMSJ at 14. But at the outset, Defendants concede that "the General Assembly has enacted separate statutes regulating firearms in these protected areas – some of which Plaintiffs do not even challenge." *Id.* And "separate statutes" are just that – not at issue here. Even so, Defendants posit that, because various "sensitive places" are purportedly "clearly constitutional," a challenge to a general restriction on public carry *in all places* therefore must fail. *Id.* This is incorrect.

First, this argument already failed in *Bruen*. The Supreme Court already held that governments cannot criminalize the "general right to public[] carry," even though some very narrow types of locations might constitutionally be regulated if consistent with historical tradition. *Bruen*, 597 U.S. at 31. Indeed, the Court identified one or two sorts of locations it "assume[d]" would survive historical review, provided they were "longstanding" and, of course, widespread enough to evince a national tradition. *See id.* at 30 (assuming in dicta "schools and government buildings"). *But see id.* at 61 (recounting that teachers carried firearms in schools in the 1860s). Ultimately, *Bruen* invalidated a law which "prevent[ed] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms" in public. *Id.* at 71. In other words, the New York law regulated public carry in *all locations*. Irrespective of *some* locations' ultimate 'sensitivity,' the Court still struck the law facially.

And second, Defendants' claim that various "sensitive places" are "clearly constitutional" lacks rigorous support – or any, for that matter. XMSJ at 14. Indeed, they cite no case conclusively holding any location to be off-limits to firearms. Rather, Defendants cite a declarant for the proposition that firearms may be banned in "densely populated areas, as well as areas where people regularly congregate[]." *Id.* But once again, *Bruen* rejected this claim as ahistorical, explaining that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly." *Bruen*, 597 U.S. at 31. Accepting Defendants' logic would "effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded," an untenable proposition. *Id.* This Court should reject Defendants' attempts to clutter the simple issues in this case with "separate statutes" that are irrelevant here.

4. Defendants' "Felon" Argument Is a Red Herring.

Next, Defendants bemoan that a facial challenge would remove the state's ability to prosecute "people convicted of violent felonies" for carrying publicly. XMSJ at 15. But, as Defendants once again concede, "Tennessee has other firearm statutes that apply to convicted felons," *id.*, and indeed, Tenn. Code Ann. §§ 39-17-1307(b) and (c) reach *unlawful possession* of firearms by felons. Moreover, Defendants' argument fails for the same reasons as above. Indeed, adopting Defendants' argument would mean that a flat ban on the possession of *all firearms* could never be challenged facially, since it would apply to felons. But the Supreme Court has never invoked "felons" to limit the scope of relief in such a manner. Neither *Heller* nor *Bruen* shied away from facial invalidation, even though felons necessarily were swept up in those cases' respective prohibitions on the possession of handguns in the home and in public. That felons

remained prohibited under other statutes was of no moment to striking laws which were plainly ahistorical as to "ordinary, law-abiding, adult citizens." *Bruen*, 597 U.S. at 31.

5. Defendants Rewrite the Law in a Last-Ditch Attempt to Save It.

Finally, Defendants claim that Tennessee's broad ban on bearing arms in public can be saved because it encompasses *at least* some illegitimate conduct – "'going armed' for offensive purposes." XMSJ at 16. But this argument suffers from the very same logical fallacy that infects Defendants' other arguments above. Meanwhile, Defendants apparently concede that "application of the law to individuals carrying handguns for self-defense raises constitutional concerns." *Id.*

In support, Defendants purport to rely on history, but fail to proffer any of their own analogues. Instead, they rely on courts' references to so-called "going armed" laws. XMSJ at 16-18. But while the challenged statute proscribes "go[ing] armed," it is missing an essential element universal to the historical prohibitions, which renders it far broader than anything the Founders approved. This overbreadth causes the challenged statute to fail *Bruen*'s "how," as it does not "impose a comparable burden on the right of armed self-defense...." *Bruen*, 597 U.S. at 29.

Indeed, as Defendants note, historical "going armed" laws "encompass[ed] the offense of 'arm[ing]' oneself '*to the Terror of the People*.'" *Id.* at 17 (alterations in original) (emphasis added). *Rahimi* acknowledged that, "[a]lthough the prototypical affray involved *fighting in public*, commentators understood affrays to encompass the offense of 'arm[ing]' oneself '*to the Terror of the People*[.]'" *Rahimi*, 602 U.S. at 697 (emphasis added). And *Bruen* itself cited an 1801 Tennessee law which "required any person who would '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*' to post a surety; otherwise, his continued violation of the law would be 'punished as for a breach of the peace, or riot at common law.'" *Bruen*, 597 U.S. at 50

(emphases added). But *Bruen* ultimately noted that, in *Simpson v. State*, 13 Tenn. 356 (1833), "the *Simpson* court found that if the Statute had made, as an 'independent ground of affray,' the mere arming of oneself with firearms, the Tennessee Constitution's Second Amendment analogue had 'completely abrogated it.'" *Bruen*, 597 U.S. at 51.

Thus, not only did the Supreme Court find that Article I, Section 26 protects precisely the conduct at issue here,[8] but other jurisdictions' "going armed" laws further required a *breach of the peace* in order to incur criminal liability. Indeed, one did not "terror[ize]" the people simply by carrying a firearm, whether openly or concealed.[9] Rather, the *manner* in which one carried – not the mere fact of carriage – must have caused a public disturbance via *brandishing* in order to incur liability.[10] For this reason, Blackstone's Commentaries listed the common-law offense of "riding or going armed, … *by terrifying the good people of the land*" within a chapter entitled "Offences Against the Public Peace." 4 William Blackstone, Commentaries on the Laws of England 149, 142 (John Taylor Coleridge ed., 1825) (emphasis added). The challenged statute therefore is

[8] That is, merely "go[ing] armed," as Tenn. Code Ann. § 39-17-1307(a) now proscribes. *See Simpson*, 13 Tenn. at 360 ("neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed, such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it, the absence of such a view.").

[9] *See also Bruen*, 597 U.S. at 51 ("At least in light of that constitutional guarantee [Article I, Section 26], the [Tennessee Supreme Court] did not think that it could attribute to the mere carrying of arms "a necessarily consequent operation as terror to the people."); *id.* at 50 ("A by-now-familiar thread runs through these three statutes: They prohibit bearing arms in a way that spreads 'fear' or 'terror' among the people. As we have already explained, Chief Justice Herbert in *Sir John Knight's Case* interpreted this *in Terrorem Populi* element to require something more than merely carrying a firearm in public.").

[10] Tennessee already prohibits "brandishing" via Tenn. Code Ann. § 39-13-102, which criminalizes aggravated assault with a deadly weapon. *See* Brittney Baird, *21-Year-Old Driver Charged with Brandishing Gun on I-24*, WKRN (June 13, 2023), https://tinyurl.com/5n6rpr7f (charging "brandishing" as "aggravated assault with a deadly weapon"). These historical "going armed" laws therefore may lend support to such a modern regulation – but that is not the one being challenged here.

missing an essential element of the historical offense. Rather than proscribing only that conduct which terrorizes the public, it reaches *all* intentional carrying of firearms. *That* is ahistorical, and it renders Tenn. Code Ann. § 39-17-1307(a) unconstitutional.

Ultimately, Defendants argue that the statute is immune from facial challenge because it is broad enough to cover the historical crime of going armed to cause public terror. *See* XMSJ at 17. But again, *Bruen* facially invalidated a prohibition on public carry which no doubt *also reached that crime*, declining to limit its scope of relief as applied.

6. Defendants Have Utterly Failed to Bear Their Burden.

At bottom, Defendants advance five arguments to uphold their "going armed" prohibition. The first relies on a repudiated interest-balancing decision. And the remaining four all make the same logical fallacy with respect to facial challenges. Thus, if this Court is to reject any one such argument, it must reject them all. And if so, Defendants are left with nothing to support Tennessee's ban on bearing arms. Indeed, not once did Defendants attempt to show a broad and enduring tradition as of 1791 of completely banning firearms in public, subject only to affirmative defenses. Through this failure, Defendants appear to concede that, if Plaintiffs had brought a challenge as applied to *everything*, *everyone*, and *everywhere except* certain specific weapons, persons, places, and activities, then that would "raise[] constitutional concerns." XMSJ at 16. But the constitutional concern permeates Tennessee's statute – its ahistorical default rule treats the right to public carry (not to mention carry in the home or on private property) as an affirmative defense. That is unconstitutional.

D. Defendants Failed to Bear Their Burden to Prove Tenn. Code Ann. § 39-17-1311 Comports with the Nation's Historical Tradition.

Defendants separately attempt to justify Tenn. Code Ann § 39-17-1311, the so-called "Guns in Parks" statute. Defendants rightly acknowledge that "the Attorney General's Office has

repeatedly interpreted the law to apply to all firearms, including handguns." XMSJ at 6. No matter, Defendants say, because again, "Plaintiffs likewise cannot 'establish that no set of circumstances exists' under which the Guns in Parks statute would be valid." *Id.* at 18. But Defendants' arguments fail. Indeed, Defendants merely recycle their facial-challenge objections, which fail for the reasons already discussed. Then, Defendants posit that historical licensing schemes generally support Tennessee's locational regulation. But Defendants fail to establish a Founding-era tradition, and their latecomer laws likewise suffer from analogical defects. Finally, Defendants claim that all manner of purportedly "sensitive places" justify the challenged regulation today. But in order to do so, they rewrite Founding-era history, only to rely on Reconstruction-era history which cannot shed light on *original* meaning. Ultimately, Defendants fail to show that the challenged statute comports with relevant historical tradition, and so Tenn. Code Ann § 39-17-1311 is unconstitutional.

1. Defendants' "Unprotected Weapons" and "Going Armed" Arguments Are No More Persuasive the Second Time.

Positing that Tennessee's ban on firearms in parks is defensible, Defendants first simply recite their arguments with respect to purportedly unprotected weapons and statutory "intent to go armed offensively." XMSJ at 18. But they fail to bolster these arguments any further. Thus, for the reasons already discussed, those arguments fail. But to summarize, Defendants cite no binding authority for the proposition that the weapons they claim are unprotected are *actually* unprotected. Indeed, these weapons are *presumptively* protected under a plain reading of the constitutional text, *Heller*, and *Bruen*. Defendants likewise fail to explain how a separate, unchallenged statute's broader regulation of simple possession of these weapons has any bearing on whether the challenged parks ban may be invalidated facially. And the history of "going armed" laws makes clear that the Founders regulated *brandishing*, not mere carrying, a totally different "how" and

"why" than Tennessee's broad ban. *Bruen*, 597 U.S. at 29. To that end, the challenged statute is missing an essential element present in historical regulations: causation of public terror. Indeed, Tennessee's separate prohibition of "aggravated assault with a deadly weapon" already prohibits what the historical terror-based laws regulated. That means the challenged statute is something else entirely, and it is no descendant of these terror-based laws. Finally, Defendants make no attempt to address *Heller* and *Bruen*'s successful facial challenges, despite many of Defendants' "applications" also existing in those cases.

2. Defendants' Licensing Argument Defies *Bruen*.

Next, Defendants claim 'no harm, no foul,' on the theory that Tennesseans can seek licensure to carry within the statute's enumerated locations. XMSJ at 19. Thus, Defendants seek to litigate the constitutionality of licensing schemes generally. But at the outset, neither the Second Amendment nor Article I, Section 26 says "keep and bear arms after receiving a government license." Indeed, regardless of whether licensure to exercise an enumerated right is constitutional (it is not),[11] licensure to carry within these locations does not cure the historical defect that licensure is an *affirmative defense* to the statute's *general prohibition*. *See* Am. Compl. ¶¶34-35. Thus, Defendants flip the "general right to public[] carry" on its head, rendering it an exception to a new default rule of *no carry*. *Bruen*, 597 U.S. at 31.

Defendants' constitutional argument also fails. Defendants claim that "*Bruen*'s analysis *proves* the constitutionality of Tennessee's law." XMSJ at 19 (emphasis added). But Tennessee's

[11] *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969) ("our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."); *Bruen*, 597 U.S. at 70 ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'").

licensing scheme was not at issue in *Bruen*, which only noted that other jurisdictions "*appear* to operate" in various ways. *Bruen*, 597 U.S. at 13 n.1 (emphasis added). Moreover, *Bruen*'s statement that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes" was no repudiation of licensing challenges generally. *Id.* at 38 n.9. Nor was *Bruen*'s dicta some sweeping declaration of the constitutionality of dozens of statutory schemes containing thousands of licensing provisions that were not before the Court.[12] *See* XMSJ at 20 (asserting that "*Bruen* explicitly approved of 'shall-issue' licensing regimes"). Rather, *Bruen* merely made an observation that what was not at issue in the matter before it was indeed *not at issue*. *Bruen*, 597 U.S. at 38 n.9; *see also Haaland v. Brackeen*, 599 U.S. 255, 294 (2023) (reiterating "Article III's strict prohibition on 'issuing advisory opinions'"); *United States v. Ayala*, 711 F. Supp. 3d 1333, 1351 (M.D. Fla. 2024) ("Reading the passage as [Defendants] urge[] would put *Bruen*'s dicta in direct contradiction with *Bruen*'s holding. … *Bruen* requires the above historical analysis."). To be sure, Chief Justice Roberts and Justice Kavanaugh suggested in concurrence that "the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." *Id.* at 79 (Kavanaugh, J., concurring). But no other Justice joined that minority view.[13]

[12] Consider Nevada's licensing regime as just one example from this list. *See Bruen*, 597 U.S. at 13 n.1. Nevada authorizes licensing officials to delay the issuance of a license for up to 120 days, or *four months*. Nev. Rev. Stat. § 202.366(3). Did *Bruen* really "explicitly approve[]" a four-month wait to exercise an enumerated right when it also repudiated "lengthy wait times in processing license applications"? XMSJ at 20; *Bruen*, 597 U.S. at 38 n.9. Of course not.

[13] *See also Commonwealth v. Donnell*, No. 2211CR2835, 2023 Mass. Super. LEXIS 666, at *5 n.3 (Mass. Super. Ct. Aug. 3, 2023) (alteration in original) ("Justices Alito, Kavanaugh (joined by Chief Justice Roberts), and Barrett filed concurring opinions. Because they all joined the majority opinion, however, these 'vanilla concurrences' have 'no impact' and 'count[] for nothing' legally.").

Defendants' purported analogues likewise fail. First, Defendants obliquely reference their declarants for the proposition that "concealed carry restrictions[] were prolific throughout the United States colonies before the Founding and throughout the nineteenth century." XMSJ at 20.[14] But Defendants do not actually identify any of these historical laws, and neither Plaintiffs nor this Court is "obliged to sift the historical materials for evidence to sustain [Defendants'] statute. That is [Defendants'] burden." *Bruen*, 597 U.S. at 60. When Defendants finally do cite historical laws, they are paltry. Defendants first cite Pennsylvania laws from 1713 to 1760 which regulated only the *discharge* of firearms, not public carry. *See* XMSJ at 21. And Defendants' 1771 New Jersey law only reached hunting on private properties, requiring "'license or permission obtained from the' landowner" – *i.e.*, not a government permission slip to exercise an enumerated right.[15] *Id.* Indeed, it was not until the Reconstruction era – "the mid- to late-nineteenth century" (*id.*, citing laws from 1870 to 1905) – that carry licensure took hold – a time that "do[es] not provide as much insight into its original meaning as earlier sources." *Bruen*, 597 U.S. at 36. In fact, with no Founding-era tradition to "confirm[]," such history is inapposite. *Id.* at 37.

Defendants' 1867 and 1879 Tennessee analogues fail for similar reasons: they regulated *discharge* and *disposition*, respectively. *See* XMSJ at 21. Of course, "[n]one of these restrictions imposed a substantial burden on public carry analogous to the burden created by" the challenged statute. *Bruen*, 597 U.S. at 50. And they stand for the broadest proposition – the government

[14] Note that terms like "before" the Founding and "throughout" the next century dance around the operative time period: *at* the Founding. Discussing the colonial period, *Bruen* emphasized that "English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution." *Bruen*, 597 U.S. at 35. If a colonial practice disappeared at the Founding, that is "relevant evidence" that the adoption of the Second Amendment was understood to abrogate such practice. *Id.* at 26.

[15] In this context, "license" simply means "Authority, Grant." 2 A New and Complete Law Dictionary (Timothy Cunningham ed., 1771).

"regulating firearms and requiring licenses" (XMSJ at 21) – which "read[s] a principle at such a high level of generality that it waters down the right." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring); *see also Bruen*, 597 U.S. at 29 ("[A] green truck and a green hat are … not relevantly similar if the applicable metric is 'things you can wear.'"). Whether the government has the general power to "regulate firearms" is not at issue here. What *is* at issue is whether the government can criminalize bearing arms as a default rule, relegating an enumerated right to an affirmative defense.

Finally, Defendants theorize that "[t]he number of historical analogs is likely more abundant than the State Defendants can show here." XMSJ at 21 (with their "experts" positing that many analogues are "lost to time"). But *Bruen* never adopted this sort of 'historian's prognostication' standard of extrapolation. Rather, *Bruen* "follow[ed] the principle of party presentation," and courts "are not obliged to sift the historical materials for evidence to sustain [a] statute. That is [the government's] burden." *Bruen*, 597 U.S. at 25 n.6, 60. Thus, "based on the historical record compiled," all Defendants have shown are two mismatched Founding-era laws from just *one state* that miss *Bruen*'s "how and why," along with a slew of "late-in-time outliers" reaching into the 20th century, evidence which "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 25 n.6, 29, 70, 66 n.28. Based on this paltry record, there is no way for this Court to conclude that, "[*s*]*ince the founding*, our *Nation's* firearm laws have included provisions" criminalizing the bearing of arms by default. *Rahimi*, 602 U.S. at 690 (emphases added). Indeed, Defendants' proffered analogues are far too few, too dissimilar, and too late.

3. Defendants' "Sensitive Places" Are "Sensitive" in Name Only.

Next, Defendants seek to justify the challenged statute by invoking a number of purported "sensitive places." XMSJ at 22. None is availing.

a. To Avoid Their Founding-Era Historical Burden, Defendants Seek to Recast Public Parks as a Uniquely Modern Invention.

i. Defendants Once Again Misrepresent *Bruen*'s Historical Methodology.

Defendants claim that public parks are a "mid-nineteenth century" invention. XMSJ at 23. But as Defendants admit, "greens" and "common areas" existed at the Founding and served as places of congregation, including for "*militia training or drills*" where firearms were not just allowed, but required. *Id.* (emphasis added). Even so, Defendants insist that these purportedly "unsightly plots" somehow were different from the open, public spaces we know today. *Id.* By citing only *one* declarant's *opinion* for this proposition,[16] Defendants seek to jettison the Founding as this Court's temporal focal point, and justify reliance on "firearms prohibition[s]" exclusively from the "the mid-nineteenth century" and even the twentieth century. *Id.* at 24, 26. But, "[a]s with their late-19th-century evidence, the 20th-century evidence presented by [Defendants] does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 66 n.28.

One analytical precept bears emphasis at the outset. <u>*Even if*</u> "[i]t was not until the mid-nineteenth century that parks as a concept emerged," XMSJ at 23, that does not sanction the unconstrained use of history *from the mid-nineteenth century*. Rather, if the notion of a recreational outdoor space as of 1791, such as the vast expanses of woods and forests, is as unprecedented as Defendants claim, then *Bruen* requires that Defendants must analogize to the

[16] Indeed, Defendants cite only *one* of their declarants for the proposition that parks were unknown at the Founding *and* for their entire version of park history. *See id.* at 23-24 (citing Defs.' SUMF ¶¶6-14 (citing Young Rep.)).

next-closest thing *at the Founding*. Indeed, "[a] court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by *the founding generation* to modern circumstances.'" *Rahimi*, 602 U.S. at 692 (second alteration in original) (emphasis added). Defendants already acknowledge a number of these next-closest locations where people congregated for recreational activity at the Founding, such as "taverns," "city-owned marketplaces," "commonly held utilitarian spaces," "and the like." Young Rep. ¶15. And to the extent Defendants' modern-park "concept" served as a "refuge" from "noisy, polluted, and crime ridden places," XMSJ at 23, then churches have always offered a similar such refuge.[17] But Defendants never claim the Founders banned firearms in any of these locations, and indeed, the Founders did not. As *Bruen* already observed, "the historical record yields relatively few 18th- and 19th-century 'sensitive places,'" and they did not include public places like the ones Defendants identify. *Bruen*, 597 U.S. at 30.

Rather, the *only* "18th- and 19th-century 'sensitive places'" *Bruen* identified were "legislative assemblies, polling places, and courthouses" – locations the Court only "assume[d]" constituted a national tradition at the Founding. *Id.* But these sorts of locations are instructive, as *Bruen* directed courts hearing challenges to "*new*" locational restrictions to "use analogies to *those* historical regulations...." *Id.* (emphasis added). Of course, public parks and other recreational

[17] And churches are one example of a location where some jurisdictions actually *required* individuals to carry firearms, precisely *because* congregations of people can be vulnerable to attack. *See, e.g.*, Act LI, Acts of February 24th, 1631, 1631 Va. Acts 174, https://tinyurl.com/bdfcvrkf ("ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne of every effence...."). The historical "principle[]" to be gleaned from these sorts of firearm regulations, *Rahimi*, 602 U.S. at 692, is that earlier generations valued "vulnerable populations" (XMSJ at 27) enough to protect them, *not* to criminalize the means of self-defense. Defendants would have it the other way, leaving parents unable to arm themselves and protect their own children in public. *See, e.g.*, Kelsey Gibbs, *Police Search for Suspect After 15-Year-Old Boy Is Sexually Assaulted in Nashville Park*, NC5 Nashville, https://tinyurl.com/2vmjhndr (Mar. 11, 2024).

areas bear no resemblance to legislative assemblies, polling places,[18] or courthouses. These historical locations are all "civic locations sporadically visited in general, where a bad-intentioned armed person could disrupt key functions of democracy," and which "are typically secured locations, where uniform lack of firearms is generally a condition of entry, and where government officials are present and vulnerable to attack." *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422, 440 (W.D.N.Y. 2022) (emphases removed).[19] And, of course, legislative assemblies, polling places, and courthouses *are not for recreational purposes*. *Bruen* therefore forecloses any notion that public parks and "recreational" areas can be "sensitive."

Finally, claiming that parks are an unprecedented historical development to justify wholesale departure from Founding-era analysis is precisely the "freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights" that *Bruen* rejected. *Bruen*, 597 U.S. at 83 (Barrett, J., concurring). Defendants' renewed claim that Reconstruction-era evidence that has "remained widespread and apparently unchallenged … deserve[s] the same weight given to pre-ratification restrictions" is completely incorrect. XMSJ at 25. Once again, evidence that is "widespread, and unchallenged *since the early days of the Republic*" has analytical relevance. *Bruen*, 597 U.S. at 36 (emphasis added). In

[18] Defendants note that some of the statute's recreational locations occasionally double as polling places. XMSJ at 26-27. Plaintiffs address this argument in Section I(D)(3)(b), *infra*.

[19] Defendants later suggest that the Second Circuit vacated *Hardaway* because the Second Circuit "recognized that the sensitive-spaces doctrine is not so limited." XMSJ at 29. The Second Circuit did indeed vacate *Hardaway*'s preliminary injunction in *Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir. 2023), but it did so only on mootness grounds because New York had amended the enjoined law to authorize the *Hardaway* plaintiffs' desired conduct while the appeal was pending. *Id.* at 343. The Second Circuit did not specifically overrule *Hardaway*'s reasoning and, in fact, it affirmed a similar preliminary injunction protecting even more conduct, which New York's amended law had not mooted. *See id.* at 352.

contrast, "19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established,'" but cannot on its own "overcome or alter th[e] text." *Id.* at 37, 36.

ii. The Founders Were No Strangers to Recreational Parks and Other Areas, and Defendants' "Expert" Cannot Credibly Claim Otherwise.

But, of course, Defendants (and specifically their "expert") are flat wrong that so-called "modern parks" are an entirely new creation unheard of at the Founding. Rather, plenty of Founding-era park analogues exist. Indeed, Defendants already acknowledge commons and greens, and never deny that vast expanses of undeveloped land and wilderness existed at the Founding – direct precursors to state and national parks. But rather than examine whether the Founders banned firearms in *these* locations (they did not), Defendants put all their eggs in the Reconstruction-era basket, mentioning the Founding only to claim that "public parks *as we know them today* did not exist" at the time. XMSJ at 23 (emphasis added). Thus, citing various factors relating to 19th-century "urbanization," Defendants credit the decay of cities as the reason "parks *as a concept* emerged" to serve as a refuge from "noisy, polluted, and crime ridden places." *Id.* (emphasis added).[20] Accordingly, Defendants characterize these 19th-century locations as places where firearms "were uniformly and entirely banned" at the time, apparently beginning with "Central Park, the first urban park in the nation...." *Id.* at 23, 24 (citing Young Rep. ¶34).

But even Defendants' "expert" does not say what they claim. Rather, he claims only that "the official prohibition *began* with Central Park" in 1858 New York City, not that it was the first park *ever*. Young Rep. ¶34 (emphasis added). Defendants thus overstate their own materials. But more importantly, Defendants' "expert" propagates a version of history which never existed.

[20] How a place disarming potential victims of crime would serve as a refuge from crime, Defendants' "expert" does not explain.

Indeed, the notion that parks only "emerged" during the 19th century has no basis in readily searchable or judicially noticeable fact. To the contrary, as Plaintiffs already explained in briefing on their Motion for Summary Judgment, Founding-era examples abound of public parks and analogous locations where the Founders never banned firearms, even if those locations did not have the label "park" at the time. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment ("MSJ") at 23-25 (collecting examples). Because Defendants dispute this history,[21] a number of these historical examples bear emphasis and further elaboration.

First, many parks date back to the Founding era and before,[22] including the National Mall in Washington, D.C., Battery and Duane Parks in New York, Boston Common in Massachusetts, and more.[23] In fact, Boston Common, established in 1634, is considered "the nation's first city park." Walls, *supra*, at 1. And, contrary to Defendants' claim that Founding-era parks were just "unsightly plots" with no ornamental features or recreational uses (XMSJ at 23), Boston Common

[21] Properly understood, these historical disputes speak to the relevancy of available evidence. As *Bruen* explained, "[t]he job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That 'legal inquiry' … relies on 'various evidentiary principles and default rules' to resolve uncertainties. … Courts are thus entitled to decide a case based on the historical record compiled by the parties." *Bruen*, 597 U.S. at 25 n.6.

[22] The English were no strangers to public recreational parks at the time. *See, e.g.*, The Sunday School Repository, or, Teachers' Magazine, vol. 1, iss. 8, at 700 (1813), https://tinyurl.com/tfnksaxm ("I think a playground is quite as useful as a school. It is still more easy to occupy a playground in these days … permission of Lord Dalhousie and the trustees that from time to time at fixed hours this park may be made a playground for certain games during the hours of recreation which the school allows."). It thus appears that the English park tradition is one we inherited.

[23] *See The Oldest City Parks*, Tr. for Pub. Land (Apr. 11, 2011), https://tinyurl.com/y4tbc54h; Margaret Walls, *Parks and Recreation in the United States: Local Park Systems*, Res. for the Future (June 2009), https://tinyurl.com/ku34nphk.

was in fact a quintessential *park*. As one 1838 source predating Defendants' materials described it:

> [W]e beg leave to invite our friends of the city to accompany us, at least in imagination, to the Common, and engage with us in a little agreeable conversation as we wander along its noble avenues of trees.....
> Dimly, amid the trees, are discerned the long lines of buildings....
> It were to be wished that every city might be able to boast of public places of recreation as valuable, as delightful, and as extensive as our Common....
> Every one who has lived in the confined atmosphere of a city, knows how much need it has of lungs....
> Much as public squares, and parks, and avenues, and fountains contribute to the beauty of a city....
> After the Common, we ought to mention the green upon *Fort Hill, which serves the appropriate purpose of a play-ground for one of our public schools – such an one as every school ought to have access to*.[24]

Indeed, "the *modern playground and recreation-park movement* may fairly be said to have had its beginnings for Americans in Boston."[25] Numerous other sources confirm the Common's recreational origins. As one scholarly article describes, Boston Common "served as a site for informal socializing and recreation" during the Founding era, including "[s]trolling," "[h]orse- and carriage riding," "sports," "entertainment," and "raucous celebrations."[26] Even the *U.S. government itself* explains that "the Common was a place for recreation as early as the 1660s."[27] And this "recreation[al]" space was far from a gun-free zone, as guns were never banned and, in fact, the Common commonly hosted militia activities. Beamish, *supra*, at 3-6. Rather than attempt to refute any of these sources pointing overwhelmingly to Boston Common's Founding-era recreational use, Defendants simply declare nakedly that locations like it "were *not* parks," but

[24] George W. Light, The Boston Common, or Rural Walks in Cities 11, 14, 21-22, 24 (1838) (emphasis added).
[25] *Parks*, 21 Encyclopedia Americana (1919) (emphasis added).
[26] Anne Beamish, *Before Parks: Public Landscapes in Seventeenth- and Eighteenth-Century Boston, New York, and Philadelphia*, 40 Landscape J. 1, 3-6 (2021).
[27] *Boston Common*, Nat'l Park Serv., https://tinyurl.com/ycyjc7dd (Jan. 16, 2025).

rather "multi-purpose utilitarian spaces." XMSJ at 29. Defendants' semantic objection[28] carries no weight.

Of course, the Boston Common was no anomaly. In New York, City Hall Park began as a "public common" in the 17th century.[29] New York's Bowling Green Park likewise was established in 1733. *The Earliest New York City Parks*, *supra*. And contrary to Defendants' declarant, nearby Duane Park was the first open space New York City purchased "specifically for use as a public park" *in 1797*.[30] Finally, in the South, urban planners designed Savannah, Georgia around public squares – open green spaces which became the landscaped parks that residents and visitors know today. Indeed, Savannah's squares started initially as "open, unplanted plazas," but they were "remodel[ed] … *around 1800* … into *landscaped neighborhood parks*."[31] It therefore would seem odd that "urbanization" (XMSJ at 23) served as some sort of a catalyst for people to discover that they could use outdoor spaces for leisure. To the contrary, the Founders had "modern" parks all along, and there is no evidence they ever banned firearms in such places.

Defendants' declarant omits all these historical examples from his report, carefully curating a version of history where the Founders never left home to stroll among nature. The notion that public parks and recreational areas are a post-Founding invention – conveniently happening to

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[28] *See* Lewis Carroll, Through the Looking Glass (1871) ("When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less." "The question is," said Alice, "whether you CAN make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all.'").

[29] *The Earliest New York City Parks*, NYC Parks, https://tinyurl.com/3ap4rkch (last visited Feb. 13, 2025).

[30] *Duane Park Origins*, Hist. Marker Database, https://tinyurl.com/45k8hpdb (last visited Feb. 13, 2025).

[31] *See* Turpin Bannister, *Oglethorpe's Sources for the Savannah Plan*, 20 J. of Soc'y of Arch. Hist. 47, 48 (1961) (emphasis added).

coincide with later regulations – does not pass the test of simple logic. Nor does it pass *Bruen*'s historical analysis.

iii. Defendants Fail to Undermine the Legal Consensus on Parks' Non-Sensitivity.

The obvious *non-sensitivity* of parks is not a novel one. Indeed, even pre-*Bruen*, courts rejected attempts to characterize such locations as "sensitive places" repeatedly, and under far less stringent constitutional tests. *See, e.g.*, *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 658 (Del. 2017) (holding that state parks and state forests are not "sensitive places" and that a county ban on firearms in such places was unconstitutional under Delaware's Second Amendment analogue); *People v. Chairez*, 104 N.E.3d 1158, 1176 (Ill. 2018) (holding that an Illinois statute that banned possession of firearms within 1,000 feet of a public park violated the Second Amendment and rejecting the notion that such an area is a "sensitive" place); *Morris v. U.S. Army Corps of Eng'rs*, 60 F. Supp. 3d 1120, 1123-25 (D. Idaho 2014) (rejecting the argument that the U.S. Army Corps of Engineers' outdoor recreation sites are "sensitive places"); *Solomon v. Cook Cnty. Bd. of Comm'rs*, 559 F. Supp. 3d 675, 690-96 (N.D. Ill. 2021) (finding that a forest preserve district is not a "sensitive place"); *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011) (contrasting "a public street or park" with "sensitive places").

Defendants' post-*Bruen* cases departing from this earlier consensus are unavailing. Defendants cite *Antonyuk v. James*, 120 F.4th 941, 1019 (2d Cir. 2024), *Wolford v. Lopez*, 116 F.4th 959, 984 (9th Cir. 2024), and *LaFave v. County of Fairfax*, 2024 U.S. Dist. LEXIS 152000, at *10-11 (E.D. Va. Aug. 23, 2024), for the proposition that "firearm regulations in parks a[re] consistent with the history and tradition of the United States." XMSJ at 25. But in order to arrive at such a conclusion, each court had to flout *Heller*, *Bruen*, and now *Rahimi*'s clear teachings on

Founding-era analysis. Indeed, *Antonyuk* held that Reconstruction-era evidence is not "mere confirmation" (*Bruen*, 597 U.S. at 37), but rather "*at least* as relevant as evidence from the Founding Era regarding the Second Amendment itself." *Antonyuk*, 120 F.4th at 988 n.36 (emphasis added). So too did *Wolford*, which simply "agree[d] with the Second Circuit" in *Antonyuk*. *Wolford*, 116 F.4th at 980. And so did *LaFave*, which relied exclusively on regulations "from 1858 to 1936" to somehow shed light on original meaning "pegged"[32] to 1791. *LaFave*, 2024 U.S. Dist. LEXIS 152000, at *26-27. At bottom, Defendants' reliance on these cases is misplaced. These are the same federal courts which had gotten *Heller*'s foundational individual-rights question *and* its standard of review nearly uniformly *wrong*.

iv. Defendants Cannot Even Show a *Tennessee* Tradition of Park Regulation.

Finally, Defendants' reliance on local Tennessee laws fails for the same reason as their reliance on *Antonyuk*, *Wolford*, and *LaFave*. Buried in two layers of citations to a declarant's report, Defendants cite regulations spanning only *1909 to 1989*, with *nothing* from even the Reconstruction era. XMSJ at 25-26. Of course, this Court need "not address any of the 20th-century historical evidence brought to bear.... As with their late-19th-century evidence, the 20th-century evidence presented … does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 66 n.28. Even so, Defendants' materials actually show just how paltry their purported Tennessee "tradition" is in the first place.

Defendants begin with 1909 Memphis and 1922 Chattanooga local ordinances – and they proceed no further. XMSJ at 25-26 (citing Defs.' SUMF ¶19 (citing Young Rep. ¶¶37, 61)).

[32] *Bruen*, 597 U.S. at 37.

Indeed, Defendants' later 1935 and 1950s citations stand only for the proposition that parks continued to proliferate in Tennessee. But Defendants' sources are silent as to firearm regulations in them. *See id.* at 26 (citing Defs.' SUMF ¶¶21-22 (citing Young Rep. ¶55)). At bottom, it was not until *1989* that the General Assembly "enact[ed] the first version of the current Guns in Parks statute" statewide. *Id.* Thus, from 1922 to 1989, Defendants offer *no evidence* that any localities other than Memphis and Chattanooga ever regulated firearms in parks. The Second Amendment's national standard aside, how just two cities' ordinances in the 1900s can shed light on Tennesseans' original understanding of Article I, Section 26 is anyone's guess. *See Bruen*, 597 U.S. at 69 (engaging in population analysis). That would be like ascribing Memphis's current actions to the entire state.[33]

At bottom, Defendants utterly failed to prove that the Founders did, or even would have, regulated firearms in parks. Indeed, contrary to Defendants' insistence otherwise, parks existed at the Founding, many of which looked much like "modern" parks, and many of which were used for identical purposes. And even if not, that is no excuse under *Bruen* to shift the analytical time period nearly a century into the future. Rather, Defendants still must analogize *to the Founding*, something they entirely failed to do. Defendants likewise failed to cite as persuasive authority any court applying a faithful Founding-era analysis to uphold a firearm regulation in parks.

[33] *See* Alex Coleman et al., *Memphis Voters Say Yes to 3 Gun Control Ordinances*, WREG Memphis, https://tinyurl.com/nhhs8vuf (Nov. 6, 2024) (city officials acknowledging "how much of a conflict" a new gun ordinance "creates with the state and conflict it has with state law" on preemption). Moreover, Defendants' suggestion that "many local laws have been lost to time" is a double-edged sword. XMSJ at 21. Indeed, City of Memphis officials just admitted their new ordinance is unlawful, but they passed it anyway. How many more of these contemporaneous acknowledgements of impermissible experimentation have been lost in the historical record? It is far more likely that such remarks would have slipped through the cracks than the enactment of laws themselves. Of course, Memphis's experimentation with preempted and unconstitutional firearm regulations sheds no light on what Article I, Section 26 means, nor would it have in an analytically relevant time period.

Defendants' Tennessee materials are even weaker, spanning just two cities during a couple decades of the 20th century. In sum, without any Founding-era historical basis, Tennessee's "Guns in Parks" statute is unconstitutional.

b. Defendants' "Polling Places" Argument Is Unavailing.

Defendants next claim that the transient use of "civic centers and governmental property" as polling places renders the challenged statute immune from a facial challenge. XMSJ at 26. But this argument fails for the same reason that limited locational restrictions could not defeat *Bruen*'s facial challenge. What is more, Tennessee *does not prohibit* firearms in polling places, unless they are otherwise off-limits to guns (like schools), and so to justify the statute using a "why" that is not the "why" the legislature chose makes little sense. Like with Defendants' claims above, a statute that bans guns at polling places is *not this statute*.

Defendants also claim that "[i]t is well-settled that polling places are traditionally sensitive places...." *Id.* at 27. But this "settled" conclusion is anything but and, indeed, it exemplifies the dangers of superficial historical compilation. *Bruen* cited a law review article to note that some polling-place restrictions existed at the Founding. *Bruen*, 597 U.S. at 30. "[A]ware" of no disputes as to the sufficiency of this tradition at the time, *Bruen* merely "assume[d]" polling places to be sensitive. *Id.* But Defendants' declarant cites *only three* Founding-era states that restricted firearms at polling places, one of which was Delaware via its 1776 state constitution. *See* Charles Rep. ¶15. Of course, *Bruen* "doubt[ed] that *three* colonial regulations could suffice to show a tradition" for the entire nation. *Bruen*, 597 U.S. at 46. But here, Defendants' declarant neglects to mention that Delaware's subsequent 1792 constitution *removed the polling-place restriction altogether* after local Revolutionary-era turmoil had subsided. *See* Del. Const. of 1792; Dan M. Peterson & Stephen P. Halbrook, *Feature: A Revolution in Second Amendment Law*, 29 Del. Law.

12, 15 (2011). Interestingly, such removal was also contemporaneous with adoption of the Second Amendment.

c. The Mere Presence of Children Does Not Render a Place "Sensitive."

Defendants next posit that "[c]hildren are one of the most important factors to consider when assessing whether an area is a sensitive space." XMSJ at 27. But Defendants cite no binding precedent for this proposition, which flatly contravenes *Bruen*'s warning not "to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded...." *Bruen*, 597 U.S. at 31. Indeed, even Defendants' cited Tennessee case warned that "not 'all places of public congregation' are 'sensitive places.'" *Columbia Hous. & Redevelopment Corp. v. Braden*, 663 S.W.3d 561, 563 (Tenn. Ct. App. 2022); *see* XMSJ at 27. Instead, Defendants rely on the Second Circuit's *Antonyuk* decision for this "vulnerable populations" "factor[]," one purportedly so "important" that the Supreme Court never mentioned it. XMSJ at 27. A closer examination of *Antonyuk*'s materials reveals just how tenuous this purported "tradition" really is.

Antonyuk divined a historical tradition as to "vulnerable populations" from two categories of laws – statutes "prohibit[ing] those with mental illness, intellectual disabilities, and alcohol addiction from serving in militias," and statutes "prohibiting guns in schools." *Antonyuk*, 120 F.4th at 1011. Notably, *Antonyuk*'s laws imposing militia disqualification standards represented only *three states* spanning 1837 to 1843. *Id.* And its "guns in schools" laws spanned the years 1870 to 1890. *Id.* But aside from both categories' post-Founding temporal irrelevance, the militia laws obviously had a different "why" – they clearly maintained the effectiveness of a fighting force. Such laws are analogous to modern military health and sobriety standards, not to broad bans on public carry.

And with respect to schools, Defendants' reliance is similarly misplaced. First and most obviously, Plaintiffs are not challenging a regulation of firearms *in schools*. Even assuming some historical tradition supports banning an adult's possession of a firearm in a school, that does not mean the limited locational restriction of a school follows children wherever they go. Indeed, children are present everywhere in society – public streets, stores, homes, and sometimes even gun ranges with parental supervision. But that does not mean a roving gun-free zone follows children wherever they go, as *Bruen* explained that the "Second Amendment guarantees a general right to public carry...." *Bruen*, 597 U.S. at 33. Defendants offer no limiting principle for their "vulnerable populations" theory.

Second, courts already have rejected attempts to analogize schools to public locations with children. As one district court observed:

> Regulating firearms at schools is different than playgrounds and youth centers in key ways. Rather than delivering children to the state (sometimes with armed officers) for protection, at playgrounds parents and caregivers remain responsible for their children's safety without any immediate support. And in contrast to the restricted grounds of a school where unauthorized persons generally may not enter, playgrounds and youth centers are public, unrestricted spaces.

May v. Bonta, 709 F. Supp. 3d 940, 960-61 (C.D. Cal. 2023). Although the Ninth Circuit later reversed this district court in *Wolford v. Lopez*, 116 F.4th 959 (9th Cir. 2024), it did so with no historical analysis as to schools or even "vulnerable populations." Indeed, *Wolford* simply declared "schools and parks" to be "sensitive" and, "by extension," places like playgrounds as well. *Id.* at 985. That "the Ninth Circuit overruled the pertinent parts of these opinions" (XMSJ at 29) is of no moment, because it did so in direct contravention of *Bruen*'s standard.

And third, rather than "doubl[ing] down" that schools are "sensitive," XMSJ at 27, *Bruen* undermined that notion. Indeed, *Bruen* observed that the operative Founding-era "historical record yields relatively few … 'sensitive places,'" listing only "legislative assemblies, polling places, and

courthouses." *Bruen*, 597 U.S. at 30. Recounting one Reconstruction-era example, *Bruen* explained that, amid racial tensions in the 1860s, teachers armed themselves to protect from "attacks on the school." *Id.* at 61.

Thus, even in Defendants' preferred historical time period, the record does not reflect a consensus on banning firearms within schools. Nor does such a consensus exist today, as teachers – adults exercising *in loco parentis* authority[34] over students – are able to arm themselves in Tennessee schools.[35] This distinction is paramount, as historical regulations only ever banned *students* from possessing firearms,[36] not the adults tasked with educating and protecting them while away from their parents. But here, Defendants rely on these same historical regulations to ban *parents* and other guardians from carrying firearms to protect *their own children* in public parks. Defendants do so apparently because "Tennessee's children deserve that protection" – that is, no protection at all. XMSJ at 28.

Nor does the concept of disarmament of "vulnerable populations" and those around them make any sense. The Supreme Court repeatedly emphasized that "individual self-defense is 'the *central component*' of the Second Amendment right." *Bruen*, 597 U.S. at 29. And indeed, "[m]any Americans hazard greater danger outside the home than in it." *Id.* at 33. Exempting the most vulnerable from "the natural right of resistance and self-preservation" would defeat its purpose entirely. *Heller*, 554 U.S. at 594. As Justice Alito observed:

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[34] *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 413 n.3 (2007); *State v. Pendergrass*, 19 N.C. 365, 366 (1837) (recognizing that the "teacher is the substitute of the parent"); *State v. Mizner*, 45 Iowa 248, 251 (1876); *North v. Bd. of Trs. of Univ. of Ill.*, 137 Ill. 296, 306, 27 N.E. 54, 56 (1891) ("By voluntarily entering the university, or being placed there by those having the right to control him, [the student] necessarily surrenders very many of his individual rights.").

[35] Amanda Musa & Jamiel Lynch, *Tennessee Governor Signs Bill Allowing Teachers and Staff to Be Armed on Campus*, CNN (Apr. 27, 2024), https://tinyurl.com/3sxtk48y.

[36] *See, e.g.*, Amicus Br. of the Ctr. for Hum. Liberty at 20-22, *Antonyuk v. Nigrelli*, No. 22-2908 (2d. Cir. Feb. 9, 2023), ECF No. 313 (collecting laws).

> The police cannot disarm every person who acquires a gun for use in criminal activity; nor can they provide bodyguard protection.... Some of these people live in high-crime neighborhoods. Some must traverse dark and dangerous streets in order to reach their homes after work or other evening activities. Some are members of groups *whose members feel especially vulnerable*. And some of these people reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury.

Bruen, 597 U.S. at 74 (Alito, J., concurring) (emphasis added). In other words, everyone who is disarmed and left helpless at the hands of criminal attackers is part of a "vulnerable population." Defendants' law is indefensible. Indeed, the ability to defend oneself in public turns a vulnerable subject into a self-reliant citizen.

Thus, based on these glaring deficiencies as to schools, Defendants' downstream analogies to "Parks, particularly when used for summer camps," "Daycares," "Playgrounds," "Community centers," and "Zoos" likewise fail. *Id.* And finally, Defendants fail to show that "Tennessee courts agree" with any of their atextual and ahistorical theories. *Id.* at 27. Indeed, they cite only *one* court for the proposition that schools are "sensitive places" for all individuals within. But *Columbia Hous. & Redevelopment Corp. v. Braden*, 663 S.W.3d 561, 567 (Tenn. Ct. App. 2022), concerned a landlord-tenant dispute, in which the landlord was a government entity, which mentioned *Heller* and *Bruen*'s reference to schools only in passing dicta. That is hardly the resounding historical holding Defendants claim.

II. PLAINTIFFS HAVE STANDING TO SUE THE ATTORNEY GENERAL AND GOVERNOR.

Defendants claim that Plaintiffs lack standing to sue Attorney General Skrmetti and Governor Lee. XMSJ at 30-38. At base, Defendants posit that the claims against these Defendants should be dismissed because "because neither Defendant enforces the challenged statutes." XMSJ at 30. Although this Court already rejected these arguments in its August 30, 2023 Order, Defendants resurrect them in the apparent belief that the different ("heightened") burden of proof

in this procedural posture will carry the day. *Id.*; *see* Aug. 30, 2023 Mem. and Order. But Defendants do not cite – and Plaintiffs likewise are unaware of – any authority requiring a plaintiff to submit more material on standing for summary judgment, for its own sake, when prior arguments already were sufficient. This Court should reject Defendants' invitation to craft a new rule of pleading, and indeed, the same issues that plagued Defendants' earlier standing arguments remain.

A. Plaintiffs Have Standing to Sue Attorney General Skrmetti.

Defendants contend that Plaintiffs lack standing to sue Attorney General Skrmetti, claiming that "Plaintiffs' alleged injuries cannot be traced to General Skrmetti or redressed by any declaration against him." XMSJ at 31. Defendants claim that injury or redress is not traceable to the Attorney General because he "cannot initiate prosecutions himself and cannot 'direct or command district attorneys general to undertake prosecutions.'" *Id.* (citing *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1032 (6th Cir. 2022)). Defendants also claim that the Advisory Opinions of the Attorney General are too indirect to trace to Plaintiffs' harms, because he does not have "determinative or coercive authority" over the various district attorneys in the State of Tennessee. *Id.* at 31-32.

However, these arguments fail to reckon with the supervisory and leadership role that the Attorney General has within the executive branch of the State of Tennessee. As Plaintiffs already explained, the Attorney General has a statutory duty to prosecute and defend criminal appeals, or cases wherein the district attorney refuses to prosecute criminal offenses. Am. Compl. ¶9. Further, the Attorney General's advisory letters are not so attenuated from Plaintiffs' harms as Defendants would have this Court believe. Indeed, "[a]lthough opinions of the Attorney General are not binding on courts, government officials rely upon them for guidance; therefore, this opinion is

entitled to considerable deference." *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995). Here, the Attorney General has promulgated an expansive opinion letter stating that Tenn. Code Ann. § 39-17-1307 and Tenn. Code Ann. § 39-17-1311 restrict the ability of citizens to lawfully carry any firearms (far broader than even the language in the applicable statute) in public parks and other recreational sites, greatly increasing the propensity of a government official to arrest and prosecute a person for engaging in such conduct. Op. Tenn. Att'y Gen. No. 18-04 (Jan. 31, 2018). This interpretation exposes Plaintiffs to liability, and it flows from the Attorney General himself.

Moreover, Defendants' faith in *Universal Life Church Monastery Storehouse* is misplaced, as the lack of standing in that case was a result of the plaintiffs seeking an *injunction* against the Attorney General to enjoin the enforcement of Tennessee's marriage laws. *Universal Life Church Monastery Storehouse*, 35 F.4th at 1032. Because he had no role in actually enforcing the statute, "plaintiffs have not shown standing to seek equitable relief against the Attorney General decreeing that he refrain from enforcement." *Id.* Here, in contrast, Plaintiffs request a declaration that Tenn. Code Ann. § 39-17-1307(a) and Tenn. Code Ann. § 39-17-1311 are unconstitutional, and defending the constitutionality of Tennessee's statutes falls squarely within the Attorney General's duties. Tenn. Code Ann. § 8-6-109(b)(9).

Indeed, as aptly described in this Court's August 30, 2023 Order, the Declaratory Judgment Act in fact *requires* "the Attorney General to be a party defendant in any proceeding where the constitutionality of the Act of the legislature is before the Court on declaratory judgments proceeding." *Cummings v. Beeler*, 223 S.W.2d 913, 916 (Tenn. 1949); *see also Buena Vista Special Sch. Dist. v. Bd. of Election Comm'rs*, 116 S.W.2d 1008, 1009 (Tenn. 1938); Tenn. Code Ann. § 29-14-107. Importantly, "the Supreme Court has never repudiated its construction in *Beeler*," and "as

long as the precedent is still 'good law,' [lower] courts must follow it." Aug. 30, 2023 Mem. and Order at 11 (alteration in original).

Even so, Defendants try to displace this well-settled principle of Tennessee law by pointing out earlier cases stating the Declaratory Judgment Act requires that the Attorney General only "shall be served with a copy of the proceeding." XMSJ at 32-34; C*ummings v. Shipp*, 3 S.W.2d 1062, 1063 (Tenn. 1928). However, the cases Defendants cite do not shake the foundations of *Beeler* or *Buena Vista*. In *State v. Superior Oil*, 875 S.W.2d 658 (Tenn. 1994), the State of Tennessee already was a party, so the Attorney General's presence would have been redundant. And in *Chattanooga-Hamilton Cnty. Hosp. Auth. v. UnitedHealthcare Plan of the River Valley, Inc.*, 475 S.W.3d 746 (Tenn. 2015), the Attorney General intervened to litigate the constitutionality of state Medicaid reimbursement rates, essentially taking the side of one of the private parties who were litigating the appropriate payment rate, hence the characterization of the suit as one "between private parties." *See id.* at 756. None of the cases Defendants cite directly call into question the holding of *Beeler*.

Nor do Defendants' citations to *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004), or *Giles v. Geico Gen. Ins. Co.*, 643 S.W.3d 171 (Tenn. Ct. App. 2021), which Defendants claim stand for the proposition that, "[w]hen two lines of precedent conflict, the majority of federal circuit courts treat the earlier opinion as controlling." XMSJ at 33. But *McMellon* was about resolving conflicts between *panel opinions*, which do not represent the full view of all judges on an appellate court. *McMellon*, 387 F.3d at 332-33. *Beeler* was no such panel opinion. In fact, it was a *unanimous decision* of the Tennessee Supreme Court, in which "[a]ll concur[red]." *Beeler*, 223 S.W.2d at 924. *Giles* certainly does not stand for the proposition that a subsequent, unanimous decision of Tennessee's highest court should be ignored. Rather, "we are bound to follow

[Tennessee Supreme Court decisions] if they are on point." *Giles*, 643 S.W.3d at 184 n.8 (alteration in original). And it does not get more "on point" than "[w]e … require the Attorney General to be a party defendant in any proceeding where the constitutionality of the Act of the legislature is before the Court on declaratory judgments proceeding." *Beeler*, 223 S.W.2d at 916.

Finally, Defendants' later obfuscation that the Attorney General is not "require[d]" as a party misses the central question of whether he *can* be named a party in this case. XMSJ at 34. For the reasons already stated, the Attorney General is, at minimum, a proper party. And, under binding precedent, this Court did not err when it ultimately held that, "under the construction of the Declaratory Judgment Act in *Beeler*, Plaintiffs were required to" name the Attorney General. Aug. 30, 2023 Mem. and Order at 11.

B. Plaintiffs Have Standing to Sue Governor Lee.

Defendants also challenge Plaintiffs' standing to sue the Governor, initially claiming that Plaintiffs did not put forth enough evidence tying him to their harms, and especially latching onto the notion that the Governor was not mentioned in Plaintiffs' Motion for Summary Judgment. XMSJ at 35. However, this ignores the facts Plaintiffs set forth in their Amended Complaint, wherein they describe how, as the head of Tennessee's executive branch, the Governor has a duty to "take care that the laws be faithfully executed," leading to the harms they suffer as a result of the enforcement of the challenged statutes. *See* Am. Compl. ¶8; Tenn. Const. art. III, § 10.

Defendants next seek to relitigate the arguments already decided by this Court in its August 30, 2023 Order, claiming that the Governor's supervisory role and control over the commissioner Defendants is insufficient to trace Plaintiffs' harms and injuries to the Governor. XMSJ at 35-37. Defendants raise three arguments on this point. *Id.* First, Defendants claim that the Governor's supervisory role and control over the commissioners who enforce the statutes at issue "does not

give him a role in the enforcement of individual criminal laws beyond his general 'take care' duty," and that Plaintiffs have failed to establish allegations and evidence about how the Governor's conduct harms them. *Id.* at 36. However, in the cases Defendants cite, the plaintiffs were seeking injunctive relief, not declaratory relief. *See Doe v. Lee*, 102 F.4th 330, 332 (6th Cir. 2024); *Universal Life Church Monastery Storehouse*, 35 F.4th at 1031. In a case regarding injunctive relief, enjoining a statute's enforcement has no effect upon the Governor unless it is a law he himself carries out. Therefore, Defendants' cited caselaw is inapplicable here. Second, Defendants claim that there has been no "governmental action" to justify a cause of action under Tenn. Code Ann. § 1-3-121.[37] XMSJ at 36. However, there *has* been "governmental action" in this case – the enforcement of the challenged statutes by the commissioner Defendants, the Governor's control and appointment of those Defendants, and the Attorney General's advisory letter encouraging governmental actors to enforce those statutes. *See* Am. Compl. ¶¶8, 18-20, 27-28. Third, Defendants claim that, because *some* district attorneys and sheriffs are elected positions not subject to the Governor's removal power, the Governor's supervisory control over *other*, more senior state officials somehow invalidates Plaintiffs' standing. XMSJ at 36-37. This argument falls flat, as a defendant does not need to have supervisory control over *each and every* person who enforces a statute. As this Court held in its August 30, 2023 Order, the Governor has that power over the commissioner Defendants here. Indeed, "[t]he power to remove is the power to control." *Silver v. United States Postal Serv.*, 951 F.2d 1033, 1039 (9th Cir. 1991).

[37] Tenn. Code Ann. § 1-3-121 reads as follows: "Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a *governmental action*. A cause of action shall not exist under this chapter to seek damages." *Id.* (emphasis added).

On the other hand, there is substantial authority supporting Plaintiffs' standing to sue the Governor in this case. Where "enforcement and administration responsibilities are diffused among different agencies and levels of state and local government, it is appropriate, under *Allied Artists*, to sue the governor...." *Doe v. Haslam*, 2017 U.S. Dist. LEXIS 186130, at *32 (M.D. Tenn. Nov. 9, 2017); *see also Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982) (explaining that a state governor can be properly sued to challenge an unconstitutional law when the substantial public interest in enforcement of the law places a significant obligation upon the governor to use his general authority to see that state laws are enforced). As evidenced by the litany of state official ranks among Defendants, this case is precisely one of diffused enforcement described by *Haslam*.

Even so, Defendants contend that *Allied Artists* and its progeny are "no longer good law." XMSJ at 37. But the cases which Defendants cite to support this assertion have substantial differences from this case and are thus inapplicable here. Nor do they overrule *Allied Artists*. In *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), and *Farhoud v. Brown*, 2022 U.S. Dist. LEXIS 20033 (D. Or. Feb. 3, 2022), the statute at issue was a specific type of law which used solely non-governmental private-party enforcement mechanisms to deny plaintiffs any standing to sue government officials. *See Whole Woman's Health*, 595 U.S. at 35; *Farhoud*, 2022 U.S. Dist. LEXIS 20033, at *10. And in *Tenn. State Conference of the NAACP v. Lee*, 2024 U.S. Dist. LEXIS 150119 (M.D. Tenn. Aug. 21, 2024), the statutes at issue were election laws where implementation and enforcement was completely outside of the Governor's chain of command.[38] *Id.* at *65-66.

[38] Tennessee law identifies the coordinator of elections as the "chief administrative election officer" with the duty to "maintain uniformity in the application, operation and interpretation of the election code." Tenn. Code Ann. § 2-11-201(b). It also gives the Secretary of State (not the Governor) the power to appoint and terminate this elections administrator. *Id.* § 2-11-201(a).

These cases are entirely dissimilar to *Allied Artists* and thus do not undermine its applicability here. *Allied Artists* still controls this case, and Plaintiffs have standing to sue the Governor.

III. DEFENDANTS' JURISDICTIONAL ARGUMENT IS UNAVAILING.

Defendants argue that this Court lacks jurisdiction to declare Tenn. Code Ann. § 39-17-1307 and Tenn. Code Ann. § 39-17-1311 unconstitutional. XMSJ at 38-41. Defendants claim that, because a chancery court is a court of equity, it cannot declare criminal statutes unconstitutional, as it lacks jurisdiction to enforce criminal laws. *Id.* at 39. But Defendants' reliance on *Zirkle v. Kingston*, 396 S.W.2d 356 (Tenn. 1965), is misplaced, as there is substantial authority that makes clear that this Court does indeed have jurisdiction to grant declaratory relief to Plaintiffs, even if it lacks jurisdiction to issue injunctive relief. This Court previously concluded as much, holding that "[t]he Court is … still able to 'hear[] and determine[]' Plaintiffs' case … because we are able to enter a final ruling on their claim for declaratory relief." Mar. 5, 2024 Order Denying Motion for Preliminary Injunction at 6 (citing *Blackwell v. Haslam*, 2012 Tenn. App. LEXIS 23 (Tenn. Ct. App. Jan. 11, 2012)). Thus, under the law of the case, "issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited." *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998).

Defendants even concede that a long line of cases "suggest that courts of equity might have authority to grant declaratory judgments on the constitutionality of a statute even if they cannot issue injunctive relief." XMSJ at 39-40 (collecting cases). However, Defendants contend that such cases do not control because they conflict with *Zirkle*, and because they rely on *Erwin Billiard*

Tennessee's Constitution, in turn, places the authority to appoint the Secretary of State in the legislature (not the Governor). Tenn. Const. art. III, § 17.

Parlor v. Buckner, 300 S.W. 565 (Tenn. 1927), which involved a property-right exception to the jurisdictional limitation on courts of equity. XMSJ at 40-41. Neither argument is availing.

First, *Zirkle*'s seemingly emphatic condemnation of chancery having jurisdiction solely for declaratory judgments was made in the unique context of plaintiffs seeking to disguise contract claims as equitable theories of relief. *Zirkle*, 396 S.W.2d at 362 ("Regardless of the name applied to the cause, it is still one for unliquidated damages for injuries to property not resulting from a breach of oral or written contract, which are excluded from concurrent chancery jurisdiction in T.C.A. sec. 16-602."). In any case, the Tennessee Supreme Court "has clearly departed from [*Zirkle*'s] unequivocal declaration." *Blackwell*, 2012 Tenn. App. LEXIS 23, at *14. Indeed, in *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520 (Tenn. 1993), the Tennessee Supreme Court upheld the judgment of a chancery court declaratory relief action challenging the constitutionality of criminal statutes, with no apparent issue with the chancery court's jurisdiction. *Id.* at 522. And in *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749 (Tenn. 2006), the Tennessee Supreme Court specifically addressed the jurisdiction of chancery courts, affirming "the general rule prohibiting state equity courts from enjoining enforcement of a criminal statute." *Id.* at 753. However, after concluding that the chancery court lacked jurisdiction to issue the *injunction* that was before the court in *Clinton Books*, the Court remanded the case "for a hearing on the merits with regard to the declaratory judgment action." *Id.* at 756. If chancery courts had no jurisdiction to issue declaratory judgments in cases where they lacked general equitable jurisdiction, the *Clinton Books* Court clearly would have dismissed the case entirely, instead of remanding for a hearing specifically regarding declaratory judgment. *See In re Brody S.*, 2016 Tenn. App. LEXIS 362, at *13 n.5 (Tenn. Ct. App. May 24, 2016) (noting "we have an independent obligation to determine whether a basis for jurisdiction existed"); *In re Estate of Trigg*, 368 S.W.3d

483, 489 (Tenn. 2012) (noting that "issues regarding a court's subject matter jurisdiction should be considered as a threshold inquiry").

And second, concerning Defendants' claims that the opinions supporting this Court's jurisdiction to issue declaratory relief "rely heavily on *Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927)," XMSJ at 40-41, neither of the two cases discussed above, *Davis-Kidd Booksellers* and *Clinton Books*, rely on or even cite *Buckner*. *See Clinton Books*, 197 S.W.3d at 752-55; *Davis-Kidd Booksellers*, 866 S.W.2d at 522. Further, Defendants' contention that the property-right exception granted the chancery court jurisdiction in *Buckner* is not supported by a careful review of that case, especially in light of *J. W. Kelly & Co. v. Conner*, 123 S.W. 622 (1909). The property-right exception, as a means of conferring a chancery court with equitable jurisdiction over a case involving a criminal statute, would allow the chancery court to enjoin the statute's enforcement, not just to issue declaratory relief. *See J. W. Kelly & Co.*, 123 S.W. at 630. If the chancery court in *Buckner* were granted jurisdiction by the property-right exception, it would have been within its power to issue an injunction against the statute's enforcement, but the *Buckner* Court specifically found that its jurisdiction was solely limited to declaratory relief. Although *Buckner* states that a plaintiff with a property right and investment distinct from the general public was "entitled to bring and maintain an action for the determination of the proper construction or constitutionality of such a statute, under the provisions of the Declaratory Judgments Law," it never states that *only* such a plaintiff could do so. *See Buckner*, 300 S.W. at 566. In sum, Defendants' arguments simply misunderstand those cases.

Finally, Defendants proffer several cases which they claim support their position, but a close reading similarly reveals otherwise. Two of Defendants' cases, XMSJ at 39, concern a chancery court's *enjoining* the enforcement of a criminal ordinance, *Spoone v. Morristown*, 206

S.W.2d 422, 424 (1947), and a criminal court's local rules, a far cry from Plaintiffs' request for *declaratory* relief. *Memphis Bonding Co. v. Criminal Court of Tenn. 30th Dist.*, 490 S.W.3d 458, 467 (Tenn. Ct. App. 2015). Defendants' other two cases feature plaintiffs requesting that chancery courts use their declaratory relief powers to declare *past criminal judgments* as unconstitutional, again unlike the facial statutory challenge Plaintiffs levy here. *See Carter v. Slatery*, 2018 U.S. Dist. LEXIS 152035, at *3 (M.D. Tenn. Sept. 6, 2018); *Frazier v. Slatery*, 2021 Tenn. App. LEXIS 423, at *13 (Tenn. Ct. App. Oct. 25, 2021). The relief Plaintiffs seek here easily fits into the equitable power of a declaration of rights, Tenn. Code Ann. § 16-11-101. In contrast, in the cases Defendants cite, the chancery courts were encroaching upon the enforcement and review of criminal cases, which would realize the concerns about the encroachment upon the state's police power voiced in *J. W. Kelly & Co.*, 123 S.W. at 638. Because Plaintiffs solely seek declaratory relief, such issues are not before this Court.

IV. PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF IS PROPER.

Finally, Defendants complain that a declaration that the challenged statutes are unconstitutional "would extend across 'Tennessee's total geographical area' and benefit even non-parties." XMSJ at 41. In other words, Defendants wish to be "free to prosecute others," even if this Court were to declare the challenged statutes entirely ahistorical and violative of Article I, Section 26 as to Plaintiffs. *Id.* Accordingly, Defendants wish declaratory relief to be "limited to the parties in this litigation." *Id.* at 43. But courts require no such "tailor[ing]," *id.* at 42, nor would it make any sense here.

The Declaratory Judgment Act provides that "[a]ny person … whose rights, status, or other legal relations are affected by a statute … may have determined any question of … validity arising under the … statute … and obtain a declaration of rights, status or other legal relations thereunder."

Tenn. Code Ann. § 29-14-103. The Act further provides that, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." *Id.* § 29-14-107(a). Finally, the Act's "purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights … and is to be liberally construed and administered." *Id.* § 29-14-113.

First, even though the Act requires "all persons … who have or claim any interest which would be affected by the declaration" to be "made parties," *id.* § 29-14-107(a), that does not mean a court can only ever declare the constitutionality of a statute as applied. Indeed, the Tennessee Supreme Court has recognized that "a suit for declaratory judgment" is available "[w]hen challenging the facial validity of a statute on constitutional grounds...." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853-54 (Tenn. 2008). In those cases, no court has ever purported to require *all Tennesseans* to be made parties to benefit from a declaration of their constitutional rights. To indulge Defendants' proposed limitation would defy logic and strain judicial resources. The "distinction between facial and as-applied challenges 'goes to the breadth of the remedy employed by the Court.'" *Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, 2019 Tenn. App. LEXIS 588, at *41-42 (Tenn. Ct. App. Dec. 12, 2019). But if a facial constitutional declaration can only ever issue if constrained to particular persons, that means all Tennesseans would have to seek declaratory relief separately against even facially unconstitutional laws.

Finally, Defendants emphasize that "*no declaration shall prejudice the rights of persons not parties to the proceedings*," in apparent support of the notion that only Plaintiffs can benefit from a declaration. XMSJ at 43 ("Thus, the available declaratory relief is statutorily limited to the

parties in this litigation."). But on its face, the statute speaks of "prejudice," not 'benefit.' Tenn. Code Ann. § 29-14-107(a). The only persons who could be "prejudice[d]" as nonparties would be government officials tasked with enforcing the challenged statutes. And Plaintiffs named seven such Defendants *who cumulatively enforce the challenged statutes statewide*. *See* Am. Compl. ¶¶8-14.

V. DEFENDANTS' "EXPERT" REPORTS SEEK TO USURP THIS COURT'S ROLE IN DECIDING QUESTIONS OF LAW.

And as an overarching matter, Plaintiffs object to Defendants' use of two "expert" reports to advance the opinions of academics on the legal relevancy and sufficiency of purported historical analogues. *Bruen* emphasized that "[t]he job of judges … is to resolve *legal* questions presented in particular cases or controversies." *Bruen*, 597 U.S. at 25 n.6. To that end, courts are "entitled to decide a case based on the historical record *compiled* by the parties," not the historical record compiled and then distilled, summarized, and editorialized by academics. *Id.* (emphasis added). Indeed, "reasoning by analogy – a commonplace task for any lawyer or judge" – falls squarely within this Court's duty to decide the threshold relevancy of evidence under *Bruen*'s "how and why" and, ultimately, whether such evidence is "well-established and representative" enough to constitute a national tradition. *Id.* at 28, 29, 30; *see also id.* at 22 (recounting that, in *Heller*, "we addressed each purported analogue and concluded that they were either irrelevant or 'd[id] not remotely burden the right of self-defense as much as an absolute ban on handguns'"). Thus, while Defendants certainly may rely on historians only to *locate and compile* historical materials, once those tasks are accomplished, the role of historians is at an end. Thereafter, determining the *meaning* of those materials (statutory texts) is quintessentially the job of lawyers and judges. Indeed, the ultimate task at hand is *constitutional interpretation*.

In direct contravention of these principles, Defendants offer that, "[s]hould the Court wish to review the historical documents cited in the expert reports," Defendants may "provide copies of these documents" at a later time. XMSJ at 3 n.1. But the *historical documents* – not purported "expert" reports – are the primary sources necessary for this Court to analyze. *See Bruen*, 597 U.S. 1 (quoting verbatim and analyzing the text of historical laws, not merely summaries or jurisdictions and years). "Expert" reports merely "cit[ing]" historical documents create an impermissible degree of separation from the source text. The sources should speak for themselves, and this Court should decline to rely on the use of anything other than those original texts.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted and Defendants' Cross-Motion for Summary Judgment should be denied.

Respectfully submitted:

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I hereby certify that a copy of the foregoing was served by mail to the Office of the Attorney General and chambers copies to the Panel on February 19, 2025:

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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
28TH JUDICIAL DISTRICT, GIBSON COUNTY

STEPHEN L. HUGHES, DUNCAN O'MARA, ELAINE KEHEL, GUN OWNERS OF AMERICA, INC., and GUN OWNERS FOUNDATION,	)	
Plaintiffs,	)	
v.	)	No. 24475
BILL LEE, in his official capacity as the Governor for the State of Tennessee, et al.,	)	Chancellor Mansfield, Chief Judge Judge Burk Judge Rice
Defendants.	)	

PLAINTIFFS' RESPONSES TO STATE DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS AND STATEMENT OF ADDITIONAL DISPUTED MATERIAL FACTS

Pursuant to Tenn. R. Civ. P. 56.03, Plaintiffs Stephen L. Hughes, Duncan O'Mara, Elaine Kehel, Gun Owners of America, Inc., and Gun Owners Foundation submit the following responses to State Defendants' Statement of Undisputed Material Facts and their separate Statement of Additional Disputed Material Facts.

RESPONSES TO STATE DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In 1869, Tennessee "enacted a law restricting the carrying of dangerous weapons into 'any election . . . fair, race course, or other public assembly of the people.'" Charles Rep. ¶ 8 (quoting *Public Statutes of the State of Tennessee 1858*, at 108 (James H. Shankland ed., 1871)).

RESPONSE: It is disputed that this is a statement of material fact. A law enacted in 1869 is immaterial to the original meaning of Article I, Section 26 of the Tennessee Constitution, whose protections cannot be lesser than those in the Second Amendment. *N.Y. State Rifle & Pistol Ass'n*

v. Bruen, 597 U.S. 1, 37 (2022) ("generally assum[ing] that the scope of the protection … is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791"); *id.* ("19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established.'"); *id.* at 36 ("[B]ecause post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'"); *see also Andrews v. State*, 50 Tenn. 165, 183 (1871) ("[I]t is evident the State Constitution was intended to guard the same right, and with the same ends in view. So that, the meaning of the one, will give us an understanding of the purpose of the other.").

Moreover, Plaintiffs dispute the materiality of a historical law not reaching the full extent of locations covered by the challenged statute today. This historical law is not "relevantly similar" under *Bruen*'s "how and why." *Bruen*, 597 U.S. at 29 (cleaned up) ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry.").

Finally, Defendants omitted this historical law from their Appendix. Such omission violates Tenn. R. Civ. P. 56.06, which requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." And neither Plaintiffs nor this Court are "obliged to sift the historical materials," as that is Defendants' "burden." *Bruen*, 597 U.S. at 60.

2. Surety laws and concealed carry prohibitions and regulations were prolific throughout the United States colonies before the Founding and throughout the nineteenth century.

These were enacted to "curb the precipitous rise in armed crime, assaults, and murders" and to "protect the health, safety, and welfare of the community." Charles Rep. ¶¶ 19-21.

RESPONSE: Disputed. Defendants provided no historical laws to support this proposition in their Appendix. Rather, their declarant primarily cited law review articles. Such omission violates Tenn. R. Civ. P. 56.06 and *Bruen*'s warning about "sift[ing] the historical materials." 597 U.S. at 60. Moreover, based on this record, whether a combination of two different regulations was "prolific" is a vague statement and a matter of opinion. *Rogers v. First Nat'l Bank*, 2006 Tenn. App. LEXIS 97, at *54 (Tenn. Ct. App. Feb. 14, 2006) (collecting cases) ("[V]ague, conclusory generalizations cannot be relied upon to create a genuine issue of material fact."). While the Supreme Court acknowledged that surety laws existed at the Founding, *United States v. Rahimi*, 602 U.S. 680, 696 (2024), there is no evidence that "concealed carry prohibitions" did as well. Indeed, *Bruen* acknowledged that, "[b]eginning in 1813 with Kentucky, six States (five of which were in the South) enacted laws prohibiting the concealed carry of pistols by 1846." *Bruen*, 597 U.S. at 52 n.16. That is a small minority of states even then. Plaintiffs therefore dispute that there were any "concealed carry prohibitions" at the Founding.

Relatedly, it is disputed that this is a statement of material fact. Regulations "before the Founding" and "throughout the nineteenth century" skirt around the relevant Founding-era time period of 1791. *Bruen*, 597 U.S. at 36-37.

Finally, surety laws and regulations of manner of carry are immaterial to justifying a regulation which criminalizes all carry as in the challenged statutes' locations. *Id.* at 29 ("how and why"); *id.* at 56 (noting "the surety statutes *presumed* that individuals had a right to public carry"); *id.* at 54 ("distinguishing between concealed and open carry").

3. From the Founding through the nineteenth century, many jurisdictions adopted licensing requirements for carrying, discharging, and selling firearms, including: Pennsylvania (1713, 1750, 1760); New Jersey (1771); New Orleans, Louisiana (1870); Bloomington, Illinois (1876); Lake, Illinois (1882); Berlin, Wisconsin (1890); Alameda, California (1894); Lincoln, Nebraska (1895); Memphis, Tennessee (1867); Tennessee (1879); St. Paul, Minnesota (1882); Chicago, Illinois (1880); St. Louis, Missouri (1868); Ritzville, Washington (1899); Sacramento, California (1876); Oakland, California (1890); Eureka, California (1905); San Francisco, California (1884); Santa Barbara, California (1888); Hood River Glacier, Oregon (1895); Osceola, Missouri (1887); Astoria, Oregon (1879); Scandia, Kansas (1894); New York (1880); Montclair, New Jersey (1897). Defs' App. at 1-28.

RESPONSE: It is disputed that this is a statement of material fact. The 1713 and 1750 Pennsylvania laws regulated only discharge. Defs.' App. at 1-2. The 1760 Pennsylvania law was an anti-poaching measure requiring permission "from the owner of such lands" to hunt. *Id.* at 3. The 1771 New Jersey law was a similar anti-poaching measure. *Id.* at 4. These laws fail *Bruen*'s "how and why" and are not "relevantly similar" to the challenged statutes' prohibitions. *Bruen*, 597 U.S. at 29. In any case, Defendants failed to show these regulations were widespread, or that they persisted into the Founding era. Defendants instead cited to local ordinances, rather than statewide laws existing in 1791. *See id.* at 36-37. Defendants' remaining Reconstruction-era laws are immaterial because they do not shed light on the original meaning of the Second Amendment. *See id.*

Finally, Defendants did not identify which of the enactments regulated carry, versus discharge, versus sale. Such omission violates *Bruen*'s warning about "sift[ing] the historical materials." 597 U.S. at 60. And it impermissibly seeks to lump together disparate laws to

synthesize a purported tradition that did not exist in 1791. *See id.* at 29 ("how and why"). Indeed, Defendants use these laws to claim the broadest authority of "regulating firearms and requiring licenses" as a general matter. State Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support of State Defendants' Cross Motion for Summary Judgment at 21. But this "read[s] a principle at such a high level of generality that it waters down the right," *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring), and it sheds no light on whether the Founders criminalized public carry as a default rule, or whether they did so in recreational locations.

4. In 1867, Memphis specifically required "a permit from the Mayor" to discharge a firearm "in the streets, alleys or public grounds of the city." (App. at 11.)

RESPONSE: It is disputed that this is a statement of material fact. A regulation of discharge fails *Bruen*'s "how and why" because the challenged statutes reach all carry. *Bruen*, 597 U.S. at 29. Moreover, a Reconstruction-era law is immaterial because it does not shed light on the original meaning of the Second Amendment. *See id.* at 36-37. Further, the cited regulation is a local municipal ordinance and does not even rise to the level of a statewide law existing in any state as of 1791. *See id.* at 67 ("[T]he bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry.").

5. In 1879, Tennessee required a license to sell, give away, or dispose of firearms. (App. at 12.)

RESPONSE: It is disputed that this is a statement of material fact. A regulation of disposition fails *Bruen*'s "how and why" because the challenged statutes reach all carry. *Bruen*, 597 U.S. at 29. Moreover, a Reconstruction-era law is immaterial because it does not shed light on the original meaning of the Second Amendment. *See id.* at 36-37.

6. During the 1700s and through the time of the Founding, public parks as we know them today did not exist. Young Rep. ¶¶ 10-12, 15.

RESPONSE: Disputed. Public parks existed at the Founding for recreational purposes, and this is a fact "not subject to reasonable dispute" because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). Indeed, the U.S. government recognizes that Boston Common, for example, "was a place for recreation as early as the 1660s." *Boston Common*, Nat'l Park Serv., https://tinyurl.com/ycyjc7dd (Jan. 16, 2025). And Savannah, Georgia's public squares started initially as "open, unplanted plazas," but they were "remodel[ed] … *around 1800* … into *landscaped neighborhood parks*." Turpin Bannister, *Oglethorpe's Sources for the Savannah Plan*, 20 J. of Soc'y of Arch. Hist. 47, 48 (1961) (emphasis added). Plaintiffs request that this Court "disallow testimony in the form of an opinion or inference" by Defendants' purported "experts" because "the[ir] underlying facts or data indicate lack of trustworthiness" and because their purported opinions cannot be reconciled with the standards of relevance as required by *Bruen* Tenn. R. Evid. 703; *Bruen*, 597 U.S. at 28-29. Indeed, Defendants' claim is contradicted by the overwhelming weight of evidence to the contrary. And whether "public parks as we know them" existed, as Defendants' boldly assert, is an entirely vague statement. *Rogers*, 2006 Tenn. App.

LEXIS 97, at *54 (collecting cases) ("[V]ague, conclusory generalizations cannot be relied upon to create a genuine issue of material fact.").

Finally, it is disputed that this is a statement of material fact. The Tennessee Supreme Court has held that "expert … opinion testimony … generally has been held not an appropriate basis for summary judgment." *Bowman v. Henard*, 547 S.W.2d 527, 530 (Tenn. 1977) (emphasis removed). *Bowman*'s recognized exception, that the "issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert," *id.*, does not apply. Indeed, a purported "expert" is not necessary for this Court to determine whether public parks or analogous locations existed at the Founding. *Bruen* recognized that "reasoning by analogy" and "decid[ing] a case based on the historical record compiled by the parties" is "a commonplace task for any lawyer or judge." *Bruen*, 597 U.S. at 28, 25 n.6, 28.

7. A few privately owned establishments had gardens for socializing and relaxation, but the publicly owned spaces—often called greens or commons—"were utilitarian rather than ornamental." Young Rep. ¶¶ 11, 16-22.

RESPONSE: Disputed for the same reasons stated in Plaintiffs' Response to Statement 6 above.

8. Founding-era "greens" or "commons" were unsightly plots used for temporarily holding livestock, cemeteries, quarantining persons with illnesses such as smallpox, storing gunpowder and other supplies, and sometimes, militia training or drills. Young Rep. ¶¶ 16-18.

RESPONSE: Disputed for the same reasons stated in Plaintiffs' Response to Statement 6 above. To reiterate, Boston Common "was a place for recreation as early as the 1660s." *Boston*

Common, Nat'l Park Serv., https://tinyurl.com/ycyjc7dd (Jan. 16, 2025). And Savannah, Georgia's public squares started initially as "open, unplanted plazas," but they were "remodel[ed] … *around 1800* … into *landscaped neighborhood parks*." Turpin Bannister, *Oglethorpe's Sources for the Savannah Plan*, 20 J. of Soc'y of Arch. Hist. 47, 48 (1961) (emphasis added).

9. The urbanization of America in the 1800s created cities increasingly viewed as socially degraded, noisy, polluted, and crime ridden places. Because of this, by the mid-nineteenth century the concept of public parks emerged, beginning at the local level. Young Rep. ¶¶ 9-14, 23-30.

RESPONSE: Disputed for the same reasons stated in Plaintiffs' Response to Statement 6 above. Moreover, whether something was "increasingly viewed" is imprecise language which represents a characterization inappropriate to a statement of fact, and to which Plaintiffs cannot agree. *Rogers*, 2006 Tenn. App. LEXIS 97, at *54 (collecting cases) ("[V]ague, conclusory generalizations cannot be relied upon to create a genuine issue of material fact.").

10. In response to the urbanization societal concerns, and from a romantic view of "nature as an interrelated world of mind, body, and being," public parks were born in the mid-1800s "because they brought nature, God's handiwork, balanced and inherently good, back to cities." Young Rep. ¶¶ 29, 31-32.

RESPONSE: Disputed for the same reasons stated in Plaintiffs' Response to Statement 6 above. A "romantic view" is a "vague, conclusory generalization[]" that "cannot be relied upon to create a genuine issue of material fact." *Rogers*, 2006 Tenn. App. LEXIS 97, at *54 (collecting cases).

11. At the local, city level parks emerged as "places for 'passive recreation,' which meant sitting, strolling, slow horse riding, and other quiet activities." Young Rep. ¶ 33.

RESPONSE: Undisputed for purposes of summary judgment. To the extent Defendants imply public parks "emerged" decades after the Founding, Plaintiffs dispute the truth and materiality of such implication for the same reasons stated in Plaintiffs' Response to Statement 6 above. Indeed, as Plaintiffs' briefing shows, Americans used public parks for these very purposes at or near the Founding. *See, e.g.*, *Boston Common*, Nat'l Park Serv., https://tinyurl.com/ycyjc7dd (Jan. 16, 2025); Turpin Bannister, *Oglethorpe's Sources for the Savannah Plan*, 20 J. of Soc'y of Arch. Hist. 47, 48 (1961).

12. State and national parks emerged shortly after local urban parks, and for the same reasons—"the improvement of American society." Young Rep. ¶¶ 41, 52.

RESPONSE: Undisputed for purposes of summary judgment, but irrelevant. To the extent Defendants imply the "emerge[nce]" of public parks only began decades after the Founding, Plaintiffs dispute the truth and materiality of such implication for the same reasons stated in Plaintiffs' Response to Statement 6 above.

13. Parks functioned both as places of contemplation, quiet, and rest, and, by the late 1880s, as places for active recreation, particularly by children at play. Young Rep. ¶¶ 30, 36, 42.

RESPONSE: Undisputed for purposes of summary judgment, but irrelevant. To the extent Defendants imply public parks did not "function[]" as "places for active recreation" prior to the 1880s, or that parks did not "function[]" as "places of contemplation, quiet, and rest" at or near the

Founding, Plaintiffs dispute the materiality of such implication for the same reasons stated in Plaintiffs' Response to Statement 6 above.

14. Recreation was seen as vital for healthy child development, and parks allowed safe and accessible recreation. Young Rep. ¶¶ 30, 36.

RESPONSE: Undisputed for purposes of summary judgment, but irrelevant. To the extent Defendants imply public parks did not exist for "[r]ecreation" at the Founding, Plaintiffs dispute the truth and materiality of such implication for the same reasons stated in Plaintiffs' Response to Statement 6 above.

15. As public parks emerged in the mid-nineteenth century, they all "embraced the same firearms prohibition." Young Rep. ¶ 34; *see* Charles Rep. ¶¶ 16-17; Young Rep. ¶¶ 16-22, 35, 37-40, 43-51, 56-68.

RESPONSE: Disputed to the extent Defendants imply that public parks had not "emerged" prior to the "mid-nineteenth century" for the same reasons stated in Plaintiffs' Response to Statement 6 above.

Moreover, it is disputed that this is a statement of material fact. Defendants impermissibly incorporated by reference scattered citations to Reconstruction-era regulations. Neither Plaintiffs nor this Court are "obliged to sift the historical materials," as that is Defendants' "burden." *Bruen*, 597 U.S. at 60. Finally, Reconstruction-era laws are immaterial because they do not shed light on the original meaning of the Second Amendment. *See id.* at 36-37.

16. Firearms were wholly inconsistent with the notion of parks as pristine places of inclusion and refuge from urban life. Young Rep. ¶¶ 40, 51, 58.

RESPONSE: Disputed. Defendants' putative expert's opinion conflicts with both factual and legal findings of the Supreme Court. Further, firearms are "wholly" consistent with "the natural right of resistance and self-preservation," *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008), the "general right to public carry," and the Supreme Court's recognition that "[m]any Americans hazard greater danger outside the home than in it." *Bruen*, 597 U.S. at 33. Indeed, churches were "pristine places of inclusion and refuge from urban life," and yet some jurisdictions *required* firearms to be carried there. *See, e.g.*, Act LI, Acts of February 24th, 1631, 1631 Va. Acts 174, https://tinyurl.com/bdfcvrkf ("ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne of every effence...."). So too were homes "pristine places of inclusion and refuge from urban life," and yet the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

Moreover, the opinion of an "expert" is "not an appropriate basis for summary judgment" for the same reasons stated in Plaintiffs' Response to Statement 6 above. *Bowman v. Henard*, 547 S.W.2d 527, 530 (Tenn. 1977).

17. Since the creation of public parks in the mid-1800s, firearms have been banned in parks from coast to coast, including San Francisco's Golden Gate Park (1872); New York's Brooklyn Park (1867) and Central Park (1858, 1861); and Philadelphia's Fairmont Park (1867). Other state and local jurisdictions across the country, including Tennessee, also prohibited firearms in their public parks, including: Buffalo, New York (1869); Chicago, Illinois (1873, 1880, 1905);

Hyde Park, Illinois (1875); Phoenixville, Pennsylvania (1878); St. Louis, Missouri (1881); Danville, Illinois (1883); Boston, Massachusetts (1886); Reading, Pennsylvania (1887); St. Paul, Minnesota (1888, 1894); Salt Lake City, Utah (1888, 1920); Trenton, New Jersey (1890); Memphis, Tennessee (1909); Chattanooga, Tennessee (1922); Berlin, Wisconsin (1890); Williamsport, Pennsylvania (1890); Grand Rapids, Michigan (1897, 1903); Milwaukee, Wisconsin (1891), Springfield, Massachusetts (1891); Cincinnati, Ohio (1892); Lynn, Massachusetts (1891); Peoria, Illinois (1892); Pittsburgh, Pennsylvania (1893); Wilmington, Delaware (1893, 1898); Canton, Illinois (1895); Detroit, Michigan (1895); Centralia, Illinois (1896); Indianapolis, Indiana (1896); Rochester, New York (1896); Kansas City, Missouri (1898, 1909); New Haven, Connecticut (1898); Boulder, Colorado (1898); Hartford, Connecticut (1907), New Bedford, Massachusetts (1902); Springfield, Illinois (1902); Lowell, Massachusetts (1903); New York, New York (1891, 1906); Pasadena, California (1903); Troy, New York (1903); Houston, Texas (1904); Neligh, Nebraska (1904); Pueblo, Colorado (1904); Harrisburg, Pennsylvania (1889); Haverhill, Massachusetts (1906); Saginaw, Michigan (1905); Denver, Colorado (1906); Los Angeles, California (1906); Portland, Oregon (1910); Oil City, Pennsylvania (1906); Olean, New York (1907); Washington, D.C. (1907); Seattle, Washington (1907); Oakland, California (1909, 1912); Paducah, Kentucky (1909); Jacksonville, Illinois (1910); Staunton, Virginia (1910); Colorado Springs, Colorado (1911); Birmingham, Alabama (1917); Joplin, Missouri (1917); and Burlington, Vermont (1921). Defs' App at 30-34; Young Rep. ¶¶ 35-38.

RESPONSE: Disputed that public parks were "creat[ed] … in the mid-1800s" for the same reasons stated in Plaintiffs' Response to Statement 6 above. Moreover, whether "firearms have been banned in parks from coast to coast" is a "vague, conclusory generalization[]" that "cannot be relied upon to create a genuine issue of material fact." *Rogers*, 2006 Tenn. App. LEXIS 97, at

*54 (collecting cases). Just because firearms were regulated in Defendants' smattering of parks primarily by local ordinances enacted long after 1791 does not mean such regulation was universal, widespread, or even a majority view. *Bruen*, 597 U.S. at 67 ("[T]he bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry.").

Moreover, the vast majority of the cited regulations do not appear in the Appendix. Such omission violates Tenn. R. Civ. P. 56.06, which requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Furthermore, neither Plaintiffs nor this Court are "obliged to sift the historical materials," as that is Defendants' "burden." *Bruen*, 597 U.S. at 60.

Finally, Reconstruction-era laws are immaterial because they do not shed light on the original meaning of the Second Amendment. *See id.* at 36-37. And, "[a]s with their late-19th-century evidence, the 20th-century evidence presented … does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 66 n.28.

18. National parks banned firearms contemporaneous with their creation, including: Yellowstone (1894); Yosemite (1897); Sequoia (1890); and Mackinac (1882). When the National Park Service was created, it banned firearms in national parks nationwide. Young Rep. ¶¶ 43-46.

RESPONSE: Undisputed for purposes of summary judgment that those regulations were imposed at those times. However, it is disputed that this is a statement of material fact. Reconstruction-era laws are immaterial because they do not shed light on the original meaning of the Second Amendment. *Bruen*, 597 U.S. at 36-37.

Moreover, Defendants only provided Yosemite (1897) in their Appendix. Such omission of the remaining materials violates Tenn. R. Civ. P. 56.06, which requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Furthermore, neither Plaintiffs nor this Court are "obliged to sift the historical materials," as that is Defendants' "burden." *Bruen*, 597 U.S. at 60.

19. Urban parks spread in Tennessee in the early twentieth century, and they came with similar firearms prohibitions. Young Rep. ¶¶ 37, 61.

RESPONSE: Disputed. Plaintiffs cannot agree to vague characterizations that parks "spread" or prohibitions were "similar." The latter is a legal question. Such "vague, conclusory generalizations cannot be relied upon to create a genuine issue of material fact." *Rogers*, 2006 Tenn. App. LEXIS 97, at *54 (collecting cases).

Moreover, it is disputed that this is a statement of material fact. The selected paragraphs of the Young Report identified only Memphis (1909) and Chattanooga (1922). Based on these two cities, Defendants cannot extrapolate that, as "[u]rban parks spread in Tennessee[,] … they came with similar firearms prohibitions." Defendants identified no other examples. And local ordinances cannot evince a statewide, much less national, tradition. *Bruen*, 597 U.S. at 67 ("[T]he bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry.").

Finally, "the 20th-century evidence presented" is immaterial because it "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 66 n.28.

20. Memphis barred carrying firearms in parks without special permission, and Chattanooga went a step further by banning firearms in parks entirely. Young Rep. ¶¶ 37, 61.

RESPONSE: Undisputed for purposes of summary judgment that those regulations were imposed at those times. However, it is disputed that this is a statement of material fact. Two cities' "20th-century evidence" is immaterial because it "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 66 n.28; *see also id.* at 67 ("[T]he bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry.").

21. In 1935, the Tennessee State Planning Commission adopted a plan to allocate land for forestry and recreational purposes with the same goal as parks around the nation: to "promote the health, safety, morals, order, convenience and welfare of the people." Young Rep. ¶ 55.

RESPONSE: Undisputed for purposes of summary judgment. However, it is disputed that this is a statement of material fact. "20th-century evidence" is immaterial because it "does not provide insight into the meaning of the Second Amendment...." *Bruen*, 597 U.S. at 66 n.28.

22. By the 1950s there were seventeen state parks in Tennessee. Young Rep. ¶ 55.

RESPONSE: Undisputed for purposes of summary judgment. Plaintiffs note that Defendants failed to produce any evidence of firearm restrictions in state parks during this time period. Indeed, Defendants' declarant conceded that he "could not determine the date and language for Tennessee State Parks' first regulations," so, based on the record before this Court, there is no telling when "today's version" of the regulations went into effect. Young. Rep. ¶ 61.

23. In the modern era, that number has exploded to 59 state parks that see approximately 38.5 million visitors per year. State Parks, Tenn. Dep't Env't & Conserv., https://tnstateparks.com/ (last accessed Dec. 15, 2024); Milestones and Momentum at 2, Tenn. Dep't Env't & Conserv. (2021), https://www.tn.gov/content/dam/tn/environment/documents/annual-reports/tdec-annual-report-2021.pdf.

RESPONSE: Undisputed for purposes of summary judgment, but immaterial under *Bruen* to the issue of what the national historical tradition was in 1791.

24. American firearms restrictions in sensitive places, such as legislative assemblies and polling places, began as early as the mid-1600s. Charles Rep. ¶¶ 14-15.

RESPONSE: It is disputed that this is a statement of material fact. The opinion that "legislative assemblies" and "polling places" are "sensitive places" is a legal conclusion unsupported by any citation to caselaw holding such places to be off-limits to firearms. *Bruen*, 597 U.S. at 30 (noting "we have no occasion to comprehensively define 'sensitive places' in this case"); *City of Memphis v. Pritchard*, 2020 Tenn. App. LEXIS 337, at *10 (Tenn. Ct. App. July 29, 2020) ("The phrase 'genuine issue' contained in Rule 56.03 refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts.").

Moreover, whether or not firearms may be restricted in legislative assemblies and polling places is immaterial to justifying the challenged statutes' general regulation of public carry and locational restrictions in recreational places. These regulations are not "relevantly similar." *See Bruen*, 597 U.S. at 29 ("how and why").

Defendants omitted these historical laws from their Appendix. Such omission violates Tenn. R. Civ. P. 56.06, which requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Furthermore, neither Plaintiffs nor this Court are "obliged to sift the historical materials," as that is Defendants' "burden." *Bruen*, 597 U.S. at 60.

Finally, Tennessee's statutes do not specifically ban firearms in either the Tennessee Legislature's Cordell Hull Building, nor in polling places. Indeed, the Tennessee Legislature has expressly allowed, since at least 2017, handgun permit holders to carry their handguns in the Cordell Hull building. https://www.newschannel5.com/news/guns-to-be-allowed-at-new-tennessee-legislative-complex . Further, to the extent that firearms are prohibited in the state capitol (as opposed to the Legislative chambers) that prohibition arises not by state statute enacted by the Legislature but because the state's Capitol Security division has "posted" the capitol as a gun free zone under § 39-17-1359. *See* https://www.tn.gov/safety/tnhp/psspb/cpunit.html.

25. Many Tennessee parks, as well as community, recreational, and civic centers, serve as polling places, including:

a. In Gibson County:
   i. Bailey Park,
   ii. Bradford Community Center
   iii. Yorkville Community Park,
   iv. Skullbone Community Center, and
   v. Kenton Youth Center.
   Polling Locations, Gibson Cnty. Election Comm'n, https://www.gibsonelections.com/polling-locations (last accessed Dec. 15, 2024);

b. In Hamblen County:
   i. Cherokee Park

Voting Precincts, Hamblen Cnty. Tenn., Election Comm'n, https://www.hamblencountytn.gov/wp-content/uploads/2023/05/Precinct-Locations-202305.jpg (last accessed Dec. 15, 2024);

c. In Knox County
   i. Larry Cox Senior Recreation Center,
   ii. South Knoxville Community Center,
   iii. Inskip Recreation Center,
   iv. Deane Hill Recreation Center,
   v. Corryton Community Center, and
   vi. Arminda Community Center

   Polling Locations, Knox Cnty. Tenn., Election Comm'n, https://knoxcounty.org/election/pdfs/polling_locations.pdf (last accessed Dec. 15, 2024);

d. In Lawrence County
   i. Civic Center,
   ii. Community Center, and
   iii. Rotary Park

   Precinct List, Lawrence Cnty. Gov't, Election Comm'n, https://lawrencecountytn.gov/wp-content/uploads/2023/09/SElection_Updated.pdf (last accessed Dec. 15, 2024);

e. In Marshall County
   i. Henry Horton State Park, and
   ii. Recreation Center Sportsplex Building

   Election Office, Marshall Cnty. Tenn., https://marshallcountytn.com/election-office (last accessed Dec. 15, 2024);

f. In Montgomery County:
   i. Fredonia Community Center, and
   ii. South Guthrie Community Center

   Precinct Addresses and Locations, Montgomery Cnty. Tenn., Election Comm'n, https://mcgtn.org/storage/departments/election/PRECINCT%20ADDRESS%20AND%20LOCATIONS%202022.pdf (last accessed Dec. 15, 2024);

g. In Overton County:
   i. Livingston Rotary Agricultural Complex Fairground

   Polling Place Locations, Overton Cnty. Election Comm'n, https://overtonvotes.com/polling-place-locations/ (last accessed Dec. 15, 2024);

h. In Robertson County:
   i. Robertson County Fairgrounds

County Voting Precincts, Robertson Cnty. Tenn., Roberston Cnty. Elections https://www.robertsoncountytn.gov/residents/elections/Voting%20Precincts%202024.pdf (last accessed Dec. 15, 2024);

i. In White County:
   i. Sparta Civic Center,
   ii. White County Fairgrounds, and
   iii. Doyle Civic Center
   Polling Locations, White Cnty. Election Comm;n, https://www.whitecountytnvotes.gov/polling-locations (last accessed Dec. 15, 2024);

j. In Williamson County
   i. Fairview Recreation Center,
   ii. Longview Recreation Center at Spring Hill,
   iii. Nolensville Recreation Center, and
   iv. County Enrichment Center
   Williamson County Voting Centers, Tenn. Sec. State, https://tnmap.tn.gov/voterlookup/votingcenters.aspx?County=Williamson (last accessed Dec. 15, 2024); and

k. In Wilson County:
   i. Charlie Daniels Park,
   ii. Gladeville Community Center,
   iii. Market Street Community Center,
   iv. Watertown Community Center, and
   v. Norene Community Center
   2024 Convenient Vote Centers, Wilson Cnty. Votes, https://www.wilsontnvotes.gov/election-day-voting-locations/ (last accessed Dec. 15, 2024).

RESPONSE: Undisputed for purposes of summary judgment that the locations Defendants identify have served as polling places. However, these alleged facts are irrelevant under the *Bruen*, particularly since Tennessee does not have a statewide law which addresses the possession of firearms in polling places.

26. Tens of thousands of children participate in programs and camps hosted in Tennessee state parks throughout the year. *See* Kids in Parks, Tenn. State Parks Conserv.,

https://tnstateparksconservancy.org/kids-in-parks-2/ (last accessed Dec. 15, 2024) (noting that more than 91,000 children participated in 2023 programs in state parks). Such programs include:

a. The Junior Ranger Program, *see* Education & Youth Programming, Tenn. State Parks, https://tnstateparks.com/about/learning (last accessed Dec. 15, 2024);

b. Kit's Club, *id.*;

c. Special Summer Programs, *id.*; and

d. A lengthy list of constantly changing activities calendared at different state parks throughout the year, *see* Upcoming Events, Tenn. State Parks https://tnstateparks.com/events (last accessed Dec. 15, 2024) (listing events such as Birding Basics for Kids, Kids Winter Woodpecker Hike, Kids Bird Heroes, and Kids Winter Critters).

RESPONSE: Undisputed for purposes of summary judgment, but irrelevant under *Bruen*

27. Tennessee governmental recreational areas and community centers offer many athletic and educational activities for children, including:

a. Youth Sports Programs, Metropolitan Govt. Nashville & Davidson County, https://www.nashville.gov/departments/parks/community-centers-and-recreation/youth-sports-programs (last accessed Dec. 1, 2024);

b. Kid Unlimited Programs, Sevierville Parks and Recreation, https://seviervilletn.org/index.php/spard-programs/children-s-programs/335-kids-unlimted-programs.html (last accessed Dec. 1, 2024); and

c. Youth Sports, Knox County Parks & Recreation, https://www.knoxcounty.org/parks/youth_sports.php (last accessed Dec. 1, 2024).

RESPONSE: Undisputed for purposes of summary judgment, but irrelevant under *Breun*.

RESPONSES TO STATE DEFENDANTS'
STATEMENT OF ADDITIONAL DISPUTED MATERIAL FACTS

1. Plaintiffs assert the "historical record is replete with examples of a tradition of widespread, unimpeded firearm possession in all manner of public spaces, parks and 'civic centers' included." (Pls' Mem. Supp. Mot. Sum. J. ("Pls' MSMJ") at 23.) But the historical records demonstrate no tradition for carrying firearms in parks or similar spaces. (Charles Rep. ¶¶ 16-17; Young Rep. ¶¶ 16-22, 34-35, 37-40, 43-51, 56-68.)

RESPONSE: It is disputed that this is a statement of material fact. The fact that public parks existed at the Founding for recreational purposes is "not subject to reasonable dispute" because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). Indeed, the U.S. government recognizes that Boston Common, for example, "was a place for recreation as early as the 1660s." *Boston Common*, Nat'l Park Serv., https://tinyurl.com/ycyjc7dd (Jan. 16, 2025). And Savannah, Georgia's public squares started initially as "open, unplanted plazas," but they were "remodel[ed] … *around 1800* … into *landscaped neighborhood parks*." Turpin Bannister, *Oglethorpe's Sources for the Savannah Plan*, 20 J. of Soc'y of Arch. Hist. 47, 48 (1961) (emphasis added). Plaintiffs accordingly request that this Court "disallow testimony in the form of an opinion or inference" by Defendants' purported "experts" because "the[ir] underlying facts or data indicate lack of trustworthiness." Tenn. R. Evid. 703.

Moreover, the Tennessee Supreme Court has held that "expert … opinion testimony … generally has been held not an appropriate basis for summary judgment." *Bowman v. Henard*, 547 S.W.2d 527, 530 (Tenn. 1977) (emphasis removed). *Bowman*'s recognized exception, that the "issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert," *id.*, does not apply. Indeed, a purported "expert" is not

necessary for this Court to determine whether public parks or analogous locations existed at the Founding. *Bruen* recognized that "reasoning by analogy" and "decid[ing] a case based on the historical record compiled by the parties" is "a commonplace task for any lawyer or judge." *Bruen*, 597 U.S. at 28, 25 n.6, 28.

Finally, Defendants acknowledge that, at minimum, Founding-era "greens" or "commons" hosted "militia training or drills." State Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support of State Defendants' Cross Motion for Summary Judgment at 23. Whether these locations are relevantly "similar" to public parks is a legal question under *Bruen*, not a fact question. *See Bruen*, 597 U.S. at 29 ("how and why"). Defendants therefore cannot claim "no tradition for carrying firearms in parks or similar spaces."

2. Plaintiffs assert that "Boston Common is reportedly the nation's first 'public park,' having been established in 1634" and because firearms were allowed in Boston Common, that "evidences a rich history of private persons openly possessing arms . . . in public parks." (Pls' MSMJ" at 23-24.) But at the time of its creation, Boston Common was not used as a public park. (Young Rep. ¶ 16.) It was instead used as a "utilitarian space" that "survived long enough to be adaptively re-used in the nineteenth century as [a] community park[]." (*Id.* ¶ 18.)

RESPONSE: It is disputed that this is a statement of material fact for the same reasons stated in Plaintiffs' Response to Statement of Additional Disputed Material Facts 1 above.

3. Plaintiffs assert that "armed public assembly" in a village greens and meetinghouses indicate there is "no historical tradition of banning firearms in parks" (Pls' MSMJ" at 24-25.) But village greens and meetinghouses were not used as parks. (Young Rep. ¶¶ 16-18.)

Instead, they were "multi-purpose utilitarian spaces" occasionally designated for "basic military exercises." (*Id.* at ¶ 16.) It just happens that some of these spaces "survived long enough to be adaptively re-used in the nineteenth century as community parks." (*Id.* ¶ 18.)

RESPONSE: It is disputed that this is a statement of material fact for the same reasons stated in Plaintiffs' Response to Statement of Additional Disputed Material Facts 1 above.

Respectfully submitted:

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Certificate of Service

I hereby certify that a copy of the foregoing was served by mail to the Office of the Attorney General and chambers copies to the Panel on February 19, 2025:

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