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.

BILL LEE, in his official capacity as the Governor for the State of Tennessee, and JONATHAN SKRMETTI, in his official capacity as the Attorney General for the State of Tennessee
Defendants.

Civil No: 24475

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION, AND/OR PERMANENT INJUNCTION

Filed 2/16/23 @10:35AM
Katelyn Orgain, Clerk & Master
By: Kim Nolan D.C.M.

TABLE OF CONTENTS

I. Introduction.

Tennessee law infringes the right to bear arms as protected by Article I, Section 26 of the Tennessee Constitution, making it a criminal act for any individual to possess or carry, "with the intent to go armed," a firearm in "or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes." Tennessee Code Annotated § 39-17-1311(a) (also referred to herein as Tennessee's "Parks Statute"). A person who possesses or carries a weapon in the places covered by the statute is at risk for being stopped, detained, questioned, charged, arrested and/or otherwise criminally prosecuted by the State of Tennessee under the Parks Statute, and bears the burden of proving, potentially at trial to a jury in a criminal prosecution, that their conduct (if it does) falls within one of the narrow affirmative defenses.

In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court stated that the Second and Fourteenth Amendments together guarantee individuals not only the right to "keep" firearms in their homes, but also the right to "bear arms" in public, meaning the ability of "ordinary, law-abiding citizens" to carry constitutionally protected arms "for self-defense outside the home," free from infringement by either federal or state governments. *Id.* at 2122, 2134. The *Bruen* Court held that, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this

Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen* at 2126.

The only appropriate inquiry, according to *Bruen*, is what the "public understanding of the right to keep and bear arms" was during the ratification of the Second Amendment in 1791, and perhaps during ratification of the Fourteenth Amendment in 1868. *Bruen* at 2137–38. This is how the Tennessee Constitution should be interpreted as well, as the state provision cannot and should not be interpreted as providing lesser protections than its Second Amendment counterpart. The Courts of other states have reached that conclusion with respect to the protections for the right to keep and bear arms found in their state constitutions. *See Stickley v. City of Winchester*, No. CL21-206, 2022 Va. Cir. LEXIS 201 (Winchester Cir. Ct. Sept. 27, 2022)

Yet there is no historical national tradition of banning firearms in any of the categories of places enumerated in Tennessee Code Annotated § 39-17-1311(a) – not in 1868, and certainly not in 1791. Such locations are far from the types of "sensitive places" the Supreme Court has identified in its cases, but rather represent entirely ordinary locations that members of the general public use for a variety of purposes. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *Bruen* at 2133–34. Moreover, because parks and the other locations enumerated in the statute add up to a significant portion of Tennessee's total geographical area, they violate *Bruen*'s express warning not to turn large areas into sensitive places simply because people tend to gather there. *Bruen* at 2134. As the challenged statutes violate Plaintiffs' constitutional rights, causing them irreparable harm, this Court should grant a preliminary injunction, enjoining enforcement of these provisions, until a decision on the merits can be reached.

II. Plaintiffs Have Standing.

To show standing, an individual plaintiff must suffer a concrete and particularized invasion of a legally protected interest that is either actual or imminent. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). This injury must be fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision. *Id.* at 560–61. For pre-enforcement challenges, "[a] party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. FEC*, 554 U.S. 724, 734 (2008). "[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Due to the clear constitutional violations at issue here, Plaintiffs easily satisfy these requirements.

A plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also Johnson v. Turner*, 125 F.3d 324, 338 (6th Cir. 1997). Tennessee case law mirrors the federal standard relative to standing. Three elements are necessary to establish constitutional standing are:

> 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.

Fisher v. Hargett, 604 S.W.3d 381, 396 (Tenn. 2020).

In pre-enforcement challenges to the constitutionality of a statute—such as this case—a plaintiff may satisfy the injury element by (1) alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest but proscribed by [the] statute" and (2)

showing the existence of "a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298. Furthermore, the Sixth Circuit has considered the following factors to determine whether a "credible threat of prosecution" exists:

> (1) "a history of past enforcement against the plaintiffs or others"; (2) "enforcement warning letters sent to the plaintiffs regarding their specific conduct"; (3) "an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action"; and (4) the "defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff."

Online Merchants Guild v. Cameron, 995 F.3d 540, 550 (6th Cir. 2021) (quoting *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016)); *Tennesseans for Sensible Election L. v. Slatery*, No. M2020-01292-COA-R3-CV, 2021 WL 4621249, at *3 (Tenn. Ct. App. Oct. 7, 2021).

A. Plaintiffs Have Announced an Intent to Engage in Conduct Protected by the State Constitution, but Which Would Be in Violation of Tennessee's Parks Statute.

As set forth in his Affidavit, Plaintiff Stephen L. Hughes has a Tennessee enhanced handgun permit. He has carried his handgun in the past and intends to carry a firearm when he visits local, state and/or federal parks, greenways, and/or other recreational areas not only in this judicial district but also statewide. He desires the capacity to carry long arms in some areas that are covered by the Parks Statute, such as areas that may be inhabited by wild predators. He is concerned that doing so has and would put him at risk for a stop and/or detention by a law enforcement officer in any of those locations, to the extent someone complains that he is armed or he is observed by law enforcement in such a location while armed. He understands that the Parks Statute prohibits not just handguns but any firearms, as that statute has been interpreted by the State Attorney General to cover his conduct and based on a public record of prosecutions under this statute in Tennessee. *See, e.g.*, *State v. Ewerling*, No. M2003-00595-CCA-R3-CD, 2005 WL 850843, at *4 (Tenn. Crim. App. Apr. 13, 2005); *see also* Tennessee Pattern Jury Instruction

Criminal T.P.I.—Crim. 36.04 "Possessing or carrying weapons on public parks, civic centers, recreational buildings and grounds." Although he has a Tennessee enhanced handgun permit, he nevertheless runs the risk of stop, arrest, and prosecution, and would have the burden of possessing that permit, proving its validity, and proving that he possessed a handgun meeting Tennessee's definition thereof in order to defeat a criminal charge under the Parks Statute. *See, e.g.*, Tennessee Code Annotated § 39-17-1311(b)(1)(H or I). Indeed, the possession of a valid enhanced handgun permit would not shield him from being stopped or detained by law enforcement seeking to investigate whether he had violated the Parks Statute. Further, the enhanced handgun permit would not operate as an affirmative defense or exception to the possession of a rifle, a shotgun, a weapon classified as a "firearm," and/or a handgun with a barrel over 12 inches in length.[1]

As set forth in his Affidavit, Plaintiff Duncan O'Mara has a Tennessee enhanced handgun permit. He has carried his handgun in the past and intends to carry a firearm when he visits local, state and/or federal parks, greenways, and/or other recreational areas not only in this judicial district but also statewide. He desires the capacity to carry long arms in some areas that are covered by the Parks Statute, such as areas that may be inhabited by wild predators. He is concerned that doing so has and would put him at risk for a stop and/or detention by a law enforcement officer in any of those locations, to the extent someone complains that he is armed or he is observed by law enforcement in such a location while armed. He understands that the Parks Statute prohibits not just handguns but any firearms, as that statute has been interpreted by the State Attorney General

[1] A firearm that would be in the mind of most people and under federal law as a "handgun" is not a "handgun" under Tennessee law if the barrel is 12 inches long or longer. Tennessee Code Annotated § 39-11-106(a)(19)("'Handgun' means any firearm with a barrel length of less than twelve inches (12″) that is designed, made or adapted to be fired with one (1) hand."). Such items under Tennessee law are only a firearm since they do not meet the definitions of a rifle, shotgun, or handgun. Tennessee Code Annotated § 39-11-106(a).

to cover his conduct and based on a public record of prosecutions under this statute in Tennessee. *See, e.g., State v. Ewerling*, No. M2003-00595-CCA-R3-CD, 2005 WL 850843, at *4 (Tenn. Crim. App. Apr. 13, 2005); *see also* Tennessee Pattern Jury Instruction Criminal T.P.I.—Crim. 36.04 "Possessing or carrying weapons on public parks, civic centers, recreational buildings and grounds." Although he has a Tennessee enhanced handgun permit, he nevertheless runs the risk of stop, arrest, and prosecution, and would have the burden of possessing that permit, proving its validity, and proving that he possessed a handgun meeting Tennessee's definition thereof in order to defeat a criminal charge under the Parks Statute. *See, e.g.*, Tennessee Code Annotated § 39-17-1311(b)(1)(H or I). Indeed, the possession of a valid enhanced handgun permit would not shield him from being stopped or detained by law enforcement seeking to investigate whether he had violated the Parks Statute. Further, the enhanced handgun permit would not operate as an affirmative defense or exception to the possession of a rifle, a shotgun, a weapon classified as a "firearm," and/or a handgun with a barrel over 12 inches in length.

As set forth in her Affidavit, Plaintiff Elaine Kehel does not have any Tennessee handgun permit but instead relies on Tennessee Code Annotated § 39-17-1307(g) to carry a handgun without a permit. She desires to carry a firearm when she visits local, state and/or federal parks, greenways, and/or other recreational areas not only in this judicial district but also statewide. She is concerned that doing so would put her at risk for a stop and/or detention by a law enforcement officer in any of those locations, to the extent someone complains that she is armed, or she is observed by law enforcement in such a location while armed. Because she lacks a handgun permit, she understands that the Parks Statute prohibits her from carrying any firearm as that statute has been interpreted by the State Attorney General and based on a public record of prosecutions under this statute in Tennessee. She would have the burden of proving some category of exigency or

justification for possessing a firearm in an area prohibited by the Parks Statute in order to defeat a criminal charge under the Parks Statute. The Parks Statute and Tennessee law does not contain any general provision that would allow her to possess or carry a firearm in an area prohibited by the Parks Statute for personal protection or self-defense purposes.

Each of the individual plaintiffs have established their respective standing by declaring their intentions filed in affidavits that were filed with the Complaint. *See Slatery*, 2021 WL 4621249, at *3; *see also* Tennessee Code Annotated § 1-3-121 ("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.").

Gun Owners of America, Inc., and Gun Owners Foundation, as member-based organizations, have standing to represent the interests of their members who are residents of Tennessee and/or who may be residents of other states but who desire to be able to carry a firearm for personal protection or self-defense in places prohibited by the Tennessee Parks Statute. Organizations have standing to represent the interests of their members.

> In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), we held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). Tennessee law recognizes representational standing. *Citizens for Collierville, Inc. v. Town of Collierville*, 977 S.W.2d 321, 323 (Tenn. Ct. App. 1998).

B. Tennessee Has a History of Enforcing the Parks Statute.

Tennessee has a history of enforcing the Parks Statute. *See, e.g., Ewerling*, 2005 WL 850843, at *4. Tennessee also has a specific pattern jury instruction, for use by trial judges, on how to instruct a jury when a violation of the Parks Statute is charged. *See* Tennessee Pattern Jury Instruction Criminal T.P.I.—Crim. 36.04 "Possessing or carrying weapons on public parks, civic centers, recreational buildings and grounds." In addition, the Tennessee Attorney General has issued several opinions concerning that office's interpretation and the application of the Parks Statute. Tennessee Attorney General Opinions 18-04; 15-63; 09-169; 09-160; 09-158; 08-26; 96-80.

Notably, in *Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012), the court had before it a federal civil rights case that arose out of a state official's "felony takedown" of a handgun permit holder in a public park in Davidson County, Tennessee. While the court resolved the federal civil rights violation in favor of the officers despite a "failed investigatory stop," for purposes of this action, it is notable that the 6th Circuit found nothing wrong with the officer's attempt to enforce Tennessee's Parks Statute. The appellate court described the events as follows:

> Embody's appearance at the park prompted two encounters with park rangers. In the first, Ranger Joshua Walsh approached Embody, asked for his permit and questioned him about the gun. Embody produced a valid permit, but Walsh could not tell whether the firearm qualified as a legal one under state law. "Technically it's a handgun," he told Embody, "but I don't know why you need it out here," and "I'm pretty sure an AK-47 is not a handgun." R.22–3 at 3. Uncertain how to proceed, Walsh allowed Embody to continue through the park—for the time being.
>
> Walsh phoned a supervisor, Ranger Steve Ward, for further direction. Ward in turn called Chief Ranger Shane Petty, who did not believe the AK-47 was a handgun

> given the description of it. Petty and Ward determined that Ward should undertake a "felony take down" of Embody, disarm him and check the weapon. *Id.* at 9. They called the Metropolitan Nashville Police Department for assistance.
>
> Ward found Embody in a parking lot and ordered him to the ground at gun point. Without arresting Embody, Ward removed the gun, patted him for other weapons and detained him. When the Nashville police officers arrived, Ward explained his concern that Embody's weapon was illegal, and the officers conducted a weapons check to determine the gun's status. Meanwhile, Embody requested the presence of a police supervisor, even after the Nashville officers advised him it would delay his release. Once the officers confirmed that the firearm fit the definition of a handgun under state law, Ward returned the gun to Embody and released him. The incident lasted about two-and-a-half hours.

Id. at 580.

Thus, Tennessee has a clear history of enforcing Tennessee Code Annotated § 39-17-1311 – even when the conduct of the individual was in full compliance with the affirmative defense provisions of the statute. Individuals who carry in places prohibited by Tennessee's Parks Statute are constantly at risk that an officer will do an investigatory stop, detain them, question them, perform a "felony takedown," and engage in other activities on the theory that it is a crime in Tennessee to possess a firearm in a public park, a greenway, or any other place prohibited by Tennessee Code Annotated § 39-17-1311(a).

C. Tennessee's Attorney General Has Had the Opportunity to Disclaim the Parks Statute as Violative of the State Constitution, but Has Concluded Otherwise.

As early as 1996, some state legislators were concerned that Tennessee's "gun free zone" statutes, including but not limited to Tennessee Code Annotated § 39-17-1311, violated Tennessee's Constitution. In 1996, State Representative Ben West Jr. asked the Attorney General to advise whether Tennessee Code Annotated § 39-17-1311, and other statutes that created gun-free zones, was a violation of the state's constitution.

In Opinion 96-80, the Attorney General concluded that Tennessee Code Annotated § 39-17-1311, as well as the other statutes that created criminal sanctions for statutory gun-free zones, did not violate the Tennessee Constitution. In part, the Attorney General stated in that opinion:[2]

> 1. Tenn. Code Ann. § 39-17-1307(a)(1) states that "a person commits an offense who carries with the intent to go armed a firearm," a certain kind of knife or a club. This statute does not prohibit owning or carrying a firearm. It prohibits the carrying of a firearm with the intent to go armed. Thus, the carrying of a firearm is prohibited only when it is carried in a manner so as to be "readily accessible and available for use in the carrying out of purposes either offensive or defensive." *Kendall v. State*, 118 Tenn. 156, 101 S.W. 189 (1906). This statute does not, in the opinion of this Office, infringe upon the citizen's "right to keep and bear arms for their common defense."
>
> The right established by Article I, Section 26 does not apply to every type of arm. *Andrew v. The State*, supra, and *Aymette v. The State*, supra, clearly establish that the right applies only to arms that "make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the state." *Andrews v. The State*, 50 Tenn. at 179. Weapons not falling in this description do not receive the protection of Article I, Section 26 at all.
>
> Wearing constitutionally protected weapons can still be regulated as long as it is done "with a view to prevent crime." Andrews indicates that such regulations must "bear some well defined relation to the prevention of crime...." *Id.*, at 181. This would include limiting the use of such arms to the ordinary mode and at the usual times and places. *Id.*, at 182. The right to keep and bear arms "is no more above regulation for the general good than any other right." *Id.*, at 185, quoting *Aymette v. The State*, 21 Tenn. at 159. Tenn. Code Ann. § 39-17-1307(a)(1) is within the powers of the state and bears a well defined relation to the prevention of crime by regulating the manner in which firearms may be carried. A firearm carried without the intent to go armed is less likely to be used in a crime.
>
> * * *

[2] Opinion 96-80 was issued prior to the Supreme Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Opinion 96-80 does not address whether the regulatory clause in Article I, Section 26 of the Tennessee Constitution retains any purpose subsequent to the *McDonald* holding, which imposed the provisions of the Second Amendment against the states pursuant to the incorporation doctrine of the Fourteenth Amendment.

> 3. Tenn. Code Ann. § 39-17-1311(a) makes it an offense to possess or carry a firearm, with the intent to go armed, with certain exceptions, in or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes. The analysis of this statute is the same as the analysis under question one. Only the possession or carrying with the intent to go armed in these designated places is prohibited. Furthermore, the statute merely regulates the carrying of these weapons in places of public assemblage. This is permitted by *Andrews v. The State*, supra. It is the opinion of this Office that this statute is a valid exercise of the state's regulatory authority under Article I, Section 26.

Tennessee Attorney General Opinion 96-80, at 2–3.

Thus, absent some indication from the current Attorney General that his office no longer considers Tennessee Code Annotated § 39-17-1311 to be constitutional under the Tennessee Constitution, it should be reasonably anticipated that those in Tennessee who carry in the places enumerated in that statute are subject to a clear and present risk of stop, detention, and/or prosecution by the government.

D. Tennessee Code Annotated § 39-17-1307(a) Makes It A Crime To Carry Anywhere In The State, At Any Time, For Any Reason And Therefore Violates The State Constitution.

Tennessee Code Annotated § 39-17-1307(a)(1) provides that "[a] person commits an offense who carries, with the intent to go armed, a firearm or a club." There are no geographic limits on this provision. Thus, the statute independently makes it a crime for an individual to possess a firearm in places that are enumerated in the Parks Statute.

An examination of the remainder of Tennessee Code Annotated § 39-17-1307 as well as § 39-17-1308 indicates that there are no exceptions or defenses to that crime with respect to carrying in places that are enumerated in the Parks Statute. Indeed, the statutory scheme makes clear that it is even a crime for an individual to carry a firearm "with the intent to go armed" in the individual's own residence, business or *their own property*, as carrying in those areas is subject to

affirmative defenses under Tennessee Code Annotated § 39-17-1308(a)(3). The fact that the statutory scheme makes carrying in these places subject to statutory affirmative defenses places the individual at risk of being stopped, detained, questioned, charged and/or indicted by law enforcement officials and/or other government officials.

III. Plaintiffs Are Entitled to a Preliminary and Permanent Injunction.

Tennessee Rule of Civil Procedure 65 authorizes the issuance of an injunction when the moving party's rights are being or will be violated and either a) the moving party will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or b) the acts of the adverse party will tend to render a final judgment ineffectual. Rule 65.04(2). The factors to be considered are:

> (2) When Authorized. A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Aside from the "ineffectual" prong, most Tennessee courts apply a four-part test to evaluate requests for injunctive relief under the first alternative prong of Rule 65.04(2).

> "The most common description of the standard for preliminary injunction in federal and state courts is a four-factor test: (1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 4–3(1) (1999).

Central Railroad Authority v Harakas, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000), *perm. app. denied* (2001). The four factors are not independent elements that must each be met, but rather are the factors to be considered together. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006).

A. Plaintiffs Are Likely to Succeed on the Merits.

i. The issue is a legal question on which there is a substantial amount of recent Supreme Court authority that clearly negates Tennessee's statutory scheme.

The issue in this action is the scope of the right protected by the Tennessee Constitution, which should be interpreted in light of the Fourteenth Amendment and the Second Amendment. More specifically, the issue is whether a state statute that makes it a crime for an individual to possess a firearm or other "arms" in a public park, greenway, campground, public recreational area, civic center, or any other area within the scope of Tennessee Code Annotated § 39-17-1311(a), violates the Tennessee Constitution, Article I, Section 26. Similarly, to the extent that Tennessee Code Annotated § 39-17-1307(a)(1) independently makes it a crime to carry in public, it violates the Tennessee Constitution, Article I, Section 26 as well. Since it would be unreasonable to interpret the state constitution to protect lesser rights than the U.S. Constitution, Article I, Section 26 of the Tennessee Constitution should be interpreted in light of federal authorities elucidating the meaning of the Second Amendment.

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." As the Supreme Court has now reiterated in *Bruen*, the Second and Fourteenth Amendments together guarantee individual Americans not only the right to "keep" firearms in their homes, but also the right to "bear arms," meaning "to carry a handgun for self-defense outside the home," free from infringement by either federal or state governments. *Bruen* at 2122. In *Bruen*, the Supreme Court first "decline[d] to adopt that two-part approach" used in this and other circuits, and reiterated that, "[i]n keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. Second, the Supreme Court held that:

> To justify [a] regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id.

Third, in reviewing the historical evidence, because "not all history is created equal," the *Bruen* Court limited the review of relevant history to a narrow time period, focusing on the period around the ratification of the Second Amendment, and *perhaps* the Fourteenth Amendment (but noted that "post-ratification" interpretations "cannot overcome or alter that text," and "we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."). *Id.* at 2136, 2137; *see also id.* at 2156 (discussing the lack of relevant historical prohibitions on concealed carry in public).

Under the *Bruen* test, then, it does not matter whether a government restriction "minimally" or "severely" burdens (infringes) the Second Amendment. There are no relevant statistical studies to be consulted. There are no sociological arguments to be considered. The ubiquitous problems of crime or the density of population do not affect the equation. There is not even a permissible inquiry as to whether such a regulation might have a crime-prevention purpose.[3] The only appropriate inquiry, according to *Bruen*, is what the "public understanding of the right to keep and bear arms" was during ratification of the Second Amendment in 1791, and perhaps during ratification of the Fourteenth Amendment in 1868 in the case of a federal challenge to a state law. *Id.* at 2138.

---

[3] *See* Tennessee Constitution, Article I, Section 26.

The Second Amendment's plain text protects the right of the people to bear arms in public without having to demonstrate *anything* to the government or obtain *anything* from the government. No other constitutional right works in a way that requires the government's permission or consent as a condition precedent to the individual's lawful exercise of the right. *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

ii. Tennessee Code Annotated § 39-17-1311(a) declares all places enumerated therein to be gun-free zones.

Tennessee's Parks Statute's laundry list of prohibited places sweeps up all manner of entirely ordinary locations in Tennessee which are clearly the kinds of places where an individual would have a need or desire to be able to provide for their own defense, including that substantial portion of East Tennessee that constitutes the Smoky Mountains. *See Bruen* at 2135 ("Many Americans hazard greater danger outside the home than in it."). As the *Bruen* Court explained, a "sensitive place" under Second Amendment jurisprudence is not just any "place[] where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." *Id.* at 2133. Rather, the Court explained, states have extremely narrow latitude to limit the places where firearms may be carried in public, mentioning in *dicta* only a limited number of potential "sensitive places such as schools and government buildings." *Id.* Although the Court acknowledged that other "*new* and analogous sensitive places" may exist, it cautioned that such potential locations would be highly limited and certainly could not be defined so broadly as to "include all 'places where people typically congregate.'" *Id.*

The concept of a "sensitive place" as used by the Court in *Bruen* and *Heller* relates to the government's control as proprietor of facilities designated for certain specific and limited government purposes. The term involves the government's relationship with the facility and the facility's designated use – not the number or type of people who might attend an event there. The

government's relationship with places like public parks is not within the scope of what *Bruen* discussed as a sensitive place. With respect to public parks and recreational areas, the government at most manages or operates the property or public accommodation on behalf of the public and *for the public's use*, with such a location designated for public use and widely available to all comers to use for any of a variety of lawful purposes. The government is not free to single out for discriminatory treatment a subclass of citizens attempting to use or frequent those venues, who merely happen to be exercising a constitutionally protected right while otherwise lawfully making use of the space. Indeed, *Bruen*'s focus on "sensitive places" involved locations "where a bad-intentioned armed person could disrupt key functions of democracy," or "where uniform lack of firearms is generally a condition of entry, and where government officials are present and vulnerable to attack." *Hardaway v. Nigrelli*, No. 22-CV-771 (JLS), 2022 U.S. Dist. LEXIS 200813, at *34 (W.D.N.Y. Nov. 3, 2022). The challenged statute, in contrast, sweeps up a whole host of entirely ordinary and nonsensitive locations where ordinary members of society are typically present for everyday activities.

iii. Tennessee Code Annotated § 39-17-1307(a) declares all places in the state to be gun-free zones.

While Tennessee's Parks Statute's enumerates a list of prohibited places, Tennessee Code Annotated § 39-17-1307(a) declares the entire state to be a gun-free zone. This statute is indiscriminate and, because it covers all property, whether public or private, it sweeps up all entirely ordinary locations in Tennessee which are the kinds of places where an individual would have a need or desire to be able to provide for their own defense. This runs afoul of *Bruen*'s admonition to New York not to turn the entire island of Manhattan into a sensitive place. *Id.* at 2134.

iv. Under *Bruen*'s "historical tradition" standard of review, Tennessee cannot come close to justifying any of the challenged provisions.

Under *Heller* and *Bruen*, the standard for assessing Second Amendment challenges requires that a plaintiff initially to show that the conduct falls under the Second Amendment's plain text. *Bruen* at 2126. Plaintiffs have clearly made this showing. Under "text, history, and tradition," the initial analysis of the Second Amendment's plain text requires an examination of whether 1) Plaintiffs are part of "the People" protected by the amendment (they are),[4] 2) the weapons (handguns, rifles, and shotguns) in question are in fact "arms" protected by the amendment (they are),[5] and 3) the regulated conduct falls under the phrase "keep and bear" (it does). *See id.* at 2134–35. Thus, as Plaintiffs have shown that the conduct regulated by the Tennessee Parks Statute as well as Tennessee's state-wide gun-free zone statute (Tennessee Code Annotated § 39-17-1307(a)) fall under the Article I, Section 26's plain text, Tennessee must rebut the strong resulting presumption of Article I, Section 26 protection:

> [T]he government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2126. Tennessee bears the burden of justifying the infringing statutes by "affirmatively prov[ing] that [the] firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. Tennessee cannot do this with respect to

[4] The Court in *Bruen* explicitly found that ordinary, law-abiding persons such as Plaintiffs carrying handguns in public is clearly within the bearing of arms protected by the Amendment.

[5] Numerous courts and, most importantly, the Supreme Court, have acknowledged that handguns are "arms" because they are "typically possessed by law-abiding citizens for lawful purposes," "in common use," and the "quintessential self-defense weapon[]." *Heller*, 554 U.S. at 625–27, 629; *McDonald*, 561 U.S. at 767 (2010); *Bruen* at 2134.

the Parks Statute nor the broader statewide prohibition in Tennessee Code Annotated § 39-17-1307(a).

The Second Amendment analysis requires courts "to assess whether modern firearms regulations are consistent with" the Second Amendment's "text and historical understanding," *id.* at 2131, meaning that courts must examine the *original public understanding* of the right when it was adopted. *See id.* at 2136 ("[W]hen it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*'" (quoting *Heller*, 554 U.S. at 634–35)). Courts must consider whether the challenged regulation finds constitutional support from directly related or analogous historical regulation from the Founding era, which evidences adoption-era acceptance of the regulation as not infringing on the pre-existing right to keep and bear arms. *See id.* at 2131–34. In assessing the existence of historical analogues, if any, *Heller* and *McDonald* guide courts with "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133.

Suffice it to say there are no founding-era analogues in accord with Tennessee's Parks Statute. As of 1791, there simply were no national trends that made it a crime for Americans, much less Tennesseans, to be armed with handguns, rifles and/or shotguns in the parks, forests, or even local recreational facilities. To the contrary, government generally *expected* (and at times *demanded*) Americans to be armed in these places for their own protection from man or beast. *See Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 201944, at *191–92 (N.D.N.Y. Nov. 7, 2022) (finding no historical tradition of restricting arms in public parks). Even worse, there are no founding era analogues to Tennessee's creation of a statewide gun-free zone under Tennessee Code Annotated § 39-17-1307(a).

Although there are typically four factors to be considered relative to a request for an injunction, when there is a likelihood of demonstrating a government violation of a constitutionally protected right, that factor – likelihood of success on the merits – becomes the most significant. *Caspar v. Snyder*, 77 F. Supp. 3d 616, 623 (E.D. Mich. 2015) ("[W]here a plaintiff demonstrates a likelihood of success on a claimed constitutional violation, a preliminary injunction is nearly always appropriate."); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor.").

B. Plaintiffs Are Likely to Continue Suffering Irreparable Harm Absent Preliminary Relief.

The impairment of a constitutionally protected right by government action, even for minimal periods of time, constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Doster v. Kendall*, 54 F.4th 398, 427–28 (6th Cir. 2022) ("[C]ourts typically treat a showing that the government likely violated the Free Exercise Clause (or some other right) as outcome dispositive.").

Tennessee's Parks Statute declares possession of any firearm (according to several Attorney General Opinions) in the enumerated places covered by the statute to be a criminal act. Anyone carrying a firearm in those places is subject to law enforcement investigative stops, detentions (perhaps for hours as in *Embody*), seizure of personal property, arrest, citations, and even prosecutions. Anyone carrying a firearm in one of these protected places bears the unconstitutional risk of being charged with a crime, the burden of being publicly observed under law enforcement detention, as well as the financial and emotional burden of potentially having to defend themselves in the criminal justice system. All of these are real and tangible harms that

Tennesseans have suffered in the past and Plaintiffs (including the members and supporters of the organizational Plaintiffs) are either likely to suffer in the future and/or which will cause them to make the choice between exercising a constitutionally protected right or risking government investigation, detention, and/or prosecution.

For the same reasons, Tennessee's creation of a statewide gun-free zone under Tennessee Code Annotated § 39-17-1307(a) currently imposes and will continue to impose substantial infringements on the constitutional rights of Plaintiffs and millions of others who live in or visit the state.

C. The Balance of Equities Is Overwhelmingly in Plaintiffs' Favor.

In assessing this injunction factor, courts "must 'balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Yang v. Kosinski*, 960 F.3d 119, 135 (2d Cir. 2020) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008)). This prong is closely tied to whether the injunction is in the public interest and, to satisfy it, this Court need look no further than the extensive explanation of the right to bear arms outside of the home in *Bruen*. The *Bruen* Court made clear that the right to keep and bear arms is no longer a "second-class right." *Bruen* at 2156. Further, *Bruen* now bans any interest balancing that a government entity might assert to be relevant in determining the "equities" of whether an existing statute or statutory scheme is constitutionally viable under the Second Amendment. The government is now required to demonstrate that the law being challenged either existed as part of the national historical tradition as of 1791 or that something very close to it did. None of that can be shown here.

Further, when a requested injunction seeks the protection of a fundamental right that is constitutionally protected, "precedent counsels that 'a state is in no way harmed by issuance of a

preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.'" *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330, 346 (4th Cir. 2021)(citations omitted, quoting *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 191 (4th Cir. 2013)).

D. An Injunction Is in the Public Interest.

The public interest is served by an injunction here because it will protect Plaintiffs' constitutionally protected rights. *See, e.g., Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp. (SMART)*, 698 F.3d 885, 896 (6th Cir. 2012) ("[T]he public interest is promoted by the robust enforcement of constitutional rights."); *Caspar*, 77 F. Supp. 3d at 641. Here, the egregious curtailment of a right protected by both the state and federal constitutions is exactly the type of limitation that the Supreme Court warned would be unconstitutional in *Bruen*.

Although public interest is generally a necessary prong for injunctive relief, under *Bruen*, Tennessee can no longer rely on the typical public safety talisman as an automatic justification for public interest. As Justice Thomas explained, "the Second Amendment does not permit—let alone require—'judges to assess the costs and benefits of firearms restrictions' under means-end scrutiny." *Bruen* at 2129.

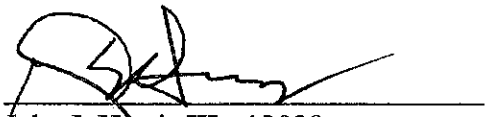
Because Plaintiffs are part of "the people" and Tennessee's Parks Statute infringes upon their right to "bear arms," Tennessee carries the burden of justifying, via historical analogue, how the statute is constitutionally permissible. Tennessee cannot shoulder this burden, because the statutory scheme consists of unprecedented restrictions and costs imposed on constitutional rights that have no historical analogue. Without historical support, the public interest requirement clearly

weighs in favor of the Plaintiffs, as it is always in the public interest to enjoin an unconstitutional law. *See, e.g., Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982).[6]

IV. Conclusion.

For the foregoing reasons, the Court should issue a preliminary injunction and then permanently enjoining the State of Tennessee from enforcing Tennessee Code Annotated § 39-17-1311(a) and § 39-17-1307(a).

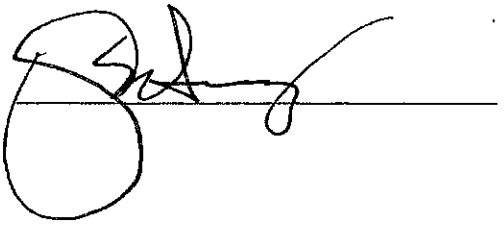
Respectfully submitted:



John I. Harris III - 12099
Schulman, LeRoy & Bennett PC
3310 West End Avenue, Suite 460
Nashville, Tennessee 37203
Tel: (615) 244-6670
jharris@slblawfirm.com

Certificate of Service

A copy of the foregoing is being served with the Complaint.



[6] Although Fed. R. Civ. P. 65(c) requires that a bond or other security be provided as a condition of issuing preliminary injunctions in federal court, this requirement may be dispensed with when there is no risk of financial harm. *Fed. Prescription Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980); *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). Even courts that view Rule 65(c) as mandatory are open to the idea of the bond being set at zero. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999). The same should apply under the application of Tennessee Rule of Civil Procedure 65 and, given the nature of this case, this Court should dispense with the bond requirement.