No. _____

In the
Supreme Court of the United States

KIMBERLY LAFAVE, *et al.*,
Petitioners,

v.

THE COUNTY OF FAIRFAX, VIRGINIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID H. THOMPSON
PETER A. PATTERSON
WILLIAM V. BERGSTROM
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

STEPHEN P. HALBROOK
Counsel of Record
3925 Chain Bridge Road
Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com

EARL N. "TREY" MAYFIELD, III
CHALMERS ADAMS BACKER & KAUFMAN, LLC
100 N. Main St., Ste. 340
Alpharetta, GA 30039
(678) 528-8900
tmayfield@chalmer-sadams.com

Counsel for Petitioners

QUESTION PRESENTED

Fairfax County, Virginia, prohibits possession of firearms in its public parks, which consist of almost 24,000 acres of mostly wooded land across 420 parks. Petitioners, who have permits to carry handguns, are thereby prohibited from carrying firearms for self-defense in Fairfax County parks. The Fourth Circuit held the restriction was facially constitutional under the Second Amendment on the basis that four preschool programs operate on a tiny portion of the total parkland, making the prohibition valid at least in those few locations.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court held that D.C.'s handgun ban was facially invalid even though firearms could be banned in "sensitive places" like certain government buildings. This Court repeated those statements in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 31 (2022), adding that sensitive places do not include "all places of public congregation that are not isolated from law enforcement," even as it declared New York's may-issue licensing scheme unconstitutional.

The question presented is whether the Fourth Circuit properly rejected Petitioners' challenge to Fairfax County's ban on carrying firearms in the hundreds of public parks operated by the County because four of those parks host preschool programs.

PARTIES TO THE PROCEEDING

Petitioners Kimberly LaFave, Glenn M. Taubman, and Robert Holzhauer are individuals who are residents of the Commonwealth of Virginia. Respondents are the County of Fairfax, Virginia, and Kevin Davis, in his official capacity as Chief of Police of Fairfax County, Virginia. No corporate entities are involved in this case, and no Rule 29.6 disclosure statement is required.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *LaFave v. County of Fairfax, Virginia*, No. 24-1886 (4th Cir. Aug. 27, 2025)
- *LaFave v. County of Fairfax, Virginia*, No. 1:23-cv-1605 (WBP) (E.D. Va. Aug. 23, 2024)

There are no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioners challenge Fairfax County's flat ban on the peaceable carry of firearms in county parks. Petitioners' challenge implicates several hotly contested issues in Second Amendment jurisprudence, including the principles underlying "sensitive places" restrictions on carrying firearms and the relative weight to afford founding-era history. The Fourth Circuit, however, did not grapple with any of these issues, and avoided the merits of the Second Amendment challenge altogether. Rather, it fixated on the "facial" nature of Petitioners' challenge and rejected Petitioners' claim because four of the over four hundred parks covered by the Fairfax County ban host preschool programs.

The Fourth Circuit's resolution of Petitioners' claim is an egregious misapplication of this Court's precedents on facial challenges. It cannot be squared with this Court's facial invalidation of the District of Columbia's handgun ban in *District of Columbia v. Heller*, 554 U.S. 570 (2008) or New York's may-issue licensing scheme in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022). But it reflects a growing body of lower court confusion and error on a recurring issue in Second Amendment jurisprudence. *See, e.g.*, *Antonyuk v. James*, 120 F.4th 941, 1025–26 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025) (mem.).

The Fourth Circuit's approach also directly conflicts with the Illinois Supreme Court's treatment of a firearm carry ban in *People v. Burns*, 79 N.E.3d 159 (Ill. 2015), and it is metastasizing across the lower federal courts as they avoid engaging Second Amendment challenges on the merits, leaving in place laws

presenting grave constitutional infirmities. This Court should grant review, whether through summary vacatur or plenary consideration, to resolve the confusion and conflict in the lower courts and ensure Second Amendment challenges are not improperly rejected on non-merits grounds.

The Fourth Circuit's rejection of Petitioners' challenge to Fairfax County's park ban rested on two fundamental distortions of the process for adjudicating constitutional claims. First, the Fourth Circuit improperly reasoned that Fairfax County's ban has constitutional applications simply because some portion of the conduct covered by the ban purportedly could be restricted consistent with the Second Amendment. But even if banning firearms in a park hosting a preschool would be constitutional, that would not be a constitutional application of Fairfax County's ban. The rule established by Fairfax County's ban is that firearms cannot be carried in *parks*, not parks containing schools, *see* Va. Code § 18.2-308.1(B) (banning, in a law not challenged here, firearms in schools), and it is that rule that must be tested against the Second Amendment.

Heller itself refutes the Fourth Circuit's approach. In *Heller*, this Court declared the District of Columbia's handgun ban facially unconstitutional, *see City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015), while simultaneously suggesting that a law banning fully automatic firearms would be constitutional and insisting that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive

places such as schools or government buildings." *Heller*, 554 U.S. at 626–27.

Similarly, the existence of sensitive places within Manhattan did not preclude this Court in *Bruen* from declaring New York's may-issue licensing scheme facially unconstitutional, even though firearms could presumptively be banned in sensitive places analogous to founding-era courthouses, legislative assemblies, and polling places. 597 U.S. at 30.

If the Fourth Circuit's approach to facial challenges were correct, this Court in *Heller* and *Bruen* could not have made those statements. Under the Fourth Circuit's reasoning, D.C.'s handgun ban would have been constitutional as applied to the possession of automatic handguns or the possession of handguns in courthouses or by felons, and New York's may-issue scheme would have been constitutional as applied to the carrying of handguns in, for example, the Thurgood Marshall United States Courthouse in Manhattan.

The implications of the Fourth Circuit's holding are far-reaching. Those same preschools are located in Fairfax County, so by implication a law banning firearms in the entirety of Fairfax County would be facially constitutional. That result not only is incompatible with *Heller* and *Bruen*, but also contradicts fundamental principles of judicial review, federalism, and the separation of powers. As this Court long ago recognized, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully be detained," as such a procedure "would, to some extent, substitute the

judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875).

The Illinois Supreme Court properly grasped these principles in *People v. Burns*, rejecting Illinois's argument that the State's flat ban on carry was constitutional as applied to a felon. *See* 79 N.E.3d at 165–66. Other courts, however, have joined the Fourth Circuit in rejecting facial Second Amendment challenges by pointing to a subset of the conduct regulated by the statute without ever actually addressing the rule established by the statute itself. *See, e.g.*, *Antonyuk*, 120 F.4th at 1025–26.

Second, the Fourth Circuit improperly accorded talismanic significance to its characterization of Petitioners' claims as "facial," rejecting the claim out of hand after concluding that Fairfax County's ban had constitutional applications without asking whether Petitioners were entitled to a narrower remedy. As this Court has explained, "the distinction between facial and as-applied challenges … goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331 (2010).

Thus, even if the Fourth Circuit were correct that it had identified constitutional applications of Fairfax County's park carry ban, it should then have asked whether Petitioners were entitled to a remedy narrower than facial invalidation (e.g., an injunction against enforcement of the law in parks that are not hosting a preschool program), before rejecting Petitioners' claim altogether. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 757 n.1 (2024) (Thomas, J., concurring in judgment); *Nat'l Ass'n for Gun Rts. v. Lamont*, 153 F.4th 213, 229 n.16 (2d Cir. 2025) (rejecting

facial invalidation but continuing analysis to assess whether the law was unconstitutional in some applications).

It is no secret that the lower courts have not always been in step with this Court when it comes to the Second Amendment. Before *Heller*, nearly every federal circuit court of appeals held that the Second Amendment does not protect an individual right, and between *Heller* and *Bruen* the federal circuits consistently subjected Second Amendment claims to a tiers-of-scrutiny, interest-balancing analysis. Now that these foundational issues have been resolved, other doctrines are being twisted to defeat otherwise valid Second Amendment claims. *Cf. Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 286 (2022). This Court should grant review in this case, whether by summarily vacating or by calendaring for plenary review, to stem the proliferation of such Second Amendment distortion in the lower courts.

OPINIONS BELOW

The opinion of the court of appeals is reported at 149 F.4th 476 (2025) and is reproduced at Pet.App.1a–16a. The memorandum opinion of the district court is unpublished but can be found at 2024 WL 3928883 and is reproduced at Pet.App.17a–64a.

JURISDICTION

The court of appeals issued its judgment on August 27, 2025. The Chief Justice extended the time to

file a petition for certiorari to January 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Second Amendment and Section One of the Fourteenth Amendment to the United States Constitution, as well as Fairfax County Code § 6-2-1, are reproduced in the Appendix beginning at Pet.App.67a.

STATEMENT

I. The Parks Ban.

Since 2020, Fairfax County has banned "[t]he possession, carrying, or transportation of any firearms, ammunition, or other components or combination thereof … [i]n any public park owned or operated by the County, or by any authority or local government entity created or controlled by the County." Fairfax County Code § 6-2-1 ("the Parks Ban"). Violation is a Class 1 misdemeanor. *Id.*

This is a significant restriction. Fairfax County owns and operates or otherwise controls "420 parks on more than 23,000 acres of land" and "325 miles of trails." *About Us*, FAIRFAX CNTY. PARK AUTH., https://perma.cc/28QL-8PWF; *see also* Pet.App.81a. That means that the Parks Ban effectively outlaws the possession or carriage of firearms in more than 9% of the entire county. Pet.App.49a n.12.

Petitioners are three individuals, licensed to carry firearms in Virginia, who wish to carry for self-defense in public parks. Petitioner Kimberly LaFave is a paralegal who also operates a dog-walking and dog-sitting business. Pet.App.95a. She has been

licensed to carry a handgun since 2013, and she carries one in public for her protection. Pet.App.95a–96a. Until the enactment of the Parks Ban, she carried while walking dogs or engaging in other activities in parks or on trails in low density, remote areas where she, as a woman, feels particularly vulnerable. *Id.* She has, however, since attempted to avoid carrying in places where the Ban makes it criminal to do so. Pet.App.96a–97a.

Petitioner Glenn M. Taubman is an attorney who, like LaFave, has long been licensed to carry a concealed firearm in Virginia. Pet.App.101a–102a. He is an avid cyclist who regularly uses parks and hiking trails in Fairfax County. Pet.App.102a. Prior to the enactment of the Parks Ban, he routinely carried a firearm with him when he used those parks and trails and he would continue to do so, for protection against both criminals and wildlife, if the Parks Ban did not make it illegal. *Id.*

Petitioner Robert Holzhauer is a retired member of the United States Army who was honorably discharged at the rank of Lieutenant Colonel after 27 years of service at a 100% permanent, total disability. Pet.App.109a–110a. Lt. Col. Holzhauer also has a permit to carry a concealed firearm in Virginia. Pet.App.110a. Since becoming a Fairfax County resident in 2004, he has used Fairfax County parks several times a week, excepting the periods when he was deployed in Iraq, Yemen, Libya, and Liberia. *Id.* Prior to the Parks Ban, he carried a handgun for self-defense against both criminals and wildlife, and he feels a particularly acute need for a defensive weapon on account of his disability. *Id.* He has, however, like the

other Petitioners, ceased to carry in the parks for fear of prosecution. *Id.*

II. Procedural History

Petitioners filed this suit in the Eastern District of Virginia on November 22, 2023, seeking declaratory and injunctive relief, alleging, as relevant here, that the Parks Ban violated their rights under the Second and Fourteenth Amendments to the United States Constitution. Pet.App.22a–24a. They named as defendants to the action Respondent Fairfax County, Virginia and Respondent Chief of Police Kevin Davis. The district court had jurisdiction over this federal question under 28 U.S.C. § 1331.

A. The parties filed cross-motions for summary judgment, and on August 23, 2024, the district court granted Respondents' motion and denied Petitioners'. Purporting to apply the *Bruen* framework, the district court first concluded that the Second Amendment's plain text "presumptively guarantees Plaintiffs' right to bear arms in County Parks." Pet.App.38a–39a.

The question therefore became whether the Parks Ban is historically justified. The district court erred in concluding it was. Based on its conclusion that present-day "parks" were an 1850s invention, the court disregarded the lack of Founding-era support for banning firearms in public parks and instead credited the proliferation of local restrictions in the latter half of the 19th century as establishing "that the Ordinance reflects this Nation's history and tradition of prohibiting firearms in parks from the Reconstruction Era to the present." Pet.App.46a. Petitioners appealed.

B. On appeal, the Fourth Circuit affirmed the district court, but reached its result a very different way. The Fourth Circuit did not conduct a fulsome *Bruen* analysis or inquire into the history of restrictions on firearms in public parks. Instead, it concluded that, because there were three preschools and one preschool program that operated on park property in Fairfax County, the Parks Ban is facially constitutional. Pet.App.10a.

The logical progression that led the Fourth Circuit to that result is instructive though it bears no resemblance to any of this Court's recent Second Amendment jurisprudence. The dispositive fact, for the court below, was that Petitioners' challenge could be characterized as a "facial" one. Relying on a simple but erroneous syllogism, the Fourth Circuit concluded that because there were a handful of preschool programs operating on park property, that was enough to shoulder the government's burden to establish the Park Ban's facial validity. Under *Heller*, it reasoned, "restrictions on carrying firearms at schools … are 'presumptively constitutional.'" Pet.App.11a. Hence, if there were some schools encompassed by the Parks Ban, that means that at least some of the time, the Parks Ban (which never mentions schools) operated to restrict firearms in places where they could constitutionally be restricted, and Petitioners' facial claim thus failed. *Id.*

REASONS FOR GRANTING THE PETITION

The decision below denied Petitioners' challenge not because the Second Amendment was found to permit bans in parks, but because Petitioners challenged the Parks Ban "facially": "Plaintiffs bring a facial challenge to the County's parks restriction, *and that*

dooms their effort." Pet.App.10a (emphasis added). The constitutional application the court found fatal to Petitioners' "facial challenge" to a ban on carrying firearms in 420 parks was the presence of "three preschools and one preschool program on park property." *Id.* Those four programs, the Fourth Circuit held, excused from any further scrutiny a law that never once even mentions schools and bans carrying a firearm in almost one tenth of Fairfax County.

This Court should grant review. Although the Fourth Circuit's reasoning is unfortunately not unique to the decision below, it is untenable under this Court's precedents. First, this Court has explained many times over that the labels "facial" and "as-applied" do not have dispositive significance. Rather, they are descriptions of the nature of a suit and, most often, an explanation of the scope of the eventual remedy. Second, when analyzing *any* form of Second Amendment challenge, whether characterized as facial or as-applied, the proper mode of analysis involves a comparison of the challenged prohibition and the historical record of firearms regulation in our country. The Fourth Circuit's decision to look beyond the scope of the actual prohibition—which applied to parks *qua* parks and does not mention schools—effectively created a different, hypothetical statute, and substituted examination of that imaginary law for the one that Fairfax County enacted.

I. Following *Rahimi*, there has been confusion in the courts of appeals over the salience of the facial/as-applied distinction in Second Amendment litigation and a deepening split in authority.

A. The Fourth Circuit is not the first circuit to err by wielding the "facial" label as a shield against Second Amendment scrutiny of broadly prohibitive firearms laws. Indeed, it is not even the first to make the error with respect to firearms prohibitions in parks. That distinction goes to the Second Circuit in *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024). Like this case, *Antonyuk* involved a "facial" challenge to New York's statewide ban on firearms on park property (among many other "sensitive place" restrictions at issue in that case). The Second Circuit vacated a preliminary injunction against the parks restriction even though it never concluded that New York was likely to show that banning firearms in parks was relevantly similar to any part of our Nation's history of firearm regulations.

Rather, *Antonyuk* concluded there was "a well-established and representative tradition of firearm regulation in often-crowded public squares such as *urban* parks." *Id.* at 1025–26 (emphasis added). That was enough, the court concluded, "to survive a facial challenge" because a successful facial challenge would require the plaintiffs to prove that "no set of circumstances exists under which the [law] would be valid," and, at least in urban parks like Central Park, there likely were. *Id.* at 1026 (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)). After the Second Circuit's initial decision in *Antonyuk*, the Ninth Circuit engaged in similar reasoning in *Wolford*

v. Lopez, 116 F.4th 959, 984 (9th Cir. 2024), *cert. granted*, No. 24-1046, 2025 WL 2808808 (U.S. Oct. 3, 2025).

The Second Circuit's *Antonyuk* decision is similar in principle to the decision below. In each case, the court posited a subset of activity covered by the challenged statute that the court thought could constitutionally be restricted and concluded that the subset constituted a valid "application" of the statute that defeated a facial challenge. In neither case did the court ask whether the actual rule created by the statute was consistent with the Second Amendment.

B. Not all courts have adopted this erroneous mode of analysis. For example, in *Burns*, the Illinois Supreme Court rejected Illinois's argument that the state's ban on carrying firearms in public was facially constitutional and could be validly applied to a felon, even if it was unconstitutional as applied to law-abiding citizens. 79 N.E.3d at 165–66. The Court accepted that the Illinois legislature likely "*could* constitutionally prohibit felons from carrying readily accessible guns outside the home." *Id.* at 165 (emphasis in original). That, however, was not the rule established by the challenged law: "The offense, as enacted by the legislature, does not include as an element … the fact that the offender has a prior felony conviction." *Id.* "[I]t is precisely because the prohibition is not limited to a particular subset of persons, such as felons," the court reasoned, "that the statute *as written*, is unconstitutional on its face," and "[a]n unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so." *Id.* at 165–66.

So too here, no element of the offense of possession of a firearm in a park requires proof that the person possessed the firearm in a school.

For another example, in considerable tension with the decision below, the en banc Fourth Circuit resisted the temptation to lapse into this mode of analysis in a different Second Amendment case. *See United States v. Price*, 111 F.4th 392 (4th Cir. 2024) (en banc). In *Price*, a majority of the court held that the federal law prohibiting possession of a firearm from which the serial number has been removed was facially constitutional because it concluded that "firearms with obliterated serial numbers are not" "in common use for a lawful purpose" and were, therefore, unprotected. *Id.* at 408.

Judge Agee, concurring in the judgment, wrote that he would have resolved the case "on a far simpler basis: because Price is a convicted violent felon who may not possess *any* firearm, [the unserialized firearm ban] is not unconstitutional as applied to him." *Id.* at 412 (Agee, J., concurring in the judgment). The majority correctly eschewed this approach, explaining that "[w]ere we to take the path our colleague urges, we would be deciding only the question of whether a law banning *felons* from possessing firearms with obliterated serial numbers is constitutional …. But that is not the law Congress enacted." *Id.* at 402 n.4 (majority op.) (emphasis in original).

In *Baird v. Bonta*, considering the constitutionality of California's ban on open carriage of firearms in counties with more than 200,000 people, the Ninth Circuit explained that "there is no meaningful distinction" between the facial and as-applied challenges raised in such a case. No. 24-565, 2026 WL 17404, at

*16 (9th Cir. Jan. 2, 2026). It reasoned, "Baird's as-applied challenge to the urban open-carry ban boils down to the argument that California cannot constitutionally deny him from carrying openly throughout the state," and "[t]he analysis of that claim is no different than for Baird's facial challenge, which merely expands the argument to contend that … California cannot constitutionally ban *others* from carrying openly throughout the state. *Bruen*'s two-step framework *applies to both*." *Id.* at *17 (final emphasis added). Even the dissent, disagreeing as to the result, fundamentally agreed with the majority that "[i]n a facial challenge, our review of the statutory scheme is limited to the text and context of the statute itself," which meant applying the *Bruen* test to the actual regulation challenged. *Id.* at *24 (N.R. Smith, J., concurring in part and dissenting in part).

As Judge Willett correctly summarized in *United States v. Bonner*, "*Bruen* and *Rahimi* instruct us to 'consider[ ] whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.' " 159 F.4th 338, 344–45 (5th Cir. 2025) (Willett, J., concurring) (quoting *United States v. Rahimi*, 602 U.S. 680, 692 (2024)). The issue in a given case is whether *the challenged regulation* "as applied to a particular defendant, comports with the Second Amendment—not whether some hypothetical statute could constitutionally apply to the defendant." *Id.* at 345. However, at times courts have "slipped into a hypothetical 'what-if' statute analysis," reformulating statutes to address subjects beyond their text. *Id.* So too here, the Fourth Circuit imagined a regulation on schools which does not exist in the Parks Ban.

* * *

As these decisions indicate, a split is emerging among the lower courts over how to properly analyze facial Second Amendment challenges. On the one side, there are decisions like the one below, in which the court analyzes a *subset of the conduct* restricted by a statute rather than *the rule* set forth by the statute. On the other hand, several other courts have more faithfully followed the analysis outlined in this Court's Second Amendment caselaw and focused on the terms of the statute, requiring a fit in both "how" and "why" the statute, by its own terms, regulates firearm rights and the way historical restrictions did so.

II. The decision below is incompatible with this Court's precedents.

The Court should grant certiorari to review this case because the decision below is decidedly on the wrong side of that split. Indeed, by taking the principles on which it relies to their logical conclusion, the decision below demonstrates their error in the manner of a *reductio ad absurdum* example. It cannot be that a ban on firearms in public parks is facially constitutional because of the happenstance that a handful of the hundreds of covered parks host preschool programs. Indeed, if the decision below were correct, it is hard to see how *any* gun control law could ever be facially unconstitutional, for it would seem that at least *some* of the conduct covered by any such law could be regulated consistent with the Second Amendment—for example, when the law in question is applied to a violent felon who has forfeited his Second Amendment rights.

A. This Court already has rejected the Fourth Circuit's approach in *Heller* by holding that D.C.'s ban

on handgun possession was *facially* unconstitutional. *See Patel*, 576 U.S. at 415. And it did so "despite simultaneously suggesting that there were several situations in which the government potentially *could* ban possession of handguns consistent with the Second Amendment." Peter A. Patterson, *Facial Confusion: Lower Court Misapplication of the Facial/As-Applied Distinction in Second Amendment Cases*, 19 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 2 (2025).

For instance, *Heller* suggested that certain "dangerous and unusual" weapons, like machineguns, could be banned to everyone, and that some people, like certain categories of "felons and the mentally ill" could be denied *all* firearms. 554 U.S. at 624, 626–27. And it suggested that even those who could ordinarily possess handguns could not possess them in certain "sensitive places." *Id.* Each of these restrictions were subsumed within D.C.'s law, which banned handgun possession by violent felons just as much as it did for law-abiding citizens and forbade the possession of fully automatic handguns and revolvers on equal footing.

Under the logic of the decision below, that should have made D.C.'s ban facially constitutional. But rather than focusing on subsets of conduct covered by the ban, *Heller* evaluated the actual rule set forth by the D.C. law. It explained that while the law in question "amount[ed] to a prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society for [a] lawful purpose …. [f]ew laws in the history of our Nation have come close to th[at] severe [of a] restriction" on the right. *Id.* at 628–29. Because the ban established by D.C.'s law was historically

unsupported, the Court concluded that the ban was facially unconstitutional. *Id.* at 635.

Similarly, *Bruen* found that "the plain text of the Second Amendment protects [plaintiffs'] proposed course of conduct—carrying handguns publicly for self-defense." 597 U.S. at 32. Yet *Bruen* recalled "*Heller*'s discussion of 'longstanding' 'laws forbidding the carrying of firearms in sensitive places.' " *Id.* at 30 (quoting *Heller*, 554 U.S. at 626). That firearms could presumptively be banned in several locations within New York, like the legislature or at courthouses, did not prevent *Bruen* from declaring New York's may-issue licensing scheme facially unconstitutional. *See Baird*, 2026 WL 17404, at *18 (describing *Bruen* as a facial challenge). Indeed, many more preschools are located in Manhattan than in Fairfax County parks. Under the Fourth Circuit's logic, New York's may-issue scheme should have been held facially constitutional because it could have been constitutionally applied in at least some discrete locations it encompassed.

United States v. Rahimi, 602 U.S. 680 (2024), is not to the contrary. To be sure, the Court in *Rahimi* emphasized that the challenger brought a facial challenge, which required him to "establish that no set of circumstances exists under which the Act would be valid." 602 U.S. at 693 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). And the Court rejected the challenger's facial challenge because the Government demonstrated that the challenged law, 18 U.S.C. § 922(g)(8), was "constitutional in some of its applications." *Rahimi*, 602 U.S. at 692.

But *Rahimi* did not posit a subset of conduct that happened to be covered by the statute that could be

constitutionally regulated. Rather, the Court recognized that the statute *itself* "provide[d] two independent bases for liability," and it concluded that it was facially constitutional because *one of those two bases* comported with the history of firearms regulation. *Id.* In other words, in *Rahimi* the legislature itself specified separate subrules, so the Court properly limited its review to one of those subrules when presented with a facial challenge. Moreover, *Rahimi* explained: "Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not broadly restrict arms use by the public generally." *Id.* at 682. The Parks Ban at issue here does just that.

B. In a facial challenge, the question is whether "the terms of the statute itself … measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contains a constitutional infirmity that invalidates the statute in its entirety." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) (quoting Mark E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359, 387 (1998)). If the answer is yes, that means the statute is facially unconstitutional, and because it is facially unconstitutional, it has no constitutional applications. It does not matter that some of the conduct covered by the statute could have been constitutionally regulated under a different statute.

These principles were illustrated nearly 150 years ago in *In re Trade-Mark Cases*, 100 U.S. 82, 98 (1879). That case concerned a challenge to an early attempt by Congress to regulate trademarks. The statute provided for the registration of trademarks, without regard to whether the trademark was used in or

affecting interstate commerce, and it made it a crime to fraudulently use, sell, and counterfeit registered trademarks. *See id.* at 92. The Court held that the statute exceeded Congress's commerce clause authority, and it refused to sustain it to the extent it did "regulate trade-marks used in commerce with foreign nations and among the several states." *Id*. at 98. To do so, the Court reasoned, would be improperly to "give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." *Id.*

And as this Court further stated in *Reese*: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." 92 U.S. at 221.

This Court's modern precedents have applied similar reasoning in the vagueness context. There, the question is whether the rule established by the law in question is vague, not whether there is some conduct that clearly falls within it. Indeed, this Court's "holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 576 U.S. 591, 602 (2015) (emphasis omitted); *see also City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring) ("But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than it could apply an (imaginary) statute that said,

'It is a crime to do wrong,' even to the worst of murderers.").

The same principles should govern in this context. Laws restricting the carrying of firearms are presumptively unconstitutional, and a law restricting such conduct must contain a valid rule (or subrule, as in the case of *Rahimi*) that brings the conduct within the government's authority to regulate firearms. If it does not, the law is unconstitutional on its face. It does not matter whether a different law that established a different rule would be constitutional, even if that law would have swept in some of the same conduct as the challenged law.

C. Furthermore, even if the Fourth Circuit were correct to hold that the Parks Ban is facially constitutional because of the parks that host preschools, that should have been the beginning, not the end, of its analysis. The Court should have continued to ask whether Fairfax County had established a valid basis for banning firearms in the other four-hundred-plus parks in the County. As this Court explained in *Citizens United*, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." 558 U.S. at 331. Rather, the distinction "goes to the breadth of the remedy employed by the Court, not what must be pleaded in the complaint." *Id.* That means that if the law in question cannot be held unconstitutional across the board, a reviewing court still should ask whether the challenger has established that *some* of its applications are unconstitutional. *See Lamont*, 153 F.4th at 229 n.16.

This is inherent in the *Bruen* inquiry as well. It cannot be the case that a law that is significantly broader than valid historical regulations to which it is compared is *constitutional* in every application because it subsumes those valid restrictions. *Bruen* emphasized that a modern restriction's constitutionality depends upon a comparison of "how and why" both it, and its historical predecessors, burdened the right to keep and bear arms. *See* 597 U.S. at 29. Under *Bruen*, a law that proscribes both conduct that is historically outside the scope of the Second Amendment's protections and conduct that *is* protected must, at the very least, be unconstitutional to the extent it restricts conduct within the Second Amendment's protective scope.

III. This case is exceptionally important and could be resolved through summary vacatur.

A. The Fourth Circuit's decision warrants this Court's review because it exemplifies the lower court confusion over how properly to evaluate facial Second Amendment challenges. This Court should grant review to remedy this confusion and prevent it from continuing to result in Second Amendment claims being shielded from review on the merits.

How the *Bruen* analysis differs between a facial and an as-applied challenge (if at all) arises frequently in all manner of Second Amendment cases. The Amendment's construction is warped by the courts' misunderstanding of the implications of facial and as-applied review. At best, courts end up dodging questions they should otherwise answer. At worst, they "endors[e] outliers that our ancestors would never have accepted" because they fail to conduct the correct

form of historical scrutiny. *Bruen*, 597 U.S. at 30 (citation omitted).

This case also provides this Court an opportunity to establish that there is no "Second Amendment exceptionalism" in constitutional adjudication. In the years between *Roe v. Wade*, 410 U.S. 113 (1973) and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), "courts frequently twisted or ignored relevant constitutional doctrine where abortion was involved." Elizabeth Sepper, *Anti-Abortion Exceptionalism After* Dobbs, J.L., MED. & ETHICS 612, 612 (2023). These "abortion distortions" impacted other general areas of law like standing and the requirements for succeeding on a facial challenge. *See Dobbs*, 597 U.S. at 286–87. In the post-*Bruen* legal landscape, lower courts' attempts to evade the proper standard and find shortcuts to affirming the constitutionality of anti-Second Amendment legislation creates the same sort of distortion.

B. If this Court is not inclined to set this case for plenary review, the decision below is the rare one that satisfies the criteria for summary vacatur: "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). The principles discussed above, and which the Fourth Circuit below misapplied, are well established. They have been the law at least since their application over 150 years ago in *In re Trade-Mark Case*, including in this Court's substantive Second Amendment decisions.

Merits aside, there can be no serious doubt that the proper method was not followed by the panel below, and no serious question as to what the correct

method is. Following *Bruen* and *Rahimi*, *every* Second Amendment challenge to a law that "regulates arms-bearing conduct," must be analyzed by comparing the modern regulations' restrictions against "relevantly similar" historical laws to determine whether the challenged law "is consistent with the principles that underpin our regulatory tradition" and "comport[s] with the principles underlying the Second Amendment." *Rahimi*, 602 U.S. at 691–92. The decision below failed to conduct that analysis at all. Absent merits consideration by this Court, summary vacatur with instruction to conduct that analysis in the first instance is appropriate.

CONCLUSION

The Court should grant petition for a writ of certiorari and vacate the decision below.

January 16, 2026 Respectfully submitted,

DAVID H. THOMPSON
PETER A. PATTERSON
WILLIAM V. BERGSTROM
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

STEPHEN P. HALBROOK
Counsel of Record
3925 Chain Bridge Road
Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com

EARL N. "TREY" MAYFIELD, III
CHALMERS ADAMS BACKER & KAUFMAN, LLC
100 N. Main St., Ste. 340
Alpharetta, GA 30039
(678) 528-8900
tmayfield@chalmer-sadams.com

Counsel for Petitioners

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 27, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1886

KIMBERLY LAFAVE; GLENN M. TAUBMAN; ROBERT HOLZHAUER,

Plaintiffs-Appellants,

v.

THE COUNTY OF FAIRFAX, VIRGINIA; KEVIN DAVIS, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE,

Defendants-Appellees.

CITY OF RICHMOND; DISTRICT OF COLUMBIA; ILLINOIS; CALIFORNIA; COLORADO; CONNECTICUT; DELAWARE; HAWAII; MASSACHUSETTS; MINNESOTA; NEVADA; NEW JERSEY; NEW YORK; OREGON; PENNSYLVANIA; RHODE ISLAND; VERMONT; WASHINGTON; BRADY CENTER TO PREVENT GUN VIOLENCE; GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE,

Amici Supporting Appellee.

Argued: May 7, 2025 Decided: August 27, 2025

Appendix A

OPINION

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. William B. Porter, Magistrate Judge. (1:23-cv-01605-WBP).

Before DIAZ, Chief Judge, and GREGORY and AGEE, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by published opinion. Chief Judge Diaz wrote the opinion, in which Judge Gregory and Judge Agee joined.

DIAZ, Chief Judge:

In this case, we consider the so-called sensitive places doctrine, which allows the government to restrict the presence of firearms in certain locations. Plaintiffs, a trio of lawful gun owners, wish to bring their weapons to two such places where a Fairfax County, Virginia ordinance prohibits them from doing so. The places at issue are, first, county parks and, second, public spaces where (or near where) an event is taking place that requires a county permit.

Plaintiffs challenge the constitutionality of the County's restrictions, based on the Second Amendment as to both restrictions, and on the Fourteenth Amendment's vagueness doctrine as to the events restriction.

The district court granted summary judgment to the County, concluding (1) that both restrictions regulate

firearms in sensitive places consistent with the Second Amendment, and (2) that the events restriction isn't unconstitutionally vague.[1]

We agree that Plaintiffs can't succeed on their facial challenge to the ordinance's restriction on arms in parks, so we affirm the district court's ruling on that front. But we conclude that Plaintiffs lack standing to challenge the constitutionality of the events restriction, so we vacate that part of the district court's judgment.

I.

A.

The County's ordinance prohibits "[t]he possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof" in various places. Fairfax County, Va., Code § 6-2-1(A).[2] Among those places are "any public park owned or operated by the County, or by any authority or local government entity created or controlled by the County," *id.* § 6-2-1(A)(2), and "any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a County-

1. Plaintiffs sued Fairfax County and its Chief of Police, Kevin Davis, in his official capacity. We refer to them together as "the County."

2. The ordinance is available at https://library.municode.com/va/fairfax_county/codes/code_of_ordinances?nodeId=FACOCO_CH6WE_ART2FICOGOFAOTPUAR_S6-2-1FIAMCOCOTHPRCEAR [https://perma.cc/6ZYE-F2NR].

permitted event or an event that would otherwise require a County permit," *id.* § 6-2-1(A)(4).

Although the latter restriction references public streets and roads, it's undisputed that the events restriction only applies "on property that is . . . controlled or owned by Fairfax County," so it doesn't generally apply on "public roadways, which are instead controlled by the Virginia Department of Transportation." J.A. 52 ¶ 11.

B.

The County operates 420 parks of varying sizes that receive between 12 and 16 million visitors per year. Most park programming "is geared towards families and children," and approximately one quarter of visitors to county parks are children. The parks offer family-friendly recreational facilities and activities, like playgrounds, minigolf courses, carousels, train rides, and summer camps.

Pivotally, the County operates three preschools on park property, and a third party runs a preschool program in a park. The County also "offers drop-in daycare" at two recreation centers on park property.

C.

Kimberly LaFave carries a handgun for protection. But she "endeavor[s] to avoid areas that [she] know[s] would be in violation of the Ordinance." J.A. 1606 ¶ 7. She does use the County's "parks and trails" while "walking dogs or engaging in other activities." J.A. 1605 ¶ 5.

LaFave claims that, "[s]hould [she] possess, carry, or transport firearms" at or near events that require a County permit, she would be "subject to arrest or prosecution." J.A. 1606 ¶ 9. And because she "may find [her]self in a motor vehicle with a firearm" while passing through an area where firearms are prohibited under the ordinance, she would "be in violation even if [she] do[es] not know [she is] in an area adjacent to an event that is permitted or should have a permit." J.A. 1607 ¶ 13. Glenn Taubman and Robert Holzhauer, the other two plaintiffs, make similar claims.

LaFave, Taubman, and Holzhauer sued to challenge the ordinance. They brought three claims: (1) violation of the Second Amendment as to the parks restriction, (2) violation of the Second Amendment as to the events restriction, and (3) violation of the Fourteenth Amendment's Due Process Clause based on the vagueness of the events restriction. They sought a declaration that the parks and events restrictions are unconstitutional and an injunction barring their enforcement.

Plaintiffs moved for a preliminary injunction, which the district court denied. The parties then cross-moved for summary judgment. The court concluded that neither restriction violated the Second Amendment, and that the events restriction wasn't unconstitutionally vague. The court therefore entered summary judgment for the County. *LaFave v. County of Fairfax,* No. 23-cv-1605, 2024 WL 3928883, at *17 (E.D. Va. Aug. 23, 2024).

This appeal followed.

II.

We review a district court's summary judgment ruling de novo. *Elderberry of Weber City, LLC v. Living Ctrs.-Se., Inc.,* 794 F.3d 406, 411 (4th Cir. 2015). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

On summary judgment, we "resolv[e] all doubts and inferences in favor of the non-moving party." *Bacon v. City of Richmond,* 475 F.3d 633, 637 (4th Cir. 2007) (citation omitted). And "[w]hen faced with cross-motions for summary judgment, we consider each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Id.* at 637-38 (quotation omitted).

III.

A.

The Second Amendment protects "the right of the people to keep and bear Arms." This right includes a "right to bear arms in public for self-defense." *N.Y. State Rifle & Pistol Ass'n v. Bruen,* 597 U.S. 1, 70, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022).

That said, the right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *District of Columbia v. Heller,* 554

U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). As with other constitutional rights, "the right secured by the Second Amendment is not unlimited." *Id.*

To determine whether a firearms restriction passes constitutional muster, we use a two-step framework. First, we look to the "Second Amendment's plain text." *United States v. Price,* 111 F.4th 392, 398 (4th Cir. 2024) (en banc), *cert. denied,* ___ U.S. ___, 145 S. Ct. 1891, 221 L.Ed.2d 583 (2025). We consider (1) whether the person challenging the gun regulation is among "'the people whom the Second Amendment protects,'" (2) whether the person's weapons are "'in common use' for a lawful purpose," and (3) whether the person's "proposed course of conduct" is covered by the textual right to keep or to bear arms. *Id.* at 400-01 (quoting *Bruen,* 597 U.S. at 31-32, 142 S.Ct. 2111). If so, "the Constitution presumptively protects [the challenger's] conduct." *Bruen,* 597 U.S. at 24, 142 S.Ct. 2111.

At the second step, "[t]he government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* At this stage, "we must engage in reasoning by analogy to determine whether a historical regulation is a proper analogue for a distinctly modern firearm regulation." *Bianchi v. Brown,* 111 F.4th 438, 462 (4th Cir. 2024) (en banc) (cleaned up), *cert. denied,* ___ U.S. ___, 145 S. Ct. 1534, ___ L.Ed.2d ___ (2025).

Historical and modern regulations are likely proper analogues if they "impose a comparable burden on the right of armed self-defense and . . . that burden is

comparably justified." *Bruen,* 597 U.S. at 29, 142 S.Ct. 2111. "Why and how the [modern] regulation burdens the right" identified at the first step "are central" to the step two inquiry. *United States v. Rahimi,* 602 U.S. 680, 692, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024).

B.

With that framework in place, we turn to the sensitive places doctrine.

The doctrine has its genesis in *Heller.* There, the Court asserted, albeit in dictum, that "nothing in [its] opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626, 128 S.Ct. 2783. And two years later, a plurality of the Court "repeat[ed] th[at] assurance[]" without elaboration. *McDonald v. City of Chicago,* 561 U.S. 742, 786, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (plurality opinion).

We received further instruction on the sensitive places doctrine in *Bruen,* where the Court observed that "weapons were altogether prohibited" in "legislative assemblies, polling places, and courthouses" in the eighteenth and nineteenth centuries. 597 U.S. at 30, 142 S.Ct. 2111. Because there weren't "disputes regarding the lawfulness of such prohibitions," the Court "assume[d] it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Id.*

And while "the historical record yields relatively few" eighteenth- and nineteenth-century sensitive places, the Court emphasized that we "can use analogies to . . . historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.*

Applying this approach, *Bruen* rejected the notion that the sensitive places doctrine allows governments to prohibit firearms in "all places of public congregation that are not isolated from law enforcement," which would "define[] the category of 'sensitive places' far too broadly." *Id.* at 31, 142 S.Ct. 2111. "[T]he island of Manhattan," said the Court, doesn't qualify as a sensitive place "simply because it is crowded and protected generally by the New York City Police Department." *Id.*

IV.

We now consider Plaintiffs' challenges to the County's ordinance.[3]

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3. The County argues that Plaintiffs failed to meet their burden at *Bruen*'s first step. There's some ambiguity on where the sensitive places doctrine falls in the analysis. *Compare Bianchi,* 111 F.4th at 450 (stating in dicta that sensitive places fall beyond the common-law tradition codified in the Second Amendment), *with McRorey v. Garland,* 99 F.4th 831, 838 (5th Cir. 2024) (asserting that "sensitive-place laws are likely captured by the plain text of the Second Amendment"), *and Price,* 111 F.4th at 417 n.2 (Quattlebaum, J., concurring in the judgment) (reading *Bruen* to "impl[y] that sensitive-place regulations are justified by historical

Appendix A

A.

Plaintiffs bring a facial challenge to the County's parks restriction, and that dooms their effort. In a facial challenge, "the challenger must establish that no set of circumstances exists under which the [challenged regulation] would be valid," *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or that "the statute lacks any 'plainly legitimate sweep,'" *Bianchi,* 111 F.4th at 452 (quoting *United States v. Stevens,* 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)). To prevail against a facial challenge, "the [g]overnment need only demonstrate that [the challenged law] is constitutional in *some* of its applications." *Rahimi,* 602 U.S. at 693, 144 S.Ct. 1889 (emphasis added).

We conclude that the parks restriction is constitutional as applied to the three preschools and one preschool program on park property. If a person were cited under the County's ordinance for bringing a gun to one of these locations, the citation would withstand Plaintiffs' Second Amendment challenge. That's enough for us to reject the facial challenge to the parks restriction.

The Supreme Court has never held that the government may ban guns at schools consistent with the Second Amendment. It's said so only in dicta. *Heller,* 554 U.S. at 626, 128 S.Ct. 2783; *McDonald,* 561 U.S. at 786, 130

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tradition at step two, not by plain text at step one"). We decline to resolve this ambiguity here because Plaintiffs' challenges fail regardless of the answer.

S.Ct. 3020 (plurality opinion); *Bruen,* 597 U.S. at 30, 142 S.Ct. 2111; *id.* at 81, 142 S.Ct. 2111 (Kavanaugh, J., concurring). But we're "obliged to afford great weight to Supreme Court dicta," *Fusaro v. Cogan,* 930 F.3d 241, 254 (4th Cir. 2019) (quotation omitted), especially where the Court has repeated its guidance, *cf. Hengle v. Treppa,* 19 F.4th 324, 347 (4th Cir. 2021). We therefore have no trouble concluding that restrictions on carrying firearms at schools, including the four preschools located within the County's parks, are "presumptively constitutional." *Md. Shall Issue, Inc. v. Moore,* 116 F.4th 211, 222 (4th Cir. 2024) (en banc), *cert. denied,* ___ U.S. ___, 145 S. Ct. 1049, 220 L.Ed.2d 381 (2025).

Plaintiffs make no attempt to rebut that presumption. In fact, they concede that "firearms may be banned in . . . schools." Appellants' Br. at 11.

Instead, Plaintiffs suggest that the sheer breadth of the ordinance lowers their burden on a facial challenge. They argue that *Bruen*'s rejection of a firearms licensing regime requiring an applicant to justify a request for a license, while recognizing the sensitive places doctrine, obviates their need to show the unconstitutionality of the parks restriction in all its applications. And they suggest that the licensing regime in *Bruen* could have been constitutional when applied in sensitive places.

But that's wrong. The licensing regime in *Bruen* required all prospective gun owners to justify their wish to own a gun, regardless of where they sought to carry the weapon. There was no application of that regime that could satisfy the Second Amendment.

That's not this case. We consider here a limitation on carrying firearms that *is* (presumptively) constitutional in at least some of its applications: on school property within County parks.[4]

Plaintiffs chose to attack the parks restriction on its face but didn't bear the attendant burden. We therefore reject their challenge.[5] *See United States v. Canada,* 123 F.4th 159, 161-62 (4th Cir. 2024) (rejecting a facial challenge to a disarmament statute where the statute could be applied constitutionality in some cases).

B.

Plaintiffs' challenges under the Second and Fourteenth Amendments to the events restriction fail for a different reason: Plaintiffs lack Article III standing.

1.

"Under Article III [of the Constitution], a party invoking the jurisdiction of a federal court must seek relief for a personal, particularized injury." *Md. Shall*

4. Plaintiffs' cases adopting a more generous standard all concern vagueness and are unpersuasive in the context of a Second Amendment challenge. *See* Reply Br. at 23.

5. The presence of schools on park property is enough to reject Plaintiffs' facial challenge. So we decline to address whether the presence of playgrounds, school groups, or other features and uses of the County's parks independently defeat the claim. *See Antonyuk v. James,* 120 F.4th 941, 1025 (2d Cir. 2024) (declining to engage in "line-drawing" on a facial challenge to a similar parks restriction).

Issue, Inc. v. Hogan, 971 F.3d 199, 210 (4th Cir. 2020) (cleaned up). The oft-repeated rule is that a plaintiff must show (1) "an injury in fact" (2) "that is fairly traceable to the challenged conduct of the defendant" and (3) "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

The injury-in-fact element requires that the defendant's conduct cause "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 339, 136 S.Ct. 1540 (quotation omitted). While a plaintiff must show an injury to have standing, they needn't wait for government enforcement or sanctions to bring a challenge. Instead, a plaintiff may sue upon "a threat" of enforcement that would implicate their legally protected interest. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

To bring such a pre-enforcement suit, a plaintiff must "allege[] an intention" to do something prohibited by the statute and "a credible threat of prosecution" under it. *Id.* at 159, 134 S.Ct. 2334 (quotation omitted). A credible threat of prosecution exists if the plaintiff alleges "fears of state persecution that are not imaginary or speculative and are actual and well-founded enough to establish that the statute will be enforced against them." *Hogan*, 971 F.3d at 217 (cleaned up). But "the claimed harm must not be so speculative as to lie at the end of a highly attenuated chain of possibilities." *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 629 (4th Cir. 2023) (quotation omitted).

2.

The district court found (with little explanation) that Plaintiffs established "a credible threat that they may be arrested[] because they intend to carry firearms . . . at events or [at places] adjacent to events that require a County permit." *LaFave,* 2024 WL 3928883, at *16. But the ordinance along with the enforcement guidelines that govern its application belie that conclusion. *See Hogan,* 971 F.3d at 218.

The ordinance requires notice of its requirements to be posted in places where it applies. As to the events restriction, the ordinance requires notice "at all entrances or other appropriate places of ingress and egress" in a regulated place. Fairfax County, Va., Code § 6-2-1(D)(1)(iv).

The County has disavowed any intent to enforce the ordinance when no notice has been posted. To that end, the County's Chief of Police has prohibited officers from "enforc[ing] the provisions of [the] ordinance [without] first confirming that signs providing [the required] notification are properly posted." J.A. 1553. And officers "respond to Ordinance-related calls and dispatches by first looking for and confirming proper signage and notification of the Ordinance." J.A. 1541 ¶ 14. Plaintiffs call this enforcement guidance "farcical," but they provide no evidence that it isn't being followed.

The bottom line is that the County won't enforce the events restriction without first informing people (via

proper notice) that they risk violating it. This conservative approach to enforcement is borne out in the Plaintiffs' declarations, which indicate that they carried firearms in public in Fairfax County both before and after the ordinance's enactment. In other words, Plaintiffs haven't changed their behavior because of the events restriction.

Nor have Plaintiffs identified a County-permitted event, or an area adjacent to one, that they've wanted to visit while armed since the ordinance's enactment. Instead, they speculate that they'd be subject to prosecution "[s]hould" they be near a permitted event with a firearm, *e.g.,* J.A. 1606 ¶ 9, or that they "may" violate the ordinance by driving through an area subject to it while carrying a weapon, *e.g.,* J.A. 1607 ¶ 13. These statements don't allege conduct that risks sanction under the ordinance.

Plaintiffs' theory of standing rests on their fears of unwittingly violating the events restriction. For example, they assert they're "left to guess" what qualifies as an area "adjacent" to a regulated place, *e.g.,* J.A. 1606 ¶ 10, and they "have no way of knowing whether [they] will be adjacent to" regulated property, *e.g.,* J.A. 1607 ¶ 12. They also say they don't "know [they] are in an area adjacent to an event that is permitted or should have a permit" while driving. *E.g.,* J.A. 1607 ¶ 13.

But Plaintiffs have identified no situation where their lack of awareness is likely to result in their prosecution, considering the ordinance's notice requirement and the County's pronouncements that any enforcement would only follow proper notice. And Plaintiffs' fears that

they may accidentally violate the events restriction by driving through an event with a firearm are belied by the uncontested fact that public roads are "controlled by the Virginia Department of Transportation" and thus not subject to the ordinance. J.A. 1543 ¶ 25; J.A. 52 ¶ 11. Plaintiffs therefore haven't demonstrated the "credible threat of prosecution" necessary to bring a pre-enforcement challenge to the events restriction. *Susan B. Anthony List,* 573 U.S. at 159, 134 S.Ct. 2334.

Of course, it's "not necessary that [a] plaintiff first expose himself to actual arrest or prosecution" to bring a pre-enforcement challenge. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (cleaned up). But a plaintiff does need to "allege[] [a] concrete intention to (arguably) violate" the disputed restriction. *Hogan,* 971 F.3d at 218.

This Plaintiffs failed to do. We therefore conclude that they haven't demonstrated their standing to challenge the events restriction.

V.

For these reasons, we affirm the district court's grant of summary judgment to the County as to the parks restriction. But we vacate the grant of summary judgment as to the events restriction, and remand with instructions to dismiss Plaintiffs' claims challenging that restriction without prejudice.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED AUGUST 23, 2024

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

Case No. 1:23-cv-1605 (WBP)

KIMBERLY LAFAVE, *et al.*,

Plaintiffs,

v.

THE COUNTY OF FAIRFAX, VIRGINIA,
AND KEVIN DAVIS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF POLICE,

Defendants.

Filed August 23, 2024

MEMORANDUM OPINION AND ORDER

Before the Court[1] are the parties' cross-motions for summary judgment. Following extensive briefing, the

1. On April 18, 2024, in accordance with 28 U.S.C. § 636(c) and FED. R. CIV. P. 73, the parties consented to the jurisdiction of the undersigned United States magistrate judge conduct all proceedings. United States District Court Judge Claude M. Hilton entered an order of reference on April 19, 2024. (ECF No. 43.)

parties presented oral argument on their motions on June 7, 2024, and later provided supplemental briefing and authorities following new precedent from the Supreme Court and the Fourth Circuit. For the reasons below, Plaintiffs' Motion for Summary Judgment is DENIED, Defendants' Motion for Summary Judgment is GRANTED, and this action is DISMISSED WITH PREJUDICE.

I.

A.

Defendant the County of Fairfax, Virginia ("County") is an urban-suburban community that maintains 420 parks across 23,632 acres in the County (collectively, the "Parks").[2] (ECF Nos. 45 at ¶ 14 and 58 at ¶ 1.) County Parks receive about 12-16 million visitors each year, a quarter of whom are children. (ECF No. 45 at 4-5 ¶¶ 13-15.) In 2022, over 100,000 individuals under the age of 18 participated in events registered with the County in the

2. While Plaintiffs and Defendants both included statements of undisputed material facts in their memoranda in support of their motions for summary judgment, only Defendants complied with this Court's Local Rules and the Federal Rules of Civil Procedure, both of which require responses to summary judgment motions to include a "specifically captioned section listing all material facts as to which it is contended that there exist a genuine issue necessary to be litigated[,]" without which the Court may consider facts undisputed. *See* E.D. Va. Local Civ. R. 56(B) and FED. R. CIV. P. 56(e). Thus, Plaintiffs concede to Defendants' statement of undisputed material facts, and the following statement of facts is undisputed unless otherwise indicated.

Parks, as did over 83,000 in 2023. (*Id.*) These numbers made up most of the over 43,000 registrants for 1,372 different summer camps hosted in County Parks. (*Id.*) In 2023, over 47,000 students participated in 830 school field trips and sports activities in County Parks. (*Id.*)

The Fairfax County Parks Authority ("FCPA") runs several popular amusements in the Parks, including minigolf, a carousel, and a train ride. (*Id.* at 5 ¶ 19.) The FCPA also operates eight golf courses in the Parks, which together generated over $16 million in 2023. (*Id.* ¶ 22.)

Both children and adults participate in many other activities hosted in the Parks, including camping, hiking, and volunteering. (*Id.* ¶¶ 19, 22.) The County also supports several other events in the Parks, including sporting events, church services, fundraising events, an Earth Day celebration, a 4-H Fair, preschool performances, protests, and election-related activities. (*Id.* ¶ 20.)

B.

On September 16, 2020, the County adopted Fairfax County Code § 6-2-1 ("Ordinance"), which states:

> A. The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in the following areas:
>
> * * *

2. In any public park owned or operated by the County, or by any authority or local government entity created or controlled by the County.

* * *

4. In any public street, road, alley, or sidewalk or public right of way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit. For purposes of this Section, County-permitted event and event that would otherwise require a County permit include events permitted by an authority or local government entity created or controlled by the Couty in whole or in part.

* * *

D. Notice of ordinance

1. Notice of this ordinance shall be posted . . . (ii) at all entrances of any public park owned or operated by the County . . . and (iv) at all entrances or other appropriate places of ingress and egress to any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.

Appendix B

Fairfax County Code § 6-2-1(A). The parties refer to paragraph A.2. of the Ordinance as the "Parks Restriction" and paragraph A.4. of the Ordinance as the "Events Restriction."

In summary, the Ordinance prohibits firearms in County Parks and in any public place that is being used by or is next to a County-permitted event. The Ordinance does not restrict the possession or transportation of firearms at locations or events that take place within the County in places that are not controlled or owned by the County, including public roadways, which are controlled by the Virginia Department of Transportation. (ECF No. 45 ¶ 11.) The County provides guidance about the Events Restriction on its website. (*Id.* ¶ 12.) The County's official enforcement policy mandates, "no sign, no enforcement"—meaning the Ordinance will not be enforced without notice. (*Id.* ¶¶ 4, 6, and 9.) If an officer encounters someone with a firearm and verifies proper signage, he or she should "first seek voluntary compliance" with the Ordinance before "initiating any citation or arrest." (*Id.* ¶ 7.)

Violations of the Ordinance constitute a Class 1 misdemeanor. § 6-2-1(E).

C.

Plaintiffs Kimberly LaFave, Glenn Taubman, and Robert Holzhauer (collectively, "Plaintiffs") live in either Loudon County or in Fairfax County, Virginia. (ECF No. 1 ¶¶ 2-4.) Ms. LaFave is a paralegal and dog business owner (ECF No. 53 at 4), Mr. Taubman is an attorney (ECF No.

53 at 5-6), and Mr. Holzhauer is a long-serving member of the U.S. Army who was honorably discharged with a 100% total disability (ECF No. 53 at 6-7).

Plaintiffs all have valid concealed handgun permits. (ECF No. 53 at 7.) Plaintiffs use the Parks and challenge the Ordinance for restricting their ability to carry firearms in the Parks and at events permitted by or next to events permitted by the County or next to events that should have been permitted by the County.

Fairfax County is organized under the Constitution and laws of the Commonwealth of Virginia, and Kevin Davis serves as the Chief of Police for the Fairfax County Police Department (together, "Defendants"). (*Id.* ¶¶ 5-6.)

II.

A.

On January 29, 2021, Plaintiffs sued Defendants in state court asserting the Ordinance infringed on their rights under the Constitution of Virginia. (ECF No. 45 at 6.) The state court judge denied Plaintiffs' motions for summary judgment and for a preliminary injunction, and the case then ended on September 7, 2023, when Plaintiffs were granted a nonsuit—the Virginia equivalent of a voluntary dismissal without prejudice. (*Id.* at 6-7.)

On November 22, 2023, Plaintiffs filed this civil action challenging the Ordinance under the Second and Fourteenth Amendments of the Constitution of the United

States. (ECF No. 1.) That same day, Plaintiffs moved for a preliminary injunction (ECF No. 2), which the district judge denied on January 24, 2024 (ECF No. 33). Plaintiffs and Defendants cross-moved for summary judgment on April 26, 2024, and the Court held a hearing on those motions on June 7, 2024. (ECF Nos. 44, 48, and 55.)

In the first two counts of their three count Complaint, Plaintiffs allege that the Ordinance violates their Second Amendment right to bear arms in the Parks (Count I—the Parks Restriction) and in areas that are "adjacent to" County permitted events or events that should be permitted by the County (Count II—the Events Restriction). (ECF No. 1 ¶¶ 42-51.) Plaintiffs allege that County Parks have "vast acreage" and that both the Parks and areas "adjacent to" County permitted events do not constitute sensitive places. (*Id.* at 45.) Plaintiffs allege that the Parks Restriction and the Events Restriction deprive them of acting in self-defense in the places identified in the Ordinance. (*Id.* at 46.)

In their third count, Plaintiffs allege that the "adjacent to" provision of the Events Restrictions is unconstitutionally vague and therefore violates their Fourteenth Amendment right to due process (Count III—Due Process Challenge to Events Restriction). (ECF No. 1 ¶¶ 52-59.) They assert that the word "adjacent" is not properly defined in the Ordinance and thus invites arbitrary and discriminatory enforcement. (*Id.* ¶ 55.) Plaintiffs argue also that persons of common intelligence would be unable to discern whether an event is permitted

or would otherwise require a permit. (*Id.* ¶ 56.) Fairfax County has complex provisions surrounding permits, which Plaintiffs believe is beyond the knowledge of an ordinary person. (*Id.*) Plaintiffs assert that these facts make the terms "adjacent to an event that would otherwise require a permit" unconstitutionally vague and in violation of due process. (*Id.* ¶ 59.)

B.

In support of their motion for summary judgment, Defendants provided the following unrebutted, expert evidence from Professor Terence Young, an expert in the history and development of parks in the United States. (ECF Nos. 45 ¶¶ 35-53; 46.)

The development of the American park system and the park movement evolved over decades and centuries in response to existing societal concerns and circumstances. During the early American Republic, cities were necessarily compact, usually about three square miles in area, and densely built. (ECF No. 46-1 ¶ 20.) Despite crowded conditions, most residents could readily retreat to relax in nearby rural areas. (*Id.* ¶¶ 21-22.) Early green spaces within cities, like Boston Common, were multi-purpose utilitarian spaces until the mid-19th century. (*Id.* ¶ 13.) They served multiple functions, including providing temporary grazing land for livestock, housing a town's cemetery, and serving as a practice ground for the local militia. (*Id.*) The utilitarian nature of the early green spaces and its predecessors are distinguishable

from today's public parks, which offer more recreational activities to escape urban life.[3] (*Id.* ¶ 15.)

America's tradition of public parks began in the 1850s as increasing numbers of Americans chose to live in cities; some cities more than doubled in population within thirty years. (*Id.* ¶ 20.) As urban populations grew, the rural spaces previously used for retreat became inadequate for the new societal concerns of urbanization. (*Id.*) Many spaces were privately owned and were inaccessible to the public, thereby excluding many working individuals from using these spaces. (*Id.* ¶ 22.) To appease the public's desire to escape cities, which had become "unhealthy, impoverished, undemocratic, and crime ridden," localities began to develop municipal parks. (*Id.* ¶ 25.) Rooted in the Romantic Movement, proponents of parks believed that contemplating parks' natural scenery could improve viewers' and society's minds and bodies and, as a result, improve democracy. (*Id.* ¶ 27.) In line with the purpose of parks and their function as a society-improving device, any features or actions in the parks that interfered with the contemplation of natural scenery were excluded from parks, including firearms, which were specifically prohibited. (*Id.* ¶¶ 29-30.)

America's large urban parks embraced firearms prohibitions shortly after these new parks emerged, and localities enacted firearm restrictions and other park rules

3. Some of these early, utilitarian green spaces, most famously the Boston Common, survived long enough to be adaptively reused as community parks, thus somewhat resembling modern-day parks. (*Id.* ¶ 15.)

to maintain order among visitors and to allow nature to reform society. (*Id.* ¶ 30.) The official firearms prohibitions began with Central Park in 1858: "All persons are forbidden . . . To carry fire-arms or throw stones or other missiles within it." (*Id.*) Other localities with large parks embraced the Central Park Commissioners' prohibition on carrying firearms in parks, which rapidly appeared across the United States, including in Brooklyn, Philadelphia, San Francisco, Chicago, and Buffalo. (*Id.* ¶¶ 31, 33.)

In the late 19th and early 20th centuries, America's national parks were created to protect landscapes of natural scenery, and firearms were restricted within those parks, too. (*Id.* ¶ 38.) At roughly the same time, state parks appeared. Like urban and national parks, many states embraced firearm restrictions within their parks to keep the spaces protected for contemplating natural scenery and active play. (*Id.* ¶¶ 52-53.)

Research has revealed well over 100 historical laws prohibiting firearms in federal, state, and local parks. Historical evidence does not support the carrying of firearms for self-defense in urban parks, national parks, or state parks.

III.

Rule 56(a) of the Federal Rules of Civil Procedure requires a court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." FED. R. CIV. P. 56(a). The Court must review cross-motions for summary judgment separately, on their own merits. *CMA CGM S.A. v. Leader Int'l Express Corp.*, 474 F. Supp. 3d 807, 814 (*quoting Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003)). Ultimately, the Court must decide whether the record evidence presents a genuine issue of material fact such that a trial is required or whether the evidence it is so one-sided that one party must prevail as a matter of law. *Rhoades v. United States Army Corps of Engineers*, No. 3:22-cv-728-HEH, 2023 U.S. Dist. LEXIS 103093, 2023 WL 3981271, at *3 (E.D. Va. June 13, 2023).

A material fact is a fact that may impact the outcome. *Id.* A genuine issue is a fact that is fairly doubted by evidence. *CMA CGM S.A.*, 474 F. Supp. 3d 807, 814. For each motion for summary judgment, the opposing party must identify with specificity the facts with genuine issues for trial. *Id.* When deciding a motion for summary judgment, the Court must view all the facts and draw inferences in favor of the nonmovant.[4] *Id.*

Here, no material facts are in dispute. Rather, the parties dispute how to apply *New York State Rifle and Pistol Association v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), and *United States v. Rahimi*, No.

4. On cross-motions for summary judgment, all facts and inferences are drawn in favor of the nonmoving party on each motion. *See Solomon v. Cook Cnty. Bd. of Commissioners*, 559 F. Supp. 3d 675, 686 (N.D. Ill. 2021).

22-915, slip op. at 1 (U.S. June 21, 2024)[5] to the Ordinance to determine its constitutionality.

The parties also dispute whether the Ordinance violates the Fourteenth Amendment's right to due process. (ECF Nos. 45 at 1; 53 at 2.) A law is unconstitutionally vague under the Fourteenth Amendment if a person of ordinary intelligence is not provided a reasonable opportunity to know what is prohibited or if the law enables arbitrary and discriminatory enforcement. *Oregon Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 945 (D. Or. 2023) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)); *Sibley v. Watches*, 460 F. Supp. 3d 302, 316 (W.D.N.Y. 2020). Statutes may be challenged "as-applied" or "facially." *Goldstein v. Hochul*, 680 F. Supp. 3d 370, 400 (S.D.N.Y. 2023). A facial challenge is a challenge to a statute in which the plaintiff alleges that the legislation is always unconstitutional, while an "as applied" challenge alleges that a particular application of a statute is unconstitutional. *See id.*

Plaintiffs' constitutional and due process claims assert a facial challenge to the Ordinance. Thus, they "must 'establish that no set of circumstances exists under which the law would be valid,' or show that the law lacks 'a plainly

5. Two weeks after oral argument on the parties' cross motions for summary judgment, the Supreme Court decided *United States v. Rahimi*, 602 U.S. 680, 144 S. Ct. 1889, 219 L. Ed. 2d 351, slip op. at 1 (U.S. 2024). At the Court's request, the Parties filed supplemental briefs addressing *Rahimi* and its effect on this case and any authority previously cited by the Parties. (ECF Nos. 68, 69, 70.)

legitimate sweep.'" *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 141 S. Ct. 2373, 2387, 210 L. Ed. 2d 716 (2021) (citations omitted and alteration adopted). Facial challenges are "disfavored for several reasons," including because they require courts to "formulate a rule of constitutional law broader than is required by the precise facts [presented]" and they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (citations omitted).

IV.

A.

The Second Amendment states, in its entirety: "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." U.S. CONST., amend. II. As the Fourth Circuit has noted, "[t]his single sentence provides us with a lofty command, but little concrete guidance." *Bianci v. Brown*, No. 21-1255, 111 F.4th 438, 2024 U.S. App. LEXIS 19624, 2024 WL 3666180, *3 (4th Cir. August 6, 2024).

A series of Supreme Court cases since 2008 have guided the analysis of the Second Amendment's right to bear arms. In *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the Supreme Court held that the Second and Fourteenth Amendments protect the rights of ordinary, law-abiding citizens to

possess handguns *inside* the home for self-defense whose exercise does not depend on the citizen's service in the militia. But *Heller* recognized that the right to bear arms was not limitless and expressly recognized that history supported a limit on the right to bear arms in "sensitive spaces," like schools and government buildings, referring to such regulatory measures as "presumptively lawful," while allowing space for other regulations not explicitly identified. *Id.* at 626-27.

Before and after *Heller*, in the Fourth Circuit and in other circuits, courts analyzed Second Amendment challenges to firearm regulations using a two-step interest-balancing framework. The court first asked whether a challenged regulation burdened conduct protected by the Second Amendment. If it did, then the court assessed the regulation's constitutionality using means-end scrutiny. *See Maryland Shall Issue, Inc. v. Moore*, 86 F.4th 1038, 1043 (4th Cir. 2023), *reh'g en banc granted*, No. 21-2017 (L), 2024 U.S. App. LEXIS 766, 2024 WL 124290 (4th Cir. Jan. 11, 2024).

In 2022, the Supreme Court decided *New York State Rifle and Pistol Association v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), which effected a "sea change" in Second Amendment law. *Moore*, 86 F.4th at 1041. *Bruen* held that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense *outside* the home. *Bruen*, 597 U.S. at 10. In reaching this conclusion, the Supreme Court also held that the two-step interest-balancing framework that had been used by courts to that point was

"one step too many." *Id.* at 19. In its place, the Supreme Court established an analysis centered on the Second Amendment's text and history, explaining that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," at which point the challenged regulation is unconstitutional unless the government can show that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17.

Like *Heller, Bruen* also recognized that the right to bear arms was not limitless. *Id.* at 22. Along with confirming *Heller*'s "sensitive spaces" doctrine, *Bruen* reconfirmed that "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* (quoting *Heller*, 554 U.S. at 626).

On June 21, 2024, the Supreme Court decided *United States v. Rahimi*, 144 S. Ct. 1889, 219 L. Ed. 2d 351, slip op. at 1 (U.S. 2024), a Second Amendment challenge to a federal statute prohibiting individuals subject to a domestic violence restraining order from possessing a firearm. Using the history and tradition analysis from *Bruen*, the Supreme Court held that an individual's Second Amendment right may be limited if that individual has been found by a court to pose a credible threat to the physical safety of another. *Id.* at 16. In the majority opinion, the Supreme Court criticized "some courts" for having "misunderstood the methodology of Second Amendment cases." *Id.* at 7. Specifically, the Supreme

Court noted that the Fifth Circuit had erroneously interpreted *Bruen* to require a "'historical twin' rather than a 'historical analogue.'" *Id.* at 16. The Supreme Court clarified that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Id.* at 7.

B.

While the Supreme Court has not established a test or identified factors for courts to consider when analyzing the Nation's historical tradition of firearm regulation, *Bruen* provided some general guidance. *Bruen* held that a modern firearms regulation need not be a "dead ringer for historical precursors" and will pass constitutional muster so long as it is "analogous enough" to historical tradition. 597 U.S. at 30. So governments need not identify a "historical *twin*," only a "well established and representative *analogue*," *id.* (emphasis in original), and "like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id.* at 28-29 (quoting C. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)); *see also Rahimi*, 219 L. Ed. 2d at 364 ("A court must ascertain whether the new law is 'relevantly similar' to the laws that our tradition is understood to permit.") (quoting *Bruen*, 597 U.S. at 29).

In applying this analogical, relevantly similar approach, courts should uphold a modern law if, in comparison to historical regulations, the law imposes a

"comparable burden on the right of armed self-defense" and the burden is "comparatively justified." *Bruen*, 597 U.S. at 29. But silence in the historical record does not automatically render a modern law unconstitutional under the Second Amendment. *See id.* at 29-30. Instead, courts should consider "how and why" a modern law burdens the right to self-defense. *Id. Bruen* also instructs courts to "use analogies to . . . historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.* at 30 (emphasis in original).

To illustrate the analysis, *Bruen* analogized the "sensitive places" from *Heller* to the New York restriction at issue. *Id.* The Supreme Court found the regulation—a proper-cause requirement for gun licensing applications—did not cover a "sensitive place" because the regulation prevented carry across *all* public spaces in New York. *Id.* at 30-31. *Bruen* held that expanding "sensitive places" to all places of public congregation—not just those isolated from law enforcement—required too broad of an analogy to uphold the regulation. *Id.* at 31. Still, *Bruen* authorizes courts to analogize the historical regulation of "sensitive places" when evaluating the constitutionality of a challenged restriction on the right to bear arms. In other words, courts may ask the question: does the regulation cover a sensitive place consistent with spaces that are historically "sensitive" as applied to the Second Amendment? *Id.* at 30-31.

Historical analysis also is shaped by whether the societal problem addressed by the modern regulation

existed in this Nation's history and tradition. *Id.* at 26-27. For instance, in *Heller* the societal issue was gun violence, which the government attempted to mitigate by banning firearms in homes. 554 U.S. at 570. But the societal issue of gun violence has existed since the 18th century, and the historical evidence made clear that the broad gun ban at issue in *Heller* was unconstitutional. *Id.* But *Bruen* also recognized that "cases implicating unprecedented societal concerns . . . may require a more nuanced approach" to the historical inquiry. *Id.* at 27. *See also Baird v. Bonta*, No. 2:19-CV-00617-KJM-AC, 2023 U.S. Dist. LEXIS 231190, 2023 WL 9050959, at * 37 (E.D. Cal. Dec. 29, 2023) ("Although the Supreme Court observed that some Second Amendment cases will be 'straightforward' . . . this is not an obviously straightforward case."). If a societal condition did not exist in the relevant period a court is examining, then self-evidently there will be no historical firearms laws addressing that condition in that period—making the consideration of later history particularly crucial. *See McCullen v. Coakley*, 573 U.S. 464, 481, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014). Thus, firearms prohibitions about societal conditions that did not exist at the founding—like with the County's Parks—demand a more expansive approach to historical analogy. *See Antonyuk v. Chiumento*, 89 F.4th 271, 359 n.78 (2d Cir. 2023) ("Though the historical analogues here are 'relatively simple to draw,' the relative novelty of public parks as institutions also justifies a flexible approach under *Bruen*."), *cert. granted, judgment vacated sub nom. Antonyuk v. James*, No. 23-910, 2024 U.S. LEXIS 2929, 2024 WL 3259671 (U.S. July 2, 2024).[6]

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6. On July 2, 2024, the Supreme Court granted the petition for certiorari in *Antonyuk*, vacated the Second Circuit's judgment,

C.

Bruen and *Rahimi* both recognize the "ongoing scholarly debate" on whether the most controlling period for the historical analysis is 1791—when the Second Amendment was first adopted as a constraint on the federal government ("Founding Era")—or 1868—when the Fourteenth Amendment made the Second Amendment applicable to state and local governments ("Reconstruction Era"). *Bruen*, 597 U.S. at 37-38 and *Rahimi*, 144 S. Ct. at 1927 n.1. In both cases, however, the Supreme Court expressly left that question open. *Bruen*, 597 U.S. at 37-38 and *Rahimi*, 219 L. Ed. 2d at 401 n.1.

But *Bruen* and *Rahimi* both make clear that the analysis need not be restricted to the Founding Era—when the Second Amendment was enacted—as Plaintiffs propose here. (ECF No. 67, 6/7/24 Tr. at 8-9.) Instead, the Supreme Court has favored a more flexible approach that

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and remanded the case to the Second Circuit for further consideration after the Supreme Court's decision in *Rahimi*. *Antonyuk v. James*, No. 23-910, 2024 U.S. LEXIS 2929, 2024 WL 3259671 (U.S. July 2, 2024). While this Court recognizes that the Second Circuit's opinion was vacated, the Supreme Court did not decide the case on the merits, and it did not dictate how the Second Circuit should rule on remand. *See, e.g., Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 164-65 (4th Cir. 2024) (recognizing that "the issuance of a [grant, vacate, and remand ("GVR")] does not speak to the underling merits of the case"); *Texas v. United States*, 798 F.3d 1108, 1116, 418 U.S. App. D.C. 387 (D.C. Cir. 2015) ("[I]t is well-settled that a GVR has no precedential weight and does not dictate how the lower court should rule on remand."). As a result, *Antonyuk* remains persuasive authority.

involves examining "a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification." *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 605) (emphasis in original). Indeed, the *Bruen* court described the historical record reviewed in *Heller*, as the "analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment," as well as "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 600-01, 605). And as *Bruen* notes, only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. 597 U.S. at 5. Consistent with its reasoning, *Bruen* examined laws spanning over 100 years before and after the Founding Era, going as far back as 1285. *Id.* at 40. *Bruen* also acknowledged that, "even during Reconstruction[,] the right to keep and bear arms had limits" and considered regulations well after the Reconstruction Era *Id.* at 60-66. Therefore, in deciding *Bruen*, the Supreme Court analyzed both Founding Era and Reconstruction Era history and tradition. Similarly, in *Rahimi*, the Supreme Court analyzed both Founding Era and Reconstruction Era laws, ultimately finding that this nation's history and tradition *supported* the federal regulation on firearm possession. 219 L. Ed. 2d 351, 144 S. Ct. 1889, Slip op. at 9-16.

The Second and Third Circuits, as well as many district courts, also have evaluated both time periods and have analogized this nation's history and tradition accordingly. *See Antonyuk*, 89 F.4th at 304-05 ("We

therefore agree with the decisions of our sister circuits—emphasizing 'the understanding that prevailed when the States adopted the Fourteenth Amendment'—is, along with the understanding of that right held by the founders in 1791, a relevant consideration.") (citing *Range v. AG United States*, 69 F.4th 96, 112 (3d Cir. 2023) and *Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021)). *See also Ezell v. City of Chicago*, 651 F.3d 684, 704-05 (7th Cir. 2011); *Kipke v. Moore*, 695 F. Supp. 3d 638, 2023 WL 6381503, at *6 (D. Md. 2023); *Worth v. Harrington*, 666 F. Supp. 3d 902, 918-19 (D. Minn. 2023). Notably, a trend exists of recognizing the Reconstruction Era as more probative of the Second Amendment's scope than the Founding Era. *See Maryland Shall Issue, Inc. v. Montgomery Cnty., Maryland*, 680 F. Supp. 3d 567, 582 (D. Md. 2023) (citing *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1322 (11th Cir. 2023)). Indeed, it was the Fourteenth Amendment—ratified during the Reconstruction Era—that incorporates the Second Amendment's right to bear arms as applicable to the states. *See McDonald*, 561 U.S. at 764. A fact recognized by *Maryland Shall Issue* when it adopted the Eleventh Circuit's reasoning, which considered historical evidence *solely* from the Reconstruction Era in analyzing gun restrictions in public parks. 680 F. Supp. 3d at 583.

V.

A.

Applying the above jurisprudence to the Ordinance, *Bruen* first requires Plaintiffs to establish that the Second

Amendment's text presumptively protects the conduct the County seeks to regulate with the Ordinance: carrying guns in County Parks and in or near County permitted events. *Bruen*, 597 U.S. at 32. Defendants argue that Plaintiffs failed to establish their textual burden, claiming that the text of the Second Amendment must specifically allow the conduct the government seeks to regulate. (ECF No. 45 at 20.) But Defendants read the text of the Second Amendment too narrowly. *Bruen* made clear that the Second Amendment guarantees a general right to public carry for self-defense, 597 U.S. at 33-34, and the Ordinance governs the activity of carrying guns in County Parks and in or near County permitted events, which are public places.[7] (ECF No. 53 at 3 ¶ 1.)

Recently, the Fourth Circuit noted that *Bruen* spent little time on the first step of the analysis because "there was no dispute in that case that the petitioners—'two ordinary, law-abiding, adult citizens'—were among the people protected by the Second Amendment. *United States v. Price*, No. 22-4609, 024 U.S. App. LEXIS 19623, 2024 WL 3665400, at *5 (4th Cir. Aug. 6, 2024). Additionally, the weapons regulated in *Bruen*—handguns—were in common use for self-defense. *Id.* The same is true here, Plaintiffs are three "ordinary, law-abiding, adult citizens" who wish to carry their "concealed handguns" in the Parks for self-protection. (ECF No. 53 at 2.) Therefore, the Second Amendment's "right to keep and bear arms" presumptively guarantees Plaintiffs' right to bear

7. While Defendants dispute how Plaintiffs characterize the Parks, Defendants do not dispute that the Parks are public spaces. (ECF No. 58 ¶ 1.)

arms in County Parks and in or near County permitted events for self-defense. *See Antonyuk*, 89 F.4th at 355-56 (prohibition on guns in public parks was covered by the Second Amendment) and *Kipke*, 695 F. Supp. 3d 638, 2023 WL 6381503, at *9, 12 (same).

B.

Having determined that the Ordinance regulates conduct protected by the Second Amendment, Defendants bear the burden of showing that "the [Parks Restriction in the Ordinance] is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

In analyzing this issue, it is important to put in context prior Supreme Court decisions. In *Heller*, the Supreme Court addressed the "historically unprecedented nature of the District's ban," *Bruen*, 597 U.S. at 22—prohibiting carrying arms within the home for the purpose of self-defense—which it characterized as a "severe restriction." *Heller*, 554 U.S. at 629. Similarly, *Bruen* involved New York's attempt to define a "sensitive place" as "all places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." 597 U.S. at 30. The Supreme Court found New York's definition of sensitive places to be overbroad, in that such a definition would "eviscerate the general right to publicly carry arms for self-defense." *Id.* at 31. *Rahimi* reiterated *Bruen*'s finding and at the same time distinguished the New York law in *Bruen* from the federal law in question:

> New York's law effectively presumed that no citizen had such a [Second Amendment] right [to carry], absent a special need. Section 922(g)(8)(C)(i) does not make the same faulty presumption. To the contrary, it [Section 922(g)(8)(C)(i)] presumes, like the surety laws before it, that the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others.

219 L. Ed. 2d at 368.

The Ordinance bears little resemblance to the restrictions in *Heller* and in *Bruen*, as it is not a "severe restriction" or "historically unprecedented." Nor is it a presumptive ban on carrying a firearm, as described by Plaintiffs rhetorically as "bann[ing] firearms in virtually every piece of land [the County] controls, all of which is public property." (ECF No. 63 at 4.) The right to bear arms throughout the County remains, and the Ordinance does not otherwise restrict that right, except within Parks and during events permitted by the County.[8] *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) ("[W]hen a state bans guns merely in particular places, such as public

8. Attempting to refute the narrow scope of the Ordinance, Plaintiffs also mischaracterize the Events Restriction as prohibiting firearms in "any event *on County property*, or any street or sidewalk that happens to be adjacent to such an event." (ECF No. 60 at n. 5 (emphasis added).) Instead, the Ordinance only prohibits firearms in and immediately next to *County permitted* events. (ECF No. 61 at n. 4.)

schools, a person can preserve an undiminished right of self-defense by not entering those places[.]"); *United States v. Class*, 930 F.3d 460, 465, 442 U.S. App. D.C. 257 (D.C. Cir. 2019) (quoting same). The Ordinance's narrow restrictions suggest that the historical analogues rejected in *Heller* and *Bruen* may be more appropriate here. *See Rahimi*, No. 22-915, slip op. at 15-16. As discussed above in Section IV.B., according to *Heller* and *Bruen*, the appropriate focus is how and why the Ordinance burdens the right to bear arms and whether that burden is "relevantly similar" to the analogous history and tradition. *Id.* at 28-29. Moreover, the permissible historical period to review may span from "immediately after [the Second Amendment's] ratification through the end of the 19th century." *Id.* at 20. As authorized by *Bruen* and *Rahimi*, this Court will do the same.

Defendants have satisfied their burden and have provided sufficient historical evidence showing that the Parks Restriction is constitutional under both Founding Era and Reconstruction Era history and tradition. As for the history and tradition from the Reconstruction Era, Defendants have cited over 100 statutes that impose firearm restrictions in parks and, importantly, none of them have been determined to have been unconstitutional. This fact shows that the Ordinance is "'relevantly similar' to the laws that our tradition is understood to permit." *Rahimi*, slip op. at 7 (quoting *Bruen*, 597 U.S. at 29). The Ordinance also is constitutional based on similarly relevant language in the surety statutes from the Founding Era. Finally, the Parks Restriction fits within the constitutionally based sensitive places jurisprudence.

See Kipke et al., v. Moore, et al., No. CV GLR-23-1293, 2024 U.S. Dist. LEXIS 137003, 2024 WL 3638025, at * 5 (D. Md. Aug. 2, 2024) (upholding gun prohibitions on summary judgment as to specific locations, including state parks, based on being analogous to sensitive places *or* aligning with history and tradition).

i.

Discussed below in Section V.B.ii., the record evidence and post-*Bruen* case law establish that modern recreational parks did not exist during the Founding Era. *See, e.g., Kipke*, 695 F. Supp. 3d 638, 2023 WL 6381503, at *9 (distinguishing between the "expansive State and federal park system" and parks from the Founding Era). Since the County Parks covered by the Ordinance are more like Reconstruction Era parks than Founding Era parks, the Court must assess the historical evidence from the Reconstruction Era and determine whether a historical analogue exists to the Ordinance. *See Bruen*, 597 U.S. at 28 ("[U]nprecedented societal concerns or dramatic technological changes may require a more nuanced approach.") This approach should be flexible and should involve examining "a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification." *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 605) (emphasis in original).

Citing over 116 prohibitions on guns in parks from 1858 to 1936, Defendants have met their burden of showing the Ordinance's congruity with this Nation's history and

tradition of regulating firearms in modern parks. (*See* ECF No. 47-18.) Beginning in 1858, regulations in Central Park and in Brooklyn Prospect Park prohibited guns and declared that offenders "shall be deemed guilty of misdemeanor, and be punished, on conviction before the Mayor, Recorder, or any magistrate of the City of New York." (ECF No. 46-1, Exs. 3, 4, and 5.) Next, in 1868, Philadelphia enacted legislation prohibiting firearms in Fairmount Park: "No person shall carry fire arms . . . in the park or within fifty yards thereof[.]" (*Id.* at Ex. 5.) San Francisco followed suit in 1872, legislating that the "carry and especially the discharge of firearms" was prohibited in Golden Gate Park. (*Id.* at Ex. 6.) In 1873, the city of Chicago forbade "[a]ll persons" from "carry[ing] firearms . . . within any one of the public parks. (*Id.* at Ex. 7.) Later, throughout the 1870s, Buffalo, New York; St. Louis, Missouri; Phoenixville, Pennsylvania; and Danville, Illinois, all enacted legislation prohibiting, in some way or another, guns in parks. (*Id.* at 15-17 ¶ 31.) Gun restrictions in parks continued to proliferate in the 1880s and 1890s.[9] (ECF No. 46-1 at 18-19 ¶ 33.) Like the Ordinance here, all these firearm restrictions were adopted by local governments like the County. (*Id.*)

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9. Between 1886 and 1899 these cities adopted restrictions on guns in parks: Boston, Massachusetts; Reading, Pennsylvania; Saint Paul, Minnesota; Salt Lake City, Utah; Trenton New Jersey; Berlin, Wisconsin; Springfield, Massachusetts; Cincinnati, Ohio; Lynn, Massachusetts; Peoria, Illinois; Spokane, Washington; Pittsburgh, Pennsylvania; Wilmington, Delaware; Rochester, New York; Detroit, Michigan; Kansas City, Missouri; New Haven, Connecticut; and Boulder Colorado. (ECF No. 46-1 at 18-19 ¶ 33.)

Defendants also provided extensive record evidence that federal parks have had firearm regulations beginning in 1872 and continuing into the 20th century. (*Id.* at 22-24 ¶¶ 38-41.) For example, the National Park Service's uniform code includes legislation restricting firearms in *all* national parks—firearms were prohibited without written permission of the superintendent or custodian. (*Id.* at 25 ¶ 43.) Finally, states began developing their own parks in the early 1900s and they, too, regulated and restricted firearms in the state parks. (*Id.* at 28-29 ¶¶ 52-53.) In sum, "how" the Nation has historically restricted the right to bear arms in public parks aligns with how the Ordinance restricts the right to bear arms—in public parks designed for recreation.

Historical evidence also implies that prohibitions on guns in parks in the 19th century were also enacted for similar reasons as the Ordinance. As Prof. Young explains, the development of the parks themselves came from the desire to retreat from the city, to be in touch with nature, and to cure societal problems. (*Id.* ¶¶ 25-26.) Thus, early modern parks were designed to provide spaces for passive recreation, not military exercises and displays. (*Id.* ¶ 29.) Some of the passive recreational activities included athletic activities, children's playgrounds, flower gardens, and museums. (ECF No. 56-1 ¶ 32.) Parks became a haven for patrons from the cities that were believed to be filled with disease, poverty, crime, and other societal issues. (*Id.*) Consequently, gun restrictions were part of a larger effort to protect these spaces for the betterment of society. (*Id.* ¶ 33.)

The County's Parks similarly are intended to serve as havens for its residents. The County Parks are used by children and adults for many activities, not limited to school field trips, sports activities, camping, hiking, Earth Day celebrations, election-related activities, protests, and more. (*Id.* ¶¶ 14-22.) These similarities in "why" guns are and were prohibited in parks show that the Ordinance is consistency with the Nation's history and tradition. *See also Antonyuk*, 89 F.4th 271, 357-58 (finding 19th century gun prohibitions created to protect spaces for leisurely activities were analogous to a park's gun prohibition); *Kipke*, 695 F. Supp. 3d 638, 2023 WL 6381503, at *10 (finding the 19th century parks gun restrictions to be "comparably justified by the need for public safety" (reaffirmed on summary judgment by *Kipke*, 695 F. Supp. 3d 638, 2024 WL 3638025)); *Maryland Shall Issue, Inc.*, 680 F. Supp. 3d at 587 ("The reasons for these historical restrictions, which appear to be to protect individuals engaged in these recreational and social activities from confrontations and encounters involving firearms . . . are comparable to the reason for the prohibitions[.]").

In response, Plaintiffs have presented no treatises, caselaw, or other evidence establishing that, in any era, the public understanding of the right to bear arms forbade the government from prohibiting guns in modern parks. Nor have Plaintiffs demonstrated that any of the over 100 regulations identified by Defendants were overturned. On this score, *Bruen* directs: "'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.'" 597 U.S. at 36 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014) (Scalia, J., concurring in judgment)). *See also Rahimi*, 44 S. Ct. 1889, 219 L. Ed. 2d 351, slip op. at 11 (Kavanaugh, J., concurring) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 785, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) ("a 'universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional'")).

The County has satisfied its burden of proving that the Ordinance reflects this Nation's history and tradition of prohibiting firearms in parks from the Reconstruction Era to the present. *Compare Maryland Shall Issue, Inc.*, 680 F. Supp. 3d at 585-88 (citing historical evidence the government provided from 1857 to 1905 to support a gun restriction at parks) *with Springer v. Grisham*, No. 1:23-cv-00781 KWR/LF, 704 F. Supp. 3d 1206, 2023 U.S. Dist. LEXIS 217447, 2023 WL 8436312, at 6-7 (D.N.M. Dec. 5, 2023) (ban on firearms in parks was unconstitutional where the government only cited *Maryland Shall Issue* without providing actual laws as historical evidence).

ii.

The Parks Restriction also withstands constitutional muster when compared to the historical burdens on the right to bear arms during the Founding Era. Chiefly, Defendants have shown that the Parks Restriction relates to an unprecedented social issue that did not exist during the Founding Era—the safety, peace, and tranquility afforded by *modern* parks designed to provide recreational

refuge. Because this unprecedented social issue did not exist during the Founding Era, *Bruen* requires the Court to conduct a more nuanced analysis of history and tradition. 597 U.S. at 27 ("other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach . . . Although its meaning is fixed . . . the Constitution can, and *mus*t, apply to circumstances beyond those the Founders specifically anticipated") (emphasis added).

Prof. Terence Young, who studies the historical geography of the American park movement, provided extensive detail surrounding the development of parks in the 1850s. (ECF No. 46-1 ¶¶ 12, 19-29.) His declaration concludes that the commons or green spaces that existed before the 1850s were different in their purpose and physical attributes from modern parks. (*Id.* ¶¶ 13-20.) For instance, in 1782 in Newburyport, Massachusetts, the town sequestered citizens who had contracted smallpox in "the pest house in the common pasture" in the town center.[10] (*Id.* ¶ 14.) Prof. Young affirmatively states that the "[commons] were not analogs to today's public parks nor were they their predecessors."[11] (*Id.* ¶ 15.)

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10. The evidence referenced in *Kipke* is nearly identical to the information contained in Prof. Young Declaration. 695 F. Supp. 3d 638, 2023 WL 6381503, at *9 ("Boston Common, for example, 'was used primarily as a pasture, place of execution, and site for the militia to muster and drill.'").

11. Young testifies that spaces like Boston Common were only adaptively reused as community parks well after the Founding Era. (*Id.* ¶ 15.)

Plaintiffs seek to rebut Defendants' evidence only by citing websites and articles that challenge the concept of whether modern parks existed during the Founding Era. (ECF No. 60 at 15-16.) Plaintiffs also assert that "[Defendants] provide[] no evidence that 'communal spaces for repose and relaxation' were only invented in the mid-19th century." (*Id.* at 15.) But these self-serving statements disregard the evidence, particularly Prof. Young's testimony, that modern parks were created partly because there were no spaces for relaxation available and that the idea of "passive recreation" derived from Romanticism and urban expansion. (ECF No. 46-1 ¶¶ 19-20, 26-29.) Nor do Plaintiffs provide any admissible evidence in support of their arguments, as required by Rule 56(c)(2) of the Federal Rules of Civil Procedure and the Local Rules. *See* Fed. R. Civ. P. 56(c)(2) and E.D. Va. Local Civ. R. 56(B). Thus, Prof. Young's testimony and history stands unrebutted, including his conclusion that the unprecedented societal issue of the safety and use of modern parks did not exist during the Founding Era, and a more nuanced approach to the Second Amendment analysis of the Ordinance is required. *See, e.g., Mintz v. Chiumento*, No. 123-cv-795MADCFH, 724 F. Supp. 3d 40, 2024 U.S. Dist. LEXIS 61699, 2024 WL 1361047, at * 12 (N.D.N.Y. Mar. 20, 2024) (recognizing that safety at summer camps was an unprecedented social issue that required a nuanced approach). This nuanced approach to analyzing the Founding Era firearm regulations also supports the Parks Restriction because a historical tradition exists of restricting firearms in places where citizens gather in public.

Appendix B

The earliest evidence provided by Defendants is the 1328 Statue of Northampton in England, which stated that "no Man great nor small, of what Condition soever he be . . . go nor ride armed by night nor by day, in Fars, Markets, nor in the presence of the Justices or other Ministers[.]" (ECF No. 47-19.) Also cited in *Bruen* and *Rahimi*, the Statute of Northampton has historical significance because Virginia adopted its language in a 1786 firearm prohibition: "That no Man great nor small, . . ride armed by night or by day, in fairs or markets, or in other places, in terror of the county." (ECF No. 47-20.) *See also Bruen*, 597 U.S. at 49-50; *Rahimi*, 144 S. Ct. 1889, 219 L. Ed. 2d 351, slip op. at 13.

While *Bruen* deemed the Virginia version of the Statute of Northampton dissimilar to "broad prohibitions on all forms of public carry," 597 U.S. at 50, unlike the New York law at issue in *Bruen*, the Parks Restriction narrowly restricts firearms in the Parks; it is not a general prohibition on the public right to carry, which right remains in 90.6 percent of the County.[12] North Carolina also adopted a version of the Statute of Northampton in 1792, which prohibited guns in "fairs, markets, [and] in the presence of the King's Justices, or other ministers[.]" (ECF No. 47-21.) In *Antonyuk*, the Second Circuit traced the statutory language from the Statute of Northampton,

12. Plaintiffs assert that the total acreage of County Parks is 23,584 which makes up 9.3 percent of the County's land mass. (ECF No. 53 at 3 ¶ 1.) Defendants disputed this fact, stating that the correct acreage is 23,632 which makes up about 9.4 percent of the County's land mass. (ECF No. 58 at 7 ¶ 1.) This factual difference is not material.

to the Founding Era Virginia and North Carolina firearm prohibitions, then, to the Reconstruction Era prohibitions on guns in public forums and places of assembly in Texas, Tennessee, and Missouri. 89 F.4th at 357. "This 'long, unbroken line' beginning from medieval England and extending beyond Reconstruction, indicates that the tradition of regulating firearms in often-crowded public forums is 'part of the 'immemorial' custom' of this nation." *Id.* at 358-60 (citing *Bruen*, 142 S. Ct. at 2136 and Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 476 2019)). *See also Rahimi*, 219 L. Ed. 2d 351, 144 S. Ct. 1889, slip op. at 13 (identifying the four states that "expressly codified prohibitions on going armed" during the Founding era).

The Founding Era history supports the Ordinance in *how* it restricts the use of firearms in gathering spaces like public parks. The *why* behind the Parks Restriction also adheres to history and tradition. The Virginia 1786 Statute prohibited going armed "in other places, in terror of the County." (ECF No. 47-20.) This language evidences that, during the Founding Era, citizens believed a prohibition on armed carry was necessary to prevent terror among Virginia residents—just as Defendants seek to prevent terror among park visitors.[13] *See Baird v. Bonta*, No. 2:19-cv-00617-KJM-AC, 2023 U.S. Dist. LEXIS 231190, 2023 WL 9050959, at *32-34 (E.D. Cal. Dec. 29, 2023) (finding colonial laws showed a history of accepting harsh

13. The Second Circuit has found the Virginia statute to be supportive even without corresponding evidence of modern-day fear. *See Antonyuk*, 89 F.4th at 355-56 (finding that the statute supported a tradition of prohibiting firearms in urban parks).

gun restrictions based on popular opinions on what was frightening or dangerous). The Supreme Court rejected this argument in *Bruen* because New York had not presented "any evidence showing that, in the early 18th century or after, the mere public carrying of a handgun would terrify people." 597 U.S. at 45. But here, Defendants have provided evidence of community fear in the form of a 2022 survey illustrating the connection between the historical analogue of preventing terror in the community with the current sentiment that the presence of guns in Parks would have "chilling effects" on the County's citizens' use of those spaces. (ECF No. 49-1; ECF No. 45 at 33.)

For these reasons, the County has shown that the Parks Restriction relates to an unprecedented social issue that did not exist during the Founding Era and it has otherwise satisfied its burden of proving that the Ordinance satisfies this Nation's history and tradition from the Founding Era of prohibiting firearms in areas for public gatherings, such as parks.

iii.

The Supreme Court has identified well-settled "sensitive places" where gun prohibitions are consistent with the Second Amendment absent a history and tradition of gun regulation in these places, such as schools, government buildings, legislative assemblies, polling places, and courthouses. *Bruen*, 1 U.S. at 30. The Supreme Court also has expressly permitted courts to evaluate new areas of firearm regulation through the lens

of the approved sensitive places doctrine. *Id.* The Supreme Court undertook such an exercise in *Bruen*; although, the Supreme Court ultimately decided that the New York firearm regulation at issue was too broad to be considered a sensitive place—because the regulation applied to all of New York. *Id.* at 31. But the analysis here is much narrower and is distinguishable from *Bruen* in that the spaces regulated are much narrower—County Parks,[14] which are analogous to recognized sensitive spaces. As noted above, the Parks Restriction narrowly restricts firearms in the Parks; it is not a general prohibition on the public right to carry, which right remains in 90.6 percent of the County.

About 4 million children visited County Parks in 2023. (ECF No. 52 ¶ 5.) Over 43,000 of the 4 million children registered for summer camps at the Parks. (*Id.* ¶ 12.) Summer camps have many of the same characteristics as schools, a well settled sensitive places. Summer camps have the same purpose of providing education and socialization to children and protecting children in those spaces. *See Mintz*, 2024 U.S. Dist. LEXIS 61699, 2024 WL 1361047, at *17 and *We the Patriots USA, Inc.*

14. *Rahimi* also distinguished the federal statute at issue in that case from the blanket New York ban at issue in *Bruen* to find the federal statute constitutional. Slip op., at 15. The surety laws, according to the majority opinion in *Rahimi*, presumed that individuals had the right to carry. *Id.* No such presumption existed in the New York restriction at issue in *Bruen*. *Id.* The Ordinance at issue more closely resembles the statute in *Rahimi* because the Ordinance presumes that County residents have the right to carry in public, and it restricts that right in a narrow way.

v. Grisham, No. 1:23-CV-00773-DHU-LF, 2023 U.S. Dist. LEXIS 177503, 2023 WL 6377288, at *3 (D.N.M. Sept. 29, 2023) (finding playgrounds to be an analogous sensitive place to schools). The County also operates three preschools in County Parks, expressly making them sensitive places. *See Maryland Shall Issue, Inc.*, 680 F. Supp. 3d at 584 (finding childcare facilities to be sensitive places because they are tasked with providing education and protecting children) and *Heller*, 554 U.S. at 626-27 (listing schools as a longstanding sensitive place for valid prohibitions on firearms). Additionally, over 43,000 students participated in school trips to the Parks, reinforcing that the Parks are used as a space to educate and protect children. (*Id.* ¶ 19.)

Plaintiffs respond that the Parks cannot be considered sensitive spaces because, historically, sensitive spaces have enhanced security and a "practical means of preventing armed criminals from entering." (ECF No. 53 at 11.) The caselaw directly refutes Plaintiffs' argument and it is otherwise unpersuasive because many recognized sensitive spaces lack enhanced security. (ECF No. 58 at 14-16.)

For these reasons, the County's Parks are analogous to schools and other sensitive places, satisfying constitutional muster for the Parks Restriction, regardless of analogues to the Nation's history and tradition of gun regulation.

Appendix B

C.

i.

Plaintiffs also have challenged the constitutionality of a portion of the Events Restriction. The Event Restriction prohibits firearms in "any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." Fairfax County Code § 6-2-1(A)(4). But Plaintiffs challenge the Events Restriction only as much as it applies to an area "adjacent to a permitted event" or "adjacent to . . . an event that would otherwise require a permit." (ECF No. 1 at 10, ¶¶ 49-50, and 13, ¶ 1(B); ECF No. 48 ¶ 1(B), removing "is being used by" from its challenge and stating "[a]n area adjacent to an event does not constitute a sensitive place . . . .") Plaintiffs therefore do not challenge the Events Restriction prohibition on firearms within a County permitted event or within an event that requires a permit, but instead only the prohibition on firearms in the area "adjacent" either to a County permitted event or to an event that requires a permit.

ii.

As described by the County in its statement of undisputed material facts, the Events Restriction is narrow. A County website describe the process for obtaining a permit at the five types of County facilities for which a permit subject to the Events Restriction can

be sought: (1) the County's main and regional government centers, (2) the County's public libraries, (3) County parks, (4) County community centers, fields, and gyms, and (5) "all other Facility Use Requests." (ECF No. 45 at 4, ¶ 12.) Events that take place within the County on property that is not controlled or owned by the County are not subject to the Ordinance, including any events on public roadways, which are controlled by the Virginia Department of Transportation ("VDOT"). (ECF No. 45 at 4, ¶ 11.) So, for example, if a 5k race or a community street fair is held on a public roadway, it is not subject to the Ordinance because VDOT would have issued the permit, not the County. (*Id.*)

Plaintiffs have not challenged the County's statement of undisputed material facts. So, in determining the parties' cross-motions for summary judgment, the Court assumes Plaintiffs admit the County's facts. E.D. Va. Local Civ. R. 56(B). Thus, the generalized concerns identified by Plaintiffs in their summary judgment papers about unknowingly stumbling into a restricted area are unfounded.[15]

15. The Court notes that Plaintiffs' briefing has many statements that overstate the scope of the Ordinance. Just as one example, the first paragraph of Plaintiffs' memorandum in support of their motion for summary judgment purports to frame this case as a "purely legal question of constitutional law that Fairfax County's gun ban in parks and public byways violates the Second Amendment of the United States Constitution." (ECF No. 53 at 1.) This over statement of the case is untethered from the Events Restriction at issue.

iii.

Contextually, Plaintiffs' narrow challenge to the Events Restriction and the limited scope of the Events Restriction are sharp contrasts, as discussed above with respect to the Parks Restriction, to the statute at issue in *Bruen*, which effectively prohibited most New Yorkers from possessing any firearm. The Events Restriction does nothing of the kind. Instead, it applies only to events requiring permits in buildings, parks, and recreation and community centers owned and run by the County. This limited restriction fits neatly within this country's history and tradition of firearm regulation and is relevantly similar to the "public assembly," "public gathering," and "to the terror of the people" laws cited in the discussion of the Parks Restriction.

The parties have spent far less time discussing the constitutionality of the Events Restriction. (*See* ECF No. 61 at 19-20 (discussing how Plaintiffs do not mention the merits of their challenge to the Events Restriction).) Instead, the parties effectively incorporate and adopt their arguments from the Parks Restriction. Because this Court finds that analysis relevantly similar to the Events Restriction, it will not be rehashed here except to note that the County has identified a robust historical tradition of prohibiting firearms not only within an area of sensitivity, but adjacent to it. *See, e.g., Maryland Shall Issue*, 680 F. Supp. 3d at 589 (noting historical tradition supporting so-called "buffer zones"); *United States v. Allam*, 677 F. Supp. 3d 545, 576-78 (E.D. Tex. 2023) (same), *appeal docketed*, No. 24-40065 (5th Cir. Feb. 1, 2024); *United States v.*

Walter, No. 3:20-cv-00039, 2023 U.S. Dist. LEXIS 69163, 2023 WL 3020321, at *7 (D. V.I. Apr. 20, 2023); ECF No. 47-18, rows r, 16-17, 19, 20 (prohibitions in Philadelphia, Pittsburg, Reading, PA, Trenton, NJ, and St. Paul, MN, including prohibitions within 50 or 100 yards of the parks).

The County also has identified a Tennessee statute (1870) and Missouri Statute (1873), each banning firearms in places including "any fair, race course, or other public assembly of the people" and "any place where persons are assembled for educational, literary or scientific purposes, or into a ball room, social party or other social gathering[.]" (ECF No. 45 at n. 21.) This additional history and tradition shows a pattern across the nation's history of regulating crowded spaces and protecting civilians who may be in those spaces. *See Antonyuk*, 89 F.4th 271, 356 (recognizing this Nation's history of regulating firearms in "quintessentially crowded" places).

Plaintiffs have provided no countervailing history and tradition with respect to their "adjacent to" or "otherwise require a permit" challenges to the Events Restriction.

For these reasons, the Events Restriction does not violate the Second Amendment.

D.

Finally, Plaintiffs challenge the same portions of the Events Restriction on the ground that it violates their Fourteenth Amendment right to due process. Plaintiffs contend that the portion of the Events Restriction that

prohibits firearms at "an event that would otherwise require a County permit" or to an area "adjacent" to such an event is unconstitutionally vague. Because a person of ordinary intelligence has a reasonable opportunity to understand what is prohibited by the Ordinance, the Events Restriction is not unconstitutionally vague.

i.

Due Process requires that an enactment's prohibition be clearly defined, and if not clearly defined, the enactment may be void for vagueness. *See Grayned v. City of Rockford*, 408 U.S. 104, 113-14, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). A law is unconstitutionally vague if a person of ordinary intelligence has not been provided a reasonable opportunity to know what is prohibited. *Oregon Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 945 (D. Or. 2023) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). A statute also may be void for vagueness if it authorizes or encourages arbitrary and discriminatory enforcement. *See Sibley v. Watches*, 460 F. Supp. 3d 302, 316 (W.D.N.Y. 2020).

Statutes may be challenged as void for vagueness "as-applied" or "facially." *Goldstein*, 680 F. Supp. 3d at 400. A facial challenge depends solely on the language of the statute and requires the movant to demonstrate that "no set of circumstances exists under which the Act would be valid." *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). Courts are to proceed with caution when evaluating facial attacks on statutes, so as not to unnecessarily interfere with a state

regulatory program. *Goldstein*, 680 F. Supp. 3d at 400-01 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)). To that end, a strong presumption exists that lawfully enacted statutes are valid. *Koons*, 673 F. Supp. 3d 515, 571 (quoting *Amaya v. New Jersey*, 766 F. Supp. 2d 533, 538 (D.N.J. 2011) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983))).

ii.

As a threshold issue, the County contends that Plaintiffs have no Article III[16] standing to challenge the Events Restriction because they have failed to demonstrate a credible threat of prosecution. (ECF No. 45 at 34-36.) To establish Article III standing, Plaintiffs must have (1) suffered an injury in fact, (2) that is traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635, (2016). Plaintiffs have Article III standing for the reasons below.

First, Plaintiffs have established their injury in fact—a credible threat that they may be arrested—because they intend to carry firearms in County Parks and at events or adjacent to events that require a County permit. (ECF No. 53 at 7 ¶¶ 18-19.) *See Maryland Shall Issue, Inc.*, 680 F. Supp. 3d at 577 (plaintiff's credible threat of enforcement

16. Article III limits federal courts' jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1.

may serve as an injury in fact) (citing *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)). Second, Plaintiffs have sufficiently stated their reasons for engaging in conduct traceable to the Ordinance, and they otherwise possess valid licenses to carry firearms in public. (*Id.* at 4-7 ¶¶ 5-17.) Because Plaintiffs have alleged that they intend to continue to engage in conduct prohibited by the Ordinance, a credible threat exists that they could be prosecuted for their conduct. Finally, Plaintiffs' injury may be redressed by a ruling that the Ordinance is unenforceable, which would allow them to carry firearms in the County's Parks and at or near County events that require a permit. For these reasons, Plaintiffs have standing to assert their Fourteenth Amendment due process claim. *See Maryland Shall Issue, Inc.*, 680 F. Supp. 3d at 579-80 (finding standing to challenge gun restriction that prohibited carrying firearms in public parks and within 100 yards of a public assembly).

iii.

Plaintiffs bring a facial challenge to the Events Restriction of the Ordinance alleging it is unconstitutionally vague under the Due Process clause of the Fourteenth Amendment. (ECF No. 53 at 23-25.) Plaintiffs assert that the portion of the Events Restriction that bans firearms at "an event that would otherwise require a permit or adjacent area thereto" is unconstitutionally vague because they cannot decipher whether an activity requires a permit or not. (*Id.* at 23.) In other words, according to Plaintiffs, the Ordinance fails to put them on notice of when they are violating the Events Restriction. Defendants maintain

that the Ordinance is constitutional when examined alongside the County's guidance about permitted events and the requirement that the Events Restriction applies only when notice of the Ordinance has been posted. (ECF No. 58 at 38-39.)

Because the County has provided publicly available information about prohibited conduct under the Events Restriction, because guidelines have been adopted to avoid arbitrary enforcement of the Events Restriction by law enforcement, and because the Ordinance's notice requirement prevents arbitrary enforcement, the Court concludes that the Events Restriction is not unconstitutionally vague in violation of the Due Process Clause.

To guide citizens on the permitting requirements for public use of County property, the County maintains a website with links that identifies "six areas where and authorities from which permits for events can be sought." (ECF No. 45 at 4 ¶ 12.) *See Koons*, 673 F. Supp. 3d at 661 (courts must consider "any limiting construction that a state court or enforcement agency has proffered") (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 71 L. Ed. 2d 362 n. 5 (1982)). This website and these links are available for Plaintiffs use to identify the areas where County permits are required for public use subject to the Ordinance. *See Koons*, 673 F. Supp. 3d at 662 (state's proffered interpretation of a "holster" put citizens on notice of potential violations). The County has also provided guidance and training to police officers, so law enforcement knows when and

how to enforce the Ordinance, which safeguards citizens from any possible arbitrary enforcement. (ECF No. 58 at 38-39.) *See Gazzola v. Hochul*, 645 F. Supp. 3d 37, 66-67 (N.D.N.Y. 2022), *aff'd*, 88 F.4th 186 (2d Cir. 2023), *cert. denied*, No. 23-995, 144 S. Ct. 2659, 219 L. Ed. 2d 1285, 2024 U.S. LEXIS 2621, 2024 WL 3014531 (U.S. June 17, 2024) (finding that an employee training program that provided guidance in assessing security plans for firearms dealers did not suggest arbitrary enforcement). *See also Koons*, 673 F. Supp. 3d at 662 ("The State's interpretation contains *explicit standards* for law enforcement officers, judges, and juries to follow that will eliminate arbitrary or discriminatory enforcement." (emphasis added)).

Finally, and most consistent with the principles of due process, the Ordinance contains the following notice requirement: "notice of this ordinance shall be posted . . . at all entrances or other appropriate places . . . that is open to the public and is being used by or is adjacent to a permitted event or event that would otherwise require a permit."[17] § 6-2-1(D)(1)(iv). Notices such as this one are

17. Though not relevant to the Fourteenth Amendment analysis, the County's notice requirement adheres to this nation's history and tradition of firearm regulation. Prof. Young's declaration states that the Central Park firearms prohibition was "posted in conspicuous locations" to inform visitors of the rule. (ECF No. 46 at 14 ¶ 30.) In 1868, Pennsylvania's state legislature also enacted a prohibition on guns in Fairmont Park with the following, additional restriction related to adjacent property: "no person shall carry fire arms or shoot birds in the park or within fifty yards thereof." (*Id.* at 74.) Pennsylvania's historical prohibition on guns in its parks is similar to the Ordinance, and it resembles the Ordinance's fifty-yard "adjacent to" provision.

enough to notify a person with ordinary intelligence that firearms are prohibited in the areas with posted notice and areas next to it. *See Second Amend. Found., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:21-cv-0116-B, 702 F. Supp. 3d 513, 2023 U.S. Dist. LEXIS 202589, 2023 WL 7490149, at * 10 (N.D. Tex. Nov. 13, 2023) (finding a person of ordinary intelligence could decipher which firearms applied to the statute based on "surface area that allows the weapon to be fired from the shoulder" even if the surface area had no "quantifiable measurement"). Finally, Plaintiffs and other ordinary citizens will know with complete certainty that an event is subject to the Ordinance because the Ordinance and the Fairfax County law enforcement manual establish that the Events Restriction applies only when notice of the Ordinance is posted, which safeguards citizens from any possible arbitrary enforcement. (ECF No. 58 at 38-39.)

Because sufficient safeguards and guidance exists for enforcing the Events Restriction in the Ordinance, it is unlikely that inadequate notice *or* arbitrary enforcement of the Ordinance will occur. *See Koons*, 673 F. Supp. 3d at 571-72 (a statute's built-in procedural mechanisms eliminated arbitrary enforcement). Thus, the Court concludes that the Events Restriction does not violate the Due Process Clause of the Fourteenth Amendment.

(*See* ECF No. 47-1 (prohibiting firearms in areas next to County-permitted events).) The Ordinance's procedural protections confirm that it adheres to history and tradition, as well as other modern-day Second Amendment limitations.

VI.

For all these reasons, Defendants' Motion for Summary Judgment (ECF No. 44) is GRANTED, and Plaintiffs' Motion for Summary Judgment (ECF No. 48) is DENIED. The Ordinance, Fairfax County Code § 6-2-1, is constitutional under the Second and Fourteenth Amendments. Consequently, Judgment will enter in favor of Defendants.

IT IS SO ORDERED.

Entered this 23rd day of August 2024.

/s/ William B. Porter
William B. Porter
Alexandria, Virginia United States Magistrate Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED AUGUST 23, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1:23-cv-1605 (WBP)

KIMBERLY LAFAVE, *et al.*,

Plaintiffs,

v.

THE COUNTY OF FAIRFAX, VIRGINIA
AND KEVIN DAVIS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF POLICE,

Defendants.

Filed August 23, 2024

JUDGMENT

Pursuant to the order of this Court entered on August 23, 2024, and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the Defendants, The County of Fairfax, Virginia, and

Appendix C

Kevin Davis, in his Official Capacity as Chief of Police and against the Plaintiff, Kimberly Lafave.

FERNANDO GALINDO,
CLERK OF COURT

By: /s/_____
Whitney Garnett
Deputy Clerk

Dated: August 23, 2024
Alexandria, Virginia

APPENDIX D — CONSTITUTIONAL AND REGULATORY PROVISIONS

U.S.C.A. Const. Amend. II.
Keeping and Bearing Arms

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.

Appendix D

U.S.C.A. Const. Amend. XIV CITIZENSHP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATOIN; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

Section 6-2-1. – Firearms, ammunition, or components or combination thereof prohibited in certain areas.

A. The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in the following areas:

1. In any building, or part thereof, owned or used by the County, or by any authority or local government entity created or controlled by the County, for governmental purposes.

2. In any public park owned or operated by the County, or by any authority or local government entity created or controlled by the County.

3. In any recreation or community center facility operated by the County, or by any authority or local government entity created or controlled by the County.

4. In any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a County permitted event or an event that would otherwise require a County permit. For the purposes of this Section, County-permitted event and event that would otherwise require a County permit include events permitted by an authority or local government entity created or controlled by the County in whole or in part.

5. In buildings not owned by the County, or by any authority or local government entity created or controlled by the County, this Section shall apply only to the part of the building used for a governmental purpose and when such building, or part thereof, is being used for a governmental purpose.

6. In parks located in the County that are owned or operated by a park authority that was created or is controlled by the County in conjunction with one or more other localities, provided that all participating localities enact an ordinance containing a prohibition substantially similar to that imposed by Paragraph A(2) above and the governing body of the park authority passes a resolution or other measure agreeing to the application of each such ordinance within the parks located in each such locality.

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

C. The provisions of this Section shall not apply to the following:

1. The activities of (i) a Senior Reserve Officers' Training Corps program operated at a public or private institution of higher education in accordance with the provisions of 1O U.S.C. § 2101 et seq., or (ii) any intercollegiate athletics program operated by a public or private institution of higher education and governed by the National Collegiate Athletic Association or any club sports team recognized by a public or private institution of higher education where the sport engaged in by such program or team involves the use of a firearm. Such activities shall follow strict guidelines developed by such institutions for these activities and shall be conducted under the supervision of staff officials of such institutions.

2. Sworn law enforcement personnel.

3. Security personnel hired as employees or contracted by the County, or an authority or other local government entity created or controlled by the County in whole or in part, when such personnel are present and working in any building or other location set forth in Paragraph A and who are authorized to carry firearms as part of their duties.

4. The activities of educational programs and

events, including static displays and historical reenactments, conducted or permitted by the County or any authority or local government entity created or controlled by the County, when such educational programs and events involve the use or display of firearms that are not loaded with projectiles.

5. The activities of the County's Deer Management Program and other wildlife management events conducted by the County, by any authority or local government entity created or controlled by the County in whole or in part, by the Commonwealth of Virginia, or by the federal government.

6. The Bull Run Public Shooting Center.

7. Individuals who are authorized to carry a concealed firearm pursuant to the Law Enforcement Officers Safety Act, 18 U.S.C. §§ 926B and 926(, as amended.

8. Active duty military personnel acting within the scope of their official duties.

9. The possession and carrying of weapons in the courthouse shall be governed by the provisions of Virginia Code§ 18.2-283.1, as amended.

10. An otherwise lawfully possessed firearm, ammunition, components or combination thereof that is stored out of sight in a locked private

motor vehicle that is lawfully parked on County property or a public street.

11. Private security officers licensed by the Virginia Department of Criminal Justice Services providing security for a County-permitted event.

D. Notice of ordinance.

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

2. Notice of this ordinance shall be posted at all entrances of any public park owned or operated by a park authority that was created or is controlled

by the County in conjunction with one or more other localities, provided that all participating localities have enacted an ordinance containing a prohibition substantially similar to that imposed by Paragraph A(2) above and the governing body of the park authority has passed a resolution or other measure agreeing to the application of each such ordinance within the parks located in each such locality.

E. Violations of Section 6-2-1(A) shall constitute a Class 1 misdemeanor. (23-20-6)

APPENDIX E — COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED NOVEMBER 22, 2023

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case No: 1:23-cv-1605

KIMBERLY LAFAVE, GLENN M. TAUBMAN,
AND ROBERT HOLZHAUER,

Plaintiffs,

v.

THE COUNTY OF FAIRFAX, VIRGINIA,
AND KEVIN DAVIS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF POLICE,

Defendants.

Filed November 22, 2023

COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

Plaintiffs, Kimberly LaFave, Glenn M. Taubman, and Robert Holzhauer, move for judgment against Defendants, the County of Fairfax, Virginia, and Chief of Police Kevin Davis in his official capacity, for the following reasons.

Appendix E

1. This is an action to vindicate the right of residents and visitors in the County of Fairfax, Virginia, to keep and bear arms under the Second Amendment to the United States Constitution, which guarantees the right of law-abiding citizens to possess and carry commonly-possessed firearms in public places for self-defense and other lawful purposes, and the Fourteenth Amendment to the United States Constitution, which guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ."

Parties

2. Plaintiff Kimberly LaFave is a resident of Loudoun County, Virginia, and a citizen of the United States.

3. Plaintiff Glenn M. Taubman is a resident of Fairfax County, Virginia, and a citizen of the United States.

4. Plaintiff Robert Holzhauer is a resident of Fairfax County, Virginia, and a citizen of the United States.

5. Defendant County of Fairfax, Virginia ("Fairfax County"), is a county organized under the Constitution and laws of the Commonwealth of Virginia.

6. Defendant Kevin Davis is the Chief of Police of Fairfax County, Virginia, whose principal place of business is in Fairfax, Virginia. He is sued in his official capacity.

Appendix E

Jurisdiction & Venue

7. Federal question jurisdiction is founded on 28 U.S.C. § 1331, as this action arises under the Constitution of the United States. The Court also has jurisdiction under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983, because this action seeks to redress Fairfax County's deprivation, under color of the laws, statute, ordinances, regulations, customs and usages, of rights, privileges or immunities secured by the United States Constitution.

8. This action seeks relief pursuant to 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. §§ 1983 and 1988.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1)-(2), because all Defendants reside in this district and/or a substantial part of the events giving rise to the claim occurred in this District.

Background

10. The Second Amendment 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."

11. Under Virginia law, a person may carry a firearm in public openly, i.e., not hidden from common observation. Va. Code § 18.2-308(A). A person may carry a concealed handgun in public if he/she has a permit issued under Va. Code § 18.2-308.01. The public places where a firearm may not be possessed are narrowly defined, such as in a

courthouse (§ 18.2–283.1) or on school property (§ 18.2-308.1). It is generally lawful under state law to carry a handgun or other firearm in a public park or in an event requiring a permit from a locality.

12. Va. Code § 15.2-915(A) provides in part: "No locality shall adopt or enforce any ordinance, resolution, or motion, as permitted by § 15.2-1425, and no agent of such locality shall take any administrative action, governing the purchase, possession, transfer, ownership, carrying, storage, or transporting of firearms, ammunition, or components or combination thereof other than those expressly authorized by statute."

13. In 2020, the Virginia General Assembly enacted Va. Code § 15.2-915(E), which provides in pertinent part:

> Notwithstanding the provisions of this section, a locality may adopt an ordinance that prohibits the possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof . . . (ii) in any public park owned by the locality, or by any authority or local governmental entity created or controlled by the locality; . . . or (iv) in any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.

14. The same bill enacted Va. Code § 15.2-915(F), which provides in pertinent part:

Appendix E

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

15. On September 15, 2020, and extending into the next day, and pursuant to the aforedescribed statutory provisions, the Fairfax County Board of Supervisors held a public hearing to consider amending Chapter 6 of the Fairfax County Code to ban carrying, possessing, and transporting firearms in public parks and near permitted events. Numerous citizens testified that they lawfully carried firearms at such places and expressed concern over violent crime being committed at such places.

16. At the hearing's conclusion, the Board of Supervisors amended Article 2 and § 6-2-1 of the Fairfax County Code (hereafter "the Ordinance"). Subsection A of that section states in pertinent part:

> The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in the following areas: . . .

> 2. In any public park owned or operated by the County, or by any authority or local government entity created or controlled by the County. . . .
>
> 4. In any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.

18. The Board of Supervisors also added § 6-2-1(D)(1) to the Code, which states in pertinent part:

> Notice of this ordinance shall be posted . . . (ii) at all entrances of any public park owned or operated by the County, or by any authority or local governmental entity created or controlled by the County; . . . and (iv) at all entrances or other appropriate places of ingress and egress to any public street, road, alley, or sidewalk . . . or public right-of-way or any other place of whatever nature that is open . . . to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.

19. The Board of Supervisors also added § 6-2-1(E) to the Code as follows: "Violations of Section 6-2-1(A) shall constitute a Class 1 misdemeanor." A Class 1 misdemeanor is punishable by confinement in jail for not more than

twelve months and a fine of not more than $2,500, either or both. Fairfax County Code § 1-1-12; Va. Code § 18.2-11(a).

20. The Ordinance took effect upon adoption.

21. Defendant Kevin Davis is the chief law enforcement officer of Defendant Fairfax County, and it is his duty to enforce the Ordinance.

Facts

22. Fairfax County owns, operates, or controls public parks consisting of 23,632 acres, 420 parks, and more than 334 miles of trails. This equates to over 9.3 percent of the County's land mass. Seventy-nine percent of Fairfax County's households are park users. The parks include vast amounts of wooded acreage, much of it remote and isolated.

23. The entirety of Fairfax County's 23,632 acres of public parks are not a sensitive place like a school, government building, legislative assembly, polling place, or courthouse. No lawful basis exists for banning the public possession of firearms in all 23,632 acres of the parks, especially given that both open and permitted concealed carry of firearms are permitted in Virginia's crowded urban areas under the Commonwealth's regulatory scheme.

24. Police do not regularly patrol most of the park acreage and are unlikely to be present if a person is attacked by a criminal. Murder, robbery, rape, assault,

and other violent crimes have been committed, and will continue to be committed, in the parks run by Fairfax County and nearby jurisdictions.

25. In 2022 in Fairfax County, the following crimes were reported to law enforcement: 22 homicides, 162 kidnappings/abductions, 374 sex offenses, and 8,918 assaults. *Fairfax County Police Department Statistical Report Calendar Years 2021 & 2022*, at 6-9 (May 2023).

26. For many potential victims of crime, including Plaintiffs, having access to a firearm may be the only way to defend themselves and keep from being a victim. Police cannot be expected to be present when a person is suddenly attacked.

27. Criminals who commit murder, robbery, rape, and other violent crimes punishable as major felonies are not dissuaded by signs prohibiting possession of firearms or by threats of misdemeanor penalties. To the contrary, the ban on possession of firearms in the parks leaves law-abiding citizens defenseless and makes it easier for criminals to attack their victims without fear of resistance.

28. Plaintiff Kimberly LaFave is a paralegal who also has a dog-walking business. She is an NRA-certified Firearms Instructor, and is a leader of the Loudoun County Chapter and the Bull Run (Fairfax County) Chapter of a non-profit women's shooting organization with 335 chapters and 11,610 members nationwide. This organization teaches women gun safety, the responsible use of firearms for self-defense, techniques for carrying

concealed handguns, and hands-on shooting skills. *See* Ex. A ¶ 2 (LaFave Decl.).

29. Ms. LaFave has used Fairfax County park trails for several years and continues to do so for recreation, dog walking, and other activities. Many of the trails are in remote areas with few people and no police presence. She is aware that serious crimes have been committed against women on the Fairfax County park trails and prior to the Fairfax Ordinance banning the carrying of firearms in parks, regularly carried a concealed handgun, for which she has a permit, for self-defense. *See id.* ¶ 3.

30. The Ordinance imposed a dilemma upon Ms. LaFave: If she continues to carry a concealed handgun in Fairfax County parks, she faces the threat of arrest and related injuries, but if she foregoes doing so, she will lose her means of security and will be vulnerable to criminal attack. But for the Ordinance, she would continue lawfully to carry a concealed handgun in Fairfax County parks. *See id.* ¶ 4.

31. Plaintiff Glenn M. Taubman is an attorney who is a member of the bars of New York, Georgia, and the District of Columbia. He previously clerked for several federal judges, and has had a Virginia concealed carry permit for over fifteen years. He is an avid cyclist who regularly uses Fairfax County parks and trails. *See* Ex. B ¶ 2 (Taubman Decl.).

32. Mr. Taubman testified against the Ordinance that is the subject of this lawsuit at the County Board

of Supervisors public hearing on September 15, 2020, in which he explained that he carried a concealed handgun in the parks and added: "Your ordinance will leave us citizens defenseless in the face of gangs and criminals (who I have personally seen in county parks and bike trails)." *See id.* B ¶ 3.

33. Before the Ordinance's enactment, Mr. Taubman possessed, carried, and transported firearms, on his person, in his vehicle, on the public streets, roads, alleys, sidewalks, public rights-of-way, and other places that are open to the public in Fairfax County. He continued doing so even though he is often unaware whether or not such places are being used by, or are adjacent to, a permitted event or an event that would otherwise require a permit. When he becomes aware of such event, he must either not carry or possess a firearm, or must endeavor to avoid such locations. *See id.* ¶ 4.

34. Plaintiff Robert Holzhauer was a commissioned police officer for eleven years and a member of the U.S. Army for 27 years, retiring as a Lieutenant Colonel with an honorable discharge and a 100% permanent, total disability. Since becoming a County resident in 2004, he used Fairfax County Parks for 3-4 days a week, and sometimes on a daily basis, minus deployment periods in Iraq, Yemen, Libya, and Liberia. *See* Ex. C ¶ 2 (Holzhauer Decl.).

35. Lt. Col. Holzhauer has a permit to carry a concealed handgun. When hiking in remote areas of the Fairfax County parks, he carried a handgun for protection

from potential criminals and wild animals like bears, the latter of which have accosted him. His disability creates a particular need to carry a handgun for self-defense. *See id.* C ¶ 3.

36. When informed of the subject Ordinance, Lt. Col. Holzhauer discontinued carrying a handgun in the parks for fear of prosecution. But for the Ordinance, he would continue to carry a concealed handgun in the parks. *See id.* C ¶ 4.

38. As noted, § 6-2-1(A)(4) of the Ordinance prohibits the possession, carrying, or transportation of any firearms "[i]n any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit."

39. Before the Ordinance's enactment, Plaintiffs Taubman, LaFave, and Holzhauer possessed, carried, and transported firearms, on their persons or in vehicles, on the public streets, roads, alleys, sidewalks, public rights-of-way, and other places that are open to the public in Fairfax County. They continue doing so while being unaware that such places are being used by or are adjacent to a permitted event or an event that would otherwise require a permit. When they are aware of such events, they must either not carry or possess a firearm or must endeavor to avoid such locations. *See* Exs. A ¶ 5; B ¶ 4; C ¶ 5.

40. Should Plaintiffs possess, carry, or transport firearms at the places specified in § 6-2-1(A)(4), regardless of whether they are aware of the event or that they are at a place adjacent to such event, they are subject to arrest and prosecution. *See* Exs. A ¶ 10; B ¶ 5; C ¶ 6.

41. Accordingly, as a proximate cause of the Ordinance's enactment by Fairfax County and its enforcement by Chief of Police Davis, Plaintiffs are threatened with irreparable harm and have no adequate remedy at law. *See* Ex. B ¶ 6.

COUNT ONE
(Violation of Second Amendment-Public Parks)

42. Paragraphs 1 through 41 are realleged and incorporated herein by reference.

43. The Second Amendment provides in pertinent part that "the right of the people to keep and bear arms, shall not be infringed." "[T]he Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

44. Section 6-2-1(A)(2) of the Ordinance provides in pertinent part: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in . . . any public park owned or operated by the County, or by any authority or local government entity created or controlled by the County."

45. Section 6-2-1(A)(2) of the Ordinance infringes on the right of the people, including the Plaintiffs herein, to keep and bear arms, by prohibiting possession, carrying, or transportation of any firearm in the entire 23,632 acres of Fairfax County public parks. Such vast acreage does not constitute a sensitive place like a school, government building, legislative assembly, polling place, or courthouse.

46. Section 6-2-1(A)(2) of the Ordinance irreparably harms Plaintiffs by infringing on their right to keep and bear arms as guaranteed by the Second Amendment, and is thus void.

COUNT TWO
(Violation of Second Amendment-Public Right-of-Ways & Events)

47. Paragraphs 1 through 46 are realleged and incorporated herein by reference.

48. Section 6-2-1(A)(4) of the Ordinance provides in pertinent part: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in . . . any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." It fails to provide any standard or distance for what may be "adjacent to" such event.

49. Application of § 6-2-1(A)(4) to an area that "is adjacent to a permitted event" or "is adjacent to . . . an

event that would otherwise require a permit" violates the right of Plaintiffs to keep and bear arms as guaranteed by the Second Amendment. An area adjacent to an event does not constitute a sensitive place like a school, government building, legislative assembly, polling place, or courthouse.

50. At any time on a public street or road or otherwise, Plaintiffs may find themselves in a motor vehicle with a firearm when they pass through or park in an area adjacent to an affected event. They will be in violation even if they do not know they are in an area adjacent to an event that is permitted or should have a permit. Even if they have such knowledge, they would be just passing through the vicinity en route to another destination. Under either alternative, the prohibition infringes on their right to keep and bear arms. *See* Exs. A ¶¶ 5, 7; B ¶¶ 4, 9; C ¶¶ 5, 9.

51. Because it deprives Plaintiffs of the ability to have firearms for lawful self-defense in the above-specified places, the Ordinance subjects Plaintiffs to potential assault, robbery, rape, murder, and other violent crimes. Section 6-2-1(A)(4) of the Ordinance irreparably harms Plaintiffs by infringing on their right to keep and bear arms as guaranteed by the Second Amendment, and is thus void. *See* Exs. A ¶ 6; B ¶ 7; C ¶ 7.

COUNT THREE
(Violation of Fourteenth Amendment-
Due Process Clause)

52. Paragraphs 1 through 51 are realleged and incorporated herein by reference.

53. The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ." Due process requires that an ordinance be sufficiently precise and definite to give fair warning that conduct is criminal. An ordinance is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning, or if it invites arbitrary and discriminatory enforcement.

54. Section 6-2-1(A)(4) of the Ordinance provides: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in … any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit."

55. Persons of common intelligence, including Plaintiffs, must necessarily guess at the Ordinance's meaning, which also invites arbitrary and discriminatory enforcement. No standard in distance or otherwise is defined for what is "adjacent" to any such event. Since no measurement in feet, yards, or otherwise is specified for what is "adjacent," Plaintiffs and other members of the public are left to guess, and the County police or other authorities are free to arbitrarily decide the distance. *See* Exs. A ¶ 8; B ¶¶ 8, 10; C ¶¶ 8, 10.

56. Plaintiffs have no basis to know if an activity is "an event that would otherwise require a permit" or what

area "being used by or is adjacent to" such event. This requires Plaintiffs to determine if a permit is required for some "event" about which they know nothing, thereby subjecting them to prosecution under the Ordinance. The Fairfax County Code of Ordinances includes numerous, complex provisions on events that require a permit, and they are not within the knowledge of ordinary persons. Ordinary persons cannot be expected to know that some activity is an "event," what events require a permit under the Ordinance, and to apply the Ordinance to determine whether the activity is an event that requires a permit. *See* Exs. A ¶ 9; B ¶¶ 8, 10, 11; C ¶¶ 8, 11.

57. Section 6-2-1(A)(4) is particularly egregious because it requires individuals to make an on-the-spot determination in seconds while walking or driving of whether something is an event requiring a permit. This causes Plaintiffs either to risk arrest and prosecution or to avoid the constitutionally permissible conduct of keeping and bearing arms based on a fear that they may be violating an unclear law, and thus inhibits the exercise of constitutionally protected activities. *See* Exs. A ¶ 10; B ¶ 12; C ¶ 12.

58. If an event requiring a permit has no permit, it is impossible for the County itself to comply with § 6-2-1(D)(1), which requires that "Notice of this ordinance shall be posted" at the described location that "is being used by or is adjacent to . . . an event that would otherwise require a permit."

59. Accordingly, the terms "is adjacent to" and "an event that would otherwise require a permit" are

unconstitutionally vague and violate Plaintiffs' right to due process of law.

Prayer for Relief

WHEREFORE, Plaintiffs pray that the Court:

1. Render a declaratory judgment that the following two provisions of the Fairfax County Code infringe on the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution and are void:

(A) Section 6-2-1(A)(2), which provides in pertinent part: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in . . . any public park owned or operated by the County, or by any authority or local government entity created or controlled by the County."

(B) Section 6-2-1(A)(4), which provides in relevant part: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in … any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and . . . is adjacent to a permitted event or an event that would otherwise require a permit.";

2. Render a declaratory judgment that the following portion of § 6-2-1(A)(4) of the Fairfax County Code, which provides in pertinent part, "The possession,

carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in . . . any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to . . . an event that would otherwise require a permit," is unconstitutionally vague and deprives Plaintiffs of life, liberty, or property without due process of law, contrary to the Fourteenth Amendment of the United States Constitution, and is void;

3. Enter preliminary and permanent injunctions enjoining the County of Fairfax, Chief of Police Kevin Davis, and their agents, officers, and employees from enforcing the aforementioned provisions of § 6-2-1(A)(2) & (4) of the Fairfax County Code;

4. Award Plaintiffs nominal damages, attorney's fees, and costs pursuant to 42 U.S.C. § 1988(b) or other applicable provision of law;

5. Award Plaintiffs such other relief as is appropriate.

Respectfully Submitted,

Kimberly LaFave
Glenn M. Taubman
Robert Holzhauer,

Plaintiffs

By Counsel

Appendix E

/s/ Stephen Halbrook
Stephen P. Halbrook
protell@aol.com
Va. Bar No. 18075
3925 Chain Bridge Road, Suite 403
Fairfax, VA 22030
(703) 352-7276

/s/ Trey N. Mayfield
Christopher M. Day
cmday@jurisday.com
Va. Bar No. 37470
Earl N. "Trey" Mayfield, III
tmayfield@jurisday.com
Va. Bar No. 41691
10521 Judicial Drive, Suite 200
Fairfax, VA 22030
(703) 268-5600

APPENDIX F — DECLARATION OF KIMBERLY A. LAFAVE IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED APRIL 26, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1:23-cv-1605-WBP

KIMBERLY LAFAVE, *et al.*,

Plaintiffs,

v.

THE COUNTY OF FAIRFAX, *et al.*,

Defendants.

Filed April 26, 2024

DECLARATION OF KIMBERLY A. LAFAVE

I, Kimberly A. LaFave, do hereby declare:

1. I am a resident of Loudoun County, Virginia, and a citizen of the United States. I have resided in Loudoun County for approximately 24 years.

2. Prior to residing in Loudoun County, Virginia, I resided in Arlington County, Virginia, for

approximately 4 years. Prior to residing in Arlington County, Virginia, I resided in Fairfax County, Virginia, for approximately 17 years, where, after graduating from South Lakes High School (Reston, Virginia), I attended George Mason University (Fairfax, Virginia). I have worked in Fairfax County continuously with the exception of the years 2002–2010. During the past 46 years, I have developed many personal and professional relationships that have been sustained, and continue to actively engage in activities in Fairfax County, Virginia, with friends and colleagues.

3. I have been employed in my current position as a paralegal in Reston, Virginia, since 2012.

4. I have been actively providing overnight pet sitting and dog walking services for clients in Fairfax County, Virginia since 2011 to the present. Over the years, I have serviced clients that reside in property adjacent to various Fairfax County parks and trails, and have serviced clients that reside in properties within the vicinity of areas where permitted events, or events that would otherwise require a permit, occur.

5. In 2013, I obtained a permit to carry a concealed handgun and carried a handgun for protection against potential criminals and wild animals, and did so until the enactment of the subject

Ordinance. As a women, I feel particularly vulnerable, especially in low density areas, such as parks and trails that I frequent while walking dogs or engaging in other activities for my own pleasure. During the past 13 years that I have been actively walking dogs and otherwise enjoying public areas in Fairfax County, I do not recall ever seeing a police office patrolling any trail or part on foot, except during clearly permitted events. Often, no one else is around when I am using the parks and trails. The trails in the County rarely indicate whose property they are on, and as a frequent user of those trails, I almost never see signs indicating that ownership. I do know, for example, that both the County and the State have parkland in the County, but have no idea where one ends and the other begins.

6. I testified against the Ordinance at the Fairfax County Board of Supervisors' public hearing on September 15, 2020, in which I explained that I my presence represented myself and other women who recognize that police officers are rarely present when criminals decide to target us. The Ordinance, thus, forces us to choose between an effective means of self-defense, or being effectively prevented from otherwise enjoying the full benefits of Fairfax County's public spaces.

7. Since the enactment of the Ordinance, I have continued to carry my handgun for self-protection;

however, I endeavor to avoid areas that I know would be in violation of the Ordinance. Due to the language of the Ordinance, I cannot state with certainty that I have not carried in violation of the Ordinance. As a law-abiding citizen, this causes me anxiety.

8. I am a member of the Jewish faith and prior to the enactment of the Ordinance frequently attended events held by various synagogues and Jewish communal organizations in Fairfax County with my friends and colleagues. Due to my general safety concerns and specific concerns regarding the ever-increasing wave of anti-Semitism in this country, since the enactment of this Ordinance, I have stopped attending these events out of caution for my safety and the safety of my family. This unfairly inhibits my ability to freely participate in communal celebrations that I became accustomed to enjoying.

9. Should I possess, carry, or transport firearms at the places specified in § 6-2-1(A)(4), regardless of whether I am aware of the event or that I am at a place adjacent to such event, I am subject to arrest and prosecution.

10. Persons of common intelligence, including me, must necessarily guess at the Ordinance's meaning, which also invites arbitrary and discriminatory enforcement. No standard in distance or otherwise is defined for what

is "adjacent" to any such event. Since no measurement in feet, yards, or otherwise is specified for what is "adjacent," I am left to guess, and the County police or other authorities are free to arbitrarily decide the distance.

11. Because the Ordinance deprives me of the ability to have firearms for lawful self-defense in County parks, or upon county property, it subjects me to potential assault, robbery, murder, and other violent crimes.

12. Section 6-2-1(A)(4) of the Ordinance provides in pertinent part: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in . . . any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." It fails to provide any standard or distance for what may be "adjacent to" such event. As I travel the County, I have no way of knowing whether I will be adjacent to, or in many instances, on, County property. Other than the Fairfax Government building and parks with signage, I have no idea what is County-owned property.

13. At any time on a public street or road or otherwise, I may find myself in a motor vehicle with a firearm when I pass through or park in

an area adjacent to an affected event. I will be in violation even if I do not know I am in an area adjacent to an event that is permitted or should have a permit. Even if I have such knowledge, I would be just passing through the vicinity enroute to another destination. Under either alternative, the prohibition infringes on my right to keep and bear arms.

14. I have no basis to know if an activity is "an event that would otherwise require a permit" or what area "being used by or is adjacent to" such event. This requires me to determine if a permit is required for some "event" about which I know nothing, thereby subjecting me to prosecution under the Ordinance. The Fairfax County Code of Ordinances includes numerous, complex provisions on events that require a permit, and they are not within the knowledge of ordinary people like me. Ordinary people like me cannot be expected to know that some activity is an "event," what events require a permit under an ordinance, and to apply the ordinance to determine whether the activity is an event that requires a permit.

15. Section 6-2-1(A)(4) is particularly egregious because it requires people to make an on-the-spot determination in seconds while walking or driving of whether something is an event requiring a permit. This causes me to either to risk arrest and prosecution or to avoid the constitutionally permissible conduct of keeping

> and bearing arms based on a fear that I may be violating an unclear law, and thus inhibits the exercise of constitutionally protected activities.

I declare under penalty of perjury that the foregoing is true and correct. I have personal knowledge of all matters discussed above, and if called upon I could testify to them.

Executed this 24th of April, 2024.

/s/ Kimberly LaFave
Kimberly LaFave

APPENDIX G — DECLARATION OF GLENN M. TAUBMAN IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, DATED MARCH 20, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No: 23-cv-1605
Judge Claude M. Hilton

KIMBERLY LAFAVE, *et al.*,

Plaintiffs,

v.

THE COUNTY OF FAIRFAX, VIRGINIA, *et al.*,

Defendants.

March 20, 2024

DECLARATION OF GLENN M. TAUBMAN

I, Glenn M. Taubman, do hereby declare:

1. I am a resident of Fairfax County, Virginia, and a citizen of the United States. I have resided in Fairfax County for approximately 40 years.

2. I am an attorney, and am a member in good standing of the bars of New York, Georgia, and the District of Columbia. I clerked for several federal judges

in Jacksonville, Florida, immediately after I graduated from Emory University Law School in Atlanta, GA (JD with Distinction) in 1980. I have practiced labor and constitutional law for the past 41 years.

3. I have a current permit to carry a concealed handgun under Virginia law, and I have held such permits continuously for at least the past 15 years. I am an avid cyclist who regularly uses Fairfax County parks and bike trails, and, before Fairfax County's enactment of the Ordinance that is the subject of this lawsuit ("Ordinance"), I regularly carried a concealed weapon when I used those parks and bike trails. I would continue to carry a concealed weapon in County parks and bike trails but for the Ordinance, which exposes me to criminal liability if I carry a weapon in such places. The Ordinance currently strips me of my Second Amendment right to defend myself and my family when I use the County's parks and bike trails. Even putting aside my legitimate concerns about criminal activities in County parks and bike trails, there were media reports not long ago about a rabid coyote attacking a defenseless citizen in a County park. I do not wish to be rendered defenseless by the County in such situations.

4. I testified against the Ordinance at the County Board of Supervisors' public hearing on September 15, 2020, in which I explained that I regularly carried a concealed handgun in the parks and added: "Your ordinance will leave us citizens defenseless in the face of gangs and criminals (who I have personally seen in county parks and bike trails)."

5. Before the Ordinance's enactment, I possessed, carried, and transported firearms, on my person or in my vehicle, on the public streets, roads, alleys, sidewalks, public rights-ofway, and other places that are open to the public in Fairfax County. I continue doing so even though I am often unaware whether or not such places are being used by, or are adjacent to, a permitted event or an event that would otherwise require a permit. When I become aware of such events, I must either not carry or possess a firearm or must endeavor to avoid such locations.

6. I am a member of the Jewish faith and am active in various synagogues and Jewish communal organizations. In the past few years some of these organizations have held gatherings in County parks (such as barbeques or meetings at Lake Accotink and Burke Lake parks) that I have attended. I expect to continue to attend such events organized by Jewish communal organizations. Despite my grave and well-founded concern about the rise of anti-Semitic attacks in this country, I am forbidden by the Ordinance from carrying a concealed weapon to protect myself and my family from such anti-Semitic attacks at those events. Moreover, I do not know if the events that my religious and communal organizations have held at Lake Accotink and Burke Lake parks or elsewhere were permitted events, or events that should have been permitted, under the Ordinance.

7. I am subject to arrest and prosecution if I possess, carry, or transport firearms at the places specified in § 6-2-1(A)(4) of the Ordinance, regardless of whether I am aware of the event or that I am at a place adjacent to such event.

8. Accordingly, as a proximate cause of the Ordinance's enactment by Fairfax County and its enforcement by Chief of Police Davis, I am threatened with irreparable harm and have no adequate remedy at law.

9. Because the Ordinance deprives me of the ability to possess or carry firearms for lawful self-defense in the specified places, it subjects me to potential assault, robbery, murder, and other violent crimes. This is true in all locations of the County parks, but it is especially true in the more remote areas of the parks that I often visit or traverse on my bicycle. In the past 20 years, I do not recall ever seeing a police officer in the remote areas of the County's parks or bike trails I regularly use, and I rarely recall seeing police officers anywhere in these parks and bike trails, even in busier places where people tend to congregate, such as the Wakefield Park Farmers' Market I frequently visit. In fact, most of the bike trails I ride on are heavily wooded, from Pickett Road in Fairfax to Lake Accotink in Springfield, and oftentimes there are not many people around when I ride. I do not recall ever seeing school classes, scout troops or similar youth groups congregating on the sections of the trail that I frequently ride. In contrast, I do recall seeing vagrants, people who appeared homeless, and gang-like activity on these trails.

10. Section 6-2-1(A)(4) of the Ordinance provides in pertinent part: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in . . . any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the

public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." The Ordinance fails to provide any standard or distance for what may be "adjacent to" such event.

11. At any time on a public street or road or otherwise, I may find myself in a motor vehicle with a firearm when I pass through or park in an area "adjacent" to a covered event. I will be in violation of the Ordinance even if I do not know I am in an area adjacent to an event that is permitted or should have a permit. Even if I have such knowledge, I would be just passing through the vicinity en route to another destination. Under either alternative, the prohibition infringes on my right to keep and bear arms.

12. Persons of common intelligence, including me, must necessarily guess at the Ordinance's meaning, which also invites arbitrary and discriminatory enforcement. No standard in distance or otherwise is provided for what is "adjacent" to any such event. Since no measurement in feet, yards, or otherwise is specified for what is "adjacent," I am left to guess, and the County police or other authorities are free to arbitrarily decide the distance. For example, my home borders on an active Catholic parish and school (St. Ambrose), which itself borders on Fairfax County's Pine Ridge/Winterset police center and its associated soccer field and playground. I am never sure if the Catholic parish is holding a permitted event, or an event that should be permitted but is not. The parish and school often uses the County's soccer field at Pine Ridge/Winterset Park, with which it shares a property border. In addition to the parish, many soccer games and other large community

or public events take place at the Pine Ridge/Winterset soccer field, and I am never sure whether those events on County property are permitted or require a permit. I frequently traverse these areas, including the Pine Ridge/Winterset soccer field, when I walk or bike in and around my own neighborhood. Because the term "adjacent" is not defined in the Ordinance, I cannot know with certainty if my own home is considered "adjacent" to the parish and/or the Pine Ridge/Winterset soccer field simply because we share common property lines. The same is true when I walk around my own neighborhood near the County's Pine Ridge/Winterset property.

13. I also have no basis to know if an activity is "an event that would otherwise require a permit" or what area is "being used by or is adjacent to" such event. In essence the Ordinance requires me to determine if a permit is required for some "event" about which I know nothing, thereby subjecting me to prosecution under the Ordinance. I believe the Fairfax County Code of Ordinances includes numerous, complex provisions regarding events that require a permit, and they are not within the knowledge of ordinary people. Ordinary people like me cannot be expected to know, on a day-to-day and moment-to-moment basis, that some activity on County property (such as a soccer field) is an "event," what events require a permit under the County's Ordinances, or to apply the Ordinance to determine whether the activity is an "event" that requires a permit.

14. Section 6-2-1(A)(4) of the Ordinance is particularly egregious because it requires me to make an on-the-spot

determination, in seconds while biking, walking or driving, of whether some occurrence is an "event" requiring a permit. This causes me to either to risk arrest and prosecution or to avoid the constitutionally permissible conduct of keeping and bearing arms based on a fear that I may be violating an unclear and ambiguous law. This dilemma, caused directly by the Ordinance, plainly inhibits the exercise of my constitutionally protected activities.

15. I understand the County to claim, based on the Chief of Police's directive, that no person will be arrested under the Ordinance unless signs are posted in that location to notify citizens of the Ordinance's restrictions. I believe this assertion is farcical. I frequently ride my bicycle on the Gerry Connolly Cross County Trail between the Fairfax City area near Pickett Road and Lake Accotink Park, a distance I estimate to be about 12 miles. There are many dozens (if not hundreds) of places one can access or leave the Cross County Trail within those 12 miles, and I have seen only 3 or 4 warning signs posted on the entire length of this trail, at 3 or 4 specified access points. The dozens (or hundreds) of other ingress and egress points do not have signs posted. For example, I can and often do access the Cross County Trail from places that have no signs posted, such as at King Arthur Road, Camelot Drive or Woodburn Road in Annandale. When I access the trail from an unmarked point, such as the streets mentioned above, I am unsure, even under the Chief of Police's directive, if I am subject to arrest if I carry a concealed weapon.

Appendix G

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. I have personal knowledge of all matters discussed above, and if called upon I could testify to them.

Executed this 20th day of March, 2024.

/s/ Glenn M. Taubman
Glenn M. Taubman

APPENDIX H — DECLARATION OF ROBERT HOLZHAUER IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, DATED APRIL 24, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No: 1:23-cv-1605-WBP

KIMBERLY LAFAVE, *et al.*,

Plaintiffs,

v.

THE COUNTY OF FAIRFAX, VIRGINIA, *et al.*,

Defendants.

April 24, 2024

DECLARATION OF ROBERT HOLZHAUER

I, Robert Holzhauer, do hereby declare:

1. I am a resident of Fairfax County, Virginia, and a citizen of the United States.

2. I was a commissioned police officer for eleven years and a member of the U.S. Army for 27 years, retiring as a Lieutenant Colonel with an Honorable Discharge and a 100% permanent, total disability. Since becoming a County

resident in 2004, I have used Fairfax County Parks for 3-4 days a week, and sometimes on a daily basis, minus deployment periods in Iraq, Yemen, Libya, and Liberia.

3. I have a permit to carry a concealed handgun. When hiking in remote areas of the Fairfax County parks, I carried a handgun for protection from potential criminals and wild animals, like bears, which have accosted me. My disability creates a particular need to carry a handgun for self-defense.

4. When informed of the subject Ordinance, I discontinued carrying a handgun in the parks for fear of prosecution. But for the Ordinance, I would continue to carry a concealed handgun in the parks.

5. Before the Ordinance's enactment, I possessed, carried, and transported firearms, on my person or in my vehicle, on the public streets, roads, alleys, sidewal. ks, public rights-of-way, and other places that are open to the public in Fairfax County. I continue doing so while being unaware that such places are being used by or are adjacent to a permitted event or an event that would otherwise require a permit. When I am aware of such events, I must either not carry or possess a firearm or must endeavor to avoid such locations.

6. Furthermore, I have no idea what places in the County are "owned or controlled" by Fairfax County unless they are posted as such, making avoidance of such properties impractical. Other than to vote early at a library, I have not knowingly used Fairfax County

properties. On that occasion, I was unable to carry concealed, as it was a polling place covered by a separate law not challenged in this suit.

7. Should I possess, carry, or transport firearms at the places specified in§ 6-2-1(A)(4), regardless of whether I am aware of the event or that I am at a place adjacent to such event, I am subject to arrest and prosecution.

8. Because the Ordinance deprives me of the ability to have firearms for lawful self-defense in County parks, or upon county property, it subjects me to potential assault, robbery, murder, and other violent crimes.

9. Section 6-2-1(A)(4) of the Ordinance provides in pertinent part: "The possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof is prohibited in . . . any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." It fails to provide any standard or distance for what may be "adjacent to" such event.

10. At any time on a public street or road or otherwise, I may find myself in a motor vehicle with a firearm when I pass through or park in an area adjacent to an affected event. I will be in violation even if I do not know I am in an area adjacent to an event that is permitted or should have a permit. Even if I have such knowledge, I would be just passing through the vicinity enroute to another

destination. Under either alternative, the prohibition infringes on my right to keep and bear arms.

11. Persons of common intelligence, including me, must necessarily guess at the Ordinance's meaning, which also invites arbitrary and discriminatory enforcement. No standard in distance or otherwise is defined for what is "adjacent" to any such event. Since no measurement in feet, yards, or otherwise is specified for what is "adjacent," I am left to guess, and the County police or other authorities are free to arbitrarily decide the distance.

12. I have no basis to know if an activity is "an event that would otherwise require a permit" or what area "being used by or is adjacent to" such event. This requires me to determine if a permit is required for some "event" about which I know nothing, thereby subjecting me to prosecution under the Ordinance. The Fairfax County Code of Ordinances includes numerous, complex provisions on events that require a permit, and they are not within the knowledge of ordinary people like me. Ordinary people like me cannot be expected to know that some activity is an "event," what events require a permit under an ordinance, and to apply the ordinance to determine whether the activity is an event that requires a permit.

13. Section 6-2-1(A)(4) is particularly egregious because it requires people to make an on-the-spot determination in seconds while walking or driving of whether something is an event requiring a permit. This causes me to either to risk arrest and prosecution

or to avoid the constitutionally permissible conduct of keeping and bearing arms based on a fear that I may be violating an unclear law, and thus inhibits the exercise of constitutionally protected activities.

I declare under penalty of perjury that the foregoing is true and correct. I have personal knowledge of all matters discussed above, and if called upon I could testify to them.

Executed this 24th day of April, 2024.

/s/ Robert Holzhauer
Robert Holzhauer