IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: TENNESSEE SUPREME COURT RULE 54 - 3 JUDGE PANEL

STEPHEN L. HUGHES, ET AL. V. BILL LEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TENNESSEE, ET AL.

Chancery Court for Gibson County
No. 24475

No. ADM2021-00775

ORDER

Upon due consideration, we affirm the decision of the Presiding Judge pursuant to Tenn. Sup. Ct. R. 54 that the statutory criteria for a three-judge panel under Tennessee Code Annotated section 20-18-101 have been satisfied. Accordingly, the three-judge panel will be composed of:

1. Chancellor Michael Mansfield, see Tenn. Sup. Ct. R. 54, § 3(b)(1);

2. Judge M. Wyatt Burk, Middle Grand Division, see Tenn. Sup. Ct. R. 54, § 3(b)(2); and

3. Judge Lisa Nidiffer Rice, Eastern Grand Division, see Tenn. Sup. Ct. R. 54 § 3(b)(2).

Chancellor Michael Mansfield shall serve as chief judge of the special three-judge panel. See Tenn. Sup. Ct. R 54 § 3(c).

It is so ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: TENNESSEE SUPREME COURT RULE 54 - 3 JUDGE PANEL

No. ADM2021-00775

Date Printed: 03/21/2023 **Notice / Filed Date: 03/20/2023**

NOTICE - Notice (Incoming) - Notice of Filing

RECEIVED - SCT Rule 54 Initial Determination regarding HUGHES, ET AL. v. BILL LEE, ET AL. - Gibson County Chancery Court No. T-24475

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

Filed 3/23/23 @ 11:44 AM
Katelyn Orgain, Clerk & Master
By: Katelyn Orgain D.C.M.

Supreme Court – Middle Division
Appellate Court Clerk's Office - Nashville
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407
(615) 741-2681

Gibson County (Trenton) Clerk & Master
Gibson County (Trenton) Chancery Court
P. O. Box 290
Chancery Bldg., 204 North Court Square
Trenton TN 38382

Re: ADM2021-00775 - IN RE: TENNESSEE SUPREME COURT RULE 54 - 3 JUDGE PANEL

Notice: Notice (Incoming) - Notice of Filing

Attached to this cover letter, please find the referenced notice issued in the above case. If you have any questions, please feel free to call our office at the number provided.

cc: Judge Clayburn Peeples
Gibson County (Trenton) Chancery Court

IN THE CHANCERY COURT OF GIBSON COUNTY, TENNESSEE
FOR THE TWENTY-EIGHTH JUDICIAL DISTRICT AT TRENTON

STEPHEN L. HUGHES,
DUNCAN O'MARA, ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC.,
and GUN OWNERS FOUNDATION,

Plaintiffs,

v.

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

Defendants.

Docket T-#24475

Filed 3/20/23 @ 1:29 PM
Katelyn Orgain, Clerk & Master
By: Katelyn Orgain D.C.M.

AS PER SECTION 3 OF TENNESSEE SUPREME COURT RULE 54, THE PRESIDING JUDGE OF THE 28TH JUDICIAL DISTRICT HEREBY SUBMITS ITS ". . . INITIAL DETERMINATION AS TO WHETHER THE ACTION FILED QUALIFIES UNDER THE PROVISIONS OF SECTION 1 REQUIRING THE EMPANELING OF A SPECIAL THREE JUDGE PANEL"

---

1. Tennessee Code Annotated § 20-18-101 provides, in part, that:

(a) A civil action in which the complaint meets each of the following criteria must be heard and determined by a three-judge panel pursuant to this chapter:

(1) Challenges the constitutionality of:

(A) A state statute, including a statute that apportions or redistricts state legislative or congressional districts;

(B) An executive order; or

(C) An administrative rule or regulation;

(2) Includes a claim for declaratory judgment or injunctive relief; and

(3) Is brought against the state, a state department or agency, or a state official acting in their official capacity.

Tenn. Code Ann. § 20-18-101(a). Section 1 of Tennessee Supreme Court Rule 54, Interim Rule for Special Three-Judge Panels, essentially adopts the language of Tenn. Code Ann. § 20-18-101(a).

2. The Complaint filed in this case in the Gibson County Chancery Court states that the Plaintiffs are Stephen L. Hughes, Duncan O'Mara, Elaine Kehel, Gun Owners of America, Inc., and Gun Owners Foundation. The Defendants are Bill Lee, Governor for the State of Tennessee, and Johnathan Skrmetti, Attorney General for the State of Tennessee, both in their official capacity only.

The Plaintiffs filed their initial Complaint seeking a declaratory judgment and injunctive relief against the state pursuant to Tenn. Code Ann. § 29-14-102, Tenn. Code Ann. § 1-3-121, and any other applicable provision or doctrine of law. The Individual Plaintiffs are residents of the State of Tennessee who desire to possess or carry a firearm with the intent of being armed, and desire to do so in ordinary places such as public parks and other public recreational venues. However, if they do so, they allege that they are subject to stops by law enforcement and to criminal prosecution by the State pursuant to the provisions of Tenn. Code Ann. § 39-17-1307 and/or § 39-17-1311. Plaintiffs contend that Tennessee's statutory scheme places them at risk of serious criminal charges if they engage in constitutionally protected activity and, with respect to the limited exceptions provided in the statute, burdens them to prove or assert that they have a statutory defense or exception when facing a criminal charge. Plaintiffs contend that the challenged statutory prohibitions on possessing firearms in public places violate their right to possess arms as protected by Article I, Section 26 of the Tennessee Constitution. The Plaintiffs

seek a preliminary injunction halting enforcement and further implementation of these allegedly unconstitutional statutes. Counsel for Plaintiffs filed a Supreme Court Rule 54 Notice.

3. The Plaintiffs' notice pursuant to Tennessee Supreme Court Rule 54, Interim Rule for Special Three-Judge Panels, states that their civil action filed in the Gibson County Chancery Court Clerk's Office names Bill Lee, Governor, and Johnathan Skrmetti, Attorney General for the State of Tennessee, in their official capacity, only. Therefore, Tenn. Code Ann. § 20-18-101(a)(3) is satisfied.

Plaintiffs further allege that the Tennessee statutes at issue in the case infringe upon their right to bear arms as protected by Article I, Section 26 of the Tennessee constitution by making it a criminal act for any individual to possess or carry "with the intent to go armed" a firearm in "or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes." The Complaint presents a challenge to the constitutionality of those state statutes and includes claims for declaratory and/or injunctive relief. Therefore, the requirements of Tenn. Code Ann. § 20-18-101(a)(1)(A) and (a)(2) are likewise satisfied in this case.

4. After a review of the Plaintiffs' notice, Plaintiffs' Complaint, and the provisions of Tenn. Code Ann. § 20-18-101 and Tennessee Supreme Court Rule 54, this Court is of the opinion that the requirements of such statute and rule are satisfied in this case. The Court understands, however, that the ultimate decision on all of these issues rests with the Justices of the Tennessee Supreme Court.

IT IS SO ORDERED.

Entered this 17 day of March 2023.

CLAYBURN PEEPLES, Presiding Judge
Twenty-Eighth Judicial District

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been forward to the following by electronic mail and/or regular US Mail, postage pre-paid to:

James M. Hivner, Tennessee Supreme Court Clerk
appellatecourtclerk@tncourts.gov

John I Harris III
Schulman, LeRoy & Bennett PC
3310 West End Avenue, Suite 460
Nashville, Tennessee 37203
615-244-6670
jharris@slblawfirm.com
Attorney for the Plaintiffs

Cody N. Brandon
Assistant Attorney General
Office of the Tennessee Attorney General and Reporter
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-532-7400
Cody.Brandon@ag.tn.gov
Attorney for the Defendants

This the 20 day of March, 2023.

D.C.M.

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

STEPHEN L. HUGHES, DUNCAN O'MARA, ELAINE KEHEL, GUN OWNERS OF AMERICA, INC., and GUN OWNERS FOUNDATION,	)	
Plaintiffs,	)	
v.	)	**No. 24475**
BILL LEE, in his official capacity as the Governor for the State of Tennessee, and JONATHAN SKRMETTI, in his official capacity as the Attorney General for the State of Tennessee,	)	
Defendants.	)	

NOTICE OF APPEARANCE

The undersigned counsel hereby gives notice of his appearance as counsel on behalf of Defendants Governor Bill Lee and Attorney General Jonathan Skrmetti, and requests that court notices and service of all motions and other papers be directed to the undersigned counsel.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ Cody N. Brandon
CODY N. BRANDON (BPR# 37504)
Assistant Attorney General
Law Enforcement and
Special Prosecutions Division
Office of the Tennessee
Attorney General and Reporter
P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 532-7400
Cody.Brandon@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was filed with the clerk and served by mail with a courtesy copy sent by email, on this the 7th day of March 2023, upon:

John I. Harris
Schulman, LeRoy & Bennett PC
3310 West End Avenue, Suite 460
Nashville, Tennessee 37203
jharris@slblawfirm.com

/s/ Cody N. Brandon
CODY N. BRANDON

Gibson County, Tennessee 28th Judicial District Chancery Court	**STATE OF TENNESSEE** **CIVIL SUMMONS**	Case Number 24475

STEPHEN L. HUGHES, DUNCAN O'MARA, ELAINE KEHEL, GUN OWNERS OF AMERICA, INC. and GUN OWNERS FOUNDATION Vs. **BILL LEE, in his capacity as the Governor for the State of Tennessee, and JONATHAN SKRMETTI, in his official capacity as the Attorney General for the State of Tennessee**

Served On: Jonathan Skrmetti, Attorney General and Reporter
P.O. Box 20207, Nashville, TN 37202-0207

SERVICE COPY - RETURN TO CLERK

You are hereby summoned to defend a civil action filed against you in Chancery Court, Gibson County, Tennessee. Your defense must be made within thirty (30) days from the date this summons is served upon you. You are directed to file your defense with the clerk of the court and send a copy to the plaintiff's attorney at the address listed below. If you fail to defend this action by the below date, judgment by default may be rendered against you for the relief sought in the complaint.

Issued: February 16, 2023 Katelyn Orgain by Kim Nelan
Clerk / Deputy Clerk

Attorney for Plaintiff: John I. Harris, III, #12099, Schulman, LeRoy & Bennett, P.C.
3310 West End Ave, Ste 460, Nashville, TN 37203 ph: 615-244-6670

NOTICE OF PERSONAL PROPERTY EXEMPTION

TO THE DEFENDANT(S): Tennessee law provides a ten thousand dollar ($10,000) personal property exemption as well as a homestead exemption from execution or seizure to satisfy a judgment. The amount of the homestead exemption depends upon your age and the other factors which are listed in TCA § 26-2-301. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt with the clerk of the court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for your self and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible, and school books. Should any of these items be seized you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer. Please state file number on list.

Mail list to Katelyn Orgain, Clerk and Master, Chancery Clerk, Gibson County
204 N. Courtsquare, Trenton, Tennessee 38382

CERTIFICATION (IF APPLICABLE)

I, _____, _____ Clerk of _____ County do certify this to be a true and correct copy of the original summons issued in this case.

Date: _____ _____
Clerk / Deputy Clerk

OFFICER'S RETURN: Please execute this summons and make your return within ninety (90) days of issuance as provided by law.

I certify that I have served this summons together with the complaint as follows: _____

_____

Date: _____ By: _____
Please Print: Officer, Title

_____ _____
Agency Address Signature

RETURN ON SERVICE OF SUMMONS BY MAIL: I hereby certify and return that on 2·21·2023 I sent postage prepaid, by registered return receipt mail or certified return receipt mail, a certified copy of the summons and a copy of the complaint in the above styled case, to the defendant Jonathan Skrmetti. On 2·27·2023 I received the return receipt, which had been signed by Harry Sherrell on 2·23·2023. The return receipt is attached to this original summons to be filed by the Court Clerk.

Date: 2·27·2023 Christy Frizzell
Notary Public / Deputy Clerk (Comm. Expires 5-7-2024)

_____ _____
Signature of Plaintiff Plaintiff's Attorney ~~(or Person Authorized to Serve Process)~~

(Attach return receipt on back)

CHRISTY FRIZZELL NOTARY PUBLIC STATE OF TENNESSEE DAVIDSON COUNTY

ADA: If you need assistance or accommodations because of a disability, please call Gibson County Chancery Court, ADA Coordinator, at (731) 855-7639.

Rev. 03/11

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Jonathan Skrmetti
Attorney General and Reporter
P.O. Box 20207
Nashville, Tennessee 37202-0207

9590 9402 7519 2098 1449 94

2. Article Number *(Transfer from service label)*
7021 2720 0001 2533 8647

COMPLETE THIS SECTION ON DELIVERY

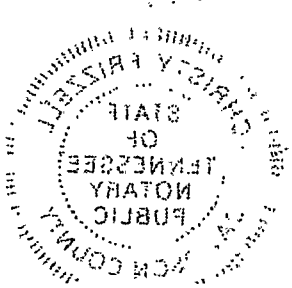
A. Signature
Amy Sewell ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* C. Date of Delivery
2/23/23

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2020 PSN 7530-02-000-9053 Domestic Return Receipt



SERVICE COPY - RETURN TO CLERK

Gibson County, Tennessee 28th Judicial District Chancery Court	**STATE OF TENNESSEE** **CIVIL SUMMONS**	Case Number 24475

STEPHEN L. HUGHES, DUNCAN O'MARA, ELAINE KEHEL, GUN OWNERS OF AMERICA, INC. and GUN OWNERS FOUNDATION Vs. **BILL LEE, in his capacity as the Governor for the State of Tennessee, and JONATHAN SKRMETTI, in his official capacity as the Attorney General for the State of Tennessee**

Served On: Bill Lee, Governor State of Tennessee, serve on Jonathan Skrmetti, Attorney General and Reporter, P.O. Box 20207, Nashville, TN 37202-0207

You are hereby summoned to defend a civil action filed against you in Chancery Court, Gibson County, Tennessee. Your defense must be made within thirty (30) days from the date this summons is served upon you. You are directed to file your defense with the clerk of the court and send a copy to the plaintiff's attorney at the address listed below. If you fail to defend this action by the below date, judgment by default may be rendered against you for the relief sought in the complaint.

Issued: February 16, 2023 Katelyn Orgain by Kim Nolan
Clerk / Deputy Clerk

Attorney for Plaintiff: John I. Harris, III, #12099, Schulman, LeRoy & Bennett, P.C.
3310 West End Ave, Ste 460, Nashville, TN 37203 ph: 615-244-6670

NOTICE OF PERSONAL PROPERTY EXEMPTION

TO THE DEFENDANT(S): Tennessee law provides a ten thousand dollar ($10,000) personal property exemption as well as a homestead exemption from execution or seizure to satisfy a judgment. The amount of the homestead exemption depends upon your age and the other factors which are listed in TCA § 26-2-301. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt with the clerk of the court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for your self and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible, and school books. Should any of these items be seized you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer. Please state file number on list.

Mail list to Katelyn Orgain, Clerk and Master, Chancery Clerk, Gibson County
204 N. Courtsquare, Trenton, Tennessee 38382

CERTIFICATION (IF APPLICABLE)

I, _____, _____ Clerk of _____ County do certify this to be a true and correct copy of the original summons issued in this case.

Date: _____ _____
Clerk / Deputy Clerk

OFFICER'S RETURN: Please execute this summons and make your return within ninety (90) days of issuance as provided by law.

I certify that I have served this summons together with the complaint as follows: _____

_____

Date: _____ By: _____
Please Print: Officer, Title

_____ _____
Agency Address Signature

RETURN ON SERVICE OF SUMMONS BY MAIL: I hereby certify and return that on 2·21·2023, I sent postage prepaid, by registered return receipt mail or certified return receipt mail, a certified copy of the summons and a copy of the complaint in the above styled case, to the defendant Bill Lee, c/o Jonathan Skrmetti. On 2·27·2023 I received the return receipt, which had been signed by Harry Sherrell on 2·23·2023. The return receipt is attached to this original summons to be filed by the Court Clerk.

Date: 2·27·2023 Christy Frizzell
Notary Public / Deputy Clerk (Comm. Expires 5-7-2024)

_____ _____
Signature of Plaintiff Plaintiff's Attorney ~~(or Person Authorized to Serve Process)~~

(Attach return receipt on back)

CHRISTY FRIZZELL NOTARY PUBLIC STATE OF TENNESSEE DAVIDSON COUNTY

ADA: If you need assistance or accommodations because of a disability, please call Gibson County Chancery Court, ADA Coordinator, at (731) 855-7639

Rev. 03/11

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Bill Lee, Governor State of Tennessee
c/o Jonathan Skrmetti
Attorney General and Reporter
P.O. Box 20207
Nashville, Tennessee 37202-0207

9590 9402 7519 2098 1450 07

2. Article Number *(Transfer from service label)*
7021 2720 0001 2533 8807

COMPLETE THIS SECTION ON DELIVERY

A. Signature
Harry Sterrell ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* | C. Date of Delivery
2/22/2023

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2020 PSN 7530-02-000-9053 Domestic Return Receipt

CHRISTY FRIZZELL
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY

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

STEPHEN L. HUGHES, **DUNCAN O'MARA,** **ELAINE KEHEL,** **GUN OWNERS OF AMERICA, INC. and** **GUN OWNERS FOUNDATION** Plaintiffs, v. **BILL LEE, in his official capacity as the Governor for the State of Tennessee, and JONATHAN SKRMETTI, in his official capacity as the Attorney General for the State of Tennessee** Defendants.	**Civil No: 24475**

PLAINTIFFS' SUPREME COURT RULE 54 NOTICE

Plaintiffs submit this notice pursuant to Tennessee Supreme Court Rule 54:

1. **Parties and counsel**. The Plaintiffs are

Stephen L. Hughes, Duncan O'Mara, Elaine Kehel, Gun Owners of America, Inc., and Gun Owners Foundation. All plaintiffs are represented by

John I. Harris III
Schulman, LeRoy & Bennett PC
3310 West End Avenue, Suite 460
Nashville, Tennessee 37203
Office: 615 244-6670
Fax: 615 254-5407
jharris@slblawfirm.com

The Defendants are, Governor Bill Lee and Attorney General Jonathan Skrmetti, each in their official capacities. Presumably, the office of the Attorney General will represent the defendants.

Jonathan Skrmetti
Attorney General and Reporter

State of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207

2. The cause number and style of the case, the trial court in which it is pending, and, if available, the name of the judge to whom it is assigned are set forth above. The clerk's office indicates that the case has been assigned to Chancellor Michael Mansfield.

3. Summary of the dispute, description of the constitutional claims asserted against the state or a state official, department, or agency, and summarize the declaratory or injunctive relief sought.

Tennessee law infringes the right to bear arms as protected by Article I, Section 26 of the Tennessee Constitution, by making it a criminal act for any individual to possess or carry, "with the intent to go armed," a firearm in "or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes." Tennessee Code Annotated § 39-17-1311(a). Further, Tennessee Code Annotated § 39-17-1307(a) makes it a crime to "carry, with intent to go armed, a firearm…" anywhere in the state, thus defining the entire state as a gun free zone. Tennessee's Constitutional provision is the state's equivalent to the Second Amendment and under *McDonald v. City of Chicago*, 561 U.S. 742 (2010) it cannot be interpreted to allow any government regulation that is greater than that permissible under the 2nd and 14th Amendments.

In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court stated that the Second and Fourteenth Amendments together guarantee individuals not only the right to "keep" firearms in their homes, but also the right to "bear arms" in public, meaning the

ability of "ordinary, law-abiding citizens" to carry constitutionally protected arms "for self-defense outside the home," free from infringement by either federal or state governments. *Id.* at 2122, 2134. The *Bruen* Court held that, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen* at 2126.

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

There is no historical national tradition of banning firearms in any of the categories of places enumerated in Tennessee Code Annotated § 39-17-1311(a) – not in 1868, and certainly not in 1791. Nor as of the relevant time was there a national historical tradition of a state banning firearms possession throughout the state such Tennessee Code Annotated § 39-17-1307(a) does at this time. Such locations are far from the types of "sensitive places" the Supreme Court has identified in its cases, but rather represent entirely ordinary locations that members of the general

public use for a variety of purposes. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *Bruen* at 2133–34. Moreover, because parks and the other locations enumerated in the statute add up to a significant portion of Tennessee's total geographical area, they violate *Bruen*'s express warning not to turn large areas into sensitive places simply because people tend to gather there. *Bruen* at 2134. As the challenged statutes violate Plaintiffs' constitutional rights, Plaintiffs seek a declaration that they are unconstitutional and an order imposing a preliminary and permanent injunction against any governmental enforcement of these statutes.

4. **A copy of the Complaint is attached to this notice.**

Respectfully submitted:

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

Certificate of Service

A copy of the foregoing is being served on all defendants with a service copy of the complaint.

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

STEPHEN L. HUGHES,
DUNCAN O'MARA,
ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC. and
GUN OWNERS FOUNDATION

Plaintiffs,

v.

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

Defendants.

Civil No: 24475

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

Plaintiffs Stephen L. Hughes, Duncan O'Mara, Elaine Kehel, Gun Owners of America, Inc., and Gun Owners Foundation bring this suit for declaratory and injunctive relief under Tennessee Code Annotated § 29-14-102, Tennessee Code Annotated § 1-3-121, and any other applicable provision or doctrine of law. The Individual Plaintiffs are residents of the State of Tennessee who desire to possess or carry a firearm with the intent of being armed, and desire to do so in ordinary places such as public parks and other public recreational venues. However, if they do so, they are subject to stops by law enforcement and criminal prosecution by the State, pursuant to the provisions of Tennessee Code Annotated § 39-17-1307 and/or § 39-17-1311. Plaintiffs contend that Tennessee's statutory scheme places them at risk of serious criminal charges if they engage in constitutionally protected activity and, with respect to the limited

exceptions provided in the statute, burdens them to prove or assert that they have a statutory defense or exception when facing a criminal charge. Plaintiffs contend that the challenged statutory prohibitions on possessing firearms in public places violate their right to possess arms as protected by Article I, Section 26 of the Tennessee Constitution. Plaintiffs further seek a preliminary injunction, halting enforcement and further implementation of these unconstitutional statutes, until a decision on the merits can be reached.

THE PARTIES

1. Plaintiff Stephen L. Hughes is a natural person and a citizen of the United States and the State of Tennessee, who is a legal possessor of at least one firearm and who currently possesses a Tennessee "enhanced" handgun carry permit. He resides in Gibson County, Tennessee. He has no disqualification under any state or federal law which would prohibit him from possessing a firearm, and is a member of Gun Owners of America

2. Plaintiff Duncan O'Mara is a natural person and a citizen of the United States and the State of Tennessee, who is a legal possessor of at least one firearm and who currently possesses a Tennessee "enhanced" handgun carry permit. He resides in Crockett County, Tennessee. He has no disqualification under any state or federal law which would prohibit him from possessing a firearm, and is a member of Gun Owners of America.

3. Plaintiff Elaine Kehel is a natural person and a citizen of the United States and the State of Tennessee, who is a legal possessor of at least one firearm and who currently does not possess a Tennessee "enhanced" handgun carry permit or a Tennessee "concealed" handgun carry permit. She resides in Gibson County, Tennessee. She is qualified and able to carry a handgun in Tennessee in public pursuant to Tennessee Code Annotated § 39-17-1307(g) (the

"2021 Permitless Carry Law"). She has no disqualification under any state or federal law which would prohibit her from possessing a firearm, and is a member of Gun Owners of America.

4. Plaintiff Gun Owners of America, Inc. ("GOA") is a California non-stock corporation with its principal place of business in Springfield, Virginia. GOA is organized and operated as a non-profit membership organization that is exempt from federal income taxes under Section 501(c)(4) of the U.S. Internal Revenue Code. GOA was formed in 1976 to preserve and defend the Second Amendment rights of gun owners. GOA has more than 2 million members and supporters across the country, including many who reside throughout the State of Tennessee and in Gibson County, Tennessee.

5. Plaintiff Gun Owners Foundation ("GOF") is a Virginia not-for-profit, non-stock corporation with its principal place of business in Springfield, Virginia. GOF is organized and operated as a non-profit legal defense and educational foundation that is exempt from federal income taxes under Section 501(c)(3) of the U.S. Internal Revenue Code. GOF is supported by gun owners across the country, including within the State of Tennessee.

6. GOA and GOF bring this action in a representational capacity on behalf of, and asserting the interests of, their members and supporters in Tennessee. For example, GOA has many thousands of members and supporters across the State of Tennessee, including within Gibson County, many of whom are being irreparably harmed by the challenged provisions. Each of these persons would have standing to challenge Tennessee Code Annotated § 39-17-1311 in their own right. Protection of these members' and supporters' rights and interests is germane to the mission of GOA and GOF, which is to preserve and protect the rights of Americans to keep and bear arms, including against infringement by anti-gun politicians and unconstitutional state statutes. Litigation of the challenges raised in this case does not require

participation of each of GOA and GOF's members and supporters. GOA and GOF are fully and faithfully representing the interests of their members and supporters without participation by each of these individuals. Indeed, GOA and GOF routinely litigate cases on behalf of their members and supporters across the nation.

7. Many of the gun owners represented in this matter by GOA and GOF, like the Individual Plaintiffs, wish to possess and carry firearms in the areas made entirely off-limits (or subject to vague "defenses" and "exceptions") by Tennessee Code Annotated § 39-17-1311(a), including those members and supporters who are eligible to carry handguns without permits and those individuals between the ages of 18–21 who are ineligible to carry handguns without permits.

8. Bill Lee is the Governor of Tennessee and is sued in his official capacity as the official representative of the State of Tennessee. The Governor is a proper party to a declaratory judgment action seeking to invalidate and/or enjoin the application of a criminal statute to a citizen.

9. Jonathan Skrmetti is the Attorney General for the State of Tennessee and is sued in his official capacity. The Attorney General is a proper party to a declaratory judgment action seeking to invalidate and/or enjoin the application of a criminal statute to a citizen. *See* Tennessee Code Annotated § 29-14-107.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to Tennessee Code Annotated §§ 16-11-101 and 16-11-102 and Tennessee Code Annotated § 29-14-102.

11. Venue lies in this Court pursuant to Tennessee Code Annotated § 20-4-104 because the Individual Plaintiffs are all residents of the 28th Judicial District and the circumstances giving to these claims arose in this judicial district.

STATEMENT OF FACTS

12. The Individual Plaintiffs each desire to be able to carry a firearm in a public park or other area enumerated in Tennessee Code Annotated § 39-17-1311(a). See Affidavits of Stephen L. Hughes, Duncan O'Mara and Elaine Kehel filed herewith. However, each of them is unable to do so without risk of being stopped and/or detained by law enforcement and potentially charged with a criminal offense because of the prohibitions contained in Tennessee Code Annotated § 39-17-1311(a). For some of these prohibited categories of locations, § 39-17-1311(b)(H) and (I) provide a limited affirmative defense to a criminal charge. Others of these prohibited categories of locations are entirely off-limits to the possession of firearms, irrespective of whether a person has a permit to carry.

13. Like the Individual Plaintiffs, GOA and GOF's members and supporters desire to carry firearms in a public park or other area(s) enumerated in Tennessee Code Annotated § 39-17-1311(a). As set forth more fully below, Tennessee Code Annotated § 39-17-1311(a) defines as an offense, and potentially a felony offense, an individual carrying certain weapons in certain areas. Further, Tennessee's statutes place the risk and burden of defending against any such criminal charges on the Individual Plaintiffs and GOA and GOF's members and supporters as individuals. *See* Tennessee Code Annotated § 39-17-1308.

14. As a result of the existence of the offense set forth in Tennessee Code Annotated § 39-17-1311(a), the Individual Plaintiffs and the members and supporters of GOA and GOF, respectively, are forced to disarm themselves before going into the places enumerated in that

section, in order to attempt to avoid any risk of being stopped, questioned, detained, and/or charged by the State and even subjected to a criminal prosecution and trial for a potential violation of that section. As a result of the challenged provisions, Plaintiffs' constitutional rights are infringed, and their personal safety and security is endangered.

15. Plaintiffs, respectively, would carry a firearm in the places enumerated in Tennessee Code Annotated § 39-17-1311(a) for lawful purposes, including self-defense and defense of third parties in their accompaniment, but for the existence of the criminal offenses set forth in that statute.

Tennessee Statutes

16. Tennessee Code Annotated § 39-17-1311(a) generally prohibits certain weapons, possessed "with the intent to go armed," in "or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes." The weapons subject to this general prohibition are enumerated in Tennessee Code Annotated § 39-17-1302(a) ("Prohibited Weapon(s)").

17. Prohibited Weapons include machine guns, explosives, and other weapons that allegedly "ha[ve] no common lawful purpose." Tennessee Code Annotated § 39-17-1302(a).

18. Interestingly enough, a handgun is not an enumerated Prohibited Weapon. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-11-106(a)(19) (defining "handgun"). Neither is a rifle. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-17-1301(13) (defining "rifle"). Neither is a shotgun. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-17-1301(15) (defining "shotgun").

19. In fact, firearms in general — provided they are not machine guns under Tennessee law — are *not* enumerated Prohibited Weapons. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-11-106(a)(13) (defining "firearm"); § 39-17-1301(10) (defining "machine gun"). One thus might conclude that, at first blush, Section 39-17-1311(a) does not apply to the carry of firearms. But one would be wrong.

20. First, after establishing the general prohibition against possessing or carrying Prohibited Weapons on public recreational properties, Subsection (b) of Section 39-17-1311 provides a list of exceptions to which "Subsection (a) shall not apply." Notable among these exceptions are carveouts for persons carrying handguns with "enhanced" or "concealed" handgun carry permits and others who "strictly conform[]" their behavior to enumerated scenarios. Tennessee Code Annotated § 39-17-1311(b)(1)(H), (I), and (J). In fact, Subsection (b)(2) of the statute warns that "[a]t any time the person's behavior no longer strictly conforms to one (1) of the classifications in Subsection (b)(1), the person shall be subject to subsection (a)." In that sense, Subsection (b) exempts conduct that Subsection (a) does not criminalize.

21. Indeed, even if a person carrying a handgun, rifle, shotgun, or indeed any common firearm did *not* conform their behavior to an exception under Subsection (b), Subsection (a) still criminalizes only enumerated *Prohibited Weapons*, which does not include handguns, rifles, shotguns, or other common firearms.

22. Notwithstanding the vagueness and ambiguity of the statute, the Tennessee Attorney General has opined that Tennessee Code Annotated § 39-17-1311 actually prohibits — in addition to the Prohibited Weapons exclusively listed — the "possession of *other types of weapons* on recreational property owned or operated by state, county, or municipal governments

at any time the person's conduct does not strictly conform to the requirements of [Subsection (b)]." Tennessee Attorney General Opinion 18-04 (January 31, 2018) (emphasis added).

23. Under this interpretation of the law, rifles and shotguns are prohibited even within the otherwise exempted "public park, natural area, historic park, nature trail, campground, forest, greenway, waterway, or other similar public place that is owned or operated by the state, a county, a municipality, or instrumentality of the state, a county, or municipality," regardless of whether a person holds an "enhanced" or "concealed" handgun carry permit. Tennessee Attorney General Opinion 18-04 (January 31, 2018) (interpreting Tennessee Code Annotated § 39-17-1311(b)(1)(H)(i) in this manner because "[t]he statute is silent regarding the possession of rifles or shotguns in those places"). Likewise, according to the Attorney General's opinion, handguns are also prohibited "on recreational property owned or operated by state, county, or municipal governments at any time the person's conduct does not strictly conform" to the handgun-permit exceptions. *See id.*

24. Tennessee law creates limited exceptions to the offense set forth in Tennessee Code Annotated § 39-17-1311(a). For example, Section 39-17-1311(b)(1)(H)(i) creates a limited exception only for individuals who are "authorized to carry the handgun pursuant to § 39-17-1351 or § 39-17-1366" but then only if two additional qualifiers are satisfied.

25. The first qualifier in Tennessee Code Annotated § 39-17-1311(b)(1)(H) provides that the offense in Subsection (a) "shall not apply" to "persons possessing a handgun, who are authorized to carry the handgun pursuant to § 39-17-1351 or § 39-17-1366, while within or on a public park, natural area, historic park, nature trail, campground, forest, greenway, waterway, or other similar public place that is owned or operated by the state, a county, a municipality, or instrumentality of the state, a county, or municipality." Tennessee Code Annotated § 39-17-

1311(b)(1)(H)(i). The list of places covered by the defense and/or exception for permit holders is more limited than the list of prohibited locations found in Subsection (a).

26. Second, the defense and/or exception for permit holders in Section 39-17-1311(b)(1)(H)(i) does not apply if the individual "possessed a handgun in the immediate vicinity of property that was, at the time of possession, in use by any board of education, school, college or university board of trustees, regents, or directors for the administration of any public or private educational institution for the purpose of conducting an athletic event or other school-related activity on an athletic field, permanent or temporary." Tennessee Code Annotated § 39-17-1311(b)(1)(H)(ii).

27. There are no defenses or exceptions available to individuals who carry, with the intent to go armed, firearms other than handguns in places enumerated in Tennessee Code Annotated § 39-17-1311(a) unless the individual does so under the narrow circumstances set forth in Tennessee Code Annotated § 39-17-1311(b)(1)(J) or in the event that Tennessee Code Annotated § 39-17-1322, Tennessee's "safe harbor" statute, might be applicable.

28. There are no defenses or exceptions to the offense set forth in Tennessee Code Annotated § 39-17-1311(a) available to an individual who is carrying a handgun pursuant to Tennessee's 2021 Permitless Carry Law, which is found in Tennessee Code Annotated § 39-17-1307(g), with the exception of the limited exceptions found in Tennessee Code Annotated § 39-17-1311(b)(1)(J) or in the event that Tennessee Code Annotated § 39-17-1322, Tennessee's "safe harbor" statute, might be applicable.

29. Under Tennessee law, when a statute creates a "defense" to an offense, the burden of proof at trial is placed on the accused, the individual, to "raise" the issue at trial by proof. Tennessee Code Annotated § 39-11-203. If, and only if, "admissible evidence is introduced

supporting the defense" does the burden at trial shift to the state to negate the defense "beyond a reasonable doubt." Tennessee Code Annotated § 39-11-201.

30. When a statute creates an "exception" to an offense, the burden of proof at trial is placed on the accused, the individual, to "raise" the issue at trial by proof and the burden remains on the accused to prove the exception "by a preponderance of the evidence." Tennessee Code Annotated § 39-11-202.

31. Consequently, under Tennessee statutes, if an individual possesses a firearm in an area listed in Tennessee Code Annotated § 39-17-1311(a), the individual is at risk of being stopped by a law enforcement officer, detained, questioned, charged, arrested, and/or indicted for the commission of a crime for the alleged violation of Tennessee Code Annotated § 39-17-1311(a).

32. Further, if an individual possesses a firearm in an area listed in Tennessee Code Annotated § 39-17-1311(a), there is no affirmative requirement on the State, any law enforcement officer, any judicial magistrate, any district attorney, and/or any trial judge to consider any statutory "defense" or any statutory "exception" prior to the trial of the matter if the individual is prosecuted.

33. Thus, under these statutes, a person carrying a handgun under one of these "exceptions" or subject to one of these "defenses" can still be arrested and charged with the associated crime under the aforementioned statutes. The Plaintiffs reasonably fear arrest, prosecution, and/or conviction for behavior that is constitutionally protected.

34. Further, Plaintiff Kehel is unable to carry any "firearm," including a handgun, "the quintessential self-defense weapon" (*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2143 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008))), in the

places enumerated in Tennessee Code Annotated § 39-17-1311(a), as no "defense" or "exception" applies to her since she does not have a handgun permit. But for these challenged laws, all Plaintiffs would have the option and could carry (firearms, including handguns) in the places enumerated in Section 39-17-1311(a) but they fear arrest and prosecution for engaging in that protected activity.

35. Under Tennessee law, if a person is subject to prosecution under Tennessee Code Annotated § 39-17-1311(a), they are also potentially subject to prosecution under Tennessee Code Annotated § 39-17-1307(a).

Tennessee Constitution, Article I Section 26

36. The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

37. Article I, Section 26 of the Tennessee Constitution provides: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." This provision was added to the Tennessee Constitution in 1870.

38. The Second Amendment to the United States Constitution and Article I, Section 26 of the Tennessee Constitution protect coextensive rights possessed by Tennesseans, making interpretations of the Second Amendment (and federal case law) persuasive to the interpretation of Article I, Section 26.

39. As Tennessee courts have used "major cases in state and federal jurisprudence concerning the right to keep and bear arms" in interpreting the right, *Embody v. Cooper*, No. M2012-01830-COA-R3-CV, 2013 Tenn. App. LEXIS 343, at *8 (Ct. App. May 22, 2013), this

Complaint addresses authorities under the Second Amendment, although — for avoidance of confusion — Plaintiffs do not bring a challenge under the Second Amendment and seek relief solely for a violation of Article I, Section 26 of the Tennessee State Constitution. *See also Andrews v. State*, 50 Tenn. 165, 177 (1871) ("We may well look at any other clause of the same Constitution, or of the Constitution of the United States, that will serve to throw any light on the meaning of this clause."); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

40. Tennessee's Constitution cannot afford its citizens fewer protections with regard to the right to keep and bear arms than the United States' Constitution. *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *see Stickley v. City of Winchester*, 2022 Va. Cir. LEXIS 201, at *35. (Winchester Cir. Ct. Sept. 27, 2022) ("[T]he Fourteenth Amendment incorporates the Second Amendment to the States. Therefore, Article I, Section 13, of the Constitution of Virginia is, at the very least, co-extensive with the Second Amendment as to the enumerated rights guaranteed by the Second Amendment. As a result, it is appropriate for this Court to examine Second Amendment jurisprudence to determine whether the [challenged] provisions . . . violate Article I, Section 13.").

41. Since the operative provision of the Tennessee Constitution was ratified after the ratification of the Second Amendment, it would make absolutely no sense for Tennesseans to knowingly ratify a state provision that protected less than the Second Amendment and, therefore, would immediately become inoperative and ineffective. For that reason, as well, Article I, Section 26 must be read to provide *at least* the same level of protection as the Second Amendment, thus making federal authorities persuasive and relevant to an Article I, Section 26 analysis.

42. In its landmark 2008 decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court rejected the nearly uniform opinions reached by the courts of appeals, which for years had claimed that the Second Amendment protects only a communal right of a state to maintain an organized militia. *Id.* at 581. Setting the record straight, the *Heller* Court explained that the Second Amendment recognizes, enumerates, and guarantees to individuals the preexisting right to keep and carry arms for self-defense and defense of others in the event of a violent confrontation. *Id.* at 592.

43. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court explained that the Second Amendment is fully applicable to the states through operation of the Fourteenth Amendment. *Id.* at 791.

44. As a result of the holding in *McDonald*, the Tennessee Constitution cannot be construed to allow government authority to infringe rights of individuals if such authority would constitute an infringement of the individual's rights under the Second Amendment. *See Andrews v. State*, 50 Tenn. 165, 177 (1871) ("We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions.").

45. In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), the Supreme Court reaffirmed its respective conclusions in *Heller* and *McDonald* that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding" and that this "Second Amendment right is fully applicable to the States." *Id.* at 411.

46. In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court stated that the Second and Fourteenth Amendments together guarantee individuals not only the right to "keep" firearms in their homes, but also the right to "bear arms," meaning the

right to carry constitutionally protected arms "for self-defense outside the home," free from infringement by either federal or state governments. *Id.* at 2122.

47. In addition to recognizing the right of individuals to carry a firearm in public for self-defense, *Bruen* also rejected outright the methodology that had been used in many state and federal courts to judge Second Amendment challenges. *Bruen* at 2117-2118.

48. Prior to *Bruen*, federal and state courts had adopted a two-part test for analyzing Second Amendment cases. *See Bruen*, at 2126, 2127 n.4 (collecting cases using two-part tests).

49. *Bruen* expressly rejected this atextual, "judge empowering" interest-balancing approach, and, referencing *Heller*, again directed the courts to assess the text of the Second Amendment, informed by the historical tradition. *Bruen*, at 2117–18, 2126–30.

50. The *Bruen* Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen* at 2126.

51. In reviewing the historical evidence, *Bruen* limited the relevant history to a narrow time period, because "not all history is created equal," focusing on the period around the ratification of the Second Amendment and perhaps the Fourteenth Amendment (but noted that "post-ratification" interpretations "cannot overcome or alter that text," and "we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791").

Id. at 2137; *see also id.* at 2136–53 (discussing the lack of relevant historical prohibitions on concealed carry in public).

52. Thus, according to the Second Amendment's text, and as applied by the Court in *Bruen*, if a member of "the people" wishes to "keep" or "bear" a protected "arm," then the ability to do so "shall not be infringed." Period. There are no "ifs, ands, or buts," and it does not matter (even a little bit) how important, significant, compelling, or overriding the government's justification for or interest in infringing the right might be. It does not matter whether a government restriction "minimally" versus "severely" burdens (*i.e.*, infringes) the Second Amendment. There are no relevant statistical studies to be consulted. There are no sociological arguments to be considered. The ubiquitous problems of crime or the density of population do not affect the equation. The only appropriate inquiry, according to *Bruen*, is what the "public understanding of the right to keep and bear arms" was during the ratification of the Second Amendment in 1791, and perhaps during ratification of the Fourteenth Amendment in 1868. *Bruen* at 2137–38.

53. Lest there be any doubt, the Supreme Court has also instructed as to the scope of the protected persons, arms, and activities covered by the Second Amendment.

54. First, *Heller* explained that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. *Heller* cited to *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), which held that "'the people' ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

55. Second, *Heller* turned to the "substance of the right: 'to keep and bear Arms.'" *Id.* at 581. The Court explained that "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*." *Id.* at 583. Next, the Court instructed that the "natural meaning" of "bear arms" was "wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584. And "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Id. Bruen* was more explicit, explaining that the "definition of 'bear' naturally encompasses public carry." *Bruen* at 2134.

56. Third, with respect to the term "arms," *Heller* explained that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller* at 582. Indeed, the "arms" protected by the Second Amendment include "'weapons of offence, or armour of defence... '[A]rms' a[re] 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'" *Heller* at 581 (citation omitted).

57. It is clear that the Plaintiffs here fall within the scope of persons, arms, and activities protected by Article I, Section 26. *See Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 WL 16744700, 2022 U.S. Dist. LEXIS 201944.

58. Finally, in addition to clearly establishing the framework by which lower courts are to analyze Second Amendment challenges, *Bruen* also provided several additional guideposts.

The Challenged Provisions Violate the Tennessee Constitution, Article I Section 26

59. As is relevant here, *Bruen* explained that states have extremely narrow latitude to limit the places where firearms may be carried in public, mentioning in *dicta* only "sensitive

places such as schools and government buildings," along with "legislative assemblies, polling places, and courthouses." *Id.* at 2133. Although the *Bruen* Court acknowledged that other "*new* and analogous sensitive places" may exist, such potential locations would be highly limited and certainly cannot be defined so broadly as to "include all 'places where people typically congregate'" or, for example, for New York to "effectively declare the island of Manhattan a 'sensitive place.'" *Id.* at 2133–34.

60. Turning large areas of the State into sensitive places where firearms are prohibited, Tennessee Code Annotated § 39-17-1311 stands in direct opposition to that warming and, as such, violates Article I, Section 26.

61. In fact, Tennessee law broadly makes it a crime for *anyone* to carry *any* firearm *anywhere* with the intent to go armed (including for self-defense purposes). Tennessee Code Annotated § 39-17-1307(a). This statute has no geographic limits and would apply to any place, whether owned or controlled publicly or privately (including merely bearing arms within one's own residence for self-defense, see, Tennessee Code Annotated § 39-17-1308(a)(3)(A)).

62. Thus, as written, Tennessee Code Annotated § 39-17-1307(a) makes all places within the state a prohibited place for the carrying of any firearm when possessed by the individual "with the intent to go armed." In other words, Tennessee statutes criminalize the exercise of the right to bear arms.

63. Tennessee law further makes it a crime for an individual "to possess or carry, whether openly or concealed, with the intent to go armed, any weapon prohibited by § 39-17-1302(a), not used solely for instructional, display or sanctioned ceremonial purposes, in or on the grounds of any [i] public park, [ii] playground, [iii] civic center or [iv] other building facility, area or property owned, used or operated by any municipal, county or state government, or

instrumentality thereof, for recreational purposes." Tennessee Code Annotated § 39-17-1311(a). The statute provides various limited exceptions for a narrow subset of persons (permit holders) in a narrow subset of locations (public parks and certain federal, state, or local recreational facilities). Tennessee Code Annotated § 39-17-1311(b)(H) and (I).

64. To be sure, there are statutory "defenses" or "exceptions" to an offense under Tennessee Code Annotated § 39-17-1307(a), some of which are found elsewhere in Tennessee Code Annotated § 39-17-1307, with others found in Tennessee Code Annotated § 39-17-1308 and § 39-17-1350 (available only to off-duty law enforcement and others identified in that code section).

65. The Article I, Section 26 right to keep and bear arms, however, is not an "exception" or an affirmative "defense" to a criminal charge. Rather, it is a pre-existing right that is recognized and protected from government infringement.

66. Tennessee Code Annotated § 39-17-1311(a) represents an attempt by the State of Tennessee to prohibit a class or classes of weapons in a purported "sensitive place" as that term is used in *Bruen*. Yet there is nothing "sensitive" about any of the locations covered by § 39-17-1311(a). First, none of the types of public locations enumerated in § 39-17-1311(a) is a school, government building where "government business takes place," a legislative assembly, polling place, or courthouse. *See Bruen* at 2133; *Stickley*, 2022 Va. Cir. LEXIS 201, at *50. Nor are they places "where a bad-intentioned armed person could disrupt key functions of democracy." *Hardaway v. Nigrelli*, No. 22-CV-771 (JLS), 2022 WL 16646220, 2022 U.S. Dist. LEXIS 200813, at *34 (W.D.N.Y. Nov. 3, 2022) (emphasis omitted). Nor are the locations enumerated in § 39-17-1311(a) places "where uniform lack of firearms is generally a condition of entry, and where government officials are present and vulnerable to attack." *Id.* (emphasis omitted).

67. Rather, the locations covered by § 39-17-1311(a) are entirely ordinary and nonsensitive public locations "where people typically congregate," *Bruen*, 142 S. Ct. at 2133, which merely happen to be owned or managed — on behalf of the public — by the government. In fact, the "public parks" covered by § 39-17-1311(a) include not only manicured parks within city centers but also vast expanses of uninhabited wilderness — places where people certainly do not "typically congregate" but yet where the mere possession of firearms is entirely prohibited (subject to limited exceptions that do not apply to all the Plaintiffs).

68. In addition to not constituting a "sensitive location" of the sort where firearm possession historically may have been restricted, § 39-17-1311(a) also violates the historical test laid out in *Bruen*, which Plaintiffs submit is the appropriate test for analyzing challenges under Article I, Section 26. Simply put, there is no relevant historical analogue — let alone the widespread pattern of relevant historical regulation that is required — for banning firearms in public parks and other similar recreational areas restricted by § 39-17-1311(a).

69. As of 1791, there was no national "historical tradition of firearm regulation" with respect to carrying a firearm in the areas that are enumerated in Tennessee Code Annotated § 39-17-1311(a). *Bruen* at 2126. As of 1868, there was no national "historical tradition of firearm regulation" with respect to carrying a firearm in the areas that are enumerated in Tennessee Code Annotated § 39-17-1311(a). *Bruen* at 2126; *see Stickley*, 2022 Va. Cir. LEXIS 201, at *51 (explaining the lack of any historical tradition — and in fact finding the opposite tradition — with respect to banning firearms in "public places, fairs, and markets"). *See also Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 WL 16744700, 2022 U.S. Dist. LEXIS 201944, at *182–87, *189–92 (N.D.N.Y. Nov. 7, 2022) (conducting a historical survey and finding no tradition of banning firearms in "public parks"); *id.* at *209–15 (finding no analogues with

respect to "theaters," "conference centers," and "banquet halls," somewhat akin to a "civic center" under § 39-17-1311(a)); *id.* at *220 ("Community Center").

70. Without any historical pedigree showing that the public carry of arms in public parks and recreational areas is categorically outside the scope of protections offered by the right to keep and bear arms, Tennessee Code Annotated § 39-17-1311(a) is unconstitutional under Article I, Section 26 of the Tennessee Constitution. A federal court in the Northern District of New York held that, after *Bruen*, a ban on firearm carry in a "public park" is unconstitutional under the Second Amendment. *See Antonyuk*, 2022 WL 16744700, 2022 U.S. Dist. LEXIS 201944, at *192. So too did a state court in Virginia, with respect to that state's constitutional provision (Article I, Section 13) protecting the right to keep and bear arms, when analyzing a City's ban on firearms in "public parks." *Stickley*, 2022 Va. Cir. LEXIS 201, at *47–50.

71. This Court's intervention is necessary to make it clear that the State of Tennessee is not free to thumb its nose at the text of Article I, Section 26 which, like the Second Amendment, is neither a "constitutional orphan" nor a "second-class right." *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari); *see McDonald*, 561 U.S. at 780; *Bruen* at 2156.

PRAYER FOR RELIEF

Plaintiffs request judgment be entered in their favor and against Defendants as follows:

1. An order preliminarily and permanently enjoining the State of Tennessee, the Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing any provision of Tennessee Code Annotated § 39-17-1311;

2. A judgment declaring Tennessee Code Annotated § 39-17-1311 unconstitutional under Article I, Section 26 of the Tennessee Constitution;

3. A judgment declaring Tennessee Code Annotated § 39-17-1307(a) unconstitutional under Article I, Section 26 of the Tennessee Constitution;

4. Attorney fees and costs pursuant to any applicable doctrine or legal theory;

5. Declaratory relief consistent with the injunction;

6. Costs of suit; and

7. Any further relief as the Court deems just and appropriate.

Respectfully submitted:

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

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

STEPHEN HUGHES,
DUNCAN O'MARA,
ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC. and
GUN OWNERS FOUNDATION
Plaintiffs,
v.
BILL LEE, in his official capacity as the Governor for the State of Tennessee, and JONATHAN SKRMETTI, in his official capacity as the Attorney General for the State of Tennessee
Defendants.

Civil No: 24475

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION, AND/OR PERMANENT INJUNCTION

Plaintiffs move this Court pursuant to Tennessee Rule of Civil Procedure 65 for a preliminary and/or permanent injunction against the state of Tennessee from enforcing or seeking to enforce the statutory prohibition making it a criminal act for any individual to possess or carry, "with the intent to go armed," a firearm in "or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes." Tennessee Code Annotated § 39-17-1311(a). Plaintiffs further seek a preliminary and permanent injunction against the State of Tennessee from enforcing of seeking to enforce the statutory prohibition making it a crime for anyone to "carry, with the intent to go armed, a firearm…" which provision applies without geographical limits in the state of Tennessee. Tennessee Code Annotated § 39-17-1307(a).

Plaintiffs rely on Article I, Section 26, of the State constitution, as such has been abridged by the United States Supreme Court's decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) and *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) as support for and

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Katelyn Organ, Clerk & Master
By: Kim Nolan D.C.M.

grounds for this motion. Plaintiffs further rely on the contemporaneously filed memorandum of law and affidavits to support this motion.

Respectfully submitted:

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

Certificate of Service

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

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
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GIBSON COUNTY

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Defendants.

Civil No: 24475

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

Plaintiffs Stephen L. Hughes, Duncan O'Mara, Elaine Kehel, Gun Owners of America, Inc., and Gun Owners Foundation bring this suit for declaratory and injunctive relief under Tennessee Code Annotated § 29-14-102, Tennessee Code Annotated § 1-3-121, and any other applicable provision or doctrine of law. The Individual Plaintiffs are residents of the State of Tennessee who desire to possess or carry a firearm with the intent of being armed, and desire to do so in ordinary places such as public parks and other public recreational venues. However, if they do so, they are subject to stops by law enforcement and criminal prosecution by the State, pursuant to the provisions of Tennessee Code Annotated § 39-17-1307 and/or § 39-17-1311. Plaintiffs contend that Tennessee's statutory scheme places them at risk of serious criminal charges if they engage in constitutionally protected activity and, with respect to the limited

exceptions provided in the statute, burdens them to prove or assert that they have a statutory defense or exception when facing a criminal charge. Plaintiffs contend that the challenged statutory prohibitions on possessing firearms in public places violate their right to possess arms as protected by Article I, Section 26 of the Tennessee Constitution. Plaintiffs further seek a preliminary injunction, halting enforcement and further implementation of these unconstitutional statutes, until a decision on the merits can be reached.

THE PARTIES

1. Plaintiff Stephen L. Hughes is a natural person and a citizen of the United States and the State of Tennessee, who is a legal possessor of at least one firearm and who currently possesses a Tennessee "enhanced" handgun carry permit. He resides in Gibson County, Tennessee. He has no disqualification under any state or federal law which would prohibit him from possessing a firearm, and is a member of Gun Owners of America

2. Plaintiff Duncan O'Mara is a natural person and a citizen of the United States and the State of Tennessee, who is a legal possessor of at least one firearm and who currently possesses a Tennessee "enhanced" handgun carry permit. He resides in Crockett County, Tennessee. He has no disqualification under any state or federal law which would prohibit him from possessing a firearm, and is a member of Gun Owners of America.

3. Plaintiff Elaine Kehel is a natural person and a citizen of the United States and the State of Tennessee, who is a legal possessor of at least one firearm and who currently does not possess a Tennessee "enhanced" handgun carry permit or a Tennessee "concealed" handgun carry permit. She resides in Gibson County, Tennessee. She is qualified and able to carry a handgun in Tennessee in public pursuant to Tennessee Code Annotated § 39-17-1307(g) (the

"2021 Permitless Carry Law"). She has no disqualification under any state or federal law which would prohibit her from possessing a firearm, and is a member of Gun Owners of America.

4. Plaintiff Gun Owners of America, Inc. ("GOA") is a California non-stock corporation with its principal place of business in Springfield, Virginia. GOA is organized and operated as a non-profit membership organization that is exempt from federal income taxes under Section 501(c)(4) of the U.S. Internal Revenue Code. GOA was formed in 1976 to preserve and defend the Second Amendment rights of gun owners. GOA has more than 2 million members and supporters across the country, including many who reside throughout the State of Tennessee and in Gibson County, Tennessee.

5. Plaintiff Gun Owners Foundation ("GOF") is a Virginia not-for-profit, non-stock corporation with its principal place of business in Springfield, Virginia. GOF is organized and operated as a non-profit legal defense and educational foundation that is exempt from federal income taxes under Section 501(c)(3) of the U.S. Internal Revenue Code. GOF is supported by gun owners across the country, including within the State of Tennessee.

6. GOA and GOF bring this action in a representational capacity on behalf of, and asserting the interests of, their members and supporters in Tennessee. For example, GOA has many thousands of members and supporters across the State of Tennessee, including within Gibson County, many of whom are being irreparably harmed by the challenged provisions. Each of these persons would have standing to challenge Tennessee Code Annotated § 39-17-1311 in their own right. Protection of these members' and supporters' rights and interests is germane to the mission of GOA and GOF, which is to preserve and protect the rights of Americans to keep and bear arms, including against infringement by anti-gun politicians and unconstitutional state statutes. Litigation of the challenges raised in this case does not require

participation of each of GOA and GOF's members and supporters. GOA and GOF are fully and faithfully representing the interests of their members and supporters without participation by each of these individuals. Indeed, GOA and GOF routinely litigate cases on behalf of their members and supporters across the nation.

7. Many of the gun owners represented in this matter by GOA and GOF, like the Individual Plaintiffs, wish to possess and carry firearms in the areas made entirely off-limits (or subject to vague "defenses" and "exceptions") by Tennessee Code Annotated § 39-17-1311(a), including those members and supporters who are eligible to carry handguns without permits and those individuals between the ages of 18–21 who are ineligible to carry handguns without permits.

8. Bill Lee is the Governor of Tennessee and is sued in his official capacity as the official representative of the State of Tennessee. The Governor is a proper party to a declaratory judgment action seeking to invalidate and/or enjoin the application of a criminal statute to a citizen.

9. Jonathan Skrmetti is the Attorney General for the State of Tennessee and is sued in his official capacity. The Attorney General is a proper party to a declaratory judgment action seeking to invalidate and/or enjoin the application of a criminal statute to a citizen. *See* Tennessee Code Annotated § 29-14-107.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to Tennessee Code Annotated §§ 16-11-101 and 16-11-102 and Tennessee Code Annotated § 29-14-102.

11. Venue lies in this Court pursuant to Tennessee Code Annotated § 20-4-104 because the Individual Plaintiffs are all residents of the 28th Judicial District and the circumstances giving to these claims arose in this judicial district.

STATEMENT OF FACTS

12. The Individual Plaintiffs each desire to be able to carry a firearm in a public park or other area enumerated in Tennessee Code Annotated § 39-17-1311(a). See Affidavits of Stephen L. Hughes, Duncan O'Mara and Elaine Kehel filed herewith. However, each of them is unable to do so without risk of being stopped and/or detained by law enforcement and potentially charged with a criminal offense because of the prohibitions contained in Tennessee Code Annotated § 39-17-1311(a). For some of these prohibited categories of locations, § 39-17-1311(b)(H) and (I) provide a limited affirmative defense to a criminal charge. Others of these prohibited categories of locations are entirely off-limits to the possession of firearms, irrespective of whether a person has a permit to carry.

13. Like the Individual Plaintiffs, GOA and GOF's members and supporters desire to carry firearms in a public park or other area(s) enumerated in Tennessee Code Annotated § 39-17-1311(a). As set forth more fully below, Tennessee Code Annotated § 39-17-1311(a) defines as an offense, and potentially a felony offense, an individual carrying certain weapons in certain areas. Further, Tennessee's statutes place the risk and burden of defending against any such criminal charges on the Individual Plaintiffs and GOA and GOF's members and supporters as individuals. *See* Tennessee Code Annotated § 39-17-1308.

14. As a result of the existence of the offense set forth in Tennessee Code Annotated § 39-17-1311(a), the Individual Plaintiffs and the members and supporters of GOA and GOF, respectively, are forced to disarm themselves before going into the places enumerated in that

section, in order to attempt to avoid any risk of being stopped, questioned, detained, and/or charged by the State and even subjected to a criminal prosecution and trial for a potential violation of that section. As a result of the challenged provisions, Plaintiffs' constitutional rights are infringed, and their personal safety and security is endangered.

15. Plaintiffs, respectively, would carry a firearm in the places enumerated in Tennessee Code Annotated § 39-17-1311(a) for lawful purposes, including self-defense and defense of third parties in their accompaniment, but for the existence of the criminal offenses set forth in that statute.

Tennessee Statutes

16. Tennessee Code Annotated § 39-17-1311(a) generally prohibits certain weapons, possessed "with the intent to go armed," in "or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes." The weapons subject to this general prohibition are enumerated in Tennessee Code Annotated § 39-17-1302(a) ("Prohibited Weapon(s)").

17. Prohibited Weapons include machine guns, explosives, and other weapons that allegedly "ha[ve] no common lawful purpose." Tennessee Code Annotated § 39-17-1302(a).

18. Interestingly enough, a handgun is not an enumerated Prohibited Weapon. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-11-106(a)(19) (defining "handgun"). Neither is a rifle. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-17-1301(13) (defining "rifle"). Neither is a shotgun. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-17-1301(15) (defining "shotgun").

19. In fact, firearms in general — provided they are not machine guns under Tennessee law — are *not* enumerated Prohibited Weapons. *See* Tennessee Code Annotated § 39-17-1302(a); § 39-11-106(a)(13) (defining "firearm"); § 39-17-1301(10) (defining "machine gun"). One thus might conclude that, at first blush, Section 39-17-1311(a) does not apply to the carry of firearms. But one would be wrong.

20. First, after establishing the general prohibition against possessing or carrying Prohibited Weapons on public recreational properties, Subsection (b) of Section 39-17-1311 provides a list of exceptions to which "Subsection (a) shall not apply." Notable among these exceptions are carveouts for persons carrying handguns with "enhanced" or "concealed" handgun carry permits and others who "strictly conform[]" their behavior to enumerated scenarios. Tennessee Code Annotated § 39-17-1311(b)(1)(H), (I), and (J). In fact, Subsection (b)(2) of the statute warns that "[a]t any time the person's behavior no longer strictly conforms to one (1) of the classifications in Subsection (b)(1), the person shall be subject to subsection (a)." In that sense, Subsection (b) exempts conduct that Subsection (a) does not criminalize.

21. Indeed, even if a person carrying a handgun, rifle, shotgun, or indeed any common firearm did *not* conform their behavior to an exception under Subsection (b), Subsection (a) still criminalizes only enumerated *Prohibited Weapons*, which does not include handguns, rifles, shotguns, or other common firearms.

22. Notwithstanding the vagueness and ambiguity of the statute, the Tennessee Attorney General has opined that Tennessee Code Annotated § 39-17-1311 actually prohibits — in addition to the Prohibited Weapons exclusively listed — the "possession of *other types of weapons* on recreational property owned or operated by state, county, or municipal governments

at any time the person's conduct does not strictly conform to the requirements of [Subsection (b)]." Tennessee Attorney General Opinion 18-04 (January 31, 2018) (emphasis added).

23. Under this interpretation of the law, rifles and shotguns are prohibited even within the otherwise exempted "public park, natural area, historic park, nature trail, campground, forest, greenway, waterway, or other similar public place that is owned or operated by the state, a county, a municipality, or instrumentality of the state, a county, or municipality," regardless of whether a person holds an "enhanced" or "concealed" handgun carry permit. Tennessee Attorney General Opinion 18-04 (January 31, 2018) (interpreting Tennessee Code Annotated § 39-17-1311(b)(1)(H)(i) in this manner because "[t]he statute is silent regarding the possession of rifles or shotguns in those places"). Likewise, according to the Attorney General's opinion, handguns are also prohibited "on recreational property owned or operated by state, county, or municipal governments at any time the person's conduct does not strictly conform" to the handgun-permit exceptions. *See id.*

24. Tennessee law creates limited exceptions to the offense set forth in Tennessee Code Annotated § 39-17-1311(a). For example, Section 39-17-1311(b)(1)(H)(i) creates a limited exception only for individuals who are "authorized to carry the handgun pursuant to § 39-17-1351 or § 39-17-1366" but then only if two additional qualifiers are satisfied.

25. The first qualifier in Tennessee Code Annotated § 39-17-1311(b)(1)(H) provides that the offense in Subsection (a) "shall not apply" to "persons possessing a handgun, who are authorized to carry the handgun pursuant to § 39-17-1351 or § 39-17-1366, while within or on a public park, natural area, historic park, nature trail, campground, forest, greenway, waterway, or other similar public place that is owned or operated by the state, a county, a municipality, or instrumentality of the state, a county, or municipality." Tennessee Code Annotated § 39-17-

1311(b)(1)(H)(i). The list of places covered by the defense and/or exception for permit holders is more limited than the list of prohibited locations found in Subsection (a).

26. Second, the defense and/or exception for permit holders in Section 39-17-1311(b)(1)(H)(i) does not apply if the individual "possessed a handgun in the immediate vicinity of property that was, at the time of possession, in use by any board of education, school, college or university board of trustees, regents, or directors for the administration of any public or private educational institution for the purpose of conducting an athletic event or other school-related activity on an athletic field, permanent or temporary." Tennessee Code Annotated § 39-17-1311(b)(1)(H)(ii).

27. There are no defenses or exceptions available to individuals who carry, with the intent to go armed, firearms other than handguns in places enumerated in Tennessee Code Annotated § 39-17-1311(a) unless the individual does so under the narrow circumstances set forth in Tennessee Code Annotated § 39-17-1311(b)(1)(J) or in the event that Tennessee Code Annotated § 39-17-1322, Tennessee's "safe harbor" statute, might be applicable.

28. There are no defenses or exceptions to the offense set forth in Tennessee Code Annotated § 39-17-1311(a) available to an individual who is carrying a handgun pursuant to Tennessee's 2021 Permitless Carry Law, which is found in Tennessee Code Annotated § 39-17-1307(g), with the exception of the limited exceptions found in Tennessee Code Annotated § 39-17-1311(b)(1)(J) or in the event that Tennessee Code Annotated § 39-17-1322, Tennessee's "safe harbor" statute, might be applicable.

29. Under Tennessee law, when a statute creates a "defense" to an offense, the burden of proof at trial is placed on the accused, the individual, to "raise" the issue at trial by proof. Tennessee Code Annotated § 39-11-203. If, and only if, "admissible evidence is introduced

supporting the defense" does the burden at trial shift to the state to negate the defense "beyond a reasonable doubt." Tennessee Code Annotated § 39-11-201.

30. When a statute creates an "exception" to an offense, the burden of proof at trial is placed on the accused, the individual, to "raise" the issue at trial by proof and the burden remains on the accused to prove the exception "by a preponderance of the evidence." Tennessee Code Annotated § 39-11-202.

31. Consequently, under Tennessee statutes, if an individual possesses a firearm in an area listed in Tennessee Code Annotated § 39-17-1311(a), the individual is at risk of being stopped by a law enforcement officer, detained, questioned, charged, arrested, and/or indicted for the commission of a crime for the alleged violation of Tennessee Code Annotated § 39-17-1311(a).

32. Further, if an individual possesses a firearm in an area listed in Tennessee Code Annotated § 39-17-1311(a), there is no affirmative requirement on the State, any law enforcement officer, any judicial magistrate, any district attorney, and/or any trial judge to consider any statutory "defense" or any statutory "exception" prior to the trial of the matter if the individual is prosecuted.

33. Thus, under these statutes, a person carrying a handgun under one of these "exceptions" or subject to one of these "defenses" can still be arrested and charged with the associated crime under the aforementioned statutes. The Plaintiffs reasonably fear arrest, prosecution, and/or conviction for behavior that is constitutionally protected.

34. Further, Plaintiff Kehel is unable to carry any "firearm," including a handgun, "the quintessential self-defense weapon" (*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2143 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008))), in the

places enumerated in Tennessee Code Annotated § 39-17-1311(a), as no "defense" or "exception" applies to her since she does not have a handgun permit. But for these challenged laws, all Plaintiffs would have the option and could carry (firearms, including handguns) in the places enumerated in Section 39-17-1311(a) but they fear arrest and prosecution for engaging in that protected activity.

35. Under Tennessee law, if a person is subject to prosecution under Tennessee Code Annotated § 39-17-1311(a), they are also potentially subject to prosecution under Tennessee Code Annotated § 39-17-1307(a).

Tennessee Constitution, Article I Section 26

36. The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

37. Article I, Section 26 of the Tennessee Constitution provides: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." This provision was added to the Tennessee Constitution in 1870.

38. The Second Amendment to the United States Constitution and Article I, Section 26 of the Tennessee Constitution protect coextensive rights possessed by Tennesseans, making interpretations of the Second Amendment (and federal case law) persuasive to the interpretation of Article I, Section 26.

39. As Tennessee courts have used "major cases in state and federal jurisprudence concerning the right to keep and bear arms" in interpreting the right, *Embody v. Cooper*, No. M2012-01830-COA-R3-CV, 2013 Tenn. App. LEXIS 343, at *8 (Ct. App. May 22, 2013), this

Complaint addresses authorities under the Second Amendment, although — for avoidance of confusion — Plaintiffs do not bring a challenge under the Second Amendment and seek relief solely for a violation of Article I, Section 26 of the Tennessee State Constitution. *See also Andrews v. State*, 50 Tenn. 165, 177 (1871) ("We may well look at any other clause of the same Constitution, or of the Constitution of the United States, that will serve to throw any light on the meaning of this clause."); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

40. Tennessee's Constitution cannot afford its citizens fewer protections with regard to the right to keep and bear arms than the United States' Constitution. *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *see Stickley v. City of Winchester*, 2022 Va. Cir. LEXIS 201, at *35 (Winchester Cir. Ct. Sept. 27, 2022) ("[T]he Fourteenth Amendment incorporates the Second Amendment to the States. Therefore, Article I, Section 13, of the Constitution of Virginia is, at the very least, co-extensive with the Second Amendment as to the enumerated rights guaranteed by the Second Amendment. As a result, it is appropriate for this Court to examine Second Amendment jurisprudence to determine whether the [challenged] provisions . . . violate Article I, Section 13.").

41. Since the operative provision of the Tennessee Constitution was ratified after the ratification of the Second Amendment, it would make absolutely no sense for Tennesseans to knowingly ratify a state provision that protected less than the Second Amendment and, therefore, would immediately become inoperative and ineffective. For that reason, as well, Article I, Section 26 must be read to provide *at least* the same level of protection as the Second Amendment, thus making federal authorities persuasive and relevant to an Article I, Section 26 analysis.

42. In its landmark 2008 decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court rejected the nearly uniform opinions reached by the courts of appeals, which for years had claimed that the Second Amendment protects only a communal right of a state to maintain an organized militia. *Id.* at 581. Setting the record straight, the *Heller* Court explained that the Second Amendment recognizes, enumerates, and guarantees to individuals the preexisting right to keep and carry arms for self-defense and defense of others in the event of a violent confrontation. *Id.* at 592.

43. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court explained that the Second Amendment is fully applicable to the states through operation of the Fourteenth Amendment. *Id.* at 791.

44. As a result of the holding in *McDonald*, the Tennessee Constitution cannot be construed to allow government authority to infringe rights of individuals if such authority would constitute an infringement of the individual's rights under the Second Amendment. *See Andrews v. State*, 50 Tenn. 165, 177 (1871) ("We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions.").

45. In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), the Supreme Court reaffirmed its respective conclusions in *Heller* and *McDonald* that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding" and that this "Second Amendment right is fully applicable to the States." *Id.* at 411.

46. In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court stated that the Second and Fourteenth Amendments together guarantee individuals not only the right to "keep" firearms in their homes, but also the right to "bear arms," meaning the

right to carry constitutionally protected arms "for self-defense outside the home," free from infringement by either federal or state governments. *Id.* at 2122.

47. In addition to recognizing the right of individuals to carry a firearm in public for self-defense, *Bruen* also rejected outright the methodology that had been used in many state and federal courts to judge Second Amendment challenges. *Bruen* at 2117-2118.

48. Prior to *Bruen*, federal and state courts had adopted a two-part test for analyzing Second Amendment cases. *See Bruen*, at 2126, 2127 n.4 (collecting cases using two-part tests).

49. *Bruen* expressly rejected this atextual, "judge empowering" interest-balancing approach, and, referencing *Heller*, again directed the courts to assess the text of the Second Amendment, informed by the historical tradition. *Bruen*, at 2117–18, 2126–30.

50. The *Bruen* Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen* at 2126.

51. In reviewing the historical evidence, *Bruen* limited the relevant history to a narrow time period, because "not all history is created equal," focusing on the period around the ratification of the Second Amendment and perhaps the Fourteenth Amendment (but noted that "post-ratification" interpretations "cannot overcome or alter that text," and "we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791").

Id. at 2137; *see also id.* at 2136–53 (discussing the lack of relevant historical prohibitions on concealed carry in public).

52. Thus, according to the Second Amendment's text, and as applied by the Court in *Bruen*, if a member of "the people" wishes to "keep" or "bear" a protected "arm," then the ability to do so "shall not be infringed." Period. There are no "ifs, ands, or buts," and it does not matter (even a little bit) how important, significant, compelling, or overriding the government's justification for or interest in infringing the right might be. It does not matter whether a government restriction "minimally" versus "severely" burdens (*i.e.*, infringes) the Second Amendment. There are no relevant statistical studies to be consulted. There are no sociological arguments to be considered. The ubiquitous problems of crime or the density of population do not affect the equation. The only appropriate inquiry, according to *Bruen*, is what the "public understanding of the right to keep and bear arms" was during the ratification of the Second Amendment in 1791, and perhaps during ratification of the Fourteenth Amendment in 1868. *Bruen* at 2137–38.

53. Lest there be any doubt, the Supreme Court has also instructed as to the scope of the protected persons, arms, and activities covered by the Second Amendment.

54. First, *Heller* explained that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. *Heller* cited to *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), which held that "'the people' ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

55. Second, *Heller* turned to the "substance of the right: 'to keep and bear Arms.'" *Id.* at 581. The Court explained that "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*." *Id.* at 583. Next, the Court instructed that the "natural meaning" of "bear arms" was "wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584. And "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Id.* *Bruen* was more explicit, explaining that the "definition of 'bear' naturally encompasses public carry." *Bruen* at 2134.

56. Third, with respect to the term "arms," *Heller* explained that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller* at 582. Indeed, the "arms" protected by the Second Amendment include "'weapons of offence, or armour of defence... '[A]rms' a[re] 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'" *Heller* at 581 (citation omitted).

57. It is clear that the Plaintiffs here fall within the scope of persons, arms, and activities protected by Article I, Section 26. *See Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 WL 16744700, 2022 U.S. Dist. LEXIS 201944.

58. Finally, in addition to clearly establishing the framework by which lower courts are to analyze Second Amendment challenges, *Bruen* also provided several additional guideposts.

The Challenged Provisions Violate the Tennessee Constitution, Article I Section 26

59. As is relevant here, *Bruen* explained that states have extremely narrow latitude to limit the places where firearms may be carried in public, mentioning in *dicta* only "sensitive

places such as schools and government buildings," along with "legislative assemblies, polling places, and courthouses." *Id.* at 2133. Although the *Bruen* Court acknowledged that other "*new* and analogous sensitive places" may exist, such potential locations would be highly limited and certainly cannot be defined so broadly as to "include all 'places where people typically congregate'" or, for example, for New York to "effectively declare the island of Manhattan a 'sensitive place.'" *Id.* at 2133–34.

60. Turning large areas of the State into sensitive places where firearms are prohibited, Tennessee Code Annotated § 39-17-1311 stands in direct opposition to that warming and, as such, violates Article I, Section 26.

61. In fact, Tennessee law broadly makes it a crime for *anyone* to carry *any* firearm *anywhere* with the intent to go armed (including for self-defense purposes). Tennessee Code Annotated § 39-17-1307(a). This statute has no geographic limits and would apply to any place, whether owned or controlled publicly or privately (including merely bearing arms within one's own residence for self-defense, see, Tennessee Code Annotated § 39-17-1308(a)(3)(A)).

62. Thus, as written, Tennessee Code Annotated § 39-17-1307(a) makes all places within the state a prohibited place for the carrying of any firearm when possessed by the individual "with the intent to go armed." In other words, Tennessee statutes criminalize the exercise of the right to bear arms.

63. Tennessee law further makes it a crime for an individual "to possess or carry, whether openly or concealed, with the intent to go armed, any weapon prohibited by § 39-17-1302(a), not used solely for instructional, display or sanctioned ceremonial purposes, in or on the grounds of any [i] public park, [ii] playground, [iii] civic center or [iv] other building facility, area or property owned, used or operated by any municipal, county or state government, or

instrumentality thereof, for recreational purposes." Tennessee Code Annotated § 39-17-1311(a). The statute provides various limited exceptions for a narrow subset of persons (permit holders) in a narrow subset of locations (public parks and certain federal, state, or local recreational facilities). Tennessee Code Annotated § 39-17-1311(b)(H) and (I).

64. To be sure, there are statutory "defenses" or "exceptions" to an offense under Tennessee Code Annotated § 39-17-1307(a), some of which are found elsewhere in Tennessee Code Annotated § 39-17-1307, with others found in Tennessee Code Annotated § 39-17-1308 and § 39-17-1350 (available only to off-duty law enforcement and others identified in that code section).

65. The Article I, Section 26 right to keep and bear arms, however, is not an "exception" or an affirmative "defense" to a criminal charge. Rather, it is a pre-existing right that is recognized and protected from government infringement.

66. Tennessee Code Annotated § 39-17-1311(a) represents an attempt by the State of Tennessee to prohibit a class or classes of weapons in a purported "sensitive place" as that term is used in *Bruen*. Yet there is nothing "sensitive" about any of the locations covered by § 39-17-1311(a). First, none of the types of public locations enumerated in § 39-17-1311(a) is a school, government building where "government business takes place," a legislative assembly, polling place, or courthouse. *See Bruen* at 2133; *Stickley*, 2022 Va. Cir. LEXIS 201, at *50. Nor are they places "where a bad-intentioned armed person could disrupt key functions of democracy." *Hardaway v. Nigrelli*, No. 22-CV-771 (JLS), 2022 WL 16646220, 2022 U.S. Dist. LEXIS 200813, at *34 (W.D.N.Y. Nov. 3, 2022) (emphasis omitted). Nor are the locations enumerated in § 39-17-1311(a) places "where uniform lack of firearms is generally a condition of entry, and where government officials are present and vulnerable to attack." *Id.* (emphasis omitted).

67. Rather, the locations covered by § 39-17-1311(a) are entirely ordinary and nonsensitive public locations "where people typically congregate," *Bruen*, 142 S. Ct. at 2133, which merely happen to be owned or managed — on behalf of the public — by the government. In fact, the "public parks" covered by § 39-17-1311(a) include not only manicured parks within city centers but also vast expanses of uninhabited wilderness — places where people certainly do not "typically congregate" but yet where the mere possession of firearms is entirely prohibited (subject to limited exceptions that do not apply to all the Plaintiffs).

68. In addition to not constituting a "sensitive location" of the sort where firearm possession historically may have been restricted, § 39-17-1311(a) also violates the historical test laid out in *Bruen*, which Plaintiffs submit is the appropriate test for analyzing challenges under Article I, Section 26. Simply put, there is no relevant historical analogue — let alone the widespread pattern of relevant historical regulation that is required — for banning firearms in public parks and other similar recreational areas restricted by § 39-17-1311(a).

69. As of 1791, there was no national "historical tradition of firearm regulation" with respect to carrying a firearm in the areas that are enumerated in Tennessee Code Annotated § 39-17-1311(a). *Bruen* at 2126. As of 1868, there was no national "historical tradition of firearm regulation" with respect to carrying a firearm in the areas that are enumerated in Tennessee Code Annotated § 39-17-1311(a). *Bruen* at 2126; *see Stickley*, 2022 Va. Cir. LEXIS 201, at *51 (explaining the lack of any historical tradition — and in fact finding the opposite tradition — with respect to banning firearms in "public places, fairs, and markets"). *See also Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 WL 16744700, 2022 U.S. Dist. LEXIS 201944, at *182–87, *189–92 (N.D.N.Y. Nov. 7, 2022) (conducting a historical survey and finding no tradition of banning firearms in "public parks"); *id.* at *209–15 (finding no analogues with

respect to "theaters," "conference centers," and "banquet halls," somewhat akin to a "civic center" under § 39-17-1311(a)); *id.* at *220 ("Community Center").

70. Without any historical pedigree showing that the public carry of arms in public parks and recreational areas is categorically outside the scope of protections offered by the right to keep and bear arms, Tennessee Code Annotated § 39-17-1311(a) is unconstitutional under Article I, Section 26 of the Tennessee Constitution. A federal court in the Northern District of New York held that, after *Bruen*, a ban on firearm carry in a "public park" is unconstitutional under the Second Amendment. *See Antonyuk*, 2022 WL 16744700, 2022 U.S. Dist. LEXIS 201944, at *192. So too did a state court in Virginia, with respect to that state's constitutional provision (Article I, Section 13) protecting the right to keep and bear arms, when analyzing a City's ban on firearms in "public parks." *Stickley*, 2022 Va. Cir. LEXIS 201, at *47–50.

71. This Court's intervention is necessary to make it clear that the State of Tennessee is not free to thumb its nose at the text of Article I, Section 26 which, like the Second Amendment, is neither a "constitutional orphan" nor a "second-class right." *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari); *see McDonald*, 561 U.S. at 780; *Bruen* at 2156.

PRAYER FOR RELIEF

Plaintiffs request judgment be entered in their favor and against Defendants as follows:

1. An order preliminarily and permanently enjoining the State of Tennessee, the Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing any provision of Tennessee Code Annotated § 39-17-1311;

2. A judgment declaring Tennessee Code Annotated § 39-17-1311 unconstitutional under Article I, Section 26 of the Tennessee Constitution;

3. A judgment declaring Tennessee Code Annotated § 39-17-1307(a) unconstitutional under Article I, Section 26 of the Tennessee Constitution;

4. Attorney fees and costs pursuant to any applicable doctrine or legal theory;

5. Declaratory relief consistent with the injunction;

6. Costs of suit; and

7. Any further relief as the Court deems just and appropriate.

Respectfully submitted:

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

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

STEPHEN HUGHES,
DUNCAN O'MARA,
ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC. and
GUN OWNERS FOUNDATION

Plaintiffs,

v.

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

Defendants.

Civil No: 24475

AFFIDAVIT OF ELAINE KEHEL

Elaine Kehel, being first duly sworn, states as follows:

1. I am over the age of 18 and make the statements contained herein from my personal knowledge, observation, or involvement.

2. I am a citizen of the United States, the State of Tennessee, and am a resident of Gibson County.

3. I am a legal possessor of at least one firearm.

4. I currently do not possess a Tennessee handgun carry permit. However, I do carry a handgun pursuant to Tennessee's permitless carry law that was enacted in 2021.

5. I have no disqualification under any state or federal law which would prohibit me from possessing a firearm.

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

6. I desire to carry a firearm in Tennessee in public parks, on greenways, in public recreational areas and in other areas enumerated in Tennessee Code Annotated § 39-17-1311(a) (the "Parks Statute").

7. It is my understanding it is a crime under the Parks Statute to carry a firearm in the places enumerated therein and that this is chargeable as a Class A misdemeanor which could result in me being jailed for up to 11 months, 29 days, fined, obligated to pay court costs and other burdens associated with a criminal prosecution. However, under certain circumstances involving the use of the property by a school, the offense could be charged as a Class E felony.

8. It is my understanding that if I am observed carrying a firearm in such places that a law enforcement officer or even perhaps another citizen exercising citizen's arrest powers could stop, detain, issue a citation to or even arrest me by asserting that they have a reasonable basis to believe that I committed a criminal offense.

9. It is my understanding that the Parks Statute provides no defense that would allow me, an individual who does not have a handgun permit, to carry handguns or any firearm generally for self-defense or defense of my family or friends while I am in the places declared to be gun free zones by the Parks Statute.

10. In order to avoid risks of being stopped, detained, issued a citation and/or arrested, I essentially banned under threat of criminal prosecution from taking any firearms into the areas enumerated in the Parks Statute.

11. But for the risks of stop, detained and/or charged with a criminal offense under the Parks Statute, I would carry a firearm, including in some instances longarms, in areas enumerated in the Parks Statute for personal protection and the protection of those that I

accompany. I also desire the capacity to carry longarms in some areas that are covered by the Parks Statute, such as areas that may be inhabited by wild predators.

Elaine Kehel

Elaine Kehel

KERRY JAY TAYLOR STATE OF TENNESSEE NOTARY PUBLIC GIBSON COUNTY

State of Tennessee
County of Gibson

Sworn to and subscribed before me the undersigned notary public on this 6th day of February, 2023.

Kerry Jay Taylor

My Commission Expires: 05-18-25

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

STEPHEN HUGHES,
DUNCAN O'MARA,
ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC. and
GUN OWNERS FOUNDATION

Plaintiffs,

v.

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

Defendants.

Civil No: 24475

AFFIDAVIT OF DUNCAN O'MARA

Duncan O'Mara, being first duly sworn, states as follows:

1. I am over the age of 18 and make the statements contained herein from my personal knowledge, observation, or involvement.

2. I am a citizen of the United States, the State of Tennessee, and am a resident of Crockett County.

3. I am a legal possessor of at least one firearm.

4. I currently possess a Tennessee "enhanced" handgun carry permit.

5. I have no disqualification under any state or federal law which would prohibit me from possessing a firearm.

6. I desire to carry a firearm in Tennessee in public parks, on greenways, in public recreational areas and in other areas enumerated in Tennessee Code Annotated § 39-17-1311(a)

(the "Parks Statute"). I have in the past carried a handgun in places covered by the Parks Statute under circumstances which I understood to be in compliance with the law.

7. It is my understanding it is a crime under the Parks Statute to carry a firearm in the places enumerated therein and that this is chargeable as a Class A misdemeanor which could result in me being jailed for up to 11 months, 29 days, fined, obligated to pay court costs and other burdens associated with a criminal prosecution. However, under certain circumstances involving the use of the property by a school, the offense could be charged as a Class E felony.

8. It is my understanding that if I am observed carrying a firearm in such places that a law enforcement officer or even perhaps another citizen exercising citizen's arrest powers could stop, detain, issue a citation to or even arrest me by asserting that they have a reasonable basis to believe that I committed a criminal offense.

9. It is my understanding that the Parks Statute provides a defense that may be my burden to establish that my possession of a firearm in some, but not all, areas enumerated by the Parks Statute. Further, it is my understanding that a law enforcement officer and/or a citizen making a citizen's arrest has no affirmative duty to consider the applicability of any affirmative defense or exception to the criminal charge.

10. It is my understanding that the defense contained in the Parks statute that may be relevant to me requires that I prove that am an enhanced handgun permit holder, that I possessed a handgun and that such possession was in one of a subset of areas defined in the Parks Statute. It is also my understanding that this defense may not be available is a school is making certain uses of the areas covered by the Parks Statute which uses might include, for example, storage of items in the protected areas.

11. In order to avoid risks of being stopped, detained, issued a citation and/or arrested, I have to make choices to a) not take any longarms to the areas enumerated in the Parks Statute, b) not take a handgun in areas enumerated by the Parks Statute, and/or c) if I do take a handgun to make sure I have my permit and that my handgun is generally not visible to third parties in order to minimize the risk of observation or detection by third parties.

12. But for the risks of stop, detained and/or charged with a criminal offense under the Parks Statute, I would carry a firearm, including in some instances longarms, in areas enumerated in the Parks Statute for personal protection and the protection of those that I accompany. I also desire the capacity to carry longarms in some areas that are covered by the Parks Statute, such as areas that may be inhabited by wild predators.

Duncan F. O'Mara

Duncan O'Mara

State of Tennessee
County of Gibson

Sworn to and subscribed before me the undersigned notary public on this 7th day of February, 2023.

Martha Skinner

My Commission Expires: My Commission Expires July 16, 2024

MARTHA E. SKINNER
STATE OF TENNESSEE NOTARY PUBLIC
GIBSON COUNTY

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

STEPHEN HUGHES,
DUNCAN O'MARA,
ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC. and
GUN OWNERS FOUNDATION

Plaintiffs,

v.

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

Defendants.

Civil No: 24475

AFFIDAVIT OF STEPHEN L. HUGHES

Stephen L. Hughes, being first duly sworn, states as follows:

1. I am over the age of 18 and make the statements contained herein from my personal knowledge, observation, or involvement.

2. I am a citizen of the United States, the State of Tennessee, and am a resident of Gibson County.

3. I am a legal possessor of at least one firearm.

4. I currently possess a Tennessee "enhanced" handgun carry permit.

5. I have no disqualification under any state or federal law which would prohibit me from possessing a firearm.

6. I desire to carry a firearm in Tennessee in public parks, on greenways, in public recreational areas and in other areas enumerated in Tennessee Code Annotated § 39-17-1311(a)

(the "Parks Statute"). I have in the past carried a handgun in places covered by the Parks Statute under circumstances which I understood to be in compliance with the law.

7. It is my understanding it is a crime under the Parks Statute to carry a firearm in the places enumerated therein and that this is chargeable as a Class A misdemeanor which could result in me being jailed for up to 11 months, 29 days, fined, obligated to pay court costs and other burdens associated with a criminal prosecution. However, under certain circumstances involving the use of the property by a school, the offense could be charged as a Class E felony.

8. It is my understanding that if I am observed carrying a firearm in such places that a law enforcement officer or even perhaps another citizen exercising citizen's arrest powers could stop, detain, issue a citation to or even arrest me by asserting that they have a reasonable basis to believe that I committed a criminal offense.

9. It is my understanding that the Parks Statute provides a defense that may be my burden to establish that my possession of a firearm in some, but not all, areas enumerated by the Parks Statute. Further, it is my understanding that a law enforcement officer and/or a citizen making a citizen's arrest has no affirmative duty to consider the applicability of any affirmative defense or exception to the criminal charge.

10. It is my understanding that the defense contained in the Parks statute that may be relevant to me requires that I prove that am an enhanced handgun permit holder, that I possessed a handgun and that such possession was in one of a subset of areas defined in the Parks Statute. It is also my understanding that this defense may not be available if a school is making certain uses of the areas covered by the Parks Statute which uses might include, for example, storage of items in the protected areas.

11. In order to avoid risks of being stopped, detained, issued a citation and/or arrested, I have to make choices to a) not take any longarms to the areas enumerated in the Parks Statute, b) not take a handgun in areas enumerated by the Parks Statute, and/or c) if I do take a handgun to make sure I have my permit and that my handgun is generally not visible to third parties in order to minimize the risk of observation or detection by third parties.

12. But for the risks of stop, detained and/or charged with a criminal offense under the Parks Statute, I would carry a firearm, including in some instances longarms, in areas enumerated in the Parks Statute for personal protection and the protection of those that I accompany. I also desire the capacity to carry longarms in some areas that are covered by the Parks Statute, such as areas that may be inhabited by wild predators.

Stephen L. Hughes

Stephen L. Hughes

State of Tennessee
County of Gibson

Sworn to and subscribed before me the undersigned notary public on this 6th day of February, 2023.

Sharon Wright

My Commission Expires: 1-11-2027

SHARON WRIGHT
STATE OF TENNESSEE
NOTARY PUBLIC
GIBSON COUNTY

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

STEPHEN L. HUGHES,
DUNCAN O'MARA,
ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC. and
GUN OWNERS FOUNDATION

Plaintiffs,

v.

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

Defendants.

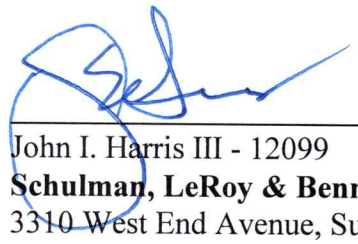
Civil No: 24475

NOTICE OF FILING

Plaintiffs, Stephen L. Hughes, Duncan O'Mara, Elaine Kehel, Gun Owners of America, Inc., and Gun Owners Foundation hereby file the following original affidavits in support of their Complaint for Declaratory and Injunctive relief:

- Affidavit of Stephen L. Hughes;
- Affidavit of Duncan O'Mara; and
- Affidavit of Elaine Kehel.

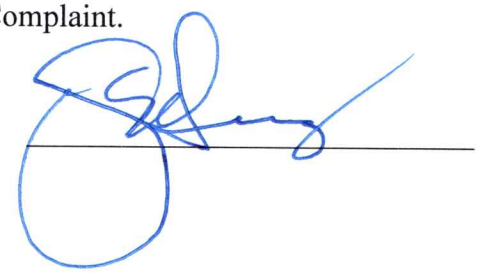
Respectfully submitted:



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

Certificate of Service

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



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

STEPHEN L. HUGHES,
DUNCAN O'MARA,
ELAINE KEHEL,
GUN OWNERS OF AMERICA, INC. and
GUN OWNERS FOUNDATION
Plaintiffs,

v.

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

Civil No: 24475

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

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

TABLE OF CONTENTS

I. Introduction.

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

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

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

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

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

II. Plaintiffs Have Standing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Each of the individual plaintiffs have established their respective standing by declaring their intentions filed in affidavits that were filed with the Complaint. *See Slatery*, 2021 WL 4621249, at *3; *see also* Tennessee Code Annotated § 1-3-121 ("Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.").

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

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

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

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

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

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

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

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

Id. at 580.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Plaintiffs Are Likely to Succeed on the Merits.

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. An Injunction Is in the Public Interest.

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

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

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

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

IV. Conclusion.

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

Respectfully submitted:

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

Certificate of Service

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

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