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, JONATHAN SKRMETTI, in his official capacity as the Attorney General for the State of Tennessee, JEFF LONG, in his official capacity as the Commissioner of the Tennessee Department of Safety and Homeland Security, DAVID SALYERS, in his official capacity as the Commissioner of the Tennessee Department of Environment and Conservation, PAUL THOMAS, in his official capacity as the Sheriff of Gibson County, Tennessee, and FREDERICK AGEE, in his official capacity as the District Attorney General for Crockett, Gibson and Haywood counties.	)	**Chancellor Mansfield, Chief Judge** **Judge Burk** **Judge Rice**
Defendants.	)	

STATE DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT OF
STATE DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"[T]he right [to carry firearms] secured by the Second Amendment is not unlimited." *United States v. Rahimi*, 602 U.S. 680, 690 (2024). So too, the twin right in Tennessee's constitution is not unlimited. Tenn. Const. art. I, § 26; *Andrews v. State*, 50 Tenn. 165, 181-82 (1871). Plaintiffs would subvert these limits. In moving for summary judgment, they ask the Court to declare two key statutes *facially* unconstitutional so they may carry firearms of their choosing in any parks and recreational areas they desire regardless of whether children are present. (Pls' Mot. Sum. J. Mem. ("Pls' MSJM"), at 5-8.) Specifically, they claim that Tennessee lacks a historical tradition to justify the Going Armed statute, Tenn. Code Ann. § 39-17-1307(a), and the Guns in Parks statute, Tenn. Code Ann. § 39-17-1311.

Those arguments fail. As a general matter, "litigants mounting a facial challenge to a statute . . . must establish that *no set of circumstances* exists under which the [statute] would be valid." *United States v. Hansen*, 599 U.S. 762, 769 (2023) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). And Plaintiffs cannot make that showing here. The challenged statutes have numerous constitutional applications. For example, the Going Armed statute can be constitutionally applied to restrict the carrying of dangerous and unusual weapons, the carrying of firearms by convicted felons, the carrying of firearms in sensitive places, and the carrying of firearms offensively to threaten others. And the Guns in Parks statute can be constitutionally applied in sensitive places—like public parks, polling locations, and playgrounds—as well as to non-permit holders. Those constitutional applications doom Plaintiffs' facial challenge.

Even for constitutionally protected conduct, the statutes are even more generous than a long history and tradition of similar laws and regulations. And they are "not even . . . genuine prohibition[s] on the carrying of firearms, as there are numerous defenses to the law[s]." *Embody v. Cooper*, No. M2012-01830-COA-R3-CV, 2013 WL 2295671, at *7 (Tenn. Ct. App. May 22,

2013). The Going Armed Statute does not apply to law-abiding adults carrying a handgun, nor does it apply in a host of other circumstances. The Guns in Parks statute similarly exempts vast swaths of people, including permit holders.

Plaintiffs are also attempting to sue two improper defendants—Attorney General Jonathan Skrmetti and Governor Bill Lee. They are suing in the wrong court. And they seek non-party relief, which no court can give. Summary judgment should be granted to the State Defendants and denied to Plaintiffs.

BACKGROUND

A. Parties and Posture

Plaintiffs are three individual Tennessee gun owners and two non-profit, firearm-rights organizations with members or supporters who reside in Tennessee. (Pls' SUMF ¶¶ 1-3, 16-24.) They claim that two of Tennessee's firearm statutes—the Going Armed statute and the Guns in Parks statute—are facially unconstitutional under article I, section 26 of the Tennessee Constitution, which 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.

(Am. Compl. ¶¶ 51-87, Prayer for Relief ¶¶ 3-4; Pls' MSJM at 3, 15-25.) They are suing the State Defendants Governor Bill Lee, Attorney General Jonathan Skrmetti, Commissioner Jeff Long, Commissioner David Salyers, and District Attorney General Frederick Agee in their official capacities. (Am. Compl. ¶¶ 8-11, 13.)

Plaintiffs have moved for summary judgment and ask the Court to declare the challenged statutes facially unconstitutional. (Pls' MSJM at 25.) They argue that it is unconstitutional to criminalize carrying firearms with the intent to go armed or to restrict carrying any firearms in sensitive places like public parks. (*Id.* at 15-16.)

The State Defendants now oppose that motion and submit a cross motion for summary judgment. Because the challenged firearm statutes are facially constitutional and the Court lacks jurisdiction to rule for Plaintiffs, the Court should grant summary judgment in favor of the State Defendants.

B. Tennessee's Firearms Laws

Tennessee is one of the most gun-friendly States in the history of the Nation, especially when it comes to allowing guns in public parks. Charles Rep. ¶ 32 (Exhibit 1); Young Rep. ¶ 61 (Exhibit 2).[1] Although the law generally prohibits carrying firearms with the intent to go armed, there are broad statutory carveouts that expressly allow the carrying of firearms in a plethora of circumstances. For example, Tennesseans may freely carry handguns, openly or concealed, without a permit throughout the State. Tenn. Code Ann. § 39-17-1307(g). Although Tennessee requires a handgun carry permit in certain sensitive places, such as public parks, *id.* § -1311(a), the State's "shall issue" licensing regime makes obtaining that permit easy. *Id.* §§ -1351(b), -1366(a). If that was not enough, there are dozens of statutory exceptions and defenses against criminal prosecution under the challenged statutes. *See, e.g., id.* §§ -1307(e), (g), -1308, -1311(b).

1. The Going Armed Statute

Under the Going Armed statute, "[a] person commits an offense who carries, with the intent to go armed, a firearm or a club." *Id.* § -1307(a). The first part of this statute, "intent to go armed," is the "gravamen of the offense," *Hill v. State*, 298 S.W.2d 799, 799 (Tenn. 1957), and the State must prove this element beyond a reasonable doubt for a conviction. *Liming v. State*, 220 Tenn. 371, 379 (1967). The Tennessee Supreme Court has held that "intent to go armed" means carrying

[1] Should the Court wish to review the historical documents cited in the expert reports that are not otherwise included in the State Defendants' appendix or available through hyperlinks in the reports, the State Defendants are prepared to provide copies of these documents.

a firearm with "offensive or defensive" intent. *Kendall v. State*, 101 S.W. 189, 189 (Tenn. 1907). Going "armed offensively" refers to a desire to menace the public—to "bear[] arms in a way that spreads 'fear' or 'terror' among the people." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 50 (2022). But if a person lacks "the *intent* or purpose of being or going armed," by for example, carrying a firearm to transport it, "the offense described in th[e Going Armed] statute cannot be committed." *Liming v. State*, 417 S.W.2d 769, 773 (1967) (quoting *Page v. State*, 50 Tenn. 198, 198 (1871)). Indeed, "[i]t would be difficult to enumerate all the instances in which [a] weapon[] could be carried innocently and without criminality." *Id.* (citation omitted).

The second part of this statute also has its nuances. Its use of "firearm" is not limited to handguns. Rather, it broadly includes "[a]ny weapon," other than an antique firearm, "that will or is designed to or may readily be converted to expel a projectile by the action of an explosive." Tenn. Code Ann. § 39-11-106(a)(13)(A)(i), (B). The statute encompasses "destructive device[s]" such as a bombs, grenades, rockets, and missiles. *Id.* § 39-11-106(10), (13)(A)(iv). The Going Armed statute is Tennessee's foundational statute upon which gun and destructive-device restrictions are built.[2] This statute, thus, broadly prohibits carrying handguns, rifles, and dangerous items like missiles or bombs with the intent of frightening others.

In 2021, the General Assembly drastically narrowed the impact of the Going Armed statute by passing the Permitless Carry Bill, which exempts from the statute's scope all Tennesseans over the age of 21[3] who lawfully possess a handgun in a place where they are lawfully present. *Id.*

[2] *See, e.g.*, Tenn. Code Ann. §§ 29-3-101, 37-1-131, 39-17-1308, 39-17-1316, 39-17-1364, 40-35-121, 49-6-3051, 49-6-4209, 65-15-106.

[3] The Commissioner of the Tennessee Department of Safety and Homeland Security has agreed not to enforce the Permitless Carry Bill and licensing statutes in a way that "prevent[s] individuals aged eighteen to twenty years old from carrying handguns or obtaining permits to carry handguns on the basis of age alone." Settlement Agreement, *Beeler v. Long*, No. 3:21-cv-152, PageID# 378 (M.D. Tenn. Mar. 24, 2023), ECF No. 50-1 (Exhibit 3).

§ 39-17-1307(g); 2021 Tenn. Pub. Acts, ch. 108, § 1. The General Assembly has also exempted individuals "carrying or possessing a firearm, loaded firearm, or firearm ammunition in a motor vehicle or boat." *Id.* § 39-17-1307(e).[4]

Numerous defenses further restrict the statute's scope. For example, law-abiding citizens may carry (1) handguns, if they possess a concealed handgun carry permit, enhanced handgun carry permit, temporary handgun carry permit, or have been granted an order of protection within the last 21 days; (2) firearms at their residence, business, or premises, or incident to lawful hunting, trapping, fishing, camping, sport shooting or other lawful activity; and (3) rifles or shotguns while engaged in the lawful protection of livestock from predatory animals. *Id.* § 39-17-1308(a); *see id.* §§ -1351 (enhanced handgun carry permit), -1365 (temporary handgun carry permit), -1366 (concealed handgun carry permit), 36-3-626 (carrying after grant of order of protection). And "[a] person shall not be *charged with* or convicted of" unlawful possession "if the person possessed, displayed or employed a handgun in justifiable self-defense or in justifiable defense of another during the commission of a crime in which that person or the other person defended was a victim." *Id.* § 39-17-1322(a) (emphasis added).

2. The Guns in Parks Statute

The Guns in Parks statute incorporates the "intent to go armed" element and restricts the possession and carrying of firearms in certain sensitive places, like public parks:

> It is an offense for any person 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 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.

[4] This does not mean that any person can possess a destructive device like a missile or rocket in a motor vehicle or boat, as those would also fall under the prohibition against possessing an "explosive weapon." Tenn. Code Ann. § 39-17-1302(a); *see* Tenn. Code Ann. § 39-17-1301(4)(A) (defining explosive weapon as including missiles and rockets).

Id. § -1311(a).

On its face, this statute only restricts the possession or carrying of "any weapon prohibited by § 39-17-1302(a),"[5] but the Attorney General's Office has repeatedly interpreted the law to apply to all firearms, including handguns. *See* Tenn. Att'y Gen. Op. 08-26, 2008 WL 474305 (Feb. 12, 2008); Tenn. Att'y Gen. Op. 07-148, 2007 WL 4896937 (Oct. 22, 2007). The General Assembly has amended the statute in accordance with these interpretations. *See* 2009 Tenn. Pub. Acts, ch. 428, §§ 1, 2 (exempting handgun carry permit holders from criminal liability). This indicates that "the Legislature agreed with, or at least acquiesced in, the Attorney General's interpretation of the statute." *Coffee Cnty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 848 (Tenn. 2019).

The Guns in Parks statute also has numerous exceptions.[6] Tenn. Code Ann. § -1311(b)(1). Most notably, in 2015, the General Assembly amended the statute to allow permit holders to carry handguns in all public parks, removing the authority of local governments to prohibit permit holders from carrying handguns in protected areas. 2015 Tenn. Pub. Acts, ch. 250, § 1. Tennesseans may now carry a handgun in a public park, natural area, historic park, nature trail, campground, forest, greenway, waterway, or similar government-owned public spaces with a handgun carry permit so long as they are not in the immediate vicinity of a school event on an athletic field. Tenn. Code Ann. § 39-17-1311(b)(1)(H). They also may carry any firearm, including handguns and destructive devices, while lawfully hunting on public hunting lands, while traversing a park to access a public or private hunting land, while attending a gun and knife show, while picking up passengers, or while sport or target shooting. *Id.* § -1311(b)(1)(J).

[5] Prohibited weapons include "explosive[s]," "machine gun[s]," "knuckles," and "[a]ny other implement for infliction of serious bodily injury or death that has no common lawful purpose." Tenn. Code Ann. § 39-17-1302(a).

[6] The Tennessee Pattern Jury Instruction treats subsection (b) as a list of exceptions rather than defenses. *See* 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 36.04, Cmt. 2 ("The Committee is of the opinion that the language of T.C.A. § 39-17-1311(b) are words 'of similar import' as the term is used in T.C.A. § 39-11-202 (Exceptions).").

The State makes it easy to obtain a handgun carry permit. Tennessee is one of 43 States with a "shall issue" permitting scheme that has "narrow, objective, and definite standards" to guide licensing officials. *Bruen*, 597 U.S. at 38 n.9 (citation omitted). The Department of Safety "shall issue" an enhanced handgun carry permit when the person (1) is not prohibited by state or federal law from possessing a firearm, (2) is at least 18 years old, (3) submits a written application to the Department providing identifying information and certifying that certain disqualifying conditions are not applicable, (4) provides fingerprints and photo identification, (5) completes a Department-approved handgun safety course within one year of the date of application, and (6) pays the applicable fee. Tenn. Code Ann. § 39-17-1351; Settlement Agreement, *Beeler*, No. 3:21-cv-152, *378 (Exhibit 3). Similarly, the Department "shall issue" a concealed handgun permit to any Tennessean who meets the eligibility requirements for an enhanced handgun carry permit and (1) applies in person to the Department, (2) provides proof of identity, (3) demonstrates competence with a handgun, (4) provides fingerprints, and (5) pays the applicable fee. Tenn. Code Ann. § 39-17-1366. After satisfying these minimal requirements, there are virtually no barriers to carrying handguns in public parks and many other sensitive places.

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. "A disputed fact is material if it 'must be decided in order to resolve the substantive claim or defense at which the motion is directed.'" *Pandharipande v. FSD Corp.*, 679 S.W.3d 610, 618 (Tenn. 2023) (citation omitted). "[D]isputes of material fact are 'genuine'—and therefore preclude the entry of summary judgment—only if the evidence produced at the summary judgment stage is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (cleaned up).

Plaintiffs have the burden of proof at trial to show their entitlement to declaratory relief under Tennessee's Declaratory Judgment Act. *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 417 (Tenn. 1997). Therefore, to prevail on their motion for summary judgment, Plaintiffs "must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle [them] to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019). If they meet that burden of production, then "[t]he burden then shifts to the nonmoving party to produce evidence showing that there is a genuine issue of fact for trial." *Id.*

On the other hand, State Defendants, who lack the burden of proof at trial, may obtain summary judgment "either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Id.* at 887 (quoting *Rye v. Women's Care Ctr. of Memphis*, 447 S.W.3d 235, 264 (Tenn. 2015)). Under either summary judgment standard, "[c]ourts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor." *Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000).

ARGUMENT

The Court should deny Plaintiffs' motion for summary judgment and instead grant summary judgment for the State Defendants. Plaintiffs assert a broad facial challenge that seeks to invalidate two foundational firearm statutes. They seek not the ability to carry constitutionally protected firearms in a particular scenario, but rather the complete invalidation of criminal statutes that restrict the carrying of firearms. If Plaintiffs had their way, *all* individuals could carry firearms across the State, including in public parks, in *all* circumstances.

The Constitution requires no such thing. First, Plaintiffs cannot prevail on their facial constitutional challenge to the Going Armed and Guns in Parks statutes because both statutes have

numerous constitutional applications. Second, Plaintiffs lack standing to sue General Skrmetti or Governor Lee. Third, this Court lacks jurisdiction to declare the constitutionality of a criminal statute. Fourth, Plaintiffs cannot obtain declaratory relief on behalf of non-parties.

I. The State Defendants Are Entitled to Judgment as a Matter of Law.

Plaintiffs "chose to litigate [this] case[] as [a] facial challenge[], and that decision comes at a cost." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). Generally, "litigants mounting a facial challenge to a statute . . . must establish that *no set of circumstances* exists under which the [statute] would be valid." *Hansen*, 599 U.S. at 769 (citation omitted). In other words, Plaintiffs "must rule out every potentially valid application." *L.W. v. Skrmetti*, 83 F.4th 460, 489 (6th Cir. 2023), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023), and *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024). And here, they cannot do so. Both statutes have many constitutional applications under the newly established framework for analyzing the federal and state right to carry a firearm for self-defense.

A. The U.S. Supreme Court has recently refined how courts analyze the constitutionality of firearm statutes.

Since the ratification of the 1870 Constitution, the Tennessee Supreme Court has held that article I, section 26 of the Tennessee Constitution protects "the same rights" as the Second Amendment to the U.S. Constitution "and for similar reasons." *See Andrews*, 50 Tenn. at 177; *compare* Tenn. Cost. art. I, § 26, *with* U.S. Const. amend. II. Because these two provisions were "intended to guard the same right, and with the same ends in view . . . the meaning of the one, will give [courts] an understanding of the purpose of the other." *Andrews*, 50 Tenn. at 183.[7]

[7] Although the Tennessee Constitution specifies that "the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime," Tenn. Const. art. I, § 26, courts have never construed this clause as placing greater limits on the right to keep and bear arms than the Second Amendment. *See Andrews*, 50 Tenn. at 177-80; *see also Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988) (recognizing that the Tennessee Supreme Court is the "final arbiter of the Tennessee Constitution," but remains "bound by the interpretations of . . . the United States Constitution to the extent that they establish a minimum level of protection").

The Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Rather it "protect[s] the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and "to carry a handgun for self-defense outside the home." *Bruen*, 597 U.S. at 8-10. And two recent Supreme Court cases, *Bruen* and *Rahimi* spell out how to determine if a state law infringes on this right.

In *Bruen*, the Court rejected a popular test that allowed courts to engage in a means-end scrutiny of firearm laws. *Id.* at 17. Instead, the *Bruen* Court created a new two-step process for evaluating gun restrictions. *See Antonyuk v. James*, 120 F.4th 941, 964 (2d Cir. 2024). First, a person must show that "the Second Amendment's plain text covers an individual's conduct" because, if so, "the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17, 24 (citing *Heller*, 554 U.S. at 570). Second, if the Constitution protects the person's conduct, then the government must show that a restriction on that conduct is justified under "this Nation's historical tradition of firearm regulation." *Id*. at 17; *see Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211, 218 (4th Cir. 2024) (en banc) (describing *Bruen's* two-step test), *cert. filed* (Oct. 2, 2024); *United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024) (same).

If the challenged law is consistent with that historical tradition, it is constitutional. *Bruen*, 597 U.S. at 17. This type of historical inquiry requires courts to analogize the challenged law to restrictions that existed in or around 1791 when the Second Amendment was ratified. *Id.* at 27-28, 34. Courts may also look to post-ratification restrictions that existed in or around 1868 when the Fourteenth Amendment was adopted if the post-ratification restrictions were "widespread, and unchallenged." *Id.* at 28, 34-36. In some cases, this may be "fairly straightforward." *Id.* at 26. In other cases, it "may require a more nuanced approach." *Id.* at 27. Either way, *Bruen* does not

purport to impose "a regulatory straitjacket." *Id.* at 30. The government only needs to "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.*

More recently, in *Rahimi*, the Supreme Court clarified the appropriate methodology for determining the scope of the Second Amendment right, which post-*Bruen*, "some courts have misunderstood." 602 U.S. at 691. The Court emphasized that its "precedents were not meant to suggest a law trapped in amber." *Id.* On the contrary, the Second Amendment "permits more than just those regulations identical to ones that could be found in 1791." *Id.* at 691-92. "[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." *Id.* at 692 (emphasis added). This requires courts to determine whether modern firearm regulations are "relevantly similar" to historical firearm regulations, considering "[w]hy and how the regulation burdens the right" to keep and bear arms. *Id.* If modern firearm laws "comport with the principles underlying the Second Amendment," they will "pass constitutional muster." *Id.* (citation omitted).

B. The Going Armed statute is facially constitutional.

Before *Bruen*, the Tennessee Court of Appeals already rejected a state constitutional challenge to the Going Armed statute. But even applying *Bruen's* methodology, Plaintiffs' facial constitutional challenge still fails. The Going Armed statute is clearly constitutional as applied to dangerous and unusual weapons that are not constitutionally protected. It is clearly constitutional as applied to convicted felons or in sensitive places, like schools and government buildings. There is also a strong historical tradition of "going armed" laws that prohibit the carrying of firearms with the intent of going armed offensively.

1. The Court of Appeals held the statute facially constitutional.

The litigation history of the Going Armed statute is not a blank slate. In 2013, the Court of Appeals held that it "is a valid regulation of the carrying of firearms that does not contravene

either the Second Amendment or Tenn. Const. Art. I, § 26." *Embody*, 2013 WL 2295671, at *1. Plaintiffs fail to acknowledge this unfavorable precedent in their summary judgment pleadings. But the case demands attention. Although "unpublished decisions are not binding precedent, they are nevertheless persuasive authority." Tenn. Sup. Ct. R. 4(G).

In *Embody*, the plaintiff challenged the constitutionality of the Going Armed statute after the Department of Safety suspended his handgun carry permit. 2013 WL 2295671, at *1. The plaintiff claimed "that the state may not regulate the carrying of firearms," but the court rejected this claim as lacking "historical or legal basis" in state and federal law. *Id.* at *6.

On the state side, the court noted that the Tennessee Constitution expressly allows the legislature to "regulate the wearing of arms with a view to prevent crime," Tenn. Const. art. I, § 26, and Tennessee courts have repeatedly upheld public carry restrictions. *Embody*, 2013 WL 2295671, at *3-5 (citing *Aymette v. State*, 21 Tenn. 154 (1840), and *Andrews*, 50 Tenn. at 165). And the court recognized that the Going Armed statute "is not even a genuine prohibition on the carrying of firearms, as there are numerous defenses to the law." *Id.* at *7 (citing Tenn. Code Ann. § 39-17-1308).

On the federal side, the court found that the Going Armed statute "does not implicate core Second Amendment rights." *Id.* at *8. Applying an intermediate level of scrutiny due to an inconclusive historical record, the Court of Appeals found the Going Armed statute survived because it was "a regulation that reasonably comports with the State's goal of preventing crime." *Id.* at *8.

Although *Embody* pre-dates *Bruen* and applied intermediate scrutiny, the opinion is persuasive on at least two key points. It recognizes the General Assembly's power under the Tennessee Constitution to regulate the carrying of firearms to prevent crime. And it reiterates that

the Going Armed statute "is not even a genuine prohibition on the carrying of firearms." *Id*. at *7. These two key insights should inform the Court's analysis when applying *Bruen's* refined constitutional methodology.

2. The statute constitutionally applies to firearms that are not constitutionally protected.

The Going Armed statute can be constitutionally applied to prohibit the carrying of dangerous and unusual weapons that are not constitutionally protected under article I, section 26 of the Tennessee Constitution. Under these circumstances, the law can be constitutionally applied. That fact alone dooms Plaintiffs' facial constitutional challenge because they cannot "establish that no set of circumstances exists under which the [law] would be valid." *Rahimi*, 602 U.S. at 693 (citation omitted).

Not all weapons qualify for constitutional protection. Article I, section 26—like the Second Amendment—protects the right to keep and to bear "arms." Tenn. Const. art. I, § 26. But there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" so the right to keep and bear arms only applies to weapons "in common use" for lawful purposes, like self-defense. *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). This means handguns are constitutionally protected "arms" because they "are the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629. Whereas other weapons, like machine guns, bombs, and grenades do not enjoy constitutional protections. *United States v. Simien*, 655 F. Supp. 3d 540, 553 (W.D. Tex. 2023); *see also Bruen*, 597 U.S. at 72 (stating that *Bruen* has not disturbed any prior decisions "about the *kinds* of weapons that people may possess") (Alito, J. concurring) (emphasis added).

As mentioned, the Going Armed statute incorporates a broad statutory definition of "firearm," which includes dangerous and unusual weapons—such as "bomb[s]," "grenade[s],"

"rocket[s]," and "missile[s],"—that enjoy no constitutional protection. Tenn. Code Ann. §§ 39-11-106(10), (13)(A)(iv), 39-17-1307(a). There is wide consensus that state and federal constitutions permit legislators to restrict the carrying of these weapons. *See, e.g., United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009)); *United States v. McCartney*, 357 Fed. App'x 73, 76 (9th Cir. 2009).[8] And Plaintiffs do not argue otherwise.

Because the Going Armed statute regulates at least some weapons not covered by the constitution's "plain text," *Bruen*, 597 U.S. at 24, the State Defendants have shown that the statute "is constitutional in some of its applications," *Rahimi*, 602 U.S. at 693, and the facial constitutional challenge must fail. *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006).

3. The statute constitutionally applies in sensitive places.

The Going Armed statute also constitutionally applies in "sensitive places," like schools and government buildings, where firearm regulations are "presumptively lawful." *Heller*, 554 U.S. at 626-27. Although the General Assembly has enacted separate statutes regulating firearms in these protected areas—some of which Plaintiffs do not even challenge—the Going Armed statute also applies in these sensitive places. Because these applications of the law are clearly constitutional, Plaintiffs' facial challenge fails. *Lynch*, 205 S.W.3d at 390.

The U.S. Supreme Court has recognized a "longstanding" historical tradition of prohibiting firearms in "sensitive places." *Bruen*, 597 U.S. at 30 (citing *Heller*, 554 U.S. at 626-27). Indeed, the sensitive-places doctrine originated in England centuries ago. Charles Rep. ¶ 5. And over the course of its development, it cast a broad net over "densely populated areas, as well as areas where people regularly congregated for lawful purposes or conducted commerce." *Id.* It traveled across

[8] "Although the decisions of other jurisdictions are not binding on this Court, 'the objective of uniformity cannot be achieved by ignoring utterances of other jurisdictions.'" *Tennessee Farmers Mut. Ins. Co. v. DeBruce*, 586 S.W.3d 901, 905 (Tenn. 2019) (citation omitted).

the Atlantic to the American Colonies, resulting in "'sensitive place' firearm restrictions" that date as far back as the mid-seventeenth century. *Id.* ¶ 7 (citing *Bruen*, 597 U.S. at 30-31).

Specifically, the U.S. Supreme Court has identified "schools and government buildings" as sensitive places. *Heller*, 554 U.S. at 626-27. It has also found a historical tradition of prohibiting firearms in "legislative assemblies, polling places, and courthouses." *Bruen*, 597 U.S. at 30. Given this history, and the lack of any "disputes regarding the lawfulness of such prohibitions," it is "settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Id.*

Tennessee has its own part of that history. In 1869, Tennessee "enacted a law restricting the carrying of dangerous weapons into 'any election . . . fair, race course, or other public assembly of the people.'" (Defs' SUMF ¶ 1). And Tennessee continues to regulate the carrying of firearms in sensitive places, including schools, government buildings, and public parks. *See, e.g.*, Tenn. Code Ann. §§ 39-17-1306 (judicial proceedings), -1309 (schools), -1311 (public parks, playgrounds, civic centers, and recreational facilities).

Given the strict standard for bringing a facial constitutional challenge, Plaintiffs' argument (at 19) that the Going Armed statute impermissibly "declares the entire state to be a gun-free zone," is misplaced. Again, the State Defendants need only prove that the statute "is constitutional in some of its applications." *Rahimi*, 602 U.S. at 693. Because the U.S. Supreme Court has consistently reaffirmed the sensitive places doctrine, the Going Armed statute does not violate Article I, section 26 of the Tennessee Constitution as applied in these protected areas.

4. The statute constitutionally applies to dangerous people convicted of violent felonies.

Tennessee has other firearm statutes that apply to convicted felons, *see* Tenn. Code Ann. § 39-17-1307(b), (c), but nothing prevents the State from prosecuting a convicted felon under the

Going Armed statute, too. And such an application of the law is surely constitutional because there is a strong historical tradition of disarming "groups of people, like felons, whom the legislature believes to be dangerous." *United States v. Williams*, 113 F.4th 637, 663 (6th Cir. 2024). Plaintiffs cannot seek sweeping declaratory relief for convicted felons.

In *Williams*, the Sixth Circuit rejected a facial constitutional challenge to the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1). *Id.* Although felons are among "the people" protected by the Second Amendment, *id.* at 649, "history reveals that legislatures may disarm groups of people, like felons, whom the legislature believes to be dangerous—so long as each member of that disarmed group has an opportunity to make an individualized showing that he himself is not actually dangerous." *Id.* at 663. Whether a felon is "dangerous" may be difficult to determine at the margins, but at a minimum, people who commit a crime "against the body of another human being," or "a crime that inherently poses a significant threat of danger," may be disarmed consistent with the Second Amendment. *Id.* (citation omitted).

Plaintiffs cannot show that "*no set of circumstances exist*" under which the Going Armed statute would be valid, *Hansen*, 599 U.S. at 769 (citation omitted), because the statute can be constitutionally applied to people convicted of violent felonies. *See Williams*, 113 F.4th at 663. That other Tennessee statutes impose criminal liability under similar circumstances does not alter the analysis.

5. The statute constitutionally restricts "going armed" for offensive purposes.

The Going Armed statute also fits squarely within the historical tradition of restricting the carrying of firearms for offensive purposes. Even if application of the law to individuals carrying handguns for self-defense raises constitutional concerns, a long history supports the constitutionality of the Going Armed Statute when it is applied to individuals who carry firearms

with the intent to go armed offensively for the purpose of threatening or intimidating others. *Rahimi* and *Bruen* provide excellent guidance on how the intent requirement proves the facial constitutionality of Tennessee's Going Armed statute.

In *Rahimi*, the Supreme Court reaffirmed the historical tradition of intent-based restrictions on public carry, citing a wealth of sources from early American history. *Rahimi*, 144 S. Ct. at 1900-02. "[G]oing armed laws," the Court explained, descended from statutes that "encompass[ed] the offense of 'arm[ing]' oneself 'to the Terror of the People.'" *Id.* at 1901. In fact, prohibitions on fighting and going armed were often codified in the same statutes. *Id.* Because "going armed" tended to "disrupt[] the 'public order' and 'le[ad] almost necessarily to actual violence,'" the law punished this offense with "forfeiture of the arms . . . and imprisonment." *Id.* (citing 4 Blackstone 149).

And *Rahimi* only builds on other precedent. As the Court noted in *Bruen*, "[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the *intent* for which one could carry arms." 597 U.S. at 38 (emphasis added)). The "thread" running through these early American firearm regulations is that "[t]hey prohibit bearing arms in a way that spreads 'fear' or 'terror' among the people." *Id.*

So too here. Tennessee has criminalized "go[ing] armed" since at least 1801. *Bruen*, 597 U.S. at 50. And, in its current iteration, the Going Armed statute stands firmly in that historical tradition because of its intent element. Although the State Defendants are not required to identify a "historical twin" to demonstrate the constitutionality of the Going Armed statute, *Rahimi*, 602 U.S. at 692, it would be hard to identify a better historical analogue than Tennessee's 1801 statute.

The Tennessee Supreme Court has previously held that the "intent to go armed" requirement includes "either offensive or defensive" intent, *Kendall*, 101 S.W. at 189, which may

raise concerns about this statute's application to individuals carrying firearms "for self-defense outside the home,"[9] *Bruen*, 597 U.S. at 10. But at a minimum, the Going Armed statute is constitutional as applied to individuals who carry firearms offensively, i.e., "to the Terror of the People." *Rahimi*, 144 S. Ct. at 1901 (quoting T. Barlow, The Justice of the Peace: A Treatise 11 (1745)). Because this constitutional application of the statute fits firmly within the historical tradition of intent-based restrictions on public carry, Plaintiffs' facial constitutional challenge fails.

C. The Guns in Parks statute is facially constitutional.

Plaintiffs likewise cannot "establish that no set of circumstances exists" under which the Guns in Parks statute would be valid. *Rahimi*, 602 U.S. at 693. First, like the Going Armed Statute, the Guns in Parks statute can be constitutionally applied to the carrying of dangerous and unusual weapons and to people who carry firearms with the intent to go armed offensively. Second, the statute does not apply to permit holders, and Tennessee's shall-issue licensing regime is presumptively constitutional. Third, there is a strong historical tradition of prohibiting firearms in sensitive places, including public parks, public spaces used for elections, and areas used by children.

1. The Guns in Parks statute constitutionally applies to dangerous and unusual weapons and people who go armed offensively.

The Guns in Parks statute prohibits carrying a firearm "with the intent to go armed," like the Going Armed statute, in a "public park, playground, civic center or other building" used by a government for recreation. Tenn. Code Ann. § 39-17-1311(a). Because there is a strong historical tradition of restricting the carrying of firearms with the intent to go armed offensively, *see supra*

[9] As Plaintiffs' note (at 11-12), the Tennessee Attorney General previously issued an opinion endorsing the constitutionality of the Going Armed and Guns in Parks statutes based, in part, on *Kendall's* interpretation of the "intent to go armed" element. But the Attorney General has withdrawn this opinion.

at p. 17-18, carrying a firearm "with the intent to go armed" in a public park or other protected area is constitutional under article I, section 26 of the Tennessee Constitution.

The Guns in Parks statute prohibits the carrying of "any weapon prohibited by § 39-17-1302(a)," which includes "explosive[s]," "machine gun[s]," "knuckles," and "[a]ny other implement for infliction of serious bodily injury or death that has no common lawful purpose." Tenn. Code Ann. § 39-17-1302(a). As discussed, such weapons are not constitutionally protected "arms" under article I, section 26 of the Tennessee Constitution. *See supra* at p. 13-14. Even if the statute is applied more broadly to all "firearms," the statutory definition of "firearms" includes many of the same weapons that are not constitutionally protected. *Id*. at p. 6, 13-14.

Thus, the Guns in Parks statute is facially constitutional for the same reasons that the Going Armed statute is facially constitutional. It can be lawfully applied to both dangerous and unusual weapons and to people who carry firearms with the intent to go armed offensively. Because plaintiffs cannot "establish that no set of circumstances exists under which the [law] would be valid," their facial challenge to the statute fails. *Rahimi*, 602 U.S. at 693.

2. The statute constitutionally applies to non-permit holders.

The Guns in Parks statute allows carrying handguns in parks and other protected areas if a person has a permit, *see* Tenn. Code Ann. § 39-17-1311(b)(1)(H)(i), and Tennessee's "shall issue" permitting regime is steeped in historical traditions, *see Bruen*, 597 U.S. at 38 n.9. Indeed, Plaintiffs do not even argue that Tennessee's licensing regime somehow imposes an unconstitutional burden on their right to bear arms. Because the licensing requirement is constitutional, the Guns in Parks statute constitutionally prohibits the carrying of firearms by non-permit holders.

Once again, *Bruen's* analysis proves the constitutionality of Tennessee's law. In *Bruen*, the Supreme Court struck down a "may issue" licensing regime in New York. *Bruen*, 597 U.S. at

14, 69-70. "But that was due to the exceptional nature of New York's proper-cause requirement," which limited a person's ability to carry a firearm based on that person's stated reasons for needing to carry a firearm. *Antonyuk*, 120 F.4th at 970. The New York scheme also "grant[ed] open-ended discretion to licensing officials" and "require[d] a showing of some special need apart from self-defense." *Bruen*, 597 U.S. at 80 (Kavanaugh, J., concurring). The Supreme Court found that the New York scheme violated the Second Amendment because the statutes subjected the right to carry for self-defense to a "special need" as determined by a state official's discretion. *Id*. at 70; *id.* at 80 (Kavanaugh, J., concurring).

Not so for shall-issue regimes like Tennessee's. The Supreme Court stated clearly that "nothing in its analysis" called into question the constitutionality of "shall-issue" licensing regimes that "appear to contain only 'narrow, objective, and definite' standards guiding licensing officials." *Id.* at 38 n.9 (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)). To underscore its point, the Court noted that 43 jurisdictions, including Tennessee, have "shall-issue licensing regimes" and "may continue to do so." *Bruen*, 597 U.S. at 13 n.1, 38 n.9; *id*. at 80 (Kavanaugh, J., concurring).

There is a reason the Court in *Bruen* explicitly approved of "shall-issue" licensing regimes: they fit squarely within our nation's history and tradition of firearm regulation. Predecessors to Tennessee's permitting requirements—surety laws and concealed carry restrictions—were prolific throughout the United States colonies before the Founding and throughout the nineteenth century. (Defs' SUMF ¶ 2); *Rahimi*, 602 U.S. at 695. These were enacted to "curb the precipitous rise in armed crime, assaults, and murders" and to "protect the health, safety, and welfare of the community." (Defs' SUMF ¶ 2.)

Likewise, from the Founding through the nineteenth century, many jurisdictions adopted licensing requirements for carrying, discharging, and selling firearms. (*Id.* at ¶ 3.) For example, in 1713, Pennsylvania imposed a fine for anyone "firing a gun without license." (App. at 1.) In 1750 and 1760, Pennsylvania required a "Governor's special license" to "fire any gun or fire-arm." (App. at 2, 3.) In 1771, New Jersey prohibited anyone from carrying a firearm or hunting on another's property without "license or permission obtained from the" landowner. (App. at 4). In the mid- to late-nineteenth century, many more jurisdictions adopted licensing for carrying or discharging firearms.[10] And many laws also required proof that the licensee was "law abiding." Charles Rep. ¶ 24 (listing ordinances in Kansas 1894 (App. at 24); New York 1880 (App. at 25-27); and New Jersey (App. at 28)).

This history includes Tennessee. In 1867, Memphis specifically required "a permit from the Mayor" to discharge a firearm "in the streets, alleys or public grounds of the city." (Defs' SUMF ¶ 4.) In 1879, Tennessee required a license to sell, give away, or dispose of firearms. (Defs' SMUF ¶ 5.) Thus, very near in time to both the 1870 adoption of the operative Tennessee Constitution and the 1868 incorporation of the Second Amendment against the States, Tennessee was regulating firearms and requiring licenses.

The number of historical analogs is likely more abundant than the State Defendants can show here. Even with the plethora of examples of licensing regimes throughout the United States, "many local laws have been lost to time" because the current "records of local laws . . . are only a

[10] *See, e.g.*, New Orleans, Louisiana 1870 (App. at 5); Bloomington, Indiana 1876 (App. at 6); Lake, Illinois 1882 (App. at 7); Berlin, Wisconsin 1890 (App. at 8); Alameda, California (App. at 9); Lincoln, Nebraska 1895 (App. at 10); *see also* Charles Rep. at 22–24 (listing going-armed ordinances from: Kansas City, Missouri 1898; St. Paul, Minnesota 1882 (App. at 13); Chicago, Illinois 1880 (App at 14); St. Louis, Missouri 1881; Ritzville, Washington 1899 (App. at 15); Sacramento, California 1876 (App. at 16); Oakland, California 1890 (App. at 17); Eureka, California 1905 (App. at 18); San Francisco, California 1884 (App. at 19); Santa Barbara, California 1888 (App. at 20); Hood River Glacier, Oregon (App. at 21); Osceola, Missouri 1887 (App. at 22); Astoria, Oregon 1879 (App. at 23)).

fragment of the whole." Charles Rep. ¶ 25. Notably, research reveals not one court that held any of the post-ratification laws unconstitutional; it reveals the opposite. *Id.* (citing Concealed Weapons: Judge Brannon's Decision on this Subject, Wheeling Register (WV), Oct. 15, 1883, at 1 (App. at 29)). So, this Court may consider them as historical analogs to Tennessee law. *Bruen*, 597 U.S. at 34-36.

As *Bruen* demonstrates, Tennessee's shall-issue licensing regime is well-grounded in the nation's history and tradition. Thus, the Guns in Parks statute complies with the state and federal constitutions when it requires permits for people to carry firearms in parks and other protected areas. And the converse is also true—the Guns in Parks statute complies with the state and federal constitutions when it restricts the carrying of firearms by non-permit holders in public parks and other protected areas. Tenn. Code Ann. § 39-17-1311(b)(1)(H)(i). This clear application of the statute is yet another reason to reject Plaintiffs' facial constitutional challenge. *Rahimi*, 602 U.S. at 693.

3. The statute constitutionally applies in sensitive places.

The Guns in Parks statute has numerous constitutional applications under the sensitive-places doctrine. First, widespread laws enacted post-ratification uniformly prohibit or restrict the carrying of firearms in parks, including in Tennessee. Second, parks, recreational centers, and other public places automatically become sensitive places when counties use them for polling, and counties throughout Tennessee do just that. Third, the playgrounds and other recreational areas used for athletic activities are readily analogous to one of the most recognized and crucial of sensitive places—schools. Finally, Plaintiffs' arguments to the contrary (at 23-24) erroneously conflate military and functional spaces with their much later conversion into parks.

a. Public parks are sensitive places.

Around the time that Tennessee adopted its current Constitution and was subject to the Second Amendment through the enactment of the Fourteenth Amendment, public parks had just begun to spread through the nation. And from the start, firearms were not only regulated in these sensitive spaces—they were uniformly and entirely banned. Thus, Tennessee's modest requirement for a handgun carry permit in public parks fits comfortably within this prolific history and tradition.

History of the Parks Movement. During the 1700s and through the time of the Founding, public parks as we know them today did not exist. (Defs' SUMF ¶ 6.) A few privately owned establishments had gardens for socializing and relaxation, but the "publicly owned spaces were utilitarian rather than ornamental." (*Id.* at ¶ 7.) These "greens" or "commons" were "unsightly plots" used for temporarily holding livestock, cemeteries, quarantining persons with illnesses such as smallpox, storing gunpowder and other supplies, and sometimes, militia training or drills. (*Id.* at ¶ 8.) These areas did not resemble or serve the purpose of modern parks. (*Id*. at ¶¶ 7-8)

It was not until the mid-nineteenth century that parks as a concept emerged, beginning at the local level. (*Id.* at ¶ 9.) The urbanization of America in the 1800s caused people to seek refuge from cramped inner-city life. (*Id.* at ¶¶ 9-10.) Cities were increasingly viewed as socially degraded, noisy, polluted, and crime ridden places. (*Id*. at ¶ 9.) In response to those newly developing societal concerns and from a romantic view of "nature as an interrelated world of mind, body, and being," public parks were born. (*Id.* at ¶ 10.) Cities disrupted people's connection to nature, resulting in societal problems, and urban parks were the solution "because they brought nature, God's handiwork, balanced and inherently good, back to cities." (*Id.* at ¶ 10.) At the local,

city level parks emerged as "places for 'passive recreation,' which meant sitting, strolling, slow horse riding, and other quiet activities. (*Id.* at ¶ 11.)

State and national parks emerged from a similar ideology and for the same purpose—"the improvement of American society." (*Id.* at ¶ 12.) For example, as the first national park, Yosemite was designed in 1864 to improve its visitors "through passive interaction with the scenery." Young Rep. ¶ 42. Most state parks did not appear until the 1900's, as a "logical insertion" between the local parks and national parks. *Id.* at ¶ 53.

The purpose of the parks changed somewhat overtime. By the late 1880's, parks were no longer solely for contemplation but were used for recreation as well, particularly by children at play. (Defs' SUMF ¶ 13.) Recreation was seen as vital for healthy child development, and parks allowed safe and accessible recreation. (*Id.* at ¶ 14.)

History of Parks as Sensitive Places. As public parks emerged in the mid-nineteenth century, they all "embraced the same firearms prohibition." (*Id.* at ¶ 15.) Central Park, the first urban park in the nation, banned firearms before the park project had even begun. Young Rep. ¶ 34. Firearms were wholly inconsistent with the notion of parks as pristine places of inclusion and refuge from urban life. (Defs' SUMF ¶ 16); *see also LaFave v. Cnty. of Fairfax, Virginia*, No. 1:23-CV-1605 (WBP), 2024 WL 3928883, at *10 (E.D. Va. Aug. 23, 2024), *appeal filed*, No. 24-1886 (4th Cir. Sept. 9, 2024). Central Park thus stated clearly and conspicuously in the first version of its 1858 rules: "All persons are forbidden . . . [t]o carry fire-arms." Young Rep. ¶ 34.

And this prohibition spread across the nation as more local parks opened. (Defs' SUMF ¶ 17.) Although there are likely more regulations to be found, and an untold number of regulations have been lost to time, *see* Charles Rep. ¶ 25, the record reflects dozens of laws, regulations, and

ordinances prohibited carrying firearms in local parks. *See generally* Young Rep. ¶¶ 34-35, 37-38; App. at 30-34.

Once the park movement took hold at the national level, the federal government followed the same pattern of firearm regulation. Yellowstone banned firearms in 1894. (Defs' SUMF ¶ 18.) After creation of the National Park Service, firearms were banned from all national parks in 1936. (*Id.*) For the 150 years since parks first began banning firearms in 1858, the firearms restrictions in parks have remained widespread and apparently unchallenged, Young Rep. ¶¶ 40, 51, 58, so they deserve the same weight given to pre-ratification restrictions, *see Bruen*, 597 U.S. at 34-36; *Antonyuk*, 120 F.4th at 1024; *see also Rahimi*, 144 S. Ct. at 1916 ("[A] 'universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional.'").

And courts have, thus, repeatedly upheld modern firearm regulations in parks as consistent with the history and tradition of the United States. *See Antonyuk*, 120 F.4th at 1019 (upholding going-armed restrictions in parks as "within the Nation's history of regulating firearms in quintessentially crowded areas and public forums, at least insofar as the regulation prohibits firearms in *urban* parks"); *Wolford v. Lopez*, 116 F.4th 959, 984 (9th Cir. 2024) ("[B]ecause of the national historical tradition of banning firearms at a wide array of parks, the state laws here are constitutionally valid with respect to many, if not all, of the parks in Hawaii and California."); *LaFave*, 2024 WL 3928883, at *4 ("Historical evidence does not support the carrying of firearms for self-defense in urban parks, national parks, or state parks.").

Parks in Tennessee. Urban parks spread in Tennessee in the early twentieth century, and they came with similar firearms prohibitions. (Defs' SUMF ¶ 19.) Memphis barred carrying firearms in parks without special permission, and Chattanooga went a step further by banning

firearms in parks entirely. (Defs' SUMF ¶ 20.) Soon after the creation of urban parks, the Tennessee General Assembly joined other states in establishing state parks. In 1935, the State Planning Commission adopted a plan to allocate land for forestry and recreational purposes with the same goal as parks around the nation: to "promote the health, safety, morals, order, convenience and welfare of the people." (Defs' SUMF ¶ 21.) By the 1950s there were seventeen state parks in Tennessee. (Defs' SUMF ¶ 22.) In the modern era, that number has exploded to 59 state parks that see approximately 38.5 million visitors per year. (Defs' SUMF ¶ 23.)

And the General Assembly followed the trend of the local-level restrictions, long ago prohibiting the carrying of firearms in parks subject to certain exceptions. 1989 Tenn. Pub. Acts, ch. 591, § 1 (enacting the first version of the current Guns in Parks statute). With time, the General Assembly has only gentled this prohibition, expanding its exceptions to a lengthy list that includes anyone who has a concealed handgun carry or enhanced handgun carry permit. Tenn. Code Ann. § 39-17-1311(b)(1)(A)-(J). Compare this moderate regulation to firearms *prohibitions* in parks that have been repeatedly upheld as constitutional protections of sensitive places. *See Antonyuk*, 120 F.4th at 1019; *Wolford*, 116 F.4th at 984; *LaFave*, 2024 WL 3928883, at *4. Tennessee's Guns in Parks statute is "less restrictive than in the nation's history and tradition." Young Rep. at 34. Thus, it is a "straightforward" descendant of other widespread, unchallenged restrictions and should be upheld as a constitutional protection of sensitive places. *Bruen*, 597 U.S. at 26, 34-36.

b. Polling locations are sensitive places.

The Guns in Parks statute can also be constitutionally applied to regulate the carrying of firearms in areas used for polling. *Rahimi*, 602 U.S. at 693. In addition to parks, the Guns in Parks statute also restricts carrying of firearms in civic centers and governmental property used for

recreational purposes, Tenn. Code Ann. § 39-17-1311(a), and all three locations are used for polling in Tennessee, *see* Defs' SUMF ¶ 25.

It is well-settled that polling places are traditionally sensitive places where states may restrict the carrying of firearms. *Bruen* 597 U.S. at 30; *see* Defs' SUMF ¶ 24. And at least as far back as 1869, the General Assembly has prohibited Tennesseans from carrying firearms when participating in an election. (Defs' SUMF ¶ 1) County websites across the state show that dozens of state and local parks, civic centers, and other types of recreational governmental facilities serve as polling places during elections. (Defs' SUMF ¶ 25.) Because Tennessee may restrict carrying firearms in locations that serve as polling places, the Guns in Parks statute cannot be facially unconstitutional. *Rahimi*, 602 U.S. at 693.

c. Recreational areas for children are sensitive places.

The Guns in Parks statute also builds on a long and profoundly important history and tradition of regulating the carrying of firearms in areas where children play and learn. Thus, yet again, Plaintiffs cannot "establish that no set of circumstances exists under which the [law] would be valid." *Rahimi*, 602 U.S. at 693.

Children are one of the most important factors to consider when assessing whether an area is a sensitive space. *Antonyuk*, 120 F.4th at 1010 (emphasizing the "Nation's tradition of firearm regulation in locations where vulnerable populations are present"). At least three different times when the topic of sensitive places has come before the U.S. Supreme Court, it has doubled down on the fact that "schools" are sensitive places. *See Bruen*, 597 U.S. at 30; *McDonald v. City of Chicago, Ill*., 561 U.S. 742, 786 (2010); *Heller*, 554 U.S. at 626. And Tennessee courts agree. *Columbia Hous. & Redevelopment Corp. v. Braden*, 663 S.W.3d 561, 563-567 (Tenn. Ct. App. 2022).

Naturally, courts have extended this protection and deemed places where children are expected to be present as sensitive places analogous to schools. Locations that courts have deemed analogous include:

- Parks, particularly when used for summer camps, *LaFave*, 2024 WL 3928883, at *12-13; *Wolford*, 116 F.4th at 985;
- Daycares, *Mintz v. Chiumento*, 724 F. Supp. 3d 40, 64 (N.D.N.Y. 2024);
- Playgrounds, *Id.*;
- Community centers, *Id.*; and
- Zoos, *Antonyuk*, 120 F.4th at 1026.

The Guns in Parks statute protects numerous areas where children are expected to be present. Tens of thousands of children participate in programs and camps hosted in Tennessee parks throughout the year. (Defs' SUMF ¶ 26.) And Tennessee governmental recreational areas and community centers offer many athletic and educational activities for children, much like activities offered at schools. (Defs' SUMF ¶ 27.) In these many applications, the parks, community centers, and recreational areas in the Guns in Parks statutes are analogous to schools and are, thus, sensitive spaces. The statute should be upheld as facially constitutional. *Antonyuk*, 120 F.4th at 1026; *Wolford*, 116 F.4th at 984-85; *LaFave*, 2024 WL 3928883, at *13; *Mintz*, 724 F. Supp. 3d at 64-65. Tennessee's children deserve that protection.

d. Plaintiffs misunderstand history.

Plaintiffs press two misguided arguments against the Guns in Parks statute. First, they rely on a body of district court opinions that have been repeatedly overruled or eroded by more in-depth historical analysis. Second, they claim that parks are not sensitive places because, at the time of the Founding, states allowed firearms in certain public areas that were *not* parks or analogous to sensitive spaces.

Unsound precedent. Plaintiffs rely heavily on a recent body of district court decisions to argue that parks are not sensitive spaces. But later, more well-developed opinions have undermined or outright overruled these opinions. Plaintiffs (at 18, 21) cite *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422 (W.D.N.Y. 2022), and *Antonyuk v. Hochul*, 639 F. Supp. 3d 232 (N.D.N.Y. 2022), for the idea that the sensitive places doctrine is exceedingly narrow, but in *Antonyuk*, the Second Circuit vacated these opinions and recognized that the sensitive-spaces doctrine is not so limited, 120 F.4th at 955 n.3, 1010-11. Likewise, Plaintiffs (at 22 & n.13) cite *Wolford v. Lopez*, 686 F. Supp. 3d 1034 (D. Haw. 2023), and *May v. Bonta*, 709 F. Supp. 3d 940 (C.D. Cal. 2023), even though the Ninth Circuit overruled the pertinent parts of these opinions. *See Wolford*, 116 F.4th at 959. The other district court opinions that Plaintiffs cite (at 21-22), *Koons v. Platkin*, 673 F. Supp. 3d 515 (D.N.J. 2023), *Springer v. Grisham*, 704 F. Supp. 3d 1206, 1221 (D.N.M. 2023), *appeal filed*, 23-2194 (10th Cir. Dec. 12, 2023), are of limited precedential value because they rely on the very opinions that *Antonyuk* and *Wolford* overruled.

Unsound comparisons. Plaintiffs argue (at 23-24) that history favors the use of firearms in parks and other places covered by the Guns in Parks statute, and they point to locations where firearms were historically allowed, like village greens, the early Boston Common, or a public assembly hall known as Faneuil Hall that hosted volunteer militia. But these locations were *not* parks when they allowed firearm usage. (Defs' Resp. Pls' SUMF, Statement of Additional Disputed Material Facts ¶¶ 1-3.) Rather they were "multi-purpose utilitarian spaces" occasionally designated for "basic military exercise." (*Id.* at ¶ 3); *see Antonyuk*, 120 F.4th at 1025 (noting the Boston Common gained its distinction as the "Nation's first urban public park . . . only in retrospect"); *Wolford*, 116 F.4th at 982 ("Boston Common was used primarily for grazing animals and for holding military exercises and was not akin to modern parks.").

This argument is further flawed in its assumption that the governmental authorization to carry arms in dangerous and warlike times can be equated to the option to carry arms for self-defense in peaceful times. Charles Rep. at 25-26. Plaintiffs' attempt to analogize early "commons" and "greens" to modern parks lacks sufficient grounding in history and tradition to merit summary judgment in their favor.

* * *

In summary, this Court should grant the State Defendants' motion for summary judgment because they have demonstrated that the Going Armed and Guns in Parks statutes are at least "constitutional in some of [their] applications." *Rahimi*, 602 U.S. at 693. In contrast, the Court should deny Plaintiffs' motion for summary judgment because they have failed to carrying their burden of "rul[ing] out every potentially valid application" of the challenged statutes. *L.W.*, 83 F.4th at 489.

II. Plaintiffs Lack Standing to Sue General Skrmetti or Governor Lee.

Summary judgment should be denied on Plaintiffs' claims against General Skrmetti and Governor Lee because neither Defendant enforces the challenged statutes. While this Court previously denied their Motion to Dismiss (August 30, 2023 Order), these Defendants raise standing again to (1) address the issue under the heightened burden of proof imposed on Plaintiffs at the summary judgment stage and (2) preserve their position in the event that this Court's order on summary judgment results in an appeal.

To establish standing, "a plaintiff must satisfy 'three "indispensable" elements.'" *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (quoting *Am. C.L. Union of Tennessee v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006)). First, a plaintiff "must show an injury that is 'distinct and palpable.'" *Id*. Second a plaintiff "must demonstrate a causal connection between the alleged injury and the challenged conduct," or put another way, the plaintiff must show "that the injury to

a plaintiff is 'fairly traceable' to the conduct of the adverse party." *Id.* Third, "the injury must be capable of being redressed by a favorable decision of the court." *Id.* Plaintiffs "must show" these three elements "by the same degree of evidence as other matters" at summary judgment. *Bowers v. Estate of Mounger*, 542 S.W.3d 470, 479 (Tenn. Ct. App. 2017). "The party invoking the court's jurisdiction has the burden of establishing the elements of standing." *Hayes v. City of Memphis*, No. W2014-01962-COA-R3-CV, 2015 WL 5000729, at *9 (Tenn. Ct. App. Aug. 21, 2015).

A. Judgment against General Skrmetti is improper.

1. Plaintiffs lack constitutional standing against General Skrmetti.

Plaintiffs' alleged injuries cannot be traced to General Skrmetti or redressed by any declaration against him. (Defs' Mot. Dismiss Am. Compl. Mem. 5-14.) And Plaintiffs offer *no* proof to the contrary. They simply say that the Attorney General has issued various opinions interpreting the challenged statutes. (Pl's MSJM at 6-12.)

The power to issue opinions is not the power to prosecute. General Skrmetti cannot initiate prosecutions himself and cannot "direct or command district attorneys general to undertake prosecutions." *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1032 (6th Cir. 2022). "What plaintiffs come closer to alleging is that the Attorney General is *indirectly* enticing district attorneys general to prosecute by issuing his interpretive opinions." *Id.* at 1033. But these opinions, at most, advise certain state officials of the Attorney General's interpretation of a statute. *Id.* If a plaintiff sues a defendant based on alleged advice the defendant gave to a third party, the plaintiff must show that the advice had a "determinative or coercive effect" on the third party. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Mere "recommendations" from the defendant to the third party allegedly responsible for the injury are not enough for traceability. *Daves v. Dallas Cnty.*, 22 F.4th 522, 543 (5th Cir. 2022). Because Tennessee district attorneys "would still have an independent duty to 'prosecute according to law,' the Tennessee Attorney

General's interpretive opinions—even if they might be characterized as enticing prosecution—" do not "meet the redressability requirement." *Ashe v. Hargett*, No. 3:23-CV-01256, 2024 WL 923771, at *7 (M.D. Tenn. Mar. 4, 2024) (citation omitted); *see McKay v. State*, No. W2023-01207-CCA-R9-CO, 2024 WL 4404318, at *5 (Tenn. Crim. App. Oct. 4, 2024) (delineating between the criminal prosecutorial authority of district attorneys and the civil litigation authority of the Attorney General).

Plaintiffs do not show that General Skrmetti has determinative or coercive authority over anyone who might read the cited opinions, much less that those enforcing the challenged statutes have even considered the cited opinions. There is no evidence that General Skrmetti has "somehow issued a direct command to district attorneys general to prosecute" anyone—let alone the plaintiffs here. *Nabors*, 35 F.4th at 1032. Thus, Plaintiffs' alleged injury is not fairly traceable to General Skrmetti. *Id.*; *see also Nat'l Council of La Raza v. Mukasey*, 283 F. App'x 848, 852 (2d Cir. 2008) (finding plaintiffs lacked standing to sue the federal government for injuries caused by state and local government because the federal governments' actions did not have "a determinative or coercive effect" on the state and local governments).

The existence of a relevant Attorney General opinion is not evidence that the Attorney General has the authority to enforce the challenged statutes. Thus, Plaintiffs lack standing to pursue a judgment against General Skrmetti. *Cf. Nabors*, 35 F.4th at 1033; *Ashe*, 2024 WL 923771, at *7.

2. The Declaratory Judgment Act does not create special liability for General Skrmetti.

Having failed to establish the indispensable elements of standing, Plaintiffs cannot fall back on the Declaratory Judgment Act's notice requirements to make General Skrmetti a party when he otherwise should not be one.

General Skrmetti acknowledges that this Court previously held in ruling on his Motion to Dismiss that the Supreme Court's decisions in *Cummings v. Beeler*, 223 S.W.2d 913 (Tenn. 1949), and *Buena Vista Special School District v. Board of Election Commissioners of Carroll County*, 116 S.W.2d 1008 (Tenn. 1938), have not been explicitly overruled and dictate that General Skrmetti is a proper defendant. But those decisions deviated from earlier Supreme Court precedent holding that the Declaratory Judgment Act requires only "that the Attorney General . . . be served with a copy of the proceeding." *Cummings v. Shipp*, 3 S.W.2d 1062, 1063 (Tenn. 1928). The Court explained in *Shipp* that the Act "protect[s] the public should the parties be indifferent to the result" of the challenge to state law, as that indifference "might affect the public welfare." *Id.* The Act protects that interest by requiring the Attorney General to receive notice of the proceeding and an entitlement "to be heard," Tenn. Code Ann. § 29-14-107(b), should he so choose. It does not require the Attorney General to participate as a party. And *Shipp* has never been overruled.

When two lines of precedent conflict, the majority of federal circuit courts treat the earlier opinion as controlling. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (collecting cases). Tennessee appellate courts have also hesitated to treat more recent decisions as implicitly overruling earlier ones. *See Giles v. Geico Gen. Ins. Co.*, 643 S.W.3d 171, 183-85 & n.8 (Tenn. Ct. App. 2021) (recounting instances where Supreme Court and Court of Appeals had narrowed or distinguished more recent decisions that appeared to conflict with earlier precedent).

And here, General Skrmetti's position is not only explicitly endorsed by the earlier of conflicting Tennessee Supreme Court decisions, but it is also supported by language in more recent Supreme Court decisions. Consider, for example, *State v. Superior Oil, Inc.*, 875 S.W.2d 658 (Tenn. 1994). There, "the record clearly reflect[ed] that the district attorney general complied with Tenn. Code Ann. § 29-14-107 by giving notice to the Office of the State Attorney General that the

constitutionality of a state law was being questioned." *Id.* at 659-60. But the Supreme Court did not suggest that the Declaratory Judgment Act required the Attorney General to be made a party. And in *Chattanooga-Hamilton County Hospital Authority v. UnitedHealthcare Plan of the River Valley, Inc.*, the Supreme Court, in a matter where the Attorney General intervened to defend the constitutionality of a Tennessee law, nevertheless recognized that the "lawsuit [was] between private parties only." 475 S.W.3d 746, 755 (Tenn. 2015). Another three-judge panel found this Supreme Court history dispositive when ruling that the Declaratory Judgment Act does *not* require the Attorney General to be made a party. *See Moses v. Goins*, No. CT-1579-19, *11-12 & n.5 (Shelby Cnty. Cir. Ct. Aug. 23, 2024) (Exhibit 4). These cases illustrate the viability of *Shipp*.

And *Shipp*'s reasoning more closely hews to the Declaratory Judgment Act's text. The relevant statutory provision explains that, "if the statute, ordinance, or franchise" being challenged as unconstitutional "is of statewide effect … , the attorney general and reporter shall also be served with a copy of the proceeding and be entitled to be heard." Tenn. Code Ann. § 29-14-107(b). That provision does not require the Attorney General to be made a party in any case; it merely requires that notice be provided to him. That provision contrasts with the immediately preceding sentence governing cases involving the validity of municipal law. *That* provision instructs that the relevant municipality "shall be made a party." *Id.* By reading those two provisions to mean the same thing despite their textual differences, the *Beeler*-based approach gives no effect to the legislature's decision to treat municipal law challenges differently from state law challenges. *Contra Effler v. Purdue Pharma L.P.*, 614 S.W.3d 681, 688-89 (Tenn. 2020). It also renders superfluous § 29-14-107(b)'s requirement that the Attorney General "be served with a copy of the proceeding and be entitled to be heard," given that all parties must be served with a copy of a complaint and are entitled to be heard. *See* Tenn. R. Civ. P. 4.01; Tenn. R. Civ. P. 12.01.

Under these circumstances, and given the plain reading of the text itself, this Court should follow *Shipp* and hold that the Declaratory Judgment Act only requires notice to the Attorney General.

B. Judgment against Governor Lee is improper.

1. Plaintiffs lack constitutional standing against Governor Lee.

Defendants reassert that Plaintiffs' alleged injuries cannot be traced to Governor Lee or redressed by any declaration against him. (Defs' Mot. Dismiss Am. Compl. Mem. 5-14.) And Plaintiffs offer *no* proof to the contrary. They do not even mention the Governor in their motion for summary judgment. Thus, they fall well short of their evidentiary burden to show they have standing to obtain a judgment against the Governor. *Bowers*, 542 S.W.3d at 479; *Hayes*, 2015 WL 5000729, at *9.

2. Governor Lee's executive order authority and removal authority do not render him liable.

Plaintiffs' claim against Governor Lee survived dismissal after this Court found that the Governor's authority to issue executive orders and to remove Commissioners without cause gave Plaintiffs standing because "the buck stops" with the Governor. (August 30, 2023 Order, at 16-17.) But this presumes that the Governor can be found liable in his official capacity under Tenn. Code Ann. § 1-3-121 solely due to his supervisory authority. That presumption is incorrect for three reasons.

First, allowing suit based purely on supervisory authority runs counter to the long-established requirements for official-capacity lawsuits. "Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, 'the entity's policy or custom must have played a part in the violation of . . . law.'" *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citation omitted); *Cuzick v. Bass*, No. 02A01-9809-CV-00244, 1999 WL 145209, at *5

(Tenn. Ct. App. Mar. 18, 1999) (same). The Governor's authority to fire people does not meet that requirement. The simple fact that the "Governor possesses power as the chief executive to remove employees from their posts, or at least to initiate such proceedings, . . . does not give him a role in the enforcement of individual criminal laws beyond his general 'take care' duty." *Doe v. Lee*, 102 F.4th 330, 336 (6th Cir. 2024). Plaintiffs needed to present "specific, plausible allegations"—and then evidence—"about what the Governor has done, is doing, or might do to injure plaintiffs." *Nabors*, 35 F.4th at 1031. That the Governor wields the "supreme executive power of the state" does not suffice. *Id.*; *see Doe*, 102 F.4th at 336.

Second, Plaintiffs' sole cause of action,[11] Tenn. Code Ann. § 1-3-121, contains a "governmental action" requirement. (Pl's MSJM at 8.) This reference—to challenges against "a governmental action," singular—requires that a discrete *action* must have been taken *against a plaintiff* by a governmental *actor*. *Cf. McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch*, 645 S.W.3d 160, 169 (Tenn. 2022) (permitting § 1-3-121 claim where plaintiff challenged "the legality of the TBI's action" in refusing to expunge his records). This language does not permit a plaintiff to sue a defendant who has not acted (or could not act) with respect to the law. A contrary reading would run up against courts' "limited" constitutional role to "decide, not advise." *State v. Wilson*, 70 Tenn. 204, 210 (1879); *Memphis Publ'g Co. v. City of Memphis*, 513 S.W.2d 511, 512 (Tenn. 1974).

Finally, treating Governor Lee's supervisory authority as a basis for standing overlooks the *limits* on the Governor's supervisory powers. While certain state officials with authority to enforce the challenged firearm statutes serve at the Governor's pleasure, *see* Tenn. Code Ann. § 4-3-2002

[11] Plaintiffs also cite the Declaratory Judgment Act, (Am. Compl., Introduction), but "Tennessee's 'declaratory judgment statute does not create a cause of action to enforce rights."' *Elvis Presley Enterprises, Inc. v. City of Memphis*, No. W2019-00299-COA-R3-CV, 2022 WL 854860, at *7 (Tenn. Ct. App. Mar. 23, 2022) (quoting *Ritchie v. Haslam*, No. M2010-01068-COA-R3-CV, 2011 WL 2520207, at *3 (Tenn. Ct. App. June 23, 2011)).

(Commissioner of Safety), others, such as district attorneys, serve at the will of the people and can only be removed by impeachment, *See* Tenn. Code Ann. § 8-7-102; *Ramsey v. Bd. of Pro. Resp. of Supreme Ct. of Tennessee*, 771 S.W.2d 116, 118 (Tenn. 1989) ("[T]he exclusive method of removal from office for . . . district attorneys is by impeachment."). Likewise local law enforcement officials, such as sheriffs, are entirely independent from the Governor's removal authority. Tenn. Const. art. VII, § 1; *State, ex rel. Estep v. Peters*, 815 S.W.2d 161, 165 (Tenn. 1991) (noting that sheriffs are subject to removal by ouster).

Because § 1-3-121 is the only cause of action alleged, and because Plaintiffs have not identified any specific "governmental action" the Governor has taken or could take against *them*, the Governor cannot be liable in this lawsuit.

3. The reasoning of *Allied Artists* is neither valid nor applicable.

Plaintiffs' claim against Governor Lee also survived dismissal after the Court relied on the Sixth Circuit's statement in *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982), that a Governor could be sued based on his general authority to enforce state laws. (August 30, 2023 Order, at 17.) But for two reasons, that opinion carries no weight.

First, the relevant analysis in *Allied Artists* is no longer good law. It has been "undermine[d]" by more recent decisions, including that of the United States Supreme Court in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021). *Farhoud v. Brown*, No. 3:20-cv-2226, 2022 WL 326092, at *4 (D. Or. Feb. 3, 2022); *see Tennessee State Conf. of NAACP v. Lee* ("*NAACP*"), No. 3:23-CV-00832, 2024 WL 3896639, at *23 (M.D. Tenn. Aug. 21, 2024) (three-judge panel rejecting the analysis in *Allied Artists*). The Supreme Court held in *Whole Woman's Health* that an attorney general could not be a defendant under the *Ex parte Young* doctrine where the plaintiffs did not "direct this Court to any enforcement authority the attorney general possesses . . . that a federal court might enjoin him from exercising." 595 U.S. at 43. And the plaintiffs

could not merely use a state official as a figurehead; "under traditional equitable principles, no court may lawfully enjoin the world at large or purport to enjoin challenged laws themselves." *Id.* at 44 (citations and quotations omitted). The Supreme Court's decision, along with those of other federal courts, call into question whether the reasoning in *Allied Artists* is still viable even in the Sixth Circuit. *Farhoud*, 2022 WL 326092, at *4; *NAACP*, 2024 WL 3896639, at *23.

Second, setting aside the flaws in the reasoning of *Allied Artists*, it is inapplicable to this case. In *Allied Artists*, the challenged statute lacked "specific state enforcement provisions," so the plaintiffs had to resort to "general authority" of the Governor to execute the laws. 679 F.2d at 665 n.5. If the Governor were not a party, the plaintiffs in that case "would be unable to vindicate the alleged infringement of their constitutional rights without first violating an Ohio statute." *Id.* Here, however, Plaintiffs have not alleged that, without Governor Lee's inclusion as a defendant, their rights could not be redressed. On the contrary, they have sued multiple defendants who are specifically authorized to enforce various aspects of the challenged statutes: the Commissioner of TDSHS, the Commissioner of TDEC, and the district attorney and sheriff for Gibson County. (*Id.* at 6-8 ¶¶ 10-13; 29 ¶¶ 90-93.) Thus, the logic in *Allied Artists* does not apply. *See NAACP*, 2024 WL 3896639, at *23. Tennessee does have "specific state enforcement provisions" for the challenged criminal statutes in this case, leaving no need to resort to the Governor as a defendant.

The elements of standing are "indispensable" and "irreducible"—they cannot be relaxed simply because a plaintiff finds it easier to name the Governor as a figurehead defendant. *Hargett*, 414 S.W.3d at 98. Plaintiffs have not demonstrated that they are entitled to judgment against Governor Lee.

III. The Court Lacks Jurisdiction to Declare the Constitutionality of Criminal Laws.

This Court is a court of equity and, thus, lacks jurisdiction to declare the constitutionality of the challenged firearm statutes.

A declaratory judgment is not a cause of action; it is a form of relief. *Elvis Presley Enters., Inc. v. City of Memphis*, No. W2019-00299-COA-R3-CV, 2022 WL 854860, at *7 (Tenn. Ct. App. Mar. 23, 2022). So, a chancery court may only declare the right of a party if it "originally could have entertained a suit of the same subject matter." *Zirkle v. City of Kingston*, 396 S.W.2d 356, 363 (Tenn. 1965); *Hill v. Beeler*, 286 S.W.2d 868, 871 (Tenn. 1956). But, as this Court already determined, courts of equity lack jurisdiction to enforce criminal laws. (March 5, 2024 Order at 2-4, 6-7); *see also Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 752 (Tenn. 2006); Tenn. Code Ann. §§ 16-10-102, 40-1-107 to -108. And the "Declaratory Judgment Act does not confer an independent basis for jurisdiction." *Memphis Bonding Co., Inc. v. Crim. Ct. of Tennessee 30th Dist.*, 490 S.W.3d 458, 466 (Tenn. Ct. App. 2015) (citation omitted). Courts have accordingly found that chancery courts lacked jurisdiction to declare:

- a criminal ordinance void, *Spoone v. Mayor & Aldermen of Town of Morristown*, 206 S.W.2d 422, 423-24 (Tenn. 1947);
- a criminal court rule unconstitutional, *Memphis Bonding Co.*, 490 S.W.3d at 465;
- a criminal judgment unconstitutional, *Carter v. Slatery*, No. M2015-00554-COA-R3-CV, 2016 WL 1268110, at *5-7 (Tenn. Ct. App. Feb. 19, 2016); or
- a criminal judgment unenforceable, *Frazier v. Slatery*, No. E2020-01216-COA-R3-CV, 2021 WL 4945235, at *4-6 (Tenn. Ct. App. Oct. 25, 2021).

The jurisdictional defect in those cases is certainly present with this action seeking a chancery court declaration about the applicability or constitutionality of criminal statutes. Thus, the Court lacks jurisdiction to grant Plaintiffs the requested declaratory relief, which "would . . . invad[e] the jurisdiction of the criminal court." *Memphis Bonding Co.*, 490 S.W.3d at 465.

A small body of contrary cases suggest that courts of equity might have authority to grant declaratory judgments on the constitutionality of a statute even if they cannot issue injunctive relief. *See Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*,

No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *26 (Tenn. Ct. App. Dec. 12, 2019); *Grant v. Anderson*, No. M2016-01867-COA-R3-CV, 2018 WL 2324359, at *7 (Tenn. Ct. App. May 22, 2018); *Blackwell v. Haslam*, No. M2011-00588-COA-R3-CV, 2012 WL 113655, at *5 (Tenn. Ct. App. Jan. 11, 2012). This precedent is not controlling for two reasons.

First, these opinions conflict with the Supreme Court's "unequivocal statements in *Zirkle* and *Hill*" that courts of equity cannot issue judgments if they lack subject matter jurisdiction over the underlying controversy. *Memphis Bonding Co.*, 490 S.W.3d at 467; *Carter*, 2016 WL 1268110, at *7. "The Court of Appeals has no authority to overrule or modify [the] Supreme Court's opinions." *Bloodworth v. Stuart*, 428 S.W.2d 786, 789 (Tenn. 1968). And the Supreme Court's *silence* on the "question of the jurisdiction of the chancery court" does not overrule binding precedent. *Spoone*, 206 S.W.2d at 424. So, *Zirkle* and *Hill* control. *Memphis Bonding Co.*, 490 S.W.3d at 467; *Carter*, 2016 WL 1268110, at *7.

Second, these opinions rely heavily on *Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927), in concluding that a court of equity generally has "jurisdiction to consider [a] declaratory judgment action" challenging the constitutionality of a criminal law. *Tennesseans for Sensible Election Laws*, 2019 WL 6770481, at *26; *Grant*, 2018 WL 2324359, at *7; *Blackwell*, 2012 WL 113655, at *3. But that is not what *Erwin Billiard Parlor* held. In *Erwin Billiard Parlor*, the owner of a pool and billiard business was uniquely targeted by a private act that declared operation of such businesses "unlawful . . . in counties . . . having a population of not less than 10,115, nor more than 10,125." 300 S.W. at 566. Because the act specifically targeted certain businesses "without affecting others in like condition elsewhere," it fell within a property-right exception to the jurisdictional limitation on courts of equity. *Id.*; *see J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 631 (Tenn. 1909) (noting the property-right exception allows chancery court

jurisdiction over criminal laws containing "special reference to complainants or their property"). It was the property-right exception, not the Declaratory Judgment Act, that gave the chancery court in *Erwin Billiard Parlor* jurisdiction to examine the constitutionality of a challenged private act. 300 S.W. at 566. The few contrary Court of Appeals' opinions all overlooked this nuance in *Erwin Billiard Parlor* and incorrectly expanded its reach. Thus, these opinions are neither controlling nor even persuasive.

Defendants recognize that this Court found it does have jurisdiction to issue declaratory relief. (March 5, 2024 Order at 6-7 & n.2.) However, for two reasons the cases on which the Court relied do not tell the whole story. First, those cases overlook the reasoning in the paragraphs above about *Erwin Billiard Parlor*. Second, the Court found the *Blackwell* decision (which allowed declaratory judgments) is distinct from and can be reconciled with *Carter* and *Frazier* (which did not allow declaratory judgments), because *Blackwell* involved a civil challenge to a statute whereas *Carter* and *Frazier* involved requests for declarations that would directly intrude on specific criminal proceedings. But *Memphis Bonding Co.* dealt with a civil challenge to proposed criminal rules instead of specific criminal proceedings. 490 S.W.3d at 460. And in that published opinion, the Court of Appeals still found the chancery court lacked jurisdiction to issue declaratory relief. *Id.* at 464-67. It is that a *criminal* statute or rule is challenged, not the existence of ongoing criminal proceedings, that deprives chancery courts of jurisdiction to issue declaratory relief. *Id.* Thus, this Court lacks jurisdiction to declare the constitutionality of the challenged criminal firearm statutes.

IV. Plaintiffs Cannot Obtain Sweeping Declaratory Relief for Non-Parties.

Plaintiffs request improper relief. They contemplate declaratory relief that would extend across "Tennessee's total geographical area" and benefit even non-parties. (Pls' MSJM. at 3; Am.

Compl., Prayer for Relief 2, 6.) Basic rules of justiciability and statutory interpretation protect Defendants from declaratory relief that reaches beyond the rights of the parties to the litigation.

A. Plaintiffs' remedy must be tailored to their alleged injury.

The requested declaratory relief would improperly extend far beyond the alleged injury. A valid remedy "ordinarily 'operate[s] with respect to specific parties,'" not on "legal rules in the abstract." *California v. Texas*, 593 U.S. 659, 672 (2021) (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 489 (2018) (Thomas, J., concurring)). And any remedy "must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018); *L. W.*, 83 F.4th at 490. This "general rule that remedies should be tailored to the injury suffered from" applies even when the alleged injury results from a "constitutional violation." *Harris v. State*, 875 S.W.2d 662, 666 (Tenn. 1994), and even when a plaintiff alleges facial invalidity, *L.W.*, 83 F.4th at 470, 491-92. Relief in facial constitutional challenges must operate in "a party-specific and injury-focused manner" like in any other case. *Id.* at 490.

This general rule is equally applicable to declaratory judgments and injunctions. "[N]o court may 'lawfully enjoin the world at large,' or purport to enjoin challenged 'laws themselves.'" *Whole Woman's Health*, 595 U.S. at 44 (citation omitted). So, no declaration on behalf of the world at large could be a "milder alternative" to an injunction. *Perez v. Ledesma*, 401 U.S. 82, 111 (1971) (Brennan, J., concurring in part and dissenting in part). Declaratory relief is available only to "resol[ve]" an actual controversy by the "settling of some dispute which affects the behavior of the *defendant* towards the *plaintiff*." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis omitted); *see Brown & Williamson*, 18 S.W.3d at 193 (citing *Jared v. Fitzgerald*, 195 S.W.2d 1, 4 (Tenn. 1946)). Declaratory relief cannot "directly interfere with enforcement of contested statutes . . . except with respect to the particular federal plaintiffs[;] the State is free to prosecute others." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). "Nonparties" to a

declaratory judgment simply are "not . . . bound by the judgment." *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023).

This general rule also preserves the separation of powers. *See United States v. Texas*, 599 U.S. 670, 703 (2023) (Gorsuch, J., concurring in judgment) ("[U]niversal relief . . . exaggerates the role of the Judiciary in our constitutional order, allowing individual judges to act more like a legislature by decreeing the rights and duties of people nationwide."). And it harmonizes with other protections of governmental discretion to enforce challenged laws against non-parties. *See United States v. Mendoza*, 464 U.S. 154, 158-63 (1984) (holding that "nonmutual offensive collateral estoppel simply does not apply against the government").

In seeking a declaratory order that extends beyond the parties to this litigation, (Am. Compl., Prayer for Relief, ¶ 6; Pl's MSJM at 3), Plaintiffs are asking the Court to abandon the general rule and issue an order binding all seven million residents of Tennessee. Such an order would "exceed[] the norms of judicial power." *L. W.*, 83 F.4th at 490.

B. The Declaratory Judgment Act limits relief to the parties.

The requested declaratory relief would also extend beyond the text of the Declaratory Judgment Act. The Act specifies that when "declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration" and "*no declaration shall prejudice the rights of persons not parties to the proceedings*." Tenn. Code Ann. § 29-14-107(a) (emphasis added). This is a "stricter [joinder] requirement" than in the Rules of Civil Procedure. *Tennessee Farmers Mut. Ins. Co. v. DeBruce*, 586 S.W.3d 901, 906 (Tenn. 2019) (quoting *Huntsville Util. Dist. of Scott Cnty., Tenn. v. Gen. Tr. Co.*, 839 S.W.2d 397, 403 (Tenn. Ct. App. 1992)) (alteration in original). "Unless all parties to be bound by the judgment are joined in the action, a trial court has no authority to grant declaratory relief." *Id.* Thus, the available declaratory relief is statutorily limited to the parties in this litigation. *See Skyworks, Ltd. v. Centers*

for Disease Control & Prevention, 542 F. Supp. 3d 719, 728 (N.D. Ohio 2021) (noting that the federal Declaratory Judgment Act on "its face . . . limits the scope of a declaratory judgment to a party"), *appeal dismissed*, No. 21-3563, 2021 WL 4305879 (6th Cir. Sept. 21, 2021).

CONCLUSION

For these reasons, Plaintiffs' motion for summary judgment should be denied and judgment should be granted in favor of the State Defendants on Plaintiffs' sole claim and request for declaratory relief.

Respectfully submitted,

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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 16th day of December 2024, upon:

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