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

JON E. WOLFF

and

BRANDON HOWARD

Plaintiffs

v.

COMMONWEALTH OF VIRGINIA
Serve: Chief Executive of the Commonwealth
Governor Ralph S. Northam
1111 East Broad Street
Richmond, Virginia 23219
Serve: Attorney General Mark Herring
202 North Ninth Street
Richmond, Virginia 23219

and

POLICE DEPARTMENT OF THE CITY OF FREDERICKSBURG
Serve: Ms. Kathleen Dooley, Esq.
City Attorney, City of Fredericksburg
601 Caroline Street, Suite 200B
Fredericksburg, Virginia 22401

and

COMMONWEALTH ATTORNEY OF THE CITY OF FREDERICKSBURG
Serve: Ms. La Bravia J. Jenkins, Esq.
Commonwealth's Attorney
601 Caroline Street, Suite 600
Fredericksburg, Virginia 22401
Serve: Ms. Kathleen Dooley, Esq.
City Attorney, City of Fredericksburg
601 Caroline Street, Suite 200B
Fredericksburg, Virginia 22401

Civil Action Number: 1:19-cv-00432

Defendants.

AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW the Plaintiffs and hereby file this complaint for declaratory judgment.

I. INTRODUCTION

Plaintiffs seek declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure ("FRCP") and 28 U.S.C. §2201, *et seq.* to clarify Plaintiffs' rights and obligations and to guide Plaintiffs in obeying the law without surrendering or sacrificing their constitutional rights, civil rights, and legal rights.

It should be clearly understood that Plaintiffs are calling for the repeal, reconsideration, or over-turning of any contrary statutes or judicial precedents as being unconstitutional and untenable. This is a Complaint to over-turn existing precedent. This Complaint argues that any contrary precedent was wrongly decided, including because perhaps the constitutional mandates were not properly presented to prior courts .

Plaintiffs seek to avoid legal jeopardy and wishes to remain as an honest, law-abiding citizen as he has been all their life including in honorable military service.

However, Plaintiffs are not willing to nor do they accept abandoning their constitutional rights or to live in fear of being accused of breaking the law based on misinterpretations of the rights of U.S. citizens under the U.S. Constitution or the deliberate efforts to infringe upon or strip U.S. citizens of their God given rights.

The core of the problem is this: Virginia now increasingly seeks to criminalize the *display* of a firearm or the manner in which a firearm ***is held*** rather than addressing an actual crime. The modern trend is to concede after the U.S. Supreme Court's landmark decision in

Dist. of Columbia v. Heller that perhaps people have the right to keep and bear arms, but only as a museum piece that cannot actually be used for anything. That is, those in rebellion against the U.S. Supreme Court's decision seek to redefine or expand the meaning of existing laws so as to turn a firearm into no longer being a firearm at all.

They make another fatal mistake: Self-defense is considered only in the context of a gun actually being fired. The right of self-defense includes ***showing*** a gun to ward off an attack as much or more than firing the weapon.

The current, mistaken view of the law is that to kill someone can be self defense but only to display a gun is a crime. Self defense generally applies to actually pulling the trigger against someone who is actually wielding a weapon. Self defense is understood to mean displaying a firearm and then later discovering that a threatening person was actually unarmed. The gun owner could be prosecuted for homicide if they shot an unarmed intruder even in their own home. But if they don't shoot a threatening person, the mere display of a firearm to warn an intruder to leave would not be treated as self-defense.

The Second Amendment constitutional right to show a firearm to urge an intruder or threatening person to go away cannot be a crime, but is a protected right under the Second Amendment. Instead, there is an imminent danger that if someone displays a firearm for the very purpose of inducing fear to make someone go away and leave the gun owner alone will be considered a crime unless the gun owner actually shoots the firearm and it can be proven to be self defense because the intruder or threatening person actually had a weapon. The recent anti-gun interpretation of old laws does not consider displaying a firearm without actually firing it at someone to be excusable self defense.

Plaintiffs challenge Va. Code § 18.2-282 as unconstitutional on its face as being "void

for vagueness" and over-broad in conflict with the Due Process clauses of the U.S. Constitution and seek a declaratory judgment that is intended future actions are lawful.

Plaintiffs challenge Va. Code § 18.2-282 as unconstitutional on its face as purporting to criminalize the mere act of keeping and bearing arms -- including ***merely holding a firearm*** -- which is a right guaranteed to Plaintiffs by the Second Amendment to the U.S. Constitution ("Second Amendment")

Plaintiffs challenge Va. Code §18.2-57 as unconstitutional as applied to a person holding a firearm as being "void for vagueness" and over-broad in conflict with the Due Process clauses of the U.S. Constitution and seek a declaratory judgment that is intended future actions are lawful.

Plaintiffs seek as a remedy injunctive relief prohibiting the Defendants from enforcing these statute outside of the constitutionally valid limits as construed by the Court, which likely will require that at least Va. Code § 18.2-282 must be stricken in its entirety as being not only unconstitutional but also unsalvageable by severing the constitutional applications from unconstitutional applications.

Plaintiffs challenge the over-breadth of both statutes as creating a chilling effect upon the exercise of constitutional rights and freedoms under the Second Amendment.

Plaintiffs expects to amend their Complaint by adding additional Plaintiffs similarly situated either as individual Plaintiffs and/or a class of Virginia citizens who own firearms.

II. JURISDICTION

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 as involving questions and controversies arising under the U.S. Constitution and the federal laws and regulations arising thereunder, pursuant to 28 U.S.C. §2201.

III. VENUE

2. Venue is proper for Defendants pursuant to 28 U.S.C. § 1391(b)(1) because Plaintiffs, the Defendants and government actors are located in the Commonwealth of Virginia.

3. Venue is proper in the U.S. District Court for the Eastern District of Virginia because all matters at issue and all decisions asserted arose from events that took place within the City of Fredericksburg, Virginia.

IV. THE PARTIES

4. The original Plaintiff, Jon E. Wolff, is a military veteran, U.S. citizen, and long-time citizen of Virginia in the City of Fredericksburg, Virginia. Jon E. Wolff was properly trained during military service in the safe, careful, responsible, and proper handling and use of weapons. They are a disabled military veteran including physical injuries during military service in the past but more significantly and more recently from a severe car accident in Virginia in 2015. His injuries are purely physical. However, their injuries do heighten their legitimate need to lawfully own, keep, and bear a firearm for their own protection being at a physical disadvantage if ever threatened by a would-be assailant.

5. Plaintiff Brandon Howard resides within the City of Hopewell in the Commonwealth of Virginia. He is a political activist promoting the constitutional rights of Virginia citizens to engage in "constitutional carry" and "open carry" rights of firearms. s

6. The Commonwealth of Virginia is the government of the State of Virginia. The General Assembly of Virginia with the signature of the then Governor of Virginia enacted into law the statute Va. Code § 18.2-282 which purports to restrict Plaintiffs' constitutional rights under the Second Amendment and which Plaintiffs challenge as

unconstitutional, void for vagueness, and unconstitutional for over-breadth. The General Assembly of Virginia with the signature of the then Governor of Virginia enacted into law the statute Va. Code §18.2-57 criminalizing "assault" which although it does not expressly address firearms is being applied by all of the Defendants so as to criminalize the right of Plaintiffs to keep and bear arms. The Commonwealth of Virginia is both the origin of these laws which creates a legal restriction upon the constitutional rights of Plaintiffs but also an interested party in defending the constitutionality of its laws during this request for declaratory judgment. Virginia's Attorney General has a right to be notified of any challenge to the constitutionality of Virginia's laws on their face or as applied. The Governor is the chief executive of the Commonwealth of Virginia.

7. The Police Department of the City of Fredericksburg, Virginia, is a unit of the local municipal government of the City of Fredericksburg, Virginia. Police officers of the Fredericksburg police department testified that they consulted with the Commonwealth Attorney for the City of Fredericksburg before interpreting or applying Va. Code § 18.2-282 and Va. Code §18.2-57 to arrest people who merely hold a firearm. Thus, the police are asserting a standing, continuing, firm interpretation of Va. Code § 18.2-282 and Va. Code §18.2-57 which will continue into the future unless restrained by the courts. It is clearly the policy and firm intention of the Police Department to enforce an interpretation of the Virginia statutes which violates Plaintiffs' constitutional and civil rights.

8. The Commonwealth Attorney for the City of Fredericksburg, Virginia, is the prosecutor for the local municipality of Fredericksburg. The Office of the Commonwealth Attorney is a unit of the local municipal government of the City of Fredericksburg, Virginia. The Commonwealth Attorney is one of the officials (there may be others unknown at this

time) establishing an over-broad and unconstitutional interpretation of Va. Code § 18.2-282 and Va. Code §18.2-57. The Commonwealth Attorney, through her Assistant Commonwealth Attorneys, actually enforces these over-broad interpretations. By all indications the Commonwealth Attorney will continue to enforce these mis-interpretations of these statutes in the future. It is clearly the policy and firm intention of the Commonwealth Attorney to enforce an interpretation of the Virginia statutes which violates Plaintiffs' constitutional and civil rights.

9. In this case, all Defendants are sued only in their official capacities.

V. CAUSES OF ACTION REQUESTING DECLARATORY JUDGMENT

Because the case is focused on the constitutionality of two Virginia statutes the Complaint presents the legal causes of action first. The Counts below rely upon the same governing constitutional precedents and to reduce duplication the legal bases are presented just once in the section following after.

COUNT I: DECLARATORY JUDGMENT
All Laws Criminalizing "Holding" a Firearm are Unconstitutional in Conflict with the Second Amendment

10. Plaintiffs incorporate all the allegations, explanations, and specific details stated within this Complaint preceding this Count I, stated within the other Counts of this Complaint, and stated in the sections following these Causes of Action as if set forth and alleged fully herein, and Plaintiffs rely upon all such allegations to define and substantiate this Count I.

11. One prong of Va. Code § 18.2-282 *(emphases added)* criminalizes the act of merely "***holding***" a firearm "in such manner" as to reasonably induce fear in another.

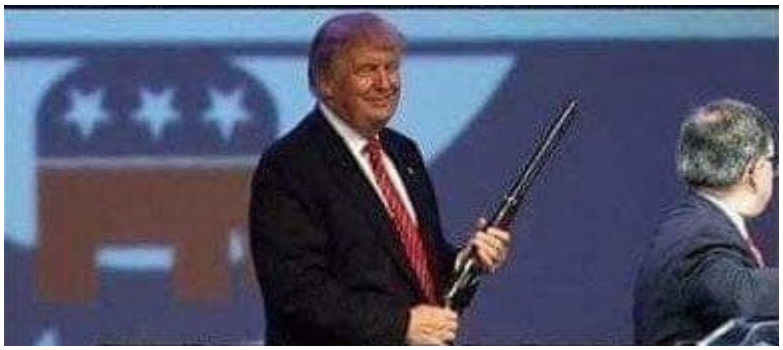
> A. It shall be unlawful for any person to point, ***hold*** or brandish

> ***any firearm*** or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another or hold a firearm or any air or gas operated weapon in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured. * * * *

12. The Second Amendment to the United States Constitution mandates that "the right to keep and bear arms shall not be infringed." See, for example, Dist. of Columbia v. Heller, 554 U.S. 570, 584, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) *(emphases added)*.

13. ***Holding*** a firearm in public, even in the presence of others, is a constitutionally protected right guaranteed by the Second Amendment.

14. The act of ***holding*** a firearm in public, in the presence of others, cannot be criminalized without violating the Second Amendment right "to keep and bear arms."



15. Under another prong which criminalizes "***brandishing,***" some definitions of

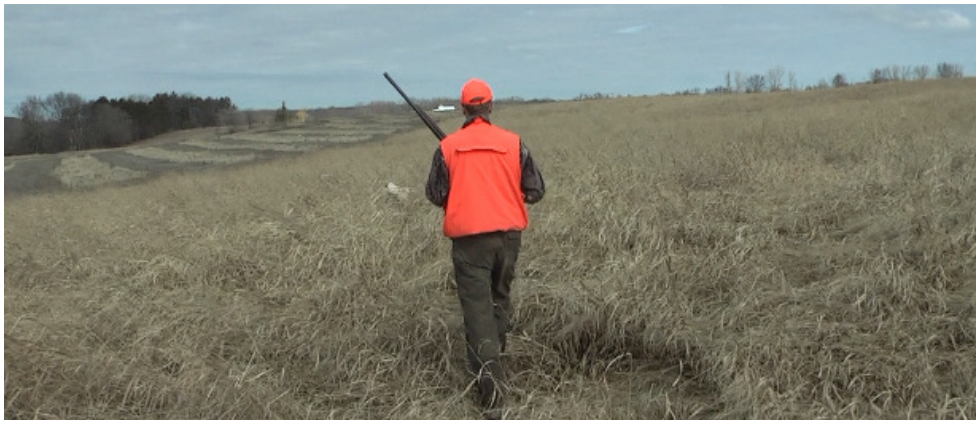
"brandish" include merely ***holding*** or ***having*** a firearm in the presence of other people.

16. Any variant of the definition of "brandishing" in a criminal statute which prohibits merely keeping or bearing arms, holding a weapon, then it is pre-empted by the Second Amendment and is unconstitutional as in direct conflict with the Second Amendment.

17. A state statute is pre-empted by Constitutional rights and is unenforceable when it conflicts with a constitutional right. *See, e.g.* Carey v. Population Services Int'l, 431 U. S. 678 (1977); Southern Ry. v. Virginia, 290 U. S. 190 (1933); Tugwell v. Bush, 367 U. S. 907 (1961); *Boddie v. Connecticut*, 401 U. S. 371 (1971).

18. Any statute criminalizing "brandishing" must criminalize conduct that is distinctly different from simply bearing or keeping arms -- that is, just "*holding*" a firearm.

19. Va. Code § 18.2-282 is also unconstitutional because in the scenario of gun use that is not controversial -- hunting -- a hunter holding a long firearm (not holstered as a pistol) could easily come into contact -- perhaps unexpectedly -- with other people, such as hikers or picnickers. The traditional activity of hunting would always be subject to a hunter randomly or unexpectedly encountering other humans in the outdoors, so that any other person with whom a hunter came into contact in the outdoors could claim to be afraid by a hunter ***merely holding a firearm in their presence***.



20. Here, there is an actual controversy and an actual and present dispute between Plaintiffs and the Defendants as to whether Plaintiffs are legally entitled to keep and bear arms by openly holding or carrying a firearm in the presence of other persons without committing a crime of brandishing a firearm.

21. Plaintiffs ask that the Court declare the rights and other legal relations of Plaintiffs as an interested party seeking such declaration concerning whether Va. Code § 18.2-282 is unconstitutional with regard to merely holding or carrying a firearm in public as being in conflict with the Second Amendment to the U.S. Constitution.

COUNT II: DECLARATORY JUDGMENT
All Laws Criminalizing "Brandishing" of a Firearm are Unconstitutionally Void for Vagueness and Over-Breadth

22. Plaintiffs incorporate all the allegations, explanations, and specific details stated within this Complaint preceding this Count II, stated within the other Counts of this Complaint, and stated in the sections following these Causes of Action as if set forth and alleged fully herein, and Plaintiffs rely upon all such allegations to define and substantiate this Count II.

23. Va. Code § 18.2-282 makes it a crime -- as a misdemeanor -- acts to "brandish" a firearm.

24. Yet the key term "brandish" is not defined in Virginia statutes or common law.

25. The key term "brandish" cannot mean "to point" because Va. Code § 18.2-282 makes it a crime to "to ***point, hold or brandish*** any firearm or any air or gas operated weapon or any object similar in appearance" (*emphasis added*).

26. Therefore, under Virginia law "brandish" cannot mean the same thing as "point" nor "hold" as these three terms are presented as being different terms.

27. The statute makes it a crime "to ***point, hold or brandish***."

28. Virginia is a plain-language state in which the statutes passed by the General Assembly are understood in their plain ordinary meaning as used by lay persons. "'[U]nder settled principles of statutory construction, we are bound by the plain meaning of the statutory language.' Ramsey v. Comm'r of Highways, 289 Va. 490, 495 (2015)." See, e.g., Ramsey v. Comm'r of Highways, 289 Va. 490, 770 S.E.2d 487 (2015).

29. It is always presumed in any Virginia statutory construction that the General Assembly meant the plain, ordinary meaning of the words used in statutes.

30. As a result, Virginia freely relies upon dictionary definitions [1] of published dictionaries that are in widespread usage and accepted as presenting mainstream, common, widespread, consensus, generally-accepted definitions of words.

31. However, dictionary definitions of "brandish" (confining the definitions to the relevant topic) are wildly inconsistent from dictionary to dictionary and entirely unhelpful in defining the word "brandish."

32. Most dictionaries define "brandish" as "to point" -- which cannot be the meaning under Virginia law for Va. Code § 18.2-282 because "point" and "brandish" are presented in the statute as different concepts, not the same.

33. So while the statute in Virginia makes "point" and "brandish" different concepts, many dictionary definitions present them as being synonyms.

34. Other dictionary definitions define "brandish" as to wave a firearm or gesture

[1] Unfortunately, with the expansion of the internet, a proliferation of non-standard purported dictionaries has occurred. What may once have been unthinkable is now a serious problem in which the difference between widely-accepted dictionaries and pop up websites without any recognized authority has become a serious challenge and problem.

with it, sometimes defined as in an "ostentatious" or "angry" manner.

35. Although "ostentatious" is not a consensus definition and appears only in some dictionary definitions, the concept of an "ostentatious" gesture is distinctly unhelpful for defining criminal behavior under the Due Process clauses of the U.S. Constitution.

36. Law-abiding citizens wishing to obey the law cannot determine how he or she may avoid "ostentatious" behavior with regard to a firearm.

37. Va. Code § 18.2-282 is unconstitutionally "void for vagueness" and over-broad under the Due Process clauses of the U.S. Constitution because the word "brandish" has no discernible meaning which can provide clear standards or guidelines by which Plaintiffs may conform their behavior to lawful conduct.

38. Va. Code § 18.2-282 is unconstitutionally "void for vagueness" and over-broad under the Due Process clauses of the U.S. Constitution because the word "brandish" provides no discernible standards by which a court trying a defendant for "brandishing" can determine whether the defendant has "brandished" or not without engaging in speculation about what are the actual standards and the precise definition of "brandishing."

39. A Virginia court cannot decide if Plaintiffs are guilty of "brandishing" without precise standards for what constitutes "brandishing" and what does not.

40. Under the existing law, a Virginia Court cannot decide whether someone is guilty of "brandishing" or not without engaging in an arbitrary or capricious decision.

41. Here, there is an actual controversy and an actual and present dispute between Plaintiffs and the Defendants as to whether Plaintiffs are legally entitled to keep and bear arms by openly holding or carrying a firearm in the presence of other persons without committing a crime of brandishing a firearm.

42. Plaintiffs ask that the Court declare the rights and other legal relations of Plaintiffs as an interested party seeking such declaration concerning whether Va. Code § 18.2-282 is unconstitutional with regard to criminalizing the brandishing of a firearm.

COUNT III: DECLARATORY JUDGMENT
Va. Code § 18.2-282 Unconstitutionally Void for Vagueness and Over-Broad Criminalizing "In Such Manner"

43. Plaintiffs incorporate all the allegations, explanations, and specific details stated within this Complaint preceding this Count III, stated within the other Counts of this Complaint, and stated in the sections following these Causes of Action as if set forth and alleged fully herein, and Plaintiffs rely upon all such allegations to define and substantiate this Count III.

44. Va. Code § 18.2-282 requires in relevant part *(emphases added):*

> § 18.2-282. Pointing, holding, or brandishing firearm, air or gas operated weapon or object similar in appearance; penalty.
>
> A. It shall be unlawful for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, ***in such manner as to reasonably induce fear in the mind of another*** or hold a firearm or any air or gas operated weapon ***in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured***. * * *

* * *

45. The crime of violating Va. Code § 18.2-282 depends upon acting "***in such manner***" so "as to reasonably induce fear in the mind of another."

46. To "point, hold or brandish" a firearm becomes a crime only when it is done "***in such manner***" as to "reasonably" induce fear.

47. However, the key term of the statute "***in such manner***" is not defined.

48. Va. Code § 18.2-282 is unconstitutionally "void for vagueness" and over-

broad under the Due Process clauses of the U.S. Constitution because the key term of the statute "***in such manner***" has no discernible meaning which can provide clear standards or guidelines by which Plaintiffs may conform their behavior to lawful conduct.

49. "In such manner" must be something different from a gun merely existing and different from a person merely exercising their right to keep and bear arms when other people are around in the vicinity.

50. "In such manner" must be something different from a complainant merely disliking guns in general no matter what the accused defendant did or did not do.

51. "In such manner" must be something different from a complainant merely being afraid of guns in general no matter what the accused defendant did or did not do.

52. Here, there is an actual controversy and an actual and present dispute between Plaintiffs and the Defendants as to whether Plaintiffs are legally entitled to hold, carry, or display a firearm in the presence of other persons without committing a crime by doing so "in such manner" as to induce fear in such other persons.

53. Plaintiffs ask that the Court declare the rights and other legal relations of Plaintiffs as an interested party seeking such declaration concerning whether Va. Code § 18.2-282 is unconstitutional with regard to criminalizing the display of a gun "in such manner" as to induce fear in another.

COUNT IV: DECLARATORY JUDGMENT
Va. Code § 18.2-282 Unconstitutionally Void for Vagueness and Over-Broad Basing a Crime on Subjective Feelings

54. Plaintiffs incorporate all the allegations, explanations, and specific details stated within this Complaint preceding this Count IV, stated within the other Counts of this Complaint, and stated in the sections following these Causes of Action as if set forth and

alleged fully herein, and Plaintiffs rely upon all such allegations to define and substantiate this Count IV.

55. As identified by the Defendants and the presiding judge in the initial General District Court trial, Va. Code § 18.2-282 defines a crime based almost exclusively upon the subjective feelings of the complainant.

56. If a crime is defined purely or almost entirely by the subjective feelings of a complaining witness, then the statute is unconstitutionally void for vagueness and over-broad.

57. A crime defined by the subjective feelings of the complainant cannot provide clear standards for a person to conform their conduct to avoid violating the law.

58. A crime defined by the subjective feelings of the complainant cannot provide clear standards for a court apply in determining if defendant has violated the law.

59. The crime of violating Va. Code § 18.2-282 must be determined by objective standards of conduct by the defendant (not by others).

60. The Second Amendment has already determined the balance -- forever established -- between the right of a gun owner to hold a firearm against the complaint of others in the vicinity to dislike guns or be afraid of guns. [2]

> The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, ***it is the very product of an interest-balancing by the people—which Justice BREYER would now conduct for them anew***. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

[2] Of course this analysis refers to a public place to which a gun owner otherwise has a right of access. In Plaintiff's case, the Plaintiff was on his own property holding his B.B. gun.

Dist. of Columbia v. Heller, 554 U.S. at 634-635

61. Here, there is an actual controversy and an actual and present dispute between Plaintiffs and the Defendants as to whether Plaintiffs' right to keep and bear arms can be infringed through government criminal laws by the subjective feelings of other persons rather than by the objective conduct of an accused defendant.

62. Plaintiffs ask that the Court declare the rights and other legal relations of Plaintiffs as an interested party seeking such declaration concerning whether the display of a firearm can be constitutionally regulated under the Due Process clause of the Constitution by the subjective feelings of others rather than by the objective conduct of the defendant.

COUNT V: DECLARATORY JUDGMENT
Second Amendment Right to "Keep and Bear Arms" Protects the Right to Ward off the Threat of Attack by Displaying, Pointing or Brandishing.

63. Plaintiffs incorporate all the allegations, explanations, and specific details stated within this Complaint preceding this Count V, stated within the other Counts of this Complaint, and stated in the sections following these Causes of Action as if set forth and alleged fully herein, and Plaintiffs rely upon all such allegations to define and substantiate this Count V.

64. The right to "keep and bear arms" includes the right to discourage or deter an attack by a would-be assailant not merely the right to actually discharge a weapon.

65. It is the very *gravamen* of the right to keep and bear arms guaranteed by the Second Amendment, including its *umbra, penumbras*, and emanations, that a citizen has the guaranteed constitutional right to brandish, display, point, and threaten with a gun in order to ward off and discourage violence against the gun owner by threatening a would-be assailant with a gun to frighten them and induce them to leave the gun owner alone.

66. Displaying a firearm in self-defense is a constitutional right, not a crime.

67. The classic scenario is best portrayed in Western films when a group of men thunder up on horses to a modest frontier house, and the brave woman of the house stands on the porch pointing -- yes pointing -- a rifle at the approaching men, warning them to stay away. Dialogue is seared into the public's awareness such as "I have a gun and I know how to use it [as she cocks the rifle menacingly] ! I don't want any trouble ! You all just turn around and ride out of here! There's nothing here for you, Jake! Just go on home now!"

68. Such classic scenario is legally significant because Virginia prides itself upon construing statutes according to the plain, ordinary meaning of words in the statute.

69. Yet the Defendants have taken the official position -- in actually prosecuting Jon Wolff -- that they will prosecute Plaintiffs for holding or carrying a firearm *because in their view the motive of threatening hostile persons in their own defense constitutes assault*.

70. Virginia law criminalizes in Va. Code § 18.2-282 the display of a weapon,

rather than firing the weapon in self-defense:

> A. It shall be unlawful for any person ***to point, hold or brandish any firearm*** or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, ***in such manner as to reasonably induce fear in the mind of another*** or hold a firearm or any air or gas operated weapon in a public place ***in such a manner as to reasonably induce fear in the mind of another of being shot or injured***. * * * *

71. The very purpose of Va. Code § 18.2-282 is to criminalize the core activity which the Second Amendment guarantees as a constitutional right: Inducing fear in the mind of a potential attacker by prominently displaying a firearm and warning them to go away.

72. The very purpose of the Second Amendment is to protect the right of a citizen to display, brandish or point a firearm to signal that if a would-be attacker follows through on committing violence against the gun owner, the gun owner is prepared to protect herself.

73. This is not a regulation tangential to the essential core of the Second Amendment, which does not affect the essential core of a firearm, such as a hypothetical state law that all guns must be colored bright fluorescent orange to minimize concealment.

74. The Defendants are criminalizing the essential core of what the Second Amendment protects.

75. The Defendants are making criminal that which makes a firearm a firearm.

76. The right "to keep and *bear* arms" suggests to *bear* a firearm *at the ready*--ready for use, as the U.S. Supreme Court has started to make clear:

> At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed.1989) (hereinafter Oxford). ***When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation.*** In *Muscarello v. United States*, 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998), in the course of analyzing the meaning

> of "carries a firearm" in a federal criminal statute, Justice GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment ... indicate[s]: 'wear, bear, or carry ... upon the person or in the clothing or in a pocket, ***for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.***' " Id., at 143, 118 S.Ct. 1911 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed.1998)). We think that Justice GINSBURG accurately captured the natural meaning of "bear arms." Although the phrase implies that ***the carrying of the weapon is for the purpose of "offensive or defensive action,"*** it in no way connotes participation in a structured military organization.

Dist. of Columbia v. Heller, 554 U.S. at 583-584 *(emphases added).*

77. Therefore, the Second Amendment right "to keep and bear arms" means the right to "bear arms" *for the purpose of using those arms* or being ready to use them.

78. "Bear" in the context of a firearm means more than just to carry or hold.

79. The core of the Defendants' prosecution of Plaintiff Jon Wolff was turned self-protection by Plaintiffs having a firearm into evidence of criminal "assault by intimidation" under Va. Code § 18.2-57.

80. Thus, it is clearly the intent of the Defendants to continue to criminalize the use of a firearm to discourage or deter attacks, and to turn self-protection by displaying a firearm into the crime of assault.

81. Here, there is an actual controversy and an actual and present dispute between Plaintiffs and the Defendants as to whether Plaintiffs are legally entitled to keep and bear arms, including to point, brandish, hold, display, and/or gesture with a firearm to ward off the threat of attack by another, as a form of self-defense *short of* actually firing a weapon.

82. Plaintiffs ask that the Court declare the rights and other legal relations of Plaintiffs as an interested party seeking such declaration concerning whether Va. Code § 18.2-282 and Va. Code § 18.2-57 (as applied to the display of a firearm) are unconstitutional

as being in conflict with the Second Amendment with regard to merely holding or carrying a firearm in public.

COUNT VI: DECLARATORY JUDGMENT
Va. Code § 18.2-282 and Va. Code § 18.2-57 are Unconstitutionally Void for Vagueness and Over-Broad for Failing to Define Threatening

83. Plaintiffs incorporate all the allegations, explanations, and specific details stated within this Complaint preceding this Count VI, stated within the other Counts of this Complaint, and stated in the sections following these Causes of Action as if set forth and alleged fully herein, and Plaintiffs rely upon all such allegations to define and substantiate this Count VI.

84. Va. Code § 18.2-282 on its face and in its entirety and Va. Code § 18.2-57 in any application of any kind relating to firearms fails to distinguish between

a. a gun owner *defensively* threatening, intimidating, and/or inducing fear in a would-be assailant to persuade a would-be attacker to refrain from attacking the gun owner, and

b. a gun owner *offensively* or *maliciously* threatening, intimidating, and/or inducing fear in a victim to harm someone or extract something of value.

85. Using a firearm to ward off, deter, or discourage an attack is part of the core rights protected by the Second Amendment.

86. Using a firearm to attack victims and threaten them or coerce them would constitute any number of crimes under the common law or the statutes of Virginia or other States, and would not be protected by the Second Amendment.

87. Va. Code § 18.2-282 and Va. Code § 18.2-57 when applied to any use of a firearm are void for vagueness and over-broad because they fail to distinguish between a gun owner *defensively* "bearing arms" so as to ward off the threat of attack by another from a gun

owner *offensively* attacking a victim.

88. Both statutes explicitly criminalize actions to induce fear in the mind of another without distinguishing between displaying a gun defensively or offensively.

89. Part of the fatal flaw in this is that any action displaying a firearm which could be legitimately criminalized under the Second Amendment would already be independently a crime under other criminal laws, such as robbery or extortion or rape.

90. The attempt to criminalize the manner in which a gun is displayed is a hopelessly flawed exercise because the objectionable use of a firearm will always already be a crime based on some other conduct, such as robbery or extortion, and the attempt to criminalize the mere display of a firearm is logically flawed at its core.

91. Because the statutes do not distinguish between defensive or offensive display of a firearm, it is not possible for Plaintiffs to know how to lawfully conform their conduct to conduct that is protected under the Second Amendment rather than breaking the law by engaging in conduct not protected by the Second Amendment.

92. Here, there is an actual controversy and an actual and present dispute between Plaintiffs and the Defendants as to whether threatening or inducing fear in another by pointing, brandishing, holding, displaying, and/or gesturing with a firearm means to ward off the threat of attack by another or means offensively attacking another person.

93. Plaintiffs ask that the Court declare the rights and other legal relations of Plaintiffs as an interested party seeking such declaration concerning whether Va. Code § 18.2-282 and Va. Code § 18.2-57 (as applied to the display of a firearm) are unconstitutionally void for vagueness with regard to using a firearm for self-defense to ward off or deter attack.

COUNT VII: DECLARATORY JUDGMENT

Va. Code § 18.2-57 Unconstitutionally Void for Vagueness and Over-Broad Criminalizing Mere Possession of a Firearm

94. Plaintiffs incorporate all the allegations, explanations, and specific details stated within this Complaint preceding this Count VII, stated within the other Counts of this Complaint, and stated in the sections following these Causes of Action as if set forth and alleged fully herein, and Plaintiffs rely upon all such allegations to define and substantiate this Count VII.

95. Va. Code § 18.2-57 is a highly-generalized, broad-based statute on assault and battery used in Virginia criminal law in a vast scope of different scenarios.

> § 18.2-57. Assault and battery; penalty.
>
> A. Any person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor, and if the person intentionally selects the person against whom a simple assault is committed because of their race, religious conviction, color or national origin, the penalty upon conviction shall include a term of confinement of at least six months, 30 days of which shall be a mandatory minimum term of confinement.
>
> * * *

96. Va. Code 18.2-57 does not provide a definition for a "simple assault" but relies upon the common law of Virginia, which is itself astonishingly and fantastically multi-farious, vague, over-broad, and ambiguous:

> "Assault" is defined at common law as "[a]n attempt or offer, with force and violence, to do some bodily hurt to another, whether from wantonness or malice, by means calculated to produce the end if carried into execution; as . . . by levelling [sic] a gun at another within a distance from which, supposing it to be loaded, the contents might injure, or any similar act accompanied with circumstances denoting an intention coupled with a present ability, of using actual violence against the person of another."

Bennett v. Commonwealth, 35 Va. App. 442, 449, 546 S.E.2d 209, 212 (2001) (quoting Harper v. Commonwealth, 196 Va. 723, 733, 85 S.E.2d 249, 255 (1955)).

97. However, the Defendants actually used Va. Code § 18.2-57 to prosecute a defendant for an alleged "assault by intimidation" for merely holding a B.B. gun down by his leg, holding the gun by the front barrel and letting the B.B. gun hang down by his leg with the trigger down toward the ground.

98. The definition in Bennett would require law-abiding citizens to know what another person might be "supposing" and applies on a vague and ambiguous "attempt" which may consist purely of unintentional "wantonness" in the mind of a person complaining.

99. Thus, under Bennett, a person may commit a crime *and never know it* (factually) based on mere wantonness as defined by the supposing of a complainant or by "any similar act accompanied with circumstances denoting an intention coupled with a present ability, of using actual violence against the person of another."

100. The Defendants have actually prosecuted Jon Wolff for "assault by intimidation" of people in the vicinity without any standards for what conduct is criminal.

101. The Defendants have actually prosecuted Plaintiffs -- clearly and unmistakably -- for ***merely holding or having*** a firearm in the presence of others.

102. Here, there is an actual controversy and an actual and present dispute between Plaintiffs and the Defendants as to what Plaintiffs are legally entitled to do without committing a crime of assault.

103. Plaintiffs ask that the Court declare the rights and other legal relations of Plaintiffs as an interested party seeking such declaration concerning whether Va. Code § 18.2-57 must be declared unconstitutional because it is unconstitutionally void for vagueness.

VI. GENERAL FACTS IN COMMON TO ALL COUNTS

104. Plaintiffs have been trained in the safe handling of firearms, the proper use of firearms, safeguarding everyone in the vicinity of a firearm from accidental injury or undue risk from a firearm, and the use of firearms with minimal harm.

105. As a member of the armed services, the original Plaintiff served to protect and defend the Constitution of the United States and the civil liberties of U.S. citizens against enemies foreign or domestic.

106. The original Plaintiff Jon Wolff is a physically disabled military veteran, injured physically both during military service but mostly more recently in a very severe car accident in 2017.

107. Being physically limited in having full strength, the original Plaintiff needs to have the protection of a legal weapon.

108. Plaintiffs want to, intend to, and will in the immediate future continue to carry a lawful firearm openly in the presence of other people who may be nearby (also known as "open carry") unless they are legally prohibited from doing so.

109. Plaintiffs want to, intend to, and will obey the law, avoid legal jeopardy from prosecution, and remain law-abiding citizens without abandoning constitutional and civil rights to which they are entitled.

110. However, the Plaintiffs believe that their intended conduct is perfectly legal and is their civil and constitutional right under the law as properly understood, interpreted by, and constrained by the limitations upon the powers of government by the Second Amendment to and Due Process clauses of the U.S. Constitution.

111. Plaintiffs do not intend to break any law or engage in any unlawful activity.

112. The Plaintiffs intend to be law-abiding citizens.

113. However, the Plaintiffs require a clear and accurate understanding of what the law actually allows and actually prohibits in order to engage in only lawful activity.

114. Here, Va. Code § 18.2-282 and Va. Code § 18.2-57, including as they attempt to depend upon inconsistent and contradictory dictionary definitions for the "plain meaning" of those statutes, are entirely unclear or if clear in some restricts clearly unconstitutional.

115. The Plaintiffs believe that any suggestion that their intended conduct might not be legal is inaccurate and that any precedent, law, argument or like that they are not free to "open carry" a firearm even if there are other people around in the area is legally flawed, unconstitutional, mistake, and just flat wrong.

116. Therefore, Plaintiffs intend to and will in the future "keep and bear arms" as that right is guaranteed to him under the Second Amendment.

117. However, officials of the Commonwealth of Virginia have declared that they will prosecute Plaintiffs in the future for merely having a gun in anyone else's presence.

118. In the future, Plaintiffs intend to "open carry" their firearm [3] even in public with other people present, including holding their long-rifle style firearm (as opposed to holstering a pistol) in public, including in self-defense to deter aggression against himself, up to and including the contours of their legal rights as construed and declared by the Courts.

119. Therefore, rather than waiting until after the fact, after taking action, to determine whether their actions were legally permitted in hindsight, Plaintiffs ask the Court

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[3] Jon E. Wolff insists that his B.B. gun is not really a firearm, but the governmental officials of Virginia classify it as a firearm, and therefore it must be analyzed from the threat of legal prosecution as a firearm, regardless of the Plaintiff's opinion.

to issue a declaratory judgment to provide legal guidance, declare the meaning of Virginia statutes in harmony with the Second Amendment, and to declare what those laws permit Plaintiffs to do.

120. Plaintiffs' standing and legal dispute is genuine because a number of people throughout the Commonwealth have been arrested and prosecuted for alleged violations of Va. Code § 18.2-282 and Va. Code §18.2-57 for merely having a firearm in the presence of other people.

121. Many of these scenarios are outrageously absurd and ridiculous, and yet the law enforcement and prosecutors of Virginia

122. In one case, a man driving in his car took a pistol out of one place in his car and moved it to another place in his car, believing that no one could see him doing that. However, a bus driver elevated high above the road was able to see it and called the police. Even though Va. Code 18.2-282 applies only when a person displays a firearm "in such manner" as to "reasonably" place another person in fear -- and the defendant did not know that anyone could see him -- the gun owner was convicted of a violation of Va. Code 18.2-282. He could not have intentionally acted "in such manner" (whatever that means) so as to *intentionally* induce fear in another person when he did not know that anyone could see his gun. The bus driver -- in an entirely different vehicle -- could not *reasonably* believe in a belief that is not completely irrational or downright perjury that a person enclosed in an entirely different vehicle on the road posed any threat to him or his passenger.s

123. Thus, there is clearly a need to clarify under the Due Process clause and the Second Amendment for the future what Va. Code 18.2-282 means within the confines of those Constitutional constraints.

124. In the case of the original Plaintiff Jon E. Wolff, Wolff held his B.B. gun in his own backyard at his fence line while investigating a loud disturbance next to his property line and calling out to trespassers he then discovered on neighboring land making a commotion next to their own property to ask them what they were doing on private property.

125. Wolff was arrested by the Police Department of the City of Fredericksburg and prosecuted by the Commonwealth's Attorney for the City of Fredericksburg

126. Plaintiff Wolff is friends with the owner of the neighboring property and has kept an eye on it for the owner for many years, and has witnessed police response flashing police car lights into his own living room, illegal partying and under-age drinking and other trespassing on their friend's private club parking lot.

127. Plaintiff Wolff knew that a cable and lock prevented entry of a car into the parking lot in the off-season in January.

128. Therefore, Plaintiff Wolff knew (from their perspective at the time) that anyone in the parking lot next door was in the midst of committing a crime and had broken down the cable closing the private parking lot and preventing anyone from entering the parking lot with a car and signaling they were not welcome by foot, either.

129. Plaintiff Wolff was found *NOT GUILTY* of assault under Va. Code §18.2-57 by holding a gun in the presence of other people in the General District Court for the City of Fredericksburg.

130. Therefore, this suit for declaratory judgment is not coincident with the past prosecution of Jon E. Wolff, but is a future-looking request for the construction of the laws under the Second Amendment.

131. Therefore, there is a genuine and serious need for declaratory judgment.

VII. LAW GOVERNING ALL COUNTS: DECLARATORY JUDGMENT

A. LAW OF DECLARATORY JUDGMENT IN FEDERAL COURTS

1) Pursuant to 28 U.S.C. § 2201, declaratory judgment under federal law is available "In a case of actual controversy within its jurisdiction," such that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Moreover, "Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." *Id.*

B. CRIMINAL LAWS ARE UNENFORCEABLE AND UNCONSTITUTIONAL WHEN VOID FOR VAGUENESS

2) Va. Code § 18.2-282 and Va. Code § 18.2-57 violate the Constitution's guarantee of due process, similar to the analysis in Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), because there are no discernible standards for the word "brandishing," the phrase "in such manner" and whether an action induces fear to defend the gun owner by warding off or deterring attack or offensively against a victim:

> In all events, although statements in some of our opinions could be read to suggest otherwise, ***our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp***. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. L. Cohen Grocery Co.,255 U.S., at 89, 41 S.Ct. 298. ***We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying.*** Coates v. Cincinnati,402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). These decisions refute any suggestion that the existence of some obviously risky crimes establishes the residual clause's constitutionality.

> Resisting the force of these decisions, ***the dissent insists that "a statute is void for vagueness only if it is vague in all its applications."*** Post, at 2574. It claims that the prohibition of unjust or unreasonable rates in L. Cohen Grocery was "vague in all applications," even though one can easily envision rates so high that they are unreasonable by any measure. Post, at 2582. It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology:

Johnson v. United States, 135 S. Ct. 2551, 2561, 192 L. Ed. 2d 569 (2015) *(emphases added).*

3) The U.S. Supreme Court has taught us not only how a vague criminal statute is unconstitutional but also how to analyze when parts of a statute can be saved and when the entire statute must be stricken:

> The text of the residual clause provides little guidance on how to determine whether a given offense "involves conduct that presents a serious potential risk of physical injury." ***This Court sought for a number of years to develop the boundaries of the residual clause in a more precise fashion by applying the statute to particular cases.*** *See James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (residual clause covers Florida offense of attempted burglary); *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (residual clause does not cover New Mexico offense of driving under the influence of alcohol); *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009) (residual clause does not cover Illinois offense of failure to report to a penal institution); *Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011) (residual clause covers Indiana offense of vehicular flight from a law-enforcement officer).
>
> In *Johnson*, a majority of this Court concluded that those decisions ***did not bring sufficient clarity*** to the scope of the residual clause, noting that the federal courts remained mired in "pervasive disagreement" over how the clause should be interpreted. *Johnson*, 576 U.S., at ——, 135 S.Ct., at 2560.
>
> ***The Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the Federal Government) and the Fourteenth Amendment (with respect to the States). The void-for-vagueness doctrine prohibits the government from imposing sanctions "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct***

> ***it punishes, or so standardless that it invites arbitrary enforcement."*** Id., at ——, 135 S.Ct., at 2556. *Johnson* determined that the residual clause could not be reconciled with that prohibition.
>
> * * * For purposes of the residual clause, then, courts were to determine whether a crime involved a "serious potential risk of physical injury" by considering not the defendant's actual conduct but an "idealized ordinary case of the crime." 576 U.S., at ——, 135 S.Ct., at 2561.
>
> The Court's analysis in *Johnson* thus cast no doubt on the many laws that "require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion ." Ibid. The residual clause failed not because it adopted a "serious potential risk" standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense. In the Johnson Court's view, the "indeterminacy of the wide-ranging inquiry" made the residual clause more unpredictable and arbitrary in its application than the Constitution allows. Id., at ——, 135 S.Ct., at 2557. ***"Invoking so shapeless a provision to condemn someone to prison for 15 years to life," the Court held, "does not comport with the Constitution's guarantee of due process." Id., at ——, 135 S.Ct., at 2560.***

Welch v. United States, 136 S. Ct. 1257, 1261-1262, 194 L.Ed.2d 387 (2016) *(emphases added).*

4) It is worth emphasizing the two different but vastly important concepts:

> ***The void-for-vagueness doctrine prohibits the government from imposing sanctions "under a criminal law so vague that***
>
> a. ***it fails to give ordinary people fair notice of the conduct it punishes,***
> ***or***
> b. ***so standardless that it invites arbitrary enforcement."***

5) Thus, a statute purporting to criminalize conduct can be unconstitutional *either* if from the standpoint of the person attempting to be law-abiding citizens he cannot reasonably discern before the fact -- as opposed to after the fact upon discovering that they are being prosecuted -- what they are legally allowed to do and what they are not *or* from the

standpoint of a public official having unbridled, standardless discretion to effectively make up their own law within the vagueness of the statute.

6) It is important to recognize -- as here -- that law-abiding citizens is often faced with conflicting legal authority, such as the conflict between the Second Amendment and these Virginia statutes. If only one of those authorities existed, they might be more clear in the reading of a law-abiding citizen. But in context, taken together, they are unclear.

C. IT IS A FUNDAMENTAL CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS

7) The Second Amendment to the United States Constitution mandates that "the right to keep and bear arms shall not be infringed." See, for example, Heller.

8) Thus this case and the statutes Va. Code § 18.2-282 and Va. Code § 18.2-57 as applied herein implicate a fundamental right guaranteed by the U.S. Constitution.

9) Even assuming *arguendo* for the moment that Virginia may regulate some aspect of gun ownership and possession which on its face violates the constitutional prohibition that "the right to keep and bear arms shall not be infringed," such criminal statutes must survive the rigorous requirements of "strict scrutiny."

10) As with the First Amendment, so it is with the Second Amendment:

> "Restrictions on speech based on its content are "presumptively invalid" and subject to strict scrutiny. Davenport v. Washington Ed. Assn., 551 U.S. 177, 188, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007); R.A.V. v. St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)." Ysursa v. Pocatello Educ. Ass'n, 129 S.Ct. 1093, 172 L.Ed.2d 770, 555 U.S. 353, 77 USLW 4105, 72 A.L.R.6th 751 (2009).

D. STRICT SCRUTINY SHOULD APPLY

11) It appears that the U.S. Supreme Court has never explicitly or officially decreed on the level of constitutional scrutiny that should be applied to Second Amendment rights, however, the Heller court expressed skepticism that any standard other than strict scrutiny is warranted. It appears to be implied by Heller and its striking down of the District of Columbia's statute that strict scrutiny applies:

> Justice BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." Post, at 2852. After an exhaustive discussion of the arguments for and against gun control, Justice BREYER arrives at their interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.
>
> ***We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.*** We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See National Socialist Party of America v. Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. ***The Second Amendment is no different. Like the First, it is the very product of an interest-balancing by the people—which Justice BREYER would now conduct for them anew.*** And whatever else it leaves to future evaluation, it surely elevates above all other

> interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Dist. of Columbia v. Heller, 128 S.Ct. 2783, 2820-2821, 171 L.Ed.2d 637, 554 U.S. 570, 634-635, 8 Cal. Daily Op. Serv. 8060, 21 Fla. L. Weekly Fed. S 497, 76 USLW 4631, 2008 Daily Journal D.A.R. 9613 (2008) *(emphases added).*

12) As strict scrutiny is defined in the context of race:

> We have held that "all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 227 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." Ibid. We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, *see Grutter v. Bollinger*, 539 U. S. 306, 326 (2003), race-based preferences in government contracts, *see Adarand, supra*, at 226, and race-based districting intended to improve minority representation, *see Shaw v. Reno*, 509 U. S. 630, 650 (1993).

Johnson v. California, 543 U.S. 499 (2005).

13) Furthermore, note that even a benign classification must satisfy strict scrutiny. *Id.* A regulation of the Second Amendment here can be for a laudable or innocent purpose and yet still must satisfy strict scrutiny.

14) To be constitutional under strict scrutiny, a regulation must not only address an (identifiable) compelling state interest but must do so in the least burdensome and narrowly-tailored means of achieving the state's compelling state interest. "We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored." Riley v. National Federation of the Blind of North Carolina, Inc, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

15) To engage in this analysis, one must be able to figure out what the compelling state interest actually is to figure out how the regulation is narrowly-tailored to that interest.

16) Here, it appears that the asserted state interest is to deter or punish "Future Crime" -- crime that might happen in the future but has not actually taken place yet -- as popularized by the Tom Hanks movie "The Minority Report."

17) These statutes are not narrowly-tailored to any valid state interests because any harmful use of a firearm is already criminalized by other statutes or common law offenses.

18) The manner by which a firearm is displayed or held does not concern any legitimate state interest, because other statutes and offenses already cover any actually harmful use of a firearm.

E. STATUTES ARE UNCONSTITUTIONAL UNDER HELLER AND PRE-EMPTED BY THE SECOND AMENDMENT

19) Va. Code § 18.2-282 and Va. Code § 18.2-57 directly contradict the Second Amendment right to keep and bear arms, forbidding a person from holding a firearm or using a firearm to deter an attack against the holder, the statute is unconstitutional as conflicting with the U.S. Constitution.

20) As the U.S. Supreme Court has taught in the context of the Second Amendment:

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, *supra.*

21) As the 14th Amendment to the U.S. Constitution requires:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

22) A state statute is pre-empted by Constitutional rights and is unenforceable when it conflicts with a constitutional right. *See, e.g.* Carey v. Population Services Int'l, 431 U. S. 678 (1977); Southern Ry. v. Virginia, 290 U. S. 190 (1933); Tugwell v. Bush, 367 U. S. 907 (1961); *Boddie v. Connecticut*, 401 U. S. 371 (1971).

23) Whether or not certain prongs or applications of the statutes can be severed from the whole, whether the statutes are unconstitutional on their face or only as applied to the original Plaintiffs or other Plaintiffs who merely ***hold*** a firearm in the presence of other people nowithstanding the self-serving, probably insincere or unusually sensitive claim of those others to be afraid that there is a gun near them, is a more difficult legal question which the Court will have to discern based on many intermediate decisions.

VIII. PRAYER FOR RELIEF

A) Plaintiffs ask the Court to declare by construing the Second Amendment, the Due Process clauses of the U.S. Constitution, Va. Code § 18.2-282 and Va. Code 18.2-57 as applied that Plaintiffs has the right to openly ("open carry") "keep and bear arms" in public places under the Second Amendment, notwithstanding the presence of other people in the vicinity.

B) Plaintiffs ask the Court to declare that Plaintiffs has the legal right to openly (as "open carry") "keep and bear arms" guaranteed under the Second Amendment including in public places and/or if other people are around.

C) Plaintiffs ask the Court to declare that the Second Amendment has already established the balance between a citizen's right to "keep and bear arms" including

in the presence of other people against the subjective claim of a bystander to be bothered by it. When enacting the Second Amendment, the Framers of the Constitution, the First Session of Congress, and the States that ratified it were well aware of the competing interests at stake and the consequences of the constitutional right "to keep and bear arms" in U.S. society.

D) Plaintiffs ask the Court to declare that Virginia's "brandishing" law Va. Code §18.2-282 is unconstitutional in its entirety because the scenarios under which it is constitutional cannot be separated from the scenarios under which it is unconstitutional as being in direct conflict with the Second Amendment.

E) Plaintiffs ask the Court to declare that Virginia's "brandishing" law Va. Code §18.2-282 is unconstitutional in its entirety because the scenarios under which it could be constitutional cannot be separated from the scenarios under which it is unconstitutionally void for vagueness and over-broad.

F) Plaintiffs ask the Court to declare that Virginia's "brandishing" law Va. Code §18.2-282 is unconstitutional because -- as construed by a Virginia General District Court judge -- the statute makes the crime completely dependent upon the subjective feelings of a person complaining and not by objective standards governing a gun owner's behavior, in violation of the Due Process clauses of the U.S. Constitution with regard to criminal / penal laws.

G) Plaintiffs ask the Court to declare that the legal right to "keep and bear arms" guaranteed under the Second Amendment cannot be infringed or undermined by the subjective feelings of other people in the vicinity.

H) Plaintiffs ask the Court to declare that if a person is prosecuted for "threatening"

someone with a gun, such "threat" cannot be simply that a complaining person does not like guns.

I) Plaintiffs ask the Court to declare that if a person is prosecuted for "threatening" someone with a gun, such "threat" cannot be simply that a gun merely exists in the vicinity of another person.

J) Plaintiffs ask the Court to declare that an excessive or unusually sensitive fear of guns (whether sincere or insincere) claimed by a person in the vicinity of a gun cannot constitutionally repeal, limit, or infringe upon the right to "keep and bear arms" guaranteed by the Second Amendment.

K) Plaintiffs ask the Court to declare that the legal right to "keep and bear arms" guaranteed under the Second Amendment includes the right to display a firearm to protect the gun owner from attack by discouraging any attack.

L) Plaintiffs ask the Court to declare that the legal right to "keep and bear arms" guaranteed under the Second Amendment necessarily includes the right to deter an attack upon the owner or holder of a gun by displaying the weapon as a discouragement against being attacked.

M) Plaintiffs ask the Court to declare that the legal right to "keep and bear arms" guaranteed under the Second Amendment includes the right to point, wave, aim, or "brandish" a firearm at a potential attacker to convince a potential attacker not to attack.

N) Plaintiffs ask the Court to declare that Virginia's "brandishing" law Va. Code §18.2-282 is unconstitutionally vague because the phrase "in such manner" [that it subjectively frightens a person] establishes no legal standards to guide law-abiding

citizens to know how to act lawfully "in such manner."

O) Plaintiffs ask the Court to declare that Virginia's "brandishing" law Va. Code §18.2-282 is unconstitutionally vague because the term "brandishing" is not defined except in dictionaries whose definitions are inconsistent, irreconcilable, vague, and ambiguous.

P) Plaintiffs ask the Court to declare that Virginia's "brandishing" law Va. Code §18.2-282 is unconstitutional because it violates the Second Amendment to criminalize ***simply holding a gun*** in the vicinity of another person.

Q) Plaintiffs ask the Court to declare that Virginia's "assault" law Va. Code §18.2-57 is unconstitutionally vague when applied ***to simply holding a gun in the presence of other people***.

R) The unconstitutional interpretation cannot be severed from the constitutional interpretations because the statute offers no standards or guidelines to criminalize only conduct not protected by the Second Amendment while allowing conduct protected by the Second Amendment.

S) Plaintiffs requests that the Court provide injunctive relief by issuing a permanent injunction against the Defendants from enforcing Va. Code §18.2-282 Va. Code §18.2-57 outside the bounds of what is constitutionally permissible as construed by the Court following full consideration of Plaintiffs' causes of action. That is, Plaintiffs are not asking at this time for a preliminary injunction under the heightened standards that that would require.

T) Plaintiffs requests award of attorneys fees and costs to the extent authorized by law.

April 23, 2019 RESPECTFULLY SUBMITTED,

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