VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

PETER EHLERT, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. CL20-582**
	)	
COLONEL GARY T. SETTLE,	)	
(In his Official Capacity as	)	
Superintendent of the Virginia State Police)	)	
	)	
Defendant.	)	

PLAINTIFFS' REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In attempting to justify Virginia's novel expansion of background-check requirements under Va. Code Ann. § 18.2-308.2:5 ("the Act"), Defendant fundamentally misunderstands the *Bruen* text, history, and tradition test, and utterly fails to carry his burden under that test. But Defendant does agree with Plaintiffs on two important points—(i) that the protections of Article I, Section 13 are at least coextensive with the Second Amendment, and (ii) that the *Bruen* framework is the correct mode of constitutional analysis for an Article I, Section 13 challenge. *See* Def.'s Br. Opp'n Pls.' Mot. Summ. J. at 2 n.1 [hereinafter "Opposition"]; *Id.* at 17. Defendant's acceptance of these precepts means Plaintiffs necessarily are entitled to summary judgment; Defendant may not rewrite the constitutional standard to exempt the Act's infringements from analysis. Instead, a textual and historical analysis faithful to *Bruen*'s guiding principles yields only one conclusion—

the Act is repugnant to Virginians' original public understanding of the Article I, Section 13 right to keep and bear arms and must be struck down.[1]

Perhaps acknowledging the Act's tenuous (rather, nonexistent) historical basis, Defendant repeatedly relies on the smokescreen of "presumptive constitutionality" as an apparent shield against judicial review. *See, e.g.*, Opposition at 1 (claiming that "the Supreme Court … has repeatedly instructed that background check laws are presumptively lawful," but then referencing only Justice Kavanaugh's *concurrence* in *Bruen*, which is neither "the Supreme Court" nor a statement of law). *See Rhode v. Becerra*, 445 F. Supp. 3d 902, 930 (S.D. Cal. 2020) (rejecting California's claim "that the background check system is a presumptively lawful regulation … Why would it be presumptively lawful? The Attorney General seems to argue that anything short of a complete ban is presumptively lawful.").

Worse yet is Defendant's plainly erroneous claim that the "Supreme Court expressly held that 'shall issue' permitting regimes are presumptively valid and require *no further analysis*." *Id.* at 2 (emphasis added). On the contrary, the *Bruen* Court created *no exceptions* to its analytical framework. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (stating

[1] Defendant triumphantly declares that "Plaintiffs … have not identified a single court in the United States holding that a background check law is unconstitutional, and the Commonwealth is aware of none." Opposition at 1. Of course, as one federal court explained – *striking down a background check* for ammunition purchases – "there is no pertinent case law about pre-purchase ammunition background checks. In fact, regarding the constitutionality of any kind of background checks, there is little caselaw at all." *Rhode v. Becerra*, 445 F. Supp. 3d 902, 941 (S.D. Cal. 2020) (remanded for reconsideration in light of *Bruen* by *Rhode v. Bonta*, 2022 U.S. App. LEXIS 32554 (9th Cir. Cal., Nov. 17, 2022)). In actuality, then, at least one "court in the United States" *has* struck down a background check requirement. *See also Heller* at 631 (finding it unnecessary to address "licensing" accompanied by a background check, as the respondent had conceded the issue); *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 182965, at *27 (N.D.N.Y. Oct. 6, 2022) ("just as lacking, it appears, are historical analogues requiring a responsible, law-abiding citizen to even apply to be able to carry a gun" – much less merely to acquire one, the issue here).

explicitly that if "the Second Amendment's plain text covers an individual's conduct," then "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation"). In fact, the *Heller* Court, whose standard of review the *Bruen* Court merely clarified and reapplied, expressly contemplated challenges to even those laws that enjoy an apparent presumption of constitutionality from judicial dicta. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."). But in Defendant's world, "presumptively" means "conclusively,"[2] leaving Plaintiffs no opportunity to *rebut* any alleged presumption.[3] That is not the law.[4]

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[2] Tellingly, Defendant's brief later ignores the word "presumptively" entirely, claiming that "both the U.S. Supreme Court and the Virginia Supreme Court have [] identified … convicted felons, domestic abusers, and the mentally ill … as *lawful* grounds for prohibiting firearms possession," even though both *Heller* and *DiGiacinto* use the phrase "*presumptively lawful*." Opposition at 8 (emphasis added).

[3] However, Plaintiffs reject the premise that the Act is even presumptively constitutional. Nowhere in *Heller*, *McDonald*, or *Bruen* did a majority (or even a plurality) flag such a requirement as presumptively constitutional. *See Heller*, 554 U.S. at 626–27 (emphasis added) (noting only "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the *commercial sale* of arms"); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (omitting any mention of presumptively constitutional restrictions); *Bruen*, 142 S. Ct. at 2138 n.9 (refusing to characterize certain jurisdictions' *carry licensing* regimes as unconstitutional—because they were not at issue in that case, as they did not grant "open-ended discretion" to licensing officials"—and, in fact, noting that "because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes").

[4] To the extent that Defendant cites to a federal district court cases that purportedly rejected "the historical analysis test articulated in *Bruen*," on the basis that the law was "presumptively lawful" (*see* Opposition at 16), those cases each involved a convicted felon charged with possessing firearms, and are not instructive or persuasive here and, either way, are contrary to *Bruen*'s requirement that *every* regulation which implicates the right to keep and bear arms be subjected to historical analysis. Moreover, every one of those cases involved *an actual* "presumptively lawful" regulation – namely 18 U.S.C. Section 922(g)(1)'s ban on felons possessing firearms. What is more, numerous courts that Defendant fails to reference *have* subjected 922(g)(1) to the *Bruen* framework. *See United States v. Coombes*, No. 22-CR-00189-GKF, 2022 U.S. Dist. LEXIS 170323, at *12 (N.D. Okla. Sept. 21, 2022) ("Thus, looking to the

Defendant's errors continue into his statement of "undisputed" facts, where he cites a dubious study claiming that the vast majority of "firearms acquired for criminal purposes are obtained *via private sales*."[5] Opposition at 3 (emphasis added). But Defendant's source does not say what he claims, stating quite differently that 96% of offenders acquired their firearm "from a supplier *not required to conduct a background check*." *Id*. at 1 (emphasis added).[6] What is more,

historical evidence, the court considers whether the government has satisfied its burden to demonstrate that felons constitute a 'well-recognized exception' to the Second Amendment's protection—that is, whether prohibition of possession by felons is consistent with historical regulations."); *United States v. Collette*, No. 22-CR-00141-DC, 2022 U.S. Dist. LEXIS 173822, at *6–7 (W.D. Tex. Sept. 25, 2022); *United States v. Charles*, No. 22-CR-00154-DC, 2022 U.S. Dist. LEXIS 180375, at *X (W.D. Tex. Oct. 3, 2022); *United States v. Riley*, No. 1:22-cr-163 (RDA), 2022 U.S. Dist. LEXIS 187709, at *30–31 (E.D. Va. Oct. 13, 2022); *United States v. Carrero*, No. 2:22-cr-00030, 2022 U.S. Dist. LEXIS 188707, at *6 (D. Utah Oct. 14, 2022) ("[T]he government has satisfied its burden to demonstrate that prohibition of firearm possession by felons is consistent with the Nation's historical tradition of firearm regulation."); *United States v. Young*, No. 22-054, 2022 U.S. Dist. LEXIS 202743, at *24–25 (W.D. Pa. Nov. 7, 2022). For all of these reasons, Defendant's string cite hardly stands for the idea that the Act challenged here is exempt from review.

[5] Plaintiffs comment on these facts in the interest of presenting a complete argument. Ultimately, none of these alleged "facts" is relevant for purposes of resolving Plaintiffs' motion for summary judgment, because *Bruen* forecloses their consideration as atextual and ahistorical policy appeals best reserved for the legislature. *See Bruen*, 142 S. Ct. at 2131 ("[W]hile … judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.").

[6] This number includes 17.4 percent who "borrowed" a gun and 8.3 percent gifts, neither of which are governed by the Act, along with 9.1 percent "other" and 13.0 percent "refused," which are too unclear to be helpful. In fact, only 49% reported "bought/traded." *Id*. at 5. Moreover, even of the remaining 49 percent reportedly "bought/traded," many of those were obtained from the "street/black market" – making it highly unlikely that the Act's requirements would be followed by criminals who, by definition, do not obey the law. *See Rhode*, 445 F. Supp. 3d at 912 ("criminals, tyrants, and terrorists don't do background checks") and at 937 (background check "experiment is based on a naive assumption that prohibited persons will subject themselves to background checks….").

federal studies by both the NIJ[7] and DOJ[8] have come to markedly different (and more current) conclusions, citing theft and black-market sales as major sources of criminals' firearms, respectively. In fact, the DOJ found that only 8 percent of all prisoners surveyed acquired their firearms via conduct now proscribed by the Act.[9] Defendant's other alleged "facts" fare no better and serve only to distract from the textual and historical analysis that Article I, Section 13 demands.[10]

In addition to his irrelevant (and flatly wrong) "facts," Defendant's agreement as to *Bruen*'s analytical framework similarly renders ineffective his entire collection of platitudes about legislative presumptive constitutionality. *See* Opposition at 1, 5–6. The *Bruen* framework preempts the notion that acts of the legislature are "presumed" constitutional, once Plaintiffs make a minimal textual showing under *Bruen* that the Act governs protected persons, arms, and activities.[11] *Bruen*,

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[7] James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms*, U.S. DEP'T JUST. OFF. JUST. PROGRAMS (1994), https://www.ojp.gov/ncjrs/virtual-library/abstracts/armed-and-considered-dangerous-survey-felons-and-their-firearms-0.

[8] Mariel Alper & Lauren Glaze, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*, BUREAU JUST. STAT. 7 tbl.5 (Jan. 2019), https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf.

[9] *See Id.* (8.0 percent were "Purchased/traded from family/friend.").

[10] *See* Opposition at 3, Fact 2 (noting that background-check requirements in Virginia only date back to 1989—hardly a longstanding tradition, and then only in the context of commercial sales); *Id.* Fact 3 (noting that States that do not impose such checks on private sales create a "sizeable exemption," thereby admitting that the Act is novel and anomalous); *Id.* at 4 Fact 5 (correctly stating what the Act does – that, unlike a dealer sale, one must actually get *approval* to make a private transfer which, unlike a dealer sale, cannot be completed after five business days if the check is inconclusive). *See infra*, n.9.

[11] Indeed, because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634–35, any restrictions on the right to keep and bear arms passed by a legislature without due consideration of the original public understanding of the right are suspect. *See Bruen*, 142 S. Ct. at 2131 (citation omitted) ("The Second Amendment 'is the very product of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.").

142 S. Ct. at 2126 ("[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."). In other words, *Bruen* creates the opposite "presumption" than Defendant advances. If Plaintiffs show that the Act affects protected conduct—namely, the acquisition of protected arms by "the people"—a burden they meet easily, then the Act is *presumptively unconstitutional* unless and until Defendant proves otherwise. *See Id.*; *see also* Pls.' Mem. Supp. Mot. Summ. J. at 13 (discussing the judicially recognized "corresponding right" to acquire arms necessarily embedded within the right to "keep" them). Because Defendant has failed to rebut this strong presumption *against* infringement, the Act facially violates Article I, Section 13 under the *Bruen* analysis.

I. The Act Is Presumptively Unconstitutional Because It Regulates Protected Conduct.

A. Defendant Erroneously Raises "How" and "Why" Considerations at the Textual Stage.

It is axiomatic that the ends do not justify the means, and thus the purported policy rationale behind a challenged regulation does not exempt it from historical analysis under *Bruen*. While Defendant correctly notes that Plaintiffs are challenging "the mechanism" by which certain ends are carried out, Opposition at 1, 8, this is a meaningless distinction because "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129–30. Distinctions between the "how" and "why" of a law are reserved for the assessment of the relevant similarity of historical analogues—if any—that a governmental party proffers to justify its challenged regulation. *Id.* at 2133. Nor is Defendant's repeated use of the hyperbolic and inflammatory language "child rapists and murderers" well taken (Opposition at 9), but rather is used as a tactic to detract from analyzing the constitutionality of the Act (the implication being that, if an entirely new legislative experiment, in effect for only 2.5 years, is struck down, "child rapists and murderers" will run amok and horrid mischief will ensue).

A focus exclusively on the public-policy goals behind a law would allow *any* sort of restrictions passed *in the name of those goals* to survive, which is precisely the sort of "means-end" analysis upon which *Bruen* foreclosed. *See* Opposition at 2 ("It does not affect Second Amendment rights because the Act does not prohibit any law-abiding citizens from acquiring, keeping, carrying or using firearms."); *see also Id.* (claiming that "common sense dictates that a background check mechanism allowing the government to enforce [] prohibitions also passes constitutional muster."). Such "common sense," taken to its logical conclusion, would justify an interview with minor children, away from their parents, to find out if Mommy has ever smoked a "funny cigarette," on the theory that the state is enforcing the prohibition found in Va. Ann. Code §18.2-308.4. Similarly, it would justify, prior to obtaining a firearm, a police search of a person's deep freezer and basement, in order to ensure they are not, in fact, a "murderer" or a "child rapist." On the contrary, *Bruen* rejected the notion that any regulation can stand so long as felon disarmament is the goal. *See Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 201944, at *157, (N.D.N.Y. Nov. 7, 2022) (rejecting the notion that a state licensing officer could require a person to "hand over the applicant's cell phone" or "provide a urine sample," even though the defendants had argued that the statute at issue was purportedly designed to "prevent[] dangerous persons from accessing firearms").

B. Defendant Misstates Bruen's Holding.

Contrary to Defendant's bold assertion that the "Supreme Court expressly blessed [the] mechanism" of a background check to acquire a firearm, the *Bruen* Court never stated that "'shall-issue' regimes … are not implicated under *Bruen*'s first prong." Opposition at 1, 10 (again, citing Justice Kavanaugh's *concurrence*, not the majority opinion). As Plaintiffs have discussed, *supra*, the Court simply declined to disturb the carry licensing regimes of jurisdictions which did not grant

"open-ended discretion" to state officials and thus *were not at issue* in a challenge to a New York law, which did. *See Bruen*, 142 S. Ct. at 2138 n.9. Defendant's claim that "*Bruen* … found no need to analyze the history of 'shall-issue' licensing regimes under step two" is similarly misleading. Opposition at 11. Plaintiffs submit that *Bruen* "found no need to analyze the history" of other states' entirely different licensing regimes because (1) again, they were not at issue, and (2) New York did not proffer historical examples of shall-issue regimes to justify its may-issue regime, when the issue in the case was "open-ended discretion" not generally present in shall-issue regimes. *See Bruen*, 142 S. Ct. at 2138. But the absence of a negative (striking down shall-issue regimes) is not a positive (affirming constitutionality of shall-issue regimes).

Incredibly, Defendant further claims that "the Act requires only that the government *verify* [one's] eligibility before receiving a firearm. The process merely enforces the existing regulation of firearm possession, *but does not impose any regulations itself*." Opposition at 11 (emphasis added). It is axiomatic that a criminal prohibition is a form of regulation, and it is undisputable that the Act *creates new crimes* for those who do not submit to its restrictions on when, where, and how they can buy and sell firearms. Va. Code Ann. § 18.2-308.2:5(C)–(D) (establishing Class 1 misdemeanors for violating the Act's requirements).

The textual implication could not be clearer—if Virginians have an Article I, Section 13 right to "keep" common arms, which includes a right to acquire those arms, a criminal prohibition on a mode of acquisition must submit to and withstand historical analysis. *See Bruen*, 142 S. Ct. at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms."). Similarly, nothing in Article I, Section 13's text prescribes or distinguishes the manner in which one may acquire firearms—in fact, *Heller* said just the opposite, noting that the government may not pick and choose the preferred method(s) of

exercising constitutional rights. *Id*. at 629. Yet at present, should a Virginian acquire a firearm via private transfer "without obtaining verification in accordance with" the Act, Va. Code Ann. § 18.2-308.2:5(C)–(D), that person commits a crime with serious repercussions.[12] At bottom, Article I, Section 13 presumptively guarantees a right to unimpeded private-party acquisition of arms because its text guarantees a right of ownership ("keep and bear") without the qualification the Act imposes. If there are limitations on this right to private-party acquisition, they must be supported by the historical record, not by Defendant's *ipse dixit* that background check laws (*Bruen's* "how") are constitutional because it is permissible to keep "murderers and child rapists" from getting guns (*Bruen's* "why").

It is important to note that the Court's July 14, 2020 Letter Opinion was issued well before *Bruen* set forth the "how" and "why" prongs of the historical analysis. In its Letter Opinion and without the benefit of *Bruen* at the time, the Court wrote:

> Even though private sales and commercial sales are different, the Court is at a loss as to how the historical justifications of preventing felons and the mentally disabled from possessing firearms would allow conditions on commercial sales and not also justify conditions on private sales. So long as the background check is limited to preventing a longstanding prohibition on a historically justified category, it does not violate the right to keep and bear arms. At this time,

[12] Under federal law, if a dealer does not receive a NICS approval within three business days, the dealer has the option to transfer the firearm. 18 U.S.C. § 922(t)(1)(B)(ii). Similarly, under Virginia law, a delayed background check whose response will not be available until after the dealer's fifth business day allows the dealer to transfer, at its discretion. Va. Code Ann. § 18.2-308.2:2(B)(2). But *for private sales*, the Act not only references a § 18.2-308.2:2 background check, but also adds the conjunction "*and* that a *determination has been received* from the Department of State Police that the prospective purchaser *is not prohibited* under state or federal law from possessing a firearm." Va. Code Ann. § 18.2-308.2:5(A) (emphasis added). Neither federal nor state law impose this requirement on commercial dealer sales – that a person be affirmatively found to be "not prohibited" before a transfer can occur. The Act thus creates a more stringent condition for a father to sell a firearm to his own son than for a dealer to sell a firearm to a stranger he has never met, but who merely does not fail a background check. *See* Opposition at 4 (acknowledging that private sales require "verification," which "confirms that the transferee is not in a prohibited category.").

> therefore, the Court holds that the Act does not violate Article I, § 13 of the Virginia Constitution. [Letter Opinion of July 14, 2020 at 7].

Bruen made clear that the analysis is not a unitary one of "justification" or "means-end," but rather one that also entails an examination of "how" historical regulations addressed the societal problem sought to be alleviated.

C. Whether the Act Is "Shall-Issue" Is Irrelevant.

Defendant repeatedly claims that "the Act is a 'shall-issue' regulation" (Opposition at 2, 7, 10, 12, 13, 15, 29), as if labeling any enactment as such is a magical incantation that conclusively proves a regulation's constitutionality.[13] But as explained above, neither *Heller*, nor *McDonald*, nor *Bruen* established some broad "nonoffending class" (Opposition at 12) of definitively constitutional firearm regulations that are immune from constitutional scrutiny. Rather, once a plaintiff has alleged a course of conduct covered by the operative provision's plain text—here, Article I, Section 13—then any dicta-derived presumption of constitutionality disappears entirely and in fact becomes a presumption of *unconstitutionality*. *Bruen*, 142 S. Ct. at 2126.

Next, Defendant spends many words arguing that the Act does not impose "open-ended discretion" on background check officials, apparently operating under the misguided belief that a *grant of discretion* is the only way to violate the Second Amendment, while all "objective" regulations are permissible. Opposition at 13-15. But it cannot possibly be the case that mere lack of discretion can transform a regulation infringing on the right to keep and bear arms into one that is constitutionally permissible – if that were true, then *any* regulation, including total or *de facto* prohibitions, would pass muster, so long as the government exercised no discretion in

[13] Moreover, while a "shall issue" regime requires a government official to act, the Act in this case puts the onus on the private purchaser and seller to find a licensed dealer willing to volunteer (for a fee) to perform a background check on their behalf. Under the Act, no such dealer "shall issue" the running of a background check.

enforcing them. For example, the statute at issue in *Heller* did not grant any discretion at all to officials, instead uniformly (and objectively) "generally prohibit[ing] the possession of handguns." *Id*. at 574.

Next, Defendant invites the Court to return to pre-*Bruen* case law and employ a "judge-empowering 'interest-balancing inquiry'" that *Heller* (at 634) and *Bruen* rejected. Specifically, Defendant claims that the Act is "a *reasonable* mechanism," because "[i]t is *imperative* that those who do not qualify to be a gun owner are not allowed access to guns." Opposition at 14 (emphasis added) (discussing the need to "clos[e] the exception" – *a.k.a.*, loophole – that has been the state of the law since the Founding era). But *see Rhode v. Becerra*, 445 F. Supp. 3d 902, 912 (S.D. Cal. 2020) ("the Second Amendment is not a 'loophole' that needs to be closed."). At best this a public policy argument that has no bearing on the scope of the right to keep and bear arms, as "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller* at 636. In fact, Defendant's argument is akin to that adopted by a federal court in the Northern Marina Islands (pre-*Bruen*), upholding "clos[ing] the Brady Act loophole that allows small-time or private sellers to transfer firearms without conducting a background check on the transferee" finding that, because the "scheme squarely fits its legitimate end of keeping firearms out of the hands of those most likely to abuse them, it passes intermediate scrutiny." *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 U.S. Dist. LEXIS 135684, at *31 (D. N. Mar. I. Sep. 28, 2016). That decision, and Defendant's echo of its reasoning, has been squarely rejected by *Bruen*.

Finally, Defendant's attempt to distinguish *Stickley v. Winchester*, No. CL21-206, 2022 Va. Cir. LEXIS 201 (Winchester Cir. Ct. Sept. 27, 2022), by arguing that "the regulation at issue in that case is not analogous with the one at issue here," and that the Act here is merely "the

mechanism" whereas other cases were the "where, and who," is unpersuasive. Opposition at 17. The *Bruen* analytical framework applies to a wide variety of challenges to restrictions on the right to keep and bear arms—not just categorical prohibitions of arms or locations where they can be carried. *See Bruen*, 142 S. Ct. at 2126, 2138 n.9. Each must be subjected to, and be justified under, the *Bruen* historical test.

II. Defendant Has Failed to Show an Enduring Virginian Tradition of Relevantly Similar Regulation.

Purporting to summarize the required historical framework, Defendant cobbles together bits and pieces of language from *Bruen* in an effort to argue that his historical showing need not be all that robust. Opposition at 17-18. Nothing could be further from the truth. *Bruen* requires the government to show a broad and enduring historical tradition sufficient to demonstrate that the nation's founding generation would have widely considered certain persons, arms, or activities to be completely outside the scope of the protections secured by the Second Amendment. Upon analysis, Defendant's feeble attempt to provide historical analogy simply does not cut it.

First, Defendant appeals to *Bruen's* language about how "dramatic technological changes may require a more nuanced approach." Opposition at 18, citing *Bruen* at 2132. But Defendant fundamentally misconstrues this language. What the *Bruen* Court meant by "technological changes" is a *change in society* (perhaps such as the invention of Star Trek "replicators" that permit their owners to conjure Romulan disruptors from thin air) which creates novel regulatory challenges and consequently requires indirect analogical comparisons to the Founding Era. On the other hand, a "centralized electronic system to check the legal status of a firearm purchaser," Opposition at 19, is not a new or novel societal problem; it is a new *means* of regulation created by and for the benefit *of the government* and, frankly, a new technology that permits the government to infringe the people's rights in new and previously unimagined ways that would

have never been permitted by those who founded this nation. In fact, after discussing "dramatic technological changes," the *Bruen* Court immediately explains exactly what it meant by that language, discussing "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791." *Id*. at 2132. A computerized background check system is not a "regulatory challenge."

Of course, the societal problem the Act purports to address—the existence of felons and mentally ill persons—has always existed. Yet the way Founding-era Virginians did—or, more accurately, *did not*—address this ubiquitous societal problem speaks volumes. While centralized electronic databases did not exist at the time, paper records certainly did—court records, mental health records, immigration records, and so on. If the original public understanding of the Article I, Section 13 right accommodated the sort of regulation the Act now imposes through electronic means, one would expect to find Founding-era Virginia laws requiring these records to be checked prior to the completion of a private firearm transaction, using the *technology available at the time* (*i.e.*, historical analogues). Unsurprisingly, however, these logical analogues are notably absent from the historical record.

A. Defendant's Attempts to Provide Historical Analogues Do Not Demonstrate a Broad and Enduring Historical Tradition.

Defendant tries to lower the bar he must clear, claiming there to be "historical precedent" for the Act (not the same thing as a "historical tradition"). Defendant claims that there were "laws requiring citizens to prove they were not prohibited from possessing firearms…." Opposition at 19. Defendant makes three attempts to support this claim – none sticks.

First, Defendant startlingly claims that "laws requiring the registration of all guns go back centuries" (Opposition at 19), referencing only a single 1631 Virginia Act that required colonists to "muster" and be counted, and allowing their possessions to be inventoried for purposes of

taxation, including "corne, cattle, hoggs, goates, shipps, barques, boates, gardens, [and] orchards…." But there is no indication that guns were "registered" but instead merely counted along with other valuables in order to apportion taxes. Even then, this single statute (which hardly shows "laws … go[ing] back centuries") was so far removed from the Founding Era (160 years) that it is of absolutely no help in determining how the founding generation viewed the Second Amendment or Article I, Section 13. Defendant in effect offers the equivalent of a 1951 statute (160 years after 1791) which is similarly of no help in determining the original meaning of the "right to keep and bear arms." Finally, this ancient statute was not used to control access to firearms or control who could obtain them and how, but merely to know who had them (again, for purposes of taxation, not gun control).

Second, Defendant references a 2012 Fifth Circuit case (pre-*Bruen*) which, in turn relied on a law review article by an anti-gun law professor who claims generally that "a variety of gun safety regulations were on the books." Opposition at 19. But Defendant does not bother to actually find or produce in his Opposition any of these purported historical sources, and neither Plaintiffs nor this Court is "obliged to sift the historical materials for evidence to sustain [Virginia's] statute. *Bruen* at 2150. This Court simply cannot rely on third-hand hearsay about historical records that allegedly exist, but which Defendant has not produced.

Third, Defendant relies on Revolution-era loyalty oaths, forced upon the opposing side during or shortly after a conflict, and which have absolutely no bearing on the acquisition of arms during peacetime.[14] Such temporary, pre-American wartime measures, enacted to disarm (and

[14] *See Bruen* at 2133 (cautioning that "courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted'"). Indeed, such oaths have been found to be patently unconstitutional. *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Speiser v. Randall*, 357 U.S. 513 (1958).

otherwise punish and harass) British loyalists (around 15-20 percent of the population) during the Revolutionary War cannot possibly be found to be evidence of a broad and enduring American tradition. *See Bruen* at 2152 n.26 ("There is … little indication that these military dictates were designed to align with the Constitution's usual application during times of peace."); at 2140 (rejecting the tradition of disarming "political opponents," which only made those who would later become Americans more "jealous of their arms"); at 2154 (rejecting territorial "improvisations" of a "transitional and temporary [nature] … which might not have been tolerated in a permanent setup"); *see also Schenck v. United States*, 249 U.S. 47, 51-52 (1919) (finding that certain otherwise-unconstitutional requirements might be justified by wartime exigencies). Defendant's reliance on Revolutionary loyalty oaths is akin to discovering an order from General George Washington, providing that deserters should be shot, and deriving from it that the government today may impose capital punishment without a jury trial or the right to counsel.

At bottom, Defendant actually concedes that there is no historical precedent for the Act, acknowledging that it is only "[s]ince 1989" that "Virginians who purchase firearms from a 'firearms dealer' … have been required to undergo a background check." Opposition at 3. This is hardly the historical pedigree that *Bruen* demands.

B. Historical Analysis of the 1969-1971 Revision to Article I, Section 13 Is Inappropriate, Has Already Been Rejected by Virginia Courts and, in Any Case, Would Not Yield a Different Outcome

Defendant next urges this Court to ignore the relevant historical time periods set forth in *Bruen* (1791 and *perhaps* 1868) in favor of the 1969-71 timeframe when the language of Article I, Section 13 was revisited and revised by the General Assembly. This argument falls flat for the numerous reasons already discussed and decided by Judge Eldridge in *Stickley et al. v. City of Winchester et al.* (Case No. CL21-206) on pages 14-23 of that opinion, which need not be

reproduced verbatim here. To summarize how the court in *Stickley* dispensed with the very same argument Defendant regurgitates, Virginians of the Founding Era specifically requested that the "right of the people to keep and bear arms" language be included in the federal Bill of Rights and, during the 1969-71 debates, the General Assembly made clear that the purpose of the 1971 revision to Article I, Section 13 was merely (i) to bring the state constitutional provision in line linguistically with the language of the Second Amendment and (ii) to clarify that it provides *at least* the same protections as the Second Amendment. It is simply not the case that Virginians in 1971 intended to rewrite and revamp constitutional protections that had existed for nearly two centuries.

But more fundamentally than that, if – as Defendant himself claims – the scope and meaning of Article I, Section 13 is at least as expansive as that of the Second Amendment (Opposition at 2 n.1), and Article I, Section 13 should be analyzed the same as the Second Amendment (*Id*. at 17), then it cannot possibly be constrained more tightly or reduced below that level by any historical analysis which differs from the one set forth in *Bruen*. In other words, Defendant's concessions defeat and foreclose his own argument. The court in *Stickley* recognized this basic analytical fact, and correctly rejected Winchester's argument that the scope and meaning of Article I, Section 13 should be historically analyzed as of 1969-71. So too should this Court.

Finally, even if this 1969-71 period were examined, the selectively edited debate transcript quoted in Defendant's brief comes nowhere close to providing any generalized understanding of the right to keep and bear arms, even at that time, which would support the onerous requirements of the Act. The debate exchanges relied upon by Defendant referred only to regulations on the possession and use of firearms – some of which, of course involved

regulations that *Heller* said were "presumptively lawful" (*e.g.*, regulation on possession by felons, or carrying firearms in "sensitive places."). Nowhere in the transcript can one find any discussion, let alone wide agreement, on the constitutionality of the notion that every gun buyer, every time he or she buys a gun, should be forced to travel during limited hours and to limited locations, to prove to the satisfaction of the government that he or she is not a prohibited person. There was no similar analog to the Act in existence even in 1969-71 – as Defendant's own brief explains, Virginia had no background checks of *any* kind on firearms sales, even commercial ones, until 1989 (Opposition at 3), and thus there was no historical analog to the Act during the 1969-71 period even if one looks to that timeframe.

III. Plaintiffs' Challenges to the Administration of the Background Check System Justify Summary Judgment, Despite Defendant's Repeated Mischaracterizations.

Defendant begins his attack on his own undisputed evidence by arguing an issue on which Plaintiffs do not even rely for summary judgment – that of exorbitant fees charged by the few dealers who will facilitate private sale background checks. Although Plaintiffs allege and have ample evidence (which has been provided to Defendant in discovery) of numerous dealers charging fees far in excess of the statutory limit of $15, Plaintiffs do not rely on that particular fact on summary judgment, nor would it be necessary to do so to support summary judgment in light of the numerous other, indisputable, constitutional infirmities of the Act. The only mention of the fee issue by Plaintiffs is the undisputed fact (admitted by Defendant) that the VSP does not ask or verify with dealers that they comply with the fee limit before VSP places a dealer on their published list of "dealers willing to conduct private sale background checks." While the VSP's admitted lack of enforcement of this aspect of the Act is perhaps relevant, Plaintiffs are not asserting at the summary judgment stage that widespread violation of the statutory fee limit is an "undisputed fact."

Defendant at least admits that background check schemes *could* be sufficiently onerous as to be unconstitutional. Plaintiffs submit that Defendant's own evidence and other indisputable facts support a finding that the Act is indeed so onerous as to infringe on the right to keep and bear arms. First, Defendant broadly alleges that there is "no evidence of lengthy wait times" and thus the Act must be constitutional, yet this bare assertion completely ignores the undisputed facts of this case:

- The requirements of the Act itself are an enormous structural delay and obstacle for every person who wishes to buy and sell a firearm, *even if the vCheck and NICS systems always functioned perfectly and for 24 hours a day,* because the parties to the sale must locate and appear in person at a willing dealer, instead of simply meeting one another at a mutually convenient place and time.

- Defendant's own discovery answers establish that only 170 of 1,436 dealers statewide have indicated their willingness to facilitate background checks for private sales – his own evidence establishes that there is no *genuine* dispute about the allegation that most dealers will be unwilling to facilitate these transactions.

- The undisputed evidence is that the vCheck and/or NICS systems do not function at all at least once per month, for varying amounts of time ranging up to an entire day.

- The undisputed evidence is that vCheck is operational for only 58% of each day.

- Defendant's own admissions in discovery are that 43% of background checks are "delayed," and that 1/3 of these take more than 3 days to complete.

- Defendant's own internal vCheck personnel have admitted that the background check system is chronically understaffed and experiences significant delays during periods of high volume, such as gun shows. Ironically, Defendant still attempts to use the "voluntary gun show background check" option to support the validity of the Act, in spite of this Court's rejection of that claim.[15]

[15] Defendant attempts to downplay the massive, systemic failings of the Act by yet again raising the option of VSP-conducted "voluntary gun show background checks." Opposition at 24-25. Defendant again spills considerable ink attacking an argument not even raised by Plaintiffs on summary judgment (regarding the legal basis for VSP's ability to the gun show background checks). More importantly, Defendant offers no evidence as to when, where, or how often these gun show background checks are available. The Court already made clear in its July 14, 2020 Letter Opinion that these gun show background checks would "not save the Act" because "[a]n infringement on the right to keep and bear arms would not be overlooked based on the lifting of the infringement on approved dates and at certain locations." These gun show background

The next undisputed factual issue that Defendant attempts to minimize and deflect in the face of his own admissions is that of vCheck/NICS outages. He does not dispute that 76 outages have occurred in the period cited, or approximately one per month, including once for an entire day in January of this year when a sprinkler system malfunction shut down vCheck entirely. Defendant does not dispute that, during each of these outages, there is no ability to conduct background checks and thus the right to acquire a firearm *ceases to exist* for every person in the Commonwealth. Defendant's response is to falsely claim that "the vast majority of those outages were mere seconds or minutes …" and allege that the Plaintiffs omit this "fact." Opposition at 25. Even a brief and casual perusal of Exhibit 4 to Plaintiffs' Memorandum in Support of Summary Judgment (a spreadsheet of the undisputed outages) would reveal that none of these outages are "mere seconds" and the majority of these outages are more than 30 minutes – with more than a few exceeding 3 hours.

Defendant further seeks to rewrite his own admissions and statistics regarding the frequency and magnitude of delays caused by the inability of the vCheck system and its personnel to process background checks "without delay" as mandated by the statute.[16] Through a somewhat confusing shell game of a "new system" and ledger moves to create numerous layered subcategories of delays, reviews, and statuses of background checks, Defendant now tries to abandon and complicate his original straightforward admissions, and then asks the Court to ignore the plain meaning of words like "delay." In the end, though, if *any* background checks are "delayed" – regardless of the definition of that word - then this violates the mandate of Va. Code

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checks would not save the Act even if one assumes on summary judgment that they are conducted lawfully.

[16] Va. Code § 18.2-308.2:2 (B)(2) states that, in response to a firearms transaction background check request from a dealer, "[t]he State Police shall provide its response to the requesting dealer during the dealer's request or by return call without delay." (Emphasis Added).

§ 18.2-308.2:2 that such background checks be completed "without delay," the system having been marketed and sold as an "instant" one. If *any* person experiences a delay in the ability to exercise his or her right to keep and bear arms, even for "minimal periods," this is irreparable harm, and any system that is both mandatory and creates such delay is constitutionally infirm.

Providing no citation or support, Defendant makes a hyperbolic statement in claiming that "[t]he Second Amendment does not include a right to sell at any time from any person, at any place instantaneously" Opposition at 23. Yet this statement once again turns the burden under *Bruen* on its head, and even turns this Court's prior pre-*Bruen* holding on its head (with this Court having previously held in its July 14, 2020 Letter Opinion that "[a]n infringement on the right to keep and bear arms would not be overlooked based on the lifting of the infringement on approved dates and at certain locations."). The starting point of that analysis is that adults *do* by default have the right to acquire firearms from any person at any time and place – and the burden is then on the state actor to demonstrate that any infringement on that right is consistent with our longstanding history of firearms regulation. Defendant cannot meet that burden in this case even on the face of this Act, and certainly cannot do so given the numerous indisputable practical problems with trying to administer the Act.

IV. All Plaintiffs Have Standing as to All Claims

The issue of standing has already been raised, litigated, heard, and decided by the Court, and nothing has changed that would warrant reconsideration of standing. In addition to the Court having issued its July 14, 2020 Letter Opinion (which would have necessarily required a finding of standing), Defendant filed a Demurrer and Plea in Bar on August 10, 2020, alleging that "[s]ome or all plaintiffs lack general and/or statutory standing to seek a declaratory judgment, a permanent injunction, or mandamus under the facts pleaded in the Complaint." Plaintiffs filed a

response in which they fully briefed the issue of standing as to all Plaintiffs (both individual and organizational) and all claims, including the standing of the individual Plaintiffs based upon the effects of the Act on them in particular. On February 4, 2021, the Court conducted a hearing on the Demurrer and Plea in Bar. By its Order of the same date, the Court dismissed the Plea in Bar as to standing, finding that Defendant failed to prosecute this argument despite Defendant having filed it himself and been given the opportunity to be heard. Defendant's Memorandum in Opposition to Summary Judgment does not even mention the fact that Defendant previously raised the issue of standing, was given an opportunity to litigate it, and yet deliberately failed to do so. Defendant provides no explanation as to why he should be permitted to re-litigate this issue now, nor does he present any relevant changes to the facts and allegations of the case which have developed since that time and were unknown to him in 2021. Defendant should not be permitted to once again raise the same issues of standing upon which he was already heard in order to take a "second bite at the apple."

To the extent that the Court finds it necessary to examine standing yet again, Defendant's argument makes a number of erroneous and fatal assumptions. First, Defendant's short argument regarding standing begins by citing a series of federal court cases on this issue, despite the well-developed law on standing that exists in the jurisprudence of Virginia state courts. Indeed, standing under Virginia law was already briefed by Plaintiffs in the prior standing challenge that Defendant abandoned. As stated in Plaintiffs' prior pleading on standing, "[t]he point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case." *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984). Each of the individual Plaintiffs in this case have clearly pleaded and sufficiently explained their interests in the outcome of this

case, and the harm caused by the Act to each of them individually in the form of infringement on each such party's right to keep and bear arms. Further, "[a] litigant has standing if he has a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Id.* at 589, 411.

What is more, there are also organizational Plaintiffs in this case. These organizational Plaintiffs represent the interests of many thousands of firearm owners throughout Virginia, and are certainly in a position to fully and vigorously develop and litigate the issues presented by this case. In a line of cases dating back to at least 2000, the Court of Appeals has expressly concluded that broad "representational standing does lie in the Commonwealth." *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd.*, 56 Va. App. 546, 549-50, 695 S.E.2d 549 (2010); *see also Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd*, 46 Va. App. 104, 112-14, 616 S.E.2d 39 (2005).

It should be clear by now that this case is not merely – or even primarily, after *Bruen* – an "as-applied" challenge by individual Plaintiffs that hinges on particular percentages or figures of outage, delay or denial encountered because of issues endemic to the vCheck system (*i.e.*, system outages, or inability to instantly produce a final result by the internal machinations of the VSP background check program).[17] Those details should not be ignored, but neither are they necessary to a grant of summary judgment. The original Complaint and Affidavits filed by Plaintiffs, and now the Motion for Summary Judgment, each make clear that the main problems with the Act are systemic and structural and, to the extent they could be characterized as "as-

[17] In fact, *Bruen* itself involved the Court's *facial* rejection of a "grant[] [of] open-ended discretion to licensing officials"—irrespective of whether that discretion had been abused in practice (*i.e.*, "as-applied"). *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring); *see also Id.* at 2138 n.9, 2123 n.1 (facially rejecting licensing regimes which "requir[e] the 'appraisal of facts, the exercise of judgment, and the formation of an opinion'").

applied," are problems that "apply" to *everyone*. These problems, which are universally applicable and not *genuinely* disputable, at this point include (1) a dearth of licensed dealers willing to facilitate private sales regardless of their adherence to the statutory limit on fees (Defendant's own data showing only 170 of over 1,400 dealers statewide will facilitate private sales), (2) the time spent locating and traveling to and from such a willing dealer (because the Act indisputably requires this for *every* firearm purchase and sale), (3) the limited hours during which the vCheck system itself is even operating when it is not understaffed or malfunctioning (based on Defendant's own admitted hours of operation for vCheck), (4) the pervasive problem of outages of the vCheck and NICS system that affect *all* purchasers and sellers of firearms at the time they occur because *all* transactions, including private sales, must go through these systems due to the Act (Defendant admits to approximately one outage per month, and Defendant himself recently admitted to the media that a sprinkler failure at VSP headquarters caused the system to go down for an entire day and was a "serious issue.").

Irrespective of whether any of the individually named Plaintiffs have suffered the harm of a delayed background check or inability to find a convenient dealer willing to conduct a private transaction, these problems indisputably exist, and members and supporters of the organizational Plaintiffs have experienced these issues. *See* Affidavits of Erich Pratt and Philip Van Cleave, collectively Ex. 1. *See also Rhode* at 927 ("the individual plaintiffs clearly have standing because they have demonstrated a direct injury of having to undergo eligibility checks for every purchase, and beyond that, by being placed at the mercy of an imprecise, slow, and erratic system. This is an actual injury to a legally protected interest, fairly traceable to the new state statutes and it is likely that this injury will be redressed by a favorable decision.").

Finally, Defendant closes by alleging – with no elaboration or examples – that the undisputed facts presented by Plaintiffs for purposes of summary judgment are somehow incomplete or mischaracterized. But unlike Defendant, Plaintiffs did not purport to enumerate in their opening brief a self-serving list of allegedly "undisputed facts" in the form of assertions, many of them not factual in nature and wholly irrelevant to the analysis of this case. Although this case now turns largely on a purely legal analysis in light of *Bruen*, and places the onus on Defendant to justify the Act by way of relevant historical analogs, from a factual standpoint, Plaintiffs rely *exclusively* on Defendant's own discovery responses, admissions, and admittedly authentic writings of his official subordinates produced by him in discovery. Words have meaning and the admissions and statements in these materials from Defendant say exactly what they say, and are binding on Defendant – there has been no mischaracterization of any of them by Plaintiffs, nor is any required to make Plaintiffs' case. Rather, it appears that Defendant is now simply trying to engage in what would be an endless game of "whack-a-mole" or "what aboutism" wherein he claims there is "more" or "newer" or "different" information that continues to be forthcoming, and would somehow permit him to escape the otherwise inescapable conclusions to be drawn from his discovery responses. Defendant cannot recast or change the plain meaning of his own words to muddy the waters in an attempt to assert a *genuine* issue of triable fact. Nor can Defendant – at this stage or any other – escape the basic application of the *Massie* Doctrine and somehow rise above his own evidence.[18]

[18] *See Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922). The *Massie* Doctrine is a longstanding and prolifically cited concept that a party cannot "rise above his own evidence." A party will not be permitted to profit at the expense of the other party by contradicting his own testimony concerning facts within his own personal knowledge, disowning such statements and relying upon contrary statements. Defendant in this case cannot simply disavow or contradict his admissions and statements in discovery by attempting to recast them.

CONCLUSION

The Court should reject Defendant's attempts to recast the analysis and burdens set forth by the Supreme Court in *Bruen*. A faithful application of the principles set forth therein require enjoining the Act in its entirety as being wholly inconsistent with the historical tradition of firearms regulation in both the Commonwealth and the Nation. Should it need to reach the question, the Court should also grant summary judgment to the Plaintiffs because the Act cannot possibly be administered and enforced without numerous impermissible infringements on the right to acquire firearms.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 3, 2023, a true and accurate copy of the foregoing Reply to Defendant's Brief in Opposition to Motion for Summary Judgment was served upon the following, thereby giving notice of the same:

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