VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

CITY OF CHARLOTTESVILLE, *et al.*, Plaintiffs, v. PENNSYLVANIA LIGHT FOOT MILITIA, *et al.*, Defendants.	Case No. 17000560-00

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' DEMURRERS

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Plaintiffs, by counsel, submit the following Brief in Opposition to the Demurrers filed by (1) Defendants Jason Kessler, Elliott Kline, Vanguard America, Traditionalist Worker Party, and Matthew Heimbach ("Alt-Right Defendants")[1] and (2) Defendant Redneck Revolt.

INTRODUCTION

On August 12, 2017, the City of Charlottesville was transformed into a virtual combat zone. Far from exemplifying the constitutional tradition of peaceful protest, the Unite the Right rally instead featured highly coordinated violence by alt-right organizations in and around Emancipation Park. These groups employed clubs, flagpoles, matching shields, and other weapons to batter their ideological opponents. Also in attendance were several private militia groups that professed to provide security for protestors and counter-protestors. Heavily armed with semiautomatic weapons, these organizations were prepared to inflict massive harm on a moment's notice. But neither they nor the alt-right combatants fell under the command of civil authorities. These groups engaged in the collective use of force—or projected a willingness to do so—wholly outside the confines of public accountability.

This suit does not seek to assess blame or obtain monetary compensation for harms that occurred last August. The Plaintiffs in this case—the City of Charlottesville, the Downtown Business Association of Charlottesville, several individual businesses, and three nearby residential associations—instead seek only injunctive and declaratory relief to prevent a recurrence of such militaristic activity in the future. Named as Defendants were four alt-right organizations that engaged in coordinated violence on August 12, as well as their individual leaders; two organizers of the Unite the Right rally who facilitated alt-right protestors' armed aggression; and private

[1] Plaintiffs have separately moved to strike the Alt-Right Defendants' Memorandum in Support of Demurrer. As explained in Plaintiffs' Amended Motion to Strike, the Alt-Right Defendants' demurrer failed to "state specifically [any] grounds" for concluding that the Amended Complaint is deficient at law. Va. Code § 8.01-273(A). These Defendants also filed a supporting memorandum in excess of 20 pages without seeking leave of the Court, contrary to Rule 4:15(c) of the Rules of the Supreme Court of Virginia.

militia groups of all political stripes, along with their individual commanders.

Plaintiffs brought claims under four sources of Virginia law: (1) the Virginia Constitution's Strict Subordination Clause, which forbids the operation of private military forces outside state authority by providing that "in all cases the military should be under strict subordination to, and governed by, the civil power," Va. Const. art. I, § 13; (2) Virginia's anti-paramilitary statute, which aims to ensure that private groups will not use "firearm[s] . . . or technique[s] capable of causing injury or death . . . in, or in furtherance of, a civil disorder," Va. Code § 18.2-433.2; (3) Virginia's false-assumption statute, which prohibits the assumption or exercise of law-enforcement functions by those without statutory authority to do so, *id.* § 18.2-174; and (4) the common law of public nuisance, which permits the abatement of any "condition that is a danger to the public." *Taylor v. City of Charlottesville*, 240 Va. 367, 372 (1990).

A number of the Defendants have entered into consent decrees resolving the claims against them; others are in default. Thus, the actively litigating Defendants are Unite the Right co-organizers Jason Kessler and Elliott Kline (also known as "Eli Mosley"); alt-right organizations Vanguard America and Traditionalist Worker Party ("TWP"); one of TWP's then-leaders, Matthew Heimbach; and Redneck Revolt, whose members stood post with semiautomatic rifles on the perimeter of Justice Park, where counter-protestors were gathered on August 12. Both the Alt-Right Defendants and Redneck Revolt have filed demurrers to the Amended Complaint. Defendants contend that Plaintiffs have failed to state a claim for injunctive relief under any of the Amended Complaint's legal theories.

Defendants' arguments are not well founded. The Amended Complaint painstakingly recounts conduct by all six Defendants satisfying each of Plaintiffs' legal theories, and the circumstances of this case present a fitting occasion for injunctive relief. Although Plaintiffs urge the Court to enjoin Defendants from violating the Strict Subordination Clause, the anti-

paramilitary statute, and the false-assumption statute, the full relief Plaintiffs seek could be achieved most simply through a straightforward application of the common law of public nuisance. The coordinated use of firearms and other weapons at public events constitutes "an unreasonable interference with a right common to the general public," *Restatement (Second) of Torts* § 821B(1) (1979)—namely, the ability to enjoy the City's parks, streets, and sidewalks free from the danger of violence inflicted by Defendants' organized, unregulated use of weaponry. That is all the Court need decide in order for the Amended Complaint to survive Defendants' demurrers.

LEGAL STANDARD

As this Court has explained, "Virginia is a 'notice pleading' state. The key is adequate notice of the basis for the claim. As long as the claim contains sufficient allegations of material fact so as to inform the Defendant of the nature and character of the claim, it will withstand a demurrer." *VAP Union Square, L.L.P. v. Cardinal Point, Inc.*, 91 Va. Cir. 134, 2015 WL 13050055, at *2 (2015). A demurrer "admits the truth of all material facts" alleged in a complaint, including "those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged." *Harris v. Kreutzer*, 271 Va. 188, 195 (2006). A complaint's factual allegations are to be "considered in the light most favorable to the plaintiff." *Welding v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 226 (2001). A pleading will survive a demurrer if the "factual allegations pled and the reasonable inferences drawn therefrom are sufficient to state a cause of action." *Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 286 Va. 38, 44 (2013).

ARGUMENT

I. Plaintiffs Have Stated a Claim Under the Virginia Constitution's Strict Subordination Clause

Count I of Plaintiffs' Amended Complaint alleges that each Defendant has violated, and will continue to violate, the Strict Subordination Clause of Virginia's Constitution. That Clause

is contained within Article I, Section 13 of the Virginia Constitution, which reads in full:

> That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Although Defendants argue otherwise, the Strict Subordination Clause regulates the conduct of *all* actors—governmental and private alike—who "would undercut the state's monopoly on the use of force." *Patrick v. Union State Bank*, 681 So.2d 1364, 1368 (Ala. 1996).

A. The Amended Complaint's Relevant Factual Allegations

Plaintiffs' Amended Complaint chronicles Defendants' armed mobilization on August 12, 2017. The Amended Complaint alleges that the Alt-Right Defendants engaged in highly coordinated military functions while bearing arms, having brought shields, batons, and clubs for that purpose. The following allegations exemplify their relevant conduct:

- Defendant TWP employed a "full shield squad" at the Unite the Right rally. Am. Compl. ¶ 97. As they approached Emancipation Park, TWP members used their shields to charge into counter-protestors. *Id.* ¶ 90. TWP members similarly "deployed their shields offensively—simply to ram into counter-protestors"—after arriving at the park. *Id.* ¶ 102. The group's members were prepared "to take the lead i[n] fighting" on August 12, and were presumed to be "willing and able to fight." *Id.* ¶ 169.

- Defendant TWP's Commanding Officer, Defendant Cesar Hess, took charge of the group's militaristic activity on August 12. He issued several commands to TWP members throughout the day, including "Let's go! Forward!," *id.* ¶ 90; "Form a line!," *id.* ¶ 97; and "[g]et ready to fucking fight!," *id.* Hess also "repeatedly grabbed TWP members, dragging them into his preferred formations." *Id.*

- As TWP's then-Chairman, Defendant Matthew Heimbach also "issu[e]d tactical commands" to TWP's shield-carriers on August 12. *Id.* ¶ 31. He shouted "shields up!" immediately before TWP members began ramming into counter-protestors. *Id.* ¶ 90. He also ordered TWP members to push down the metal police barricades separating two quadrants of Emancipation Park. *Id.* ¶ 105. In advance of the rally, Heimbach had publicly discussed ways to "free[] up our fighting men." *Id.* ¶ 170.

- In advance of the Unite the Right rally, Defendant Elliott Kline—a co-organizer of the event—circulated a set of "General Orders" to the alt-right attendees. *Id.* ¶ 159. These Orders explained that "the shield wall will be deployed . . . to reduce the threat" posed by

counter-protestors. *Id.* ¶ 160. On August 12, Kline marched at the head of Vanguard America's "military-style formation" as the group approached Emancipation Park. *Id.* ¶ 87. Once in the park, Kline repeatedly ordered alt-right attendees to form shield walls. *Id.* ¶¶ 101, 107. "I run this as a military operation," he explained. *Id.* ¶ 101.

- Members of Defendant Vanguard America carried matching shields at the Unite the Right rally and deployed them in a coordinated fashion—namely, by contributing to multi-group shield walls. *Id.* ¶¶ 102, 108. Vanguard's leader, Dillon Irizarry, had earlier stated that "[w]e want to be like ants. We're a colony and we just go and destroy everything in our way." *Id.* ¶ 209.

- As the primary organizer of the Unite the Right rally, Defendant Jason Kessler co-moderated the private "Charlottesville 2.0" Discord chat group. In it, Kessler advocated weaponizing shields should things "turn ugly." *Id.* ¶ 162. He also insisted that "[w]e . . . don't want to scare [Antifa] from laying hands on us." *Id.* ¶ 176. Kessler was well aware that many alt-right attendees were planning to engage in organized violence, having purposefully "t[aken] a very laissez faire approach" to the grim discussions unfolding on Discord. *Id.* ¶ 177. Kessler reached out to two private militia groups to provide a security presence at the rally, *id.* ¶ 28, and "liked" a Facebook post in which one militia leader proposed "crush[ing] these little cunt rags for good" on August 12, *id.* ¶ 180.

The Amended Complaint also alleges that Defendant Redneck Revolt—a self-described "militant formation," *id.* ¶ 51—formed a security perimeter around Justice Park on August 12, *id.* ¶ 79. Approximately 20 members participated, "most of them open-carrying tactical rifles" in coordination with one another. *Id.* Redneck Revolt sought to make Justice Park an "autonomous zone" by "keep[ing] cops" and "keep[ing] the state . . . out of the park." *Id.*

B. The Strict Subordination Clause Regulates the Conduct of Private Actors

The Alt-Right Defendants and Defendant Redneck Revolt maintain that the Strict Subordination Clause is inapplicable to the conduct of nongovernmental actors. *See* Alt-Right Br. 7; Redneck Revolt Br. 4–8. This position would defeat the purpose of strictly regulating those who perform military functions within the Commonwealth—a goal expressed vividly throughout the Virginia Code and in the Strict Subordination Clause itself.

That Clause undoubtedly prohibits governmental actors from severing the connection between military personnel and their democratically accountable superiors. For example, the

General Assembly could not pass a law transferring command of the Virginia National Guard to a private citizen. Defendant Redneck Revolt concedes, moreover, that the Clause applies to members of the "organized armed forces" who have rendered themselves insubordinate to the civil power. Redneck Revolt Br. 6. That is correct—precisely because, having stepped outside the established command structure, those persons no longer satisfy the state-law requirements for performing functions assigned to the institutionalized military.

The Strict Subordination Clause's application cannot turn on whether a person usurping regularized military functions is formally enrolled in the Commonwealth's armed forces. Such an arbitrary distinction would bear no relation to the Clause's manifest purpose: to ensure that *all* persons who engage in the coordinated use of force—or who project a willingness to do so—are answerable to elected officials, rather than free to coerce compliance with extralegal demands. Otherwise, a breakaway unit of the Commonwealth's armed forces could function as a vigilante military, entirely free of regulation under the Strict Subordination Clause, as long as it formally disassociated itself from established military institutions.

As explained below, the Strict Subordination Clause ensures that the Commonwealth's comprehensive system for regulating military activity will not be subverted by private actors performing the same functions. Reinforcing this conclusion are numerous state and federal constitutional provisions that courts have expressly deemed applicable to private conduct.

1. The Military Laws of Virginia Specify Key Mechanisms of Strict Subordination

The Strict Subordination Clause's mandate is so essential that an entire chapter of the Virginia Code was enacted to implement a well-functioning regime of civil–military relations. Title 44, Chapter 1, entitled "Military Laws of Virginia," facilitates judicial application of the Strict Subordination Clause in three distinct ways.

First, it clarifies the legal chain of command by specifying to whom, and how, military

personnel must remain "under strict subordination." Va. Const. art. I, § 13. In effect, the Strict Subordination Clause incorporates by reference the content of any later-enacted statutes specifying how command over the military is to be exercised. The Governor, as "commander-in-chief of the armed forces of the Commonwealth," Va. Const. art. V, § 7, cl. 2, is expressly authorized to issue orders to military officers, Va. Code § 44-77. The Governor's highest-ranking military subordinate is the Adjutant General. This officer leads Virginia's Department of Military Affairs, the entity responsible for "[a]dministering and employing" the Commonwealth's armed forces under the Governor's supervision. *Id.* § 44-11.1. The Adjutant General "shall have command of all of the militia of the Commonwealth, subject to the orders of the Governor as Commander in Chief." *Id.* § 44-13.

Second, Virginia's Military Laws indicate various functions that "the military" is authorized to perform. The Governor may use the Commonwealth's armed forces "to repel invasion, suppress insurrection, and enforce the execution of the laws." *Id.* § 44-8. Accordingly, he may call out the organized military to active duty "[w]hen any combination of persons becomes so powerful as to obstruct the execution of laws in any part of this Commonwealth" or "[w]hen . . . agencies having law-enforcement responsibilities are in need of assistance to perform particular law-enforcement functions," among other circumstances. *Id.* § 44-75.1. And Virginia's Department of Military Affairs is charged with "[p]roviding for the safety of citizens of the Commonwealth by maintaining order and public safety . . . in cooperation with Virginia State Police and local law-enforcement agencies." *Id.* § 44-11.1(A). These functions—all of which involve organized arms-bearing—supplement the Strict Subordination Clause's preexisting scope, including conceptions of combatant roles traditionally performed by "the military."

Third, all persons who conform to the Military Laws' strict requirements for using organized force are properly regarded as "the military," whose conduct is authorized by, and in

strict subordination to, the civil power. State law designates as "the militia" all persons liable to be called upon to render military service to the Commonwealth. *Id.* § 44-1. The militia is subdivided into three classes: (1) the National Guard, which is composed of the Army National Guard and the Air National Guard; (2) the Virginia Defense Force; and (3) the unorganized militia. *Id.* At every step, those who would perform functions appertaining to "the military," Va. Const. art. I, § 13, must do so in strict compliance with the Commonwealth's Military Laws. If they fail to do so, they operate outside the civil power and thus violate the Strict Subordination Clause.

All members of the Virginia National Guard, for instance, must satisfy an age requirement and other qualifications prescribed in regulations. Va. Code § 44-2. National Guard members must sign an enlistment contract and subscribe to an oath of enlistment. *Id.* § 44-36. Their uniforms, arms, equipment, discipline, training, and manner of organization are also carefully regulated by state law. *Id.* §§ 44-25, 39–41. While undergoing training, National Guard personnel "shall at all times be subject to the orders of their . . . commanders." *Id.* § 44-75.2.

The Virginia Defense Force, too, is extensively regulated by state law. Defense Force members are "subject to the control of the Department of Military Affairs," *id.* § 44-54.4, and must "serv[e] in conformity with regulations prescribed by the Adjutant General," *id.* § 44-54.6. Standardized regulations govern "[r]ecruiting, enlistment, retention, organization, administration, equipment, facilities, training, discipline, discharge, dismissal, wearing of the uniform, appearance, and standards of conduct" for all Virginia Defense Force members. *Id.* § 44-54.7.

The same pattern holds true for the unorganized militia. Although that class includes "all able-bodied residents of the Commonwealth" who fit certain age and citizenship parameters, *id.* § 44-1, resident civilians are not actually inducted into the Commonwealth's military forces unless the Governor formally "order[s] them out" pursuant to state law, *id.* § 44-87. When that happens, such persons are fully "incorporated into the Virginia Defense Force," *id.* § 44-88, and are to be

"governed by the same rules and regulations . . . as the National Guard," *id.* § 44-85.

2. These Legal Requirements Are Exclusive for All Who Would Perform Military Functions Within the Commonwealth

The manifest purpose of codifying such a detailed set of Military Laws was to ensure that everyone who performs functions reserved to the Virginia National Guard, Virginia Defense Force, and unorganized militia (when ordered out) conforms to the requirements imposed on these entities under state law. As implemented by Virginia's "comprehensive scheme" for regulating its military institutions, the Strict Subordination Clause functions to "prohibit the formation of any private military company or organization which would compete with the state military forces." *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 217 (S.D. Tex. 1982) (discussing the purpose of a state statute barring private military companies or organizations); *see also* John Kulewicz, *The Relationship Between Military and Civil Power in Ohio*, 28 Clev. St. L. Rev. 611, 612 (1979) (stating that Ohio's Strict Subordination Clause "prohibits the existence of an autonomous military force"). Permitting unaccountable groups to wield weapons in concert at public events would undercut "the myriad legislation establishing strict civilian oversight of the Commonwealth's armed forces." Redneck Revolt Br. 6.

This view is strongly supported by the writings of Professor A.E. Dick Howard, formerly the Executive Director of the Virginia Commission on Constitutional Revision. According to Professor Howard, the Strict Subordination Clause ensures that all exercises of "military authority" remain "integrated with the popular will," as filtered through the Commonwealth's duly elected officials. 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia*, at 274 (1974). The Clause "ensures the right of all citizens . . . to live free from the fear of an alien soldiery commanded by men who are not responsible to law and the political process." *Id.* at 277. In this way, the Strict Subordination Clause is "intertwined with the survival of representative government." *Id.*; *see also Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 218 (observing that

unauthorized "[m]ilitary organizations are dangerous wherever they exist, because of their interference with the functioning of a democratic society").

As has been remarked in a different context, "[t]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct" in which a well-functioning society demands uniformity. *Cullum v. Faith Mission Home, Inc.*, 237 Va. 473, 482 (1989) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972)). Nowhere is that axiom more true than as concerns the collective use of force. Long ago, the U.S. Supreme Court upheld the constitutionality of a state statute forbidding private citizens to "associate themselves as a military company, or to drill or parade with arms without the license of the governor." *Presser v. Illinois*, 116 U.S. 252, 262 (1886). In doing so, the Court emphatically declared that

> [m]ilitary organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers.

Id. at 267.

The Defendants in this case wrongly seek to "usurp[] . . . the State's right to the exclusive control of military force within its borders." *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 212. As courts have long made clear, under the American form of government, "no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command." *Feres v. United States*, 340 U.S. 135, 141–42 (1950); *see also Hall v. United States*, 528 F. Supp. 963, 968 (D.N.J. 1981) (identifying "the maintenance of an army" and "the operation of combat instrumentalities" as activities that "private persons do not perform"); *Sulik v. Total Petroleum, Inc.*, 846 F. Supp. 747, 752 (D. Minn. 1994) (rejecting the notion of "private armies" as a "late-medieval" concept); *Matter of Cassidy*, 268 N.Y.S.2d 202, 205 (N.Y. App. 1944) (explaining that "the creation of . . . a private army" would be "incompatible

with the fundamental concept of our form of government").

It is no answer to observe that Virginia has not separately criminalized the unauthorized formation of military organizations, as some states have. *See* Redneck Revolt Br. 20. Consider, for example, the provision immediately following the Strict Subordination Clause. Article I, Section 14 of the Virginia Constitution provides that "no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." The General Assembly has since proscribed materially identical conduct: the act of "[e]stablishing, without authority of the legislature, any government within its limits separate from the existing government." Va. Code § 18.2-481(3). Yet the Virginia Supreme Court recently held Article I, Section 14, to be self-executing, meaning that it is fully operative on its own terms, without regard to any parallel civil or criminal prohibitions. *See DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 138 (2011). The same is true of the Strict Subordination Clause. The fact that the General Assembly has not separately prohibited private military organizations as such, then, is hardly a reason to interpret the Clause as tolerating the unauthorized assumption of military functions.

3. The Strict Subordination Clause Is One of Many Constitutional Provisions Applicable to Private Actors

Holding that the Strict Subordination Clause regulates private conduct would break no new legal ground. The U.S. Supreme Court has naturally inferred a state-action requirement from many federal constitutional prohibitions—including Section 1 of the Fourteenth Amendment, whose text includes the phrase "[n]o State shall." *See United States v. Morrison*, 529 U.S. 598, 621 (2000). But whether a constitutional provision constrains private actors is entirely contingent on its text and purpose. Because the Thirteenth Amendment, for example, "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States," it has been held to regulate private

conduct. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). Before its repeal, the Eighteenth Amendment operated in just this way; it "prohibited" the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States." U.S. Const. amend. XVIII, § 1. Its successor Amendment—the Twenty-First—is most naturally read as applying to private actors, as well. *See* U.S. Const. amend. XXI, § 2 ("The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."). And the Supreme Court has expressly concluded that other federal constitutional protections restrain private conduct. *See Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) ("Our cases have firmly established that the right of interstate travel . . . is assertable against private as well as government interference."); *United States v. Classic*, 313 U.S. 299, 315 (1941) (concluding that the "right of qualified voters . . . to cast their ballots and have them counted at Congressional elections" is "secured against the action of individuals as well as of states").

This feature is even more common at the state level. As the New Jersey Supreme Court rightly remarked, "federal requirements concerning 'state action,' founded primarily in the language of the Fourteenth Amendment and in principles of federal-state relations, do not have the same force when applied to state-based constitutional rights." *State v. Schmid*, 84 N.J. 535, 559–60 (1980) (holding that "the rights of speech and assembly guaranteed by the [New Jersey] Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well."). Unsurprisingly, a multitude of state courts have found that particular state constitutional provisions regulate both private and governmental conduct. *See, e.g.*, *Moresi v. State*, 567 So.2d 1081, 1092 (La. 1990) (holding that Louisiana's constitutional protection against invasions of privacy "goes beyond limiting state action,"

especially since "the expression 'no law shall' was not used"); *Hartford Accident & Indemnity Co. Insurance Comm'r of Commonwealth*, 505 Pa. 571, 586 (1984) ("The rationale underlying the 'state action' doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment . . . ."); *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wash. 2d 230, 243 (1981) (interpreting two Washington constitutional provisions as "not requiring the same 'state action' as the Fourteenth Amendment").[2] And the prohibition immediately following Virginia's Strict Subordination Clause—that "no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof," Va. Const. art. I, § 14—plainly applies to persons who enjoy no governmental authority.

Defendants' proposed interpretation of the Strict Subordination Clause—a provision ratified to subject all forms of military power to direct civilian oversight—would permit private armies to impose their will on perceived political foes. This Court is empowered to prevent "the proliferation of private military organizations," which would "threaten[] to result in lawlessness and destructive chaos." *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 216.

C. The Strict Subordination Clause Is Suitable for Judicial Application

Defendants contend that Virginia's Strict Subordination Clause is too amorphous and

[2] Additional examples are legion. *See, e.g.*, *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1041 (1989) (holding that California's constitutional right to privacy "reach[es] both governmental and nongovernmental conduct"); *Cologne v. Westfarms Assocs.*, 37 Conn. Supp. 90, 114–15 (Conn. Super. 1982) (enjoining private actors from interfering with plaintiffs' free-speech and petition rights under the Connecticut Constitution); *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 88–89 (1983) (holding, in light of "the absence of State action language," that Massachusetts's constitutional right to "elect officers, and to be elected, for public employments" is not "directed exclusively toward restraining government action"); *Bellerive Country Club v. McVey*, 365 Mo. 477, 489–90 (1955) (explaining that private conduct can "bring about a violation of a provision of [Missouri's] constitution"—namely, the right of employees "to organize and to bargain collectively through representatives of their own choosing"); *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 196 (1961) (concluding that the New Jersey Constitution's right to organize and bargain collectively "reaches beyond governmental action," protecting against "the acts of individuals who would abridge these rights"); *Peper v. Princeton Univ. Bd. of Trs.*, 77 N.J. 55, 80 (1978) (holding that New Jersey's Constitution prohibits sex discrimination by private employers); *Commonwealth v. Tate*, 495 Pa. 158, 171 (1981) (concluding that "the rights of freedom of speech, assembly, and petition" guaranteed by Pennsylvania's Constitution function "not simply as restrictions on the powers of government").

indefinite for judicial application. *See* Alt-Right Br. 10–11; Redneck Revolt Br. 10–11. This concern is vastly overstated.

Although no published decision has expounded on the Clause's contours—likely because unauthorized military activity is not a common feature of modern life—the absence of judicial precedent is no reason to refrain from adjudicating properly presented legal claims. Plaintiffs' proposed application of the Strict Subordination Clause is based on sound and well-settled legal principles, and constitutional provisions do not become inoperative simply because no court has yet examined their reach. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (identifying several Bill of Rights provisions that "remained unilluminated for lengthy periods").

At this early juncture, moreover, "one should not expect [this Court] to clarify the entire field" of civil–military subordination. *Id.* at 635. The Court need decide only whether the Strict Subordination Clause prohibits private citizens from engaging in the coordinated use of force—or projecting a willingness to do so—at public events. "[T]here will be time enough" to consider the Strict Subordination Clause's full scope if and when other fact patterns arise. *Id.* Even so, any future line-drawing concerns are not nearly as severe as Defendants portray them to be, as one scholar has explained:

> The lines between the individual's constitutionally protected right to own and use firearms and to associate with like-minded others and the creation of private armies that the state is empowered to prohibit may not always be easy to draw. Yet . . . line-drawing here need not prove any more difficult than line-drawing in many other areas of constitutional law.

Thomas B. McAffee, *Constitutional Limits on Regulating Private Militia Groups*, 58 Mont. L. Rev. 45, 60–61 (1997). As Plaintiffs have already shown, the Military Laws of Virginia render this task even more manageable. The General Assembly has clarified how, and through whom, civilian command authority is to be exercised; which functions may be considered military in nature; and which requirements one must satisfy in order to participate in exercising them.

The Strict Subordination Clause plainly does not cover the conduct of "a hunting club," "civil war reenactors," or "a bowling club." Alt-Right Br. 10. Nor does the Clause forbid individuals from "openly carry[ing] legal firearms at public demonstrations," Redneck Revolt Br. 10, or attaining proficiency in firearms training. It comes nowhere close to regulating firearm-related activities typically engaged in by law-abiding Virginians (such as those included in the list of exceptions from Virginia's anti-paramilitary prohibition, *see* Va. Code § 18.2-433.3). But whatever the Strict Subordination Clause's exact parameters, it surely forbids private persons from engaging in the organized use of force at public events—or visibly threatening to do so—outside the strictures of state law. That is all the Court need decide on Count 1 of the Amended Complaint.

Adjudicating Plaintiffs' strict-subordination claim would not be a leap in the dark. Courts already have been called upon to conduct substantially similar inquiries. Twenty-eight states have criminalized the formation of unauthorized military organizations.[3] In upholding the constitutionality of one of these laws, the U.S. Supreme Court necessarily presumed that courts can competently ascertain the existence of private "military organizations" and "military compan[ies]." *Presser*, 116 U.S. at 264, 266. Other decisions have reinforced the manageability of this task, proceeding under the assumption that identical (or nearly identical) phrasing contains enforceable legal content. *See Heller*, 554 U.S. at 621 ("private paramilitary organizations"); *Person v. Miller*, 854 F.2d 656, 661 (4th Cir. 1988) ("paramilitary organization[s]"); *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 209 ("private armies," "military operations," and "military activities"); *Dunne v. People*, 94 Ill. 120, 140 (1879) ("military companies" and "military organizations"); *Commonwealth v. Murphy*, 166 Mass. 171, 172–73 (1896) ("military

[3] *See* Institute for Constitutional Advocacy and Protection, *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions*, at 4 (2018), *available at* http://www.law.georgetown.edu/academics/centers-institutes/constitutional-advocacy-protection/upload/prohibiting-private-armies-at-public-rallies.pdf.

organization[s]" and "independent military compan[ies]"); *State v. Gohl*, 46 Wash. 408, 410 (1907) ("armed bod[ies] of men").

D. The Strict Subordination Clause's Prohibition Is Self-Executing

The Alt-Right Defendants maintain that the Strict Subordination Clause is not "self-executing," claiming that it merely states an abstract principle that cannot give rise to cognizable legal claims. *See* Alt-Right Br. 6. This argument also falls short, largely for the same reasons that the Clause is suitable for judicial application.

According to the Virginia Supreme Court,

> [a] constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

DiGiacinto, 281 Va. at 138 (quoting *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 103–04 (2008)). The mark of a self-executing constitutional provision is that "no further legislation is required to make it operative." *Id.* (quoting *Gray*, 276 Va. at 103). In addition, "constitutional provisions in bills of rights . . . are usually considered self-executing." *Id.* (quoting *Gray*, 276 Va. at 103).

Again, the Strict Subordination Clause—which appears in Section 13 of Virginia's Bill of Rights—provides that "in all cases the military should be under strict subordination to, and governed by, the civil power." Va. Const. art. I, § 13. This language is hardly a standardless political aspiration, unlike several other Virginia constitutional provisions. *See, e.g.*, *Robb v. Shockoe Slip Found.*, 228 Va. 678, 682–83 (1985) (deeming to be non-self-executing a provision declaring it to "be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings"); Va. Const. art. I, § 15 ("That no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue . . . .").

The Strict Subordination Clause is plainly self-executing in at least some respects. It is, at a minimum, a self-contained prohibition on governmental action that would detach military personnel from civilian oversight. For example, the General Assembly could not assign control over military operations to a local chemistry professor. So the issue is not *whether* the Clause is self-executing, but *to what extent* its commands apply without need of further legislation. The answer to that question is entirely a function of whether the Strict Subordination Clause applies to private behavior. If it does—as Plaintiffs have shown—it prohibits such conduct of its own force, thereby supplying a judicially administrable tool for enjoining unauthorized military activity.

The Alt-Right Defendants observe that Section 13 speaks of a right to keep and bear arms that "shall" not be infringed, provides that standing armies "should" be avoided in times of peace, and specifies that the military "should" be strictly subordinated to the civil power. According to these Defendants, "[t]he drafters of the Constitution clearly knew they could use the word 'shall' . . . but they chose to use the word 'should.'" Alt-Right Br. 6. The Alt-Right Defendants further suggest that the Strict Subordination Clause cannot be self-executing, because if it were, Section 13's prohibition on standing armies in peacetime—which also uses the word "should"—would be violated by the existence of the Virginia National Guard. *See id.* Each point is meritless.

As to the first point, although most of Section 13 has remained unchanged since its original adoption in 1776, the phrase "the right of the people to keep and bear arms shall not be infringed" was not added until 1969. Howard, *Commentaries on the Constitution of Virginia*, at 270, 273. So Section 13's inconsistent phraseology did not result from the deliberate choices of a single set of Constitution-makers.

Drawing ironclad inferences from these sorts of distinctions could well upend much constitutional law in Virginia. Multiple Bill of Rights provisions are similarly structured, yet are undoubtedly self-executing in every respect. *See, e.g.*, Va. Const. art. I, § 9 ("That excessive bail

ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; that the privilege of the writ of habeas corpus *shall* not be suspended unless when, in cases of invasion or rebellion, the public safety may require; and that the General Assembly *shall* not pass any bill of attainder, or any ex post facto law.") (emphases added). One constitutional provision declares that the three departments of government "should" be separate and distinct, Va. Const. art. I, § 4, while another indicates that they "shall" be separate and distinct, Va. Const. art. III, § 1. And although the Governor is forbidden to suspend the laws, *see Howell v. McAuliffe*, 292 Va. 320, 326–27 (2016), the relevant constitutional provision merely provides that such suspensions "ought not" occur, Va. Const. art. I, § 7. Judicial inquiries into self-execution cannot be conducted in such a mechanized fashion.

As for the Alt-Right Defendants' second point, it is far from obvious that all provisions beginning with "should" must be treated identically for self-execution purposes. According to Professor Howard, Section 13's prohibition on standing armies is "exhortatory in nature," yet the Strict Subordination Clause "possesses more vitality." Howard, *Commentaries on the Constitution of Virginia*, at 273–74. But even granting the assumption, the Virginia National Guard cannot be characterized as a "standing army." It is composed of part-time citizen-soldiers who train and serve the Commonwealth at periodic intervals. For that reason, the National Guard is to be "distinguished from regular troops or a standing army." 6A C.J.S. Armed Services § 338 (2018) ("Militia, Generally").

Although the Military Laws of Virginia greatly channel judicial discretion in assessing Strict Subordination Clause claims, it does not follow that the Clause would have been inoperative without further legislative refinement. In other contexts, non-constitutional sources of law routinely shed light on the content of self-executing constitutional provisions. For example, the U.S. Constitution empowers Congress to "call[] forth the Militia," U.S. Const. art. I, § 8, cl. 15,

but the precise composition of "the Militia" is left to statutory regulation.

Lastly, because the Strict Subordination Clause is self-executing, no statutory private right of action is needed to render it judicially enforceable. The Alt-Right Defendants' contrary view (*see* Alt-Right Br. 10) ignores the very hallmark of self-executing constitutional provisions—that "no further legislation is required to make [them] operative." *DiGiacinto*, 281 Va. at 138 (quoting *Gray*, 276 Va. at 103); *cf. Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 315 (2016) ("The claimed right here does not implicate any protected right under the Constitution of Virginia . . . . The existence of any viable right of action, therefore, must come from statutory law."). In fact, numerous state courts have ordered relief against private actors directly under a state constitutional provision.[4] Count 1 of Plaintiffs' Amended Complaint asks for nothing more.

E. Plaintiffs Have Standing to Sue Under the Strict Subordination Clause

The Alt-Right Defendants insist that, because "[n]o Plaintiff even alleges that it is the 'civil power,' . . . they have no standing to sue anyone for being 'insubordinate.'" Alt-Right Br. 13. Echoing this point, Defendant Redneck Revolt argues that "determinations of whether and when strict subordination has been violated [are] within the sole purview of the Governor in his capacity as Commander in Chief of the armed forces." Redneck Revolt Br. 9. On this theory, Plaintiffs are improperly seeking to "usurp such enforcement determinations from the Governor by appointing themselves the arbiters of who is and is not acting as 'the military.'" *Id.*

These assertions are entirely unexplained, and they do not follow logically from the fact of the Governor's empowerment. The act of assigning authority to a particular institution does not vest that institution with exclusive authority to ascertain encroachments on its prerogatives (and to seek judicial redress, if desired). Courts routinely adjudicate separation-of-powers disputes

[4] *See, e.g.*, *Cologne*, 37 Conn. Supp. at 115 (injunctive relief); *Bellerive*, 365 Mo. at. 492 (injunctive relief); *Batchelder*, 388 Mass. at 93 (declaratory relief); *Schmid*, 84 N.J. at 569 (trespass conviction overturned); *Tate*, 495 Pa. at 176 (trespass conviction overturned).

brought by private parties whose claims implicate the proper distribution of authority among governmental entities. *See, e.g.*, *In re Phillips*, 265 Va. 81, 87 (2003) (holding, in a suit brought by a convicted felon, that a statute regulating the process of restoring voting rights did not usurp the Governor's constitutional authority to remove political disabilities resulting from criminal convictions); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 498 (2010) (holding, in a suit brought by private institutions, that a federal statute imposing conditions on the removal of executive officers "subvert[ed] the President's ability to ensure that the laws are faithfully executed").

A party claiming standing need only "demonstrate a personal stake in the outcome of the controversy," such that a court can be assured "that the issues will be fully and fairly developed." *Goldman v. Landsidle*, 262 Va. 364, 371 (2001). That standard is easily satisfied here. Plaintiffs have alleged a host of legally cognizable injuries stemming from Defendants' unlawful actions on August 12, 2017, *see* Am. Compl. ¶¶ 135–51, to say nothing of the harms that would result from a repetition of such conduct. This Court is fully empowered to adjudicate Plaintiffs' claims for relief under state law—including the Strict Subordination Clause.

F. Neither Dillon's Rule Nor Virginia's Firearm-Preemption Statute Precludes the City from Seeking Judicial Relief

Finally, Defendants advance two arguments that apply only to the claims brought by the City. First, they assert that the City lacks authority to bring this suit under a principle known as "Dillon's Rule." *See* Alt-Right Br. 24; Redneck Revolt Br. 9, 26. Redneck Revolt additionally argues (at 9–10, 26–27, 29–30) that the City was affirmatively prohibited from doing so under a Virginia statute limiting the local regulation of firearms.

Neither argument has merit. Defendants ask this Court to endorse radical extensions of both Dillon's Rule and Virginia's firearm-preemption statute, theories that would virtually eliminate municipalities' ability to seek redress for violations of state law. Although both arguments logically apply to each of Plaintiffs' claims, they will be addressed in full only here for

the sake of simplicity.

1. Dillon's Rule

Under the rule of construction known as Dillon's Rule, local governments in Virginia "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Bd. of Zoning Appeals of Fairfax Cnty. v. Bd. of Supervisors of Fairfax Cnty.*, 276 Va. 550, 554 (2008). But Dillon's Rule does not implicate *courts'* authority to determine parties' rights and obligations—even those of a municipality—under state law. Defendants have offered only bare assertions to the contrary.

Defendants also fail to mention that the General Assembly *has* expressly authorized municipalities to seek judicial redress, providing that "[e]very locality may sue or be sued in its own name in relation to all matters connected with its duties." Va. Code § 15.2-1404. The statutorily defined "duties" of localities, moreover, plainly encompass efforts to ensure safety at public events. The Virginia Code expressly empowers cities to regulate in sweeping terms:

> A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof . . . .

Va. Code § 15.2-1102; *see also* Va. Code § 15.2-1700 ("Any locality may provide for the protection of its inhabitants and property and for the preservation of peace and good order therein."); *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 744 (W.D. Va. 2001) (alluding to "Virginia's broad grant of powers to localities").

The City of Charlottesville's Charter—also enacted by the General Assembly—echoes this broad grant of statutory authority. The City's Charter authorizes it to "preserve public peace and

good order"; to "make such other and additional ordinances as it may deem necessary for the general welfare of said city"; to regulate as it "deem[s] necessary for the good order and government of the city, . . . the peace, comfort, convenience, order, morals, health, and protection of its citizens or their property"; and "to do such other things . . . as may be necessary or proper to carry into effect any power, authority, capacity, or jurisdiction . . . vested in said city . . . or which may be necessarily incident to a municipal corporation." City of Charlottesville Charter §§ 14(14), (16), (20).

The power to sue is widely "regarded as an incident to the existence of a municipal corporation." 17 Eugene McQuillin, *The Law of Municipal Corporations* § 49:2 (3d ed. 2017). But the General Assembly removed any doubt by expressly authorizing localities to sue in connection with their statutorily defined duties, which include the maintenance of peace, safety, and good order. Naturally, Virginia courts have adjudicated the merits of cities' claims for injunctive relief under state law without first identifying a subject-matter-specific grant of authority.[5]

The City of Charlottesville is not attempting to "participate in [the] governance of the Commonwealth's armed forces." Redneck Revolt Br. 9. It is simply seeking relief for a violation of state law, pursuant to explicit statutory language authorizing it to sue and be sued in its own name. Dillon's Rule has never been understood to affect cities' capacity to litigate in the Commonwealth's courts, and this Court should reject Defendants' suggestion to the contrary.

[5] *See, e.g.*, *Rainey v. City of Norfolk*, 14 Va. App. 968, 970 (1992) (affirming civil contempt sanctions for violating a circuit court's order enjoining the defendant to comply with the Virginia Uniform Statewide Building Code in a suit brought by a municipality); *Town of New Market v. Battlefield Enters.*, No. 2191, 1985 WL 306890, at *1 (Va. Cir. 1985) (adjudicating a town's request for an injunction under state law, but denying relief because the facts alleged did not meet the relevant legal standard); *cf. City of Petersburg v. Petersburg Aqueduct Co.*, 47 S.E. 848, 850 (Va. 1904) (holding that the complaint's allegations "would clearly entitle the city to the injunctive relief prayed for," pursuant to its state-law authority to regulate "in the interest of the public welfare").

2. Virginia's Firearm-Preemption Statute

Defendant Redneck Revolt further maintains (at 9) that Virginia's firearm-preemption statute, Va. Code § 15.2-915, "constrains [the City] from acting in this case." This argument fares no better.

In relevant part, the statute provides as follows:

> No locality shall adopt or enforce any ordinance, resolution or motion, as permitted by § 15.2-1425, and no agent of such locality shall take any administrative action, governing the purchase, possession, transfer, ownership, carrying, storage or transporting of firearms, ammunition, or components or combination thereof other than those expressly authorized by statute.

Va. Code § 15.2-915(A). Redneck Revolt implicitly acknowledges (at 10, 29–30) that the City's decision to join as a plaintiff did not constitute an ordinance, resolution, motion, or administrative action governing the relevant subject matters. Its argument instead is that the City may not "achieve through civil litigation [that] which it is expressly prohibited from accomplishing by ordinance, resolution, motion, or administrative action." *Id.* at 10. Redneck Revolt fails to explain why this Court should concoct a statutory prohibition far broader than the one actually enacted.

As a state-level preemption statute, § 15.2-915 operates to limit the types of municipal law that may be enacted and enforced. But the City is not acting as an enactor or enforcer of local law; in its capacity as a litigant, it is asking this Court to apply existing state law, pursuant to an express statutory grant of authority to sue and be sued. Moreover, the City's decision to seek judicial redress did not "govern[]" anything, because it did not alter anyone's legal rights and obligations. Redneck Revolt rightly refrains from arguing as much. But it is entirely unclear why a provision focused on the enactment and enforcement of local law should be interpreted—in unprecedented fashion—as implicitly abrogating other statutes authorizing cities to sue under state law.

Redneck Revolt's position is further undermined by the provision immediately following Virginia's firearm-preemption statute. Va. Code § 15.2-915.1 forbids localities from suing for

injunctive relief concerning "the lawful design, marketing, manufacture, distribution, sale, or transfer of firearms or ammunition to the public." Such action is instead "reserved exclusively to the Commonwealth." *Id.* If Redneck Revolt were correct, that prohibition would have been unnecessary—localities would have been forbidden from seeking such relief in the first place. And in specifying which types of firearm-related suits may be brought only by the Commonwealth, § 15.2-915.1 implies that cities retain all litigating authority not expressly withdrawn.

Virginia's firearm-preemption statute simply does not apply to the City's participation in this lawsuit. And because the City has not violated Va. Code § 15.2-915(A), it cannot be made to pay Redneck Revolt's attorney's fees, expenses, and court costs. Section 15.2-915(D)'s fee-shifting provision presupposes a successful challenge to "an ordinance, resolution, or motion," or "an administrative action taken in bad faith." Redneck Revolt has identified no such action by the City governing the relevant subject matters, much less an unlawful one—much less an egregiously unlawful one. This Court should reject Redneck Revolt's misguided preemption objection.

II. Plaintiffs Have Stated Claims Under Virginia's Anti-Paramilitary and False-Assumption Statutes

Counts 2 and 3 of Plaintiffs' Amended Complaint allege that each Defendant has violated, and will continue to violate, Va. Code § 18.2-433.2, Virginia's anti-paramilitary statute. Count 4 alleges that Defendant Redneck Revolt (among other Militia Defendants) has violated, and will continue to violate, Va. Code § 18.2-174, which prohibits falsely assuming the functions of police officers and other law-enforcement officers.

The Alt-Right Defendants do not argue that the conduct alleged against them fails to satisfy the terms of the anti-paramilitary prohibitions contained in §§ 18.2-433.2(1) and (2); they merely suggest (at 11) that a clarification appended to those prohibitions immunizes their actions from liability. Redneck Revolt contends (at 18–23) that Plaintiffs have failed to state a claim under both §§ 18.2-433.2(2) and 18.2-174. Defendants also insist that, under the circumstances, no private

right of action exists to seek injunctive relief under these statutes. *See* Alt-Right Br. 14–16; Redneck Revolt Br. 11–18.

These objections are mistaken: Plaintiffs' Amended Complaint alleges violations of both statutes, and the circumstances of this case are a fitting occasion to enjoin expected violations.

A. Plaintiffs Have Alleged Sufficient Facts to Establish a Violation of § 18.2-433.2

Va. Code § 18.2-433.2, titled "Paramilitary Activity Prohibited," is divided into two subsections—two distinct ways of committing "unlawful paramilitary activity." The first readily applies to persons in a leadership capacity; the second applies more naturally to organizations, as well as to persons not serving as leaders or commanders.

Under Va. Code § 18.2-433.2(1), a person is guilty of "unlawful paramilitary activity" if he

> [t]eaches or demonstrates to any other person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that such training will be employed for use in, or in furtherance of, a civil disorder.

This provision is the basis for Count 2 of the Amended Complaint, which was brought against (among others) Defendants Kessler, Kline, and Heimbach. These Defendants do not contest that Plaintiffs' allegations against them satisfy the terms of § 18.2-433.2(1). *See, e.g.*, Am. Compl. ¶ 233 ("Defendants Jason Kessler and Eli Mosley [i.e., Elliott Kline]—as co-organizers of the Unite the Right rally—solicited the presence of paramilitary organizations, facilitated attendees' instruction in military techniques, and issued tactical commands to the other Alt-Right Defendants on August 12."); *id.* ¶¶ 87, 101, 107, 109 (highlighting specific instances in which Defendant Kline exercised command authority over alt-right attendees carrying shields); *id.* ¶¶ 90, 105 (same for Defendant Matthew Heimbach).

Under Va. Code § 18.2-433.2(2), a person is similarly guilty of "unlawful paramilitary activity" if he

> [a]ssembles with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, intending to employ such training for use in, or in furtherance of, a civil disorder.

This provision is the basis for Count 3 of the Amended Complaint, which was brought against (among others) Defendants TWP, Vanguard America, and Redneck Revolt. Defendants TWP and Vanguard America do not contest that Plaintiffs' allegations against them satisfy the terms of § 18.2-433.2(2). *See, e.g.*, Am. Compl. ¶ 90 (alleging that TWP "spent the morning [of August 12] engaged in 'preparation,' including 'doing some basic training in organization and self defense maneuvers'"); *id.* ¶¶ 90, 97, 102 (detailing TWP's coordinated use of weaponry on August 12); *id.* ¶¶ 87, 102, 108 (same for Vanguard America).

Redneck Revolt, on the other hand, disputes that Plaintiffs have alleged conduct that would violate § 18.2-433.2(2). According to Redneck Revolt, it is "fatal" to Plaintiffs' claim that the Amended Complaint contains "no factual allegations against Redneck Revolt that occurred before their arrival at the Park on August 12" or "prior to their arrival at the counter-protest." Redneck Revolt Br. 19. As an initial matter, in this suit for injunctive and declaratory relief, the Court need not confine its analysis to any Defendant's precise historical conduct. It is hardly foreordained, for example, that Redneck Revolt (or any other Defendant) will not engage in training exercises in advance of future rallies in Charlottesville.[6]

Moreover, Redneck Revolt is wrong to suggest that conduct satisfying each element of § 18.2-433.2 is somehow excluded from the statute's reach if it occurs at a public event rather than before it. Redneck Revolt simply states—but makes no effort to justify—its view that "no training,

[6] Redneck Revolt's website, for example, depicts five persons aiming firearms in unison. *See Redneck Revolt Organizing Principles*, Redneck Revolt, https://www.redneckrevolt.org/principles (cited in Am. Compl. ¶ 51 n.27). If Redneck Revolt members in fact received no training or instruction in the use of semiautomatic weapons before deploying them in Charlottesville last August, that would only highlight the public-safety risks posed by wielding arms collectively at public events outside the reach of public accountability.

practicing, or instruction . . . t[ook] place" among its members on August 12. Redneck Revolt Br. 19. The group's conduct, however, easily satisfies ordinary definitions of the word "practice." *Merriam-Webster*'s leading entries for the verb and noun forms of "practice" are "carry out, apply," and "actual performance or application." *Merriam-Webster*, "Practice," *available at* https://www.merriam-webster.com/dictionary/practice (last viewed May 15, 2018). These meanings contrast sharply with that dictionary's leading entry for the intransitive form of the verb "train"—"to undergo instruction, discipline, or drill." *Merriam-Webster*, "Train," *available at* https://www.merriam-webster.com/dictionary/train (last viewed May 15, 2018).

As previously mentioned, § 18.2-433.2 is titled "Paramilitary Activity Prohibited," and the forbidden conduct is styled "unlawful paramilitary activity." It would be an odd conception of paramilitary activity that would encompass only preparatory or inchoate behavior and not the act of deploying dangerous techniques in a public setting. Nor would any sensible legislature have deemed certain activities too unsafe to be rehearsed in private, while permitting them to be carried out on the cusp of, or during, an actual civil disorder. There is no principled reason that training, practicing, or instruction would satisfy § 18.2-433.2 if it occurred in a nearby parking lot minutes before a group's arrival at a public event, but not after an armed deployment had actually occurred.

That the statute forbids both "training" *and* "practicing" counsels strongly against according the latter word an artificially narrow sweep. Other states, after all, prohibit paramilitary "train[ing]," but not "practicing." *See* Ga. Code Ann. § 16-11-151(b)(2); La. Stat. Ann. § 14:117.1(A). This conclusion is reinforced by § 18.2-433.2(2)'s placement within a chapter called "Crimes Against Peace and Order."[7] (Other provisions within that chapter include

[7] The Alt-Right Defendants (at 12) and Redneck Revolt (at 20) urge this Court to interpret § 18.2-433.2 narrowly given that the General Assembly recently declined to enact an amendment to that statute that would have criminalized "[a]ssembl[ing] with one or more persons with the intent of intimidating any person or group of persons by drilling, parading, or marching with any firearm, any explosive or incendiary device, or any components or combination

prohibitions on violent assemblies, Va. Code § 18.2-406; incitement to riot, *id.* § 18.2-408; disorderly conduct in public places, § 18.2-415; and cross-burning in public places with intent to intimidate, *id.* § 18.2-423.)

On August 12, approximately 20 Redneck Revolt members purposefully formed a "security perimeter" around Justice Park, "most of them open-carrying tactical rifles," Am. Compl. ¶ 79—thereby carrying out (i.e., "practicing") the use of firearms. Those members undoubtedly intended to employ their firearms "for use in . . . a civil disorder," § 18.2-433.2(2), as defined in the immediately prior provision—namely, the Unite the Right rally. Indeed, one of Redneck Revolt's stated reasons for attending the event was to repel the "violence" and "power" of opposition groups expected to attend. *See Call to Arms for Charlottesville*, Redneck Revolt, Aug. 10, 2017, https://www.redneckrevolt.org/single-post/CALL-TO-ARMS-FOR-CHARLOTTESVILLE (cited in Am. Compl. ¶ 78 & n.71).

That Defendants' conduct meets § 18.2-433.2(2)'s definition of "unlawful paramilitary activity" is not the end of the matter, however. Section 18.2-433.3 contains a list of four exceptions to the prohibition and one clarification. But the conduct alleged in Plaintiffs' Amended Complaint satisfies none of them. The four exceptions listed in §§ 18.2-433.3(1)–(4) are plainly inapplicable to group-based conduct capable of causing injury or death and intended for use in a civil disorder. In fact, the inclusion of the first exception—which exempts from § 18.2-433.2's coverage "[a]ny act of a law-enforcement officer performed in the otherwise lawful performance of the officer's official duties"—strongly suggests that coordinated armed peacekeeping activity is presumptively forbidden under the anti-paramilitary statute (at least when it bears the necessary relation to a civil

thereof." S.B. 987 (NS), 2018 Gen. Assem., Reg. Sess. (Va. 2018). But Plaintiffs have not invoked § 18.2-433.2 to enjoin Defendants from drilling, parading, or marching with the intent to intimidate. The amendment would have applied only to those three activities; it was not, as Redneck Revolt suggests (at 20), a proposed ban on unauthorized military organizations. In any case, the legislature's rejection of this amendment says nothing about the proper scope of § 18.2-433.2, which was enacted in 1987.

disorder). This lends further support to Plaintiffs' argument that conduct can be actionable under § 18.2-433.2 even if it occurs at a public event.

Va. Code § 18.2-433.3 also clarifies that "no activity of any individual, group, organization or other entity engaged in the lawful display or use of firearms or other weapons or other facsimiles" shall be deemed to violate § 18.2-433.2. Both the Alt-Right Defendants and Redneck Revolt contend that the allegations against them describe a "lawful" display or use of weapons. *See* Alt-Right Br. 11; Redneck Revolt Br. 21. But if the conduct alleged does in fact violate § 18.2-433.2, then it is not "lawful." This clarification's reference to the "lawful" display or use of weapons does not purport to create a category of conduct immune from § 18.2-433.2's strictures, as do the exceptions listed in § 18.2-433.3(1)–(4). It instead incorporates by reference any other sources of law rendering lawful what the text of § 18.2-433.2 might otherwise cause to be unlawful. Were it otherwise, the inquiry would be aimless, inviting substitution of one's abstract conceptions of "lawful[ness]" for the standard laid out by the General Assembly.

B. Plaintiffs Have Alleged Sufficient Facts to Establish a Violation of § 18.2-174

Defendant Redneck Revolt also claims (at 22–23) that its members did not falsely assume or exercise the functions of law-enforcement officers in Charlottesville on August 12, 2017. This argument can be advanced only by selectively omitting critical allegations included in the Amended Complaint.

Va. Code § 18.2-174 provides as follows:

> Any person who falsely assumes or exercises the functions, powers, duties, and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or any local, city, county, state, or federal law-enforcement officer, or who falsely assumes or pretends to be any such officer, is guilty of a Class 1 misdemeanor. A second or subsequent offense is punishable as a Class 6 felony.

This provision contains two separate prohibitions: engaging in activities reserved to law-enforcement officers without statutory authorization to do so, and attempting to deceive others into

believing that one is a law-enforcement officer. Count 4 of Plaintiffs' Amended Complaint proceeds under the former theory. Redneck Revolt does not contest that § 18.2-174 presupposes a category of functions reserved exclusively to law-enforcement officers, or that its members lack authority to engage in those functions. Redneck Revolt argues only that the Amended Complaint's allegations are insufficient to state a claim under § 18.2-174.

State law specifies that "[t]he police force of a locality . . . is responsible for . . . the safeguard of life and property" and "the preservation of peace." Va. Code § 15.2-1704. Members of the Virginia National Guard and Virginia Defense Force also qualify as "law-enforcement officer[s]" when called upon to help "maintain[] order and public safety . . . in cooperation with Virginia State Police and local law-enforcement agencies." Va. Code § 44-11.1(A).

The General Assembly has entrusted such functions only to those persons who meet a strict set of statutory requirements. Accordingly, every police officer must "comply with . . . compulsory minimum training standards," Va. Code § 9.1-114, which include completion of a statewide certification exam, *id.* § 15.2-1706(A). Prospective police officers must also be U.S. citizens at least 18 years of age, have at least a high-school education (or the equivalent), undergo a comprehensive background check, pass a physical examination and a drug test, and have no felonies in their criminal histories. *Id.* § 15.2-1705(A). State law does permit the existence of "private police department[s]," but they must be "authorized by statute" and "comply with . . . the laws governing municipal police departments." *Id.* § 9.1-101. All persons employed as private police officers must "meet all requirements, including the minimum compulsory training requirements, for [regular] law enforcement officers." *Id.* As detailed in Plaintiffs' Amended Complaint, *see* Am. Compl. ¶ 63, Virginia law also thoroughly regulates the provision of private security services.

State law envisions several mechanisms for providing additional assistance to local police

departments, should the need arise. First, localities may enter into reciprocal agreements "for cooperation in the furnishing of police services," Va. Code § 15.2-1726, to help "maintain peace and good order," *id.* § 15.2-1736. Even without such agreements, moreover, localities are authorized to send their police officers anywhere in the Commonwealth "in response to any law-enforcement emergency involving any immediate threat to life or public safety." *Id.* § 15.2-1724. Second, as outlined above, members of the organized military can be called upon to help maintain public safety. This can occur on the Governor's own initiative or at the request of "the governing body or the chief law-enforcement officer" of a locality. *See id.* § 44-78.1. And third, localities may establish auxiliary police forces "for the further preservation of the public peace, safety, and good order of the community." *Id.* § 15.2-1731(A). Auxiliary police officers may be called into service "in time of public emergency" or "at such times as there are insufficient numbers of regular police officers to preserve the peace, safety and good order of the community." *Id.* § 15.2-1734(A). But such officers must "me[e]t the training requirements established by the Department of Criminal Justice Services," *id.* § 15.2-1731(A), and "wear the uniform prescribed by the governing body," *id.* § 15.2-1734(A).

It is no wonder that the General Assembly has prohibited "falsely assum[ing] or exercis[ing] the functions, powers, duties, and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or any local, city, county, state, or federal law-enforcement officer." *Id.* § 18.2-174. The unauthorized assumption of such functions would undercut the General Assembly's finely calibrated approach toward ensuring public safety.

With these principles in mind, Plaintiffs' allegations readily state a claim under Va. Code § 18.2-174. The Amended Complaint alleges that approximately 20 Redneck Revolt members created a security perimeter around Justice Park on August 12, "most of them open-carrying tactical rifles." Am. Compl. ¶ 79. These members "sought to make Justice Park an 'autonomous

zone' by 'keep[ing] cops' and 'keep[ing] the state . . . out of the park.'" *Id.* The Amended Complaint cites Redneck Revolt's insistence that it must step into the shoes of law enforcement by "tak[ing] the defense of our communities into our own hands." *Id.* ¶ 51. Also quoted is Redneck Revolt's ongoing belief that it must "not allow the state to have a direct monopoly on the use of force." *Id.* ¶ 79. Lastly, the Amended Complaint alleges that Redneck Revolt failed to "follow[] the statutory prerequisites" for exercising these functions. *Id.* ¶ 256.

C. This Court Should Enjoin Defendants from Continuing to Violate § 18.2-433.2 and § 18.2-174

Both the Alt-Right Defendants and Redneck Revolt urge the Court to avoid recognizing a private right of action to enjoin future violations of Virginia's anti-paramilitary and false-assumption statutes, even assuming that Plaintiffs have alleged conduct falling within both prohibitions. *See* Alt-Right Br. 14–16; Redneck Revolt Br. 11–18. Such reticence is unwarranted by precedent and improper under the circumstances of this case.

1. Plaintiffs' Allegations of Harm Warrant the Issuance of Injunctive Relief to Forestall Further Violations

Defendants are correct that the mere violation of a penal statute does not warrant injunctive relief. *Black & White Cars, Inc. v. Groome Transp., Inc.*, 247 Va. 426, 430 (1994). But "[t]he fact that a statute contains an express penalty for violation does not bar a court from considering the equitable remedy of injunction." Kent Sinclair, *Sinclair on Virginia Remedies* § 51-2[C], at 51-28 (5th ed. 2016). The Virginia Supreme Court has repeatedly endorsed "the long standing principle that an injunction is appropriate relief where violation of a penal statute or penal ordinance results in special damage to property rights which would be difficult to quantify." *Id.*

As an initial matter, the property-rights framework of *Black & White Cars* has never been held applicable to suits brought by governmental parties. Quite the contrary: the Virginia Supreme Court has deemed it "well settled that a court of equity has jurisdiction upon the application of . . .

a governmental subdivision to restrain by injunction acts which are a menace to the public rights or welfare," rather than to the government's own property rights. *Thomas v. City of Danville*, 207 Va. 656, 661 (1967). With that framework in mind, the Court upheld the issuance of an injunction, in a suit brought by a locality, against certain "violation[s] of the laws of the Commonwealth . . . designed to maintain the public peace." *Id.* at 658. The City of Charlottesville may likewise seek injunctive relief for harms to its residents and businesses stemming from violations of two statutes designed to maintain the public peace.

In any case, the non-City Plaintiffs have satisfied the *Black & White Cars* standard by alleging special damage to their property rights that would be difficult to quantify. The Amended Complaint contains the following allegations of property-based harms stemming from the events of August 12, 2017, to say nothing of the further harms Plaintiffs would endure should Defendants be permitted to return to Charlottesville to engage in unlawful activity:

- Before the Unite the Right rally, Plaintiff businesses and members of Plaintiff Downtown Business Association of Charlottesville (DBAC) "spent significant amounts of time and resources to understand and prepare for the risk of violence." Am. Compl. ¶ 138. Some Plaintiff businesses "invested in measures to secure their property from harm, including hiring additional staff and private security, boarding up their store windows, and installing blackout curtains." *Id.*

- Many Plaintiff restaurants and retail stores, and other members of Plaintiff DBAC, either closed early or never opened on August 12 "out of fear for the safety of their owners, employees, and property." *Id.* ¶ 139. Some Plaintiffs remained closed the next day, August 13. *Id.*

- Employees of many Plaintiff businesses opted not to show up for work on August 12 and 13 "out of fear for their safety." *Id.* ¶ 140.

- On August 12, two militia members stationed themselves in front of Plaintiff Alakazam Toys and Gifts, "interfering with its business." *Id.* ¶ 141. Alakazam locked its doors "in order to protect [its] patrons from physical harm." *Id.*

- The owners of Plaintiffs Hays + Ewing and Wolf Ackerman were unable to reach their offices on August 12, "because they felt it was unsafe to travel downtown." *Id.* ¶ 142.

- Plaintiff Quality Pie "shut down construction work for four days" after August 12, "thereby delaying its opening to customers." *Id.* ¶ 143.

- "[P]laintiff businesses and members of DBAC have experienced a marked decline in revenues" since August 12. *Id.* ¶ 144. "Would-be clients and customers have avoided . . . the downtown area in particular, because they fear the return of private militias and alt-right paramilitary groups." *Id.* "The public has also come to associate Charlottesville with paramilitary activity, diminishing Plaintiffs' business prospects and property values in Charlottesville." *Id.*

- Multiple Plaintiff businesses "have invested new efforts and resources into marketing to try to make up for the loss of business and reputational harms they have experienced." *Id.* ¶ 146. Plaintiff Champion Brewery, in particular, has had to compensate by "expand[ing] the distribution of its packaged products" and "invest[ing] significant amounts of time to encourage tourism to Charlottesville." *Id.*

- Due largely to "the association between Charlottesville and paramilitary activity," "[c]onfidence in Charlottesville as a quality place to live and work has been eroded." *Id.* ¶ 147. These changes have fallen particularly hard on Plaintiffs Hays + Ewing and Wolf Ackerman, two architectural design firms that have recently received "notably fewer inquiries for new building projects than anticipated based on past experience." *Id.* "Each architectural project is unique and takes several years to complete, making the amount of loss impossible to quantify." *Id.*

- Members of Plaintiffs Belmont-Carlton, Little High, and Woolen Mills neighborhood associations "felt unsafe in their homes" on August 12. *Id.* ¶ 149. Fearing for their children's safety, "residents either kept their children indoors or sent them out of town to stay with friends and family members." *Id.* "Neighborhood events planned for the weekend of August 12 were canceled, as well." *Id.*

- On August 12, "Defendants, many of them armed, trespassed on the property of Plaintiff neighborhood associations' members in traveling to and from the rally." *Id.* ¶ 150.

The Alt-Right Defendants contend that these property-based harms are irrelevant for purposes of applying *Black & White Cars*, because the underlying criminal statute must itself "confer[] . . . property rights." Alt-Right Br. 16. Redneck Revolt agrees, insisting that the *Black & White Cars* principle should be confined to the narrow class of "franchise property rights." Redneck Revolt Br. 14. The Court should reject this invitation to rewrite binding precedent.

Under *Black & White Cars*, injunctive relief should issue "where violation of a penal statute

. . . results in special damage to property rights which would be difficult to quantify." 247 Va. at 430. The Virginia Supreme Court did not say—and has never suggested—that only franchise rights qualify as property rights for these purposes. Confining that category to franchise rights would nonsensically exclude other more paradigmatic forms of property. A franchise represents only a "means of acquiring wealth," after all, not a form of "tangible and visible property." *Grand Int'l Bhd. of Locomotive Eng'rs v. Mills*, 43 Ariz. 379, 400 (1934). In an early decision enjoining the violation of a criminal provision, the Virginia Supreme Court explained that it had "enlarge[d] and broaden[ed] the originally narrower meaning of the term 'property rights'" by deeming franchise rights to fall within that category. *Long's Baggage Transfer Co. v. Burford*, 144 Va. 339, 354 (1926) (internal quotation marks omitted). But the Court made clear that equity will still protect more traditional forms of property, including by "prevent[ing] a threatened trespass." *Id.* at 353 (internal quotation marks omitted).

Redneck Revolt counsels that the *Black & White Cars* exception should not be allowed to "swallow the general rule." Redneck Revolt Br. 14. That is of course correct, and it is why the rule contains its own limiting principle: that the damage to property rights must "be difficult to quantify." *Black & White Cars*, 247 Va. at 430. That sensible limitation on equitable relief accounts for the vast majority of cases that Defendants insist mandate their unduly narrow approach. There is a simple reason that decisions enjoining the violation of a penal ordinance or statute are "primarily franchise cases": "In such cases it is clear that damages . . . are difficult to quantify. It would be difficult to determine exactly what business was lost because another interfered with a franchise." *Shepard v. AOC/VNC P'ship*, 61 Va. Cir. 261, at *2 (2003).

The Virginia Supreme Court's decision in *Landon v. Kwass*, 96 S.E. 764 (1918), is instructive in this regard. In that case, a plaintiff sought injunctive relief to prevent the erection of a wooden wall on adjacent property, in violation of an ordinance that restricted the erection of

buildings and structures within the fire limits of the town unless made of brick or stone. The Court denied the request—not because the plaintiff had failed to allege a harm to his property, but in part because the injury alleged (an "increase of the rate of fire insurance") could be fully repaired with damages. *Id.* at 765. Other decisions relied on by Defendant Redneck Revolt identified similar deficiencies. *See Dial A Car, Inc. v. Transp., Inc.*, 132 F.3d 743, 746 (D.C. Cir. 1998) ("Dial A Car states that its damages are 'more easily quantifiable' than the damages in *Black & White* . . . ."); *Patel v. Zillow, Inc.*, No. 17-CV-4008, 2017 WL 3620812, at *9 (N.D. Ill. Aug. 23, 2017) ("Plaintiffs make no argument that the damages they seek would be difficult to quantify.").

For this reason, Defendants are also wrong to invoke decisions refusing to afford relief for criminal violations where the plaintiffs ascribed a specific dollar value to their monetary losses. *See, e.g.*, *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 358 (1993) ("[A]ppellant . . . s[ought] recovery against the defendants . . . in the sum of $308,553.07"); *Riverside Hosp. v. Optima Health Plan*, 82 Va. Cir. 250, at *1 (2011) (describing a claim for "damages . . . in the amount of $703,646"). It is also unremarkable that injunctive relief has been denied under criminal provisions that reserved enforcement authority to specific governmental actors,[8] or that authorized a private right of action for damages only.[9]

Imposing a rigid limitation on the issuance of injunctive relief would be misguided for yet another reason: equity abhors bright-line rules and fixed preconditions. Whether to issue an

[8] *See Landon*, 123 Va. at 766 ("The ordinance . . . reserves to the council the discretion to determine whether a building erected in violation thereof shall be torn down."); *Comfort v. City of Norfolk*, 82 Va. Cir. 89, at *2 (2011) (explaining that the relevant provisions vested enforcement authority exclusively with "the local building departments," "the director of public health," and "certain law enforcement officers"); *Dial A Car*, 132 F.3d at 745 (stating that the "primary purpose of the [underlying] statute" was "to consolidate responsibility for the regulation of the industry in a single administrative agency"); *Patel*, 2017 WL 3620812, at *7 ("The statute provides for criminal penalties, a civil penalty for up to $25,000 for each violation, and injunctive relief. Three different government actors may pursue that injunctive relief . . . .").

[9] *See Physicians Comm. for Responsible Medicine*, 283 Fed. Appx. 139, 145 (4th Cir. 2008) ("[T]he statute is not silent as to whether a private cause of action exists, but rather explicitly authorizes a private cause of action that is limited to only damages.").

injunction always "rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008); *see also* 30A C.J.S. Equity § 2 (2018) ("There are no established rules and fixed principles laid down for application of equity.").

Just as the non-City Plaintiffs have identified property rights implicated by Defendants' unlawful activity, they have also alleged special damages to those property rights—ones that would be especially difficult to quantify. To take just one example, Redneck Revolt claims (at 15) that the "lost revenue or potential business opportunities" alleged by Plaintiff businesses are too "generalized" to count as special damages. But that is the very sort of harm alleged in *Black & White Cars*. *See Black & White Cars*, 247 Va. at 431 (holding that a likelihood of "fares lost" in the marketplace, "in conjunction with the inherent difficulty of establishing the quantum of lost profits in these circumstances, satisfies the required showing of special damages"). That Plaintiff businesses "have not identified a single person whose business [they] lost," Alt-Right Br. 19, is precisely the point. Plaintiffs cannot easily account for counterfactual transactions, just as the franchise-holding taxis in *Black & White Cars* could not pinpoint lost business opportunities resulting from a minuscule increase in the total amount of competition. *See* 247 Va. at 430 (indicating that 233 taxicabs had been issued certificates to operate and advertise).

2. Injunctive Relief Would Furnish More Effective and Complete Relief Than Criminal Prosecutions

Defendant Redneck Revolt urges the Court to stay its remedial hand on the theory that "a more effective, complete, and just remedy" would be to criminally prosecute each Redneck Revolt member who violated Va. Code §§ 18.2-433.2 and 18.2-174 on August 12, 2017. Redneck Revolt Br. 17. In fact, this case is a classic instance of when injunctive relief would furnish fuller and fairer relief.

For starters, as Redneck Revolt acknowledges, "the Commonwealth has sole enforcement

authority" to prosecute violations of penal statutes. *Id.* at 13 n.8. No Plaintiff is empowered to initiate criminal enforcement proceedings. The same would not be true of contempt proceedings, were an injunction to issue in this case. Redneck Revolt also suggests that Plaintiffs ought to have availed themselves of the so-called "citizen's warrant" procedure, pursuant to Va. Code § 19.2-72, enabling them to secure "severe felony penalties" for "these felony statutes." Redneck Revolt Br. 17. But magistrates are expressly forbidden from "issu[ing] an arrest warrant for a felony offense" at the urging of a private citizen unless an agent of the Commonwealth has authorized the arrest. Va. Code § 19.2-72. That required level of intermediation belies Redneck Revolt's suggestion that Plaintiffs need only make a probable-cause showing to trigger criminal enforcement.

Even were the "citizen's warrant" procedure available to Plaintiffs (as it would be for first-time violations of the false-assumption statute, a misdemeanor), injunctive relief would be far more effective than a "multiplicity of prosecutions," *Turner v. Hicks*, 164 Va. 612, 615 (1935) (quoting *Long's Baggage Transfer Co.*, 144 Va. at 353), which would not provide the forward-looking relief Plaintiffs seek. First, it would require a massive investigative undertaking to successfully identify the scores of Vanguard America, TWP, and Redneck Revolt members who violated criminal statutes on August 12. Even if that task could be accomplished, prosecuting each member seriatim would be a tremendous drain on scarce judicial and prosecutorial resources. Out-of-state defendants—likely the vast majority—would need to be extradited. And this multitude of prosecutions could never be completed in advance of August 11 and 12, 2018, when Defendant Kessler intends to hold a Unite the Right anniversary rally in Charlottesville. *See* Am. Compl. ¶¶ 6, 195–96.

Second, even if such prosecutions were successful, any resulting penalties for past conduct could not ensure that the same conduct would not be repeated in the future. *Cf. Stead v. Fortner*, 255 Ill. 468, 477 (1912) (explaining that a criminal prosecution "can only dispose of an existing

nuisance and cannot prevent renewal of the nuisance, for which a new prosecution must be brought"). For Defendant organizations, moreover, even if every person who violated §§ 18.2-433.2 and 18.2-174 last August could be successfully identified and prosecuted in advance of Defendant Kessler's planned rally, other members of those groups—not being personally subject to a court order—would remain free to attend in their place and commit similar violations. Pursuing post hoc, individualized prosecutions for repetitive harm *after* it has occurred can hardly be thought a more effective, complete, and just remedy than enjoining organizations from committing those violations in the first place. And although Defendants could choose to violate any injunction issued against them, the forward-looking remedy sought by Plaintiffs would not depend solely on arrests and prosecutions for enforcement. Finally, to the extent that Defendants suggest that arrests and prosecutions for future violations are an adequate remedy, public safety might well counsel against arresting entire groups of people carrying dangerous weaponry during volatile public demonstrations.

Redneck Revolt's concern about "having liberty interests deprived based on alleged criminal violations," Redneck Revolt Br. 16, is misplaced. Courts have "frequently and uniformly rejected" the notion that equitable remedies unlawfully deprive defendants of constitutional criminal-procedure protections, as "such injunctive restraints are not criminal in character but are civil." *Sinclair on Virginia Remedies* § 51-2[C], at 51-28. An injunction based on a criminal statute is identical in character to an injunction based on a civil statute: each is issued at the conclusion of civil proceedings and forbids a defendant from engaging in particular conduct, with violations punishable by contempt. When criminal contempt proceedings do arise, the enjoined parties are entitled to the full constitutional protections accorded to criminal defendants. It is unclear why Redneck Revolt believes that its members' liberty interests would be better served if they were criminally prosecuted rather than civilly enjoined. And equitable relief will of course

issue only at the hand of a "neutral and impartial actor[]," Redneck Revolt Br. 16—this Court.

III. Plaintiffs Have Stated a Public-Nuisance Claim

Count 5 of Plaintiffs' Amended Complaint alleges that Defendants have engaged in, and will continue to engage in, conduct that amounts to a public nuisance under the common law of Virginia. "When Defendants engage in paramilitary activity in public areas independent of any civil authority," the Amended Complaint states, "their conduct necessarily threatens public health, safety, peace, and comfort, and the general welfare." Am. Compl. ¶ 264. Defendants deny that their alleged conduct would constitute a public nuisance under state law. *See* Alt-Right Br. 22; Redneck Revolt Br. 27–28. This Court should reject Defendants' crabbed understanding of the tort of public nuisance.

Plaintiffs' public-nuisance theory is not "based on a violation of a criminal statute." Redneck Revolt Br. 26. Plaintiffs simply allege that Defendants' anticipated conduct would qualify as a public nuisance, and that it should be enjoined for that reason. This is a straightforward application of a well-established common-law doctrine.[10]

A public nuisance is "an unreasonable interference with a right common to the general public," *Restatement (Second) of Torts* § 821B(1) (1979), including "public safety, public peace, and public comfort or convenience in public facilities," *Va. Prac. Tort & Personal Injury Law* § 8:7 (2017). The claimed interference must be "substantial," for "[t]he law does not concern itself with trifles" and "petty annoyance[s]." *Id.* §§ 8:4, 8:7. It is often said that "[a] public nuisance is a condition that is a danger to the public." *Taylor v. City of Charlottesville*, 240 Va. 367, 372 (1990); *see also Chapman v. City of Virginia Beach*, 252 Va. 186, 192 (1996) (same). In

[10] The Alt-Right Defendants wrongly assert (at 21) that the General Assembly abrogated common-law public-nuisance claims by passing Va. Code §§ 48.1 *et seq.*, a statutory mechanism for abating public nuisances that dates to the early 20th century. *See* Va. Code § 1520 (1919). No court has ever deemed this remedial process to be exclusive, as demonstrated by the large body of decisions adjudicating public-nuisance claims brought by private parties in Virginia state court.

determining whether particular conduct would present a danger to the public, a court may consider "whether [it] is proscribed by a statute," among other factors. *Restatement (Second) of Torts* § 821B(2)(b).

The allegations in the Amended Complaint readily state a claim for public nuisance. Although Defendants' precise historical conduct cannot be determinative in this suit for forward-looking relief, the Amended Complaint exhaustively describes how Defendants engaged in the coordinated use of force—or projected a willingness to do so—at a volatile demonstration in downtown Charlottesville. This behavior substantially and unreasonably interfered with the general public's ability to gather in Emancipation and Justice Parks, and on nearby streets and sidewalks, free from the danger of violence inflicted by Defendants' coordinated use of weaponry. Courts have explicitly recognized that unauthorized military activity threatens "the public peace, safety and good order." *Presser*, 116 U.S. at 268; *see also Dunne*, 94 Ill. at 141 (stating that unofficial military bodies "endanger the public peace" and "endanger the public security"); *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 218 (concluding that unauthorized "[m]ilitary organizations are dangerous wherever they exist"); *Murphy*, 166 Mass. at 172 (remarking that such organizations adversely "affect the public security, quiet, and good order").

Rather than considering the substantiality or unreasonableness of the alleged interference, Defendants seek to reorient the inquiry by focusing on the *frequency* with which the relevant acts must occur. The Alt-Right Defendants insist (at 22) that a condition "must prevail at all times and under all circumstances" in order to constitute a public nuisance. But the Virginia Supreme Court used that phrase to describe the category of "nuisance[s] *per se*." *Price v. Travis*, 149 Va. 536, 547 (1927); *see also Turner v. Caplan*, 268 Va. 122, 128 (2004) (explaining that "the term nuisance *per se*" is "restrict[ed] . . . to such things as are nuisances at all times and under all circumstances") (internal quotation marks omitted). That sweeping phrase also appeared in the distinct context of

announcing "the principles upon which the law of public nuisances *as to highways* is based." *Price*, 149 Va. at 546 (emphasis added); *cf. Harman v. Nininger*, 83 Va. Cir. 280, at *4 (2011) ("The highway was not continuously obstructed and therefore a public nuisance was not created.").

Both the Alt-Right Defendants and Redneck Revolt also claim that conduct cannot be a public nuisance unless it is more than "sporadic or isolated," Alt-Right Br. 22; Redneck Revolt Br. 23, the implication being that Defendants' alleged conduct—occurring only intermittently—necessarily cannot qualify as a public nuisance. But that phrase has been used in the case law in contradistinction to the governing legal standard—whether an interference was (or would be) substantial. *See Breeding ex rel. Breeding v. Hensley*, 258 Va. 207, 213 (1999) ("More than sporadic or isolated conditions must be shown; the interference must be 'substantial'"). The concept of a public nuisance carries "no fixed duration or definite time limit," for "[e]ach case must be adjudged according to its own circumstances." *Pope v. Commonwealth*, 109 S.E. 429, 437 (Va. 1921); *see also Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.2d 580, 596 (Tex. 2016) (clarifying that the "duration or recurrence of the interference is merely one—and not necessarily a conclusive—factor in determining whether the damage is so substantial as to amount to a nuisance") (internal quotation marks omitted).

Redneck Revolt misunderstands the basis for Plaintiffs' requested relief. According to Redneck Revolt, Plaintiffs seek an injunction based solely "on the allegation that the single incident of August 12 has given rise to damages sufficient to warrant an injunction." Redneck Revolt Br. 24. But Plaintiffs, as their Amended Complaint makes clear, filed this suit to prevent injuries likely to result from *anticipated* violations of state law, including on Defendant Kessler's planned anniversary rally. Am. Compl. ¶¶ 195–96. The Amended Complaint's backward-looking factual allegations are merely probative of the types of conduct that this Court can conclude are reasonably likely to occur in the future. Redneck Revolt's contention that a so-called "single-

incident exception" has been "limited to claims for damages," Redneck Revolt Br. 24, is thus entirely beside the point. The plaintiffs in such cases sought damages precisely because they did not allege that the causes of their injuries would occur again. Because Plaintiffs here seek purely prospective relief, this is inherently a "multi-incident" case.[11]

The organized use of force outside the reach of public accountability, as well as implicit threats to engage in such activity in public settings, fall comfortably within the category of substantial and unreasonable interferences with rights held in common by the public. Courts have held each of the following to constitute a public nuisance: the emission of loud music from a restaurant, *City of Va. Beach v. Murphy*, 239 Va. 353, 356 (1990); a single act of indecent exposure, *Truet v. State*, 3 Ala. App. 114, 116 (1912); a single act of public urination on a commercial street, *People v. McDonald*, 137 Cal. App. 4th 521, 535–37 (2006); and a single prize fight, *Commonwealth v. McGovern*, 75 S.W. 261, 265 (Ky. 1903). It would require no doctrinal gymnastics to reach the same conclusion on the allegations presented here, for the relevant factual allegations provide far more detail than necessary to inform each Defendant of the "true nature of the claim" against it. Rule 1:4(d). At the very least, because "there are factual issues" remaining to be resolved through discovery, *Tickle v. City of Roanoke*, 81 Va. Cir. 324, at *2 (2010), Plaintiffs should not be "precluded at this stage of the proceeding from going forward with their case," *Breeding*, 258 Va. at 214.

Finally, neither party contests that the City may sue to enjoin a public nuisance.[12] It is statutorily authorized to do so, after all, to protect the safety and welfare of its citizens. *See* Va.

[11] To be clear, Plaintiffs could seek injunctive relief even if no violative conduct had previously occurred. *See Restatement (Second) of Torts* § 821B, com. i. ("[F]or an injunction harm need only be threatened and need not actually have been sustained at all.").

[12] Because the City's standing is uncontested and relief with respect to the City would provide relief as to all Plaintiffs, it is unnecessary to consider the argument that the non-City Plaintiffs cannot demonstrate the harm required to sustain a public-nuisance claim.

Code § 15.2-900. "[A]batement of a public nuisance" has long been deemed "an exercise of the police power." *Lee v. City of Norfolk*, 281 Va. 423, 439 (2011); *see also Thomas*, 207 Va. at 661 ("It is well settled that a court of equity has jurisdiction upon the application of . . . a governmental subdivision to restrain by injunction acts which are a menace to the public rights or welfare."); *City of Rochester v. Charlotte Docks Co.*, 114 N.Y.S.2d 37, 41 (N.Y. Sup. Ct. 1952) ("[A] municipal corporation . . . has the capacity and is a proper party to bring an action to restrain a public nuisance . . . .") (internal quotation marks omitted).

IV. Plaintiffs' Requested Relief Would Not Implicate Defendants' First and Second Amendment Rights

Defendants next argue that the proposed injunctive relief would infringe their First and Second Amendment rights.[13] Yet instead of citing any legal authority for these propositions, Defendants tellingly offer only threadbare assertions. The Alt-Right Defendants complain of encroachments on their "[f]reedom of speech, [f]reedom to peaceably assemble," and "right to bear arms," but decline to "delv[e] . . . into the immense law that applies." Alt-Right Br. 19–20. Defendant Redneck Revolt, too, simply identifies the concepts of the "rights to free speech and group assembly at public protests" and the "right to bear arms," with no supporting argumentation. *See* Redneck Revolt Br. 29. It also invokes a supposed "inherent right to . . . community defense," *id.* 16 n.9, rather than one with any foundation in judicially enforceable law.

Defendants' contentions are unsupportable. Even if Defendants' objections enjoyed minimal plausibility under the governing case law, statutes enacted by the General Assembly—which "carr[y] a strong presumption of validity"—may not be invalidated unless they "clearly violate[] a provision of the United States or Virginia Constitutions." *Marshall v. N. Va. Transp.*

[13] Analogous protections under the Virginia Constitution are coextensive with those guaranteed by the First and Second Amendments to the U.S. Constitution. *See Elliott v. Commonwealth*, 267 Va. 464, 473–74 (2004) (First Amendment); *DiGiacinto*, 281 Va. at 134 (Second Amendment).

Auth., 275 Va. 419, 427 (2008). Defendants have come nowhere close to satisfying that standard.[14]

A. The First Amendment

The Strict Subordination Clause, the anti-paramilitary statute, and the false-assumption statute do not regulate speech. They instead contain generally applicable prohibitions on conduct deemed harmful to public safety. These provisions affect what persons "m[ay] *do* . . . not what they may or may not *say*." *Rumsfeld v. FAIR*, 547 U.S. 47, 60 (2006). Yet even if the provisions above could be conceived as targeting expression rather than conduct, they would not be subject to heightened scrutiny. That is because they plainly apply without regard to "the topic discussed or the ideas or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

Even generally applicable prohibitions on conduct can trigger First Amendment scrutiny in the context of specific acts that are "sufficiently imbued with elements of communication" to give rise to as-applied challenges. *Spence v. Washington*, 418 U.S. 405, 409 (1974). But the U.S. Supreme Court has rejected the notion "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). It is "possible to find some kernel of expression in almost every activity a person undertakes," of course, but "such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). To qualify as so-called "symbolic speech" or "expressive conduct," the conduct in question must be "inherently expressive." *FAIR*, 547 U.S. at 66.

Even if Defendants' militaristic and coordinated weapons-wielding could somehow be

[14] Redneck Revolt asserts (at 29) that its constitutional concerns are "exacerbated . . . by the participation of the City in this case as a government actor." Yet again, Redneck Revolt mischaracterizes the nature of the City's participation as a plaintiff in this case. The City is merely suing to vindicate its rights under state law. Plaintiffs' identities are entirely irrelevant to whether Redneck Revolt's constitutional rights will be violated if the Court orders it to refrain from engaging in particular conduct.

deemed inherently expressive, the underlying message—an implicit threat to engage in violence—would not be protected by the First Amendment. *See Virginia v. Black*, 538 U.S. 343, 360 (2003) (explaining that communications made "with the intent of placing [another] in fear of bodily harm or death" are not constitutionally protected). And even if the First Amendment were implicated, the state-law prohibitions invoked by Plaintiffs would easily survive an as-applied First Amendment challenge. That is because they "promote[] a substantial government interest"—namely, protection of public safety and good order—"that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

B. The Second Amendment

The Second Amendment guarantees an individual right to self-defense, not a right to wield weapons in coordination with others. Defendants do not have a Second Amendment right to form private armies; they do not have a Second Amendment right to substitute themselves for law enforcement; and they do not have a Second Amendment right to use, or prepare to use, firearms or dangerous techniques in a civil disorder.

Before the U.S. Supreme Court took up the question in 2008, scholars had long debated how to harmonize the Amendment's prefatory language—"[a] well regulated Militia, being necessary to the security of a free State"—with the idea of a judicially enforceable "right of the people to keep and bear arms." U.S. Const. amend. II. The Court's decision made one point unmistakably clear: the right is secured to people "as individuals," and "not as members of a fighting force." *Heller*, 554 U.S. at 593. The Court has specifically held that the Second Amendment embodies "an individual citizen's right to self-defense." *Id.* at 603; *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality) (reiterating that the Amendment "protects a personal right to keep and bear arms for lawful purposes"); *DiGiacinto*, 281 Va. at 134 (explaining that the Amendment safeguards a right to "[i]ndividual self-defense").

When persons associate together to train in the use of firearms, *Heller* went on to explain, they must "observ[e] in doing so the laws of public order." *Heller*, 554 U.S. at 618 (internal quotation marks omitted).

Heller also affirmed the continued vitality of certain types of "longstanding prohibitions" on the use and possession of firearms. *Id.* at 626. Prohibitions on unauthorized military activity readily fit that descriptor. Not only are these sorts of regulations longstanding and pervasive, but there is also an unbroken tradition of upholding them against Second Amendment challenges. *See Presser*, 116 U.S. at 265, 267; *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 210; *Dunne*, 94 Ill. at 140–41; *Murphy*, 166 Mass. at 173; *Gohl*, 46 Wash. at 411. On this point, *Heller* explicitly reaffirmed *Presser*'s holding that "the Second Amendment . . . does not prevent the prohibition of private paramilitary organizations." 554 U.S. at 621. Defendants have cited, and Plaintiffs' research has uncovered, no decision holding that the Second Amendment protects a right to engage in coordinated arms-bearing outside of institutions subject to governmental control.

The conduct Plaintiffs seek to enjoin lies nowhere close to the Second Amendment's core: the right to individual "self-defense *within the home*." *McDonald*, 561 U.S. at 780 (plurality) (emphasis added); *see also United States v. Masciandaro*, 638 F.3d 458, 469 (4th Cir. 2011) ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."). Moreover, Plaintiffs are not relying on laws that "tak[e] away the people's arms." *Heller*, 554 U.S. at 598. The relevant prohibitions do not restrict the possession or use of any class of weapon, nor do they limit individuals' ability to arm themselves for personal self-defense in any setting (including at public rallies). It would understate the case considerably to say that Plaintiffs' proposed injunction would "leave ample channels for keeping and for carrying arms." *Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017). So even if Defendants' group-based conduct fell within the outermost margins

of Second Amendment protection, the relevant prohibitions would easily satisfy the requisite means-end scrutiny. Each is a narrowly crafted effort to advance the Commonwealth's "compelling" interest "in the protection of its citizenry and the public safety." *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017) (en banc).

V. Equitable Relief Is Appropriate Under the Circumstances

Finally, the Alt-Right Defendants argue (at 16–20) that Plaintiffs have not alleged facts that could give rise to an award of injunctive relief. For largely the reasons explained above, the Amended Complaint's allegations against each Defendant—and all reasonable inferences therefrom—have demonstrated "the existence of a legal basis" for the issuance of an injunction.[15] *Friends of the Rappahannock*, 286 Va. at 44.

Under Virginia law, injunctive relief is appropriate when four factors are present: (1) the defendant "is violating, or threatening to violate, a substantial right or interest of the plaintiff"; (2) the plaintiff's injury "will be irreparable if an injunction is not entered"; (3) the plaintiff "has no adequate remedy using any of the available legal causes of action or procedures"; and (4) "[t]he balance of hardships and other equitable considerations favor enjoining defendants' conduct." *Sinclair on Virginia Remedies* § 51-2[A], at 51-11. Factors two and three have proven to be largely interchangeable. *Id.* § 51-2[A], at 51-19 ("If one is threatened with irreparable injury it is because there is no adequate remedy elsewhere, and if one has no adequate remedy, he will surely suffer irreparable harm."). A legal remedy may be deemed inadequate if it is "materially less helpful to the plaintiff." *Id.* § 51-2[A], at 51-15.

[15] The Alt-Right Defendants claim (at 22) that Plaintiffs have "unclean hands," which would disentitle them from seeking equitable relief. The only affirmative misconduct ascribed to Plaintiffs is an alleged failure to name as defendants certain left-leaning organizations. A plaintiff's selection of defendants plainly cannot constitute "fraud, illegality, tortious conduct or the like." *Cline v. Berg*, 273 Va. 142, 147 (2007) (internal quotation marks omitted). Even so, the list of defendants in this case attests to Plaintiffs' neutrality in the application of their legal theories and assertion of their legal rights.

As Parts I through IV of this Brief explain, Plaintiffs have stated claims for relief under each count of the Amended Complaint. The factual allegations excerpted above, moreover, demonstrate that Plaintiffs' future injuries could not be "adequately compensated in damages." *Genheimer v. Crystal Spring Land Co.*, 155 Va. 134, 142 (1930). Nor would the Commonwealth's post hoc prosecutorial authority furnish "a more effective, complete, and just remedy," Redneck Revolt Br. 17, than a forward-looking injunction applicable to each member of the Defendant groups. The balance of hardships also cuts strongly in favor of injunctive relief under the circumstances alleged. Plaintiffs are not asking this Court to preclude Defendants from speaking freely, from peaceably assembling, from exercising their "individual right to use arms for self-defense," *Heller*, 554 U.S. at 603, or from doing all three at the same time. This suit simply seeks to prevent Defendants from engaging in the *coordinated* use of weaponry at public events outside the reach of public accountability, in violation of Virginia's Strict Subordination Clause and its anti-paramilitary and false-assumption statutes. Were this behavior to become normalized, political rallies might regularly devolve into armed clashes between oppositional forces.

Defendant Redneck Revolt insists (at 28–29) that the Amended Complaint offers no basis for concluding that the group will return to Charlottesville and engage in unlawful conduct once again. This argument, too, falls short. The Amended Complaint cites Defendant Kessler's public commitment to holding a Unite the Right anniversary rally in Charlottesville on August 11 and 12, 2018. *See* Am. Compl. ¶¶ 195–96. Redneck Revolt attended Kessler's first Unite the Right rally because of its refusal to "[l]et[] fascists organize publicly . . . without challenge." *Id.* ¶ 78. The group believes that it must "not allow the state to have a direct monopoly on the use of force," *id.* ¶ 79, and that "[w]e have to be prepared to take the defense of our communities into our own hands," *id.* ¶ 51. Among Redneck Revolt's core convictions is that "[i]t is time to turn our guns on our real enemies." *Redneck Revolt Organizing Principles*, *supra* (cited in Am. Compl. ¶ 51

n.27). Redneck Revolt members "are not pacifists" and expect "to act militantly" in the future. *Id.* The Amended Complaint further alleges that Redneck Revolt "look[s] forward to building stronger defense networks together" with like-minded organizations. Am. Compl. ¶ 227.

This issue—like all others—will undoubtedly "be the subject of elaboration when the evidence is presented." *Breeding*, 258 Va. at 213. "But that does not mean that the plaintiffs are precluded at this stage . . . from going forward with their case." *Id.* at 214. Redneck Revolt did not reveal its plans for last year's Unite the Right rally until just two days before the event. *See* Am. Compl. ¶ 78. And if the group had no intention of reprising its August 2017 conduct, it presumably would not be litigating to secure its ability to engage in coordinated arms-bearing in Charlottesville once again. Plaintiffs have adequately alleged to a "reasonable probability" that Redneck Revolt—along with the Alt-Right Defendants—will return to Charlottesville and wield weapons in concert once again. *WTAR Radio-TV Corp. v. City Council of City of Virginia Beach*, 216 Va. 892, 895 (1976).

At a minimum, the Court should permit Plaintiffs' request for declaratory relief to proceed. Neither the Alt-Right Defendants nor Redneck Revolt contests that Plaintiffs have alleged a sufficient basis for the issuance of declaratory relief, assuming that one or more of their claims is grounded in a valid legal theory. And for good reason: "[D]eclaratory relief involves a lesser showing than injunctive relief," requiring no demonstration of irreparable harm or the relative balance of hardships. *Sinclair on Virginia Remedies* § 4-1[A], 4-19, 20 (emphasis removed). Plaintiffs have certainly alleged "a controversy beyond the realm of speculation." *Martin v. Garner*, 286 Va. 76, 83 (2013).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' Demurrers.

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Respectfully submitted,

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