Lafave v. County of Fairfax

Circuit Court of Fairfax County, Virginia

June 23, 2023, Decided

Case No. CL2021-01569

Reporter
2023 Va. Cir. LEXIS 203 *

KIMBERLY LAFAVE, et al., Plaintiffs, v. THE COUNTY OF FAIRFAX, VIRGINIA, et al., Defendants.

Core Terms

preliminary injunction, ordinance, firearms, plaintiffs', right to bear arms, regulation, restrictions, courts, constitutional right, irreparable harm, coextensive, injunction, parties, prong, public interest, circuit court, county park, self-defense, merits, places, gun

Case Summary

Overview
HOLDINGS: [1]- In light of the historical traditions of firearms regulations in parks and at public events, for purposes of the case and the challenge mounted by gun owners under the Virginia Constitution alone, Va. Const. art. I, § 13, the gun owners had not met the first prong of the test for a preliminary injunction regarding a county ordinance restricting firearms in county parks and events, and their ability to succeed on the merits regarding a constitutional challenge to that ordinance; [2]-There was not a likelihood of success. After filing suit, the gun owners delayed for two years before seeking a preliminary injunction. Their likelihood of success on the merits was drawn into question when examining the case under the historical framework provided by the U.S. Supreme Court, given that the gun owners chose to pursue a remedy under the Virginia Constitution alone.

Outcome
Gun owners' motion for preliminary injunction denied.

LexisNexis® Headnotes

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN1[] **Case or Controversy, Constitutionality of Legislation**

A plaintiff can only mount a successful facial challenge to a statute by first showing that the statute in question is unconstitutional as applied to him or her, and that the statute in question would not be constitutional in any context.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

In Virginia, a preliminary injunction is an extraordinary remedy that rests on the sound discretion, judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. A preliminary injunction is meant to preserve the status quo between the parties during ongoing litigation. The court may contemplate the substance and adequacy of a plaintiffs' factual allegations and also the veracity and magnitude of the asserted harm. Virginia courts typically follow the federal standard for evaluating preliminary injunctive relief. A plaintiff seeking a preliminary injunction must establish first he or she is likely to succeed on the merits. Second, he or she is likely to suffer irreparable harm in the absence of preliminary relief. Third, the balance of the equities tips in his favor, and fourth, the injunction is in the public interest. In evaluating these factors, the court must balance the competing claims of injury and consider the effect on each party of granting or withholding relief.

Constitutional Law > State Constitutional Operation

HN3[] **Constitutional Law, State Constitutional Operation**

An examination of the legislative history surrounding the enactment of Va. Const. art. I, § 13 makes clear that the Virginia General Assembly meant for the plain text of Va. Const. art. I, § 13 to incorporate the right to bear arms in the Virginia Constitution, and that said right was to cover individual conduct, and not a mere militia right.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

HN4[] **Fundamental Rights, Right to Bear Arms**

The court must first ask, number one, whether the individual's proposed course of conduct is covered by the plain text of the constitutional amendment, and if yes, then number two, whether the constitution presumptively protects the conduct in the government, must justify the regulation by demonstrating that it is consistent with historical tradition of firearm regulation. There are sensitive places where arms carrying may be prohibited consistent with the Second Amendment, and courts can use analogies to those historical regulations of sensitive places to determine that modern regulations prohibiting the carry of firearms in new or analogous sensitive places are constitutional permissible.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

HN5[] **Fundamental Rights, Right to Bear Arms**

A temporary violation of a constitutional right is enough to establish irreparable harm. Further, the constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than other guarantees. At any time the government is joined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.

Civil Procedure > Remedies > Injunctions > Grounds for Injunctions

HN6[] **Injunctions, Grounds for Injunctions**

The public interest favors enjoining a constitutional violation not allowing the unconstitutional application of a statute to perpetuate.

Counsel: **[*1]** For Plaintiffs: Christopher M. Day VSB # 37470, Earl N. "Trey" Mayfield, III VSB # 41691, Juris Day, PLLC, Fairfax, Virginia; Stephen P. Halbrook VSB # 18075, Stephen P. Halbrook, Ph.D., Fairfax, Virginia.

For Defendants: Douglas R. Kay (VSB No. 35468), Thomas W. Repczynski (VSB No. 39967), Anders T. Sleight (VSB No. 84458), OFFIT KURMAN, P.C., Tysons Corner, Virginia; Corinne N. Lockett (VSB No. 34824), John W. Burton (VSB No. 42223), Office of the County Attorney, Fairfax, Virginia; William J. Taylor, Jr. (admitted pro hac vice), EVERYTOWN LAW, New York, New York.

Judges: HONORABLE CHRISTIE ANN LEARY, Fairfax County Circuit Court Judge.

Opinion by: Christie Ann Leary

Opinion

ORDER

THIS MATTER came before the Court for a hearing on Plaintiffs' Motion for a Preliminary Injunction on March 20, 2023. After hearing evidence and argument from the parties, the Court took the matter under advisement. On May 24, 2023, upon consideration of the previously submitted pleadings, evidence and argument of counsel, and for the reasons stated from the bench (a transcript of which is attached hereto and incorporated into this Order by this reference), it is hereby

ADJUDGED, ORDERED AND DECREED that the Plaintiffs' Motion for Preliminary **[*2]** Injunction is DENIED.

IT IS SO ORDERED.

ENTERED this 23 day of June, 2023.

/s/ Christie Ann Leary

Fairfax County Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT FOR COUNTY OF FAIRFAX

KIMBERLY LAFAVE, ET AL,

PLAINTIFF,

VS.

COUNTY OF FAIRFAX, ET AL,

DEFENDANT.

CASE NO. CL2021-1569

JUDGE'S RULING FROM THE

TRIAL BEFORE

THE HONORABLE CHRISTIE ANN LEARY

WEDNESDAY, MAY 24, 2023

9:01 A.M.

FAIRFAX COUNTY COURTHOUSE

4110 CHAIN BRIDGE ROAD

FAIRFAX, VIRGINIA 22030

APPEARANCES

ON BEHALF OF THE PLAINTIFF,

KIMBERLY LAFAVE, ET AL:

EARL N. MAYFIELD, ESQUIRE

JURIS DAY PLLC

10521 JUDICIAL DRIVE

SUITE 200

FAIRFAX, VIRGINIA 22030

TELEPHONE: 703.268.5600

FACSIMILE: 703.268.5602

E-MAIL: TMAYFIELD@JURISDAY.COM

ON BEHALF OF THE DEFENDANT,

COUNTY OF FAIRFAX, ET AL:

DOUGLAS R. KAY, ESQUIRE

OFFIT KURMAN

8000 TOWERS CRESCENT DRIVE

SUITE 1400

TYSONS CORNER, VIRGINIA 22182

TELEPHONE: 703.745.1800

FACSIMILE: 703.745.1835

E-MAIL: DKAY@OFFITKURMAN.COM

ON BEHALF OF THE DEFENDANT,

COUNTY OF FAIRFAX, ET AL:

THOMAS W. REPCZYNSKI, ESQUIRE

OFFIT KURMAN

8000 TOWERS CRESCENT DRIVE

SUITE 1400

TYSONS CORNER, VIRGINIA 22182

TELEPHONE: 703.745.1800

FACSIMILE: 703.745.1835

E-MAIL: TREPCZYNSKI@OFFITKURMAN.COM

ON BEHALF OF THE DEFENDANT,

COUNTY OF FAIRFAX, ET AL:

ANDERS T. SLEIGHT, ESQUIRE

OFFIT KURMAN

8000 TOWERS CRESCENT DRIVE

SUITE 1400

TYSONS CORNER, VIRGINIA 22182

TELEPHONE: **[*3]** 703.745.1800

FACSIMILE: 703.745.1835

E-MAIL: ANDERS.SLEIGHT@OFFITKURMAN.COM

OTHERS PRESENT:

STEPHEN HALBROOK

WILLIAM TAYLOR

JEANNINE MILLER, PARALEGAL

JUDGE'S RULING FROM THE

TRIAL BEFORE

THE HONORABLE CHRISTIE ANN LEARY

WEDNESDAY, MAY 24, 2023

9:01 A.M.

THE COURT: We are back on the record in the case of LaFave vs. County of Fairfax et al, CL2021-1569. We are here this morning with regards to the Court's ruling from a prior hearing back in March, and I have everybody appearing via Webex. And hopefully everyone can hear me okay, but please let me know if we have any technology issues. So this matter came before the Court from an evidentiary hearing on plaintiffs' request for a preliminary injunction. Trial took place in this matter on March 20, 2023, and at the conclusion of the hearing, the Court took the matter under advisement. Litigation has been ongoing in this case since it began in January of 2021. Most recently, the Honorable Dontae Bugg denied plaintiffs' motion for summary judgment on November 7, 2022. The instant motion for a preliminary injunction was filed on January 27, 2023. This motion requests enforcement of a Fairfax County ordinance be preliminary enjoined until the case is determined on the merits **[*4]** at trial. Trial in this matter is set for September 18, 2023.

After review of the evidence submitted, the arguments of counsel, and the applicable law, the Court is now prepared to rule. This matter arises out of an alleged unconstitutionality of a 2020 enacted Fairfax County code provision which limits possession of firearms in certain public areas. On April 22, 2020, the Virginia General Assembly amended and reenacted *Virginia Code Section 15.2-915*, which provides authority to counties, cities, and towns to enact ordinances which restrict the use of firearms in government buildings and in parks and recreational areas.

Consistent with that statute in September 2020, Fairfax County enacted Code Section 6-2-1A, which is the ordinance at issue in this case. This ordinance mirrors identically the language of the Virginia statute. The two challenged provisions of the ordinance in this case are section 6-2-1A2, which restricts firearms in county parks, otherwise referred to as the parks restriction, and section 6-2-1A4, which restricts firearms at or adjacent to certain events, or referred to by the parties of the events restriction. Fairfax County also adopted an official enforcement of policy which prohibits enforcement of the ordinance unless officers first conform, **[*5]** confirm warning signage posted at any entrances or exits at qualifying locations, and two, attempt to educate and seek voluntary compliance from violators.

On January 29, 2021, plaintiffs filed suit against the County of Fairfax and the county's acting chief of police, collectively referred to as the defendants. The complaint in this case asserts that the Fairfax County ordinance constitutes an ongoing violation of the Virginia individual Constitutional right to bear arms enshrined in the Virginia Constitution at *Article 1 Section 13*, and the right to due process at *Article 1 Section 11*.

The named plaintiffs in this case, Robert Holzhauer, Kimberly LaFave, and Glenn Talbon are three individual plaintiffs who are registered gun owners and who reside in Loudoun and Fairfax Counties. The individual plaintiffs each gave a deposition explaining how the ordinance applied to them personally, asserting a violation of their right to carry firearms publicly for self-

defense. Plaintiff LaFave is a dog walker who carries for self-defense, as she often walks through wooded areas. Plaintiff Holzhauer lives surrounded by county-owned properties and was a regular user of Fairfax County parks for physical training and walking his dog. And **[*6]** plaintiff Talbon would bike through county parks and on county-maintained trails.

Plaintiffs argue that the Fairfax County ordinance at issue is unconstitutional, but as applied and facially. The Virginia Supreme Court has stated that ***HN1***[] a plaintiff can only mount a successful facial challenge to a statute by first showing that the statute in question is unconstitutional as applied to him or her, and that the statute in question would not be constitutional in any context. To this, I'm referring to the *Toghill vs. Commonwealth case, 289 Va. 220, 768 S.E.2d 674*, a 2015 Virginia Supreme Court case. Based upon the examination of those arguments and relevant case law from both parties, the Court will determine whether it's appropriate to issue a preliminary injunction to prevent enforcement by the defendants of the applicable Fairfax County ordinance.

HN2[] In Virginia, a preliminary injunction is an extraordinary remedy that rests on the sound discretion, judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. And for this, the Court is relying on the case of Loudoun County School Board vs. Cross, a 2021 case at WL9276274, and that case is quoting the case of Commonwealth ex. rel. Bowyer vs. Sweet Briar Institute, a 2015 case at WL6364691. A preliminary injunction is meant to preserve **[*7]** the status quo between the parties during ongoing litigation. The Court may contemplate the substance and adequacy of a plaintiffs' factual allegations and also the veracity and magnitude of the asserted harm. While the Virginia Supreme Court has not set forth a specific framework for evaluating preliminary injunctive relief, Virginia courts typically follow the federal standard, and for this, the Court is relying on the case of Zachary Piper LLC vs. Popelka, 109 Va. Circuit 71, a Fairfax County case from 2021.

A plaintiff seeking a preliminary injunction must establish first he is likely to succeed on the merits. Second, he is likely to suffer irreparable harm in the absence of preliminary relief. Third, the balance of the equities tips in his favor, and fourth, the injunction is in the public interest. In evaluating these factors, the Court must balance the competing claims of injury and consider the effect on each party of granting or withholding relief. The parties in this case are in agreement as to the standard that is applicable to this Court's analysis of the propriety of a preliminary injunction. The points of disagreement arise from the application of the preliminary injunction framework to the facts of this case, given **[*8]** the current state of constitutional jurisprudence.

Of significance to this Court is that the plaintiffs combined their constitutional challenge of the ordinance at issue to the Virginia Constitution alone. This attack creates an issue of first impression in the Commonwealth of Virginia in the wake of New York State Rifle & Pistol Association, Incorporated vs. Bruen, 142 Supreme Court 2111, a 2022 case. And in consideration of the sole Virginia precedent analyzing this particular amend, or this particular article of the Virginia Constitution in *Digiacinto vs. Rector and Visitors of George Mason University, 281 Va. 127, a 2011* Virginia Supreme Court.

Turning first to the first factor to be analyzed with regards to a preliminary injunction, a preliminary evaluation of the strength of the plaintiffs' claim, whether the ordinance violates the *Virginia Constitution, Article 1 Section 13*, requires this Court to examine the applicable standard to apply when analyzing a constitutional challenge to the right to bear arms encapsulated by the Virginia Constitution. Defendants note that the applicable constitutional analysis under Virginia law is not yet clear due to the new *Second Amendment* framework recently set forth in Bruen.

While it is true that the Virginia Supreme Court has not yet applied the Bruen analysis, two Virginia courts **[*9]** have held that the right to bear arms under the *Virginia Constitution, Article 1 Section 13*, is coextensive with the rights guaranteed under the *Second Amendment to the U.S. Constitution*. Those cases are the case previously mentioned and then a case out of the city of, the Circuit Court of the City of Winchester, Commonwealth vs. Stickley, which is 2022 WL16950948, a 2022 case. However, with these two cases, one case is distinguishable from this case and the other is not controlling precedent.

This Court does not believe that Digiacinto held that the *Second Amendment* in *Article 1 Section 13 of the Virginia Constitution* are coextensive in all circumstances. In Digiacinto, which was prior to the Bruen case, the Supreme Court of Virginia held that the campus of George Mason University qualified as a sensitive place, such that GMU's prohibition of weapons on campus was un, or excuse me, was constitutional.

The Digiacinto court distinguished the GMU campus as a sensitive place, and in Digiacinto, the Virginia Supreme Court reviewed whether the *Virginia Constitution, Article 1 Section 13*, contained greater or lesser protections to the right to bear arms than that of the *Second Amendment of the United States Constitution*.

The interpretation of *Article 1 Section 13 of the Virginia Constitution* was an issue of first impression to the Digiacinto court. For purposes of the analysis of the application of both the Federal and Virginia Constitutions in that case, Digiacinto declined **[*10]** to hold that the Virginia Constitution provided a greater protection to the *Second Amendment* and instead found for purposes of the facts relevant to that case alone that the *Second Amendment* and the Virginia Constitution were coextensive. In doing so, though, this Court notes that the issue is not settled in this case because Digiacinto limited its holdings to the facts of that case. Of note, Digiacinto considered a challenge to both the *Second Amendment of the U.S. Constitution* as well as *Article 1 Section 13 of the Virginia Constitution*.

Here, the plaintiffs challenged the Fairfax County ordinance on the grounds of the Virginia Constitution alone. No other case in Virginia precedence has examined Article 1 Section 13 prior to Digiacinto. The only analysis since that case arises from a circuit court opinion out of the city of Winchester. In the case of Stickley vs. the City of Winchester, the circuit court in Winchester applied the Bruen analysis to grant a preliminary injunction enjoining enforcement of a Winchester city ordinance. In that 2022 case, the ordinance at issue in Stickley is virtually identical to that in this Fairfax case, which prohibits firearms in city parks in Winchester and in any public right of way in or adjacent to a permanent event.

The Stickley court issued its ruling granting the preliminary injunction **[*11]** in a comprehensive letter opinion. The Court found that the plain text of the Virginia Constitution covered the conduct at issue, namely, the desire of an individual to carry firearms for self-defense at public events and public parks. The Stickley court then held that the city had not met its burden under Bruen to demonstrate the restrictions were consistent with tradition.

Nothing in the dicta in Digiacinto regarding public streets or, or excuse me, noting the dicta in Digiacinto regarding public streets and parks, the Stickley court found that locations encompassed by the city ordinance were not sensitive places within the historical context of firearm regulation. Stickley is one Virginia circuit court's interpretation of the likelihood of success under a claim analogous to the instant case. However, the decision to grant a preliminary injunction rests within the discretion of the Court hearing the evidence in the request. And although Stickley is analogous to this case, it is not dispositive.

Turning to the issue of what rule of law should be employed to analyze the first prong required for this request of a preliminary injunction, this Court believes that the Bruen analysis is required. **[*12]** *HN3*[↑] An examination of the legislative history surrounding the enactment of Article 1 Section 13 makes clear that the Virginia General Assembly meant for the plain text of Article 1 Section 13 to incorporate the right to bear arms in the Virginia Constitution, and that said right was to cover individual conduct, and not as the defendant suggests, a mere militia right. Therefore, this Court finds that the Bruen analysis should apply.

Under Bruen's two-step analysis, *HN4*[↑] this Court must first ask, number one, whether the individual's proposed course of conduct is covered by the plain text of the constitutional amendment, and if yes, then number two, whether the constitution presumptively protects the conduct in the government, must justify the regulation by demonstrating that it is consistent with historical tradition of firearm regulation. Bruen emphasized that there are sensitive places where arms carrying may be prohibited consistent with the *Second Amendment* in that case, and citing that courts can use analogies to those historical regulations of sensitive places to determine that modern regulations prohibiting the carry of firearms in new or analogous sensitive places are constitutional permissible.

With regard to the first prong of the Bruen analysis, **[*13]** this Court finds that the plaintiffs have established that the first prong has been met. As a result, the burden now shifts to the defendants to establish whether the ordinance in this case is consistent with the nation's, or excuse me, with Virginia's historical tradition of firearms regulation and not throughout the United States. In addressing this historical analysis, the United States Supreme Court in Bruen explained that historical sources are relevant because the Constitution's meaning is fixed according to the understandings of those who ratified it. And that's Bruen at page 2132.

But when it comes to interpreting the Constitution, not

all history is created equal. The United States Supreme Court itself has declared that constitutional rights are enshrined with the scope they were understood, to have understood by the people who adopted them, and that's Bruen quoting the Heller case at *554 U.S. 634* and 5. Much discussion has been undertaken in Bruen as to the operable period in history to apply to the needed historical analysis with the justices debating in Bruen whether courts should use 1791, the date of the adoption of the *Second Amendment of the U.S. Constitution*, or 1868, the date of the adoption of the *Fourteen Amendment to the U.S. Constitution*, making the Bill of Rights applicable to the states as **[*14]** the appropriate historical timeline.

Whereas here, the plaintiffs challenge not the *Second* or the *Fourteenth Amendments* but the Virginia Constitution. The Virginia Constitution at issue here, Article 1 Section 13, was adopted in 1971. Plaintiffs assert that pursuant to Digiacinto, the *Second Amendment of the U.S. Constitution* and *Article 1 Section 13 of the Virginia Constitution* are coextensive, and therefore the application of the Bruen case and the historical analysis required is limited to pre-reconstruction era laws. This Court, however, is not persuaded by this logic.

With respect to this case, the operable period of history for purposes of the analysis that is required in this case should be 1971, which is when the Virginia Legislature chose to adopt the right to bear arms in Article 1 Section 13. To review historical tradition according to 1791, the date on which the *Second Amendment* was adopted, or 1868, the date on which the *Fourteenth Amendment* was adopted, apply in the *Second Amendment* to the states, would ignore the fact that the Virginia General Assembly chose to wait nearly 100 years before incorporating the right to bear arms into the Virginia Constitution. It makes no sense to suggest that the Virginia Legislature would have bound themselves to an understanding of the Virginia Constitution that they did not share when they enacted Article 1 Section 13 in 1971.

In its analysis, the Stickley court **[*15]** in Winchester analyzed the procedural history of the enactment of Article 1 Section 13. In doing so, the Court reviewed the extensive debate amongst the then-sitting legislature as to the effect of Virginia's enactment of the right to bear arms, as well as the existing Second and *Fourteenth Amendments of the U.S. Constitution*, and the impact on Virginia to continue to enact reasonable gun legislation. These debates occurred in the late 1960s, and this timeframe is of significance to this Court given Bruen, in which the Supreme Court has placed heavy emphasis on the need for historical introspection of the existence of gun legislation. This Court's review of the applicable legislative history associative of the enactment of Article 1 Section 13 does not leave this Court to conclude that the analysis of the productions of Article 1 Section 13, nor the ability to regulate gun control in the Commonwealth of Virginia should be confined identically to the historical timeframe afforded to the *Second Amendment* or the *Fourteenth Amendment of the U.S. Constitution*.

This case challenges only the constitutional application of the Virginia Constitution. Plaintiffs would have this Court rule that Digiacinto established that even in the absence of a challenge to the *Second Amendment*, this Court must find that the Virginia and Federal Constitutions are coextensive for this analysis, **[*16]** and therefore that this Court is bound to analyze this case as it would a challenge to the *Second Amendment*, thus confining any historical analysis undertaken to the period of 1791 when the *Second Amendment* was enacted. Such a conclusion ignores the legislative history of the enactment of Article 1 Section 13 and draws a conclusion not specifically set forth in the prior Digiacinto case. In making this conclusion, this Court finds that for purposes of the facts of this case, Article 1 Section 13 and the *Second Amendment* are not coextensive when applying the historical analysis required in the wake of Bruen.

Regarding the second step in Bruen, defendants have provided a lengthy and detailed compilation of state and local laws prohibiting firearms in parks. In addition to the federal compendium and regulation dating back to the 1600s up through the 1960s at the time of the amendment of the Virginia Constitution, to provide for a right to bear arms. See specifically the appendix B of defendant's motion in opposition to this request for a preliminary injunction. In Stickley, the Court in Winchester found that the city had failed to demonstrate that its restrictions were analogous to traditional historical restrictions. However, the support cited by the government in Stickley **[*17]** was apparently limited to excerpts from the legislative debate on Article 1 Section 13, and an example that Virginia prohibited firearms in state parks from at least 1965 to 2012.

The defendants in this case have provided a much more extensive compilation. With regard to the applicable historical analysis, this Court incorporates by reference appendix B to their opposition to this motion for a

preliminary injunction, which provides a historical review of applicable laws which predate 1971 and the enactment of Article 1 Section 13. Based upon a thorough examination of the historical sources cited, ample historical basis exists for the prohibition of firearms in public parks and at public events consistent with that sought in the applicable Fairfax ordinance. The defendants have met their burden to demonstrate that the firearms restrictions in the Fairfax ordinance are consistent with historical tradition.

In the words of the Bruen court, cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. Parks in the modern sense did not come into being until the mid-19th century, as the modern concept of a public park emerged in the 19th and 20th century. There are numerous **[*18]** examples of legislation designed to limit the right to carry weapons in such spaces. In examination of the unique characteristics of county parks as covered through the testimony of various witnesses at the trial of this preliminary injunction reveal that Fairfax County, in Fairfax County the majority of visitors to the parks include families and children attending athletic events, educational programming, and family-oriented events. Such uses make the parks more akin to a sensitive place like a school or recreation center.

The Court in this opinion does not need to analyze or reach the issue of whether the county parks fall within the sensitive places doctrine. First, there is no Virginia Supreme Court jurisprudence commanding such a decision on the issue, but second, this Court is not reaching that analysis for purposes of a decision on the request for a preliminary injunction. But certainly, the Digiacinto court left open the argument on that issue when considering restrictions on George Mason University. In light of the historical traditions of firearms regulations in parks and at public events, this Court finds that for purposes of this specific case and the challenge mounted by **[*19]** the plaintiffs under the Virginia Constitution alone, the plaintiffs have not yet met the first prong of the test for a preliminary injunction regarding the Fairfax ordinance and their ability to succeed on the merits regarding a constitutional challenge to that ordinance.

Turning to the second prong of irreparable harm, Virginia courts have held that ***HN5***[↑] a temporary violation of a constitutional right is enough to establish irreparable harm, and the Court relies on the case of Lynchburg Range & Training vs. Northam, which is 105 Va. Circuit 159, a 2020 case. Further, as the U.S. Supreme Court has recently noted in Bruen, the constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than other guarantees, and that's Bruen at 2156. The government, on the other hand, the potential harm to the defendants if the injunction is granted is clear, at any time the government is joined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury, and that's citing to the *Maryland vs. King case, 567 U.S. 1301 in 2012, 133 S. Ct. 1, 183 L. Ed. 2d 667*.

Here, the plaintiffs waited to seek a preliminary injunction until January 2023, two years after the suit was originally filed **[*20]** and only eight months before the current trial date. Courts often deny preliminary injunctive relief when a party substantially delays moving for a preliminary junction because such delay reflects a lack of irreparable harm. At first glance, the filing timeline of plaintiffs' motion undermines their claim for irreparable harm, and for this, the Court relies on the Clint's case at 872 F. 2nd, page 80.

Because a preliminary injunction is promised on an urgent need to protect the rights of the plaintiff, a delay in seeking relief suggests that it's not necessary. However, the plaintiffs' delay in seeking the relief in this case was at least partially due to their strategic decision to first seek summary judgment, which was denied relatively recently in November 2022. The trial date was originally set for November of 2022 before being continued to September of this year. The Court is not persuaded that the delay in raising the preliminary injunction operates a bar as to the conclusion for irreparable harm, and on this point, the plaintiffs would carry the day.

With respect to the balance of equities under this factor, the plaintiffs must demonstrate that the harm to them before the trial **[*21]** on the merits without the requested relief would be greater than the harm to the county. For this, the Court relies on the King case at *567 U.S. 1303*.

(WHEREUPON, the Court conferred with someone in the courtroom.)

THE COURT: The court reporter? I think we've lost the court reporter. We don't see her on the screen. Does anybody else see her on theirs?

MR. HALBROOK: Yes.

MR. KAY: I see her on there.

MR. HALBROOK: She's here.

CLERK: She's back.

THE COURT: Okay, never mind.

Sorry.

MR. KAY: No worries.

THE COURT: We lost her on our end, I guess. So turning back to the public interest factor, analogous to the discussion, Virginia courts have held that *HN6*[] the public interest favors enjoining a constitutional violation not allowing the unconstitutional application of a statute to perpetuate, and for that the Court relies on Elhert vs. Settle, 105 Va. Circuit 544, a 2020 case. Here, the public interest factor is disputed as follows. The plaintiffs argue that because there is a constitutional right to publicly carry a firearm for self-defense, it is in the public interest to preserve this right and grant the injunction. Then defendants respond that the ordinance was designed to protect public safety and reduce the gun violence, so an injunction would not **[*22]** be against public interest. On this factor, with respect to the weighing of both the plaintiff and the defendant's claim, the Court finds that the plaintiff would carry the day as to the public interest associated with the potential constitutional right.

But after an examination of all the factors with respect to a preliminary injunction, the Court finds that the plaintiff has not met their burden to establish a right to this extraordinary remedy based upon the Court's belief that there is not a likelihood of success as to the first prong of the preliminary injunction review. And as a result, the Court, this Court is denying the request for a preliminary injunction. After filing suit in 2021, the plaintiffs delayed for two years before making this request, and in assessing the plaintiffs' likelihood of success on the merits, this is drawn into question when examining this case under the historical framework provided by the U.S. Supreme Court, given that the plaintiffs have chosen to pursue a remedy under the Virginia Constitution alone.

So that is the Court's ruling. Are there any questions as to my ruling?

MR. KAY: I don't have, we don't have any questions on our side. Do you want us **[*23]** to prepare an order, Judge? Or are you going to prepare one?

THE COURT: I would appreciate if you would prepare one, Mr. Kay, and if you could circulate it to counsel and then you can file it through chambers.

MR. KAY: Will do.

MR. MAYFIELD: Nothing from plaintiffs, Your Honor.

THE COURT: Thank you. And given that I have no questions from anyone, I will go ahead and adjourn for the morning, and I hope you-all enjoy the rest of your week.

MR. MAYFIELD: Thank you, Your Honor.

MR. KAY: Have a nice week.

THE COURT: Thank you.

MR. HALBROOK: Thank you.

Goodbye.

THE COURT: Same to you.

(WHEREUPON, the JUDGE'S RULING was concluded at 9:27 a.m.)

CAPTION

The foregoing matter was taken on the date, and at the time and place set out on the title page hereof.

It was requested that the matter be taken by the reporter and that the same be reduced to typewritten form.

CERTIFICATE OF REPORTER AND SECURE ENCRYPTED SIGNATURE AND DELIVERY OF CERTIFIED TRANSCRIPT

I, **Cheryl Renee Lane**, Notary Public, do hereby certify that the foregoing matter was reported by stenographic and/or mechanical means, that same was reduced to written form, that the transcript prepared by me under my direction, is a true and accurate record **[*24]** of same to the best of my knowledge and ability; that there is no relation nor employment by any attorney or counsel employed by the parties hereto, nor financial or otherwise interest in the action filed or its outcome.

This transcript and certificate have been digitally signed and securely delivered through our encryption server.

IN WITNESS HEREOF, I have here unto set my hand this 25TH day of MAY, 2023.

Cheryl Renee Lane

Court Reporter / Notary

Notary Registration Number: 7864242

My Commission Expires: 05/31/2024

LaFave, et al. vs Fairfax, et al. Judge's Ruling May 24, 2023 VR # 013181-9 Page 35
VETERAN REPORTERS 855.667.0077 VETERANREPORTERS.COM

VETERAN REPORTERS 855.667.0077 VETERANREPORTERS.COM

VETERAN REPORTERS 855.667.0077 VETERANREPORTERS.COM

LaFave, et al. vs Fairfax, et al. Judge's Ruling May 24, 2023 VR # 013181-9 Page 43

VETERAN REPORTERS 855.667.0077 VETERANREPORTERS.COM

LaFave, et al. vs Fairfax, et al. Judge's Ruling May 24, 2023 VR # 013181-9 Page 45

VETERAN REPORTERS 855.667.0077 VETERANREPORTERS.COM

End of Document