IN THE
Supreme Court of Virginia

RECORD NO. _____

PETER EHLERT, *et al*.,

Petitioners,

V.

COLONEL GARY T. SETTLE, in his official capacity as SUPERINTENDENT of the VIRGINIA STATE POLICE,

Respondent.

PETITION FOR REVIEW

David G. Browne (VSB 65306)
SPIRO & BROWNE, PLC
6802 Paragon Place, Suite 410
Richmond, Virginia 23230
(804) 573-9220
(804) 836-1855 (Fax)
dbrowne@sblawva.com

Robert J. Olson (VSB 82488)
William J. Olson (VSB 15841)
WILLIAM J. OLSON, P.C.
370 Maple Avenue, West, Suite 4
Vienna, Virginia 22180
(703) 356-5070
114 Creekside Lane
Winchester, Virginia 22602
(540) 450-8777
(540) 450-8771 (Fax)
wjo@mindspring.com

Counsel for Petitioners

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Assignments of Error

1. The circuit court erred by concluding that the challenged statute's requirement of a "universal background check" on the private sale of firearms is facially valid and does not violate Article I, Section 13 because it is "limited to preventing a longstanding prohibition on a historically justified category," namely "preventing felons and the mentally disabled from possessing firearms...." Opinion Letter p. 7; Error preserved at Tr. pp. 5-6, 8, 40-41; Complaint at pp. 18, 20; Plaintiffs' Reply Brief at 3-7.
2. The circuit court erred by misreading *Heller*'s list of "presumptively lawful regulatory measures," blending them together and concluding that *new* "conditions … on the [private] sale of arms" are justifiable because they might further the "*longstanding* prohibitions on the possession of firearms by felons and the mentally ill." (Emphasis added), Opinion Letter p. 7; Error preserved at Tr. pp. 5-6, 8, 40-41; Complaint at pp. 18-20; Plaintiffs' Reply Brief at 3-7.

Nature of the Case and Proceedings

This petition is brought pursuant to Code of Virginia § 8.01-626 and Rule 5:17A, seeking review of the denial of Plaintiffs' motion for a temporary injunction by the Circuit Court for the City of Lynchburg ("circuit court"). This case involves the recently enacted § 18.2-308.2:5 of the Code of Virginia, requiring a pre-transfer background check at a licensed firearms dealer for private sales of firearms between

Virginia residents as of July 1, 2020. Previously, Virginia and federal law required a background check only for commercial transfers by licensed firearms dealers.

On June 22, 2020, Plaintiffs filed a Complaint for Declaratory Relief, Application for Temporary and Permanent Injunctive Relief, and Petition for Writ of Mandamus, and supporting documents. On June 30, 2020, the Defendant filed his Memorandum in Opposition to Motion for Temporary Injunction. On July 1, 2020, Plaintiffs filed their Reply to Defendant's Memorandum in Opposition to Motion for Temporary Injunction. On July 2, 2020, the circuit court (Hon. F. Patrick Yeatts, presiding) held a hearing on Plaintiffs' Application for Temporary Injunction.

On July 14, 2020, the circuit court issued an order and opinion letter, granting in part and denying in part Plaintiffs' application for temporary injunction. On July 20, 2020, the circuit court issued an Amended Order Granting Temporary Injunction. The circuit court's opinion denied issuance of a temporary injunction with respect to Plaintiffs' facial challenge to the new private sale background check statute, but enjoined the statute's enforcement as applied to private sales of handguns to those adults under the age of 21, who had been completely barred from purchasing handguns by operation of the challenged statute.

Pursuant to Rule 5:17A(a), Plaintiffs file this Petition for Review within 15 days of the circuit court's July 14, 2020 Order and July 20, 2020 Amended Order, seeking review of the circuit court's orders only insofar as they failed to enjoin the whole statute as a violation of Article I, Section 13 of the Constitution of Virginia.

Summary of Facts

On April 10, the Governor signed into law Senate Bill 70/House Bill 2, which took effect on July 1, 2020. That act adds a new § 18.2-308.2:5 to the Virginia Code which requires that, before a person sells a firearm in a private sale, he first must obtain a background check from a Virginia licensed firearms dealer, completed through the Department of State Police, which results in a determination that the transferee "is not prohibited under state or federal law from possessing a firearm." [1] Va. Code § 18.2-308.2:5(A). The statute requires the Virginia State Police ("VSP") to create the "means" through which this can occur, in "conform[ance]" with the existing background check system for sales by dealers laid out in § 18.2-308.2:5. The statute requires that dealers who facilitate private transfers collect certain fees on behalf of VSP, and permits them to charge an additional fee of up to $15 for their services. *See* § 18.2-308.2:5(A). The statute provides two exceptions to the UBC rule: the sale of a firearm to the Commonwealth in a so-called "buy-back" program, or a private sale occurring at a gun show where the VSP has conducted a so-called "voluntary background check" pursuant to § 54.1-4201.2. *See* § 18.2-308.2:5(B). A person who sells or purchases a firearm without the required background check is guilty of a Class 1 misdemeanor. *See* § 18.2-308.2:5(C) and (D).

[1] Of course, it has been and continues to be a crime under both state and federal law to transfer a firearm to a prohibited person. *See* 18 U.S.C. Section 922; Virginia Code Section 18.2-308.2:1. Possession of firearms by such persons is also a crime.

The Plaintiffs in this case include three law-abiding adult residents of Lynchburg and Campbell County, Virginia, who desired to engage in private transactions for the sale of firearms after July 1, 2020, but for the challenged statute. Plaintiff Wilson wished to sell firearms from his private collection, while Plaintiffs Ehlert and Lowman wished to purchase firearms from him. Plaintiff Lowman is an adult under the age of 21. None of the plaintiffs wished to obtain government preclearance through a background check from a licensed dealer before completing the proposed transactions. Nor did the plaintiffs wish to assume the financial burden of the transfers, or the burden of time and hassle in finding and traveling to a licensed dealer willing to perform the transfer. Plaintiffs Virginia Citizens Defense League, Gun Owners of America, Inc., and Gun Owners Foundation are associational plaintiffs with tens of thousands of members and supporters across the Commonwealth, many of whom are similarly situated to the individual plaintiffs.

Argument

I. Standard of Review.

A circuit court's decision to grant or deny a temporary injunction is a discretionary act and is reviewed by this Court on an abuse-of-discretion standard. However, "'[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions,'" and "'[a circuit] court by definition abuses its discretion when it makes an error of law.'" *Porter v.*

Commonwealth, 276 Va. 203, 260 (2008). The basis for Plaintiffs' challenge to the circuit court's decision is that it made two legal errors in its analysis. Should this Court agree on either front, it should reverse the circuit court's decision denying a temporary injunction, and remand the case for further proceedings. *See May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 822 S.E.2d 358, 368 (2019). The circuit court addressed only Plaintiffs' likelihood of success on the merits with respect to their facial challenge to the statute; thus reversal and remand is appropriate.

II. The Circuit Court Made Critical Errors Which Infected Its Conclusion.

A. The Circuit Court Laid a Solid Legal Foundation.

In its opinion, the circuit court began with first principles, correctly recounting the uniquely American nature of the right to keep and bear arms, and the vital role that an armed citizenry plays in protecting and preserving the core values and freedoms of our society. Opinion Letter pp. 1-2. Next, the court concluded that "Article I, § 13 should be interpreted with a history-and-tradition framework,[2]

[2] As laid out by then-Judge Kavanaugh in his dissent in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"), the concepts of "history and tradition" are to be used as an interpretive tool to understand the meaning of the Second Amendment's text. For example, if there were a historical or traditional way that the term "the people" was understood — such as to exclude certain categories of individuals — something that was largely or universally agreed to at the time the Amendment was adopted, that certainly can inform as to the meaning of the text. Indeed, the large part of the Supreme Court's opinion in *Heller* is devoted to examining the text of the Second Amendment, looking to historical and traditional guideposts to do so. However, these interpretive tools have their limits, and cannot be used to override the plain text of the right to keep and bear arms based on the

not a sliding scale" such as "the strict and intermediate scrutiny balancing tests…." *Id.* at 3, 5. Rather, the court explained, "*Heller* and *McDonald* should provide the framework for analyzing the present case," noting that Virginia courts have not gone "beyond the *Heller/McDonald* framework by choosing a level of scrutiny." *Id.* at 4. Likewise, the circuit court refused to do so, correctly determining the atextual "sliding scale of heightened scrutiny" proposed by the Commonwealth and "applied by the United States Fourth Circuit Court of Appeals" to be precisely "the type of interest balancing rejected by the United States Supreme Court" in *Heller*. *Id.* at 4-5. The court reasoned that to apply the Commonwealth's preferred interest balancing test would require "conjecture," "guesswork," and "empirical judgments," and that to engage in this "whirl of rebalancing" would "severely undercut" the right to keep and bear arms by permitting judges to "dance around constitutional rights whenever they desire." *Id*. at 5-6. Having established this solid constitutional footing for its opinion, the circuit court then analyzed the

---

misguided assumption that any firearms-related restriction with any historical analogue is therefore automatically constitutional. *See* Plaintiffs' Reply at 6-8. Indeed, there are examples in Virginia law of restrictions that have a "historical" and "traditional" basis, but nevertheless are patently unconstitutional. For example, the Commonwealth's 1748 slave codes provided that "[n]o negro or mulatto shall keep or carry any gun, powder, shot, club, or other weapon whatever...." H.S. Geyer, A Digest of the Laws of Missouri Territory (1818) at 374. *See also* Halbrook, Stephen P. (2014) "The Right to Bear Arms in the Virginia Constitution and the Second Amendment: Historical Development and Precedent in Virginia and the Fourth Circuit," Liberty Univ. L. Rev.: Vol. 8: Iss. 3, Article 5 (noting Virginia's 1926 "[r]egistration and an annual tax of one dollar per pistol or revolver").

challenged statute. The court noted that "the Commonwealth does not dispute that the Act falls within the scope of" the right because "the right to keep and bear arms … implies the corresponding right to buy and sell arms." *Id.* at 4.

B. Background Checks Are Not Permissible Simply Because They Allegedly Are Designed to Keep Felons from Getting Guns.

1. The Circuit Court Fell into the Commonwealth's Trap.

Next, "[t]urning to the history-and-tradition framework," the circuit court claimed that "whether gun regulations are permissible depends on their historical justifications." *Id.* at 6. It is undisputed that there is no historical justification whatsoever for a background check on gun purchases of any sort. Indeed, there was no background check at all in Virginia prior to 1989 (Opinion Letter at 7), no federal background check until 1993, and no state background check on purely private sales until July 1, 2020. *See* Reply at 7. As Plaintiffs noted, none of these enactments can be characterized as "longstanding," and no court in the country has ever found restrictions of such short duration to be so. Reply at 7-8. Indeed, the circuit court did not conclude that background checks are longstanding.

Rather, the circuit court fell into a trap laid by the government (Opp. Br, at 3-4), and about which Plaintiffs had specifically warned (Reply at 7). The circuit court concluded that, because *certain* prohibitions on possession by persons such as felons and the mentally ill allegedly *are "longstanding,"* it follows that *other* prohibitions (background checks to "enforce" those prohibitions) are themselves

constitutional. The circuit court asserted that "preventing felons and the mentally disabled from possessing firearms" are restrictions with "historical justifications." *Id.* at 7. Thus, the court erroneously claimed, "[s]o long as the background check is limited to preventing a longstanding prohibition on a historically justified category, it does not violate the right to keep and bear arms." *Id.*

2. The Circuit Court's Flawed Approach Would Gut its Analytical Framework.

The circuit court's reasoning, that the private sale background check statute is permissible merely because it is intended to further prohibitions on possession by felons and the mentally ill, is deeply flawed and undermines the solid foundation the court had laid. Under the circuit court's view, so long as a given restriction is alleged to be in furtherance of an unrelated "longstanding prohibition," then the restriction would be upheld regardless of its infringement on the rights of millions of people who are not prohibited in any way from possessing firearms. This logic could permit the Commonwealth to impose "preclearance" requirements on any number of enumerated rights – such as requiring every person registering to vote to undergo a background check to ensure that person is not a felon, or requiring every author and publisher to submit written work for approval before publication to ensure it is not defamatory. That is not the way a free society works, where robust constitutional rights and personal freedom carries the cost that not all crimes can be stopped before they occur. As this Court explained, there is "a theory deeply etched in our law: a

free society prefers to punish the few who abuse rights ... after they break the law than to throttle them and all others beforehand." *KMA, Inc. v. City of Newport News*, 228 Va. 365, 374, 323 S.E.2d 78 (1984) (citation omitted). Requiring government preclearance before a firearm is sold in a private sale, the challenged statute throttles the enumerated right of all Virginians to keep and bear arms, allegedly to keep a few prohibited persons from obtaining firearms unlawfully.

More fundamentally, however, the circuit court's reasoning is a *non sequitur*. Allegedly constitutional ends do not justify unconstitutional means. Even if restrictions on felons possessing guns were "longstanding" and thus *presumptively* permissible, that does not mean background checks on every person in the Commonwealth, in order to keep a small prohibited minority from obtaining guns, is consequently permissible. Were that the case, this reasoning would justify other methods used to keep felons from obtaining firearms, such as a universal gun registry, a requirement that all handguns be "smart guns" equipped with fingerprint sensors, or a law permitting warrantless and suspicionless searches for firearms of the homes and vehicles of those with felony convictions. Alternatively, the "longstanding" prohibition on gun purchases by the mentally ill would justify a law requiring periodic mental health exams of all gun owners. Likewise, such reasoning could be used to justify a background check to purchase firearms ammunition, since felons are prohibited from possessing that as well. *See* 18

U.S.C. Sections 922(d) and (g). Finally, requiring a license from a state merely to possess a firearm — such as the Illinois Firearm Owner Identification ("FOID") Card — could also be defended as preventing felons from getting guns. Each of the measures above could be defended as advancing the "longstanding" prohibition on felons obtaining guns, but that would not make any of them constitutional.

C. The Circuit Court Blurred Its Own Distinction Between Commercial Sales and Private Sales.

In its brief below, the Commonwealth claimed that a background check requirement on the *private* sale of firearms constitutes a "condition[] or qualification[] on the *commercial* sale of arms." Response at 8 (*citing Heller* at 626-27 and n.26). Attempting to shoehorn private sales into *Heller*'s *dicta* about commercial sales, the Commonwealth argued that universal background checks on private sales is a "presumptively lawful regulatory measure[]." *Id.* Plaintiffs refuted this notion in their Reply. *See* Reply at 4-6. The circuit court agreed, and recognized "that a commercial sale is not the same as a private sale," and correctly explained that "the distinction between commercial and private sales has long been understood in the context of firearm regulations." Opinion Letter at 7.

1. The Circuit Court Misread *Heller.*

Yet immediately after distinguishing between commercial and private sales, the circuit court abandoned that distinction, concluding that "the Court is at a loss as to how the historical justifications of preventing felons and the mentally disabled

from possessing firearms would allow conditions on commercial sales and not also justify conditions on private sales." Opinion Letter at 7. But *Heller* never found that regulations on commercial sales were justified by the allegedly "historical justification" of keeping felons from getting guns. Rather, the circuit court's conclusion is based on a misreading of the list of "presumptively lawful regulatory measures" identified in *Heller*. There, the Supreme Court noted that "nothing in our opinion should be taken to cast doubt on [i] longstanding prohibitions on the possession of firearms by felons and the mentally ill, **or** [ii] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, **or** [iii] laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626 (emphasis added). In that list of three, the language "longstanding prohibitions" modifies only the first item, "possession of firearms by felons and the mentally ill." The subsequent items each stands on its own, yet the circuit court read them as if the first and third were blended together, assuming the allegedly longstanding prohibition on felons possessing firearms provided the Court's basis for presumptively approving of conditions on commercial sales.

The circuit court's mistaken reading of Heller's list of "presumptively lawful regulatory measures" allowed it erroneously to tie "commercial sales" to "longstanding prohibitions" such as felon disarmament. Without that link, the phrase "laws imposing conditions and qualifications on the commercial sale of

arms" must stand on its own. And, as the circuit court recognized, the challenged statute clearly does not regulate "commercial sales" but rather entirely private conduct, and thus certainly cannot be considered "presumptively lawful" under *Heller*. Quite to the contrary, by limiting "sales" with the adjective "commercial," *Heller* should be understood to have excluded private sales from regulations that the Court believed may be lawful. *Expressio unius est exclusio alterius*. *See also* A. Scalia and B. Garner, Reading Law (West: 2012), p. 10. Either way, it was error for the circuit court to assume that background checks on both commercial and private sales are permissible simply because both allegedly keep felons from getting guns.

2. Commercial Sales vs. Private Sales – A Distinction with a Difference.

The circuit court did not seem to understand why private sales should be treated differently from commercial sales, and why regulations on the latter could not also justify regulations on the former. But as Plaintiffs explained, there are good reasons why these two forms of sales have always been treated differently. To be sure, the "commerce clause" basis for the Brady Act, 107 *Stat*. 1536, has been held to be broad enough that Congress presumably could have regulated both private and commercial sales. But it chose not to do so.[3] Issuing such a sweeping regulation over private sales clearly concerned Congress, because it would have

3 Indeed, early versions of what later became the Brady Act, such as H.R. 975 submitted by Representative Feighan in 1988, applied to both dealer sales and private sales, across the board, but this approach was rejected.

given the government access to detailed information about *every* firearm sale in America. This was something that Congress clearly did not want to do, because it would have created the mechanism to establish a national gun registry. In fact, in the Firearm Owners Protection Act of 1986, Congress had gone out of its way to ensure that records obtained by the government with respect to the limited category of dealer sales could not be used to establish such a registry. *See* 18 U.S.C. Section 926(a)(3). The challenged act, however, would undermine this principle, creating a situation where every firearm sale in Virginia is recorded, reported to the Virginia State Police and the FBI, and the make, model and serial number transcribed. In other words, no sale of any gun is permitted outside of the government's prying eye.

Even more fundamentally, private sales function as a safety valve from the heavily regulated commercial system, should that system fail. Complaint §§ 99-102. Indeed, as Plaintiffs have explained, the FBI NICS system through which private sales are now run often provides false positives, prohibiting perfectly law-abiding people from getting guns. Complaint § 48. Private sales permit an alternative way for the law-abiding to exercise their rights. When the computerized background check system is unavailable (due to technical problems, natural disasters, pandemics, *etc*.) at either the state or federal level, private sales allow Virginians a way by which they can still exercise their rights. Without that ability, no one in Virginia can engage in the exercise of an enumerated right until a complex

and interconnected system of computer systems, communications systems, and human beings come together to participate. That fact alone should give anyone pause about putting all of our constitutional eggs into one government basket.

Private sales also permit Virginians a way to obtain firearms without being required to go through federally licensed dealers, who have been turned into federal gatekeepers providing access to enumerated rights, but who are not required to participate. Complaint §§ 78-80. And, until the challenged act, private sales provided a way for adults under 21 years old to obtain handguns, a right correctly preserved by the circuit court's temporary injunction. Complaint §§ 52-63. Finally, as the circuit court notes, federal cases upholding aspects of the federal background check for commercial sales specifically "note that the statute's prohibition does not apply to private sales…." Opinion Letter at 8.

Conclusion

As the circuit court noted, Article I, Section 13 claims should be analyzed based on the text, interpreted and understood with reference to historical and traditional sources, rather than based on the personal policy predilections of judges, using "vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." Opinion Letter at 5 (quoting *McDonald* at 803-04). But in spite of its correct understanding of the text, the circuit court erred in upholding a universal background check, which has absolutely

no textual or historical basis. Allegedly constitutional ends do not justify unconstitutional means. Plaintiffs Petition for Review should be granted, and the decision of the circuit court denying the full temporary injunctive relief sought by Plaintiffs' should be reversed and the case remanded for further proceedings.

Respectfully Submitted,

PETER EHLERT
RAUL WILSON
WYATT LOWMAN
VIRGINIA CITIZENS DEFENSE LEAGUE
GUN OWNERS OF AMERICA, INC.
GUN OWNERS FOUNDATION

BY: _____
COUNSEL

David G. Browne (VSB No. 65306)
Spiro & Browne, PLC
6802 Paragon Place, Suite 410
Richmond, VA 23230
Telephone: 804-573-9220
E-mail: dbrowne@sblawva.com

Robert J. Olson (VSB No. 82488)
William J. Olson (VSB No. 15841)
William J. Olson, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180
Telephone: 703-356-5070

114 Creekside Lane
Winchester, VA 22602
Telephone: 540-450-8777
E-mail: wjo@mindspring.com

Counsel for Plaintiffs/Petitioners

CERTIFICATE

In accordance with Rule 17A(c)(iii), the undersigned certifies that:

1. Petitioners are Peter Ehlert, Raul Wilson, Wyatt Lowman, Gun Owners of America, Inc., Gun Owners Foundation, and Virginia Citizens Defense League.

2. Respondent is Col. Gary T. Settle, in his official capacity as Superintendent of the Virginia

3. Counsel for Petitioners are:

David G. Browne (VSB No. 65306)
Spiro & Browne, PLC
6802 Paragon Place, Suite 410
Richmond, VA 23230
Telephone: 804-573-9220
Fax: 804-836-1855
E-mail: dbrowne@sblawva.com

Robert J. Olson (VSB No. 82488)
William J. Olson (VSB No. 15841)
William J. Olson, P.C.
370 Maple Avenue, West, Suite 4
Vienna, Virginia 22180
Telephone: 703-356-5070
114 Creekside Lane
Winchester, Virginia 22602
Telephone: 540-450-8777
Fax: 540-450-8771
E-mail: wjo@mindspring.com

4. Counsel for Respondent are:

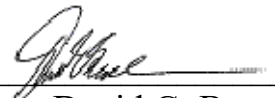
Toby Jay Heytens (VSB No. 90788)
Martine E. Cicconi (VSB No. 94542)
Zachary R. Glubiak (VSB No. 93984)
Office of the Attorney General (Richmond)

202 North 9th Street
Richmond, VA 23219
(804) 786-7240
Fax: (804) 371-0200
Email: theytens@oag.state.va.us
solicitorgeneral@oag.state.va.us
mcicconi@oag.state.va.us

5. A copy of the record being filed is an accurate copy of the record of the circuit court and contains everything necessary for a review of the Petition.

6. On July 29, 2020, a true and accurate copy of the foregoing Petition for Review was served upon the following via U.S. Mail and e-mail, thereby giving notice of the same:

Toby Jay Heytens (VSB No. 90788)
Martine E. Cicconi (VSB No. 94542)
Zachary R. Glubiak (VSB No. 93984)
Office of the Attorney General (Richmond)
202 North 9th Street
Richmond, VA 23219
(804) 786-7240
Fax: (804) 371-0200
Email: theytens@oag.state.va.us
solicitorgeneral@oag.state.va.us
mcicconi@oag.state.va.us



David G. Browne