

IN THE SUPREME COURT OF VIRGINIA

No. 20-_____

**GUN OWNERS OF AMERICA, INC., VIRGINIA CITIZENS DEFENSE
LEAGUE, KENNETH VAN WYK, ERICH PRATT, and JOHN VELLECO,**

Petitioners,

v.

**HON. RALPH S. NORTHAM (In his Official Capacity as Governor of the
Commonwealth of Virginia) and COLONEL ANTHONY S. PIKE (In his
Official Capacity as Chief of the Division of Capitol Police),**

Respondents.

EMERGENCY PETITION FOR REVIEW

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January 16, 2020

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ASSIGNMENT OF ERROR

1. Whether the Circuit Court erred in denying the preliminary injunction against enforcement of Executive Order No. 49 (2020), in wrongful disregard and violation of sections 7, 12, and 13 of Article I of the Virginia Constitution, and Virginia Code § 44-146.15(3), resulting in the deprivation of constitutionally protected liberties for petitioners and many thousands of Virginians, for which there is no adequate remedy at law.
2. Whether the Circuit Court erred in completely disregarding petitioners' First Amendment argument.
3. Whether the Circuit Court erred in misconstruing *District of Columbia v. Heller* as somehow overriding the limitation on the Governor's authority to ban firearms.
4. Whether the Circuit Court erred in finding that the deprivation of the right to keep and bear arms did not constitute irreparable harm because individuals have a "limited" right to bear arms.

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Spence v. Washington, 418 U.S. 405 (1974)

EMERGENCY PETITION FOR REVIEW

COME NOW Petitioners, by counsel, and pursuant to Rule 5:17A of this Court's Rules, request this Court for emergency review of the decision of the Circuit Court and request immediate entry of an Order enjoining the enforcement of the portion of Executive Order Number Forty-Nine (the "EO"), issued on January 15, 2020 by Governor Ralph S. Northam, which purports to temporarily bar the carrying or possession of firearms upon the grounds of the Virginia State Capitol during the annual "Lobby Day" on January 20, 2020.

NATURE OF THE CASE

On January 16, 2020, Petitioners filed a Complaint and Application for Temporary Injunction with the Circuit Court of the City of Richmond. At 1:30 p.m., the Circuit Court held a hearing before Judge Joi Jeter Taylor, and at 4:31 p.m., the court issued an order denying the request for an injunction. Due to the urgent nature of this matter, Petitioners are filing this Emergency Petition for Review.

STATEMENT OF FACTS

Petitioner Gun Owners of America, Inc. ("GOA") is a California non-stock corporation with its principal place of business in Virginia, at 8001 Forbes Place, Springfield, VA 22151. GOA has over 2 million members, including tens of thousands from the Commonwealth of Virginia, and operates as a non-profit organization, exempt from federal income taxes under Section 501(c)(4) of the Internal Revenue Code. GOA's mission is to preserve and defend the Second Amendment rights of gun owners.

Petitioner Virginia Citizens Defense League ("VCDL") is a Virginia non-stock corporation, with its principal place of business in Newington, VA. VCDL is organized and

operated as a non-profit civic league that is exempt from federal income taxes under Section 501(c)(4) of the U.S. Internal Revenue Code. VCDL has over 10,000 members and operates as a non-profit, non-partisan, grassroots organization dedicated to advancing the fundamental human right of all Virginians to keep and bear arms as guaranteed by the Second Amendment to the United States Constitution and Article I, § 13 of the Constitution of the Commonwealth of Virginia. VCDL has held an annual “Lobby Day” Rally on the Martin Luther King, Jr. Holiday for many years (the “Rally”), at which hundreds and often thousands of responsible, law-abiding firearm owners from throughout the Commonwealth gather in order to exercise their rights to peaceably assemble, address, and meet with members of the General Assembly, and to exercise their right to bear arms under the Second Amendment to the United States Constitution and Article I, § 13 of the Virginia Constitution.

Petitioners Kenneth VanWyk, Erich Pratt, and John Velleco are law abiding United States citizens and residents of Virginia who intend and wish to attend the Rally on January 20, 2020, which is scheduled to take place on the grounds of the Virginia State Capitol, and to lawfully and peaceably carry firearms at the Rally as they are authorized as holders of concealed carry permits. Plaintiffs do not wish to enter the Capitol buildings during Lobby Day. Affidavits of the Plaintiffs were attached to the Complaint and Application collectively as Exhibit A, in accordance with Va. Code § 8.01-628.

Respondent Hon. Ralph S. Northam is the Governor of the Commonwealth of Virginia (“Governor”), and was responsible for the promulgation of the EO that is the subject of this Complaint and Application. Respondent Colonel Anthony S. Pike is the Chief of the Division of Capitol Police, which is the agency primarily responsible for law enforcement within the

“Capitol District,” which includes the grounds of the Virginia State Capitol. Colonel Pike is the chief law enforcement officer tasked with enforcing the provisions of the EO.

FACTUAL AND PROCEDURAL BACKGROUND

Every year on Martin Luther King Jr. Day, Petitioner VCDL has organized a peaceful assembly on the grounds of the Virginia State Capitol to honor and defend the rights guaranteed to the American people in the Second Amendment to the United States Constitution.

On January 15, 2020, the Governor issued the EO which, in paragraph C, purports to order that “no weapons, including firearms, may be carried or possessed on any land, real property, or improvements owned by the Commonwealth of Virginia within the area bounded by Broad Street, Ninth Street, Bank Street and Governor Street in the City of Richmond, Virginia, as well as any Commonwealth-owned parking lots for Virginia’s Department of Transportation, the Madison Building, the Monroe Building, the Patrick Henry Building, Washington Building, the Jefferson Building, and the Oliver Hill Building” during the duration of the EO, which runs from 5:00 P.M. on Friday, January 17, 2020 through 5:00 P.M. on Tuesday, January 21, 2020. A copy of the EO was attached as Exhibit B to the Complaint and Application.

As a direct result of Paragraph C of the EO, if enforced, the Petitioners, along with their members and supporters, and thousands of others similarly situated, will be wrongfully and unlawfully denied entry to the grounds of the Virginia State Capitol merely because they are exercising their pre-existing rights recognized under the United States Constitution and the Virginia Constitution.

In addition to violating numerous federal and state constitutional provisions, for the reasons set forth in more detail below, Paragraph C of the EO as it applies to firearms (as opposed to other categories of “weapons,” for which no injunction is sought at this time) is facially unlawful in light of the statutory prohibition set forth in Va. Code § 44-146.15(3), which was enacted in its current

form in 2012 specifically to prevent and prohibit the Governor from in any way limiting or prohibiting the possession or carrying of firearms pursuant to a declaration of a state of emergency. It also violates Article I, §§ 7, 12 and 13 of the Virginia Constitution.

ARGUMENT

I. Standard for Granting Preliminary Injunction

In granting the extraordinary remedy of a preliminary injunction, Virginia circuit courts have looked to the following criteria: (1) the likelihood of success on the merits; (2) whether the plaintiffs are likely to suffer irreparable harm if the injunction is not granted; (3) whether the balance of equities tip in plaintiffs' favor; and (4) a showing that the injunction would not be adverse to the public interest. *See The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009). *See also McEachin v. Bolling*, 84 Va. Cir. 76, 77 (Richmond Cir. Ct. 2011).

Under the *Real Truth* analysis, which Virginia courts have widely adopted in the absence of any specific elemental test from the Supreme Court of Virginia or statutes, “[a] preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the [circuit] court that grants relief *pendente lite* of the type available after the trial.” *Real Truth*, 575 F.3d at 345.

II. Application of *Real Truth* Factors to the EO

The Governor’s sole legal bases for the EO, including the challenged provision, are his declaration of a state of emergency pursuant to Va. Code § 44-146.2, *et seq.*, and his administrative “authority to formulate executive branch policies” pursuant to Va. Code § 2.2-103.¹ *See* EO at 1. The Governor cites the Virginia Constitution generally as authority for his actions, but cites no specific provision thereof. Chapter 3.2 of Title 44 of the Code outlines the

¹ Va. Code § 2.2-103 in no way provides authority for the EO’s firearms ban, giving the Governor only “authority and responsibility for the formulation and administration of the policies of the executive branch,” and the section expressly states that any power granted by the section is not intended to conflict with “the Constitution or law.”

powers and duties of the Governor in declaring a state of emergency. Neither statute relied on by the Governor comes close to providing him the authority that he purports to exercise in the EO. On the contrary, they expressly prohibit the Governor's actions.

In 2012, the General Assembly enacted the current version of Va. Code § 44-146.15(3), which provides, in relevant part, as follows:

Nothing in this chapter is to be construed to:

(3) Empower the Governor, any political subdivision, or any other governmental authority to in any way limit or prohibit the rights of the people to keep and bear arms as guaranteed by Article I, Section 13 of the Constitution of Virginia or the Second Amendment of the Constitution of the United States, including the otherwise lawful possession, carrying, transportation, sale, or transfer of firearms except to the extent necessary to ensure public safety in any place or facility designated or used by the Governor, any political subdivision of the Commonwealth, or any other governmental entity as an emergency shelter or for the purpose of sheltering persons; ...

In a twist of fate, in February of 2012, Governor Northam and Attorney General Herring, then state senators, both voted in favor of H.B. 20, the current version of the statute that they now seek to subvert. Even more significant, H.B. 20 added language specifically protecting the "carrying" of firearms, the exact activity the Governor now seeks to suppress. *See* Exhibit C to the Complaint and Application.

The plain and unambiguous language of Virginia Code § 44-146.15(3) expressly prohibits the Governor from using a declaration of a state of emergency to do precisely what he purports to do via Paragraph C of the EO, banning firearms on Capitol Square during Lobby Day.

Virginia Code § 44-146.15(3) provides a narrow exception by permitting limited restrictions on the carrying of firearms in "emergency shelters," but only "to the extent necessary to ensure public safety." The EO attempts to shoehorn itself into this very

narrow exemption by making a passing reference to people “sheltering” on the 14 acres at the Capitol, as if the open and exposed sloping hill of the grounds of the Capitol could somehow provide anyone shelter from anything. The Governor’s disingenuous attempt to skirt the clear prohibition of Virginia Code § 44-146.15(3) is beyond flimsy, particularly in light of the earlier well-publicized ban on firearms within all of the General Assembly’s buildings at and around the Capitol. There is no conceivable peril from which any person could be seeking “shelter” upon the open grounds of the Capitol, when numerous secure government buildings, protected by battalions of armed police, lay just steps away in all directions.

Petitioners have a clear likelihood of success on the merits given that the challenged portion of the EO directly violates a statutory provision intended to prevent precisely the order given by the Governor restricting the carrying of firearms. The challenged portion of the EO also violates Article I, § 7 of the Virginia Constitution, which provides “[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.” In this instance, the Governor has unilaterally and arbitrarily sought to suspend or ignore both the rights of the people, and the authority of the General Assembly.

In addition to the clear statutory violation discussed above, the EO also violates multiple state and federal constitutional provisions. Without relief from this Court, Petitioners and thousands of other Rally participants will be irreparably denied their right to bear arms as guaranteed by Article I, § 13 of the Constitution of Virginia, the Second

Amendment of the Constitution of the United States, and Virginia law, in direct violation of Va. Code § 44-146.15(3).

Additionally, if the EO is permitted to stand, Petitioners and thousands of other Rally participants will be irreparably denied their right to peaceably assemble, engage in protected speech, and petition the government, as guaranteed by Article I, § 12 of the Constitution of Virginia and the First Amendment of the Constitution of the United States. Without relief from this Court, Petitioners will be forced to an unenviable choice – if they wish to exercise their First Amendment rights, they must give up their Second Amendment rights, or *vice versa*. But more importantly, the unique nature (and power) of Lobby Day is the combination of the two rights, exercised together. More specifically, the act of peaceably and openly carrying firearms – which has been done at numerous other “Lobby Day” rallies at the same location over many years without incident – is itself a form of protected speech, particularly when the Rally is specifically intended to express opinions to public officials through the symbolic act of bearing arms. *See, e.g., Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003) (“[g]un possession can be speech where there is an intent to convey a particularized message, and the likelihood [is] great that the message would be understood by those who viewed it.”). It is difficult to imagine a more clear example of an event where carrying firearms is intended to convey an unambiguous political message. *See also Spence v. Washington*, 418 U.S. 405 (1974) (to determine whether conduct constitutes speech for First Amendment purposes, we must ask whether “[a]n intent to convey a particularized message was present” and whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”). As the U.S. Supreme Court has noted, “The loss

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Petitioners clearly lack an adequate remedy at law. If the EO is permitted to take effect, monetary damages would in no way remedy the restraint upon Petitioners’ fundamental rights. The very nature of Lobby Day is to petition government officials to refrain from taking further steps to violate the constitutional rights of Virginians. In that sense, a violation of rights now, leading to the inability to petition the government, could beget additional and more significant violations of rights down the road, in the form of unconstitutional legislation. Money damages cannot replace constitutional rights. Monetary damages would be inadequate, untimely, and impossible to calculate. Injunctive relief is the only remedy that will permit the Petitioners to be made whole, by permitting them to exercise their rights at the Rally on January 20, 2020.

Unlike the real and concrete irreparable harm that will befall Petitioners under the EO, the EO lays out nothing but purely hypothetical and speculative scenarios, and based on vague conjecture, that could occur if Lobby Day proceeds unimpaired by the EO. Indeed, there is no credible threat of harm to Defendants if an injunction were issued with respect to the challenged portion of the EO. Such an injunction would merely return the rights of the people to the status quo regarding the peaceable carrying of firearms on the grounds of the Capitol. The EO makes vague, unspecified allusions to “credible intelligence” and “available information” that persons from “outside the Commonwealth” may have as their purpose certain unlawful acts, such as engaging in “violence, rioting,

and insurrection.” and that certain other people “may” come for purposes other than peaceable assembly. EO at 1.

Yet, despite the EO’s attempts to paint a picture of “threats of violence,” there is no indication that the granting of the injunction would be against the public interest. At a press conference on January 15, 2020, the Governor made vague, non-specific references to “information” on the “dark web,” and certain “intelligence,” but provided no basis for any threats beyond those generalizations. Indeed, the Associated Press reported the day before that, according to officials working with the Governor, “the state does not have intelligence that the groups are planning a specific act of violence, but said Northam has grown increasingly concerned about numerous ominous-sounding postings on social media from forces outside Virginia.” See “*Virginia Governor to Ban Guns From Capitol Square Ahead of Gun Rights Rally*, Associated Press Reports, January 14, 2020, Exhibit D to the Complaint and Application. The Associated Press also reported that the state officials reported only “credible threats of **potential** violence and **extremism**” - whatever that means. *Id.* (emphasis added). However, so far as Petitioners are aware, “extremism” in support of constitutional rights is no crime, and presents no danger to anyone – except perhaps to the political futures of tyrants. Finally, it is axiomatic that the mere *possibility* that *some* individuals *may* engage in violence, however, has never been a basis to deny the rights of all.²

2 Even assuming, *arguendo*, that the Governor has the authority to declare vast swaths of open spaces to be “emergency shelters,” and thus sidestep the express prohibition of Code § 44-146.15(3), he must still show that any restrictions on firearm are “necessary to ensure public safety.” As explained here, vague and unsubstantiated theories about potential problems on Lobby Day in no way suffice.

Shockingly, rather than an attempt to protect Virginians and diffuse the situation, the Governor's EO itself has the appearance of a deliberate attempt to provoke a confrontation. Indeed, Lobby Day has been scheduled every year, on the same day, for well over a decade. There has never, to Petitioners' knowledge, been an adverse incident involving a firearm at any Lobby Day. And it has been no secret – for weeks if not for months since the November 2019 election – that attendance at the 2020 Lobby Day will far surpass prior attendance numbers. It also appears evident that the Governor intended to wait until the last minute to issue the EO, but that his hand was forced by “anonymous” government sources who outed his plan to the media on Tuesday. When the House of Delegates rules committee voted to keep firearms out of certain Capitol buildings, gun owners announced their intention to abide by the rule, and stay outside. Now, the Governor is attempting to provoke, by stating that firearms will be prohibited even on the grounds. The Governor's clear intent is to send a message to gun owners that they are not welcome in Richmond, and to give them no place or opportunity to assemble and petition their government. The Governor's underlying message is thus one of provocation and challenge, all while purporting to be an effort to protect public safety.

If an injunction is not obtained at this time, Lobby Day will pass under the unlawful EO without any other adequate remedy, including monetary damages.

Given the EO's clear violation of state law, along with its several state and federal constitutional violations to the detriment of thousands of individuals, and the basis for the action being non-specific threats based on mere internet posts, the challenged portion of the EO is clearly not in the public interest.

III. The Circuit Court Erred.

In its opinion, the circuit court acknowledges that EO 49 relies on only two statutory bases, Code §§ 2.2-103¹ and 44.146.13 *et seq.* Op. at 1. And, as the court acknowledges, those provisions do not grant the Governor the authority he purports to exercise, admitting that “the grant of authority in ... 44.146.17 is limited by ... 44.146.15(3)....” Op. at 2. However, rather than ruling in Plaintiffs favor, the court instead embarks on a frantic search through the Code in an attempt to find any other general grant of authority that can be construed as giving the Governor the unilateral power to ban firearms at the Capitol grounds.

First, the court first settles on Code § 2.2-1144, and claims that provides the Governor the authority he seeks, because it assigns DGS, operating “under the direction and control of the Governor,” the duty to “control” the Capitol Square. But § 2.2-1144 is clearly a general statute that provides generally for the “maintenance” and care of “public grounds,” discussing the keeping of “keys,” the doing of “work,” and the making of “repairs” in and around the Capitol. Section 2.2-1144 is not, as the lower court paints it, a broad grant of authority to the Governor to exercise complete domination over the Capitol Square (and its visitors) in any manner he sees fit.

Perhaps recognizing the weakness of § 2.2-1144, the lower court then adds that the Governor has authority to “take ‘action ... relating to the safety and welfare of the Commonwealth,’” citing the Emergency Powers Law, § 44.146.17. Of course, the court just got done explaining why the Governor **has no authority under that Chapter** of the code — because § 44.146.15(3) expressly forbids him from using any powers thereunder to infringe the right to keep and bear arms.

¹ The lower court does not even bother to examine the Governor’s reliance on § 2.2-103, apparently finding it such a slender reed that it does not even warrant serious discussion.

Thereafter, the Court recites vague generalities about “deference to professional judgement,” glossing over the clear, express, and unambiguous language in § 44.146.15(3) prohibiting the Governor from doing exactly what he has done with EO 49. Apparently when firearms are involved, and the incantation of “public safety” is invoked, courts are to step out of the way and let the executive branch do whatever it wants, even in the face of an unambiguous prohibition to the contrary.

Finally, the Court cherry picks statements from the Supreme Court’s decision in *Heller v. District of Columbia*, 554 U.S. 570 (2008), as if that case has some relevance here. The Court recites language about “longstanding prohibitions” and “laws forbidding the carrying of firearms in sensitive places.”² Of course, this case does not involve whether a **legitimately enacted** legislative ban on firearms at Capitol Square passes Second Amendment muster. The issue here is whether the Governor has any authority to ban firearms in the way he has done. Recitation of the platitude that “individuals have limited right [sic] to bear arms” does not mean the Governor has acted within his power in this case.

Finally, the trial court failed entirely to address the substantial First Amendment arguments regarding the carriage of firearms in a peaceful manner as symbolic speech.

² Of course, we are not dealing with a “longstanding prohibition” here, but one that has existed for barely 24 hours. Nor does this case involve a “law,” but rather an executive branch policy. The Governor has no authority to create new substantive law, only to follow the law that exists and exercise any authority he is granted thereunder. Likewise, the two cases on which the lower court relies (Class and Bonidy) involve challenges to duly enacted legislative prohibitions, and are likewise inapplicable in deciding whether the Governor has exceeded his authority here.

CONCLUSION

Plaintiffs respectfully request review of the circuit court's denial of a preliminary injunction and request this Court to issue a temporary injunction, through and including Tuesday, January 21, 2020, enjoining the enforcement of Paragraph C of the EO as it pertains to firearms.

Respectfully Submitted,

**GUN OWNERS OF AMERICA, INC
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CERTIFICATE

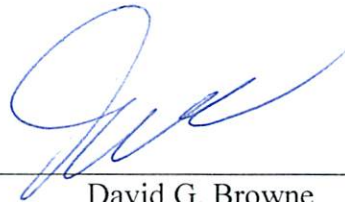
In accordance with Rule 17A, the undersigned certifies that:

Petitioners are Gun Owners of America, Inc., Virginia Citizens Defense League, Kenneth Van Wyk, Erich Pratt, and John Velleco. Respondents are Hon. Ralph S. Northam in his official capacity as Governor of the Commonwealth of Virginia and Colonel Anthony S. Pike (in his official capacity as Chief of the Division of Capitol Police).

The 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.

On January 16, 2020, a true and accurate copy of the foregoing Emergency Petition for Review was served upon the following by e-mail, thereby giving notice of the same:

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