IN THE SUPREME COURT OF VIRGINIA

Record No. 200089

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.

PETITIONERS' REPLY

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I. EO 49 Exceeds the Governor's Powers.

1 The Governor, in EO 49, has declared a "state of emergency" pursuant to Va. Code § 44-146.13, *et seq.*, and announced that he has banned possession of all weapons — including all firearms — on Capitol Square between today, January 17, 2020, and January 21, 2020. The Emergency Services and Disaster Law does not permit the Governor to do this, stating expressly that "Nothing in this chapter is to be construed to ... empower the Governor ... to in any way limit or prohibit the rights of the people to keep and bear arms ... including the otherwise lawful possession, carrying, transportation, sale, or transfer of firearms...." Va. Code § 44-146.15(3). The law could not be more clear.

The circuit court appeared to agree with Petitioners, noting that EO 49's ban on firearms was "limited by Va. Code § 44-146.15(3)," but then undertook a frantic search for "authority **outside** of the Commonwealth Emergency Services and Disaster Law of 2000" to justify the Governor's actions. Judge Taylor Order (Jan. 16, 2020) ("Op.") at 2 (emphasis added). On appeal, the Respondents now seem to concede Petitioners' point, appearing to abandon any pretense that EO 49 can be justified under the Emergency Services and Disaster Law. Now, the Respondents argue that their main point of reliance was "only *one* of the various sources of authority on which the Governor relied...." Govt. Br. at 16.[1] The Respondents attempt to right its listing ship by arguing that if the Respondent can find "**some other source** of authority to issue the Executive Order," then perhaps it can be saved. Govt. Br. at 17 (emphasis added). The

[1] Neither the circuit court, nor the Respondent on appeal now, has even attempted to defend the absurd claim in the EO that the entire open and exposed Capitol grounds can somehow serve as a shelter to anyone for anything. This Court should consider the argument waived that the EO in any way qualifies for the extremely narrow exemption provided in Code § 44-146.15(3).

Respondents then compile a laundry list of constitutional and statutory provisions on which they purport to rely, presumably hoping that something will stick.

First, the Respondents note that the Governor has "chief executive power" under Article V, Section 1, and that he is "commander-in-chief" under Article V, Section 7, including the "power ... to repel invasion [and] suppress insurrection" — as if the Governor believes that tens of thousands of law abiding Virginians attending lobby day to petition their Respondent are instead an invading army engaged in insurrection against the Commonwealth. (Royal Governor Lord Dunmore might have had similar thoughts in 1775.) From these general constitutional powers, the Respondents divine that the Governor has the "quintessential executive function" to "protect[] public safety from violence...." Govt. Br. at 18. That is a *non sequitur*. The Governor cannot simply loudly announce "Executive Power!" in the abstract, and then declare the royal prerogative to take whatever actions he believes are purportedly necessary to further public safety. The Governor's claims are more akin to those of a King than a public servant bound by the rule of law.

Second, the Respondents claim that various statutory provisions give the Governor the power he seeks, namely Virginia Code § 2.2-103 (cited in EO 49), and 2.2-1144 (not cited in EO 49, but relied on by the circuit court). Yet as Petitioners have explained, these are slender reeds, and certainly not substantive grants of executive power to the Governor. Code § 2.2-103 merely states the Governor's authority to set administrative "policies of the executive branch," and Code § 2.2-1144 is a grounds keeping statute. *See* Petition at 14. Neither code section grants the Governor the authority to create substantive law, restricting the exercise of constitutional rights, as he has done here.

Third, the Respondents confusingly circle back to the "Emergency Law" as giving the Governor power independent from the Emergency Law. Govt. Br. at 19. The Respondents claims that Code § 44-146.15(3) cannot "render *unlawful* executive action that would otherwise have been a lawful exercise of authority under Code § 44-146.17." That claim is absurd. Of course it can. Code § 44-146.15(3) expressly limits the Governor's power under the rest of the Emergency statute, making unlawful what may otherwise have been lawful. The Respondents' argument is basically like saying that the Second Amendment cannot keep Congress from banning guns, because the Respondent could have banned guns were it not for the Second Amendment. It is a circular tautology, void of any meaning.

The Respondents next claim that "Petitioners insist that Code § 44-146.15(3) sweeps far further" than intended, and quotes Petitioners' claim that the section was designed to "prevent and prohibit the Governor from *in any way* limiting or prohibiting the carrying of firearms pursuant to a declaration of a state of emergency." Govt. Br. at 20 (emphasis original), quoting Pet. at 6-7. The Respondent italicizes the words "*in any way*," as if Petitioners made up that extreme language in an attempt to expand the language of the Code. The Respondents' claims of Petitioners' language "that is not what the statute says," and that the true meaning of the statute is not what Petitioners say, but "the meaning of that which ... the legislature ... did enact." The Respondents' point is well taken, because the Respondents apparently overlook the fact that the language "*in any way*" was not made up by Petitioners, but was taken **straight from the statute** — which states that the Governor shall not "*in any way* limit or prohibit the rights of the people to keep and bear arms...." Code § 44-146.15(3) (emphasis added). Petitioners' view is not extreme; rather, it is **exactly** what the Code says.

II. The Charlottesville Incident Is an Inadequate Basis for the EO.

The Respondents' make a superficial and emotional appeal to the tragic events that occurred in Charlottesville in August of 2017, in an attempt to justify the challenged provisions of the EO. However, the differences between that event and the VCDL Lobby Day are night and day. Unlike the one-off "Unite the Right" event in Charlottesville, VCDL Lobby Day has occurred peacefully and without incident for many years in Capitol Square. VCDL and its members come from all walks of life, all races, and all genders, and have a proven track record of peaceful demonstrations while armed. They are certainly not violent Neo-Nazis, "white supremacists," or deserving of any comparison to violent or derided groups.[1]

The Respondents also point to three deaths that occurred in Charlottesville, but none of them occurred as a result of firearms, despite Respondents' allusions to armed groups at that event who were allegedly looking for trouble. Two Virginia State Police Troopers lost their lives in a helicopter crash that was not caused by any events or actions at the event on the ground, and another individual was struck and killed by a car. These events merely underscore the Petitioners concern raised at oral argument before the trial court, that people who choose to show up armed to Lobby Day – and there will be many who seek to – will be forced by this EO into the unprotected chaos of the surrounding streets, rather than the "shelter" of the Capitol grounds. The EO's ban on firearms on the grounds for this permitted event has *increased* the risk of problems despite the purported justification of "avoiding another Charlottesville."

Respondents' brief claims that the FBI recently arrested three "suspected Neo-Nazis" who "discussed" attending the Lobby Day rally. Yet the brief does not claim that these individuals planned or discussed any violent acts in Richmond. The reason for their arrest, in

[1] Nor does it appear that Lobby Day will be an event at which two groups of citizens square off against one another. Reportedly, even radical left-wing "Antifa" groups have expressed their support for the VCDL rally.

another state, was for alleged possession of an illegal machinegun and an alleged immigration violation – not because of any credible threat to any event in Richmond. Respondents also rely in footnote 5 of their brief and in support of their claims about "credible threats" a website writing authored by a fringe conspiracy theorist, Alex Jones. Mr. Jones is, to put it politely, the furthest one can get from being "credible." His writings include assertions that the Respondent has machines that can create and steer tornadoes, that chemicals in the water turn frogs gay, and that the 2012 Sandy Hook school shooting was a hoax. *See* "Alex Jones' 5 most disturbing and ridiculous conspiracy theories," CNBC September 14, 2018 (located at https://www.cnbc.com/2018/09/14/alex-jones-5-most-disturbing-ridiculous-conspiracy-theories.html.) If the Governor of Virginia is relying on such material to formulate and justify any policy decision, let alone one of this magnitude, we are all in grave trouble, and one must wonder how credible all of his "intelligence" may be.

III. EO 49 Violates the Second Amendment.

The Respondents rely heavily on cherry-picked language from *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), claiming that the right to keep and bear arms is "not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose." Govt. Br. at 8. Of course, this case does not involve any of those limitations. It does not involve "dangerous or unusual" weapons, but instead very ordinary weapons — the quintessential self-defense rifles and handguns that millions of Americans own, safely carried in holsters and with slings. Nor does this case involve any place that any court has declared a "sensitive place" (such as courthouses, buildings, or schools), contrary to what the Respondent asserts (Govt. Br. at 9) without any explanation. Rather, this case involves an open space — not a building of any sort — that the Respondents admit is a "public place," and is open to any

member of the public for lawful purposes at any time (unlike a court or a school which have designated purposes where the government arguably would have certain greater powers to exclude and regulate).

Amazingly, the Respondents next appears to argue that the Second Amendment does not even apply outside the home. Respondents. Br. at 9. Apparently the phrase "**bear** arms" has no meaning in the text. Of course, Virginia law expressly recognizes a right to bear arms outside the home. *See* Va. Code § 18.2-308 *et seq*. And Virginians have always exercised these rights, since the birth of this nation. Petitioners are unaware of any court that has ever held that "bear arms" has no meaning outside the home. While that issue has yet to be ruled upon by this Court, the Supreme Court in *Heller* did discuss the right to "carry weapons in case of confrontation," and other courts are in agreement that the right to keep and bear arms applies outside the home. *See Moore* v. Madigan, 702 F.3d 933, 935-36 (7th Cir. 2012); *Masciandaro* (Niemeyer, J. separate opinion) at 468. Likewise, the D.C. Circuit, in striking down the District's ban on carrying firearms outside the home, concluded that "**carrying beyond the home**, even in populated areas, even without special need, **falls within the Amendment's coverage, indeed within its core.**" *Wrenn* v. *Dist. of Columbia*, 864 F.3d 650, 664 (D.C. Cir. 2017) (emphasis added).

Next, the Respondents attempt to convince this Court to shy away from its duty to "say what the law is" by citing Judge Harvey Wilkinson in *Masciandaro* for the dicta that "[w]e do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." Respondents. Br. at 10. In other words, the Respondents believe this Court should simply overlook the EO's legal infirmities because this case involves (as it certainly does) serious issues

with potential public safety repercussions. Of course, if constitutional protections, and laws specifically designed to protect them, apply only in calm and happy times, then they mean nothing. On the contrary, constitutional rights apply most forcefully when the times are tumultuous, and tyrants wish to restrict the freedoms of their people in order to suppress dissent.

Finally, Petitioners refuse to follow the Respondents down the rabbit hole (Respondents Br. at 10-12) of judicial interest balancing and arguing about whether strict or intermediate scrutiny applies to permit the infringement of a right that unequivocally "shall not be infringed." This case, as Petitioners have explained, does not involve whether the provisions of the Governor's EO appears more reasonable to judges than do the People's rights to keep and bear arms. This case is about **whether the Governor has the legal authority in the first place**, to unilaterally declare that the Second Amendment does not apply on Capitol Square, a property that the Respondents have admitted is a "public place." Respondent. Br. At 2. If the EO exceeds the Governor's legal authority, then it does not matter how "substantial" or "compelling" his reasons or how "reasonable" his purposes seem to judges. The Second Amendment provides its own standard of review — "shall not be infringed." As Justice Scalia explained:

> [t]he very enumeration of the right takes out of the hands of government — even the Third Branch of government — the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.... Like the First, it is the very product of interest balancing by the people...." [*Heller*, 554 U.S. at 634 (emphasis added).]

It is when threats exist that the Second Amendment has its most important application. Indeed, if all of the representations in the Respondents' brief are correct, it should militate in favor of the People being able to assemble, petition their government, and, at the same time, ensure that those who would do them harm will not succeed. The Respondents' brief asks the Court to engage in a pragmatic analysis of costs and benefits of protecting the right to keep and

bear arms — but, as Justice Scalia instructed us, interest balancing is not the way to interpret the Second Amendment, even if the law is limited to an "urban area," because "balancing has already been done for us by the Founders." *District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

Despite the Respondents' desire to instill fear in the heart of the Court, there is no insurrection that needs to be put down, There is no rioting. For many years, the VCDL lobby day has gone on peacefully. There were reports in Charlottesville, Virginia that the police were directed to "stand down" in the face of violence by those opposing the Rally. If that information is correct, the need for exercising self-defense with firearms is particularly acute. Lawless persons do not obey gun laws. If the ban is left in place, guns will be only in the hands of the lawless, and law abiding gun owners (who leave their guns at home) will be at their mercy.

IV. EO 49 Violates the First Amendment.

The Respondents argue that the EO does not prevent anyone from assembling or speaking, and offer numerous alternatives, such as clothing and signs, by which attendees may express their views. But it is axiomatic that the Respondent cannot dictate the means and forms of expression under the First Amendment, that "free speech" is not limited to verbal or written expression, and that the Respondent cannot limit these otherwise lawful forms of expression at a demonstration in a public place where demonstrators may otherwise assemble. *Brown v. Louisiana,* 383 U.S. 131 (1966).

It is also well-established that the First Amendment protects "symbolic speech," in which one communicates a message through non-verbal actions. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the burning of a flag at a political rally was clearly intended to convey a message, given the context, and was thus protected "speech."). In *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003), cited by both sides, the 9th Circuit made clear that carrying a firearm

can in fact be protected symbolic speech if meant to convey a message and if that message is likely to be received by the intended audience. In fact, the court in *Nordyke* stated that "[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. As the district court noted, a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally. Flag waving and flag burning are both protected expressive conduct." *Id.* at 1190 (emphasis added). The Plaintiff in *Nordyke* lost only because the case involved whether holding a gun show was protected "commercial speech," and the court ultimately found that display of guns as a mere business transaction is not a sufficient "message" so as to be protected. If peaceful display of a firearm at a political rally involving gun rights, at the doorstep of lawmakers, isn't protected, then nothing is.

The EO is nothing more than an unjustified prior restraint on the First Amendment rights of rallygoers. Prior restraints bear "a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). Prior restraints upend core First Amendment principles because "a free society prefers to punish the few who abuse rights of speech after they break the law [rather] than to throttle them and all others beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The rights of the vast majority of VCDL Lobby Day participants, who intend to rally peacefully, cannot be enjoined by bare fears about a small number of potential wrongdoers.

CONCLUSION

Even with the collective heads of dozens of Respondent attorneys, the issuance of EO 49, argument to the circuit court, and now an overnight brief to this Court, the Respondents have

been entirely unable to come up with any source of authority for the Governor's banning of firearms in Capitol Square during Lobby Day this coming Monday, January 20. On the other hand, Petitioners, armed with far fewer resources, have explained that no such authority exists and, even worse, that state law expressly forbids the Governor from taking the action that he has. The circuit court below overlooked all of that, choosing instead to rely on vague platitudes about how courts must defer to the Governor whenever he makes vague assertions that his actions are necessary to preserve "public safety."

Our founding fathers would not have been pleased. They recognized that the protection of constitutional rights always carries with it some amount of inherent risk, but, as the Second Amendment states, is essential to preserve "a free state." The First Amendment can be dangerous, in that people could be incited to violence and rioting, as happened in Charlottesville. The Fourth Amendment could be dangerous, in that law enforcement may not always be able to uncover every load of drugs, every dangerous weapon, or every stash of child porn. However, they also recognized that the alternative — a government unchecked by the people — was far more dangerous. As Thomas Jefferson wrote to James Madison, "*Malo periculosam, libertatem quam quietam servitutem.*"

The argument made by the Governor is not unlike the argument flatly rejected by the U.S. Supreme Court in the Pentagon Papers case. *See New York Times Co.* v. *United States*, 403 U.S. 713 (1971). There, the government sought to enjoin the publication of classified information about the origin of the Vietnam War based on its fear that national security would be impaired. Concurring, Justices Black and Douglas were astonished that other justices "are apparently willing to hold that publication of the news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment." *Id.* at 715. They explained that the

government was asking the Court to stop publication "despite the First Amendment's emphatic command....' *Id.* at 718. Here, the First and Second Amendments are given no better treatment by the Governor's Executive Order.

Making matters even worse, it seems abundantly clear that the Governor's action was not taken to protect public safety — quite to the contrary. As explained above, the Respondents have been unable to point to any credible threat of anything — aside from tens of thousands of displeased Virginians descending on the Capitol to lobby their representatives not to further destroy the right to keep and bear arms. Rather, the Governor's disturbing actions perpetuate a series of events in which the newly-minted ruling class in Richmond has expressed unwillingness to listen to anything that Virginians have to say, determined to plod ahead unimpeded by their constituents. The Governor's ban on firearms, then, is not an attempt to keep the peace, but an attempt to irritate and incite, to create further unrest and problems on Lobby Day.

Regardless of the Governor's EO and, even regardless of this Court's opinion, certain things remain true. On Monday, tens of thousands of people will descend upon the Capitol. And many if not most of them will be armed. The Governor's EO will not stop that from happening. The only question to be decided is whether these demonstrators will be welcome on Capitol grounds, free to express their views through reasoned discussion and debate and through the symbolic speech of bearing arms, or whether they will be forced back onto the streets of Richmond, unwelcome, and unable to assemble and collectively petition the government on Capitol Grounds.

Respectfully Submitted,

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CERTIFICATE

The undersigned certifies that on January 17, 2020, a true and accurate copy of the foregoing Reply Brief was served upon the following by e-mail, thereby giving notice of the same:

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