VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

PETER ELHERT

and

RAUL WILSON

and

WYATT LOWMAN

and

VIRGINIA CITIZENS DEFENSE LEAGUE

and

GUN OWNERS OF AMERICA, INC.

and

GUN OWNERS FOUNDATION

Plaintiffs,

v. **Case No.**

COLONEL GARY T. SETTLE
(In his Official Capacity as
Superintendent of the Virginia State Police)
7700 Midlothian Turnpike
North Chesterfield, Virginia 23235

Defendant.

COMPLAINT FOR DECLARATORY RELIEF,
APPLICATION FOR TEMPORARY AND PERMANENT
INJUNCTIVE RELIEF, AND PETITION FOR WRIT OF MANDAMUS

COME NOW Plaintiffs, by counsel, and move this Court for: (1) declaratory relief in the form of a finding that Va. Code § 18.2-308.2:5 (effective July 1, 2020) is unconstitutional under

Article I, Section 13 and Article IV, Section 12 of the Constitution of Virginia; (2) issuance of a temporary injunction enjoining the enforcement of Va. Code § 18.2-308.2:5 until such time as this case is fully adjudicated; (3) issuance of a permanent injunction which enjoins the administration, enforcement, and imposition of the requirements of Va. Code § 18.2-308.2:5; (4) a writ of mandamus to enjoin enforcement of Va. Code § 18.2-308.2:5 as well as to notify the public of the injunction; and (5) such other and further relief as the Court may deem appropriate, and in support thereof state as follows.

BACKGROUND AND PRELIMINARY STATEMENT OF CASE

Enactment of Va. Code § 18.2-302.2:5

1. On April 10, 2020, Governor Northam signed into law Senate Bill 70/House Bill 2, which is scheduled to take effect on July 1, 2020, entitled "An Act ... to amend the Code of Virginia by adding a section numbered 18.2-308.2:5, relating to firearm sales; criminal history record information check; penalty" ("Act") (Virginia Acts of Assembly, Chapter 1112, 2020 Sess.). The Act in final form was passed by the House on March 5, 2020 (54Y-46N) with the Senate voting to accept this version in its Conference Report that was agreed to on March 7, 2020 (23Y-17N). A copy of the Act as enacted is attached as Exhibit A. The Act amended existing Virginia Code by adding § 18.2-308.2:5, which unconstitutionally requires a background check for any firearm sale, even between private parties.

2. The Act is often described as imposing a Universal Background Check ("UBC") requirement on Virginians seeking to purchase or sell a firearm.

3. The Act makes changes to several sections of Virginia's laws regulating sale of firearms and related background checks, adding a new Section 18.2-308.2:5 to the Code, as follows:

> ***§ 18.2-308.2:5. Criminal history record information check required to sell firearm; penalty.***
>
> *A. No person shall **sell a firearm** for money, goods, services or anything else of value unless he has obtained verification from a **licensed dealer in firearms** that information on the prospective purchaser has been submitted for a criminal history record information check as set out in § 18.2-308.2:2 and that a determination has been received from the Department of State Police that the prospective purchaser is not prohibited under state or federal law from possessing a firearm or such sale is specifically exempted by state or federal law. The Department of State Police shall provide a means by which sellers may obtain from **designated licensed dealers** the approval or denial of firearm transfer requests, based on criminal history record information checks. The processes established shall conform to the provisions of § 18.2-308.2:2, and the definitions and provisions of § 18.2-308.2:2 regarding criminal history record information checks shall apply to this section mutatis mutandis. The **designated dealer** shall collect and disseminate the **fees prescribed** in § 18.2-308.2:2 as required by that section. The dealer may charge and retain an **additional fee not to exceed $15** for obtaining a criminal history record information check on behalf of a seller.*
>
> *B. Notwithstanding the provisions of subsection A and unless otherwise prohibited by state or federal law, a person may sell a firearm to another person if:*
> *1. The sale of a firearm is to an authorized representative of the Commonwealth or any subdivision thereof as part of an authorized voluntary gun buy-back or give-back program; or*
> *2. The sale occurs at a firearms show, as defined in § 54.1-4200, and the seller has received a determination from the Department of State Police that the purchaser is not prohibited under state or federal law from possessing a firearm in accordance with § 54.1-4201.2.*
>
> *C. Any person who willfully and intentionally sells a firearm to another person without obtaining verification in accordance with this section is guilty of a Class 1 misdemeanor.*
>
> *D. Any person who willfully and intentionally purchases a firearm from another person without obtaining verification in accordance with this section is guilty of a Class 1 misdemeanor.* (Emphasis added.)

4. In sum, under the UBC provision, no individual in Virginia may sell a firearm to any other individual without first obtaining a background check from a federal firearms licensee

("FFL") on the prospective transferee, which results in a determination that the transferee "is not prohibited under state or federal law from possessing a firearm." Va. Code § 18.2-308.2:5(A). The statute requires the 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.

5. The statute requires that dealers who facilitate private transfers collect on behalf of the VSP a fee for running the background check under § 18.2-308.2:2 ($2 for in-state and $5 for out-of-state). Finally, the statute permits dealers to charge and retain up to $15 as an additional fee for their services in facilitating the private transfer. *See* § 18.2-308.2:5(A).

6. 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 firearms show where the VSP has conducted a so-called "voluntary background check" ("VBC") pursuant to § 54.1-4201.2. *See* § 18.2-308.2:5(B).

7. 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).

PARTIES

8. Raul Wilson is a United States citizen and resident of Campbell County, Virginia. Mr. Wilson is a law-abiding person and has no disqualification that would prevent him from acquiring and possessing firearms.

9. Peter Ehlert is a United States citizen and resident of Lynchburg, Virginia. Mr. Ehlert is a law-abiding person and has no disqualification that would prevent him from purchasing and possessing arms.

10. Wyatt Lowman is a United States citizen and resident of Lynchburg, Virginia. Mr. Lowman is a law-abiding person and is 18 years old. Aside from the challenged statute, Mr. Lowman is eligible to possess firearms, including obtaining a handgun through a private, non-dealer sale.

11. Plaintiff Virginia Citizens Defense League ("VCDL") is a Virginia non-stock corporation, with its principal place of business in Newington, Virginia. VCDL is organized and operated as a nonprofit organization that is exempt from federal income taxes under Section 501(c)(4) of the U.S. Internal Revenue Code ("IRC"). VCDL has tens of thousands of members, and operates as a nonprofit, nonpartisan, grassroots organization dedicated to advancing the fundamental human right of all Virginians to keep and bear arms, including as enumerated by Article I, Section 13 of the Constitution of the Commonwealth of Virginia.

12. Plaintiff Gun Owners of America, Inc. ("GOA") is a California non-stock corporation with its principal place of business in Virginia, at 8001 Forbes Place, Suite 202, Springfield, VA 22151. GOA has over 2 million members and supporters, including tens of thousands in Virginia, and operates as a nonprofit organization exempt from federal income taxes under Section 501(c)(4) of the IRC. GOA's mission is to preserve and defend the inherent rights of gun owners.

13. Plaintiff Gun Owners Foundation ("GOF") is a Virginia non-stock corporation with its principal place of business in Virginia, at 8001 Forbes Place, Suite 202, Springfield, VA 22151. GOF is organized and operated as a nonprofit legal defense and educational foundation that is exempt from federal income taxes under § 501(c)(3) of the IRC. GOF is supported by gun owners across the country, including Virginia residents.

14. Defendant Colonel Gary T. Settle is the Superintendent of the Virginia Department of State Police, which is the agency primarily responsible for administering and enforcing the statutes with respect to which this Complaint seeks declaratory, injunctive, and mandamus relief.

JURISDICTION AND VENUE

15. This Court has jurisdiction to grant the relief sought pursuant to Va. Code § 8.01-184, § 8.01-620, and § 8.01-645.

16. Venue is proper and preferred in this Court pursuant to Va. Code § 8.01-261(15)(c), § 8.01-261(1)(a), and § 8.01-261(5), and is otherwise proper.

OPERATIVE FACTS

17. Plaintiff Wilson is a Virginia gun owner and a member of GOA and VCDL. Plaintiff Wilson wishes to sell various firearms from his collection, through private sales, including to Plaintiffs Ehlert and Lowman, on a date after July 1, 2020, in the City of Lynchburg, Virginia.

18. Plaintiff Ehlert is a member of GOA and VCDL. Plaintiff Ehlert wishes to purchase a firearm from Plaintiff Wilson through a private sale, on a date after July 1, 2020, in the City of Lynchburg, Virginia.

19. Plaintiff Lowman is 18 years old, and wishes to purchase a handgun from Plaintiff Wilson through a private sale, on a date after July 1, 2020, in the City of Lynchburg, Virginia.

20. However, Plaintiffs Wilson, Ehlert, and Lowman are prohibited from engaging in these private firearms transactions under the provisions of the challenged statute unless they pay an FFL to conduct state and federal background checks on both Plaintiffs Ehlert and Lowman. Neither Plaintiff Ehlert nor Plaintiff Lowman wishes to submit to such a background check for these private, intrastate sales, which are perfectly lawful under federal law. Moreover, neither

Plaintiff Wilson nor Plaintiff Elhert nor Plaintiff Lowman wishes to incur an additional minimum $17 in VSP and dealer fees for each of the transfers to occur, *even if* they were able to find a dealer willing to facilitate the transfer for the statutory maximum of $15.

21. Unless the challenged statute is enjoined, Plaintiffs Wilson, Ehlert, and Lowman, and other identically and similarly situated individuals throughout the Commonwealth, will be irreparably harmed. Plaintiffs Ehlert and Lowman will be denied the right to obtain firearms to keep and bear for self-defense and other lawful purposes as protected by Article I, Section 13, without unconstitutional government interference, while Plaintiff Wilson will be denied the constitutional right to sell firearms from his collection to Plaintiffs Ehlert and Lowman, without unconstitutional government interference, as protected by Article I, Section 13. But for the challenged statute, Plaintiffs Wilson, Ehlert, and Lowman wish to engage in a voluntary and otherwise lawful transaction for the sale of a firearm, but are prohibited from doing so by the challenged statute unless they first submit to government preclearance.

22. Countless other Virginians like these Plaintiffs, many of whom comprise the members and supporters of the associational Plaintiffs, will find themselves in the same situation beginning on July 1, 2020. The individual Plaintiffs, along with the associational Plaintiffs, their members, and supporters, will be irreparably harmed if the statute is permitted to take effect on July 1, 2020.

23. Because the statute being challenged will become effective in days, the threat of harm to Plaintiffs is imminent, and Plaintiffs possess no adequate remedy to compensate for their injuries.

24. The balance of the equities weighs in Plaintiffs' favor. Plaintiffs' state constitutional rights will be violated in real and concrete ways on the effective date of the statute, while the

only stated basis for the statute is to prevent the theoretical transfer to a prohibited person. As noted above, neither Plaintiff Wilson nor Plaintiff Ehlert nor Plaintiff Lowman is a prohibited person, and transfer to a prohibited person is already illegal and punished severely under both state and federal law. Moreover, there is no credible proof that the problem even exists, or that so-called universal background checks will have any effect in alleviating it.

25. The public interest supports the granting of an injunction, because it is always in the public interest that the government be prevented from infringing enumerated constitutional rights.

ARGUMENT

I. VA. CODE § 18.2-308.2:5 VIOLATES ARTICLE I, SECTION 13 OF THE VIRGINIA CONSTITUTION.

26. The challenged statute significantly restricts the exercise of, and therefore infringes, the pre-existing right recognized and protected by Article I, Section 13 of the Virginia Constitution, which states, in pertinent part:

> [t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed....[1]

27. The 1969 Virginia Commission on Constitutional Revision[2] stated:

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[1] The first clause of Article I, Section 13 is original to the 1776 Virginia Declaration of Rights, while the second clause was added in 1971, adopting language drawn directly from the Second Amendment of the United States Constitution, which had been ratified by the States 180 years earlier.

[2] The Virginia General Assembly passed a joint resolution in 1968 which created a Commission to study and recommend changes to the Virginia Constitution in the wake of the Civil Rights movement. The recommendations led to the overwhelming passage of numerous modifications to the Virginia Constitution, including the explicit language added to Article I, Section 13.

> [t]hat most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is ... no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people's liberties, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts.

[*Report of the Commission on Constitutional Revision*, p. 86 (1969). *See also Richmond Newspapers, Inc. v. Com.*, 222 Va. 574, 281 S.E.2d 915 (1981).]

A. Article I, Section 13 Protects the Same Rights as the Second Amendment, but Virginia Courts Have Always Taken a Different Approach to Interpret the Right to Keep and Bear Arms.

28. Although the prefatory clauses of the federal and Virginia constitutional provisions differ somewhat, these two protections of the right to keep and bear arms generally have been viewed as having the same scope and meaning.[3] A January 13, 1993 Virginia Attorney General legal opinion concluded that it is "clear that the 'right to bear arms' language of Article I, § 13 ... tracks the Second Amendment ... and ... judicial interpretation of the Second Amendment thus applies equally to Article I, § 13."[4]

29. Likewise, the Supreme Court of Virginia has more recently noted that "provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning," and concluded that the state provision "is coextensive with the rights provided by the Second Amendment ... concerning all issues in the instant case."

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[3] Of course, that does not mean that Virginia courts must agree with federal courts about what that scope and meaning is in every application.

[4] Opinion of Va. Atty. Gen. (Jan. 13, 1993) https://www.oag.state.va.us/files/AnnualReports/Vols1980-81to2000/1993_Annual_Report.pdf at 16.

Digiacinto v. Rector & Visitors of George Mason Univ., 281 Va. 127, 134, 704 S.E.2d 365, 369 (2011).

30. Due to the similarity of the federal and state provisions and the decisions of Virginia courts generally interpreting them coextensively, this Complaint addresses authorities under the Second Amendment, although – for avoidance of confusion – it seeks relief *solely* for a violation of Article I, Section 13 of the Constitution of Virginia. Certainly, the rights of Virginians under its State Constitution can be no less expansive than under the Second Amendment to the United States Constitution. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010).

31. Aside from *Digiacinto* and a few cases discussed below, Virginia courts have not had occasion to expound on the meaning of either state or federal constitutional protections for the right to keep and bear arms, largely due to the Commonwealth's historically strong protection for these rights. As one commentator put it, "[w]here a constitutional right is respected by the legislature, it would seem to be a virtue that few judicial decisions are necessary."[5]

32. In contrast to the lack of Virginia court cases interpreting the right to keep and bear arms, there have been many Second Amendment challenges to state and federal laws elsewhere around the nation affecting access to firearms. The U.S. Court of Appeals for the Fourth Circuit has decided several firearms cases, primarily originating in Maryland, whose state constitution contains no protection of the right to keep and bear arms, and where repeated severe infringements on the right to keep and bear arms have been enacted by its legislature. As far back as *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974), the Fourth Circuit concluded that

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[5] S. Halbrook, "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, Issue 3 at 646 (Oct. 2014).

"the Second Amendment only confers a collective right...." *Id.* at 550. *See also Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995) (reaffirming the court's "collective right" holding and claiming that "[t]he Second Amendment does not apply to the states.").[6] Of course, the Fourth Circuit was not alone in its misestimation of Second Amendment rights, as every federal court (except one[7]) to consider the issue prior to *District of Columbia v. Heller*, 554 U.S. 570 (2008) arrived at that same erroneous conclusion.[8]

33. During the same period that the federal courts were narrowing the scope of the Second Amendment to protect nothing more than a state government's inherent power to raise a military force, Virginia was on a very different track. For example, in 1964, the General Assembly passed a resolution recognizing "the right of the citizen" and "the individual's right to bear arms but [also] his duty to bear arms," noting that the protection of all other freedoms "has been allied with the right to bear arms or the deprivation of such rights," and resolving that this "inalienable part of our citizens' heritage" should be protected against any "power which would prohibit the purchase or possession of firearms...." Journal of the Senate (Va.) 250-51, 472 (1964). Similarly, in 1970, when debating whether to send the 1971 constitutional revision to Article I,

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[6] In *Heller*, the Court soundly refuted the collective rights theory – it was not even a close call – almost every federal court got it wrong. *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008).

[7] *See United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

[8] *See, e.g.*, *Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988); *United States v. Bayles*, 310 F.3d 1302, 1307 (10th Cir. 2002); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997).

Section 13 to the voters, both branches of the General Assembly again made clear that the right to keep and bear arms is one "guaranteed to the citizens."[9]

34. Consistent with the General Assembly's clear understanding of the Article I, Section 13 right to keep and bear arms as an individual right, Plaintiffs have been unable to identify any Virginia court decision that expressly adopted the "collective right" doctrine ultimately rejected in *Heller*. Indeed, if there is any difference to be found between Article I, Section 13 and the Second Amendment, it is that the Virginia provision is even more clear in its protection of an **individual** right of **citizens**, stating unambiguously that the militia is "composed of the body of the people, trained to arms...." In short, even before *Heller*, the Commonwealth had soundly rejected the federal courts' now-defunct collective rights view of the right to keep and bear arms.

35. Similarly, Virginia courts have not adopted, and indeed have expressly declined to adopt, the watered down "two-step" test adopted by some federal courts in the wake of *Heller* and *McDonald v. City of Chicago*, *supra*. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017). Nor have Virginia courts applied what Justice Scalia (and the *Heller* majority which joined his opinion) rejected as "judge-empowering" interest-balancing tests (*Heller* at 634) – particularly the "intermediate scrutiny test" that many judges have used to justify infringements of firearms rights (the position urged in the *Heller* dissent by Justice Breyer). *See Heller* at 689 (Breyer, J., dissenting).[10]

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[9] *See* Proceedings and Debates of the Senate of Virginia Pertaining to the Amendment of the Constitution, Extra Session 1969/1970, 391 (1970); House at 775 (Statement of Del. Slaughter); Senate at note 10 at 392 (Statement of Sen. Barnes & Sen. Bateman).

[10] Together, adoption of the atextual two-step test and "intermediate scrutiny" balancing have done great damage to a proper understanding of the right to keep and bear arms by enabling many judges to substitute their judgment for the judgment of those who wrote and ratified the

36. Resisting the interest-balancing trend in certain federal courts, in 2011, the Supreme Court of Virginia used a type of categorical approach to decide that George Mason University's firearms ban "inside campus buildings and at campus events" was constitutional because "GMU is a sensitive place" as referenced in *Heller*. *Digiacinto* at 136. The court also noted that "a university traditionally has not been open to the general public, 'but instead is ... devoted to its mission of public education.'" *Id.* Rather than balancing the individual's need for firearms against the university's need to restrict them, the Supreme Court instead held that the carrying of firearms in certain narrow categories of places is outside the scope of the right to keep and bear arms based on text, history, and tradition – consistent with the U.S. Supreme Court's analytical approach in *Heller*.

37. Likewise, in 2016, the Court of Appeals of Virginia explicitly declined to adopt the "two-step" test, or apply a balancing test using a "standard of scrutiny," in spite of the fact that the Fourth Circuit has applied such tests. Rather, the court determined that the temporary ban on firearm possession by a juvenile felon was "so closely analogous to the presumptively valid ban on possession of firearms by felons" that the activity was categorically outside the scope of Second Amendment protection. *Prekker v. Commonwealth*, 66 Va. App. 103, 116-17 (Ct. App. Va. 2016). Once again, the Virginia appellate court looked to the text, history, and tradition of the right to keep and bear arms as described in *Heller* rather than to any judicially created "balancing test." *See also Lynchburg Range & Training v. Northam*, 2020 Va. Cir. LEXIS 57, *9 (Lynchburg Cir. Ct. 2020) ("The Court declines to invent a level of scrutiny to circumvent the text in the statute.").

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constitutional text and by deciding cases upholding all but the most extreme gun control legislation.

38. Even in the federal courts, the tide is turning against the "two-step" test and the application of "intermediate scrutiny" in the Second Amendment context in the federal courts. Several Supreme Court justices have rejected those judicial machinations.[11] Criticism of judicial balancing has come from the lower federal courts as well.[12] Despite Defendant's expected

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[11] *See Jackson v. City & Cnty. of San Francisco*, 135 S.Ct. 2799 at 2799-2800, 2801-02 (2015) (Thomas, J., dissenting from denial of certiorari) (explaining that "Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document," noting that "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts ... have failed to protect it," and making clear that "courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights."); *Friedman v. City of Highland Park*, 136 S.Ct. 447, 448 (2015) (Thomas, J. and Scalia, J., dissenting from denial of certiorari) (criticizing the lower court's grabbed reading of *Heller*, which left the Circuit free to adopt a test for assessing firearm bans that eviscerates many of the protections recognized in *Heller* and *McDonald.*); *Peruta v. California*, 137 S.Ct. 1995, 1996-97 (2017) (Thomas, J. and Gorsuch, J., dissenting from denial of certiorari); *Silvester v. Becerra*, 138 S.Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari) (noting "the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights."); *Rogers v. Grewal*, No. 18-824, 590 U.S. ___ (2020) (Thomas, J. and Kavanaugh, J., dissenting from denial of certiorari) ("the courts of appeals' test appears to be entirely made up. The Second Amendment provides no hierarchy of 'core' and peripheral rights. And '[t]he Constitution does not prescribe tiers of scrutiny.'").

[12] In the year after *McDonald*, the D.C. Circuit upheld D.C.'s modified gun regulation scheme, but then-Judge (now Justice) Kavanaugh dissented and would have held that *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny. *Heller v. District of Columbia,* 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*") at 1271 (Kavanaugh, J., dissenting). *See also Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., ruminating) (encouraging equal treatment of the Second Amendment among the Bill of Rights: "The time has come to treat the Second Amendment as a real constitutional right. It's here to stay."); *see also Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), opinion withdrawn and superseded on reh'g, 682 F.3d 361 (5th Cir. 2012) (*per curiam*); *NRA v. BATFE*, 714 F.3d 334 (5th Cir. 2013) (six judges dissenting from a denial of rehearing *en banc*); *see also Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting with six other judges) ("Simply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history – as required under *Heller* and *McDonald* – rather than a balancing test like strict or intermediate scrutiny."

invitation to do so, there is simply no reason for a Virginia Court to adopt the interest balancing used by some federal courts when interpreting the U.S. Constitution, to interpret Article I, Section 13 of the Virginia Constitution.

39. Other than to facilitate the circumvention of the plain language of the text, there is simply no reason to conduct an interest balancing inquiry into the Article I, Section 13 right to keep and bear arms. Like the Supreme Court noted of the Second Amendment in *Heller*, Article I, Section 13 "is the very *product* of an interest balancing by the people." *See id.* at 635. Unlike the Second Amendment, however, which was ratified in 1791, the people's balancing for Article I, Section 13 reoccurred as recently as 1971.

B. The Act Infringes the Right of the People to Keep and Bear Arms Under Article I, Section 13.

40. For the reasons set forth *supra*, Plaintiffs urge this Court to decline any invitation from the Commonwealth to follow the interest balancing approach, which has undermined the clear meaning of the right to keep and bear arms and the Commonwealth's expected invitation to the Court to use "intermediate scrutiny" to perform a "two-step" sidestep around the unambiguous text and meaning of Article I, Section 13. Rather, the Court is urged to analyze the meaning of the Virginia constitutional right to keep and bear arms according to the same approach followed in *Heller* – "text and history." *Heller* at 595. *See Lynchburg Range & Training, LLC v. Northam* at *10 ("courts must apply the meaning of the text at the time it was adopted because failing to exercise this duty would render worthless the rights contained in the text.").

41. The text of Article I, Section 13 does not employ terms such as "fundamental" or "core" rights, or look to the "severity" of infringements on those rights, requiring varying levels of balancing tests based on "the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *See United States v. Chester*, 628 F.3d 673, 682 (4th Cir.

2010). It does not authorize courts to give lesser protection to rights that judges might not deem to be "fundamental." Rather, Article I, Section 13 establishes a very different bright line standard – "shall not be infringed." That language was selected by the 1968 Commission and overwhelmingly ratified by the people of Virginia in 1971. It is simple and clear, limiting the power of government over the people and providing no credible way for legislators, lawyers, and judges to fashion ways to disregard its protections. According to the text, *any* infringement of this constitutionally protected right is too much.

42. Applying this simple, textual, straightforward test in this case, the individual Plaintiffs, along with the tens of thousands of members and supporters represented by the associational Plaintiffs, are clearly part of "the People" protected by Article I, Section 13. Plaintiffs Wilson, Ehlert, and Lowman are U.S. citizens, residents of Virginia, and law-abiding adults, part of "'a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community'" (*Heller* at 580), with no disqualification under federal or state law from acquiring and possessing firearms.

43. Next, the handguns that Plaintiffs Ehlert and Lowman wish to purchase and Plaintiff Wilson wishes to sell are indisputably protected "arms." Indeed, the handgun Plaintiff Wilson wishes to sell to Plaintiff Lowman constitutes, according to the U.S. Supreme Court, "the quintessential self-defense weapon," being "the most popular weapon chosen by Americans for self-defense in the home."[13] *Heller* at 629.

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[13] It should go without saying, but Article I, Section 13 protects modern handguns such as those Plaintiff A wishes to purchase. The Court of Appeals of Virginia "rejected" the idea of "limiting the right to keep and bear arms only to muskets because more modern firearms came to be at a later point in time." *Prekker* at 121 n.12 (*citing Heller* at 582) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.... the

44. Finally, in order to engage in the protected activities of "keeping" and "bearing" firearms, weapons first must be acquired. It is beyond serious debate that Article I, Section 13 thus protects the corresponding right to purchase firearms, just as the freedoms of speech and press protect the right to purchase books, paper, and ink. And it wouldn't mean much if there was a right to purchase a firearm, but no right to sell one. Multiple courts have held as much, such as the Seventh Circuit which opined that "[t]he right to possess firearms for protection implies a **corresponding right to acquire** and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Lynchburg Range & Training, LLC v. Northam* at *7 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)) (emphasis added).[14] *See also Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("Thus 'the right to possess firearms for protection implies a **corresponding right' to obtain** the bullets necessary to use them.") (emphasis added). The right of Plaintiffs Wilson, Ehlert, and Lowman to engage in the proposed transactions falls squarely within the right to keep and bear arms.

45. Article I, Section 13 categorically and unequivocally protects certain persons ("the People") engaged in certain activities ("keep" and "bear") with respect to certain weapons ("arms"). All three criteria are met here. Because § 18.2-308.2:5 attempts to place impediments

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Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

[14] *Cf.* the Fourth Circuit's unpublished opinion in *United States v. Chafin*, 423 Fed. Appx. 342, 344 (4th Cir. 2011) ("Chafin has not pointed this court to any authority, and we have found none, that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to sell a firearm. Indeed, although the Second Amendment protects an individual's **right to bear arms**, it does **not** necessarily give rise to a corresponding right to sell a firearm."). (Bold added, underlining original.)

to Virginians' right to purchase handguns that may be lawfully possessed, this leads to one inescapable conclusion — the statute is unconstitutional on its face.

46. Indeed, the restriction that would be imposed by § 18.2-308.2:5 is not just any type of infringement of a right that "shall not be infringed," but it is also a grossly overreaching infringement on the right of Virginians to keep and bear arms. In effect, it tells law-abiding Virginians that they cannot exercise their right to keep and bear arms until both the Commonwealth of Virginia and the federal government first have actively interceded and decided that it is permissible for them to do so. Meanwhile, existing federal and state statutes requiring background checks for firearm transfers (18 U.S.C. Section 922(t), Va. Code § 18.2-308.2:2) apply only to transfers by licensed dealers and do not apply to private sales. Of course, intrastate private sales are still subject to both federal and state prohibitions on the transfer of a firearm to a prohibited person, which apply to all firearm transfers nationwide. 18 U.S.C. Section 922(d); Va Code § 18.2-308.2:1.

47. In essence, the Act *presumes* that *any and every* person who wishes to obtain a firearm could be a prohibited person. The statute then places the onus on such a person to prove to the Commonwealth's satisfaction that he is *not* a prohibited person by requiring him to complete a burdensome background check through an FFL, and to pay a fee for the privilege of doing so if he can even find an FFL willing to accept the statutory limit of $15. Such requirements to demonstrate one's purity before being permitted to keep and bear arms shifts the burden from the government to charge a person with a crime and thereafter prove to a jury that person is **ineligible**, to the gun owner to prove to the government that he is **eligible**. This prior restraint turns the very concept of any "right" on its head, especially a right that this Court has recognized as "the 'true palladium of liberty'...." *Lynchburg Range v. Northam* at *13.

48. The peril of the Act's infringement on the right to keep and bear arms is further illustrated by the way in which the FBI's NICS background check system works.[15] As the FBI points out, the NICS system quickly approves proposed transferees and authorizes firearm transfers – *most of the time*.[16] Of course, when it comes to the number of "instant" background checks that are not, in fact, instant, a small percentage of a large number is itself a large number. In the past 12 months, the FBI reports that it has run 32.1 million NICS checks, and a total of more than 348 million NICS checks since the system began in November of 1998.[17] At a reported 10 percent "delayed" rate, a total of 32.1 million NICS checks in the past year means roughly 3 million "delayed" results from the FBI (more than the population of Mississippi). And it would appear that about 90 percent of these "delayed" results are eventually determined to be false positives,[18] because GAO estimates that only about 1 percent of total NICS checks[19] result in denials to what the FBI *believes to be*[20] a prohibited person.

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[15] Virginia has operated its state-level background check for purchases from licensed dealers since 1989. *See* Va. Code § 18.2-308:2.2, first enacted by the Acts of the General Assembly, 1989, c. 745. The Virginia State Police operate this system and act as a "portal" to the NICS system to also conduct the federally required NICS background check. Thus, it is possible that even more, or more frequent, delays could occur as a result of the Virginia dealer-level background check, in addition to those visited upon purchasers by the federal NICS system.

[16] *See* https://www.fbi.gov/news/testimony/national-instant-criminal-background-check-system-nics ("Over 70 percent of NICS transactions handled by the FBI result in no descriptive matches or hits to the potential transferee against information contained in the three national databases," and NICS has "an '**immediate determination' rate of over 90 percent** to the firearms dealer.") (emphasis added).

[17] https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf.

[18] In reality, the FBI does not actually bother to investigate and clear all "delayed" NICS results. It is reported that "[t]he FBI never completes hundreds of thousands of gun background checks each year...." https://www.rollcall.com/2019/12/03/fbi-never-completes-hundreds-of-thousands-of-gun-checks/.

[19] https://www.gao.gov/assets/700/694290.pdf, page 1.

49. In other words, allegedly in order to keep the guns out of the hands of a tiny number of prohibited persons, the background check system (that the Act now mandates for all Virginia private sales after July 1, 2020) infringes the right to keep and bear arms of everyone. To be sure, for about 90 percent of transferees, the infringement only lasts a few minutes, while for another 9 percent, the infringement can last up to three days, at which point the FFL is given the *option* (but is not required) to transfer the firearm. *See* 18 U.S.C. § 922(t)(B)(ii).[21] This is contrary to the "'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, 82 (1984).

50. The statute is no less an infringement on the right to keep and bear arms than requiring prior government approval for the purchase of a Bible would be an infringement on the rights of Virginians under Article I, Section 12 of the Virginia Constitution (analogous to the First Amendment to the U.S. Constitution). Indeed, the statute's restriction is jurisprudentially indistinguishable from requiring government preclearance before the exercise of any other enumerated right, a prohibited prior restraint.

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[20] Even among "denied" NICS checks, a large percentage are based on inaccurate records or improper legal determinations as to what constitutes a prohibiting factor (such as a misdemeanor crime of domestic violence). In such a case of an erroneous denial, the burden then falls upon the person wrongly denied to file a NICS Appeal and prove to the FBI or referring state or local agency that he is not, in fact, a prohibited person. If the FBI still improperly refuses to correct the record, the person must then hire an attorney to sue under 18 U.S.C. § 925A. *See, e.g., John Paul Bickett v. United States of America*; 1:17-cv-01276-CRC (D.D.C. 2017).

[21] Many FFLs refuse to transfer firearms even after the Brady Act's three-business-day period, since the practice is looked on negatively by regulators within the ATF. *See* https://www.usatoday.com/story/news/politics/2020/05/06/gun-dealers-urged-defer-fbi-gun-sales-soar-amid-coronavirus/3084281001/.

51. The statute at issue seeks to impose an infringement on the rights of Virginia citizens under Article I, Section 13 of the Virginia Constitution by enjoining them from purchasing any firearm until they receive affirmative permission from both the federal and state governments.

C. The Act Violates Article I, Section 13, As it Raises the Age to Purchase a Handgun from 18 to 21.

52. Under federal and Virginia law, it is generally "unlawful for any person under 18 years of age to knowingly and intentionally possess or transport a handgun...." Va. Code § 18.2-308.7; 18 U.S.C. § 922(x). Under federal law, however, it is unlawful for an FFL to transfer a handgun to anyone under 21 years of age. 18 U.S.C. § 922(b)(1). Prior to the Act, this created a situation wherein a person between the ages of 18 and 21 could purchase a handgun through a private sale from another Virginia resident, but not from a dealer.

53. However, the Act now requires that all private sales be run through FFLs, who under federal law cannot transfer firearms to those under 21. In other words, the General Assembly and the Governor have surreptitiously raised the age to purchase a handgun in Virginia from 18 to 21.

54. Although reportedly initially denying that the Act would restrict the ability of those 18-20 to obtain handguns, VSP staff recently confirmed (June 16, 2020) via phone VSP's understanding that those 18-20 will no longer be able to purchase handguns in Virginia.

55. The ATF agrees. According to ATF, "Private party firearm transfers conducted ... underage persons (i.e., under 18 for all firearms, or 21 for firearms other than a shotgun or rifle),

must comply with ... age requirements under the Gun Control Act, 18 U.S.C. 921 et. seq."[22] ATF separately and again states that facilitating a private transfer is "**subject to the same rules and regulations as any other sale conducted by the FFL**."[23] Emphasis added.

56. Were there any remaining doubt, the FBI NICS process also confirms the reality that those 18-20 no longer will be able to purchase handguns in Virginia. When information is submitted to the FBI's NICS system in order to obtain a background check, both the buyer's age, and also the proposed type of firearm to be transferred, *i.e.*, "handgun," are required. Thus, the FBI NICS system would automatically reject a dealer transfer of a handgun to someone under 21. *See also* ATF Form 4473 (Instructions to Question 16).

57. This new restriction violates Article I, Section 13, which protects the rights of "the people," not just the people that the Commonwealth decides to trust with firearms. Those persons who are 18-20 years old clearly are adults and constitute members of the "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

58. Under Virginia law, 18 years old is the age of majority. Va. Code. § 1-204. Those 18-20 years old may serve on juries (§ 8.01-337), vote (Amendment XXVI), hold public office (§ 24.2-

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[22]"ATF Procedure 2017-1 - Facilitating Non-FFL Transfers of Firearms." https://www.atf.gov/firearms/docs/ruling/atf-procedure-2017-1-facilitating-non-ffl-transfers-firearms

[23]https://www.atf.gov/firearms/docs/ruling/atf-procedure-2017-1-facilitating-non-ffl-transfers-firearms/download (emphasis added)

500), and join the military (https://www.usa.gov/join-military), where they are entrusted with a whole host of deadly weapons.

59. Yet now, as a result of the Act, they are prohibited from acquiring handguns. This result is incompatible with the plain text of Article I, Section 13, which protects the right to keep and bear arms in order to preserve "a well regulated militia, composed of the body of the people, trained to arms." If there were any doubt that those persons 18-20 are part of "the body of the people," Virginia Code § 44-1 defines the militia to include "all able-bodied residents of the Commonwealth" between the ages of 16 and 55. *See Lynchburg Range & Training v. Northam* at *5 ("the prefatory clause provides that the purpose of the right is to have a population trained with firearms in order to defend the Commonwealth.").

60. That is hardly surprising, as this age bracket traces its roots to the Revolutionary War, where "[t]he official enlistment age for the Continental Army was 16, (15 with parental consent) but soldiers could sign on up to the age of 55."[24] On May 8, 1792, just a few months after the Second Amendment was ratified, the Second Militia Act, 1 *Stat.* 271, narrowing the historical age range slightly, providing that "every free able-bodied white male citizen … who is or shall be of age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia."

61. In other words, the text of Article I, Section 13 protects the rights of "the people," which history confirms include those 18-20 years old. In *Heller*, the Supreme Court confirmed this understanding, citing with approval an 1870 Georgia case that "'[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every

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[24] https://historyofmassachusetts.org/continental-soldiers-revolutionary-war/.

description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree.'" *Heller* at 612 (quoting with approval *Nunn v. Georgia*, 1 Ga. 243, 251 (1846)).

62. The Commonwealth is not now free to restrict the exercise of enumerated rights by this subset of adults, as "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller* at 634-35.

63. The Act's restriction on the ability of those 18-20 years old to acquire handguns thus violates the plain text of Article I, Section 13, which protects the rights of all "the people."

D. The Act Violates Article IV, Section 12 of the Virginia Constitution.

64. The Act's change to the law, *de facto* raising the age to obtain a handgun from 18 to 21, is surreptitious – discussed nowhere in the text of either Senate Bill 70 or House Bill 2. Nor is it referenced in the bills' titles, which state as follows:

> An Act to amend and reenact §§ 18.2-308.2, as it is currently effective and as it shall become effective, 18.2-308.2:2, 22.1-277.07, and 54.1-4201.2 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-308.2:5, **relating to firearm sales; criminal history record information check; penalty**. (Emphasis added.)

65. The Act surreptitiously changes Virginia law, adding a new and unenumerated section to the Virginia Code, making it unlawful for those aged 18-20 to obtain handguns, without any reference to that provision in the title.

66. Confirming the General Assembly's stealth approach to banning the purchase of handguns by those under 21, the legislature specifically considered during the same 2020 regular session, but *did not enact*, SB18, a bill that would have openly and transparently made such a change.

67. In fact, the provisions of SB18 would *both* have created the same universal background check as SB70/HB2, and *also* raised the age to purchase a firearm from 18 to 21, a change that was expressly identified in its title, as required by Article IV, Section 12:

> A BILL to amend and reenact §§ 18.2-56.2, 18.2-308.2:2, 18.2-308.7, and 54.1-4201.2 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-308.2:5, relating to firearms; **criminal history record information checks; <u>age requirement</u>; penalty**." (Emphasis added.)

68. When entitling SB18, its drafters understood it necessary to include "age requirement" when raising the age to purchase firearms from 18 to 21. Yet when entitling SB70/HB2 (now the Act), which also raises the age for handguns from 18 to 21, the drafters did not include "age requirement" in the title, apparently content to enact the same change to the law, but in a surreptitious manner, concealing from the public the full effect of the proposed statute.

69. Article IV, Section 12 of the Constitution of Virginia states, in pertinent part, that "[n]o law shall embrace more than one object, which shall be expressed in its title." The Supreme Court of Virginia has held that "the title of an act will be sufficient, within the meaning of the Constitution, if the things authorized to be done, though of a diverse nature, may be fairly regarded as in furtherance of the object expressed in the title. All that is required is that the subjects embraced in the statute, but not specified in the title, be congruous and have natural connection with or be germane to the subject expressed in the title. And the Constitution is to be liberally construed so as to uphold the law, if practicable." *Commonwealth ex rel. Richmond v. Chesapeake & O. R. Co.*, 118 Va. 261, 268 (1916).

70. As with *Richmond v. Chesapeake*, other of the Supreme Court's decisions typically deal with **general** titles, where the bill then delves into **specifics**. *See, e.g., Marshall v. N. Va. Transp. Auth.*, 275 Va. 419 (2008) (deciding that "relating to transportation" was broad enough

to include virtually any provision dealing with transportation). Here, however, the title of SB70/HB2 is **specific**, stating its precise changes to the Code – yet leaving off one very significant one. The title here specifically announces its creation of a background check, but does not inform its reader that it also is prohibiting 18-20 year old persons from purchasing handguns.

71. Even though, as the Supreme Court has determined, a bill with a general title can include a wide array of specific provisions, the opposite is not also true. The Act violates Article IV, Section 12 because it purports to be specific, yet does not inform the public as to *all* the specifics that the General Assembly was proposing to enact through the legislation, violating the integrity of the legislative process.

E. The Act Leads to Other Serious Problems.

1. Compliance with the Act's Requirement of FFL Participation Depends on the Decision of a Private Party.

72. With certain limited exceptions, §18.2-308.2:5 makes unlawful the transfer of a firearm between private individuals unless and until an FFL has completed a NICS background check run through the VSP, which acts as "point of contact"[25] for the FBI NICS system. That background check, in turn, must comply with §18.2-308.2:2, which includes the VSP contacting the NICS system.

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[25] https://www.fbi.gov/file-repository/nics-participation-map.pdf.

In order to fulfill the federal and Virginia dual background check requirements, Virginia acts as a "point of contact" state, whereby the VSP acts as an intermediary between the dealer and the NICS system. At the point of sale, a dealer will enter a prospective transferee's information and contact the VSP Firearms Transaction Center ("FTC") to obtain a background check. The VSP's FTC will then query both state records at Central Criminal Records Exchange ("CCRE") databases within the Virginia Criminal Information Network ("VCIN") and federal records through NICS in databases at the National Crime Information Center ("NCIC").

73. However, while the Act imposes a mandatory requirement that a buyer and seller *obtain* a NICS check from an FFL, the Act does not require any FFL to *provide* such a service. Instead, the FFL's participation to facilitate private sales is entirely optional.[26] Nor could the Act require FFLs to participate. As ATF points out, "[f]acilitating private sales is purely voluntary under federal law."[27] Instead, the Act requires the transferor to locate — and persuade — an FFL to obtain the VSP background check, complying with all federal and state laws and using the same procedure as if the proposed transfer were of a firearm sold out of the FFL's own firearms inventory. The statute leaves it to FFLs' absolute, unfettered, and unreviewable discretion as private businesses to deny some or all such requests to facilitate private transfers.[28]

74. The Act requires private parties to obtain FFL participation, yet does not require FFLs to participate, severely limiting the ability of private parties to obtain that FFL participation. Indeed, the Act places a *below-market cap* on the maximum fee that an FFL may charge for facilitating a private sale, ensuring that few if any dealers will participate.

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[26] To make the FFL's participation mandatory would create its own problems, such as the fact that the state would be commandeering federal licensees and forcing them to perform a state government function by using a federal background check system. This would raise a sort of reverse anti-commandeering doctrine issue. *See Printz v. United States*, 521 U.S. 898 (1997). Making FFLs' participation mandatory would also contradict ATF's longstanding rule that FFLs have complete discretion to refuse a transfer to any person at any time — even if they pass a background check. *See, e.g.*, https://www.usnews.com/news/articles/2016-06-17/dealers-choice-gun-store-owners-can-deny-anyone-they-want.

[27] *See* "Facilitating Private Sales: A Federal Firearms Licensee Guide" (ATF).

[28] Contrast that with a Virginia hunting license, which can be obtained from the government online, from various court clerks, over the phone, *or* from a private party at "hundreds of license agents around the state." https://www.dgif.virginia.gov/hunting/regulations/licenses/.

75. The statute provides a mere token incentive for an FFL to facilitate a private transfer, allowing that "[t]he dealer may charge and retain an additional fee[29] not to exceed $15...." However, this cap does not reflect the actual value of the service requested. Indeed, $15 is grossly insufficient to convince a federal firearms dealer to facilitate the transfer of a firearm.[30]

76. Perhaps 10 or 20 years ago, a "dealer transfer" might have been available for $15.[31] These days, however, the fee that dealers charge for this service is nearly always in the range of $25 to $50, depending on one's location.[32]

77. In short, by capping the transfer fee at a below-market price of $15, the statute creates a requirement for private buyers and sellers to get a background check that will be difficult if not impossible to obtain, and virtually ensures that few if any private transfers of firearms can occur. Thus, section 18.2-308.2:5 is all but a surreptitious ban on private sales of firearms, making it impossible to transact one by its imposition of an artificially low ceiling on the fee.

2. By Requiring the Participation of FFLs, the Act Turns Private Transfers into Federal Transfers.

78. In addition to the time it takes an FFL to effectuate a private transfer for $15, federal law and regulations add additional hidden costs to providing that service. Once an FFL becomes

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[29] This $15 fee is in addition to the VSP fees ($2 for in-state and $5 for out-of-state) under § 18.2-308.2:2(J).

[30] Ordinarily, dealers do not charge "transfer fees" when they sell guns from their own inventory. Instead, they profit from the difference between wholesale and retail price. However, some dealers agree to act as "middle men" to facilitate transfers from other geographically distant FFLs or distributors, accepting shipment of the firearm and then conducting a NICS check before transferring a firearm to the end buyer.

[31] This statutory amount is not indexed for inflation, meaning that the financial incentive to dealers will steadily decline over time in real terms.

[32]

involved in a private sale, the sale is "subject to the same rules and regulations as any other sale conducted by the FFL."[33] The transfer thus brings to the dealer the same risk and potential liability as any other sale. The FFL must obtain a complete and correctly filled out ATF Form 4473 from the prospective transferee and must completely and accurately fill out the dealers' sections of the Form. Indeed, the current version of ATF's Form 4473 includes a check box (question 32) for private transfers.[34]

79. ATF provides a complex set of rules as to when an FFL must put a privately transferred firearm "on his books" by entering it into and logging it out of his Acquisition and Disposition (A&D) records, and what steps to take if he receives a "delayed" or "denied" response from the background check. Regardless, after a 4473 completion and successful background check, the dealer must record both the acquisition and the disposition, and must then keep those records, subject to ATF inspection, for two decades. A mistake at any stage of the process opens the dealer to possible ATF sanctions such as a warning letter, a warning conference, fines, revocation of license, and even possible criminal liability. *See* ATF Order 5370, Federal Firearms Administrative Action Policy and Procedures.

80. Nor is there any way to involve an FFL in the transfer of a firearm without it being considered a federally regulated transfer. Virginia law (18.2-308.2:2(A)) requires that licensed

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[33] "Facilitating Private Sales: A Federal Firearms Licensee Guide" at 4. This means that there is no way to involve an FFL in a private Virginia transfer without invoking federal rules and responsibilities. The statute could not, for example, simply require the FFL to obtain a completed SP-65 (and not a Form 4473), and to contact VSP and have VSP search only state databases (and not NICS) during a background check. Rather, if an FFL is involved, federal law and regulations apply.

[34] https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download.

dealers conduct a "criminal history record information check" ("CHRIC") prior to transferring a firearm, and federal law requires that a "licensed dealer shall not transfer a firearm to any other person who is not licensed [unless] before the completion of the transfer, the licensee contacts the national instant criminal background check system" ("NICS"). 18 U.S.C. § 922(t). All private transfers facilitated by FFLs are federal transfers.

3. The Existing Statute Providing For "Voluntary Background Checks" Was Implemented through Fraudulent Dealings by the Commonwealth.

81. Section 18.2-308.2:5(B)(2) of the Act creates an exception for private sales that occur at gun shows, stating that the VSP may conduct the background check instead of involving an FFL. It is likely that the Commonwealth will point to the existence of this exception as a way to avoid the problems with a private sale going through an FFL, such as the $15 transfer fee limit. Yet the VSP's implementation and administration of Section 54.1-4201.2 is based on fraudulent misrepresentations by VSP under the Governor Terry McAuliffe administration. Section (B)(2) thus does not temper the Act's draconian requirement to involve an FFL in all private sales by permitting some to occur through VSP at gun shows.

82. In 2016, Section 54.1-4201.2 was added to the Code, providing for "voluntary background checks" by private sellers at gun shows to be conducted directly by VSP employees. The voluntary background check statute requires that gun show promoters provide sufficient space for VSP at each gun show. That statute requires that the voluntary VSP background check be done "in accordance with ... 18.2-308.2:2," which means that part of this background check involves contacting the federal NICS system.[35] The statute also requires that the background

[35] When conducting voluntary background checks at gun shows, VSP does not collect any information about the gun being transferred (such as make, model, and serial number), nor

check be done "in accordance with 28 C.F.R. § 25.6...." For avoidance of doubt, this Complaint and Petition does not allege a violation of 28 C.F.R. § 25.6 or any other federal law, nor seek any interpretation thereof.

83. However, the federal regulation, 28 C.F.R. § 25.6, states unambiguously that **only** "FFLs may initiate a NICS background check," and "**only** in connection with a proposed firearm transfer as required by the Brady Act." (Emphasis added). In the case of a private sale voluntary background check, it is VSP, **not** an FFL, initiating the NICS check, and **not** in connection with a Brady Act (FFL) transfer, but rather a transfer between private parties.

84. Second, 28 C.F.R. § 25.6(d) states that, for states like Virginia acting as a point of contact ("POC") for NICS, "FFLs will contact the POC to initiate a NICS background check," and makes clear that the POC can initiate such a check **only** "[u]pon receiving a request for a background check **from an FFL**...." (Emphasis added).

85. Third, 28 C.F.R. § 25.6(j) outlines certain specific exemptions from its prohibitions, including checks for a firearms "permit or license," "an inquiry from" ATF, or "[d]isposing of firearms." FBI publications confirm these limits, stating that "[a]ccess to the NICS is restricted to ... four circumstances."[36]

86. Although none of these circumstances applies to VSP running voluntary NICS checks at gun shows pursuant to Section 54.1-4201.2, VSP and the FBI appear to have come to an informal "understanding" permitting VSP to access the NICS system. Va. Code Ann. Section 54.1-4201.2's Editor's Note explains that the voluntary background check "became effective

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does it use an ATF Form 4473, or even the Virginia SP-65. Similarly, it does not keep the records required of dealers under federal law.

[36] https://www.fbi.gov/file-repository/nics-overview-brochure.pdf/view.

July 1, 2016, pursuant to: a January 2016 Executive Order directing the State Police to establish a voluntary criminal background check program ... and an email dated January 2016 from the FBI stating that the Executive Order meets the standards of 28 C.F.R. section 25.6(j)(i)...."

87. On April 28, 2020, Plaintiff GOA submitted a Freedom of Information Act Request to the VSP. *See* Exhibit B. Thereafter, VSP provided records responsive to that request. *See* Exhibit C. The records provided by VSP seriously undermine the legitimacy of the Section 54.1-4201.2 voluntary background check by demonstrating that the VSP has fraudulently obtained access to the FBI's NICS system.

88. Apparently realizing that the "voluntary" gun show background check statute could not be implemented in the manner that it was enacted by the General Assembly, the McAuliffe administration developed a mechanism to end-run the federal prohibition on NICS checks for private sales.

89. From November 2015 to January of 2016, the VSP and the FBI exchanged a series of e-mails wherein the FBI advised Virginia that it could not approve use of the NICS System for a private "voluntary background check" **but** that, if VSP would instead create a "permit" system for the buyer, then the FBI could approve VSP's use of the NICS System under the federal exception for NICS checks for "issuance of a firearm-related ... permit or license." 28 C.F.R. § 25.6(j)(1). Of course, the Virginia statute purporting to allow for "voluntary" gun show background checks did not create or authorize any "permit or license," nor could it possibly be construed as doing so given the *voluntary* nature of the background check on a transaction that requires no "permit" or "license."

90. Although SB715 of the 2016 Session neither establishes nor requires a "permit" or a "license" to conduct a sale between private parties, the McAuliffe administration drafted an

Executive Order to create — out of thin air — a *"special permit" to run a "voluntary background check."* Of course, these bureaucratic gymnastics were done without any statutory authority, as no provision of Virginia law allows the Governor to establish a system of firearm "special permits" by Executive Order.

91. Nevertheless, based on the January 2016 FBI email promising to enact an executive order, VSP was granted access to NICS and began to conduct voluntary background checks at Virginia gun shows. However, the draft McAuliffe Executive Order that was floated *in theory* to the FBI was *never actually issued* by Governor McAuliffe, nor subsequently by Governor Northam. In fact, the copy of the executive order provided by VSP in response to Plaintiff GOA's FOIA request is neither signed by the Governor, nor on letterhead — it is merely a draft. No final version appears on the official list of McAuliffe-issued Executive Orders. Indeed, the VSP confirmed to Plaintiff GOA that they have no final copy of any such executive order. *See* Exhibit D.

92. All of this means that the VSP has gained access to and utilized the FBI's NICS system to run "voluntary" gun show background checks based on a fraudulent representation – a *theoretical* executive order that was never *actually* issued, and never issued because the Governor had absolutely no authority to do so.

93. Meanwhile, VSP has been contacting the NICS system and running "voluntary background checks" at gun shows for over two years.

94. Thus, the Act cannot purport to provide an exception to the UBC requirement for voluntary background checks at gun shows. At any time, the FBI could revoke the VSP's fraudulently obtained access to the NICS system.

95. To be clear, Plaintiffs' allegation is that VSP's access to the NICS system for "voluntary gun show background checks" was fraudulently obtained based on the facts alleged above, and that Virginia law does not grant the Governor the power to issue the executive order proposed (but never issued) above. Plaintiffs do not allege that Virginia Code § 54.1-4201.2 violates 28 C.F.R. § 25.6, nor do they seek any interpretation of the federal regulation.

4. Section 18.2-308.2:5 Unconstitutionally Delegates Governmental Power to Private Parties (FFLs).

96. The background check required of private firearms transferors under § 18.2-308.2:5 is legally possible only if an FFL voluntarily chooses to provide access to the state and federally administered background check databases. The FFL's decision to conduct, or refuse to conduct, a private background check depends wholly on the FFL's business decision. The FFL is free to provide access to the government-required background check for private transfers according to his economic needs and wants, unfettered by any government regulation or control (other than the $15 limit on fees).

97. For example, the FFL could choose to provide this private transfer service only to existing customers, or only to those persons who purchase additional goods or services from the FFL, thereby raising the cost (in real terms) for a private transfer beyond the statutory maximum. Indeed, since FFLs already routinely charge far more than the statute permits, it is highly likely that alternative forms of "compensation" such as this will be sought.

98. Section 18.2-308.2:5 unconstitutionally vests legislative power in Virginia FFLs, contrary to Article IV, Section 1 of the Virginia Constitution, which vests all legislative powers in "a General Assembly, which shall consist of a Senate and House of Delegates." According to Section 18.2-308.2:5, an FFL has absolute discretion to decide whether it would be in the public good to assist any proposed transfer of a firearm, without any policy constraint or standards

specified by the General Assembly. Such unrestrained discretion may not be delegated. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-21 (1935). Accordingly, the Act violates the legislative powers provision of Article IV, Section 1 of the Virginia Constitution.

5. The Act Criminalizes the Private Marketplace and Creates a Government Monopoly on Firearm Transfers.

99. Prior to the Act, a person seeking to purchase a firearm had a free market alternative to the government monopoly the Commonwealth now seeks to create. If the federal NICS background check system failed to operate as intended (due to erroneous denials, delays, *etc.*), there was an alternative – purchasing a firearm from a private seller, through friends and family, word of mouth, online message boards, etc.[37]

100. When the Act becomes effective, there will be no alternative. Governor Northam's Executive Orders regarding the COVID-19 pandemic instructed Virginians to stay home and avoid going out in public, but the challenged Act he signed requires gun purchasers and sellers to visit commercial establishments in order to exercise their constitutionally protected rights. With recent events related to COVID-19 and the resulting desire to obtain firearms, the FBI's NICS system reportedly has been "overwhelmed,"[38] with a 300 percent spike in NICS checks and resources stretched thin.[39] If the NICS system ever were to fail to function, even on a

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[37] Of course, the private market of secondhand sales does not provide a complete alternative to dealers, as new firearms still may be purchased only at dealers. A person must search for a particular firearm or wait for the firearm he seeks to become available. He must then negotiate a fair price, time and place to meet, and other factors with a private seller. And he is, as always, buying a "used" firearm, regardless of whether it has been fired.

[38] https://www.usatoday.com/story/news/politics/2020/05/06/gun-dealers-urged-defer-fbi-gun-sales-soar-amid-coronavirus/3084281001/.

[39] https://www.washingtonexaminer.com/washington-secrets/fbi-300-spike-in-gun-buy-checks-huge-backlogs-shutdown-threatened.

temporary or localized basis (such as due to a natural disaster), then there would literally be no way for a person in Virginia to acquire a firearm legally, and thus there would be no way to exercise the right to keep and bear arms for those who did not already own a firearm.

101. Moreover, if Virginia, which acts as a "point of contact" state for FBI NICS checks, ever was unable (or unwilling) to fulfill its duty to contact NICS checks on behalf of dealers, the FBI has claimed that the Brady Act's 3-business-day transfer date would not even begin to run, meaning no firearm transfers could occur until Virginia again decided to begin processing background checks.[40]

102. Private firearm sales currently provide a safety valve for a dealer sale background check system with inherent limitations. Should the Act be permitted to take effect, there is a risk that, at some point in the future, it will be impossible to transfer any firearms through NICS checks. If that occurs, then the challenged Act will not just have mandated universal background checks, but it will also have eliminated the ability of Virginians lawfully to obtain firearms for self-defense and other lawful purposes from any source. There is no good reason to put all our eggs in one basket, especially with a government monopoly over the exercise of an enumerated right.

RELIEF SOUGHT

Declaratory Relief

103. Plaintiffs incorporate and re-allege the foregoing paragraphs as though fully set forth herein.

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[40] https://www.nicsezcheckfbi.gov/ ("Should a state choose to limit days of operation by completely closing state offices one or more days a week or even indefinitely, this could potentially impact the Brady Transfer Date (BTD) by changing the time in which an FFL can legally transfer a firearm in a delayed status.").

104. Plaintiffs seek entry of an order of declaratory judgment, declaring that the requirement of a universal background check contained in § 18.2-308.2:5 violates both Article I, Section 13 and Article IV, Section 12 of the Constitution of Virginia.

105. The purpose of Va. Code § 8.01-184 is remedial. The statute was enacted "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor." Va. Code § 8.01-191. *See also Liberty Mutual Ins. Co. v. Bishop*, 211 Va. 414, 418, 177 S.E.2d 519, 522 (1970) (*citing Criterion Ins. Co. v. Grange Mutual,* 210 Va. 446, 448-49, 171 S.E.2d 669, 671 (1970)).

106. Declaratory judgments are intended to determine the *rights* of parties with respect to established writings and principles, rather than to determine disputed *facts* upon which the resolution of some dispute may depend. *Williams v. Southern Bank of Norfolk*, 203 Va. 657, 663, 125 S.E.2d 803, 807 (1962) (quoting 16 Am. Jur., "Declaratory Judgments," § 20 at 294-95); *accord Hoffman Family, L.L.C. v. Mill Two Associates P'ship*, 259 Va. 685, 693, 529 S.E.2d 318, 323 (2000); *Green v. Goodman-Gable-Gould Co., Inc.*, 268 Va. 102, 597 S.E.2d 77 (2004).

107. The Supreme Court of Virginia has repeatedly made clear that facial challenges to the constitutionality of a statute as violative of self-executing provisions of the Constitution of Virginia present a justiciable controversy over which the Court has jurisdiction and power to enter a declaratory judgment. *See Daniels v. Mobely*, 285 Va. 402, 737 S.E.2d 895 (Va. 2013), citing *DiGiacinto v. Rector & Visitors of George Mason Univ.,* 281 Va. 127, 137, 704 S.E.2d 365, 371 (2011).

Temporary and Permanent Injunctive Relief

108. In granting a temporary injunction, the Court must look 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 tips 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) (applying the test set forth in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008)). *See also McEachin v. Bolling*, 84 Va. Cir. 76, 77 (Richmond Cir. Ct. 2011).

109. Virginia courts have widely adopted the *Real Truth* analysis in the absence of any specific elemental test from the Supreme Court of Virginia or applicable statutes. *See, e.g., BWX Techs., Inc. v. Glenn*, 2013 Va. Cir. LEXIS 213 (Lynchburg Cir. Ct. 2013); *McEachin* at 77. *See also CPM Va., L.L.C. v. MJM Golf, L.L.C.*, 94 Va. Cir. 404, 405 (Chesapeake Cir. Ct. 2016) (listing several Virginia Circuit Courts which have used the federal four-part test).

110. Plaintiffs seek a temporary injunction, enjoining the VSP from administering, enforcing, and otherwise imposing the requirements of Va. Code § 18.2-308.2:5 upon the Plaintiffs, the members and supporters of the associational Plaintiffs, and others similarly situated in the Commonwealth.

111. A temporary injunction allows a court to preserve the *status quo* while litigation is ongoing. *Iron City Sav. Bank v. Isaacsen*, 158 Va. 609, 625, 164 S.E. 520, 525 (1932); *May v. R.A. Yancey Lumber Corp.,* 297 Va. 1, 822 S.E.2d 358 (2019). In this case, the status quo is that Virginians may fully exercise their rights under Article I, Section 13, and are not yet hindered by the Act set to take effect on July 1, 2020.

112. The Plaintiffs have a substantial likelihood of success on the merits, given that the challenged statute directly and significantly infringes a constitutionally enumerated right that "shall not be infringed." The Plaintiffs also have a substantial likelihood of success, as the ostensible harm sought to be alleviated by the Commonwealth – transfer of a firearm to a prohibited person – is already a crime under both federal and state law, and thus the challenged statute is superfluous, in addition to being facially violative of Article I, Section 13.

113. It is well established that the loss of a fundamental right, for even minimal periods of time, unquestionably constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Without relief from this Court, Plaintiffs and countless other Virginians will be irreparably denied their right to keep and bear arms as guaranteed by Article I, Section 13 of the Virginia Constitution. By being forced to submit to a background check before being able to obtain a firearm, Virginians are required to get prior government approval before being permitted to exercise their enumerated rights. It is also clear from the facts set forth in this case that no adequate remedy at law exists, as monetary damages would be both inappropriate and incalculable for the harm inflicted by the challenged statute.

114. The balance of equities favors granting a temporary injunction pending the outcome of this case. Unlike the real and concrete irreparable harm that will befall Plaintiffs and other Virginians under this new law, the basis for the new law is nothing but purely hypothetical and speculative, and based on vague conjecture about the efficacy of yet another law designed to prevent prohibited persons from obtaining firearms, which is already a crime. Indeed, there is no credible proof that the challenged statute would have any effect on such already-felonious transfers to prohibited persons. If a person has decided to commit a felony by providing a firearm to a prohibited person, a requirement of a background check (with a misdemeanor

penalty) is a highly unlikely additional deterrent. However, the statute would infringe on the rights of law-abiding citizens. The issuance of a temporary injunction would merely maintain the *status quo* with respect to the rights of the people to have lawful access to firearms.

115. The granting of a temporary injunction would not be adverse to the public interest. As stated already, the challenged statute purportedly seeks to prevent persons from obtaining firearms who are already prohibited from doing so. It seeks to impose an infringement on an enumerated right, under the pretense of trying to reduce the commission of an act that has been punishable as a state and federal felony for decades. The public interest in such an enactment is pre-textual and non-existent. Not issuing a temporary injunction, on the other hand, would immediately, undoubtedly, and substantially infringe the enumerated rights of Plaintiffs and countless firearm purchasers throughout Virginia starting on July 1, 2020.

116. The injunction sought would apply statewide and enjoin Defendant's enforcement of the statute as against all necessary parties situated similarly to the named Plaintiffs. To be clear, it is only state actors who would be enjoined, and thus all parties to be enjoined are named in this case. Other residents of the Commonwealth, not named as Plaintiffs but who would merely benefit from the injunction by being permitted to exercise their right to keep and bear arms, are not being "enjoined" and thus could not possibly violate the injunction order, or otherwise need to be personally subject to the Court's jurisdiction. Virginia Circuit Courts have broad, statewide authority to issue injunctions, including injunctions that enjoin parties and actions outside of their particular Circuit. Virginia Code § 8.01-620 sets forth the authority for Circuit Courts to enter injunctions, and provides that "[e]very circuit court shall have jurisdiction to award injunctions, … whether the judgment or proceeding enjoined be in or out of the circuit, or the party against whose proceedings the injunction be asked resides in or out of the circuit."

117. As the Virginia Supreme Court has noted, "[t]he only limitation on the **State-wide jurisdiction** of the Circuit Court ... given by section 5890 [the jurisdictional statute which preceded Va. Code § 17.1-513] and the common law, is found in the venue statutes [which] were never intended to repeal or modify section 5890 and thereby deprive the chancery courts of any portion of the jurisdiction conferred upon them by that section." *Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corp.*, 145 Va. 317, 326 (1926) (emphasis added). Likewise, the Supreme Court has stated that, "where the proper parties are before a circuit court, then by virtue of the statute ... and the common law rule on the subject, its territorial jurisdiction over persons and property is **co-extensive with the bounds of the whole State**...." *Moore v. Norfolk & W. R. Co.*, 124 Va. 628 (1919) (emphasis added).

118. Under Virginia precedent, a litigant has standing if he has "a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Cupp v. Board of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984). Analyzing this standing issue further with respect to voter rights in *Howell v. McAuliffe*, 292 Va. 320, 788 S.E.2d 706 (2016), the Supreme Court of Virginia stated that "[e]very qualified voter (though not every member of the general public) suffers the same vote-dilution injury. To rule otherwise would be to hold that unlawful vote dilution occurring within a geographic subset of a state triggers standing, but an equally unlawful vote dilution of far greater proportions, one affecting the entire state, does not." *Id*. at 334.

119. Alternatively, a court can choose to proceed without a necessary party if: (1) it is "practically impossible" to join a necessary party and the missing party is represented by other parties who have the same interests; (2) the missing party's interests are separable from those of the present parties, so the court can rule without prejudicing the missing party; or (3) a necessary

party cannot be made a party, but the court determines that the party is not indispensable. *See Marble Techs., Inc. v. Mallon*, 290 Va. 27, 32, 773 S.E.2d 155, 157 (2015); Rule 3:12(c).

120. Plaintiffs Virginia Citizens Defense League and Gun Owners of America, Inc. widely represent the interests of individuals throughout the Commonwealth who will have their right to keep and bear arms infringed, should enforcement of this statute not be enjoined. Individual Plaintiffs Wilson, Ehlert, and Lowman fully and faithfully represent the interests of others who will have their right to keep and bear arms infringed, should enforcement of the Act not be enjoined. These Plaintiffs, collectively, fully and faithfully represent the interests of all stakeholders in this case, and it would be "practically impossible" to join every citizen in the Commonwealth whose constitutional rights will be violated by enforcement of the Act.

121. Plaintiffs also seek a permanent injunction, based on the above factors, enjoining the VSP from administering, enforcing, and otherwise imposing the requirements of Va. Code § 18.2-308.2:5.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Plaintiffs, by counsel, move this Court for: (1) declaratory relief in the form of a finding that § 18.2-308.2:5 (effective July 1, 2020) is unconstitutional under Article I, Section 13 and Article IV, Section 12 of the Constitution of Virginia; (2) issuance of a temporary injunction enjoining the enforcement of § 18.2-308.2:5 until such time as this case is fully adjudicated; (3) issuance of a permanent injunction which enjoins the administration, enforcement, and imposition of the requirements if § 18.2-308.2:5; (4) a writ of mandamus to enjoin enforcement of Va. Code § 18.2-308.2:5 as well as notifying

the public of the injunction; and (5) such other and further relief as the Court may deem appropriate.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

In accordance with Va. Code § 8.01-629, the undersigned certifies that on June 22, 2020 (after 5:00 P.M.), a true and accurate copy of the foregoing Complaint and Petition was served upon the following, thereby giving notice of the same:

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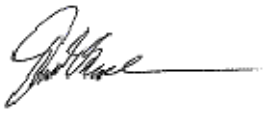

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