VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

RAUL WILSON

and

PETER ELHERT

and

WYATT LOWMAN

and

VIRGINIA CITIZENS DEFENSE LEAGUE

and

GUN OWNERS OF AMERICA, INC.

and

GUN OWNERS FOUNDATION,

Plaintiffs,

v. **Case No. CL20-582**

COLONEL GARY T. SETTLE
(In his Official Capacity as
Superintendent of the Virginia State Police)

Defendant.

PLAINTIFFS' REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION

1. The Commonwealth Asks this Court to Defer to a "Policy Choice" that Article I, Section 13 Has Taken "Off the Table," or Else to Balance Away a Constitutional Right that Is "The Very Product of an Interest Balancing by the People."

The Commonwealth markets the challenged statute as being "common-sense,"[1] a platitude that has come to be the hallmark of anti-gun forces across the country who seek to dismantle, piece by piece, the right of the People to keep and bear arms. In defense of this so-called "common-sense" law, the Commonwealth argues that this Court must defer to the judgment of the General Assembly, in contravention of the judgment of the People as expressed in the plain text of Article I, Section 13 of the Constitution of Virginia. In support of this proposition, the Commonwealth cites *Howell v. McAuliffe*, 292 Va. 320 (2016) where, ironically, the General Assembly was the only branch of government not involved in the case. MIO at 1. To be sure, the Supreme Court in *Howell* did begin by reciting the maxim that courts are not "to judge the advisability or wisdom of policy choices" (*id*. at 326) of the politically accountable branches, but the Court then went on to strike down the challenged "policy choices" as incompatible with the provisions of Article II, Section 1 and Article I, Section 7 of the Virginia Constitution.

Likewise here, the question is not whether the General Assembly has made a "good policy choice," but whether that policy choice conflicts with Article I, Section 13. *District of Columbia v. Heller*, 558 U.S. 570, 636 (2008) ("the enshrinement of constitutional rights necessarily takes certain policy choices off the table"). If Article I, Section 13 rights have been infringed, then the challenged statute must be struck down no matter how allegedly "common-sense" or reasonable it appears to its proponents. Such a determination is directly within this Court's mandate to "say

[1] Defendant's Memorandum in Opposition to Motion for Temporary Injunction ("MIO") at 1, 2, 32.

what the law is,"[2] and this Court owes neither the General Assembly nor the Governor any deference on the subject when an enumerated right is directly infringed.

Indeed, interpreting the identical language of the Second Amendment to the United States Constitution, the U.S. Supreme Court instructed that "[t]he Second Amendment ... [l]ike the First, it is the very *product* of an interest balancing by the people.... The 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. Constitutional 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 (emphasis added).

2. The Commonwealth's Appeal to Cherry-Picked *Dicta* From *Heller* Falls Flat.

The Commonwealth's brief relies, perhaps most prominently, on particular *dicta* from *Heller* — that there are certain "longstanding prohibitions on the possession of firearms by felons and the mentally ill" (quoted 11 times), and "presumptively lawful regulatory measures" (quoted 25 times) that do not violate Second Amendment rights, such as those "imposing conditions and qualifications on the commercial sale of arms" (quoted 8 times). MIO at 1, *passim*. This, the Commonwealth argues, means that the challenged statute should be upheld "without further analysis." *Id.* at 12, 13, 14, 24. The Commonwealth bases its entire argument on the theory that the challenged statute fits neatly into these categories from *Heller*. But these *Heller dicta* are not the magic bullet the Commonwealth wishes them to be and, without this central component of its

[2] *Marbury v. Madison*, 5 U.S. 147, 177 (1803).

argument, the Commonwealth's entire case falls apart at the seams.

a. Background Checks on Private Sales Do Not "Prohibit" Possession of Firearms by Anyone, Nor Do They Regulate "Commercial" Sales.

The Commonwealth makes the striking claim that "the new law 'prohibit[s] the possession of firearms by felons and the mentally ill' by 'imposing conditions and qualifications on the commercial sale of arms'...." MIO at 8 (*citing Heller* at 626-27 and n.26). But even the Commonwealth does not believe any of this to be the case and, in fact, specifically admits neither of these allegations is true.

First, the challenged statute does not prohibit firearm possession by *anyone*; rather it mandates a background check for *everyone*. As the Commonwealth is forced to admit, "the *only* people who will be precluded from buying any type of firearm under this law .... are [already] barred from possessing firearms...." MIO at 17; *see also* at 2. Nevertheless, the Commonwealth spends a large portion of its brief discussing firearm possession by felons,[3] something that the challenged statute does not address in any way.[4]

Second, the challenged statute does not impose a "condition" or "qualification" on "the *commercial* sale of arms," but rather regulates heretofore entirely *private* conduct. As the Commonwealth admits, "the new law[] *exten[ds*] mandatory background checks to private

[3] Presumably, the Commonwealth hopes to use the word "felon" enough (31 times) to make universal background checks for private sales appear reasonable (allegedly because stopping felons from getting guns is reasonable).

[4] Elsewhere, the Commonwealth notes that prohibitions on felons, mentally ill, and domestic violence prohibitions have been upheld by various courts, arguing this makes it "doubly apparent" that "the background check designed to enforce" those prohibitions is constitutional. MIO at 11. This is nonsensical. Prohibitions on drug possession have been upheld by the courts, yet random and warrantless searches to root out drug possession are not "doubly" constitutional even if they are "designed to enforce" drug laws.

sales...." MIO at 11 (emphasis added). The word "commercial" means "prepared, done, or acting with sole or chief emphasis on salability, profit, or success."[5] But if profit were the "chief emphasis" for a private seller, then he would be "engaged in the business" and thus required by the ATF and federal law to obtain an FFL.[6] *By definition*, then, private sales are not commercial sales. Were it otherwise, then everyone who engages in a private sale would need to obtain a federal firearms license. *Actual* commercial sales have always been subject to many types of rules and regulations, while private sales of all sorts between residents of the same state have gone almost entirely unregulated under both federal and state law. The Commonwealth seeks now to crush the distinction between private sales and commercial sales, and crush the rights of gun owners with it.

Finally, in a last ditch effort, the Commonwealth attempts to make it seem as if Plaintiffs agree with the nonsensical idea that private sales are commercial sales. The Commonwealth refers to the brief filed by Plaintiffs GOA, GOF, and VCDL in *Trojan v. Settle*, No. CL20-474 (Goochland Cir. Ct. June 24, 2020), as somehow having conceded the commercial nature of universal background checks on private sales. The Commonwealth quotes that brief, providing as an example of a commercial qualification "a requirement that a person submit to an 'instant'

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[5] https://www.dictionary.com/browse/success

[6] According to 18 U.S.C. Section 923(a), a person must obtain a license if he is "engage[d] in the business of … dealing in firearms…." Section 921(a)(21)(C) states that the term "engaged in the business" means "as applied to a dealer in firearms … a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the *principal objective of livelihood and profit* through the repetitive purchase and resale of firearms…." Emphasis added. Section 921(a)(22), in turn, defines "'with the principal objective of livelihood and profit' means that the intention underlying the sale or disposition of firearms is predominantly one of *obtaining livelihood and pecuniary gain*, as opposed to other intents, such as improving or liquidating a personal firearms collection…." Emphasis added.

background check before purchasing a firearm...." MIO at 11 n. 13. The Commonwealth claims that "the institutional plaintiffs offer no explanation for their retreat from that plainly accurate reading." *Id.*

But this is not the "gotcha!" moment the Commonwealth wants it to be. Conspicuously, the Commonwealth **leaves off the end of the sentence from Plaintiff's reply brief** in the other case. The full statement from this reply brief is that "[t]he challenged statute does not impose a 'condition' on the commercial sale of arms, such as a requirement that a person submit to an 'instant' background check before purchasing a firearm **from a federally licensed dealer**." *Reply Brief* in *Trojan v. Settle.* at 4 (emphasis added). Plaintiffs do not — nor have they in another case — conceded that a "universal background check" requirement that applies to private sales constitutes a condition or qualification on the "commercial sale of arms." The Commonwealth's thinly veiled attempt to make it seem that way, by selectively quoting from Plaintiffs' brief is, at best, reckless, if not worse.

b. Universal Background Checks on Private Sales Are Brand New — Neither "Longstanding," Nor "Presumptively Lawful."

The Commonwealth argues that the challenged statute, which was enacted only 82 days ago, and effective *just today*, must be upheld because *other* firearms statutes — specifically, those which prevent felons or the mentally ill from acquiring firearms, and statutes which required background checks to be performed by federally licensed gun dealers — are allegedly "longstanding." MIO at 3-4. This is a *non-sequitur*.

The Commonwealth is playing a shell game with the Court. It hopes to divert the Court's attention away from the newly enacted 2020 restrictions on private sales, and refocus attention exclusively on the other two shells it has placed on the table — restrictions on felons and

restrictions on *commercial* sales. The Commonwealth believes that, if it can convince the Court that these other two gun regulations are "longstanding," then the brand new 2020 law similarly must be deemed constitutional. That argument fails for any number of reasons.

Contrary to the Commonwealth's repeated and blatant attempts at misdirection, this case is not about felons, and does not involve the near-ubiquitous felon disenfranchisement provisions that exist in federal and state law. As the Commonwealth admits, "none of those restrictions is challenged here." MIO at 3. The fact that laws banning possession of firearms by felons have been around for a while[7] has no relevance to whether the challenged statute is longstanding. At best, the challenged statute is an entirely new attempt to enforce a preexisting prohibition - sort of like saying that a requirement for an author to obtain pre-publication approval from the government is constitutional because laws prohibiting libel and slander are longstanding.

Moreover, as the Commonwealth notes, the federal NICS check only came into law in 1993, while Virginia's background check for dealer sales began a few years before that in 1989. MIO at 3-4. Earlier this year, after examining the "longstanding" issue in the context of the Second Amendment, the Third Circuit could conclude only that "neither courts nor scholars have agreed on the precise contours of this category — and in particular how 'longstanding' a regulation must be for its violators to be considered part of the historically barred class." *Holloway v. AG United States*, 948 F.3d 164, 180-81 (3rd Cir. 2020). However, no case has been found by counsel for plaintiffs where any court has ever held that a 31-year-old statute qualifies as "longstanding"

[7] But perhaps not as long as one may think. Even in 1934, when Congress required tax payments and registration of machineguns, suppressors, and other devices, there were no federally "prohibited persons" such as felons and the mentally ill. The current categories that appear in 18 U.S.C. Section 922(g) appeared piecemeal from 1938 until 1997, when the Lautenberg Amendment added the "misdemeanor crime of domestic violence."

— much less a statute enacted *82 days ago* and which is effective *only today*.[8]

c. The Supreme Court Did Not Intend the Cited Dicta from *Heller* to Be a Magic Bullet Upon which to Decide Future Cases.

Even if there were any merit to the Commonwealth's argument that universal background checks on private sales are longstanding or regulate commercial activity, that does not magically end the inquiry. The basic holdings of *Heller* were first, that the "text and history" (*Heller* at 595) of the Second Amendment protects an individual right to keep and bear arms — not a collective right; and second, that the District of Columbia could not ban the possession of handguns in the home *(Heller* at 679). This is the way that the Virginia Supreme Court viewed the essence of *Heller* in *Digiacinto* at 134. Having made clear those basic holdings, the *Heller* Court then issued a cautionary note that its decision should not be misunderstood to strike down other gun laws at this time:

> Although we do not undertake an exhaustive historical analysis **today** of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on [i] **longstanding** prohibitions on the possession of firearms by felons and the mentally ill, or [ii] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or [iii] laws imposing conditions and qualifications on the **commercial sale of arms**. [*Heller* at 626-27 (emphasis added).]

[8] For decades Congress has been very clear to maintain the distinction between commercial/dealer sales and private sales. Congress certainly knew what it was doing when it enacted record keeping, background check, and other requirements for dealer sales, but left private sales untouched. The Commonwealth, however, would have this Court think that private sales are a "loophole" that somehow slipped Congress' mind. The word "loophole" implies an unintended consequence of or ambiguity to a law, where a certain item, activity, or person evades coverage and thus frustrates the clear intent of the drafters. That simply does not apply to the challenged statute, which suddenly purports to regulate activity which has been knowingly, deliberately, and consistently left unregulated by both federal and state legislatures.

At this point in its opinion, the Supreme Court dropped a footnote, which the Commonwealth apparently believes to be the centerpiece of the *Heller* decision, which states: "[w]e identify these **presumptively lawful** regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627, n.26 (emphasis added).

The Commonwealth argues as though Justice Scalia had declared a conclusive presumption that every federal, state, and local regulation of firearms that was then in existence, or similar regulation that might ever be adopted in the future, must be viewed by all judges for all time to be lawful, and not subject to challenge, for a violation of the Second Amendment. Certainly, this is not what he was saying — as indeed, he had just declared unconstitutional a law that the District of Columbia viewed as longstanding and presumptively constitutional. Each law must stand or fall on its own. Rather, Justice Scalia was trying to ensure that the scope of the Court's ruling would not be misunderstood, and that the Court was addressing no other firearms regulations than the ones before it.

Even if the private sales regulated by the challenged statute were somehow considered to be commercial sales, even presumptively lawful restrictions can be challenged for violating constitutional rights. Indeed, the Commonwealth wishes that the general presumption of constitutionality would end this case (MIO at 1), but such presumptions can be rebutted and overcome — and often are. Even the "longstanding prohibition on the possession of firearms by felons" recently has been called into question by the Third Circuit as it applies to a non-violent felon. *See Binderup v. Attorney General of the United States of America*, 836 F.3d 336 (3d Cir. 2016) (*en banc*). *See also* C.K. Marshall, "Why Can't Martha Stewart Have a Gun?" 32 HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol. 32, p. 695 (Spring 2009).

3. The Commonwealth's Statistical Evidence Does Not Hold Up to Scrutiny. It Is Also Irrelevant to Resolution of this Case.

Next, the Commonwealth puts on a parade of statistical claims which range from questionable to outright bunk, in an attempt to paint private firearm sales in a negative light and justify the clear infringements in the new law.

First, the Commonwealth argues that private sales account for a "sizeable loophole" in enforcement, because "nearly a quarter" of gun purchasers allegedly have obtained a firearm through a private sale. MIO at 5. There is good reason to question this statistic. To its credit, the Commonwealth does not parade out the widely-debunked 40 percent statistic often used by anti-gun politicians over the years. However, even 25 percent is ambitious. According to the *Washington Post*, "[t]he result, depending on the definition, was 14 percent to 22 percent' were purchased without a background check.[9] The "definition" referred to was whether to include "gifts (and even sales) among family members and neighbors." Since the challenged statute does not cover *bona fide* gifts, it would seem that the actual percentage of total firearm sales involved here is likely closer to half of what the Commonwealth claims.

Second, the Commonwealth notes that approximately 3 million NICS checks have resulted in denials since 1994, but then wrongly concludes this means those denials "prevented more than *three million* unlawful purchases...." *Id*. Later, the Commonwealth similarly argues that "the *only* people who will be precluded from buying any type of firearm under this law .... are [already] barred from possessing firearms...." MIO at 17. That is a most basic logical fallacy (the converse error), and it is also just plain wrong. As Plaintiffs explained in their Complaint, the mere fact that the FBI *believes* a person to be prohibited does not always mean that a person is

[9] shorturl.at/dsD07.

actually prohibited. Compl. ¶ 48. Indeed, according to one study, out of 73,000 surveyed denials, there were only 13 guilty pleas in federal court.[10] In fact, Professor John Lott estimates that as many as 99 percent of NICS denials are "false positives" where the person is not actually prohibited from possessing firearms by any law.[11]

Third, the Commonwealth cites a study based on interviews conducted with incarcerated prisoners about their crimes. MIO at 5. Aside from the illogic of assuming prisoners to be honest and truthful about past criminal behavior,[12] the study was funded by entities (such as Bloomberg) who openly seek to provide the predicate for more gun laws.[13] And, even then, the Commonwealth's summary of the study is not accurate "that 80% of firearms acquired for criminal purposes are obtained via private sales and that 96% of those who commit firearms-related crimes despite being legally prohibited from possessing them obtained the firearm via private sale." MIO at 5. First, the Commonwealth falsely assumes that, if 80.1 percent of firearms were purchased from dealers, then all the rest were acquired in private sales — ignoring

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[10] https://www.washingtonpost.com/blogs/fact-checker/post/the-claim-that-the- brady-law-prevented-15-million-people-from-buying-a-firearm/2013/01/23/77a8c1d4-65b4-11e2-9e1b-07db1d2ccd5b_blog.html

[11] http://johnrlott.blogspot.com/2011/06/problem-with-brady-background-checks.html

[12] This runs contrary to "common sense," as it is widely understood that, at least according to prisoners, almost all are innocent. Why a prisoner would give accurate details of his criminal past to an interviewer when that information could be used against the prisoner — whether as admissions of other crimes, or denials of parole, or harsh treatment while incarcerated — is a mystery.

[13] The Vittes study was conducted by the Center for Gun Policy and Research, Johns Hopkins **Bloomberg** School of Public Health and was funded by The Joyce Foundation. *See* https://injuryprevention.bmj.com/content /19/1/26.short. The Joyce Foundation has it as one of its goals to fund "research" to justify increasing restrictions on firearms. *See* http://www.joycefdn.org/programs/gun-violence.

many that were stolen, borrowed, received as a gift, or a case where the inmate did not explain how the firearms were acquired. The Commonwealth's 96 percent claim is similarly flawed — that, because only 4 percent were dealer sales, *all the rest* must be from private sales.

Fourth, the Commonwealth seeks to save its sinking evidentiary ship by invoking a series of three anecdotal stories about persons in Texas and Wisconsin who purportedly were prohibited from possessing firearms, yet allegedly obtained them through private sales and later went on to commit heinous crimes. MIO at 5. On the other side of that coin, there are anecdotal stories about how the lauded NICS system has failed to stop prohibited persons, including the Virginia Tech shooter and the Sutherland Springs, Texas shooter.[14] And the Commonwealth appears uninterested in the persons who are wrongfully rejected by NICS — the well-known problem of "false positives" — are thus rendered unable to obtain firearms from dealers, only to fall victim to crime without a constitutionally protected means to defend themselves.

Of course, at bottom, none of this decides the outcome of the legal issue before the Court. Fortunately, this Court's role in applying the Constitution does not require it to decide which side has put on the most or the best social science studies. The Commonwealth's evidence, even if it had not been paltry, would not affect the underlying question to be answered — whether the challenged statute can survive Article I, Section 13's mandate that the right to keep and bear arms "shall not be infringed." The People who ratified the Constitution knew that firearms could be dangerous. But they also knew that if the state had the authority to restrict their access to firearms, they would no longer be able to preserve the Commonwealth as a "free state." Article I,

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14 https://www.npr.org/2019/04/20/714921726/20-years-on-the-background-check- system-continues-to-miss-dangerous-gun-buyers

Section 13. Speculation as to a given statute's desired effects — which always ignore "unintended consequences" — is no substitute for the required textual analysis of the Virginia Constitution.

4. *DiGiacinto* and *Prekker* Do Not Help the Commonwealth's Case. Nor Do the Other Cases on Which the Commonwealth Relies.

The Commonwealth claims that "[t]he only two Virginia appellate decisions to have considered Article I, Section 13 challenges" have relied on "*Heller*'s list of 'presumptively lawful regulatory measures'...." MIO at 10. The Commonwealth notes that *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127 (2011) upheld a ban on firearms in a "school" while *Prekker v. Commonwealth*, 66 Va. App. 103 (2016) upheld a ban on possession of firearms by juveniles who are the equivalent of "felons." MIO at 9-10. But this gets the Commonwealth nowhere. *Heller*'s list of "presumptively lawful regulatory measures" expressly includes schools and felons (neither of which is challenged here), but does not include universal background checks on private, non-commercial sales. *Heller* at 626. The fact that Virginia courts have relied on *Heller*'s list does not help the Commonwealth's case because, quite simply, the challenged statute in this case is not on that list.

Next, the Commonwealth argues that Plaintiffs cite no case where a universal background check applicable to private sales has been struck down outside of Virginia based on other constituitonal provisions. MIO at 1. But on the other side of that coin, the Commonwealth has cited no case where such a provision has been upheld by any court.[15] An absence of citations to legally helpful authorities does not make the Commonwealth's case more attractive. A tie does

[15] Rather, the Commonwealth drops a footnote alleging a "broad consensus among scholars" — but apparently not courts — "that universal background checks do not violate the constitutional right to keep and bear arms." MIO at 13 n. 14.

not "go to the runner," as the Commonwealth wishes.

The Commonwealth next cites to *United States v. Hosford*, 843 F.3d 161 (4th Cir. 2016), a case which challenged the federal statutory requirement to obtain a license to "engage in the business" of dealing in firearms. Of course, as noted in Section 2.a, *supra*, being "engaged in the business" means that a person is engaged in the *commercial* activity of dealing in firearms, while private sales of firearms do not constitute commercial activity under federal law. *Hosford* is not helpful on that point.

The Commonwealth relies on *Hosford*, and also on *NRA v. ATF*, 700 F.3d 185 (5th Cir. 2012) for what is known as the "complete destruction" proposition — the misguided idea that, so long as a challenged statute does not completely obliterate a constitutional right, it is nevertheless permissible to infringe it. The challenged statute, the Commonwealth argues, "is worlds away from a 'functional prohibition' on gun purchases," and thus "may be upheld without further analysis." MIO at 12-13. Of course, *Heller* rejected the idea that a statute need leave open only a narrow avenue for the exercising of rights. *Id.* at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.").

The Commonwealth claims that Plaintiffs do not "meaningfully engage with the binding precedent described above" (MIO at 13), presumably meaning *DiGiacinto* and *Prekker*, and not the Fourth and Fifth Circuit cases on which the government relies, yet which are not at all binding on this Court. The Commonwealth accuses Plaintiffs of "attempt[ing] to construct their own new doctrinal framework," apparently ignoring the fact that *DiGiacinto* and *Prekker* used the very same categorical (black and white) analysis that Plaintiffs have urged this Court to apply. Most certainly, *DiGiacinto* and *Prekker* did **not** adopt — and expressly refused to adopt — the

freewheeling interest balancing approach advocated by the Commonwealth later in its brief (MIO at 15-19). Nor has any Virginia court adopted the complete destruction test from the Fourth and Fifth Circuits. In short, it is the Commonwealth, not Plaintiffs, that has strayed from the path set by *Heller, DiGiacinto* and *Prekker*.

Finally, the Commonwealth creates and then defeats a straw man, attributing to Plaintiffs a fallacious argument that they never made. The Commonwealth alleges Plaintiffs' argument to be "that *any* regulation of firearms not falling within *Heller*'s list of presumptively lawful regulation is, categorically, 'too much' and thus unconstitutional." MIO at 14 (*citing* Compl. ¶ 41). The Commonwealth doubles down on this allegation, claiming again that "plaintiffs' proposed approach ... would automatically *reject* any law that has not already been labeled presumptively lawful." MIO at 14-15. Yet Plaintiffs never said any of those things, or anything even close to that. In fact, Plaintiffs' Complaint *never even referred* to *Heller*'s "presumptively lawful regulatory measures" at all. The Commonwealth brought that up. On the contrary, Plaintiffs' Complaint put forth a simple, straightforward test, based on the methodology employed in *Heller*, to determine whether a challenged statute infringes the right to keep and bear arms. Compl. ¶ 40-45. Plaintiffs certainly did not opine on the constitutionality of any regulation other than the one at issue in this case — universal background checks applied to private sales of firearms. The Commonwealth either seriously misunderstands Plaintiffs' arguments, or is deliberately tilting at windmills in an attempt to avoid them.

5. The Commonwealth's Attempts to Invoke the Interest Balancing Test of "Intermediate Scrutiny" Should Be Rejected Outright.

As noted above, the parties agree that intermediate scrutiny analysis should not apply to this case, but for very different reasons. Plaintiffs argue that the challenged statute is

categorically unconstitutional, while the Commonwealth argues that it is categorically constitutional.

However, as a fall back argument to its "longstanding" and "presumptively lawful" arguments, the Commonwealth claims that "some level of heightened scrutiny" applies. MIO at 16. The Commonwealth alleges that the challenged statute does not directly bear on so-called "core" rights to keep and bear arms, because "it does not preclude law-abiding citizens from obtaining a firearm or learning to use it," and thus that "intermediate scrutiny" applies.[16] *Id*. The Commonwealth relies primarily on *U.S. v. Chester*, the Fourth Circuit case which adopts the judge empowering interest balancing test that *Heller* rejected, and which Virginia courts have not adopted. *See* Compl. ¶¶ 36-37, 41.

The Commonwealth casts Plaintiffs' reliance on the plain text of Article I, Section 13 and the *Heller* decision as an "attempt to construct their own new doctrinal framework." MIO at 13. On the contrary, Plaintiffs' Complaint makes it abundantly clear that it is the "two step" judge-empowering interest balancing test used by many federal courts — but repeatedly rejected by Virginia courts — which is the "new doctrinal framework," one that was invented to circumvent the unambiguous constitutional text. The Commonwealth claims that "Plaintiffs

[16] The Commonwealth points to the fact that interest balancing tests based on the "tiers-of-scrutiny" are used in First Amendment cases, so they must be used here too. MIO at 14 n. 15. Yet at oral argument in *Heller*, Chief Justice Roberts opined quite differently that:

> These various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to.... [T]hese standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. [*District of Columbia v. Heller* Oral Argument (Mar. 18, 2008), p. 44, ll. 5-23 (emphasis added).]

identify *no case whatsoever* in support of their plea for a converse 'bright line standard'" (MIO at 14), apparently having overlooked the categorical test found in the *Heller* decision,[17] along with Plaintiffs' two string-cites of judicial decisions which consumed almost a page of their Complaint. *Id.* ¶ 38 n. 11, 12.

The Commonwealth points to *Heller*'s explanation that the Second Amendment does not protect "the right of citizens to carry arms for *any sort* of confrontation" to support balancing tests. MIO at 16. But that statement is far better explained as a jurisdictional dividing line between activities that are categorically protected (such as carrying a firearm concealed for self-defense) versus activities that are categorically unprotected (such as carrying a firearm openly to commit a bank robbery). As Plaintiffs noted in their Complaint, 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. Complaint ¶ 41. Yet as expected, the Commonwealth points this Court to the very Fourth Circuit cases that Plaintiffs explained have been considered and repeatedly rejected by Virginia courts. MIO at 16.

Purporting to apply intermediate scrutiny in a single paragraph of its brief, the Commonwealth waves its magic talisman that it has "substantial ... interests" in "protecting public safety and preventing crime." MIO at 18. The Commonwealth then baldly asserts that "a battery

[17] There is absolutely no honest way to read the *Heller* decision as the Commonwealth does, as having "assumed that *some* level of scrutiny would be appropriate *even for* laws limiting the core right of handgun possession in the home." MIO at 15 (emphasis added). Plaintiffs are not aware of any litigant in the country that has made so bold an argument about *Heller*. If a level of scrutiny applies to a right, then that right can be circumvented, at least in some circumstances. According to the Commonwealth then, *even the most basic protection* of the right to a handgun in the home for self-defense could be overcome if the Commonwealth's interest in infringing was found by a judge "compelling" and "narrowly tailored" enough. Such a reading of *Heller* and the right to keep and bear arms would turn Article I, Section 13 into a parchment barrier.

of evidence supports the commonsense conclusion that preventing felons, domestic abusers, and the mentally ill from illegally possessing firearms will promote those interests." *Id.* That is all the Commonwealth has to say on the issue.

The Commonwealth cannot possibly be found to have met its burden under intermediate scrutiny, as it has failed to even make the most basic of assertions — much less showings — about the challenged statute. Intermediate scrutiny would require that the challenged statute furthers an important governmental interest, yet the Commonwealth has only alleged that prohibitions on possession by felons and abusers (something not at issue here) furthers that interest. Interestingly, the Commonwealth *never alleges that the statute at issue* — mandating background checks for private sales — *furthers its interest*.

Nor does the Commonwealth show how the challenged statute is "substantially related" to its goals of promoting public safety. Having failed to make even the most basic of allegations that the challenged statute survives intermediate scrutiny, the Commonwealth has all but forfeited the argument. The Commonwealth apparently feels confident to simply rest on its laurels, assuming the Court will just fill in the blanks. This Court should not accept that invitation.

6. The Commonwealth's Attempts to Shift the Blame to Federal Law Represent a Distinction Without a Difference.

Since the enactment of the challenged statute, VSP has waffled back and forth about whether the challenged statute's universal background check unwittingly created a new minimum age requirement (21 instead of 18) for the purchase of a handgun. But after hearing from ATF, who apparently unequivocally advised VSP that this would be the case, the Commonwealth has now accepted the reality that the challenged statute will have the effect of raising the age to purchase a handgun from 18 to 21 in Virginia.

Nevertheless, the Commonwealth seeks to avoid the blame for this change, pointing its finger instead at "a product of *federal* law," which it claims is the true culprit behind the 21 year old requirement for handgun transfers. MIO at 19. In reality, the resulting ban on 18-20 year old handgun purchases is "a product of" the interplay between two statutes, one state, and one federal. But for the federal statute, the prohibited conduct would be lawful. And similarly, but for the Virginia statute, the prohibited conduct would also be lawful.

The Commonwealth fundamentally misunderstands the *status quo* (*see also* Section 11, infra). Prior to today, July 1, 2020, a person 18-20 years old could purchase a handgun in Virginia, under both state and federal law. However, as of today, that is no longer the case. What has changed? It is certainly not the federal statute. On the contrary, it is state law that has added new requirements. The federal law does not, as the Commonwealth claims, "stand[] as an obstacle to the transactions in which plaintiffs claim they wish to engage." MIO at 21. Federal law is no obstacle in this case, as it has literally nothing to say about a legal, private, intrastate transfer of a handgun to someone 18 to 20 years old. It is this Virginia law that has made this unlawful, by requiring that all private sales become federally regulated sales.

7. The Ban on Handgun Purchases by Those 18-20 Violates Article I, Section 13.

The Commonwealth argues that "age-related restrictions" on firearms generally have received approval from courts that have considered them and, thus, that this Court should reject Plaintiffs' claim that the challenged statute's ban on 18-20 year olds purchasing handguns violates Article I, Section 13. MIO at 21. Relying primarily on the Fifth Circuit case *NRA v. ATF*, 700 F.3d 185 (5th Cir. 2012), the Commonwealth argues that the "historical record" and "historical evidence" dictate that persons under 21 are outside the scope of Article I, Section 13's protections. The Commonwealth references seven other cases by state and federal courts, upholding age

related restrictions on firearms, to support its claim.[18] MIO at 24-25. The Commonwealth's argument is flawed for a number of reasons.

First, while the Fifth Circuit was interpreting the Second Amendment, which protects a "well-regulated militia," Article I, Section 13 goes on to specifically define that militia as being "composed of the body of the people, trained to arms...." Were there any doubt as to the contours of that body, there is also a Virginia statute (Virginia Code § 44-1) which specifically defines the body of the people as those between 16 and 55 years of age. *See* Compl. ¶ 59. The Commonwealth makes no effort to wrestle with this statute. What's more, Section 44-1's wide range of 16-55 is in no way only the product of a recent trend to lower the age of majority. *See* MIO at 23. As far back as 1755, a Virginia "Act for better regulating and training the Militia" required registration of those "above the age of eighteen years, and under the age of sixty years, within this colony...."[19] Between those bookends of history (1755 until 2020), Virginia law has been consistent in its definition of the militia to include those 18-20 years old. Regardless of anything the Commonwealth can say about the Second Amendment, federal statutes, and the laws of other states, these uniquely Virginian statutes make it abundantly clear that "the people" protected by Article I, Section 13 include those who are 18-20 years old. This analysis is also consistent with this Court's decision in *Lynchburg Range & Training LLC v. Northam*, No. CL 200003-33 (Lynchburg Cir. Ct. Apr. 27, 2020) (noting that "the prefatory clause [of Article I, Section 13] provides that the purpose of the right is to have a population trained with firearms in

[18] Of course, none of these decisions are binding on this Court, as this issue is a matter of first impression for Virginia courts.

[19] https://www.encyclopediavirginia.org/An_Act_for_better_regulating_and_training_the_Militia_August_1755

order to defend the Commonwealth.").

Second, the Fifth Circuit in *NRA v ATF* made it quite clear that its holding was limited "only to the extent that these laws prohibit sales of handguns or handgun ammunition by FFLs to 18-to-20-year-olds." 700 F.3d. at 189-90. The court explained that, in spite of federal law and the court's decision to uphold it, "[e]ighteen-to-twenty-year-olds may possess and use handguns. Parents or guardians may gift handguns to 18-to-20-year-olds. Those not 'engaged in the business' of selling firearms — that is, non-FFLs—may sell handguns to 18-to-20-year-olds; put differently, 18-to-20-year-olds *may acquire handguns through unlicensed, private sales*." *Id.* (emphasis added). *See also* at 190 n.1 (noting the ATF position that "an FFL may lawfully sell a firearm to a parent or guardian who is purchasing it for a minor provided that the minor is not otherwise prohibited from receiving or possessing a firearm.") Thus, *NRA v. ATF* does not go nearly as far as the Commonwealth would hope. The decision upholds only a limited and narrow restriction on the ability of someone 18-20 to obtain a handgun, and in no way supports the challenged statute which enacts a *complete* prohibition on the ability of those 18-20 to purchase handguns *from any source*.

Third, while the Commonwealth would have this Court refer to "common law" to determine the age range covered by Article I, Section 13 (MIO at 22), that argument is misplaced. It is axiomatic that a historical, common law rule can be abrogated by statute[20] and, indeed, must

[20] Va. Code § 1–200 provides that "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth ... continue[s] in full force [and is] the rule of decision, *except as altered by the General Assembly*." Emphasis added. *See also Jenkins v. Mehra*, 281 Va. 37, 704 S.E.2d 577 (2011) (quoting *Isbell v. Commercial Inv. Assocs., Inc.*, 273 Va. 605, 614, 644 S.E.2d 72, 75–76 (2007) (emphasis added) (The General Assembly "is presumed to have known and to have had the common law in mind in the enactment of a statute, in conjunction with the common law, giving effect to both unless it clearly appears from express language *or by necessary implication* that the purpose of the statute

yield to more specific enactments[21] on the issue, such as Va. Code Section 44-1. Moreover the common law, by definition, predates both the Second Amendment and Article I, Section 13. Yet in enacting these provisions, the founders indicated a desire to break with the historical tradition (including the 1689 English Bill of Rights) and enact an expansive and sweeping protection of the right to keep and bear arms.[22] The text of Article I, Section 13 protects a broader class of persons than does the English Bill of Rights — "the People" rather than "subjects which are Protestants." Likewise, Article I, Section 13 protects a broader range of activities — "keep and bear" instead of "to have arms." Finally, Article I, Section 13 protects a broader class of "arms" broadly speaking, rather than arms "for their defence" and "suitable to their conditions" and "as allowed by law." In short, neither the English tradition, nor the "common law," inform the boundaries of Article I, Section 13.

Finally, to the extent that *NRA v ATF* still conflicts with Plaintiffs' argument, the Fifth Circuit's decision was wrong, and should not be followed. In large part, the court's decision was based on the federal court "two step" test and the judge empowering interest balancing test of "intermediate scrutiny." As Plaintiffs have noted, Virginia courts have refused to adopt these modes of analysis, and this Court should follow that pattern.

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was to change the common law.").

[21] *See Commonwealth v. Brown*, 259 Va. 697, 706, 529 S.E.2d 96, 101 (2000) ("when one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails.").

[22] Likewise, the scope of Article I, Section 13 is not informed by reference to the 1689 English Bill of Rights.

8. The Commonwealth Seeks to Avoid an Article IV, Section 12 Violation By Attempting to Recast Highly Specific Terminology as General Language.

The Commonwealth disputes the notion that the title of SB70/HB2 violates Article IV, Section 12. The Commonwealth hangs it hat on the language "relating to firearm sales" in the title of SB70/HB2. The Commonwealth claims that this is general language sufficient to cover the challenged statute's lifting the age from 18 to 21 in order to purchase a handgun. MIO at 26.

But the phrase "relating to firearm sales," even if general standing on its own, is limited by what comes before it — "adding a section numbered 18.2-308.2:5, relating to firearm sales...."[23] By limiting "relating to firearm sales" *only* to a specific section of the code, it would follow that changes would be made *only* to that specific section of the code. But Section 18.2-308.2:5 is a brand new code section, and an entirely different code section, § 18.2-308.7, the statute which prohibits handgun possession by anyone under 18. Yet it is 18.2-308.7 which is amended by the challenged statute, having the effect of changing the number "18" to "21." Meanwhile, the title of SB70/HB2 make no reference to § 18.2-308.7. The Commonwealth, then, is back where it started — the title of SB70/HB2 is highly specific, and does not cover the challenged statute's lifting of the age to purchase a handgun from 18 to 21.

Nor does the Commonwealth wrestle with the problem that the drafters of (unenacted) SB 18 included *both* the words "age requirement" *and* the specific code section "18.2-308.7" in the title of SB18 when raising the age to purchase a handgun from 18 to 21. Yet the drafters of SB70/HB2 did not include that language, even though the bills made the same fundamental change

[23] As Justice Cardozo once explained, "the meaning of a statute is to be looked for, not in any single section [or word], but in all the parts together...." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting). *See also* A. Scalia & B. Garner, Reading Law (West Publishing: 2012) at 167.

to the law. *See* Compl. ¶ 68. This simple reality belies the Commonwealth's argument that it was unnecessary to include this language in the title of SB70/HB2.

9. The Commonwealth Attempts to Cover up the VSP's Fraudulent Dealings with FBI with Additional Fraudulent Representations to this Court.

In their Complaint, Plaintiffs noted that the existing "voluntary background check" ("VBC") in § 54.1-4201.2 is inoperable, because VSP's implementation of that statute occurred through fraudulent dealings with the FBI. Compl. ¶¶ 81-95. Plaintiffs note that the VSP's access to the NICS system is based on a "special permit" system proposed by an executive order, but never actually signed. In response, the Commonwealth's argument is essentially that it's not the executive order that failed to deliver what was promised, but instead the VBC statute passed by the General Assembly. Six of one, half a dozen of the other.

As shown in the Exhibit C to the Complaint, the FBI agreed to permit the VSP to access the NICS system in order to run VBCs *solely* on the representation by the VSP that there would be enacted a "special permit" scheme which would then permit access to a system which is normally reserved only for federally licensed firearms dealers.

In response, the Commonwealth argues that Governor McAuliffe's promise to enact an executive order, and subsequent failure to do so, is irrelevant because the VBC is "premised on a specific statutory authorization that complies with federal requirements." MIO at 28. In other words, the Commonwealth argues, there was "no need" for an executive order because the statute *itself* "took the place" of the executive order that was promised to the FBI. MIO at 29.

Yet, unlike the draft executive order that was never signed, and upon which FBI approval was based, the text of Virginia Code § 54.1-4201.2 **does not establish** a "firearm-related permit or license" of any sort. Rather, it purports to provide for a completely ordinary NICS background

check — but one to be conducted by the VSP (not a licensed firearms dealer) in connection with a private sale (not a Brady Act dealer sale). While the draft (and unsigned) executive order purported to (unlawfully) establish a "special permit program for voluntary background checks," this language is conspicuously missing from the provisions of § 54.1-4201.2.

b. The Commonwealth's Exhibit D is Deceptive.

The Commonwealth apparently hopes this Court will gloss over the problem. Audaciously, the Commonwealth puts on its Exhibit D, a *highly misleading* exhibit designed to *make it seem* as if the text of the draft executive order and the text of § 54.1-4201.2 are nearly identical. But comparing Plaintiffs' Exhibit C, pages 15-16 with Defendant's Exhibit D, the problem is self-evident. The Commonwealth's Exhibit D *leaves off a paragraph* from the executive order containing the critical language at issue:

> **Establishment of a Special Permit Program for Voluntary Background Checks**
>
> There is hereby established a program, to be administered by the State Police, to offer special permits to non-federally licensed persons engaging in firearms transactions at gun shows and who desire to conduct a criminal background check to do so where possible. [Plaintiffs' Exhibit C, pp. 15-16.]

Again, the *entire paragraph* above — constituting the *sole basis* for the FBI's determination to permit the VSP to access NICS — is *missing* from the Commonwealth's Exhibit D.

c. Plaintiffs' Claims Are Not "Fatally Undermined" Without their VBC Arguments.

The Commonwealth claims that, without their argument about the fraudulent basis of the VBC at gun shows, Plaintiffs' arguments are "fatally undermine[d]." MIO at 27. As usual, the Commonwealth does not bother to further explain this claim, and for good reason – it doesn't make any sense. In fact, none of Plaintiffs' arguments are "fatally" tied to its VBC argument,

which was included to show the fraudulent and illegal foundation on which the challenged statute is built. *Even if* the VBC provision were determined to be perfectly legal:

a) the requirement of a universal background check for all private sales would still violate Article I, Section 13;

b) the new 18-20 year old restriction would still apply at gun shows and thus would still violate Article I, Section 13, as the Commonwealth admits "VSP will encounter the same issue with the NICS system" at gun shows (MIO at 20); and

c) the statute would still violate Article IV, Section 12, by providing a highly specific title that did not include raising the age to purchase a handgun from 18 to 21.

Each of these realities remain even if the VBC scheme was perfectly legal and not fundamentally flawed.

10. The Commonwealth's Defense of the Unconstitutional Delegation of Power to (and Empowerment of) Private Parties Is Unpersuasive.

As Plaintiffs argued, the challenged statute delegates governmental authority to private parties (FFLs) by prohibiting a private sale unless the parties find an FFL willing to process the transaction. The Commonwealth offers two reasons that it believes supports the statute's constitutionality. MIO at 29-30.

First, the Commonwealth asserts that private parties can conduct that transaction at a gun show in Virginia, under Virginia Code § 54.1-4201.2 and, for this reason, Plaintiffs' argument "falls apart." *Id*. at 30. However, the Commonwealth does not point out the numerous difficulties in this proposed constitutional "work around":

a) at present, there have been no gun shows for many months due to COVID-19;

b) even assuming gun shows begin again across the Commonwealth, many people will not want to go to a crowded gun show and risk exposure to COVID-19;

c) gun shows occur in different parts of the state at different times, and there may only be one show, or no shows, geographically and temporally proximate to a buyer and seller;[24]

d) gun shows charge admission of generally $10 per person ($20 for both buyer and seller) to enter the show to access the VSP table, thereby significantly increasing the cost of effecting the transfer; and

e) a gun show promoter is *still* a private party, and having to go through that entity would *still* represent an unconstitutional delegation of governmental authority.

Second, the Commonwealth cites *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 313 (2013) for the proposition that the FFL's action is merely "ministerial," and constitutes a minimal "empowerment." MIO at 30. Yet ironically, *Elizabeth River* is incredibly damaging to the Commonwealth's case. For example, the Virginia Supreme Court there explicitly distinguished between "delegation of legislative power to an administrative agency," versus "empowerment" of a private party, of the sort involved here. The court made clear that "[w]hen the General Assembly delegates a legislative power directly to a private entity, 'this is legislative delegation in its most obnoxious form.'" *Elizabeth River* at 312 (citation omitted). In that case, the challenged empowerment of the private entity was to set tolls (which the court determined were not taxes) to be charged by the Elizabeth River Crossings OpCo, LLC. Here, the "empowerment" of the private FFL is much more substantial — it has the unreviewable, standardless, absolute discretion to perform the one act that is essential to effect the transaction (process the NICS check or not). The empowerment challenged here is more akin to a private land owners unreviewable veto which was deemed unconstitutional in *County of Fairfax v. Fleet*

[24] The Commonwealth apparently would just have a buyer and seller agree to terms, and then sit around for days, weeks, or months, until a gun show pops up, forming something of a sliding scale waiting period to the exercise of an enumerated right.

Industrial Park Ltd. Partnership, 242 Va. 426 (1991). The challenged statute, as the Virginia Supreme Court has said, is "legislative delegation in its most obnoxious form."

11. The Remaining *Winter* Factors Favor Plaintiffs.

a. Irreparable Harm

The Commonwealth argues that Plaintiffs have not shown irreparable harm, seemingly ignoring the axiomatic proposition that constitutional rights violations constitute irreparable harm as held in *Elrod v. Burns*, 427 U.S. 347 (1976). It is a basic precept of American jurisprudence that a violation of one's constitutional rights is irreparable. "Constitutional violations are *routinely recognized* as triggering irreparable harm unless they are promptly remedied. ... In fact, 'when an alleged deprivation of a constitutional right is involved, most courts hold that *no further showing* of irreparable injury is necessary.' § 11A Fed. Prac. & Proc. Civ. § 2948.1 (2d ed.)." *Obergefell v. Kasich*, 2013 U.S. Dist. LEXIS 102077, *16 (S.D. Oh. 2013) (emphasis added).

Indeed, the Seventh Circuit has specifically held that, for the loss of Second Amendment rights, irreparable harm is presumed. *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). *See also* K. Stoll-DeBell, N. Dempsey, B. Dempsey Injunctive Relief: Temporary Restraining Orders and Preliminary Injunctions (American Bar Association) p. 45 ("In cases involving the intersection of Constitutional rights and injunctive relief, a finding of irreparable harm may presumed if the Constitutional right at issue is being threatened or impaired," giving examples of First, Fourth, Eighth, and Fourteenth Amendment cases).

The challenged statute clearly infringes on an enumerated right. Furthermore, and contrary to the assertion in the Commonwealth's opposition that it will not prevent *any* of the Plaintiffs from acquiring firearms, at least one Plaintiff – 18-year-old Wyatt Lowman - will be completely denied the ability to purchase a handgun due to the effects of this law.

b. Balancing of the Equities and Public Interest

The Commonwealth fundamentally misdefines the concept of maintaining the "status quo" as it relates to this case. "Status quo" is the shortened version of *in status quo res errant ante bellum*, which translates to "in the state of which things were before the war." The status quo to be preserved by a temporary injunction is the "last uncontested status between the parties which preceded the controversy." *Aggarao v. MOL Ship Mgmt. Co., Ltd*., 675 F.3d 355, 378 (4th Cir. 2012). In this case, the last uncontested status is that which exists prior to the effective date (July 1, 2020) of the challenged statute, wherein Virginians are not forced to find and pay a dealer willing to facilitate a purely private, non-commercial sale of a firearm, in violation of their right to keep and bear arms.

Rather than actually addressing the balance of equities and public interest factors, the Commonwealth in Section III of its opposition largely repeats its argument that the wisdom or policy choices within a statute are the prerogative of the General Assembly. This response is deeply flawed for several reasons. First, as the Commonwealth acknowledges and, in fact, argues in this very section, such policy judgments are simply not permitted if they are "plainly repugnant to some provision of the state or federal constitution" – which is precisely the core of the Plaintiffs' argument. The entire purpose of enumerated rights *vis a vis* a legislature's policy judgment is that enumerated rights take certain policy judgments "off the table." *Heller* at 636. Enumerated constitutional rights (expressed as the will of the People themselves) and legislative power (the judgment of the People's representatives) are not co-equal combatants in the arena of the law, where one is permitted to debate whether a mere policy can eclipse an enumerated right. One stands always and forever above the other, for good reason. The Commonwealth's plea to elevate a narrowly enacted policy judgment of the General Assembly above an enumerated constitutional

right can never be equitable, nor in the public interest.

Enjoining an unconstitutional law is not nearly the "extraordinary remedy" that the Commonwealth suggests, though it has regrettably become one of more frequent resort of late, due to recent and unprecedented intrusions on the rights of Virginians. Enjoining unconstitutional enactments is, in fact, the very duty of courts. "But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid." *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

The Court in *Jacobson* went on to conclude that, "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, **or** is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.* at 31. Emphasis added. The challenged statute is clearly a palpable invasion of the rights secured by Article I, Section 13 of the Virginia Constitution, and the public's interest continues to be served by the long-standing prohibitions on possession of firearms by felons and certain persons with mental illness. The Commonwealth's opposition brief closes with a repetition of its plea for those affected by "gun violence." The Supreme Court addressed that argument succinctly in closing its opinion in *Heller*, stating that "[w]e are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. … But the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller* at 636.

Respectfully Submitted,

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