

VIRGINIA:

**IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building**

GUN OWNERS OF AMERICA, INC.

and

VIRGINIA CITIZENS DEFENSE LEAGUE

and

KENNETH VAN WYK

and

ERICH PRATT

and

JOHN VELLECO

Plaintiffs,

v.

Case No.

**HON. RALPH S. NORTHAM
(In his Official Capacity as
Governor of the Commonwealth of Virginia)**

and

**COLONEL ANTHONY S. PIKE
(In his Official Capacity as
Chief of the Division of Capitol Police)**

Defendants.

COMPLAINT AND APPLICATION FOR TEMPORARY INJUNCTION

COME NOW Plaintiffs, by counsel, and move this Court for immediate entry of an Order enjoining the enforcement of the portion of Executive Order Number Forty-Nine (the "EO"),

issued on January 15, 2020 by Governor Ralph S. Northam, which purports to temporarily bar the carrying or possession of firearms upon the grounds of the Virginia State Capitol, and in support thereof state as follows:

PARTIES

1. 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, Springfield, VA 22151. GOA has over 2 million members, including tens of thousands from the Commonwealth of Virginia, and operates as a non-profit organization, exempt from federal income taxes under Section 501(c)(4) of the Internal Revenue Code. GOA’s mission is to preserve and defend the Second Amendment rights of gun owners.

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

their right to bear arms under the Second Amendment to the United States Constitution and Article I, § 13 of the Virginia Constitution.

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

4. Hon. Ralph S. Northam is the Governor of the Commonwealth of Virginia (“Governor”), and was responsible for the promulgation of the EO that is the subject of this Complaint and Application.

5. Colonel Anthony S. Pike is the Chief of the Division of Capitol Police, which is the agency primarily responsible for law enforcement within the “Capitol District,” which includes the grounds of the Virginia State Capitol. Colonel Pike is the chief law enforcement officer tasked with enforcing the provisions of the EO.

FACTUAL AND PROCEDURAL BACKGROUND

6. Venue is proper and preferred in the Court pursuant to Va. Code § 8.01-261(15)(C).

7. This Court has jurisdiction to issue the relief sought – a temporary injunction enjoining the enforcement of a portion of the EO – pursuant to Va. Code §§ 8.01-620 and 624.

8. On January 15, 2020, the Governor issued the EO which, in lettered paragraph C, purports to order that “ no weapons, including firearms, may be carried or possessed on any land,

real property, or improvements owned by the Commonwealth of Virginia within the area bounded by Broad Street, Ninth Street, Bank Street and Governor Street in the City of Richmond, Virginia, as well as any Commonwealth-owned parking lots for Virginia’s Department of Transportation, the Madison Building, the Monroe Building, the Patrick Henry Building, Washington Building, the Jefferson Building, and the Oliver Hill Building” during the duration of the EO, which runs from 5:00 P.M. on Friday, January 17, 2020 through 5:00 P.M. on Tuesday, January 21, 2020. A copy of the EO is attached hereto as Exhibit B.

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

10. In addition to violating numerous federal and state constitutional provisions, for the reasons set forth in more detail below, Paragraph C of the EO as it applies to firearms (as opposed to other categories of “weapons,” for which no injunction is sought at this time) is facially unlawful in light of the statutory prohibition set forth in Va. Code § 44-146.15(3), which was enacted in its current form in 2012 specifically to prevent and prohibit the Governor from in any way limiting or prohibiting the possession or carrying of firearms pursuant to a declaration of a state of emergency. It also violates Article I, §§ 7, 12 and 13 of the Virginia Constitution.

ARGUMENT

I. Standard for Granting Preliminary Injunction

11. In granting a preliminary 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 tip in

plaintiffs' favor; and (4) a showing that the injunction would not be adverse to the public interest. *See The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009). *See also McEachin v. Bolling*, 84 Va. Cir. 76, 77 (Richmond Cir. Ct. 2011).

12. Virginia courts have widely adopted in the *Real Truth* analysis in the absence of any specific elemental test from the Supreme Court of Virginia or applicable statutes,

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

13. The Governor's sole legal bases for the EO, including the challenged provision, are his declaration of a state of emergency pursuant to Va. Code § 44-146.2, *et seq.*, and his administrative "authority to formulate executive branch policies" pursuant to Va. Code § 2.2-103.¹ *See* EO at 1. The Governor cites the Virginia Constitution generally as authority for his actions, but cites no specific provision thereof. Chapter 3.2 of Title 44 of the Code outlines the powers and duties of the Governor in declaring a state of emergency. Neither statute relied on by the Governor comes close to providing him the authority that he purports to exercise in the EO. On the contrary, they expressly prohibit the Governor's actions.

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

Nothing in this chapter is to be construed to:

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

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

designated or used by the Governor, any political subdivision of the Commonwealth, or any other governmental entity as an emergency shelter or for the purpose of sheltering persons; ...

15. Ironically, in February of 2012, Governor Northam and Attorney General Herring, then state senators, both voted in favor of H.B. 20, the current version of the statute that they now seek to subvert. Even more ironically, H.B. 20 added language specifically protecting the “carrying” of firearms, the exact activity the Governor now seeks to suppress. *See Exhibit C.*

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

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

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

19. In addition to the clear statutory violation discussed above, the EO also violates multiple state and federal constitutional provisions. Without relief from this Court, the Plaintiffs and thousands of other Rally participants will be irreparably denied their right to bear arms as guaranteed by Article I, § 13 of the Constitution of Virginia, the Second Amendment of the Constitution of the United States, and Virginia law, in direct violation of Va. Code § 44-146.15(3).

20. Additionally, if the EO is permitted to stand, Plaintiffs and thousands of other Rally participants will be irreparably denied their right to peaceably assemble, engage in protected speech, and petition the government, as guaranteed by Article I, § 12 of the Constitution of Virginia and the First Amendment of the Constitution of the United States. Without relief from this Court, Plaintiffs will be forced to an unenviable choice – if they wish to exercise their First Amendment rights, they must give up their Second Amendment rights, or *vice versa*. But more importantly, the unique nature (and power)

of Lobby Day is the combination of the two rights, exercised together. More specifically, the act of peaceably and openly carrying firearms – which has been done at numerous other “Lobby Day” rallies at the same location over many years without incident – is itself a form of protected speech, particularly when the Rally is specifically intended to express opinions to public officials through the symbolic act of bearing arms. *See, e.g., Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003) (“[g]un possession can be speech where there is an intent to convey a particularized message, and the likelihood [is] great that the message would be understood by those who viewed it.”). It is difficult to imagine a more clear example of an event where carrying firearms is intended to convey an unambiguous political message. *See also Spence v. Washington*, 418 U.S. 405 (1974) (to determine whether conduct constitutes speech for First Amendment purposes, we must ask whether “[a]n intent to convey a particularized message was present” and whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”). As the Supreme Court has noted, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

21. The Plaintiffs clearly lack an adequate remedy at law. If the EO is permitted to take effect, monetary damages would in no way remedy the restraint upon Plaintiffs’ fundamental rights. The very nature of Lobby Day is to petition government officials to refrain from taking further steps to violate the constitutional rights of Virginians. In that sense, a violation of rights now, leading to the inability to petition the government, could beget additional and more significant violations of rights down the road, in the form of unconstitutional legislation. Money damages cannot replace constitutional rights. Monetary damages would be

inadequate, untimely, and impossible to calculate. Injunctive relief is the only remedy that will permit the Plaintiffs to be made whole, by permitting them to exercise their rights at the Rally on January 20, 2020. “It is well established that ‘[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.’” *Am. Broad. Cos., Inc. v. Wells*, 669 F. Supp. 2d 483, 489 (D.N.J. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm’rs*, 802 F. Supp. 1223, 1237 (D.N.J. 1992)).

22. Unlike the real and concrete irreparable harm that will befall Plaintiffs under the EO, the EO lays out nothing but purely hypothetical and speculative scenarios, and based on vague conjecture, that could occur if Lobby Day proceeds unimpaired by the EO. Indeed, there is no credible threat of harm to Defendants if an injunction were issued with respect to the challenged portion of the EO. Such an injunction would merely return the rights of the people to the status quo regarding the peaceable carrying of firearms on the grounds of the Capitol. The EO makes vague, unspecified allusions to “credible intelligence” and “available information” that persons from “outside the Commonwealth” may have as their purpose certain unlawful acts, such as engaging in “violence, rioting, and insurrection.” and that certain other people “may” come for purposes other than peaceable assembly. EO at 1.

23. Yet, despite the EO’s attempts to paint a picture of “threats of violence,” there is no indication that the granting of the injunction would be against the public interest. At a press conference on January 15, 2020, the Governor made vague, non-specific references to “information” on the “dark web,” and certain “intelligence,” but

provided no basis for any threats beyond those generalizations. Indeed, the Associated Press reported the day before that, according to officials working with the Governor, “the state does not have intelligence that the groups are planning a specific act of violence, but said Northam has grown increasingly concerned about numerous ominous-sounding postings on social media from forces outside Virginia.” See “*Virginia Governor to Ban Guns From Capitol Square Ahead of Gun Rights Rally*, Associated Press Reports, January 14, 2020, attached as Exhibit D. The Associated Press also reported that the state officials reported only “credible threats of **potential** violence and **extremism.**” *Id.* (emphasis added). Perhaps the Governor is fearful that some Virginians might be “extremely” in favor of preserving their constitutional rights. However, so far as Plaintiffs are aware, “extremism” in support of constitutional rights is no crime, and presents no danger to anyone. Finally, it is axiomatic that the mere *possibility* that *some* individuals *may* engage in violence, however, has never been a basis to deny the rights of all.²

24. Interestingly enough, rather than an attempt to protect Virginians and diffuse the situation, the Governor’s EO itself has the appearance of a deliberate attempt to provoke a confrontation. Indeed, Lobby Day has been scheduled every year, on the same day, for well over a decade. There has never, to Plaintiffs’ knowledge, been an adverse incident involving a firearm at any Lobby Day. And it has been no secret – for weeks if not for months since the November 2019 election – that attendance at the 2020 Lobby Day will far surpass prior attendance numbers. It also appears evident that the

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

Governor intended to wait until the last minute to issue the EO, but that his hand was forced by “anonymous” government sources who outed his plan to the media on Tuesday. When the House of Delegates rules committee voted to keep firearms out of certain Capitol buildings, gun owners announced their intention to abide by the rule, and stay outside. Now, the Governor is attempting to provoke, by stating that firearms will be prohibited even on the grounds. The Governor’s clear intent is to send a message to gun owners that they are not welcome in Richmond, and to give them no place or opportunity to assemble and petition their government. The Governor’s underlying message is thus one of provocation and challenge, all the while purporting to be an effort to protect public safety.

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

RELIEF SOUGHT

Plaintiffs seek immediate entry of a temporary injunction, through and including Tuesday, January 21, 2020, enjoining the enforcement of Paragraph C of the EO as it pertains to firearms, in substantially the form as the proposed order attached as Exhibit E. For avoidance of doubt, the Plaintiffs do not seek any injunction or relief with respect to any other aspect of the EO.

Respectfully Submitted,

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

BY: 

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CERTIFICATE OF SERVICE

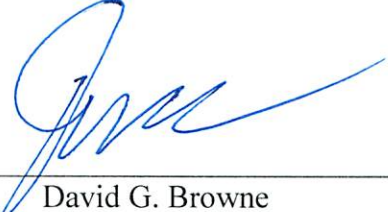
In accordance with Va. Code § 8.01-629, the undersigned certifies that on January 16, 2020, a true and accurate copy of the foregoing Complaint and Application for Temporary Injunction was served upon the following via e-mail, thereby giving notice of the same:

Toby Jay Heytens – Solicitor General
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David G. Browne



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COLONEL ANTHONY S. PIKE

**In his Official Capacity as
Chief of the Division of Capitol Police**

Defendants.

ORDER GRANTING TEMPORARY INJUNCTION

CAME THIS DAY the Plaintiffs, by counsel, upon their Complaint and Application for Temporary Injunction. Upon review of the pleadings and the arguments of counsel, and for good cause shown, it is hereby ORDERED that:

1. The Application for Temporary Injunction is GRANTED upon the further terms set forth herein.

2. The Governor, the Division of Capitol Police, and all law enforcement divisions, agencies, and officers within the Commonwealth, are hereby enjoined and prohibited from enforcing, in any manner, the prohibitions regarding firearms (but not weapons other than firearms) as set forth in Paragraph C of Executive Order Number Forty-Nine issued by the Governor on January 15, 2020.

3. The Governor, the Division of Capitol Police, and all law enforcement divisions, agencies, and officers within the Commonwealth, are hereby enjoined and prohibited from denying or conditioning access to the Capitol grounds, as that areas is defined in Paragraph C of Executive Order Number Forty-Nine issued by the Governor on January 15, 2020, to any person who is carrying or in possession of a firearm in an otherwise lawful manner.

4. Nothing in this Order shall be construed to enjoin or prevent the enforcement of any other aspect of Executive Order Number Forty-Nine issued by the Governor on January 15, 2020, nor to enjoin the enforcement of any other valid statutes pertaining to the possession, carry, and use of firearms.

5. This Temporary Injunction shall take effect immediately, or upon the posting of any required bond if so ordered, and remain in effect until 5:00 P.M. prevailing Eastern Time on Tuesday, January 21, 2020.

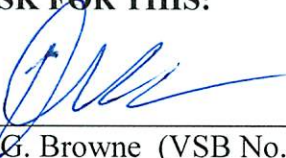
6. In accordance with Va. Code § 8.01-631, an injunction bond in the amount of \$_____ shall be posted with the Clerk.

ENTER: / /2020

TIME:

CIRCUIT COURT JUDGE

WE ASK FOR THIS:



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FURTHER ENDORSEMENTS WAIVED PER RULE 1:13