

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**SHOWMASTERS, INC.**  
d/b/a Showmasters Gun Shows,

**SONNY'S GUNS AND TRANSFERS,**

and

**JOHN CRUMP,**

**Plaintiffs,**

**Case No.**

v.

**HON. RALPH S. NORTHAM**  
(In his Official Capacity as  
Governor of the Commonwealth of Virginia)  
Capitol Square  
Richmond, Virginia 23219

**2020 18145**

and

**M. NORMAN OLIVER**  
(In his Official Capacity as  
State Health Commissioner)  
Virginia Department of Health  
109 Governor Street  
Richmond, Virginia 23219,

**Defendants.**

**COMPLAINT, APPLICATION FOR TEMPORARY INJUNCTION,**  
**AND PETITION FOR WRIT OF MANDAMUS**

**FILED**  
**CIVIL INTAKE**  
**2020 NOV 17 PH 3:47**  
**JOHN T. FREY**  
**CLERK, CIRCUIT COURT**  
**FAIRFAX, VA**

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**COMPLAINT AND APPLICATION FOR TEMPORARY INJUNCTION**

COME NOW the Plaintiffs, Showmasters, Inc., Sonny's Gums and Transfers, and John Crump, and move this Court for:

(1) a declaratory judgment finding that The Nation's Gun Show, scheduled to be held this Friday, November 20 through Sunday, November 22, constitutes a "Brick and Mortar Retail Business" under Executive Order Sixth Amended Number Sixty-Seven ("EO67/6") issued by the Governor and State Health Commissioner on Friday, November 13, 2020 and effective Monday, November 16, 2020 and that, as such a "Brick and Mortar Retail Business," The Nation's Gun Show not subject to any capacity limits on attendance; or

(2) a declaratory judgment finding that the provisions of EO67/6 which, as interpreted by health authorities, would force the cancellation of The Nation's Gun Show this weekend are:

(a) *ultra vires* and beyond the scope of the Governor's executive authority under the Constitution of Virginia, the Emergency Services and Disaster Law (Va. Code § 44.1-146.13, *et seq.*), or otherwise;

(b) beyond the Commissioner's statutory authority under Title 32.1 and otherwise;

(c) violative of Article I, § 13 of the Constitution of Virginia (Right to Keep and Bear Arms);

(d) violative of Article I, § 12 of the Constitution of Virginia (Freedom of Speech and Assembly); and

(e) violative of Article I, § 7 of the Constitution of Virginia (Anti-Suspension Provision);

(3) immediate entry of a temporary injunction, on an emergency basis, enjoining the Governor, State Health Commissioner, and all departments of health, law enforcement divisions,

agencies, and officers within the Commonwealth, from enforcing, in any manner, provisions of EO67/6 insofar as they prohibit the holding of The Nation's Gun Show this weekend, provided that The Nation's Gun Show operates to the fullest extent possible in a manner consistent with the social distancing and sanitizing guidance from federal and state authorities, including that provided for in EO67/6 and the Commonwealth's "Guidelines for All Business Sectors;"

(4) a writ of mandamus to enjoin enforcement of the provisions of EO67/6 insofar as they have been interpreted to effect a stop to The Nation's Gun Show to be held this weekend; and

(5) such other and further relief as the Court may deem appropriate, and in support thereof state as follows.

#### JURISDICTION AND VENUE

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

2. 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.

#### PARTIES

3. Plaintiff Showmasters, Inc., d/b/a Showmasters Gun Shows ("Showmasters"), is a Virginia corporation that hosts gun shows at various locations within the Commonwealth, and in other states on the East Coast of the United States. Showmasters is the largest organizer of gun shows in the Mid-Atlantic Region.

4. Plaintiff Sonny's Guns & Transfers is a federal firearms licensee doing business in Richmond, Virginia. Sonny's Guns & Transfers ("Sonny's") is a retail business that derives over 90 percent of its income from attending gun shows, with The Nation's Gun Show making

up a large portion of that amount. In preparation for The Nation's Gun Show this weekend, Sonny's has expended significant funds to purchase firearm and ammunition inventory to sell at the show. Sonny's estimates that, if The Nation's Gun Show is canceled this weekend, the business will lose out on \$60,000 to \$70,000 in gross sales. Prior COVID-19 orders and closures have greatly affected the ability of Sonny's to conduct its business, leading to the business having almost no revenue during certain times. Each time it attends The Nation's Gun Show, Sonny's spends over \$2,000 in Fairfax County on hotels, restaurants, gas, etc. Sonny's has and will continue to follow applicable social distancing, masking, and sanitization requirements when it conducts business at gun shows.

5. Plaintiff John Crump ("Crump") is a United States citizen, a resident of Ashburn, Virginia, and a law abiding gun owner with no disability preventing him from keeping and bearing arms. Crump is also a journalist specializing in the right to keep and bear arms, and is the Virginia state director for Gun Owners of America, Inc. Crump wishes to attend The Nation's Gun Show this weekend, both to purchase firearms and ammunition, and also to gather together with like minded individuals, to discuss relevant issues with respect to the right to keep and bear arms, both in a personal capacity, and in a professional capacity as a journalist covering issues pertaining to such rights. Crump is willing to follow all social distancing, masking, and other requirements of both the Commonwealth and The Nation's Gun Show.

6. Defendant Ralph S. Northam is the Governor of the Commonwealth of Virginia ("Governor"), and is responsible for the promulgation of EO67/6, including the provisions thereof which are the subject of this Complaint, Application, and Petition. Exhibit A.

7. Defendant M. Norman Oliver is State Health Commissioner of the Virginia Department of Health, and is responsible for both the promulgation of EO67/6, as well as oversight and enforcement of EO67/6.

### **PROCEDURAL BACKGROUND**

8. On November 13, 2020, Governor Northam signed “Executive Order Sixth Amended Number Sixty-Seven (2020) and Order of Public Health Emergency Seven” (“EO67/6”).<sup>1</sup>

9. Having taken effect on Monday, November 16, 2020 at midnight, EO67/6 purports to continue the Commonwealth’s “phase three” reopening from prior iterations of the Governor’s litany of executive orders. Yet at the same time, EO67/6 imposes a so-called “tightening of certain temporary restrictions” which constitute a large step back from “phase three.” Even though conceding that “the Commonwealth’s case count per capita and positivity rate remain comparatively low,” EO67/6 claims that these “additional measures are necessary.”

10. Under EO 67/6, “Brick and Mortar Retail Businesses” that are not considered “essential retail businesses” are permitted to “continue to operate,” but they are required to follow “sector-specific guidance” provided for in the current iteration of “Guidelines for All Business Sectors”<sup>2</sup> (pp. 1-4), including guidance for “Brick and Mortar Retail” (pp. 17-19).

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<sup>1</sup> [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-SIXTH-AMENDED-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Further-Adjusting-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-SIXTH-AMENDED-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Further-Adjusting-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf)

<sup>2</sup> <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Forward-Virginia-Phase-Three-Guidelines-November-2020.pdf>

See EO67/6 Section A.4. There is no fixed limit on capacity for the operation of such businesses.

11. Under EO 67/6, "Entertainment and Amusement Businesses" are similarly required to follow the Guidelines for All Business Sectors (pp. 1-4) and their sector-specific requirements (pp. 30-33). See EO67/6 Section A.12. However, unlike for "Brick and Mortar Retail," this category is specifically limited to the lesser of "30% of the lowest occupancy load on the certificate of occupancy, if applicable, or 250 persons." EO67/6, Section A.12.a (emphasis original).

12. Finally, EO67/6 lowers the catch-all "public and private in-person gatherings" limit from 250 back to 25 persons. Section B.1.

13. As with past executive actions, EO67/6 threatens prosecution "as a Class 1 misdemeanor pursuant to § 32.1-27 of the *Code of Virginia*," among its list of enforcement measures. Section A.14.

14. In this case, Plaintiffs do not challenge EO67/6 or the Guidelines for All Business Sectors, even insofar as they impose a myriad of illegal and unconstitutional mandates about what people must say, where they can and cannot walk, sit, or stand, what they must wear, along with other social distancing and sanitization requirements. Plaintiffs are willing and able to comply with (and indeed exceed) those requirements, as they have in the past.

15. Here, Plaintiffs contend first that their scheduled event (described below) should fall under the category of "Brick and Mortar Retail Businesses," for which no capacity limit is imposed, a classification that Virginia health authorities dispute. Alternatively, Plaintiffs challenge EO67/6's newly imposed limits on the number of persons who may attend events



classified as "Entertainment and Amusement Businesses." Plaintiffs' challenges to those capacity limits consist of both statutory and constitutional claims.

### **FACTUAL BACKGROUND**

16. Several times per year, Plaintiff Showmasters hosts "The Nation's Gun Show" (referred to at times as "the gun show") at the Dulles Expo Center in Chantilly, Virginia.<sup>1</sup> The Nation's Gun Show is one of the largest, most well-known, and most successful recurring gun shows in the nation, bringing together exhibitors, vendors, and attendees from across the country. The Nation's Gun Show also represents one of the biggest economic functions that occurs in Fairfax County. Indeed, the Dulles Expo Center is the largest event center of its kind within Fairfax County, and The Nation's Gun Show is the single largest event that occurs at the Dulles Expo Center.

17. Exhibitors have accumulated and built up stock with large investments for months preparing to come to this show. It takes months to prepare for this show. The loss of this show represents months of investment for all involved.

18. Each occurrence of The Nation's Gun Show is a large and highly complex event that requires months of meticulous planning among hundreds of participants, vendors, staff, and partner businesses. For example, The Nation's Gun Show held August 21-23, 2020 involved no fewer than 60 event staff, 530 exhibitors, and hosted over 12,500 attendees — and was safely and successfully executed even while being severely limited by the "phase three" COVID-19 emergency restrictions that were in place at the time. Attendance lines for that gun

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<sup>1</sup> <https://www.showmastersgunshows.com/show-dates.html>.

show snaked through the parking lot, and attendees were willing to wait up to three hours in line just for their turn to get in the door.

19. The Nation's Gun Show has been administered successfully and safely, even during COVID-19. The Dulles Expo Center and The Nation's Gun Show maintain and enforce a written set of policies and procedures (See Exhibit B) that not only mirror the sanitization and distancing requirements provided by the state, but also go further than the state requires. For example, Showmasters previously has utilized a germicidal UV-C lighting system and an industrial HEPA air purification system in order to combat the spread of disease throughout the show. Showmasters also has in the past ordered tens of thousands of face masks to have on hand for event staff to hand out to attendees.

20. During prior occurrences of The Nation's Gun Show, Showmasters and Dulles Expo Center staff effectively limited the number of attendees on the floor at any given time, and enforced sanitization, distancing, and masking requirements among participants. As a result, neither state nor county health departments have reported any spread of COVID-19 as a result of The Nation's Gun Show.

21. Each time The Nation's Gun Show is held, Plaintiff Showmasters expends significant funds on reserving the event space, paying for event staff, and the provision of amenities, cleaning services, etc. In addition, tens of thousands of dollars are spent on advertising leading up to the show. Off-duty Fairfax County police officers are scheduled to provide on-site security for the event. Private security companies are also contracted to provide their services. During each gun show, event staff are employed by the Dulles Expo

Center to maintain the numerous aspects of site infrastructure and keep things running smoothly, including the PA system, trash, bathrooms, electricity, cleaning, etc.

22. To attend the Nation's Gun Show, vendors pay between \$115 and \$120 per table in order to offer their merchandise and services. Large vendors might reserve and pay for a dozen or more tables. During COVID-19 times, tables have been limited to allow for sufficient distancing but, in the past, as many as 1300 tables have been reserved. At each gun show, tens of thousands of attendees pay as much as \$23 each as an entry fee. During COVID-19 times, attendance has been reduced due to capacity restraints (approximately 12,500 in August of 2020) but, in the past, as many as 23,000 persons have attended The Nation's Gun Show. At every gun show, many millions of dollars changes hands during the three-day period of the show. Although the Nation's Gun Show has participants both large and small, it is common for vendors to display hundreds of thousands of dollars of merchandise for sale.

23. Additionally, at The Nation's Gun Show, firearms related training and classes are offered, including those that offer medical training, firearms safety and legal classes qualifying a person to obtain a concealed handgun permit in Virginia and other states, firearm cleaning seminars, etc.

24. In addition to the direct, state constitutionally protected firearms-related commerce at the show, the indirect economic effects of The Nation's Gun Show are tremendous. Nearby hotels sell out of rooms, which are booked far in advance by both vendors and attendees. Local restaurants make large advance purchases of food in order to feed thousands of gun show participants. The Walmart location adjacent to the gun show

experiences a large temporary uptick in business. Gas stations sell many thousands of gallons of gas to participants. Local hardware and office supply stores provide significant amounts of goods to service the show.

25. At bottom, Plaintiff Showmasters reasonably estimates the total economic impact of a single gun show to be in the neighborhood of \$20-25 million, depending on the show.

26. However, in recent months, the demand for firearms, ammunition, and related products and services has skyrocketed, fueled by intersecting scares over COVID-19 and interruptions in government-related services including policing, fears of demonstrations, rioting and social unrest purportedly in response to various police shootings, and a general sense of apprehension about the November 2020 presidential election and the future for gun rights in this country.<sup>2</sup> In short, the gun industry as a whole has experienced an unprecedented demand, leading to both shortages and scarcities of firearms, magazines, ammunition, components, and related products across the spectrum.

27. Together, this confluence of events creates the potential for booming and unprecedented levels of business to occur at The Nation's Gun Show this weekend, to the benefit of the event hosts, vendors, and participants alike. Plaintiff Showmasters reasonably estimates that attendance and sales could easily surpass those of any prior Nation's Gun Show.

28. Of course, in addition to the economic side, there is also a constitutional component to The Nation's Gun Show. First, law abiding gun owners from all walks of life

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<sup>2</sup> See <https://www.examiner-enterprise.com/story/news/2020/11/05/bartlesville-area-firearm-sales-meet-perfect-storm/6166992002/>.

come together for the opportunity to exercise to exercise their right to keep and bear arms under Article I, Section 13 of the Constitution of Virginia. Every court to have considered the issue has concluded that these rights include the right to engage in commerce to acquire arms and ammunition. Second, gun owners — along with organizations advocating for the right to keep and bear arms — congregate at The Nation's Gun Show and engage in protected speech and assembly, rights that Article I, Section 12 states are "great bulwarks of liberty, and can never be restrained except by despotic governments."

29. Recently, Plaintiff Showmasters has placed several calls both the Fairfax County Health Department, and the Virginia Department of Health, inquiring as to what rules in EO67/6 will apply to The Nation's Gun Show, and seeking classification of The Nation's Gun Show within EO67/6. Specifically, Showmasters inquired as to whether the gun show would be considered a "Brick and Mortar Retail Business," on the grounds that it is an event that assembles numerous such retail businesses under one roof, with the main purpose to engage in retail sales of goods to the public. As of the filing of this litigation, Plaintiff Showmasters has been unable to speak with anyone either willing or able to provide definitive guidance one way or another.

30. In the past, however, Dulles Expo Center inquired and was told by the Fairfax Health Department that all events held at the Expo Center are considered "Entertainment and Amusement Businesses," and thus would be subject to Section A.12 of EO67/6's capacity restrictions.

31. The problem with EO67/6 is that it is often vague and unclear, and virtually impossible for even sophisticated parties represented by legal counsel to predict how it will be

interpreted. Such vague laws, especially when they carry criminal penalties, are the very definition of tyranny. Absent definitive guidance that The Nation's Gun Show will be considered as Brick and Mortar Retail, Showmasters is forced to assume that it will be considered "Entertainment and Amusement," and thus required to cancel the show. Indeed, as noted above, this is the message that health authorities previously relayed.

32. Based on this conclusion by the health authorities, EO67/6, which walks back various aspects of the Commonwealth's prior "phase three" reopening, effectively makes Plaintiff Showmasters unable to hold The Nation's Gun Show. Indeed, counting only exhibitors and event staff would far exceed a 250 person capacity — *even before including attendees*. Thus, without relief from this Court, Plaintiff Showmasters will be forced to cancel The Nation's Gun Show.

33. Canceling The Nation's Gun Show will cause significant and irreparable harm to Plaintiff Showmasters, Sonny's Guns and Transfers, and John Crump. In addition, dozens of other businesses and livelihoods will be significantly harmed, and the constitutional rights of thousands will be violated. Gun show vendors are already en route to The Nation's Gun Show, from places as distant as Florida and Texas. Showmasters already has a tractor trailer inbound containing event supplies. The Dulles Expo Center has and is already setting up and arranging tables for the gun show, and otherwise engaging in significant work to prepare the venue for the gun show. Plaintiff Crump (and the other Plaintiffs) will be denied the opportunity to engage in protected commerce related to the Article I Section 13 right to keep and bear arms. Additionally, all the Plaintiffs will be denied their Article I Section 12 right to associate with other like-minded gun owners, to engage in political discourse related to keeping

and bearing arms, and to seek out training and education related to becoming a better equipped and informed law abiding gun owner. Finally, EO67/6 will inflict a host of direct and indirect, financial and non-economic harms, many irreparable, affecting various companies, organizations, and individuals, including the named plaintiffs herein.

34. The severity of EO67/6's effects are further magnified by the EO67/6's proximity to this weekend's gun show. With a stroke of the pen, EO67/6 seeks to pull the rug out from under The Nation's Gun Show's many participants, outlawing *at the very last minute* millions of dollars of lawful commerce, and the exercise of numerous constitutional rights, both of which have been months in the planning by many hundreds (if not thousands) of persons. One of the main functions of government is to facilitate and protect lawful commerce — not destroy it.

#### SUMMARY OF ARGUMENT

Justice Samuel Alito recently gave an address in which he expressed his view on the duty of judges to evaluate carefully challenges to COVID-19 restrictions implemented by state executive branch officials under broadly worded statutes:

The pandemic has resulted in previously unimaginable restrictions on individual liberty.... We have never before seen restrictions as severe, extensive and prolonged as those experienced, for most of 2020.....  
 [L]aws giving an official so much discretion can, of course, be abused....  
 Simply slapping on [a COVID] label cannot provide the ground for abrogating our most fundamental rights. And whenever fundamental rights are restricted, the Supreme Court and other courts cannot close their eyes.  
 Jacobson versus Massachusetts ... does not mean that whenever there is an emergency, executive officials have unlimited unreviewable discretion. [Video and Transcript of Justice Alito's Keynote Address to the Federalist Society, Reason.com (Nov. 13, 2020).]

35. This case presents two questions. First, does Plaintiff Showmaster's scheduled

event, The Nation's Gun Show, to be held this Friday, Saturday, and Sunday at the Dulles Expo Center, constitute a "Brick and Mortar Retail Business" pursuant to Section A.4 of EO67/6, and thus is not subject to capacity limitations on attendance?

36. If this Court answers that narrow question in the affirmative, it need not reach the second question, because Plaintiffs stand ready to comply with all other social distancing and sanitization requirements in EO67/6 and the Guidelines.

37. However, should the Court determine that The Nation's Gun Show is not a "Brick and Mortar Retail Business," but instead is an "Entertainment and Amusement Business" under Section A.12 of EO67/6, it is thus subject to a 250 person capacity limit on attendance, and so the second question presented would need to be addressed. That is whether the Governor of Virginia and the State Health Commissioner, together or separately, have the authority to order the complete cancellation of one of the single largest economic events in the Commonwealth, at which thousands of persons gather together to engage in millions of dollars of lawful commerce, and activity expressly protected by multiple provisions of the Constitution of Virginia?

38. That second question answers itself. Neither the Governor nor the Commissioner has such power. The Governor is expressly barred from closing down The Nation's Gun Show under the Virginia "Emergency Services and Disaster Law." But even more importantly, his closure order infringes on rights recognized and protected by Article I, §§ 12 and 13 of the Virginia Constitution. It does not matter that the Governor has issued an emergency declaration or declared a state of emergency, or that the Commissioner declared a public health emergency, as no elected official has the discretionary authority to suspend the



protections the People wrote into their Constitution which also created the office in which the Governor serves, and under which the Commissioner serves.

39. Although there is no enumerated right in Constitution of Virginia to frequent a tanning salon, racetrack, or bowling alley (other so-called "Entertainment and Amusement Businesses"), there is more than one enumerated constitutional right that protects The Nation's Gun Show. Moreover, EO67/6 allows other categories of businesses (such as restaurants) to remain open that are favored by the Governor, yet which expose Virginians to a much higher degree of social interaction and thus higher risk of infection than does The Nation's Gun Show, which has gone to great lengths to protect its participants from COVID-19.

40. Forcing the cancellation of The Nation's Gun Show has serious consequences well beyond the significant economic losses to Showmasters, the Dulles Expo Center, Sonny's Guns and Transfers, and numerous vendors and associated businesses that are harmed both directly and indirectly by EO67/6. Forcing cancellation of The Nation's Gun Show deprives Plaintiff Crump and others of their right to engage in the commerce necessary to exercise their right to keep and bear arms, as well as depriving all the Plaintiffs of the freedom to associated with other like minded persons to engage in protected speech and assembly.

41. Forcing cancellation of The Nation's Gun Show also defies and undermines the determination by the U.S. Department of Homeland Security that gun shows (which are comprised of hundreds of "firearm, or ammunition product manufacturers, retailers, importers, [and] distributors") are part of the Essential Critical Infrastructure of the nation.

42. Significantly, the Governor has not closed down firearm and ammunition retailers themselves, and EO67/6 expressly permits indoor shooting ranges to remain open.

Yet when those same retailers (many of them Virginia corporations) gather together for a common purpose at The Nation's Gun Show, the Governor has ordered that the show must *not* go on. EO67/6's unlawful effect of forcing cancellation of The Nation's Gun Show cannot stand.

### ARGUMENT

#### I. STANDARD FOR GRANTING TEMPORARY INJUNCTION.

43. In granting a temporary injunction, the Court often looks 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).

44. 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).

45. The basis for a declaratory judgment and the reasons for issuance of a temporary injunction showing likelihood of success on the merits is addressed below.

#### II. EO67/6 CONSTITUTES AN *ULTRA VIRES* ACT OF THE GOVERNOR, IN

**VIOLATION OF VIRGINIA'S EMERGENCY SERVICES AND DISASTER LAW.**

46. To Plaintiffs' knowledge, never before in the history of the Commonwealth has any Governor — and there have been 72 before the current occupant of that office — claimed to have the extraordinary and unilateral authority to, with the stroke of a pen, and without action by the General Assembly, close entire categories of businesses throughout the entire Commonwealth.<sup>3</sup> Deeply embedded in the Virginia legal tradition is “a cautious and incremental approach to any expansions of the executive power.” *Gallagher v. Commonwealth*, 284 Va. 444, 451, 732 S.E.2d 22, 25 (2012). This tradition reflects our Commonwealth's belief that the “concerns motivating the original framers in 1776 still survive in Virginia,” including their skeptical view of “the unfettered exercise of executive power.” *Id.* No authority exists anywhere in the laws of the Commonwealth that would permit the Governor to simply decide to close any categories of businesses, as he has done since through numerous executive orders and amendments since May of 2020.

47. The text of EO67/6 sets forth two bases of purported authority for the Governor to completely shutter a broad variety of lawful businesses in Virginia: Article V of the Constitution of Virginia, and Va. Code § 44.1-146.17, which is part of the “Emergency Services and Disaster Law” within the Code of Virginia. Yet even an expansive and deferential reading of these provisions would not support the Governor's actions and, as discussed, *infra*, other Executive Orders have been struck down by Virginia Courts in the past.

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<sup>3</sup> To be sure, the City of Richmond is reported to have implemented certain public measures in response to the Spanish Flu a century ago. See Addeane S. Caellegh, “The Influenza Pandemic in Virginia (1918-1919),” *Encyclopedia Virginia*.

48. The State Health Commissioner fares no better. EO67/6 sets forth three independent bases of purported authority allegedly possessed by the Commissioner, Va. Code § 32.1-13, Va. Code § 32.1-20, and Va. Code § 35.1-10. Yet examination of those statutory provisions reveals no legitimate source of authority to effect cancellation of The Nation's Gun Show.

**A. Article V, Section 7, Virginia Constitution.**

49. Article V, Section 7 of the Constitution of Virginia simply contains no language or provision which could possibly be construed to empower the Governor to completely close an entire category of lawful businesses, let alone one which implicates, and directly provides for the exercise of, multiple constitutional rights.

50. The full text of Article V, Section 7 is as follows:

The Governor shall take care that the laws be faithfully executed.

The Governor shall be commander-in-chief of the armed forces of the Commonwealth and shall have power to embody such forces to repel invasion, suppress insurrection, and enforce the execution of the laws.

The Governor shall conduct, either in person or in such manner as shall be prescribed by law, all intercourse with other and foreign states.

The Governor shall have power to fill vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision. If such office be one filled by the election of the people, the appointee shall hold office until the next general election, and thereafter until his successor qualifies, according to law. The General Assembly shall, if it is in session, fill vacancies in all offices which are filled by election by that body.

Gubernatorial appointments to fill vacancies in offices which are filled by election by the General Assembly or by appointment by the Governor which is subject to confirmation by the Senate or the General Assembly, made during the recess of the General Assembly, shall expire at the end of thirty days after the commencement of the next session of the General Assembly.

51. The Governor cannot rely on a constitutional provision for authority to issue an executive order on a subject that bears no relation whatsoever to the limited grant of executive power in the constitutional provision. Nor can this Court, regardless of any “policy” argument that the Commonwealth may raise, bend the language of a constitutional provision to mean something different from, or greater than, the text. In construing constitutional provisions, the Court is “not permitted to speculate on what the framers of [a] section might have meant to say, but are, of necessity, controlled by what they did say.” *Harrison v. Day*, 200 Va. 439, 448, 106 S.E.2d 636, 644 (1959). If there are “no doubtful or ambiguous words or terms used, we are limited to the language of the section itself and are not at liberty to search for meaning, intent or purpose beyond the instrument.” *Id.* See also *Blount v. Clarke*, 291 Va. 198, 782 S.E.2d 152 (2016).

52. As the Circuit Court of the City of Lynchburg recently held, Article V, Section 7 provides the Governor no authority to regulate firearms related business. That court flatly rejected the argument that the Governor “when he declares a state of emergency ... can ignore any law [discussed below] that limits his power, even laws designed to limit his power during a state of emergency.” 2020 Va. Cir. LEXIS 57, \*4. In this instance, Article V, Section 7 provides no executive authority to engage in the complete closure of gatherings of constitutionally protected businesses at The Nation’s Gun Show. EO67/6 is plainly *ultra vires* to the extent that it purports to rely on Article V, Section 7 of the Constitution of Virginia.

## B. Virginia Emergency Services and Disaster Law.

53. The second source of the Governor's purported authority for EO67/6 is Va. Code § 44.1-146.17, which enumerates a specific and limited list of powers that the Governor has in relation to a declaration of emergency. This Code section includes powers such as ordering evacuations of areas stricken or threatened by natural disasters, and issuing orders to control and allocate essential goods such as food and fuel. As is true with respect to Article V, Section 7, there is no provision within Va. Code § 44.1-146.17 that could possibly be construed as empowering the Governor to close entire categories of businesses throughout the Commonwealth. It is simply not a power granted or even contemplated by the Emergency Services and Disaster Law.

54. What is more, with regard to firearms in particular, in 2012, the General Assembly also enacted the current version of Va. Code § 44-146.15(3), which provides in relevant part as follows:

Nothing in this chapter is to be construed to:

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

55. In February of 2012, both Governor Northam and Attorney General Mark Herring, then state senators, voted in favor of H.B. 20, the current version of the statute that the Governor's Executive Order now subverts.

56. This 2012 amendment to the Emergency Services and Disaster Law was specifically intended to prevent the Governor from using executive authority, under a declaration of emergency, to infringe upon the right to keep and bear arms held by Virginians under Article I, § 13 of the Virginia Constitution. As discussed in detail *infra*, gun shows (whereat gun owners acquire firearms, ammunition, accessories, education, and training) are indisputably protected by the Article I § 13 right to keep and bear arms. As it pertains to gun shows, then, EO67/6 directly violates an express statutory limitation on the Governor's emergency powers, in addition to being *ultra vires* for the more general reasons set forth above.

57. In a challenge to Executive Order 53 by an indoor shooting range, an earlier COVID-19 emergency executive order, the Lynchburg Circuit Court applied Va. Code § 44-146.15(3) to a prior executive order that ordered indoor shooting ranges to close. There, the court noted that, while the Emergency Services and Disaster Law "grants the Governor broad emergency powers," at the same time the law expressly "constrains the Governor" when it comes to activities protected by Article I, Section 13. *Lynchburg Range & Training, LLC v. Northam*, 2020 Va. Cir. LEXIS 57, \*3 (Lynchburg Cir. Ct. Apr. 27, 2020). The Court also noted that this explicit statutory provision made it largely unnecessary to reach the question as to whether the executive order's closure of indoor ranges infringed Article I, Section 13 (although the court still concluded that the order infringed Article I Section 13 rights). *Id.* at \*8-9.

**C. Article I, Section 7 of the Virginia Constitution – Anti-Suppression Provision.**

58. Article I, Section 7 of the Constitution of Virginia provides: “That 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.” This provision of the Virginia Constitution has been applied recently by the Supreme Court of Virginia in 2016 to strike down as unconstitutional a similarly sweeping Executive Order by then-Governor Terry McAuliffe. *Howell v. McAuliffe*, 292 Va. 320, 788 S.E.2d 706 (2016).

59. In *Howell*, the Supreme Court of Virginia examined an executive order which purported to restore, in a blanket and non-individualized manner, the voting rights of 206,000 Virginians who had been convicted of felonies but had completed their sentences. Similar to the present case, the *Howell* case pitted a clear provision of the Virginia Constitution (Article II, § 1, which provides that no person convicted of a felony shall be eligible to vote unless his right to do so be restored by the Governor) against a limited grant of executive power (Article V, § 12, which gives the Governor specific powers to grant clemency). Historically, the power of the Governor to restore voting rights had always been understood to be limited to a case-by-case basis and had been exercised on an individual basis.

60. The Court made clear in *Howell* that any assertion by a Governor of absolute power to issue executive orders “runs afoul of the separation-of-powers principle protected by Article I, § 7 of the Constitution of Virginia.” *Id.* at 344. As discussed in *Howell*, the very purpose of this provision was to prevent a Governor from becoming a King who could simply cast aside any restraints on his power, or rewrite laws that he found inconvenient to his policy goals. There, the Supreme Court held that “[t]he unprecedented scope, magnitude, and



categorical nature of Governor McAuliffe's Executive Order crosses that forbidden line." *Id.* at 349. Yet this is precisely how Governor Northam has governed the Commonwealth since May of this year, issuing edict after edict purporting to direct the operation of virtually every aspect of life within the Commonwealth, all the while refusing to seek guidance, input, or approval from the General Assembly (even though controlled by his political party).

61. *Howell* articulated the primary standards by which this Court must exercise a "duty of judicial review" to determine whether a Governor's executive order demonstrates "the attributes of an *ultra vires* assertion of the suspending power that has been forbidden by our Constitution since 1776." *Id.*, 292 Va. at 350. The Court endorsed three primary inquiries:

(1) Precedent: Whether historical precedent demonstrates that the Governor has "adopted a 'practical construction'" of the enabling language that "has been acquiesced in for a considerable period" or "has been generally accepted as correct." *Id.* at 339. The Court stressed that whether the Governor's interpretation of his authority reflects a "longstanding 'practice of the government' [that] has traditionally played an important role in informing 'our determination of what the law is,' and the interpretation of prior executives over a long course of years should be treated as 'a consideration of *great weight* in a proper interpretation' of the scope of executive power." *Id.* at 339-340 (emphasis original, citations omitted).

(2) Textual analysis of the source: Whether the text of the source cited by the Governor as authority for the Executive Order plainly or impliedly authorizes the asserted powers. If the "textual argument is overstated" or irreconcilable with other provisions proscribing the Governor's powers, it betrays the claimed authority. *Id.* at 342.

(3) Effects upon other provisions or laws: Whether an Executive Order “runs afoul of the separation-of-powers principle protected by Article I, § 7 of the Constitution of Virginia” by effecting the suspension or waiver of other laws or rights. *Id.*, at 344. To this end, the Court warned that one obvious “characteristic of an unlawful executive suspension is its expansive scope and generality.” The more categorical it is, the less likely it will truly represent a permissible deviation from a general rule of law, and thus, the more likely it will result in a suspension of all or part of another general provision or law.” *Id.* at 348.

62. EO67/6 fails under any of these inquiries. There is simply no precedent whatsoever for the sheer scope, numerosity, and magnitude of the Governor’s cornucopia of executive orders issued this year, and particularly Executive Order 67/6.

63. First, there is not a single example in the nearly 50 year history of the Emergency Services and Disaster law which would lend credence to these recent orders being a result of a “practical construction,” or of any kind of “acquiescence” for a considerable period of time.

64. Second, EO67/6 is not authorized by any source of executive power (even impliedly). In the present case, the challenged provisions of EO67/6 are simply the latest in a whole series of equally sweeping Executive Orders of unprecedented scope, magnitude, and categorical nature. Indeed, the Orders at issue in this case restrict and enjoin both business activity (in manners not contemplated by any statutory or constitutional authority of the Governor), and constitutionally protected individual activity. In *Howell*, there was arguably *some* substantive and logical connection between the Governor’s clemency authority and his directive to restore the voting rights of felons *en masse*. Although ultimately rejected by the

Supreme Court of Virginia, the Governor's position in *Howell* was not entirely absurd or frivolous. Yet the Supreme Court of Virginia nonetheless rejected the sweeping executive order in that case, one that was both narrower and more debatable with respect to its legal underpinnings. In the instant case, the Executive Orders sweep farther and invade (rather than expand as in *Howell*) the rights of countless Virginians, while purporting to stand on a legal foundation which crumbles to dust upon even cursory review.

65. Third, EO67/6 tramples upon the constitutional separation of powers, intruding into powers traditionally held by the General Assembly, amassing both the legislative and executive powers into a single person. Moreover, EO67/6 directly conflicts both with the express provisions of the Emergency Services and Disaster Law, and also with Article I Sections 12 and 13. Finally, this case presents a sweeping Executive Order of unprecedented scope, magnitude, and categorical nature. The gulf between the Governor's actual authority and the directives of EO67/6 are much greater than those in the *Howell* case. In the present case, the directive of EO67/6 resulting in the ordered cancellation of The Nation's Gun Show directly implicates and infringes on constitutionally protected rights of thousands of Virginians, yet — unlike *Howell* — there is no provision in the Constitution or Code of Virginia that would even *arguably* give the Governor such power. It is simply a bare and unsupported directive that directly violates the core protection and purpose of Article I, § 7. See Section IV, *infra*.

#### D. Executive Orders and Title 32.1 (Health Code).

66. The Governor attempts to piggyback his own powers onto those of the Commissioner. The Virginia Emergency Services and Powers statute states that "executive orders declaring a state of emergency may address exceptional circumstances that exist relating

to an order of quarantine or an order of isolation concerning a communicable disease of public health threat that is issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1.”

The Governor’s Executive Order 67 purports to be based on this provision. *See* EO 67 at 1.

67. In this statutory provision, the General Assembly empowers the Governor to issue Executive Orders that relate to orders of quarantine or isolation — restrictions of movement and liberties — but expressly conditions any such orders upon the procedures and standards set forth in Title 32.1, Chapter 2. This entire provision would be meaningless surplusage if the first paragraph of Va. Code § 44-146.7(1) intended to broadly authorize Governor to issue any executive order “necessary” in his “judgment” without any limitations. The General Assembly intended that, while the Governor was authorized to restrict certain liberties of movement and use through orders of quarantine or isolation, such extraordinary powers could only be exercised within the prescribed limitations of Title 32.1, Chapter 2, and the oversight of the State Health Commissioner. (*See* Count II, *infra*.)

68. A review of those provisions in Title 32.1 reinforces the conclusion that the General Assembly did not intend to implicitly grant unlimited power to the Governor in orders affecting the liberty of Virginia citizens, let alone the power to unilaterally shutter large sectors of businesses closed and restrict liberties without check. There is, obviously, a reason why the General Assembly drafted laws that enumerate the Governor’s power in the specific context of a “communicable disease of public health threat” — the class of emergency at issue with COVID-19 — to the laws in Title 32.1, Chapter 2. Unlike Code § 44-146.17, those laws pertain specifically to how the General Assembly anticipated the relevant situation of “Disease

Prevention and Control" must be handled, to effect the least restrictive impositions on fundamental rights of liberty and property.

69. Recognizing the special issues that might arise in situations involving public health threats from communicable diseases, including infringements of liberty and property that arise from extreme measures restricting movements or actions, such as orders of quarantine or isolation, the General Assembly enacted a particular Code provision that proscribes the powers administered by the Health Commission, and constrains those powers with standards, procedures, and definitions.

70. For instance, Va. Code § 32.1-48.05 (exceptional circumstances) and § 32.1-48.07 (conditions) define the conditions and parameters by which the State Health Commissioner may order measures restricting movements of citizens through quarantine or isolation. With a clear purpose of protecting civil liberties and property interests, and ensuring a rational, evidence-based threshold for action, the General Assembly authorized restrictions within affected areas according to standards and procedures designed "to assure that any quarantine or isolation is implemented in the least restrictive environment." Va. Code § 32.1-48.05.

71. The General Assembly also designated the State Health Commissioner, not the Governor, as the responsible expert official for declaring quarantines and implementing all of these procedures. *E.g.*, Va. Code § 32.1-48.08. (*See* Count Two, *infra*.) Such provisions would be pointless if the Governor could accomplish far more through unlimited and unregulated executive orders under Va. Code § 44-146.17.

72. The challenged order purports to impose much greater and more expansive restrictions upon liberty and property interests of the state's citizens and businesses than the General Assembly has seen fit to expressly permit under Title 32.1, and wields that more expansive, restrictive power with none of the protective limitations or standards the General Assembly imposed on a similar scenario in a specific statutory scheme. Quarantine and isolation orders under Title 32.1 are, by the plain language of the statute, intended to apply to individuals or discrete groups (Va. Code § 32.1-43, referring to "individuals or groups of individuals") based on specific findings of fact. Such orders of quarantine and isolation are also subject, on an individual basis, to judicial review (Va. Code §§ 32.1-48.04, 32.1-48.09). The Executive Orders of the Governor seek to loosely wrap themselves in the legal clothing of quarantine and isolation orders, yet they purport to apply to all Virginians, and with no provision for judicial review.

### III. THE STATE HEALTH COMMISSIONER WAS ENTIRELY WITHOUT AUTHORITY TO ENACT EO67/6.

73. The State Health Commissioner has claimed that, "[o]n February 7, I declared COVID-19 a Communicable Disease of Public Health Threat for Virginia." See Affidavit of M. Norman Oliver, MD, MA, Virginia Health Commissioner (Apr. 23, 2020) in *Lynchburg Range & Training v. Northam*, Civil Action CL20000333 (Lynchburg Cir. Ct.). However, the document making such declaration cannot be found on the Department of Health website and does not appear to have been made publicly available.

74. Indeed, the initial COVID-19 restrictions contained in EO 51 (March 12, 2020), EO 53 (March 23, 2020), and EO 55 (March 30, 2020) were imposed by the Governor alone,

without any effort made to invoke the powers contained in Title 32.1. Title 32.1 was first invoked in Order of Public Health Emergency [One] (March 17, 2020), and Order of Public Health Emergency Two (March 25, 2020). Thereafter, beginning with EO 61 (May 8, 2020), every COVID-19 related Executive Order has been combined with an Order of Public Health Emergency, has been issued by the Governor in conjunction with the Commissioner, and has included a claim to exercise authority under that title.

75. The three provisions of Title 32.1 cited as authority for the EO67/6 are as follows:

- VA Code § 32.1-13 — “The Board may make separate orders and regulations to meet any emergency, not provided for by general regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other dangers to the public life and health.” [Emphasis added.]
  - VA Code § 32.1-20 — “The Commissioner shall be vested with all the authority of the Board when it is not in session, subject to such rules and regulations as may be prescribed by the Board.” [Emphasis added.]
  - VA Code § 35.1-10 — “Nothing in this title applicable to restaurants shall prevent the Commissioner from taking whatever action he deems necessary to control the spread of preventable diseases as set forth in Title 32.1, including but not limited to the exclusion of employees, the medical examination of any employee, the immediate closing of a hotel, restaurant, summer camp, or campground, and the taking of samples for testing.” [Emphasis added.]
- A. **The Statutory Powers of the Commissioner of Health.**

76. The Commissioner of Health can respond to a biological health emergency along two paths. One path, cited in the Governor’s and Commissioner’s orders, is exercising the authority of the Board of Health in Va. Code § 32.1-13 which can be exercised by the Commissioner when the Board is not in session. See Va. Code § 32.1-20 (authorizing orders

"to meet any emergency" to suppress communicable, contagious, and infectious diseases dangerous to public health.)

77. Although the Board (and by extension, the Commissioner) is authorized to "make separate orders and regulations to meet any emergency," that power is not unlimited. The broadly worded statute cannot be read to give the Commissioner of Health powers which no state has over its citizens. Nor can the statute be read as authorizing the violation of rights protected by the Constitution. Rather, any such order or regulation must be within the scope of the statutory and constitutional authority and responsibility of the Department of Health.

78. What is more, as an emergency order or regulation, the Board's or Commissioner's actions under Va. Code § 32.1-13 are subject to the procedural requirements of the Virginia Administrative Process Act ("VAPA"), Va. Code § 2.2-4011, which allows for emergency regulations, but which provisions were not followed by the Commissioner.

79. Assuming, *arguendo*, that any of the Commissioner's Orders were lawful, such orders expired once the Board of Health had the opportunity to meet, as it did on June 4, 2020 and again on September 3, 2020. At that point, the Commissioner's power to act unilaterally on behalf of the Board ended, and any regulations he had issued, if not ratified or issued by the Board, expired. The Commissioner's regulations were not ratified or issued by the Board. Therefore, the Commissioner's February 7, 2020 Declaration of Public Health Threat ended on June 4, 2020. Further, the Board's inaction on June 4, 2020 should be understood to limit the authority of the Commissioner to issue new orders on the same matter, unless justified by exigent circumstances unknown at the time of the Board session of June 4, 2020. The



Commissioner's continued reliance on VA Code § 32.1-13 as authority for the Governor's executive orders is misplaced.

80. The second path allows the Commissioner to exercise the authority directly granted to him to issue orders of isolation or orders of quarantine. Va. Code §§ 32.1-48.05 and 32.1-48.06. However, those statutes lay out specific requirements and findings that must be made for the Commissioner to issue such orders. The authority to issue an order of quarantine or isolation must be made upon a finding "exceptional circumstances" based on knowledge or reasonable suspicion of exposure or infection:

Upon a determination by the State Health Commissioner that exceptional circumstances exist relating to one or more persons in the Commonwealth who are known to have been exposed to or infected with or reasonably suspected to have been exposed to or infected with a communicable disease of public health threat and that such exceptional circumstances render the procedures of Article 3.01<sup>4</sup> (§ 32.1-48.01 et seq.) of this chapter to be insufficient control measures or that the individuals have failed or refused to comply voluntarily with the control measures directed by the State Health Commissioner in response to a communicable disease of public health threat, the State Health Commissioner may invoke the provisions of this article relating to quarantine and isolation. [Va. Code § 32.1-48.05.]

The orders that were issued never relied on, cited, or followed the statutes granting the Commissioner's specific powers to issues orders of isolation or quarantine.

81. The Governor's COVID-19 orders, starting with the Declaration of a State of Emergency in EO 51, cite the Governor's Emergency Powers statute (§ 44-146.17). That

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<sup>4</sup> "Isolation of certain persons with communicable diseases of public health significance."

statute specifically directs and limits the Governor's authority to act in relation to Title 32.1, stating that he may do so only in relation to orders of quarantine and isolation:

**Such executive orders declaring a state of emergency may address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health threat that is issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1. [Va. Code § 44-146.17 (emphasis added).]**

But it does not appear that the Commissioner ever issued an order pursuant to the second path.

Because the Commissioner's order did not relate to either an order of quarantine or an order of isolation, the Governor has no emergency powers under § 44-146.17 to address Commissioner orders that do not exist.

**IV. THE EXECUTIVE ORDER VIOLATES RIGHTS PROTECTED BY ARTICLE I, SECTION 13 OF THE VIRGINIA CONSTITUTION.**

82. EO67/6 significantly restricts and burdens the exercise of, and therefore violates, the pre-existing right recognized and protected by Article I, § 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....<sup>5</sup>

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<sup>5</sup> The first clause of Article I, § 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 U.S. Constitution which had been ratified by the States 180 years earlier.

The Virginia Constitution is quite similar to the Second Amendment to the U.S. Constitution<sup>6</sup>

which states that:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The 1968 Virginia Commission on Constitutional Revision<sup>7</sup> stated:

[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) (emphasis added).]

See also *Richmond Newspapers, Inc. v. Com.*, 222 Va. 574, 281 S.E.2d 915 (1981).

83. 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. 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." 1993 Report of the Attorney General at 16 (Jan. 13, 1993).

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<sup>6</sup> For avoidance of doubt, Plaintiffs do not rely upon, and seek no determination pursuant to, the Second Amendment, but only pursuant to Article I, § 13 of the Virginia Constitution.

<sup>7</sup> 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, § 13.

84. 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.” *Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 134, 704 S.E.2d 365, 369 (2011). Certainly, the rights of Virginians 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). However, it should be understood that Plaintiffs do not bring this action under the Second Amendment of the United States Constitution, and their analysis of cases arising under the Second Amendment is presented solely to allow this Court to see how other courts have resolved similar issues. Plaintiffs do not seek any determination by the Court, of any aspect of this case, under the Second Amendment to the U.S. Constitution, but when discussing the right to keep and bear arms, lay a claim only under Article I, § 13 of the Constitution of Virginia.

85. EO67/6’s provisions place capacity limitations on certain categories of business events, thus forcing cancellation of The Nation’s Gun Show. The question as to whether such provisions violate Article I, § 13 of the Constitution of Virginia has not been decided. However, it is well established that the similar provision in the Second Amendment protects activities associated with the right to keep and bear arms — including the right to acquire arms and ammunition. Until this year, the Commonwealth has long respected and revered to the right to keep and bear arms, which has led to very few constitutional challenges to firearms laws, and thus, very little case law in the Virginia courts. As a noted Second Amendment

scholar explained, “[w]here a constitutional right is respected by the legislature, it would seem to be a virtue that few judicial decisions are necessary.”<sup>8</sup>

86. By contrast to Virginia, there have been many Second Amendment challenges to state and federal laws elsewhere around the nation due to the many laws, both new and old, affecting access to firearms. These challenges led to the U.S. Supreme Court recognizing that the Second Amendment protects each individual citizen’s right to keep and bear arms. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

87. In order to engage in the constitutionally 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, magazines, ammunition, and accessories from vendors at gun shows, 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.” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)) (emphasis added). Recently, the Circuit Court for the City of Lynchburg concluded similarly of Article I, Section 13 that “[t]he operative clause, which provides the right to keep and bear arms, implies the corresponding right to buy and sell arms.

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<sup>8</sup> 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 lack of a right to buy and sell arms would negate the right to keep arms as well as defeat the purpose of the right stated in the prefatory clause....” *Elhert v. Settle*, CL20000582, 2020 Va. Cir. LEXIS 119, \*7 (July 14, 2020). 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).

88. Yet EO67/6 denies Plaintiffs both the right to buy and the right to sell arms. By classifying The Nation’s Gun Show as an “Entertainment and Amusement Business,” the Governor has arbitrarily and capriciously lumped constitutionally protected activity in with fairs and carnivals. The Commonwealth might argue that the vendor plaintiffs may find other places to sell their wares, or that the attendee plaintiffs may find other places to purchase arms. Yet as the Supreme Court noted in *Heller*, “[i]t 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. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.” *Id.* at 629. Nor can the Commonwealth argue that the Article I Section 13 right to keep and bear arms must yield in importance to protecting the public health. As *Heller* noted in discussing the federal constitutional provision protecting firearms, “[t]he very enumeration of the right takes out of the hands of government ... the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.* at 634.

89. The Governor’s actions deprive Plaintiffs of the right to engage in a broad category of constitutionally protected activity for which there is no substitute. Indeed, gun

shows aggregate large numbers of buyers and sellers into a single time and place, presenting unique opportunities for both buyer and seller that are not otherwise available.

90. By effecting a cancellation of The Nation's Gun Show this weekend, EO67/6 infringes rights that are expressly protected by Article I, Section — rights that "shall not be infringed."

**V. ARTICLE I SECTION 12 SPEECH AND ASSEMBLY ARGUMENT.**

91. Plaintiffs incorporate by reference the allegations in the preceding paragraphs, as if fully set forth herein.

92. Article I, Section 12 of the Constitution of Virginia states:

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances. [Emphasis added.]

93. In *NAACP v. Harrison*, the Supreme Court of Virginia explained that both Article I, Section 12 of the Virginia Constitution and the First Amendment guarantee:

the right to hold views on all controversial questions, to express such views, and to disseminate them to persons who may be interested and neither the Federal nor State government can take any action which might prevent such free and general discussion of public matters as may seem to be essential to prepare people for an intelligent exercise of what they may consider to be their rights as citizens. [*Id.*, 202 Va. 142, 163, 116 S.E.2d 55 (1960) (citation omitted) (emphasis added).]

94. In *Elliott v. Commonwealth*, the Virginia Supreme Court made clear the scope of Article I, section 12 in relation to the First Amendment:

We take this opportunity to declare that Article I, § 12 of the Constitution of Virginia Bill of Rights is coextensive with the free speech provisions of the federal First Amendment. [*Id.*, 267 Va. 464, 593 S.E.2d 263 (2004) (emphasis added).]

Since the Virginia Supreme Court has found Article I, Section 12 to be co-extensive with the first Amendment, Plaintiffs cite U.S. Supreme Court cases as persuasive authority, but are not bringing a claim under the federal constitution.

95. The speech and assembly rights protected by the First Amendment, as described by Chief Justice Hughes in *DeJonge v. Oregon*, encompass the activities engaged in at the Nation's Gun Show:

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment.... The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.... "The idea of a government, republican in form, implies a right to the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for the redress of grievances. [*DeJonge v. Oregon*, 299 U.S. 353, 364 (1937). ]

96. Not even the threat of revolutionary changes in government achieved through speech and peaceable assembly can justify criminalization of speech and assembly, as under an Oregon law seeking to punish an individual for "the crime of criminal syndicalism if he presides at, conducts, or assists in conducting a meeting of an organization or group which teaches or advocates criminal syndicalism or sabotage." *DeJonge*, 299 U.S. at 355.

While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly.... [*DeJonge*, 299 U.S. at 363.]



97. Particularly at a time when organizations such as Antifa are taking to the streets in localities such as Washington, D.C. to engage in acts of violence, ostensibly seeking political change, the rights of speech and assembly must be protected. Indeed, as the U.S. Supreme Court has explained, the greater the danger, the greater the need to protect speech and assembly:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.....

[P]eaceable assembly for lawful discussion cannot be made a crime. [*DeJonge*, 299 U.S. at 365 (emphasis added).]

98. EO67/6 cannot be assumed to be a pure public health measure, as it has the effect of furthering the political agenda of Governor Northam, in restraining speech and assembly with which he disagrees at The Nation's Gun Show. For example, the Nation's Gun show is sponsored and attended by persons who deeply believe in the right to keep and bear arms. Governor Northam urged the General Assembly to adopt eight anti-gun bills during the 2020 session of the General Assembly, which adopted all such bills except the ban on what the Governor calls "assault weapons." Alan Suderman, "Gov. Northam signs gun-control bills into law," *Loudoun Times* (April 10, 2020) ("Virginia Gov. Ralph Northam has signed several new gun restrictions he championed during this year's legislative session, cementing gains by gun control advocates they hope will serve as a "blueprint" for states around the country." Governor Northam's anti-gun views are long standing, and he took the same position last year

as well. See "Gov. Northam announces package of 8 bills aimed at gun control for special session," ABC13 news (July 3, 2019).

99. The challenged governmental actions constitute an exercise of impermissible and unbridled discretion by Governor Northam and his designees, such as Commissioner Oliver.

100. In *Hague v. CIO*, 307 U.S. 496 (1939), the Supreme Court struck down an ordinance which gave authority to a state "Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.'" *Hague*, 307 U.S. at 516. The Court explained the danger of giving such arbitrary power to a state official:

It can thus ... be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. [*Id.*]

101. The United States Supreme Court has cited *Hague* in support of the right to assemble so as to "listen, observe and learn" — quintessential components of education, particularly at the college and university level:

People assemble in public places not only to speak or take action, but also to listen, observe and learn; indeed they may "[assemble] for any lawful purpose." [*Richmond Newspapers v. Virginia*, 448 U.S. 555, 578 (1980) (citation omitted) (emphasis added).]

102. The Order prevents Plaintiffs from carrying out the educational mission associated with The Nations' Gun Show. During The Nation's Gun Show, like-minded, pro-gun individuals may have literally tens of thousands of conversations relating how to resist the anti-gun initiatives of Governor Northam and other such politicians. At the show, attendees receive training in gun safety, and the effective lawful deployment of weapons. There have

many times when a “good guy with a gun,” such as Jack Wilson of the West Freeway Church of Christ in Texas, have stopped or prevented acts of violence by criminals and terrorists. *See, e.g.,* “Texas man who stopped church shooting says he ‘had to take out’ gunman because ‘evil exists’,” *Fox News* (Dec. 30, 2019).

103. EO67/6, on its face and as applied, imposes an unconstitutional prior restraint on the Plaintiffs’ speech and right to assembly in violation of the Virginia Constitution.

104. The Order, on its face and as applied, is irrational and unreasonable and imposes unjustifiable and unreasonable restrictions on the Plaintiffs’ constitutionally protected speech and right to assemble.

105. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the provisions of EO67/6 that operate to require the cancellation of The Nation’s Gun Show this weekend.

**VI. THE DECLARATION OF AN EMERGENCY DOES NOT GIVE THE GOVERNMENT THE AUTHORITY TO SUSPEND CONSTITUTIONALLY PROTECTED RIGHTS.**

106. The Virginia Constitution does not provide for suspension of the Bill of Rights during an emergency and, indeed, any such suspension is expressly forbidden. As Justice Robert Jackson explained in a leading case circumscribing executive power:

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion

or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis.<sup>9</sup> I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. [*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring) (emphasis added).]

107. Justice Jackson's opinion is highly persuasive as it was written shortly after he served as Chief Prosecutor of the Nuremberg Trials, studying what had happened in Germany under the Weimar Constitution, which expressly empowered the President of the German Republic "to suspend any or all individual rights if public safety and order were seriously disturbed or endangered."<sup>10</sup> *Id.* at 651. After the burning of the Reichstag in 1933, German President Hindenburg used that power to suspend most civil liberties in Germany, and those rights were not reinstated until after World War II. *See id.*

108. Governor Northam has no power to suspend civil liberties enumerated in and guaranteed by the constitution pursuant to his emergency powers. This also includes the right

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<sup>9</sup> Pandemics were a well-known phenomenon at the time of the writing and ratification of the Constitution. *See, e.g.*, H. Schenawolf, "Diseases and Epidemics During Revolutionary America 1763-1783," *Revolutionary War Journal* (Aug. 8, 2014); "Pandemics That Changed History," *History.com* (Apr. 1, 2020).

<sup>10</sup> Justice Jackson is remembered for his dissent from what has been recognized as one of the worst Supreme Court decisions to have been issued: *Korematsu v. United States*, 323 U.S. 214 (1944) ("[I]f we cannot confine military expedients [or emergencies] by the Constitution, neither would I distort the Constitution to approve all that the military [or emergency orders] may deem expedient." *Id.* at 244 (Jackson, J., dissenting).). The Supreme Court's authorization of the detention of Japanese Americans was recently effectively overruled in an opinion by Chief Justice Roberts. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — 'has no place in law under the Constitution'" — quoting Justice Jackson's dissent in *Korematsu*).

to keep and bear arms, the right to speech and assembly, as well as any necessarily associated rights such as the ability to purchase firearms, ammunition, and accessories, and the ability to host a gun show in order to facilitate the exercise of all of those rights simultaneously.

109. No constitutional provision or law authorizes Governor Northam to suspend the right to keep and bear arms. While his Order did not close all gun stores — a decision that would have led to massive push-back — EO67/6 has had the effect of closing down numerous gun stores when they assemble together at The Nation's Gun Show — effectively a chipping away of Article I, § 13 protected rights. This incremental attack must be rejected.<sup>11</sup>

110. Both Article I, § 13, and Article I, § 12 of the Virginia Constitution clearly prohibit EO67/6 forced cancellation of The Nation's Gun Show, and no emergency can justify such a restriction.

**VII. EO67/6 IS INCONSISTENT WITH THE FEDERAL GOVERNMENT'S DESIGNATION OF FIREARMS RETAILERS AS ESSENTIAL CRITICAL INFRASTRUCTURE.**

111. On March 19, 2020, the Cybersecurity and Infrastructure Security Agency, a component of the U.S. Department of Homeland Security, issued guidance on 16 sectors of

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<sup>11</sup> Three courts have already issued injunctions against Alabama, Ohio, and Texas, preventing those states from using emergency powers to prevent abortions as elective medical procedures during the COVID-19 pandemic. See *Robinson v. Marshall*, 2020 U.S. Dist. LEXIS 54767 (M.D. Ala., Mar. 30, 2020); *Planned Parenthood Center for Choice v. Abbott*, 2020 U.S. Dist. LEXIS 57365 (W.D. Tex., Mar. 30, 2020) (stayed by *In Re Abbott*, Fifth Circuit (No. 20-50264, Mar. 31, 2020)); and *Preterm-Cleveland v. Attorney General of Ohio*, Docket No. 19-cv-00360, Doc. No. 43 (S.D. Ohio, Mar. 30, 2020) (affirmed by the Sixth Circuit on Apr. 6, 2020). It would make a mockery of the U.S. Constitution if courts were to enjoin other states' governors who have ordered the cessation of elective abortions (an unenumerated right which courts have granted elevated status), while permitting the suspension of the exercise of an expressly enumerated right.

businesses that are considered “Essential Critical Infrastructure.”<sup>12</sup> In response to feedback, on March 28, 2020, CISA issued revised guidance, and this list is currently in its fourth iteration.<sup>13</sup> Included in the “Law Enforcement, Public Safety, and Other First Responders” sector is “Workers supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges.” Emphasis added. The Nation’s Gun Show includes vendors from every one of those categories.

112. Although the CISA guidance is advisory in nature, its findings and conclusions provide significant support in the context of the pandemic, especially as the guidance was developed “in collaboration with other federal agencies, State and local governments, and the private sector.” CISA Mar. 28 letter. Furthermore, the purpose of the guidance is to help state and local governments “as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security.” *Id.*

113. The revised CISA guidance recognized the importance of the Firearms Industry activity, which also serves an important defensive purpose, and was already recognized by many other states which issued states of emergency and stay at home orders. *See, e.g.*, Executive Order of Governor of Illinois, Executive Order in Response to COVID-19 (COVID-19 Executive Order No. 8) at 12(n), (defining “Essential Businesses and Operations” to include “firearm and ammunition suppliers and retailers for purposes of safety and security”).

<sup>12</sup> <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>.

<sup>13</sup>

[https://www.cisa.gov/sites/default/files/publications/Version\\_4.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_FINAL%20AUG%2018v3.pdf](https://www.cisa.gov/sites/default/files/publications/Version_4.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_FINAL%20AUG%2018v3.pdf)

114. Some states which had previously closed gun stores and ranges under their orders reversed course and adopted the revised guidance. For example, on March 30, 2020, the Governor of New Jersey classified gun stores as essential and allowed them to reopen, stating, “[I]n accordance with the guidance released over the weekend by the federal Department of Homeland Security, we will allow firearms retailers to operate.” N.J. Governor Phil Murphy, Coronavirus Briefing Media (Mar. 30, 2020).

115. The revision to the CISA guidance reflects the principles: (i) of respect for the right of self-defense, and that rights that it guarantees should not be suspended during an emergency; and (ii) that access to gun stores (including through gun stores) contribute to local and national security, by providing the People with necessary means of self-defense and methods to become proficient with those implements of self-defense.

116. During an emergency, local law enforcement can be depleted, particularly during a pandemic, by members of the forces becoming infected or needing to quarantine in order to prevent potential spread of the virus. Further, some incarcerated criminals are being released to mitigate the spread of the virus. And several municipalities have released directives to their police that certain suspected criminals, who would be arrested under normal circumstances, will only be cited and released, again due to the desire to reduce the transmission of the pandemic. All of these factors leave individual citizens more aware of their need to be responsible for their own protection, and the CISA revised guidance is implicit acknowledgment of that reality.

117. While Governor Northam has followed the federal lead on COVID-19 issues, such as wearing face masks,<sup>14</sup> and has requested and accepted help from the federal government related to the pandemic,<sup>15</sup> and while some Virginia agencies are working closely with federal agencies on important research related to the COVID-19 virus,<sup>16</sup> EO67/6 as applied to cancel The Nation's Gun Show departs from the federal government's guidance on this critical issue of Essential Critical Infrastructure.

#### VIII. THE OTHER TEMPORARY INJUNCTION FACTORS WEIGH IN FAVOR OF GRANTING AN INJUNCTION.

118. Plaintiffs have addressed likelihood of success on the merits in the sections *supra*. In this section, they address the remaining three elements for issuance of a temporary injunction.

##### A. The Plaintiffs Are Certain to Suffer Irreparable Harm If the Injunction Is Not Granted.

119. Several types of irreparable harm will be suffered in the absence of injunctive relief. First, Plaintiff Showmasters will be harmed, not only incurring significant economic losses, but also in reputational damage as a gun show promoter, and lost good will with vendors. Plaintiff Sonny's Guns and Transfers will be irreparably harmed, in that it has

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<sup>14</sup> See D. Belt, "VA Residents Should Wear Face Masks: Gov. Northam, CDC," *Patch* (Apr. 3, 2020).

<sup>15</sup> See Governor Northam press release (Apr. 2, 2020) ("We thank the federal government for moving quickly to approve Virginia's request for a Major Disaster Declaration," said Governor Northam. "This critical funding will support our ongoing, statewide efforts to fight this virus in our Commonwealth and keep Virginians safe.").

<sup>16</sup> See Governor Northam press release (Apr. 6, 2020) (announcing Virginia's Division of Consolidated Laboratory Services is working with the CDC).



invested considerable resources and time in preparing for The Nation's Gun Show, an event on which its employees and their families rely for a livelihood. Plaintiff Sonny's Guns and Transfers, along with Plaintiff Crump's Article I Sections 12 and 13 rights will also be violated, as they will be unable to engage in constitutionally protected commerce in arms, and be unable to gather together with like-minded individuals to engage in protected speech and association. As noted above, commerce in arms and ammunition is a prerequisite to engaging in the right to keep and bear arms. In addition to the named plaintiffs, many other persons and entities will experience irreparably harm should The Nation's Gun Show be canceled. Thousands of gun owners, like Plaintiff Crump, will have lost their best (and potentially last) good opportunity to lawfully acquire arms and ammunition that have been in short supply in recent months, and largely unavailable from other sources. These persons, like Plaintiff Crump, will also be unable to seek training and education with respect to firearms, safety, use, cleaning, etc., all of which occur at The Nation's Gun Show.

120. Many persons seeking firearms-related goods and services in recent days have been new gun owners and novice shooters, who have not previously owned a firearm, and whose business the vendors at The Nation's Gun Show may not be able to obtain in the future.

The Virginia Firearms Transaction Center recorded 80,228 transactions in March — a 75% jump over March 2019 and the highest total for any month on record since state police began tracking the data in 1990.... [M. Bowes, "Va. gun sales soar to new monthly record in March, topping 80,000 amid COVID-19 fears," *Richmond Times-Dispatch*, Apr. 6, 2020.]

The Virginia experience is not unique, as the nation perceives the threat from COVID-19:

The FBI says the National Instant Criminal Background Check System conducted 3.7 million screenings in March, the highest number recorded since

its inception in 1998. The previous single-month record was 3.3 million in December 2015. [*Id.*]

Moreover, even if a claim for that lost revenue to the Plaintiffs and associated businesses and persons were made in the future, the state could and certainly would assert sovereign immunity, potentially resulting in there being no adequate remedy at law.

121. The current shutdown ordered by EO67/6 "shall remain in full force and effect until amended or rescinded" and, should the shutdown continue into the future, will affect future dates for The Nation's Gun Show, and affect both Showmasters and its partner gun show vendors so that some may be so financially crippled that they could be forced to shut down permanently, unable to reopen at all by the time the shutdown order is lifted.

122. Persons who recently purchased their first firearm for self-defense purposes during the current pandemic are particularly harmed. Should opportunity to gather together with like minded individuals for education and training, as well as to purchase ammunition, magazines, and accessories for that new firearm, be eliminated, it could result in the inability of a gun owner to properly defend himself from burglaries, robberies, home invasions, rapes, murders, and other crimes, and otherwise to become a victim of crimes, such harm could not be resolved by monetary award.

123. Also, attendees of The Nation's Gun Show seeking training to obtain licenses for concealed carry are being deprived of the ability to receive such training, thereby depriving those individuals of the ability to be able to obtain a permit and thus to lawfully defend themselves in public.

124. Numerous irreparable and constitutional violations, as laid out above, are certain to occur if EO67/6 is permitted to force cancellation of The Nation's Gun Show. It is always irreparable harm to be deprived of the exercise of a constitutionally protected right. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the loss of a constitutionally protected right, "for even minimal periods of time, unquestionably constitutes irreparable injury").

**B. The Balance of Equities Favor Plaintiffs.**

125. The balance of equities in this case could be analyzed by weighing an impossible-to-estimate risk of transmission of flu-like "Coronavirus Disease 2019," abbreviated as "COVID-19," with as-of-yet unclear transmission rates and serious health consequences, against the definite, concrete, and irreparable harm that will be suffered by Plaintiffs, as discussed *supra*. The risk of COVID-19 to Virginians cannot be fully known but, during recent months, various public health officials have routinely overestimated the infectiousness, morbidity, and mortality from COVID-19, as shown by recent reassessments. *See* A. Heymann, "Virginia's peak coronavirus prediction moved from May to April," *WRIC* (Apr. 6, 2020) ("The Institute for Health Metric and Evaluation has moved the Virginia's [sic] peak outbreak of COVID-19 from late May to late April."). *See, e.g.*, N. Arama, "Good News: IHME Revise Their Numbers Down as to Deaths, Hospitalizations, Bed, and Ventilator Need," *RedState* (Apr. 6, 2020). *See also* S. Doughton "New UW analysis lowers coronavirus death projections and suggests hospitalizations may have already peaked in Washington," *The Seattle Times* (Apr. 6, 2020) ("After a 'massive infusion of new data,' modelers at the University of Washington are painting a much more optimistic picture of the novel coronavirus epidemic in the state, revising sharply downward their estimate of how

many people are likely to die and suggesting Washington may have already passed the peak of hospitalizations.”).

126. What is more, EO67/6 explicitly notes that transmission rates within the Commonwealth remain relatively low, yet takes drastic action in spite of those comparatively low numbers. EO67/6 thus operates as an indiscriminate bludgeon, contrary to expert advice that shutdowns should be tailored to the needs of particular communities.

127. Whatever the risk of transmission may be, it is worth noting that such risk would be borne primarily by persons who choose to accept that risk — those who choose to attend The Nation’s Gun Show. Indeed, every time a person goes to a food store to make a purchase, or goes to work at that person’s place of business which is allowed to be open, one assumes some risk of being exposed to COVID-19, but that is no reason to close food stores or all businesses — and the Governor, in his order, agrees.

128. In fact, as explained above, there have been no reported transmissions of COVID-19 at prior gun shows. Moreover, The Nation’s Gun Show has taken significant steps to contain viral transmission, *in addition to* those required by the Commonwealth, such as UV-C lighting, sophisticated air filtration, and the supplying of face masks for attendees. These are all factors the Lynchburg Circuit court found compelling in the balance of the equities when granting an injunction halting the closure of indoor shooting ranges. *See Lynchburg Range & Training v. Northam* at \*12-13.

**C. The Injunction Would Not Be Adverse to the Public Interest.**

129. Clearly, the public interest favors the protection of constitutional liberties from being abridged. It is always in the public interest for the Governor to follow the law, and not to deprive citizens of their constitutionally protected right to keep and bear arms.

130. Although EO67/6 was issued to protect the public interest and health, it arbitrarily and capriciously miscategorizes The Nation's Gun Show as an "Entertainment and Amusement Business," even though a gun show has very few similarities to the other places listed there and serve a purpose far more significant than mere amusement. The EO specifies mitigation measures that must be undertaken by those businesses which are allowed to remain open, and as explained, The Nation's Gun Show has followed and will continue to follow those measures. Finally, as the Lynchburg Circuit Court noted, "§ 44.146.15(3) carves out an protection for the right to keep and bear arms in order to ensure the force of this right during an emergency. The Court does not see how disregarding the statute would benefit the public interest and the rule of law." *Lynchburg Range & Training v. Northam* at \*13.

131. The U.S. Department of Homeland Security, part of the same U.S. Government as the CDC, has declared that the businesses that operate at The Nation's Gun Show to be part of the nation's Essential Critical Infrastructure Workforce. If it were in the public interest to close gun shows, doubtless, the U.S. Department of Homeland Security would not have put the businesses who comprise gun show vendors on its list of essential businesses.

**IX. A WRIT OF MANDAMUS SHOULD ISSUE TO REQUIRE DEFENDANTS TO CEASE AND DESIST FROM ENFORCING EO67/6 INsofar AS IT OPERATES TO REQUIRE CLOSURE OF THE NATION'S GUN SHOW, AND FOR THE GOVERNOR TO NOTIFY THE PUBLIC OF THE RESCISSION OF THE APPLICATION TO THE NATION'S GUN SHOW.**

132. Plaintiffs petition for and seek issuance of a writ of mandamus, with payment of costs as permitted by Va. Code § 8.01-648 directing that, because EO67/6 is unconstitutional and otherwise *ultra vires* with respect to its forcing cancellation of The Nation's Gun Show, the Governor provide notice to the residents of the Commonwealth of Virginia that The Nation's Gun Show no longer must be cancelled, and that no law enforcement department, division, agency, or officer in the Commonwealth has the discretion to enforce the provision of current EO67/6 insofar as its capacity limits are being applied to force closure of The Nation's Gun Show.

133. The Supreme Court of Virginia has consistently held that "[t]he writ of mandamus... only issues when there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy." *Hertz v. Times-World Corp.*, 259 Va. 599, 608, 528 S.E.2d 458, 463 (2000) (quoting *Tyler v. Taylor*, 70 Va. (29 Gratt.) 765, 766-67 (1878)); accord *Town of Front Royal v. Front Royal and Warren County Indus. Park Corp.*, 248 Va. 581, 584, 449 S.E.2d 794, 796 (1994), *Hall v. Stuart*, 198 Va. 315, 323-24, 94 S.E.2d 284, 290 (1956). Such a writ is appropriate where, as here, there is no adequate remedy at law. *Cartwright v. Commonwealth Transp. Com'R*, 613 S.E.2d 449 (2005). Issuance of a writ of mandamus will help remove the chilling effect of EO67/6 in having unlawfully prohibited the exercise of constitutionally protected rights by Virginians.

134. The Supreme Court of Virginia has repeatedly indicated, including as recently as 2016, that mandamus is appropriate to remedy and enjoin enforcement of actions involving what were ultimately held to be unlawful executive acts. *Howell v. McAuliffe*, 788 S.E. 2d. 706, 724 (2016) (issuing writ of mandamus effectively overturning an executive order, and stating that “[a]s a result of our holding that the Executive Orders are unconstitutional, no election official in the Commonwealth has the discretion to enforce them.”).

#### RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, plaintiffs seek the following relief:

- A declaratory judgment finding that the provisions of Executive Order 67/6, issued November 13, 2020 and effective November 16, 2020, which operates to require cancellation of The Nation’s Gun Show to be held this weekend, is (a) *ultra vires* and beyond the scope of the Governor’s executive authority, under the Constitution of Virginia, the Emergency Services and Disaster Law (Va. Code § 44.1-146.13, *et seq.*), and otherwise; (b) violative of Article I, §§ 12 (Speech and Assembly) and 13 (Right to Keep and Bear Arms) of the Constitution of Virginia ; and (c) violative of Article I, § 7 of the Constitution of Virginia (Anti-Suspension Provision).
- Immediate entry of a temporary injunction, on an emergency basis and without bond, enjoining the Governor, the Commissioner, the Department of Health, and all state and local law enforcement divisions, agencies, and officers within the Commonwealth, from enforcing, in any manner, the provisions of EO67/6 insofar as their capacity restrictions operate to require cancellation of The Nation’s Gun Show this weekend, provided that The Nation’s Gun Show shall operate to the fullest extent possible in a

manner consistent with social distancing and sanitizing guidance and requirements from federal and state authorities;

- Issuance of a writ of mandamus, with payment of costs as permitted by Va. Code § 8.01-648, directing that, because EO67/6 is unconstitutional and otherwise *ultra vires* insofar as its capacity limitations require cancellation of The Nation's Gun Show, that the Governor provide notice to the residents of the Commonwealth of Virginia that The Nation's Gun Show is no longer shut down, and that no law enforcement department, division, agency, or officer in the Commonwealth has the discretion to enforce capacity restrictions against The Nation's Gun Show; and
- Further relief pursuant to and in accordance with such declaratory judgment, to include permanent injunctive relief, plaintiffs' costs, and such other and further relief as the Court may deem appropriate.



Respectfully Submitted,  
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SONNY'S GUNS AND TRANSFERS  
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