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COMMONWEALTH OF VIRGINIA
CITIES OF LYNCHBURG AND BEDFORD
COUNTIES OF AMHERST, BEDFORD, CAMPBELL AND NELSON

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RE: Raul Wilson, et al. v. Colonel Gary T. Settle, CL20000582, Circuit for the City of Lynchburg

Dear Counsel,

I am writing to furnish you with the decision of the Court in the above case. The constitutional challenge to Virginia Code § 18.2-308.2:5 ("the Act"), which requires background checks for private firearm sales, came before the Court for trial on February 21, 2024. Plaintiffs are seeking declaratory relief in the form of a finding that the Act is unconstitutional under Article I, Section 13 of the Constitution of Virginia, and permanent injunctive relief which enjoins the administration, enforcement, and imposition of the requirements of the Act on the same basis. The Court has reviewed the pleadings and considered the arguments made at the prior hearing.

Facts

The Court previously detailed the facts set forth in this case in its July 14, 2020 preliminary injunction opinion, and the Court incorporates by reference those facts. During the bench trial on

February 21, 2024, the Court granted partial summary judgment as to the individual plaintiffs in this matter but struck the motion for partial summary judgment against the organizational plaintiffs. This Court found that the individual members' participation was not necessary for purposes of standing, and the organizational members had representational standing to go forward with their claims. The Court extended the preliminary injunction until the conclusion of this matter.

Background

I. Courts Favor Addressing As-Applied Challenges Versus Facial Challenges.

Constitutional challenges can generally be separated into two categories: "facial" challenges and "as-applied" challenges. A plaintiff will only succeed in a facial challenge by "establish[ing] that no set of circumstances exist under which the Act would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *United States v. Salerno*, 481 U.S. 739 (1987)). This means that the law must be unconstitutional in every application in order for a facial challenge to succeed. *Id.* An as-applied challenge, on the other hand, can be defined as one where the challenger alleges "that the [statute in question] is unconstitutional because of the way it [is] applied to the particular facts of [his] case." *Stoltz v. Commonwealth*, 297 Va. 529, 534 (2019) (quoting *Salerno*, 481 U.S. 739 (1987)). In most instances, an as-applied challenge will only invalidate a statute as to the individual or set of individuals that succeed on the as-applied challenge, and will otherwise remain constitutional and enforceable. *See Ayotte v. Planned Parenthood*, 540 U.S. 320, 329 (2006). In Virginia, for a litigant to have standing to mount a successful facial challenge against a statute, he must first establish that the statute in question is unconstitutional as-applied to him. *Shin v. Commonwealth*, 294 Va. 517, 526 (2017).

The Supreme Court has repeatedly stated its disfavor for facial challenges as opposed to as-applied challenges. *See e.g. Wash. State Grange*, 552 U.S. at 450. It has warned that "[i]n

determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50. The Court has further encouraged that:

> [e]xercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.' Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.' Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Id. at 450-51 (internal citations omitted). The Virginia Court of Appeals has also weighed in on addressing as-applied and facial challenges, stating:

> Because our jurisprudence recognizes that a penal statute may be facially valid and yet unconstitutional as-applied in a particular case, '[t]he usual judicial practice is to address an as-applied challenge before a facial challenge.' This method is generally efficient because this sequencing decreases the odds that facial attacks will be addressed unnecessarily and avoids encouraging gratuitous wholesale attacks upon state laws. Courts 'should not declare a statute to be wholly unconstitutional unless such determination is absolutely necessary to decide the merits of the case.'

Chianelli v. Commonwealth, 64 Va. App. 632, 643 (2015). Generally speaking, when addressing a constitutional flaw in a statute, courts should limit their solution to the problem. "We prefer, for example to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Ayotte*, 540 U.S. at 328-29 (citing *United States v. Raines*, 362 U.S. 17, 20–22 (1960)).

However, the Virginia Supreme Court has recognized that "in rare circumstances, it may be proper to totally invalidate a statute even if it is merely unconstitutional as applied in some

circumstances and constitutional in others." *Toghill v. Commonwealth*, 289 Va. 220, 232 (2024) (citing *Ayotte*, 546 U.S. at 328-32). In *Ayotte*, the United States Supreme Court provides an analytical framework for discerning the proper remedy to be applied when a statute is unconstitutional as-applied. *Id.*

A court must consider three interrelated principles to determine the appropriate remedy when a statute is unconstitutional as-applied. First, the Court must refrain from "nullify[ing] more of the legislature's work than is necessary, for . . . '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte*, 540 U.S. at 329 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). "Accordingly, the 'normal rule' under this first consideration is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* (citations omitted).

The second principle appears to be a limiting counterpart to the first principle. It instructs that a court should not take the place of the legislature by "rewriting state law to conform it to constitutional requirements even as [a court] strives to salvage it." *Id.* "The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).[1] Thus, while it may be the general rule to strive to leave some portion of a statute intact, there are instances where a statute simply cannot be effectively severed.

The last principle to consider is that "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Ayotte*, 540 U.S. at 330. The Supreme Court instructs courts to ask: "Would the

[1] Although this case addresses the second principle with regard to the First Amendment, the Court is of the opinion that the same "readily susceptible" limitation would apply to a statute involving the Second Amendment.

legislature have preferred what is left of its statute to no statute at all?" *Id.* For courts should be wary of legislatures who would rely on a court's intervention for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. *United States v. Reese*, 92 U.S. 214, 221 (1875). "This would, to some extent, substitute the judicial for the legislative department of the government." *Id.*

It is with this background in mind that the Court considers the challenger's as-applied challenge, facial challenge, and the proper remedy to be applied in this case. The challengers have brought an as-applied challenge as to the validity of Virginia Code § 18.2-308.2:5 in its application to those 18 to 20 years of age, as well as a facial challenge asserting that there is no set of circumstances in which the requirements of the Act, as written, could be applied without violating Article 1 Section 13 of the Virginia Constitution. The Court will begin by addressing the as-applied challenge raised by the challengers.

II. The Application of Va. Code § 18.2-308.2:5 is Unconstitutional As-Applied to Persons 18 to 20 Years of Age.

In 2020, at the preliminary injunction phase, the Court issued a lengthy opinion detailing its ruling that this Act is unconstitutional as-applied to individuals 18 to 20 years of age. At that time, the Supreme Court had not yet decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Today, after considering the implications of the *Bruen* decision, the Court reaffirms its earlier ruling with regard to the as-applied challenge and holds that history and tradition of firearm regulations support the conclusion that the Act is unconstitutional as-applied to persons 18 to 20 years of age.

In Virginia, persons 18 to 20 years of age have a right to bear arms. *United States v. Blakeney*, 44 Va. 405, 418 (1847). Prior to the Act, those between the ages of 18 and 20 could

purchase a handgun through a private sale, but not from a licensed dealer. *See* 18 U.S.C. § 922(b)(1). Now, due to the Act, individuals 18 to 20 years of age can no longer purchase a handgun through any legal means, whether it be privately or commercially. The Act requires that, for a private sale to occur, the seller must first obtain verification from a licensed dealer that the prospective purchaser's criminal history has been checked and that they are not prohibited from possessing a firearm under state or federal law. *See* Va. Code § 18.2-308.2:5. In order to obtain a background check from the National Instant Criminal Background Check System ("NICS system"), both the buyer's age and type of firearm are required; the NICS system automatically rejects a handgun transfer to an individual under 21 years of age. Thus, while Va. Code § 18.2-308.2:5 does not explicitly forbid adults 18 to 20 years of age from purchasing a handgun through a private sale within the Commonwealth of Virginia, this is its practical effect, as all individuals under 21 are rejected.

This prohibition, which prevents those 18 to 20 years of age from purchasing a handgun, constitutes an unconstitutional infringement on the Second Amendment, both under the old constitutional analysis and under the new *Bruen* test. *See generally Bruen*, 597 U.S. 1. In Virginia, the Code defines an *adult* as a person 18 years of age or older. Va. Code Ann. § 1-203. While courts have long held that age-based restrictions on the sale of firearms with regard to minors is supported by history and tradition, there is no such history or tradition supporting a restriction on adults 18 to 20 years of age. *See* July 14, 2020 Opinion. Thus, it is for these reasons that the Court holds that the Act is unconstitutional and unenforceable as to adults 18 to 20 years of age.

III. In Finding that Va. Code § 18.2-308.2:5 is Unconstitutional As-Applied to Adults 18 to 20 Years of Age, the Court Must Now Consider the Appropriate Remedy to Apply in Light of the Three Interrelated Principles Laid Out in *Ayotte*.

The Court is now left to consider what the appropriate remedy is after finding the Act unconstitutional as-applied to those 18 to 20 years of age. The challengers seek to have the Court invalidate the Act facially based on a finding that no set circumstances exist under which the Act would be valid. However, in exercising judicial restraint, the Court declines to rule on the challengers' facial challenge due to the strong disfavor higher courts express for such challenges, and because this Court believes it should first determine the validity of the Act under an *Ayotte* analysis. Whether the Act presents one of the "rare circumstances" where it is proper for the Court to facially invalidate the statute in its entirety is an undertaking this Court must address. *See Ayotte*, 546 U.S. at 328-32.

As stated earlier, it is a general rule that courts should only enjoin the unconstitutional applications of a statute while leaving other applications in force. *Ayotte*, 540 U.S. at 328-29 (citing *United States v. Raines*, 362 U.S. 17, 20–22 (1960)). However, there are rare circumstances where the proper action for a court to take is to totally invalidate a statute after finding the statute unconstitutional as-applied in some circumstances. *Toghill v. Commonwealth*, 289 Va. 220, 232 (2024) (citing *Ayotte*, 546 U.S. at 328-32). In such cases, courts must consider three interrelated principles laid out in *Ayotte* to decide whether the statute should be invalidated in its entirety.

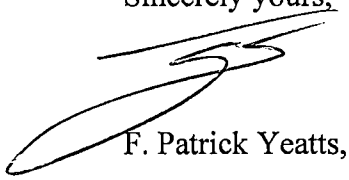
Ultimately, because the Court has decided that the Act is Unconstitutional as-applied to those 18 to 20 years of age, the Court believes that it must now determine what is to be done with the remainder of the statute under an *Ayotte* analysis.

Conclusion

For the reasons set forth above, the Court holds that the Act is unconstitutional as currently applied to adults 18 to 20 years of age seeking to purchase a handgun through a private sale, and the Court will grant declaratory relief in the form of a finding that the Act is unconstitutional as-

applied to adults 18 to 20 years of age under Article I, Section 13 of the Constitution of Virginia, and the Court grants permanent injunctive relief which enjoins the administration, enforcement, and imposition of the requirements of the Act on the same basis to adults 18 to 20 years of age. While the Court is unwilling at this time to strike the Act on the facial grounds raised by the challengers, the Court does believe that a further hearing is necessary to determine, under *Ayotte*, the constitutionality of the statute in light of finding the Act unconstitutional as-applied to those 18 to 20 years of age. Counsel is therefore instructed to contact the Court within the next 10 days to schedule a further hearing.

Sincerely yours,



F. Patrick Yeatts, Judge