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IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 281 MD 2023

GRANT SCHMIDT

SHOT TEC, LLC, and

SECOND AMENDMENT FOUNDATION

Petitioners

vs.

COLONEL CHRISTOPHER PARIS, COMMISSIONER PENNSYLVANIA STATE POLICE, and

SEAN KILKENNY, SHERIFF OF MONTGOMERY COUNTY

Respondents

Petitioners' Brief in Opposition to Respondent Paris' Preliminary Objections and Reply in Support of Application for Summary Relief

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I. COUNTER STATEMENT OF FACTS

In 2019, Petitioner Schmidt formed Shot Tec, LLC and procured a Federal Firearms License from the ATF and a PA License to Sell Firearms license from Respondent Sheriff Kilkenny as a responsible person for Shot Tec, LLC. [1] Although Petitioner Schmidt acknowledges preparing and submitting the Application for a PA License to Sell Firearms (SP 4-128), [2] given the legal requirements, pursuant to 18 Pa.C.S. § 6112 and 37 Pa.Code § 33.117, to procure a Pennsylvania License to Sell Firearms in order to "sell or otherwise transfer or expose for sale or transfer, or have in his possession with intent to sell or transfer any firearm" as retail dealer and the failure to procure the license being a misdemeanor of the first degree, pursuant to 18 Pa.C.S. § 6119, [3] he believed he had no option other than to involuntarily complete and sign the PSP's promulgated form, as required by 37 Pa.Code § 33.116. [4] If he believed or otherwise understood that he could lawfully sell or otherwise transfer a firearm in Pennsylvania as retail dealer in the absence of procuring a PA License to Sell Firearms, he would not

[1] *See,* Declaration of Grant Schmidt, ¶¶ 1-3.
[2] *See,* Exhibit D, an un-executed copy of the SP 4-128.
[3] A conviction of a misdemeanor of the first degree in Pennsylvania would trigger the federal prohibition of 18 U.S.C. § 922(g)(1), which would prohibit Petitioner Schmidt from purchasing, possessing, or utilizing firearms and ammunition.
[4] *See,* Declaration of Grant Schmidt, at ¶¶ 4-5.

have procured a PA License to Sell Firearms. [5] Additionally, if he believed or otherwise understood that he could obtain a PA License to Sell Firearms in the absence of being forced to execute a PA License to Sell Firearms (SP 4-128) or without putatively waiving any constitutional rights, he would have done so. [6]

Furthermore, Petitioner Schmidt currently owns a second home in Bala Cynwyd, Montgomery County, from which he intends to start a second firearms-related business by his procuring a home-based FFL, from the ATF. [7] In order for Petitioner Schmidt to sell or otherwise transfer a firearm from his second home, pursuant to 18 Pa.C.S. § 6112 and 37 Pa.C.S. § 33.117, he is being forced to acquire a PA License to Sell Firearms from Respondent Sheriff Kilkenny, which, pursuant to 37 Pa.C.S. § 33.116(c) and the Application for a PA License to Sell Firearms (SP 4-128), also forces him to waive his constitutional rights to be free from searches. [8] Moreover, by being forced to acquire a PA License to Sell Firearms from Respondent Sheriff Kilkenny, he is being subjected to Kilkenny's Policy, which beyond the scope of authority of § 33.116, requires, *inter alia*, him or a representative to be seized in the absence of a warrant and compels him or a

[5] *Id*. at ¶ 6.
[6] *Id*. at ¶ 7.
[7] *Id*. at ¶ 8.
[8] *Id*. at ¶ 9.

representative to speak with law enforcement and provide any requested documents. [9]

Even more disconcerting, as 18 Pa.C.S. § 6113 does not define what constitutes "cause" to revoke a PA License to Sell Firearms, by Petitioners Schmidt and Shot Tec, LLC asserting their constitutional rights to be free from searches and seizures in the absence of a warrant and to remain silent, they believe, based on Respondent Sheriff Kilkenny's statements, [10] that Respondent Sheriff Kilkenny will revoke their PA License to Sell Firearms, which will result in an average loss of income to Petitioners Schmidt and Shot Tec, LLC in the amount of $250,000, per year. [11] Furthermore, as 18 Pa.C.S. § 6113 does not define what constitutes a "reputable applicant" for issuance of a PA License to Sell Firearms, by Petitioners Schmidt and Shot Tec, LLC asserting their constitutional rights to be free from searches and seizures in the absence of a warrant and right to remain silent, Petitioner Schmidt does not know if his assertion of his constitutional rights or being on a Responsible Person on a PA License to Sell Firearm that is revoked for asserting its constitutional rights are bases for denial of him allegedly not being a "reputable applicant" for a PA License to Sell Firearms at his second home and

[9] *Id*. at ¶ 10.
[10] *See,* Exhibit C, pg. 4, declaring, "if push comes to shove we'll go ahead and have to revoke their license."
[11] *Id*. at ¶¶ 16, 17.

fears denial on both of these basis, merely as a result of asserting Shot Tec, LLC's or his constitutional rights. [12] Petitioner Schmidt, based on his business plan, anticipates that the denial of his forthcoming Application for a PA License to Sell Firearms at his second home would result in a loss of income in the average amount of $50,000, per year. [13]

Accordingly, by asserting their constitutional rights to be free from searches and seizures in the absence of a warrant and right to remain silent and otherwise refusing to comply with Kilkenny's Policy, Petitioners Schmidt and Shot Tec, LLC fear the revocation of Shot Tec, LLC's PA License to Sell Firearms and the denial of Petitioner Schmidt's forthcoming Application for a PA License to Sell Firearms in relation to his second home, which will result in a believed loss of income for Petitioner Schmidt in the amount of $300,000, per year. [14]

II. ARGUMENT

A. The issues raised in this case are justiciable

In response to Respondents Paris' [15] and Kilkenny's [16] arguments that this matter is non-justiciable due to Petitioners' putative lack of standing and ripeness,

[12] *Id*. at ¶ 18.
[13] *Id*. at ¶ 19.
[14] *Id*. at ¶¶ 16-19.
[15] Respondent Paris' Brief at 7-11.

Petitioners respond as follows:

> Where the effect of the challenged regulations upon the industry regulated is direct and immediate, the hardship thus presented suffices to establish the justiciability of the challenge in advance of enforcement.

Arsenal Coal Co. v. Com., Dep't of Envtl. Res., 505 Pa. 198, 209 (1984). [17]

i. Petitioners Have Standing

Ignoring the legion of binding precedent from the Pennsylvania Supreme Court, [18] Respondents contend that Petitioners lack standing, even though the binding precedent is explicitly clear that a plaintiff, pursuant to the Declaratory Judgment Act, has standing to bring a challenge "to determine its rights when a law forces upon the plaintiff a number of choices, including surrendering perceived

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(footnote continued)

[16] Respondent Kilkenny's Brief at 11-19.

[17] Petitioners believe this to be the appropriate analysis for this matter given that the challenged laws, regulations, and policy affect the firearms industry in this Commonwealth; however, the standard provided by the Court in *Firearm Owners Against Crime, et al. v. City of Harrisburg, et al.*, 261 A.3d 467 (Pa. 2021) (hereinafter "FOAC v. Harrisburg") adds a "substantial" prong (*i.e.* substantial, direct, and immediate) and, for justiciability purposes, delineates between standing and ripeness. As *FOAC v. Harrisburg* did not involve a regulated industry, it is easily distinguishable and Petitioners have been unable to find any more recent precedent by the Court – in the context of the justiciability of a regulatory challenge – that would suggest that *Arsenal Coal* is no longer the appropriate legal framework in this context. Nevertheless, Petitioners will address the *FOAC v Harrisburg* analysis, since it is more encompassing than, and includes the prongs of, the *Arsenal Coal* analysis.

[18] *See, FOAC v. Harrisburg*, 261 A.3d 467; *Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 639 Pa. 521 (2017); *Com., Office of Governor v. Donahue*, 626 Pa. 437 (2014); *Robinson Twp., Washington Cnty. v. Com.*, 623 Pa. 564 (2013); *O'Connor v. City of Philadelphia Bd. of Ethics*, 608 Pa. 570 (2011); *Arsenal Coal Co.*, 505 Pa. 198.

rights to comply with the law" and consistent therewith, individuals of this Commonwealth have a right to "challenge laws before the laws have been enforced against them *and before enforcement has been threatened*." *FOAC v. City of Harrisburg,* 261 A.3d at 489-90 (emphasis added).

As the Supreme Court acknowledged in *FOAC v. Harrisburg*, to establish standing, a plaintiff only needs to demonstrate he or she has been "aggrieved" by the conduct he or she challenges. *Id*. at 481. As the Court explained,

> To determine whether the plaintiff has been aggrieved, Pennsylvania courts traditionally examine whether the plaintiff's interest in the outcome of the lawsuit is substantial, direct, and immediate. "A party's interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party's interest is immediate when the causal connection with the alleged harm is neither remote nor speculative."

Id. at 481 (citations omitted).

No different than in *Cozen O'Connor*, *Robinson Township*, *Donahue*, *Yocum*, and *FOAC v. Harrisburg*, Petitioners have established their standing, even under the most stringent application of the criteria.

a. Petitioners' Interest is Substantial

Petitioners' interest is substantial as it "surpasses the interest of all citizens in procuring obedience to the law." *Id*. As the Supreme Court explained in *FOAC v. Harrisburg*, the Appellees' interest was substantial because, "as lawful

possessors of firearms and concealed carry licenses," they sought a determination of the validity of several ordinances enacted by Harrisburg purporting to limit, *inter alia*, their ability to carry and use firearms within the city, which "exceeds the 'abstract interest of all citizens in having others comply with the law.'" *Id*. at 487-88. [19]

And this matter is no different. Petitioner Shot Tec operates a firearms business, which is being subjected to 37 Pa.C.S. § 33.116(c) and Respondent Kilkenny's Policy. [20] And neither Respondent Paris nor Respondent Kilkenny dispute that Shot Tec is subjected to the laws, regulations, and policy challenged in this matter. As such, Shot Tec's interest is substantial, since, unlike individuals and business who are not required to obtain a PA License to Sell Firearms, Shot Tec, LLC is specifically subjected to 37 Pa.C.S. § 33.116(c) and Respondent Kilkenny's Policy. Moreover, while a plaintiff is not required to establish any pecuniary harm, "such allegations certainly may confer standing." *FOAC v. Harrisburg*, 261 A.3d at 496 (Wecht, J., concurring). And here, Shot Tec averred that its *non-compliance* with Section 33.116(c) and Respondent Kilkenny's Policy would result in the revocation of its license and cause "a loss of annual income in the average amount

[19] *See also, City of Philadelphia v. Com.*, 575 Pa. 542, 560 (2003)(finding that residents of Philadelphia had an interest surpassing Pennsylvania citizens generally, for purposes of challenging legislation enacted by the General Assembly)
[20] *See*, Declaration of Grant Schmidt, ¶¶ 1-6.

of $250,000." [21] Furthermore, it averred that its *compliance* with Section 33.116(c) and Respondent Kilkenny's Policy would cost it, at a minimum, $150.00, per employee, [22] since it will take a minimum of 6-8 hours to train them and Respondent Kilkenny has contended that his inspection will likely last "between one (1) hour and two (2) hours." [23]

In relation to Petitioner Schmidt, he intends to start a second firearms-related business by his procuring a home-based FFL, from the ATF. [24] In order for him to sell or otherwise transfer a firearm from his home, pursuant to 18 Pa.C.S. § 6112 and 37 Pa.C.S. § 33.117, he is being forced to acquire a PA License to Sell Firearms from Respondent Sheriff Kilkenny, which, pursuant to 37 Pa.C.S. § 33.116(c) and the Application for a PA License to Sell Firearms (SP 4-128), also forces him to waive his constitutional rights to be free from searches. [25] Thus, his interest "exceeds the 'abstract interest of all citizens in having others comply with the law.'" *FOAC v Harrisburg*, 261 A.3d at 488. Moreover, he too has averred that his inability to obtain a PA License to Sell Firearms at his home "would result in a loss of annual income in the average amount of $50,000." [26]

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[21] *Id*. at ¶¶ 16-17.
[22] *Id*. at ¶ 20.
[23] *See*, Exhibit A.
[24] *Id*. at ¶ 8.
[25] *Id*. at ¶ 9.
[26] *Id*. at ¶ 19.

And as Petitioners Shot Tec and Schmidt are members of the Second Amendment Foundation ("SAF"), [27] SAF "has standing as an associational representative of these members to challenge the [regulations]." *FOAC v Harrisburg*, 261 A.3d at 488.

b. Petitioners' Interest is Direct

As the Supreme Court declared in *FOAC v. Harrisburg*, "a direct interest simply means that the person claiming to be aggrieved must show causation of the harm to his [or her] interest by the matter of which he [or she] complains." *Id*. (citation and quotation omitted). Thereafter, it found that the Appellants' "interest is direct because the challenged ordinances allegedly infringe on their constitutional and statutory rights to possess, carry, and use firearms within the City." *Id*.

Once again, no different than in *FOAC v. Harrisburg*, the laws, regulations, and policy challenged in this matter are contended to infringe on Petitioners' constitutional and statutory rights; thereby, establishing that their interest is direct.

c. Petitioners' Interest is Immediate

In turning once again to the Supreme Court's decision in *FOAC v.*

[27] *See*, Pet. for Review, ¶¶ 4-6.

Harrisburg, it found that the Appellants' interest was immediate "because they are currently subject to the challenged ordinances, which the City is actively enforcing, and must presently decide whether to violate the ordinances, forfeit their rights to comply with the ordinances, or avoid the City altogether." *Id*.

Here, neither Respondents Paris nor Kilkenny dispute that they are actively enforcing [28] the challenged laws, regulations, or policy. In fact, Respondent Paris declares "that inspections [pursuant to Section 33.116(c)] have been taking place for decades" [29] and Respondent Kilkenny admits that in May of 2023, he sent letters announcing his newly minted policy, [30] informing licensees, *inter alia*, that his Office would be "inspecting every licensed firearms dealer in the County [p]ursuant to Pennsylvania Code Section 33.116(c)," and provided them with the inspection checklist. [31] Respondent Kilkenny also held a press conference, where he told attendees that if a licensee refuses to comply with his Policy, he would revoke their PA License to Sell Firearms. [32]

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[28] And as the Court declared in *FOAC v. Harrisburg*, "[i]t is not necessary for the mayor or police chief to specifically threaten any individual with enforcement as Appellees' interests are immediate without that factual development, and it would not assist the legal inquiry into the validity of the ordinances." 261 A.3d at 489.
[29] Respondent Paris' Brief at 25.
[30] Referred to by Petitioners throughout their filings as "Kilkenny's Policy."
[31] Respondent Kilkenny's Brief at 8-9.
[32] *See*, Exhibit C, pg. 4, declaring, "if push comes to shove we'll go ahead and have to revoke their license."

Resultantly, there can be no dispute that Petitioners Shot Tec and Schmidt are subject to the challenged laws, regulations, and policy, which Respondents Paris and Kilkenny are actively enforcing; thereby, forcing Petitioners to presently decide whether to (1) violate the law, regulations, and policy, (2) forfeit their rights to comply with the law, regulations, and policy, or (3) abstain from being a dealer of firearms in the Commonwealth. Hence, Petitioners' interest is immediate.

d. The Supreme Court's Legion of Binding Precedent Supports Pre-Enforcement Challenges

While Respondents contend that Petitioners cannot bring this action as a pre-enforcement challenge, [33, 34] in simply turning to *FOAC v. Harrisburg*, the Court explicitly declared that "[t]his Court has afforded standing to plaintiffs in pre-enforcement declaratory judgment actions challenging the legality or constitutionality of statutes," and after reviewing *Cozen O'Connor*, *Robinson Township*, *Donahue*, *Yocum* – which *were all pre-enforcement challenges* – declared that "our jurisprudence in pre-enforcement declaratory judgment cases, as discussed above, has developed to give standing to plaintiffs to challenge laws

[33] Respondent Paris' Brief at 8-10.
[34] Respondent Kilkenny's Brief at 15-17.

before the laws have been enforced against them and *before enforcement has been threatened*." 261 A.3d at 482, 488-89 (emphasis added). [35, 36]

For example and analogous to this matter, in *Yocum*, an attorney with the Pennsylvania Gaming Control Board, was found to have standing for a pre-enforcement challenge in relation to her desire "to seek and accept new employment as an attorney representing gaming clients," which would potentially violate the Gaming Act's employment restrictions on former employees accepting such employment for a two year period of time post-termination that she contended was unconstitutional, even though the restriction was in place at the time she was hired. 639 Pa. at 526-30. The Supreme Court found that she had standing to challenge the constitutionality of the employment restrictions because she would

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[35] *See also*, *Harris-Walsh, Inc. v. Borough of Dickson City*, 420 Pa. 259, 263-64 (1966); *Bliss Excavating Co. v. Luzerne Cty.*, 418 Pa. 446, 451–52 (1965); *Firearm Owners Against Crime v. Lower Merion Twp.,* 151 A.3d 1172, 1180, fn. 10 (Pa. Cmwlth. 2016)*, appeal denied, 642 Pa. 64, 169 A.3d 1046 (2017); Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Cmwlth. 2013); *City of Erie v. Northwestern Pennsylvania Food Council*, 322 A.2d 407, 411-12 (Pa. Cmwlth. 1974)(holding that "[t]his traditional [of standing] prerequisite to the issuance of an injunction is not applicable where as here the Legislature declares certain conduct to be unpermitted and unlawful.").

[36] Furthermore, as the Supreme Court acknowledged in *FOAC v. Harrisburg*, "[t]his Court has also permitted plaintiffs to seek pre-enforcement relief when a law imposed unappealing options in cases that were not brought under the Declaratory Judgments Act. In *Arsenal Coal*, this Court held that the petitioners' petition for pre-enforcement injunctive relief from the Department of Environmental Resources' regulatory scheme presented a justiciable claim…. In *Shaulis*, this Court held that an attorney, previously employed by the Department of Revenue, had standing to bring a constitutional challenge to a provision of the Public Official and Employee Ethics Act that the State Ethics Commission had determined prevented her, as a former government employee, from engaging in certain aspects of private practice that would involve the Department." 261 A.3d at 486, fn. 14.

violate the Gaming Act by attempting to obtain new employment in the gaming industry, which would expose her and her potential employer to adverse consequences. *Id*. at 536.

In this matter, no different than *Yocum*, to become employed in a particular field, Shot Tec was forced and Schmidt is being forced to agree to requirements that they contend are unconstitutional *ab initio* and have left them with no options other than to (1) violate the challenged laws, regulations, and policy, (2) forfeit their rights to comply with the law, regulations, and policy, or (3) abstain from being a dealer of firearms in the Commonwealth. *See*, *FOAC v. Harrisburg*, 261 A.3d at 490 (declaring that "[t]he Declaratory Judgments Act provides an avenue of relief for a plaintiff to determine its rights when a law forces upon the plaintiff a number of choices, including surrendering perceived rights to comply with the law.)

e. Petitioners' Claims are not Speculative or Wholly Contingent on Future Events

Respondents, relying on pre-*FOAC v. Harrisburg* cases, attempt to contend that Petitioners' claims are speculative or wholly contingent on future events, [37, 38] even though, as addressed *supra*, Petitioners have established that they are

[37] Respondent Paris' Brief at 1, 7, 11.
[38] Respondent Kilkenny's Brief at 12-15.

aggrieved and therefore have standing, since their interest in challenging the laws, regulations, and policy are substantial, direct, and immediate. Simply put, there is no way for the Supreme Court in *FOAC v. Harrisburg* to have found the Appellants there to have standing and for Petitioners here not to have standing.

For example, Respondent Paris contends that "[n]o action has been taken against a license held by Petitioners," which is directly contrary to Respondent Kilkenny's admission that he sent letters to all Montgomery County licensees – inclusive of Shot Tec – that they must undergo an inspection or face revocation of their license. [39] Furthermore, Respondent Paris admits "that inspections [pursuant to Section 33.116(c)] have been taking place for decades" by the Pennsylvania State Police [40] and thus, Respondent Shot Tec is under threat of an inspection, pursuant to Section 33.116(c), in violation of its constitutional rights, not just by Respondent Kilkenny, but also by, Respondent Paris' PSP.

ii. Ripeness

As the Court in *FOAC v. Harrisburg* declared, "ripeness is distinct from standing as it addresses whether the factual development is sufficient to facilitate a judicial decision." 261 A.3d at 482. But where a litigant challenges the facial

[39] Respondent Kilkenny's Brief at 8-9; Petitioners' Exhibit C, pg. 4, declaring, "if push comes to shove we'll go ahead and have to revoke their license."
[40] Respondent Paris' Brief at 25.

validity of a law, regulation, or policy, "[a]dditional factual development that would result from awaiting [enforcement] is not likely to shed more light upon the constitutional question of law presented[.]" And as this Court has declared, a public threat of enforcement is enough to demonstrate "the ripening seeds of a controversy sufficient to support judicial review." *Wecht v. Roddey*, 815 A.2d 1146, 1150 (Pa. Cmwlth. 2002)(holding that a county coroner's public statements in opposition of newly adopted regulations were enough evidence of the "inevitability of litigation" to confer standing); *see also*, *Petition of Kariher*, 284 Pa. 455, 471 (1925)(declaring that "the ripening seeds of [a controversy]" is sufficient to establish standing for judicial review). Where no other avenue of *adequate* recourse exists, a plaintiff may seek equitable relief from the courts. *Harris-Walsh*, 420 Pa. at 263-64. Requiring an individual to wait to challenge a law, ordinance, regulation, policy, or rule's validity until *after* enforcement of it is *not* considered "adequate." *Id.*

In relation to this matter, as addressed *supra*, Respondents Paris and Kilkenny both admit that they are enforcing the respective laws, regulations, and policy. Thus, there simply cannot be any argument that this matter is not ripe.

iii. Contrary to Respondents' Argument, Petitioners Challenge Does Not Constitute an Advisory Opinion

Contrary to the seeming contention of Respondents, [41, 42] Petitioners' challenge does not constitute an advisory opinion, as the harm is neither remote nor speculative. *Gulnac by Gulnac* only prohibits employing a declaratory judgment "to determine rights in anticipation of events which may never occur," but as discussed *supra*, there is no dispute that Petitioners in this case are currently subject to the unconstitutional restrictions and evisceration of their rights imposed by the challenged laws, regulations, and policy and that harm is neither remote nor speculative. *Gulnac by Gulnac v. S. Butler Cnty. Sch, Dist.*, 526 Pa. 483, 488 (1991). While Respondents may be correct that it would advisory in nature if Respondent Paris' PSP was in the *pre-enactment portion* of rulemaking or Respondent Kilkenny was only *considering* an inspection policy, in this case, as addressed *ad nauseum*, there is no dispute that the challenged laws, regulations, and policy have been enacted/implemented and both Respondents Paris and Kilkenny admit that they are enforcing them. Thus, it is clear that the effect of the challenged laws, regulations, and policy on Petitioners is not abstract [43]and that

[41] Respondent Paris' Brief at 8.
[42] Respondent Kilkenny's Brief at 11, 17-18.
[43] Respondent Paris seemingly acknowledges this in his Brief at 8 in quoting *Bayade Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 607 Pa. 527, 542 (2010), where the Court declared "[i]n the
(footnote continued)

they have established that they are aggrieved; therefore, establishing standing to bring this action.

The Declaratory Judgments Act exists specifically to provide relief from uncertainty and insecurity with respect to rights and legal relations and which does not involve risking the adverse criminal, civil, ethical, and reputational consequences that are invited by violating the law. 42 Pa.C.S. § 7541(a). The Supreme Court has repeatedly affirmed the position that "pure questions of law" – like the constitutionality of the challenged laws, regulations, and policy underlying this matter – "are particularly well-suited for pre-enforcement review." *Yocum*, 639 Pa. at 532 (quoting *Robinson Twp.,* 623 Pa. 564 (citing *Rendell v. Pa. State Ethics Comm'n.*, 603 Pa. 292 (2009)). And the factual development that would come from forcing Petitioners to violate the challenged laws, regulations, and policy "is not

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(footnote continued)

context of administrative law, the basic rationale of ripeness is to prevent the courts, through the avoidance of premature adjudication … from judicial interference *until an administrative decision has been formalized* and its efforts felt in a concrete way by the challenging parties." (emphasis added).

Furthermore, to the extent Respondent Paris argues that the "dispute first needs to be resolved through the agency adjudicatory process," setting aside the fact that an administrative law judge cannot consider constitutional challenges (*see*, *ChildFirst Servs., Inc. v. Dep't of Human Servs.*, 681 C.D. 2021, 2022 WL 905477, at *7 (Pa. Cmwlth. Mar. 29, 2022)), as this Court acknowledged in citing to *Bayade Nurses*, "[w]here, however, the impact of a regulation on an industry is direct and immediate, pre-enforcement judicial review is appropriate." *Marcellus Shale Coal v. Dep't of Envtl. Prot.*, 216 A.3d 448, 459 (Pa. Cmwlth. Ct. 2019).

likely to shed more light upon the constitutional question of law." *Robinson Twp.*, 623 Pa. at 592.

iv. The Absurdity of Respondents' Arguments

As just one example of the absurdity of Respondents' arguments that Petitioners lack standing, is Respondent Paris' requirement that an applicant for a PA License to Sell Firearms sign the application declaring that "[b]y signing this application, I acknowledge that if a license is granted, I give permission to the Pennsylvania State Police, or their designee, an the issuing authority to come to the business location and inspect the premises, records, and documents without warrant, to ensure compliance with 37 Pa. Code § 33.1 et seq." [44] Both Respondent Paris [45] and Respondent Kilkenny [46] argue that Shot Tec – which was forced to involuntarily sign the application so to be able to sell firearms in the Commonwealth in compliance with the law – waived or otherwise consented to the searches by executing the application, but then, in the same breath, that Petitioner Schmidt lacks standing to challenge the requirement *in advance* of being forced to involuntarily sign an application for a PA License to Sell Firearms at his home; [47]

[44] Exhibit D, pg. 1.
[45] Respondent Paris' Brief at 26.
[46] Respondent Kilkenny's Brief at 34-37.
[47] *See*, Declaration of Grant Schmidt, at ¶¶ 8-10.

which, if accepted, would preclude a challenge to the provision from *ever* being considered. If neither a person before signing the application nor after signing the application can challenge the requirement, then when can a challenge be brought? According to the Respondents the answer is *never*.

And this is just one example of the issues facing Petitioners – as detailed in their Petition for Review and Application for Summary and Special Relief – in relation to the challenged laws, regulations, and policy; a violation of any of which can subject them to criminal prosecution, loss of their Second Amendment rights, [48] and/or revocation of their license, resulting in the substantial loss of money and reputation.

* * * *

For the reasons specified *supra*, there cannot be any dispute that Petitioners have standing to challenge the laws, regulations and policy complained of in the Petition for Review and that the matters are ripe for adjudication.

[48] *See*, 18 Pa.C.S. § 6119. A conviction of a misdemeanor of the first degree in Pennsylvania would trigger the federal prohibition of 18 U.S.C. § 922(g)(1), which would prohibit Petitioner Schmidt from purchasing, possessing, or utilizing firearms and ammunition.

B. Petitioners' right to relief is clear and they are entitled to declaratory relief

For brevity, Petitioners incorporate by reference their argument that their right to relief is clear from their Brief in Support of Application for Summary and Special Relief, pgs. 21-39.

In response to Respondents Paris' [49] and Kilkenny's [50] arguments that Petitioner's right to relief is not clear, Petitioners respond as follows:

i. 18 Pa.C.S. §§ 6111.5, 6112, and 6113 and 37 Pa.Code §§ 33.116 and 33.117 Violate Article II, Section 1 of the Pennsylvania Constitution

Respondents' silence regarding the seminal binding precedent that Petitioners cited in their Brief in Support of Application for Summary and Special Relief in relation to Article II, Section 1 of the Pennsylvania Constitution, including the Supreme Court's pronouncement in *State Board of Chiropractic Examiners v. Life Fellowship of Pennsylvania*, 441 Pa. 293, 297 (1971) that "[i]t is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority," [51] its

[49] Respondent Paris' Brief at 12-28.
[50] Respondent Kilkenny's Brief at 19-50.
[51] Or, as John Locke put it, legislative power consists of the power "to make laws, and not to make legislators." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (R. Cox

(footnote continued)

command in *Murray v. City of Philadelphia*, 364 Pa. 157 (1950) and *Ruch v. Wilhelm*, 352 Pa. 586 (1945) that administrative agencies cannot attempt to supply essential substantive provisions that are missing from, or unclear in, the statute, or its holding in *Bell Telephone Co. of Pennsylvania v. Driscoll*, 343 Pa. 109 (1941) that the phrase "public interest," standing alone, is too vague and elastic to furnish a standard for the guidance of administrative discretion speaks volumes. [52] Nor do they address that if the legislature fails to prescribe with reasonable clarity the limits of the power delegated, or if those limits are too broad, its attempt to delegate is a nullity. *Id*.; *Holgate Bros. Co. v. Bashore*, 331 Pa. 255 (1938). Rather, Respondent Kilkenny merely responds that "[i]t is of no moment that the UFA itself does not expressly address the inspections." [53]

(footnote continued)

ed.1982). And command is essential to the American tripartite system of representative government. The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty. *See, Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty."); *see also,* The Federalist No. 47, at 301 (J. Cooke ed. 1961) (J. Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.").

[52] Interestingly, Respondent Paris attempts to conflate court decisions addressing the *manner* in which administrative agencies may enforce their explicitly delegated duties (*e.g.* through injunctions and *in camera* review) with an "*implicit"* ability for administrative agencies to enact substantive law in the absence of an explicit delegation and in direct defiance of *State Board of Chiropractic Examiners, Murray*, and *Ruch.* Respondent Paris' Brief at 14-15, 17-18. Under Respondent Paris' theory, we no longer require the General Assembly nor Governor, as administrative agencies can make and execute on the law.

[53] Respondent Kilkenny's Brief at 41.

a. 18 Pa.C.S. § 6111.5

As addressed in Petitioners' Brief in Support of Application for Summary and Special Relief at 8, in enacting Section 6111.5, the General Assembly neither (1) mentioned nor provided for any form of inspections for PA License to Sell Firearms applicants or holders nor (2) defined or provided any framework for what constituted "rules and regulations necessary to carry out this chapter," other than to declare that such "include[es] regulations to ensure the identity, confidentiality and security of all records and data provided pursuant thereto." And as such, the language is so vague and fails to "contain adequate standards which will guide and restrain the exercise of the delegated administrative functions" as the Court in *Gilligan v. Pennsylvania Horse Racing Comm'n*, 492 Pa. 92, 96 (1980), declared to be required for a valid delegation of authority, that Section 6111.5 is unconstitutional *in toto*. [54]

Respondent Paris, after declaring that the language "regulations to ensure the identity, confidentiality and security of all records and data provided pursuant thereto…cabin[s] the authority of the State Police," [55, 56] contends that although

[54] *See also*, *Bell Telephone Co. of Pennsylvania*, 343 Pa. 109; *Holgate Bros. Co*, 331 Pa. 255.
[55] Respondent Paris' Brief at 16-17.
[56] Respondent Kilkenny likewise agrees that this language "cabins" the Pennsylvania State Police. Brief at 24.

"the General Assembly did not use the word 'inspection,'" [57] that somehow, someway, without any analysis, such implicitly includes "[an] audit by the licensing body," [58, 59] even though such is violative of *Firemen's Relief Ass'n of Washington*, 430 Pa. 66 (1968)(holding that an administrative body or officer may not read into a statute conditions or requirements not plainly expressed therein.) [60] If "regulations to ensure the identity, confidentiality and security of all records and data" implicitly allows for the usurpation of constitutional rights, through warrantless searches, in the absence of any action taken by the General Assembly, what doesn't that language – which Respondent Paris admits "cabin[s] the authority of the State Police" – then implicitly allow?

As even acknowledged by Respondent Kilkenny's Brief at 40, the General Assembly was aware of how to impose obligations and restrictions on licensees, as evidenced by 18 Pa.C.S. § 6113, which requires an individual wishing to deal in

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[57] *Id*. at 17.
[58] *Id*.
[59] Neither Respondent Paris nor Respondent Kilkenny take any time to analyze the text that they contend putatively permits them to institute warrantless searches. Beyond the text being wholly devoid of the words "inspection," "inspect," "audit," "accuracy," and "licensee," the terms utilized – identity, confidentiality, and security – all modify "records and data." There is simply no basis, under those terms modifying "records and data," to contend that such supports a delegation of authority to conduct warrantless searches – especially when, as discussed *infra*, the General Assembly is acutely aware of how to draft such language – or to even audit or otherwise check the accuracy of records being maintained by a licensee.
[60] *See also*, *Com. v. Di Meglio*, 385 Pa. 119 (1956)(holding that an administrative body or officer, under the guise of its regulatory power, may not broaden the scope of a proscription contained in its enabling legislation.)

firearms to obtain a license, and after issuance of the license, restricting the business "to be carried on only upon the premises designated in the license or at a lawful gun show or meet," for the license to "be displayed on the premises where it can easily be read," and to preclude a firearm from being "displayed in any part of any premises where it can readily be seen from outside," as just several examples. [61, 62] Moreover, the General Assembly is acutely aware of how to draft and implement statutory language providing for warrantless and administrative searches and inspections, as it has provided for such in relation to liquor licensees, [63] hunters, [64] community adult respite service providers and participants, [65] and pharmacies. [66] What Respondents Paris and Kilkenny argue to this Court is that although the General Assembly knew how to impose these restrictions, this "policy decision" should be made by an administrative agency instead of our elected representatives, in violation of Article II, Section 1 and *State Board of Chiropractic Examiners, Murray, Ruch,* and *Bell Telephone Co. of Pennsylvania*. As made explicitly clear by the legion of precedent from the Pennsylvania

[61] The General Assembly also knew how to impose record retention requirements on licensees – for "a period of 20 years" – in relation to form completed by the purchaser/transferee. 18 Pa.C.S. § 6111(b)(1).
[62] Interestingly, Respondent Kilkenny acknowledges that "[t]he statutory framework plainly sets forth the expectations and conditions for operation" and that warrantless searches are not part of the statutory framework. Respondent Kilkenny's Brief at 22
[63] *See*, 47 P.S. §§ 2-211(3), 5-513.
[64] *See*, 34 Pa.C.S. §§ 901(a)(8), 2724(a).
[65] *See*, 62 P.S. § 3070.7(a).
[66] *See*, 63 P.S. § 391.13.

Supreme Court, this is a *legislative judgment decision*, [67] as this Court recently recognized in *Crawford v. Commonwealth*, 277 A.3d 649, 671-76 (Pa. Cmwlth. 2022)(declaring, *inter alia*, "[i]t is in the very nature of deliberative bodies to choose between and among competing policy options … [t]here are numerous factors and considerations which must be taken into account by the legislature in establishing the policy it determines provides the most protection for the public.") And here, being aware of the numerous factors and considerations, including the serious constitutional implications, the General Assembly elected not to provide for warrantless searches.

But what if this Court agreed with Respondents that this "cabined" language allows an administrative agency to usurp constitutional rights? Or stated slightly differently, what other constitutional rights may they abridge at will? Well, Respondent Paris, under Section 6111.5, could impose a regulation that allows for the warrantless search by the Pennsylvania State Police or issuing authority of an individual's home, business, and vehicle, simply based on the fact that the individual was granted a license to carry firearms, pursuant to 18 Pa.C.S. § 6109,

[67] As Petitioners have argued even in their Petition for Review at fn 1., "while it *extremely* questionable – especially given Article I, Section 25 of the Pennsylvania Constitution – how even the General Assembly would have the power to waive Article I, Section 8 of the Pennsylvania Constitution absent a constitutional amendment, there can be no dispute that in the absence of any duly enacted and constitutional law, an administrative agency wholly lacks the power and authority to waive or otherwise infringe the inviolate constitutional rights of the People."

and to ensure that they can produce their license upon demand, as provided by 18 Pa.C.S. § 6122, and are otherwise in compliance with carry laws of the Commonwealth. PennDOT, pursuant to 75 Pa.C.S. § 6103, could promulgate a regulation that by obtaining a driver's license, the individual must agree to the warrantless search of his/her vehicle, at any time, and installation of a tracking device to ensure compliance with traffic safety control devices, including driving in excess of the specified speed or failure to come to a complete stop at a stop sign. The Department of State, State Board of Medicine, pursuant to 63 P.S. § 422.8, could likewise implement a regulation that allows warrantless searches of a medical facility; whereby, all of the patient's confidential medical information is disclosed to the auditors. But that would be a bridge too far, right? Then why is it any different in this situation, as the General Assembly has mandated that all purchaser/transferee and licensee information is confidential and not subject to disclosure, pursuant to 18 Pa.C.S. §§ 6111(g)(3.1), (i), and has not seen fit to even attempt to provide for warrantless searches.

Accordingly, since Section 6111.5 is unconstitutional, as addressed further *infra*, Sections 33.116 and 33.117 are unconstitutional.

b. 18 Pa.C.S. §§ 6112, 6113

As addressed in Petitioners' Brief in Support of Application for Summary

and Special Relief at 10, in enacting Section 6113, the General Assembly did not define or provide any framework for what constituted a "reputable applicant," or "cause" for revocation of a PA License to Sell Firearms, and as such, the terms are so vague and fail to "contain adequate standards which will guide and restrain the exercise of the delegated administrative functions" as the *Gilligan* Court, 492 Pa at 96, declared to be required for a valid delegation of authority, that Section 6113 is unconstitutional *in toto* [68] and resultantly, Section 6112 is unconstitutional, as there would be no manner to comply with Section 6112's mandate, which imposes criminal sanctions of a misdemeanor of the first degree for non-compliance. [69]

While Respondent Paris contends that his "State Police has parameters in awarding and revoking licenses for cause" and tacitly seems to admit that the "cause" to revoke a licensee is limited to the enumerated provisions in Section 6113(a)(1)-(6) and 18 Pa.C.S. § 6111, [70] as addressed *supra*, 37 Pa.Code 33.116 and Kilkenny's Policy force a licensee to submit to a warrantless search and Respondent Kilkenny contends that refusal to comply with his policy constitutes cause to revoke the licensee's license, even though neither are provided for in

[68] *See also*, *Bell Telephone Co. of Pennsylvania*, 343 Pa. 109; *Holgate Bros. Co*, 331 Pa. 255.
[69] *See*, *Civil Rights Def. Firm, P.C., et al. v. Wolf*, 657 Pa. 559, 562 (2020)(Wecht, J., concurring and dissenting, "Quite simply, if firearm dealers are not able to conduct any business in-person at their licensed premises, then no transfers of firearms can be completed. This amounts to an absolute and indefinite prohibition upon the acquisition of firearms by the citizens of this Commonwealth—a result in clear tension with the Second Amendment to the United States Constitution and Article I, Section 21 of the Pennsylvania Constitution.")
[70] Respondent Paris' Brief at 18.

Sections 6113(a)(1)-(6) or 6111 as "cause" for revocation. Does this or does this not constitute cause? Respondent Paris' Brief is noticeably silent as to this and Respondent Kilkenny contends that it is sufficient.

And turning to a "reputable applicant," Respondent Paris' brief is, once again, devoid of response as to whether Petitioner Schmidt can be denied a license at his home, as a result of Shot Tec refusing to permit a warrantless search of its premises, but Respondent Kilkenny implicitly acknowledges that he can deny him as not being reputable on the basis of refusing a warrantless search at Shot Tec's premises, since Kilkenny's Policy allows for revocation of a license for failure to permit an inspection. This allowance for *unequal* application of the law, due to the lack of specificity, is informative, particularly when it is Respondent Paris, who contends that Petitioners are "quibbling with terminology," [71] but when neither he, nor Respondent Kilkenny, can set forth any specific definitions for the terms. Clearly, these terms cannot constitute "adequate standards," as required by binding legal precedent. Or, as stated by Respondent Kilkenny, "the relevant inquiry here is whether persons of common intelligence must necessarily guess at the term's meaning and differ as to its application," [72] yet, as evidenced here, persons of

[71] Respondent Paris' Brief at 20.
[72] Respondent Kilkenny Brief at 26.

common intelligence have to guess at these terms' meanings and differing as to their application.

In fact, the "cause" to revoke a license and who constitutes a "reputable applicant" are *so* clear that the Respondents cannot agree on the application of the law to Petitioners. And that's because the General Assembly has failed to provide an adequate framework, as required by Article II, Section 1, and the legion of precedent; thereby resulting in Sections 6112 and 6113 being unconstitutional.

c. 37 Pa.Code §§ 33.116, 33.117

As addressed in Petitioners' Brief in Support of Application for Summary and Special Relief at 28, even if, *arguendo*, 18 Pa.C.S. § 6111.5 is a constitutional and lawful delegation of authority, as not only has the General Assembly *never* enacted any law permitting for the warrantless searches of licenses issued pursuant to 18 Pa.C.S. § 6113 but it also has *never* enacted any law involving the inspection of such licensees, [73] the PSP lacks any delegated authority to promulgate regulations that address inspections or waive constitutional rights of licensees, as it would be making law, contrary to the holding of the *State Board of Chiropractic Examiners* Court, 441 Pa. at 297. Furthermore, as Section 33.117 requires an

[73] As addressed *supra*, the General Assembly is acutely aware of how to draft such statutory provisions as demonstrated by the enactment of such provisions in relation to other industries within the Commonwealth.

applicant to utilize the PSP's promulgated Application for a PA License to Sell Firearms (SP 4-128) – which is based upon Section 33.116 [74] – and prohibits the issuing authority from utilizing a different form, Sections 37 Pa.Code §§ 33.116, 33.117 are unconstitutional. [75]

Respondent Kilkenny, in arguing that the Pennsylvania State Police had the authority to enact Sections 33.116, 33.117, cites to 18 Pa.C.S. § 6111.1 and quotes that the State Police has the "responsibility to **administer** the provisions of this chapter." [76] What is apparently lost on Respondent is the operative clause: "to administer **the provisions of this chapter**." As has been addressed *ad nauseum*, even though the General Assembly is aware of how to draft warrantless search provisions, it made the policy decision not to implement such a statutory evisceration of constitutional rights in relation to PA License to Sell Firearm holders. In the absence of such a provision, there is nothing – in the context of warrantless searches, inspections, or audits – for the State Police to administer.

[74] *See*, Petitioners' Exhibit D.
[75] Moreover, as the General Assembly has never provided for inspections of licensees – let alone the warrantless searches of licensees – Section 33.116 cannot constitute an interpretative rule – as there is nothing to interpret – and cannot constitute a constitutional and lawful legislative rule, because, in the absence of any basis even for inspections, the PSP would be making law; a power reserved solely within the General Assembly.
[76] Respondent Kilkenny's Brief at 29 (emphasis in original).

d. Kilkenny's Policy

As addressed in Petitioners' Brief in Support of Application for Summary and Special Relief at 14-16, Kilkenny's Policy includes numerous provisions that go well beyond the scope and authority of Section 33.116. Respondent Kilkenny's failure to address how his policy is consistent with Section 33.116 while contending that Petitioners "fail to identify any elements of the proposed inspection that are not directly tied to *ensuring compliance with the UFA and the Pennsylvania Code*," [77] even though Petitioners were explicit in addressing such demonstrates the weakness in his argument. For example, from Petitioners' Brief at 16, Kilkenny's Policy requires licensees "to provide ATF 4473 forms, ATF Report of Multiple Sale forms, and an acquisition and disposition record, none of which are required the Uniform Firearms Act or the regulations." [78] ATF is a federal, not a state, agency and none of the aforementioned forms and records are required under the UFA or its regulations. There is also no basis under Section 33.116 for the seizure of the license holder or a representative for one to two hours or for those individuals to be forced to answer any questions, under either the UFA or its

[77] Respondent Kilkenny's Brief at 32 (emphasis added).
[78] The only forms, relative to being a PA License to Sell Firearms holder, that a licensee must maintain – and then only for 20 years – is the PA Application/Record of Sale form (SP 4-113), as required by 18 Pa.C.S. § 6111(b).

regulations. In fact, Section 33.116 only speaks of an ability to "inspect," not to seize, interview, examine, or otherwise interrogate. [79]

Indeed, only now does Respondent Kilkenny in his Brief at 33 provide a definition for his newly minted term "willfully negligent." What is interesting is that he contends that it means that the "dealer is deliberately not in compliance and is intentionally disregarding *the law*." [80] What law, pray tell, is that, since Respondent seems to hold a very different view of "the law" than the statutory and regulatory text, as well as, that of Petitioners. Furthermore, as addressed in Petitioners' Brief at 29, Respondent lacks any delegated authority to create, define, and enforce new terms under the UFA and as such, cannot impose his "willfully negligent" standard.

* * *

Accordingly, as the General Assembly never enacted any law under the Uniform Firearms Act of 1995 that provided for inspections of PA License to Sell Firearms licenses or for the waiver of their constitutional rights and it never

[79] *Cf.* 47 P.S. § 2-211(3)(permitting Liquor Control agents "to **search for and to seize**, without warrant or process); 62 P.S. § 3070.7(a)(permitting the Department of Public Welfare to "enter, visit and inspect any program licensed …[and] to **interview** and evaluate [] participants"); 63 P.S. § 391.13 (providing for "full opportunity to **interview employees** and inspect such premises and records of the facility.)

[80] Respondent Kilkenny's Brief at 33 (emphasis added)

provided any form of framework in relation to its delegation of authority or what constitutes a "reputable applicant" or "cause" to revoke a PA License to Sell Firearms license, or what constitutes a "clear and present danger," 37 Pa.Code §§ 33.116 and 33.117, 18 Pa.C.S. §§ 6111.5, 6112, and 6113, and Kilkenny's Policy related thereto are violative of Article II, Section 1 and thus unconstitutional.

ii. 37 Pa.Code § 33.116 and Kilkenny's Policy Violate Article I, Sections 8, 25, and 26 of the Pennsylvania Constitution

As addressed in Petitioners' Brief at 30 and as made explicitly clear in the text of Art. I, Sec. 8 – especially when buttressed against Art. I, Sec. 25 and 26 – there are no exceptions to the warrant requirement for searches and seizures and the Commonwealth may not deny *any* civil right, including the rights enumerated in Art. I, Sec. 8, to *anyone,* even through statutory enactment.

However, Respondents Paris [81] and Kilkenny [82] contend that Petitioners "misconstrue the Constitution, stating that 'there are no exceptions to the warrant requirement [] when there are 'well-delineated exceptions." [83, 84]

[81] Respondent Paris' Brief at 21-26.
[82] Respondent Kilkenny's Brief at 34-42.
[83] Respondent Paris' Brief at 21.
[84] Contrary to Respondents' allegations, Petitioners explicitly stated that "extremely limited exceptions to the warrant requirement exist" and those are ones that are not found in the text of any Constitutional provision but rather, have been judicially created. Petitioners' Brief at 32.

First and foremost, there are no exceptions provided for in the text of Article 1, Section 8 or the Fourth Amendment to the United States Constitution. [85] Both are explicit in their respective limitations on governmental powers. And while Respondents are correct that there exist some judicially-created exceptions,[86] such have been called into question by the U.S. Supreme Court's decision in *NYSRPA v. Bruen,* 142 S.Ct. 2111, 2126, 2131 (2022), [87] where the Court, beyond providing the appropriate and simple analysis for determining the constitutionality of a statute, eschewed the judicially-created levels of scrutiny that have existed since 1938, [88] explaining that when a constitutional amendment's "plain text covers an individual's conduct, the Constitution presumptively protects that conduct, and to justify a [] regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of [such] regulation." [89, 90]

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[85] As the Pennsylvania Supreme Court declared, the "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment. *Com. v. Sell*, 504 Pa. 46, 63 (1983).

[86] *See*, *Com. v. Edmunds*, 526 Pa. 374 (1991)(rejecting a "good faith" exception to Article 1 Section 8, even though the U.S. Supreme Court approved of such an exception, pursuant to the Fourth Amendment).

[87] The Pennsylvania Supreme Court has declared that "the federal constitution establishes certain minimum levels which are equally applicable to the [analogous] state constitutional provision. However, each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution." *Edmunds*, 526 Pa. at 388 (internal quotations omitted).

[88] *See, United States v. Carolene Products Company*, 304 U.S. 144, 152 fn. 4 (1938).

[89] While *Bruen* involved laws relative to the Second Amendment, there exists no constitutional basis to treat any of rights enumerated in the Bill of Rights any different than another. And recently, the Third Circuit *en banc*, citing to the U.S. Supreme Court's decision in

(footnote continued)

To counter this presumptive protection, the government must "affirmatively prove that its [] regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. In fact, *Bruen* could not be clearer in its holding that it is *the government* that bears the burden of justifying its regulations. *See id.* at 2130 ("The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of [] regulation."); *id.* at 2135 (explaining "the burden falls on respondents"); *id.* at 2138 (holding that "respondents have failed to meet *their burden* to identify an American tradition" (emphasis added)).

In addressing what constitutes the Nation's historical tradition of regulation, *Bruen* explains that "when it comes to interpreting the Constitution, not all history is created equal." *Id*. at 2136. That is why courts must "guard against giving postenactment history more weight than it can rightly bear." *Id.* "As [the Court]

(footnote continued)

D.C. v. Heller, 554 U.S. 570, 580 (2008), echoed this, when it declared that it would be improper "to adopt an inconsistent reading of 'the people,'" between Constitutional provisions. *Range v. Attorney Gen. United States of Am.*, 69 F.4th 96, 102-03 (3d Cir. 2023). As such, the plain text of each Constitutional provision controls and *only if* the Government can establish a historical tradition of regulation, around the time of Founding, can it rebut the presumption of the plain text controlling.

[90] While stated slightly differently, this is identical to the Pennsylvania Supreme Court's pronouncement of the proper analysis for a Constitutional provision: "[T]he Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption;" whereby, any interpretation must "completely conform[] to the intent of the framers and [] reflect[] the views of the ratifying voter." *League of Women Voters v. Commonwealth*, 645 Pa. 1, 97 (2018).

recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms came '75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" *Id.* at 2137 (quoting *Heller*, 554 U.S. at 614); *see also Sprint Communications Co. v. APCC Servs., Inc.,* 554 U.S. 269, 312 (2008)(Roberts, C.J., dissenting) ("The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787]"). In fact, "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Bruen*, 142 S. Ct. at 2137 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

Bruen thus establishes that a court must prioritize Founding era evidence, [91] while evidence from around the "mid- to late- 19th century" is at most "secondary." *Id.* at 2137. "19th-century evidence [is] treated as mere confirmation of what the Court thought had *already been established*" in the Founding era. *Id.*

[91] *See*, *League of Women Voters*, 645 Pa. at 97 (declaring that a Constitutional provision "must be interpreted in its popular sense, *as understood by the people when they voted on its adoption*." (emphasis added)).

(emphasis added). Thus, 1776 [92] is the relevant time to "peg[] . . . the public understanding of the right." *Bruen*, 142 S. Ct. at 2137.

While the historical tradition need not be a "historical twin," the tradition, around the time of Founding, must, at a minimum, be a historical analogue to be relevant. *Id*. at 2126, 2133. But a single historical analogue around the time of Founding is not a tradition; rather, it is a mere aberration or anomaly, with no followers. [93] Even two or three historical analogues around the time of Founding are at best a trend and not a tradition,[94] especially when short-lived. [95, 96]

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[92] As the Pennsylvania Supreme Court declared, "[t]he requirement of probable cause in this Commonwealth thus traces its origin to its original Constitution of 1776, drafted by the first convention of delegates chaired by Benjamin Franklin…The primary purpose of the warrant requirement was to abolish 'general warrants,' which had been used by the British to conduct sweeping searches of residences and businesses, based upon generalized suspicions. Therefore, at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen." *Edmunds*, 526 Pa. at 394 (internal citations omitted). If, on the other hand, one were to analyze this under the Fourth Amendment, 1791 would be the relevant time to "peg . . . the public understanding of the right."

[93] *See, Heller*, 554 U.S. at 632 (2008) ("[W]e would not stake our interpretation of the Second Amendment upon a single law . . . that contradicts the overwhelming weight of other evidence.")

[94] *See, Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011) (finding that two historical statutes "falls far short of establishing that [a regulated activity] is wholly outside the Second Amendment as it was understood" in 1791); *Illinois Ass'n of Firearms Retailers*, 961 F. Supp. 2d 928, 937 (N.D. Ill. 2014) ("[C]itation to a few isolated statutes—even to those from the appropriate time period—fall[s] far short of establishing that gun sales and transfers were historically unprotected by the Second Amendment.") (internal quotation marks omitted).

[95] *See, Bruen*, 142 S. Ct. at 2155 ("[T]hese territorial restrictions deserve little weight because they were . . . short lived.")

[96] *See*, *League of Women Voters*, 645 Pa. at 97 (declaring that a Constitutional provision "must be interpreted *in its popular sense*, as understood by the people when they voted on its adoption." (emphasis added)).

In turning to this matter, the Pennsylvania Constitution of 1776 in its Declaration of Rights, clause 10 provided that:

> The people have a right to hold themselves, their houses, papers and possessions free from search and seizure and therefore warrants without oaths or affirmations first made affording a sufficient foundation for them [97] and whereby an officer or messenger may be commanded to search suspected places or to seize any person or his property not particularly described are contrary to that right and ought not to be granted.

In 1790, the Constitution would be amended; whereby, it would move the provision to Art. IX, § 8 and revise the language to:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation. [98, 99 100]

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[97] As the Pennsylvania Supreme Court declared, "The requirement of probable cause in this Commonwealth thus traces its origin to its original Constitution of 1776, drafted by the first convention of delegates chaired by Benjamin Franklin…The primary purpose of the warrant requirement was to abolish 'general warrants,' which had been used by the British to conduct sweeping searches of residences and businesses, based upon generalized suspicions. Therefore, at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen. *Edmunds*, 526 Pa. at 394 (internal citations omitted).

[98] *See,* https://www.paconstitution.org/texts-of-the-constitution/1790-2

[99] *Cf.* The text of the Fourth Amendment to the U.S. Constitution, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[100] The location and language remained the same through the 1838 amendments. *See*, https://www.paconstitution.org/texts-of-the-constitution/1838-2

In 1874, it would be amended again; whereby, it would be moved to Art. 1, § 8 and "subscribed to by the affiant" was added to the end. [101] It has remained in that location and in that form, since then.

Since the enactment of the text of present-day Article 1, Section 8 (as well as, the Fourth Amendment), there have *never* been any exceptions to the warrant requirement. As the Pennsylvania Supreme Court noted, "the survival of the language now employed in Article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth." *Sell*, 504 Pa. at 65 (1983). Or stated slightly differently, "Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth." *Edmunds*, 526 Pa. at 397.

And the plain text, since 1790, has explicitly declared that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures." And "unreasonable searches and seizures" were those that occurred in the absence of a "warrant to search any place or to seize any person or things" or a warrant issued in the absence of probable cause and oath or

[101] *See*, https://www.paconstitution.org/texts-of-the-constitution/1874-2/

affirmation. [102, 103] All but one of the "exceptions" to the warrant requirement that Respondents speak of, would only be judicially created in the early- to mid-20th century and then still required probable cause. The exception relied upon by Respondents, in relation to "closely regulated" businesses in the *absence of probable cause*, [104] only came about in the 1970s – almost 180 years after the enactment of the text that became Article 1, Section 8 and the Fourth Amendment – as a result of *Colonnade Corp. v. U.S.*, 397 U.S. 72 (1970) and *U.S. v. Biswell*, 406 U.S. 311 (1972). [105] And, as the *Bruen* Court directed, that is approximately 150 years too late. Beyond the fact that it is Respondents' burden to establish a historical tradition of regulation around the time of enactment, one searches in vain

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[102] *Edmunds*, 526 Pa. at 394 (declaring that "[t]he primary purpose of the warrant requirement was to abolish 'general warrants'… based upon generalized suspicions, [and that] the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen.)

[103] *See also*, The Proceedings Relative to Calling the Conventions of 1776 and 1790, the Minutes of the Convention that Forms the Present Constitution of Pennsylvania, at 87, available at https://www.paconstitution.org/wp-content/uploads/2017/11/proceedings1776-1790-1.pdf.

[104] With the sheer number of laws on the books regulating almost all professions, it is extremely difficult to comprehend how this "exception" does not absolutely eviscerate Article 1, Section 8 and the Fourth Amendment. While the test is supposed to encompass (1) a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made, (2) that warrantless inspection is necessary to further the regulatory scheme, and (3) a statutory inspection program must be certain and regular in its application, it is hard to fathom in what context the first two would not apply given the current regulatory framework of all professions; thus, simply requiring a statutory – not regulatory – inspection program. Under this rubric, the General Assembly is virtually limitless in enacting warrantless search of all businesses within the Commonwealth and that is constitutionally obscene.

[105] Respondents do not cite to a single case of the Pennsylvania or U.S. Supreme permitting the warrantless searches of closely regulated businesses, where the authority for the warrantless search comes from the administrative agency, itself. Instead, precedent of those Courts requires a "statutorily" provided for warrantless search provision.

for any exception to the warrant requirement, prior to the 20th century, and any exceptions involving an absence of probable cause or "closely regulated" business, prior to the 1970s. In fact, as late as 1967, the U.S. Supreme Court declared:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant.

See v. City of Seattle, 387 U.S. 541, 543 (1967). [106]

Accordingly, as there exists no historical tradition tolerating warrantless searches of homes and businesses alike and such is therefore unreasonable, 37 Pa.Code § 33.116 and Kilkenny's Policy violate Article I, Sections 8, [107] 25, and 26 of the Pennsylvania Constitution.

iii. Kilkenny's Policy Violates Article I, Sections 9, 25, and 26 of the Pennsylvania Constitution

First and foremost, while Respondent Kilkenny contends that "[a]n

[106] Even if, *arguendo*, one were to analyze this challenge under the duration of firearm regulation in this Commonwealth, Respondents fair no better as Respondent Kilkenny acknowledges that Pennsylvania's "history of regulating firearms sales[o]riginally passed in 1972" and that the warrantless search regulation was only promulgated in 2001. Respondent Kilkenny's Brief at 6, 39 fn. 7.

[107] As declared by the Pennsylvania Supreme Court, in comparison to the Fourth Amendment, "Article I, section 8 of the Pennsylvania Constitution, as consistently interpreted by this Court, mandates greater recognition of the need for protection from illegal governmental conduct offensive to the right of privacy." *Sell*, 504 Pa. at 67.

individual waives the privilege against self-incrimination with regards to his or her licensed activity, where the activity is regulated and *licensure entails self-reporting requirements*," [108] he ignores the fact, as addressed *supra*, that the statutory licensure framework does *not* entail self-reporting requirements [109] and the General Assembly has demonstrated it knows how to draft statutory provisions, where it seeks to allow persons and things to be seized and interviewed. [110]

Second, perhaps more importantly, pursuant to *Bruen*, like the warrantless search exceptions, one searches in vain for exceptions to the right to remain silent, prior to the mid- and late-20th century. And, as the *Bruen* Court directed, that is approximately 150 years too late.

In turning to this matter, the Constitution of 1776 in its Declaration of Rights, clause 9 provided that:

> That in all prosecutions for criminal offences a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly

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[108] Respondent Kilkenny's Brief at 44 (emphasis added, quotations omitted).
[109] Even if, *arguendo*, one were to ignore that the General Assembly has not deemed it appropriate to enact a warrantless inspection requirement for PA License to Sell Firearm holders, Section 33.116 only allows the "Pennsylvania State Police, or their designee, and the issuing authority to come to the licensee's business location and *inspect the premises, records, and documents* without a warrant, to ensure compliance with this chapter, and the act." Thus, there is simply no authority, pursuant to Section 33.116, to seize individuals or force them to answer questions.
[110] *See* fn. 79, *supra*

> deprived of his liberty except by the laws of the land, or the judgment of his peers. [111], [112]

In 1790, the Constitution would be amended; whereby, it would move the provision to Art. IX, § 9 and ever so slightly [113] revise the language to:

> That, in all criminal prosecutions, the accused hath a right to be heard by himself and his council, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favour, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage: That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.[114, 115 116]

In 1874, it would be re-codified again; whereby, it would be moved to Art. 1, § 9. [117] It has remained in that location and in that form, since then.

Since the enactment of the text of present-day Article 1, Section 9 (as well as, the Fifth Amendment), there have *never* been any exceptions to the right not to

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[111] *See* https://www.paconstitution.org/texts-of-the-constitution/1776-2

[112] As declared by the Pennsylvania Supreme Court, "[t]he privilege against compelled self-incrimination has been included in the Pennsylvania Constitution since 1776. *Com. v. Swinehart,* 541 Pa. 500, 510 (1995).

[113] Changing "a man" to "the accused."

[114] *See* https://www.paconstitution.org/texts-of-the-constitution/1790-2

[115] *Cf.* The text of the Fifth Amendment to the U.S. Constitution, which provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[116] The location and language remained the same through the 1838 amendments. *See*, https://www.paconstitution.org/texts-of-the-constitution/1838-2

[117] *See*, https://www.paconstitution.org/texts-of-the-constitution/1874-2/

be "compelled to give evidence against [oneself]." The plain text, since 1776, has explicitly declared such and the Pennsylvania Supreme Court has declared that "the privilege must be broadly interpreted to include not only answers which would incriminate the witness in criminal conduct, [118] but also to protect the witness from answering any questions which would bring him into 'disgrace or infamy,'" or which could otherwise plausibly "damage the reputation of the witness." *Swinehart*, 541 Pa. at 512–13, 517.

And yet, without any historical tradition limiting this right or explanation as to how the questioning of licensees could not plausibly damage their reputations through the revocation of their licenses for any violations,[119] Respondent Kilkenny contends that he has legal authority to do so, which is constitutionally infirm. Accordingly, Kilkenny's Policy violates Art. I, Sec. 9, 25, and 26.

iv. 18 Pa.C.S. § 6113, 37 Pa.Code § 33.116, and Kilkenny's Policy Violate Due Process

Contrary to Respondent Paris' [120] and Kilkenny's [121] contentions that

[118] It is not necessary that a real danger of prosecution exist to justify the exercise of the privilege against self-incrimination. It is sufficient if the person questioned has reasonable cause to apprehend such danger. Moreover, [t]he privilege extends not only to the disclosure of facts which would in themselves establish guilt, but [a]lso to any fact which might constitute an essential link in a chain of evidence by which guilt can be established. *Com. v. Hawthorne*, 428 Pa. 260, 263 (1968).
[119] Which, as discussed *supra*, Respondent Kilkenny has threatened.
[120] Respondent Paris' Brief at 27-28.

"Petitioners have failed to explain how these terms would lead to the law's arbitrary enforcement," [122] not only were Petitioners explicit in their Petition for Review, Application for Summary and Special Relief, and Brief in Support, but they have additionally detailed *supra* that the Respondents themselves cannot agree on what these terms mean and their application to Petitioners. Respondent Kilkenny, in relation to "reputable applicant" and "cause," merely cites to other statutory text, with similar, but not identical verbiage, and contends that it must not be vague, even though, he neither cites to nor provides a specific definition. As discussed *supra*, the Pennsylvania Supreme Court in *Bell Telephone Co.* already found that the phrase "public interest" was too vague and elastic to furnish a standard for the guidance of administrative discretion. So too, are "reputable applicant" and "cause," unless they are explicitly limited to the enumerated provisions in Section 6113(a)(1)-(6) and 18 Pa.C.S. § 6111; thus, not including the regulations promulgated by Respondent Paris and the policy implemented by Respondent Kilkenny. Of course, Respondents have not admitted that "reputable applicant" and "cause" are limited to those bases; thereby, requiring Petitioners to "guess" and allowing for Respondents to take different positions.

(footnote continued)

[121] Respondent Kilkenny's Brief at 45-49.
[122] *Id*. at 46.

Accordingly, 37 Pa.Code §§ 33.116, 18 Pa.C.S. § 6113, and Kilkenny's Policy are violative of due process.

C. Petitioners are entitled to a permanent injunction

A party seeking relief in the form of a permanent injunction "must establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested." *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 489 (Pa. 2006) (internal citation omitted). [123]

i. Petitioners' Right to Relief is Clear

For brevity, Petitioners incorporate their argument regarding their right to relief being clear, *supra*.

ii. An Injunction is Necessary to Avoid an Injury that Cannot be Compensated by Damages

Ignoring the precedent that Petitioners cited in their Brief at 40-41,

[123] *See also*, *Buffalo Twp. v. Jones*, 813 A.2d 659, 663 (2002), declaring that "unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief."

Respondent Paris [124] and Respondent Kilkenny [125] contend that Petitioners cannot establish irreparable harm.

As the Pennsylvania Supreme Court declared in *SEIU Healthcare Pennsylvania v. Com.*, 628 Pa. 573, 594 (2014), the violation of a statutory or constitutional right cannot be adequately compensated by monetary damages and therefore constitutes irreparable injury. [126] Moreover, it has declared that "[t]he argument that a violation of law can be a benefit to the public is without merit…For one to continue such unlawful conduct constitutes irreparable injury." *Pennsylvania Public Utility Commission v. Israel,* 356 Pa. 400, 406 (1947). Furthermore, even Respondent Kilkenny acknowledged, in citing *Santoro v. Morse*, 781 A.2d 1220, 1228 (Pa. Super. Ct. 2001), that [i]n a commercial context, loss of a business opportunity or market advantage also can be considered irreparable harm." [127] And in this matter, as discussed *supra*, Petitioners Shot Tec and Schmidt have specified the financial harm in relation to the challenged provisions. [128]

Thus, Petitioners have established irreparable harm.

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[124] Respondent Paris' Brief at 28-29.
[125] Respondent Kilkenny's Brief at 50-51.
[126] To be clear, the courts have consistently held that even if there is an ability to obtain financial recovery, the violation of a statutory or constitutional right cannot be adequately compensated by monetary damages, as they are not readily measurable. *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971); *Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966) (*en banc*).
[127] Respondent Kilkenny's Brief at 51.
[128] *See*, Declaration of Grant Schmidt, ¶¶ 16-19.

iii. Greater Injury Will Result From Refusing Rather than Granting the Injunction

Only Respondent Paris contends that "[g]reater injury will result from an injunction being entered in this case…[because this] would undermine the UFA's goal of uniform applicability, giving rise to the possibility of *ultra vires* local laws [and there] would be no regulation of the sales of firearms." First and foremost, Respondent Paris fails to provide any basis for the possibility of *ultra vires* local laws, especially when, Pennsylvania's preemption law – 18 Pa.C.S. § 6120 – preempts local forms of government from regulating in such a manner. Second, contrary to Respondent Paris' contention, the federal Gun Control Act, 18 U.S.C. § 921, *et seq*., would still regulate the sales of firearms, including requiring gun dealers to obtain a license from the Bureau of Alcohol, Tobacco, Firearms, and Explosives and be subjected to its regulations.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Application for Summary and Special Relief and declare unconstitutional and enjoin the enforcement of 18 Pa.C.S. §§ 6111.5, 6112, and 6113, 37 Pa.Code §§ 33.116, 33.117, and Kilkenny's Policy.

Respectfully Submitted,

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