IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TANNER HIRSCHFELD, et al.,

Plaintiffs-Appellants,

v. No. 19-2250

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, et al.,

Defendants-Appellees.

REPLY IN SUPPORT OF CROSS-MOTION FOR VACATUR

Both plaintiffs in this case have turned 21 and are no longer prevented by the challenged statutory restrictions from purchasing a handgun from federally licensed firearms dealers. This case is therefore moot, and this Court should vacate its opinion under *United States v. Munsingwear*, 340 U.S. 36, 39 (1950), vacate the district court's order, and remand to the district court for this case to be dismissed as moot, as explained in the government's motion. Plaintiffs' arguments only confirm that this case is moot and that vacatur is the appropriate remedy.

I. Plaintiffs do not dispute that both Hirschfeld and Marshall are now over the age of 21. *See* Doc. 83-2 (Hirschfeld Aff.) ("I am over the age of twenty-one years old."); Doc. 83-3 (Marshall Aff.) ("I am over the age of twenty-one years old"). Plaintiffs alleged in their complaint that they "desire to purchase" a handgun from federally licensed dealers for self-defense, but are unable to do so because the

challenged laws prohibit federally licensed firearms dealers from selling handguns to individuals between the ages of 18 and 21. *See* JA13-15. Plaintiffs no longer suffer from that injury. The challenged laws no longer prevent them from purchasing a handgun from a federally licensed dealer for self-defense. This case is therefore moot. *See* Op. 5 (citing *Craig v. Boren*, 429 U.S. 190, 192 (1976)).

Plaintiffs now assert for the first time that a case or controversy remains because they are "prospective sellers of firearms" in Virginia, and according to plaintiffs, they cannot "sell" firearms in Virginia to those under the age of 21 because of how a Virginia state law interacts with the federal background check system. *See* Resp. 2-3. Plaintiffs' attempt to generate a new controversy at this stage of the proceedings fails, for several reasons.

As an initial matter, the complaint contains no allegations about plaintiffs' desire to privately "sell" handguns or their alleged inability to do so. As discussed, plaintiffs' complaint alleges that they cannot "purchase" a handgun from a federally licensed dealer for self-defense, *see* JA13-15, and the district court's and this Court's opinions addressed plaintiffs' individual right to purchase a handgun from a federally licensed dealer for self-defense. *See, e.g.*, Op. 4-5, 14-16. The right to "sell a handgun to [ones] friends," *see* Doc. 83-2, at 1, is not co-extensive with the individual right to keep and bear arms for personal self-defense, and neither this Court nor the district court addressed the scope of plaintiffs' rights to privately sell handguns to those under the age of 21. Plaintiffs cannot now rely on new allegations to assert a different injury

on appeal, after this Court has issued its decision. That is particularly so given that plaintiffs' asserted inability to sell handguns to their friends is not based on the independent operation of the challenged federal laws—which do not regulate private handgun sales—but is rather premised on plaintiffs' new theory about how a Virginia state law interacts with other federal regulations that have not been challenged or addressed in this case. *See* Mot. 2.

Plaintiffs' cursory reference to the capable-of-repetition-yet-evading-review exception to the mootness doctrine (Mot. 2) similarly does not save their claims. *See* Mot. 2. As the government's motion for vacatur explained, that exception applies only where "the challenged action is too short in duration to be fully litigated before the case will become moot," and where "there is a reasonable expectation that the complaining party will be subjected to the same action again." *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003). Plaintiffs do not dispute that an age restriction spanning three years is not inherently too short in duration to be fully litigated. *See* Mot. for Vacatur 5. And it cannot reasonably be disputed that plaintiffs will never again be "subjected to the same action" they challenge in their complaint. *See Mellen*, 327 F.3d at 364. Both plaintiffs are now over the age of 21, and the challenged restrictions no longer prevent federally licensed firearms dealers from selling them a handgun for self-defense.

II. Because this case has become moot prior to the deadline for the government to seek rehearing of the panel opinion, this Court should vacate its

opinion under *Munsingwear*, 340 U.S. at 39, vacate the district court's order, and remand to the district court for this case to be dismissed as moot. As explained in the government's motion, this case has become moot due to the aging of the plaintiffs—not "settlement" or the "unilateral action[s]" of the government. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 15 (1994). Although "there is substantial public interest in judicial judgments," *Valero Terrestial Corp. v. Paige*, 211 F.3d 112, 118 (4th Cir. 2000), vacatur is this Court's "customary practice when a case is rendered moot" by "happenstance" prior to the final conclusion of litigation, *see Catawba Riverkeeper Foundation v. North Carolina Dep't of Transp.*, 843 F.3d 583, 589-90 (4th Cir. 2016) (recognizing that the "public interest in judicial judgments" "did not prevent the Court in *Bancorp* from 'stand[ing] by' the proposition that 'mootness by happenstance provides sufficient reason to vacate'" (quoting *Bancorp*, 513 U.S. at 23, 25 n.3)); *contra* Mot. 3.

Plaintiffs' suggestion that vacatur is inappropriate because the government has intentionally sought to "delay" this litigation (Mot. 4) is unfounded. In May 2020, after briefing was completed on appeal, plaintiffs moved to dispense with oral argument in light of the COVID-19 pandemic. *See* Doc. 34. Plaintiffs then withdrew that request and moved to expedite the scheduling of oral argument, asserting for the first time that expedition was needed to secure a judicial decision prior to plaintiffs aging out of the restriction. *See* Doc. 38-1, at 3. The government's response noted that, under this Court's practice, plaintiffs' request did not appear to justify "mov[ing]

this case ahead of others waiting for disposition," though the government noted it did not object to "advanc[ing] the disposition" of this case by proceeding without oral argument, as plaintiffs had originally requested. *See* Doc. 43. Nothing in that response suggests that the equities weigh against vacatur in this circumstance. To the contrary, as explained, vacatur would "clear[] the path for future relitigation of the issues" and "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 40-41.

Respectfully submitted,

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AUGUST 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limits of Federal rule of Appellate Procedure 27(d)(2)(A) because it contains 1,050 words. The motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Courtney L. Dixon
Courtney L. Dixon

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Courtney L. Dixon
COURTNEY L. DIXON