RECEIVED
Jul 11 2023
S.C. SUPREME COURT
RECEIVED
Jul 25 2023
SC Court of Appeals

The State Of South Carolina
In The Supreme Court

Appeal from Spartanburg County
Court of Common Pleas
Hon. J. Mark Hayes, Circuit Court Judge

Consolidated Civil Action No. 2018-CP-42-04297

Cindy Coxie, as Special Administrator for the Estate of Johnny Coxie, ...Respondent,

v.

Academy, Ltd., d/b/a Academy Sports and Outdoors; and Dustan Lawson..... Defendants,

and

Academy, Ltd. d/b/a Academy Sports + Outdoors, ...Crossclaimant,

v.

Dustan Lawson and Todd Christopher Kohlhepp,.....Cross-Defendants,

Of which Academy, Ltd. d/b/a Academy Sports + Outdoors, is the .....Petitioner.

Petition for a Writ of Certiorari

In a stunning abuse of discretion, the trial court ordered tens of thousands of irrelevant firearm transaction records over a nine-year period and sixteen years of nationwide law enforcement trace requests that federal law immunizes from civil discovery to be produced in a case about the sale of only twelve firearms to a single individual. This is an impermissible infringement of the reasonable expectation of customers regarding the confidentiality of their firearms purchases and has the potential to have a chilling effect on South Carolinian's exercise of their Second Amendment rights. Accordingly, Academy, Ltd. d/b/a Academy Sports + Outdoors

("Academy") petitions this Court to issue a writ of certiorari to review the trial court's recent discovery orders granting Plaintiffs' motion to compel Academy to produce (1) records for over 100,000 firearms sold to nonparty customers in South Carolina over a nine-year period, and (2) information about all law enforcement trace requests related to firearms sold at the over 260 Academy stores nationwide for a sixteen-year period.

These records have absolute immunity from discovery under the Tiahrt Amendment, Pub. Law 112-55, 125 Stat. 552, a federal law specifically enacted to protect highly sensitive information about firearms sales and law enforcement trace requests. Additionally, these records contain the names and addresses of tens of thousands of customers as well as the number and types of firearms they have purchased at Academy. A written order issued by the trial court yesterday requires Academy to begin producing these records by 1:30pm today.

This situation presents "exceptional circumstances" warranting the Court's exercise of its authority to review a trial court's discovery orders. *See* S.C. Const art. V, § 5; S.C. Code Ann. § 14-3-310; Rule 245(b), SCACR. These exceptional circumstances include:

I. In the absence of intervention by this Court, the compelled production of these records would moot any claim Academy could raise in a later appeal that the discovery was erroneously allowed despite the absolute immunity from discovery provided by the Tiahrt Amendment and other grounds raised by Academy. *See Hollman v. Woolfson*, 683 S.E.2d 495, 498 (2009); *McGee v. Bruce Hosp. Sys.*, 439 S.E.2d 257, 259 (S.C. 1993).

II. The absolute immunity under the Tiahrt Amendment protecting from disclosure law enforcement trace requests and information about firearms sales to consumers presents a novel issue of law that is a matter of significant public interest impacting the rights of consumers to protect the privacy of their firearms purchases and the confidentiality of law enforcement investigations. *See Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154, 160 (S.C. 2009).

III. The trial court's orders negatively impact nonparties exercising their protected Second Amendment right to buy and own firearms, as well as Academy's right to prevent the unwarranted disclosure of confidential and proprietary commercial information protected under the South Carolina Trade Secrets Act, S.C. Code Ann. §§ 39-8-10 to -130. *See Hollman*, 683 S.E.2d at 498; *Laffitte*, 674 S.E.2d at 160.

IV. Plaintiffs' discovery requests are abusive and seek records "not remotely relevant to a resolution" of the claims in civil actions subject to a federal immunity statute intended in part to allow firearms licensees to avoid the expense of this type of discovery. *See Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Env't Control*, 692 S.E.2d 920, 925 (S.C. 2010).

For these reasons, discussed more fully below, Academy requests that the Court issue a writ of certiorari to review the trial court's discovery orders. Academy has also filed a Notice of Appeal of these orders to the South Carolina Court of Appeals as well as a motion under Rule 204, SCACR, asking this Court to certify and transfer the appeal from the Court of Appeals to this Court. Academy is seeking in the trial court a stay of the deadlines for production of records, and, if unsuccessful, an emergency writ of supersedeas pending appeal from the Court of Appeals and, if necessary, this Court.

FACTUAL BACKGROUND

In November 2016, law enforcement discovered Kala Brown being held captive in a shipping container on rural property belonging to Todd Kohlhepp. (App'x at 612.)[1] She had disappeared over two months earlier with her boyfriend David Carver. (App'x at 617.) Kohlhepp confessed to shooting and killing David Carver in August 2016 as well as shooting and killing Johnny and Meagan Coxie in December 2015. (App'x at 15, 46, 71.) Law enforcement found 27

[1] Academy contemporaneously files an Appendix to this Petition in two volumes: Volume I (pages 1–376) and Volume II (pages 377–775).

firearms and 10 suppressors at two different properties in owned by Kohlhepp. (App'x at 771, 773.)

Kohlhepp had a felony conviction early in his life that prohibited him from buying or owning firearms. (App'x at 610.) He was resourceful, however, and had developed a number of sources for obtaining firearms in Spartanburg County. (App'x at 606–607.) One of those sources was Defendant/Cross-Defendant Dustan Lawson. (App'x at 606–608.) Lawson bought firearms and suppressors for Kohlhepp from seven different federal firearms licensees. (App'x at 644.) Two of the firearms licensees where Lawson bought firearms, but not suppressors, were the Greenville and Spartanburg Academy stores (each store has its own license). (App'x at 641.) Lawson bought a total of twelve firearms at Academy during a seven-year period dating as far back as 2009. (App'x at 641.) Lawson was not prohibited by federal or state law from buying firearms and successfully passed the FBI National Instant Background Check every time he made a firearm purchase from Academy. (App'x at 645); 18 U.S.C. § 922(t); 27 C.F.R. § 478.102. Lawson's purchase history at Academy over the seven-year period was unremarkable and made him appear no different from other firearm collectors. (App'x at 641–642.) Kohlhepp's other 15 firearms were from sources other than Lawson making purchases at Academy. (App'x at 775.)

Kohlhepp carefully prepared Lawson for the purchases. Lawson was educated on the types, features, and operation of the firearms he was purchasing. (App'x at 607, 643.) He was well prepared to respond to questions by salespersons and was undetectable as a straw purchaser for Kohlhepp. (App'x at 631, 643.) This is best shown by the fact that none of the seven firearms licensees ever suspected that Lawson was a straw purchaser or denied him a firearm sale. (App'x at 645.) Additionally, federal law required the ATF to have notice of and approve Lawson's purchase of the 10 suppressors. *See* 26 U.S.C. § 5841; 27 C.F.R. § 479.101. The ATF never saw

any reason to deny any of Lawson's suppressor applications, which included his photograph and fingerprints. (App'x at 645.) Lawson was also required to walk into the headquarters for the Spartanburg County Sheriff's Office for each suppressor purchase to give federally required notice of all of the suppressor purchases. He had no problem doing so. (App'x at 644–645.)

Shortly after the activities of Kohlhepp and Lawson were discovered, the ATF performed compliance inspections of both the Greenville and Spartanburg Academy stores and found no violations of any firearms laws. (App'x at 647.) The ATF has never taken any action against Academy related to the sales to Lawson, confirming that there were no reasonable means to detect Lawson's secret intention of buying firearms for Kohlhepp. (App'x at 647.)

Kohlhepp was sentenced to serve seven consecutive life sentences for the murders of David Carver and Johnny and Meagan Coxie as well as four additional murders committed in 2003. (App'x at 660.) Lawson was convicted of numerous violations of federal firearms laws and sentenced to 87 months of confinement. (App'x at 618–630.)

PROCEDURAL BACKGROUND

A. The Commencement of the Actions

On December 17, 2018, the Estate of Johnny Coxie sued Academy and Lawson in the Spartanburg County Court of Common Pleas, assigned Civil Action No. 2018-CP-42-04297. (App'x at 17–42.) The Complaint included allegations that Academy should have known that Lawson was a straw purchaser and that the firearm used by Kohlhepp to shoot the victims was sold by Academy to Lawson back in July of 2013, over two years before the first murder. (App'x at 28, 30.) Claims asserted included negligence, negligence *per se*, and negligent entrustment.

On February 18, 2019, Academy filed a motion to dismiss asserting a number of grounds, including immunity provided by the Protection of Lawful Commerce in Arms Act, 15 U.S.C.

§ 7901–03 ("PLCAA"). The PLCAA is a federal law promulgated by Congress that provides immunity to licensed firearms dealers from certain civil actions. 15 U.S.C. § 7902(a). This immunity covers licensed firearms dealers when, as here, they are sued for damages resulting from the criminal misuse of firearms by third parties, unless one of the narrow exceptions applies. *Id.* § 7903(5)(A). The PLCAA immunity protects Academy from the present claims even being brought because Academy is a federally licensed seller of firearms and it is being sued for damages resulting from the criminal conduct of Kohlhepp. The trial court denied the motion to dismiss in July 2019. (App'x at 11–14.) The trial court stated among its reasons for denial that "this is a novel case where a more-developed record will assist in evaluating the application of the PLCAA, its immunity provisions, and its predicate exception to Academy's actions." (App'x at 13.)

On August 23, 2019, two additional actions were commenced by the Estate of Meagan Coxie and the Estate of David Carver in the Spartanburg County Court of Common Pleas, assigned Civil Action Nos. 2019-CP-42-02965 and 2019-CP-42-02962, respectively. (App'x at 43–92.) The Complaints made very similar allegations and claims as were asserted in the action filed by the Estate of Johnny Coxie. (App'x at 17–92.) In April 2020, the court consolidated the three actions for discovery purposes, and later that year, the consolidated actions were designated as complex and assigned to the Honorable J. Mark Hayes. (App'x at 127.)

Academy responded to the three actions by denying that Lawson could have been detected as a straw purchaser (which means no violation of law by Academy occurred) and asserting immunity under the PLCAA (because no exception to PLCAA immunity had been established). (App'x at 663–754.) Academy also asserted crossclaims against Lawson for his efforts to deceive Academy and asserted a third-party claim against Kohlhepp for his participation in the effort to obtain firearms from Academy. (App'x at 663–754.)

B. Plaintiffs' Discovery Requests

During the four and a half years of this litigation, Academy has already produced 1,809 pages of documents from its own records, along with another 63,312 pages of documents obtained from third parties through subpoenas or FOIA requests. (App'x at 447.) Academy produced all of its firearms policies and training materials back in July 2021 and November 2021, over a year and a half ago, and provided a corporate representative to testify about them more than a year ago. (App'x at 445.)[2] Academy has also produced eight current and former employees for depositions, and coordinated the deposition of four experts and five third-party deponents. (App'x at 447.) These depositions included four Academy employees who participated in firearms sales to Lawson. (App'x at 447.) The discovery deadline in the Court's scheduling order was June 26, 2023, and trial is scheduled to begin on November 27, 2023.

In March 2020, Plaintiffs served Requests for Production on Academy. (App'x at 111–122.) Academy responded, producing thousands of pages of documents. (App'x at 126–149.) Academy also asserted objections to a number of the requests, including, among other objections, the Tiahrt Amendment's absolute immunity, lack of relevance, undue burden, and immunity from suit under the PLCAA. (App'x at 126–149.) In March 2023, Plaintiffs moved to compel the production of documents responsive to three of their 123 Requests for Production:

- **Request No. 12**: "All books or records documenting firearms, firearm related accessories and ammunition sales, which were kept and/or maintained by Academy Sports Greenville and Spartanburg Stores documenting firearms, firearms related accessories and/or ammunition, sold from 2012-Present. The record book or documents can be redacted to exclude the names, other than Dustan Lawson and/or Todd Kohlhepp, and/or any persons who accompanied them."

- **Request No. 13**: "All documents and records that Academy Sports has received from or sent to the ATF or the U.S. Department of Justice (including the U.S.

[2] Perry Davis, the Senior Director of Compliance at Academy for the past 14 years, was deposed over an eight-hour period, providing 289 pages of testimony. (App'x at 445.)

Attorney's Offices) and/or other Federal or State regulatory agencies from 2007-present on behalf of Academy Sports Greenville and Spartanburg stores including but not limited to: . . ."

- **Request No. 19**: "All documents concerning any firearm sold or transferred at Academy Sports from 2007-present that, after transfer, has been used, recovered and/or investigated by law enforcement in connection with a crime, an alleged crime or unauthorized use, subject of a trace, or recovered by law enforcement, including but not limited to any transfers [sic] records or other documents listing the make, model, and serial number of the firearm and/or ammunition, trace data, and information regarding how the gun and/or ammunition was obtained by the user. This request includes but is not limited to all notices from the ATF, FBI or other law enforcement agencies, regarding firearms and ammunition sold by Academy Sports used in a crime."

(App'x at 6–7, 119.) The documents sought by these requests can be divided into two categories: (a) documents relating to the sales of firearms ("Sales Records") (Request No. 12 and 13), and (b) documents relating to law enforcement trace requests ("Trace Records") (Request Nos. 13 and 19).

1. Sales Records

Sales Records are requested for all firearms sales at the Academy stores in Greenville and Spartanburg from 2012 to the present. The Sales Records include four subcategories.

First, under 18 U.S.C. § 923(g), Academy maintains an acquisition and disposition log ("A&D Log") at both its Greenville and Spartanburg stores. The A&D Log is electronically maintained and contains entries for over 100,000 firearm sales for the Greenville and Spartanburg stores for the time period in Request No. 12. (App'x at 479.) Each entry contains the name and address of the customer purchasing the firearm, as well as the make, model, type, caliber, and serial number of the firearm purchased. (App'x at 482.) In the most recent order, the trial court limited the date range for the A&D Logs from November 2, 2008, to November 6, 2017, but the date range in Request No. 12 applies to the other subcategories of Sales Records.

Second, under 18 U.S.C. § 923(g), Academy maintains all ATF Form 4473s ("4473 Forms")[3] for each of the over 100,000 firearms sales at the Greenville and Spartanburg stores for the time period requested. (App'x at 479–480.) Before July 18, 2016, these forms were maintained in hard copy, bound-booklet format at each Academy store. (App'x at 480.) They are in electronic format after that time. (App'x at 480.) In addition to names and addresses, the 4473 Forms contain dates and places of birth, citizenship, and government identification numbers like driver's license numbers and Social Security numbers, among other types of sensitive personal information about nonparty-customers who have no connection to the claim at issue here. (App'x at 480.) The 4473 Forms are maintained in chronological order as required by federal law and so that they can be available for, among other reasons, future law enforcement trace requests. (App'x at 480.)

Third, Academy has multiple sale forms that it sends to the ATF and local law enforcement by the close of business on each day in which it transfers two of more handguns to a resident of South Carolina who does not have a federal firearms license in a five-business-day period.

Fourth, Academy has point-of-sale register receipts for the same firearms transactions. (App'x at 482.) Because these receipts have the type and number of firearms purchased, as well as the customer's name and address, they are duplicative of much of the information from the 4473 Forms and the A&D Logs.

2. Trace Records

Trace Records have been requested for any firearm sold at any of the over 260 Academy stores across the United States. Federal law requires Academy to respond to trace requests within 24 hours. 18 U.S.C. § 923(g)(7). Trace requests can relate to a firearm sold at any point in time by Academy. The firearms subject to trace requests may, or may not, have been used in a crime.

[3] The current version of the 4473 form is available from the ATF at https://bit.ly/46DcTGS.

No information is typically given by law enforcement to Academy or other federal firearms licensees about the purpose of the trace requests. (App'x at 483.) Request Nos. 13 and 19 ask for Trace Records from 2007 to the present. Trace Records include two subcategories.

First, Academy has emails it receives from the ATF National Tracing Center and other law enforcement agencies submitting trace requests, and Academy has emails sent by its employees back to the Center and other law enforcement agencies responding to the trace requests. (App'x at 483.) The emails from the National Tracing Center and other law enforcement agencies would typically include the make, model, manufacturer, and serial number of the firearm being traced. Academy's reply email would include that information and also the name and address of the purchaser and the date of sale of the firearm.

Second, there are Excel spreadsheets containing the same trace request and response information that would have been in the emails. Some of these spreadsheets were prepared by the National Tracing Center and sent to Academy submitting multiple trace requests at one time. Other spreadsheets were created by various Academy employees to help them keep track of the requests and responses to ensure timely compliance. (App'x at 483–484.) Some of the spreadsheets were transmitted via email, and, for this reason, there is some duplication between the spreadsheet subcategory and the email subcategory when spreadsheets were attachments to emails.

C. Plaintiffs' Motion to Compel and Trial Court Orders

On March 29, 2023, over two and half years after Academy's written responses and objections, and less than three months before the discovery deadline, Plaintiffs filed a Motion to Compel seeking compliance with Request Nos. 12, 13, and 19. (App'x at 93–107.) The trial court scheduled a hearing for June 26, 2023, and entertained argument from both parties. The trial court scheduled a second hearing for two days later.

Following the second hearing, the trial court entered its first order on July 3, 2023. (App'x at 1–5.) In that order, the trial court granted Plaintiffs' motion to compel and overruled Academy's objections. (App'x at 1–5.) The trial court concluded that the immunity from discovery provided by the Tiahrt Amendment was not applicable. (App'x at 1.) The trial court also ruled that all records requested by Plaintiffs were relevant for discovery purposes. (App'x at 1.) The trial court ordered counsel for the parties to meet and confer regarding the level of burden on Academy for compliance with the requests. (App'x at 2.)

The trial court held a third hearing on July 6, 2023. After that hearing, it entered a second order on July 10, 2023, requiring Academy to produce by the next day at 1:30 p.m. the trace request spreadsheets in the possession of counsel for Academy. (App'x at 6–10.) The trial court ordered that Academy produce all trace related emails, starting with a first batch of trace request emails by July 21, 2023, and that it produce the A&D Logs for the Greenville and Spartanburg stores by August 8, 2023. (App'x at 6–7.) To address customer privacy concerns, the trial court provided Academy with the option of either producing the records marked "Attorney's Eyes Only," or redacting the customer names and addresses and replacing them with unique customer identifiers consistent across all of the different types of records being produced. (App'x at 6.)

LEGAL STANDARD

"The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." S.C. CONST. art. V, § 5; *see also* S.C. Code Ann. § 13-3-310 (same). The South Carolina Appellate Court Rules allow an extraordinary writ to be issued "[i]f the public interest is involved, or if special grounds of emergency or other good cause exist why the original jurisdiction of the Supreme Court should be exercised." Rule 245(a), SCACR.

A writ of certiorari "is appellate in nature when used for purposes of reexamining the action of an inferior tribunal." *Fontaine v. Peitz*, 354 S.E.2d 565, 566 (1987). "A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist." *Oncology & Hematology Assocs.*, 692 S.E.2d at 924 (quotation omitted). Exceptional circumstances include addressing an argument that may be waived or mooted by disclosure before appeal, *Hollman*, 683 S.E.2d at 498 (2009); addressing a claim of privilege before production, *McGee v. Bruce Hosp. Sys.*, 439 S.E.2d 257, 259 (S.C. 1993) (reviewing circuit court order requiring production of confidential hospital documents immune from discovery under state statute); addressing novel questions of law or issues of significant public interest, *Laffitte*, 674 S.E.2d at 160; correcting the lower court's disregard of some procedure prescribed by law, *Wyse v. Wolfe*, 123 S.E. 818, 820 (S.C. 1924); and to prevent irreparable harm, *S.C. Dept. of Parks, Recreation, and Tourism v. Brookgreen Gardens*, 424 S.E.2d 465 (S.C. 1992).

ARGUMENT

These actions present extraordinary circumstances justifying the issuance of a writ of certiorari. Without the writ, Academy will lose the ability to seek appellate review of many of the issues as compliance with the trial court's orders will moot its objections. Academy would also be forced to produce enormous amounts of records in response to abusive discovery requests without a proper showing of relevance and necessity, irreparably harming Academy, its customers, and law enforcement. For these reasons, discussed below, the Court should exercise its discretion and issue a writ of certiorari providing for the immediate appellate review of the trial court orders.

II. The Objection Based on Immunity from Discovery Under the Tiahrt Amendment Will Become Moot if Not Protected by an Immediate Appellate Review.

Federal law provides that certain firearms related records "shall be immune from legal process [and] shall not be subject to subpoena or other discovery . . . nor shall testimony or other evidence be permitted based on the data, in a civil action in any State," under the Tiahrt Amendment. *See* 2012 Consolidated and Further Continuing Appropriations Act, Pub. L. 112-55, 125 Stat. 552, 609–10.[4] This is an absolute immunity from discovery that cannot be overcome by a showing of need by private litigants. Producing the Sales Records and Trace Records—even with redactions or labeled "attorneys' eyes only"—would deprive Academy, its customers, and law enforcement of the protection mandated by Congress. Similar to an assertion of attorney-client privilege, once the material is produced to an opposing party, even with confidentiality protections, the information is known and its disclosure cannot later be remedied by an appeal at the end of the litigation. For this reason, the Court should intervene at this juncture to address the applicability of the Tiahrt Amendment so that it does not otherwise evade appellate review.

A. The Sales Records and Trace Records Are Immune from Discovery Under the Tiahrt Amendment.

Beginning in 2003, Congress enacted riders to appropriations bills, known as the Tiahrt Amendment, which are designed to prevent the public disclosure of firearm sales and trace records. In response to efforts by litigants to work around these restrictions, Congress repeatedly revised the Tiahrt Amendment to strengthen its provisions.

[4] Excerpts from the different versions of the Tiahrt Amendment since 2003 are reproduced in the Appendix. (App'x at 539–561.)

The current version of the Tiahrt Amendment is in the 2012 Consolidated and Further Continuing Appropriations Act, Pub. Law 112-55, 125 Stat. 552.[5] These appropriation riders are binding federal law, *see Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992), and control over contrary state law under the Constitution's Supremacy Clause, *see* U.S. Const. art. VI, cl. 2. This federal appropriations rider is interpreted like any other federal statute, and that interpretation begins with the text adopted by Congress. *See United States v. Bilodeau*, 24 F.4th 705, 712 (1st Cir. 2022). The text of the Tiahrt Amendment confirms that it broadly restricts the disclosure of Academy's A&D Log, 4473 Forms, multiple sale forms, and Trace Records.

The current version of the Tiahrt Amendment has three distinct restrictions, only one of which involves restrictions on the expenditure of federal funds. The first provision—the only one with a restriction on the expenditure of federal funds—states:

> [D]uring the current fiscal year and in each fiscal year thereafter, *no funds appropriated under this or any other Act may be used* to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section . . . .

Pub. Law 112-55, 125 Stat. 552 (emphasis added); (App'x at 560.). This part of the amendment then lists certain exceptions, all of which pertain to production of these federally protected records to state and federal law enforcement and prosecutors only. (App'x at 560–561.)

The second provision states that "no person or entity described in (1), (2) or (3) shall knowingly and publicly disclose such data . . . ." (App'x at 561.) Notably missing from this second provision is any reference or restriction on the expenditure of federal funds. Rather this

[5] A summary of the different versions of the Tiahrt Amendment along with the text of each version as set forth in the official reporter is included in the Appendix. (App'x at 539–561.)

second provision prevents disclosure of protected records by three types of entities: (1) Federal, State, local, or tribal law enforcement agencies and Federal, State, or local prosecutors; (2) foreign law enforcement agencies; and (3) Federal agencies. (App'x at 560–561.) The disclosure of any of the documents by State, local, or tribal law enforcement agencies; State, or local prosecutors; or foreign law enforcement agencies would not involve the expenditure of federal funds. In *City of Chicago v. U.S. Dep't of Treasury*, 423 F.3d 777 (7th Cir. 2005), the United States Court of Appeals for the Seventh Circuit expressly rejected the argument that the Tiahrt Amendment does not have any effect beyond the prohibition on the expenditure of federal funds by the ATF.

The final provision of the Tiahrt Amendment—and the one at issue here—likewise makes no reference to the expenditure of federal funds. It provides:

> [A]ll such data shall be immune from legal process and shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act in any State (including the District of Columbia) or Federal court . . . .

Pub. Law 112-55, 125 Stat. 552. This provision is a sweeping prohibition without qualification. It uses the phrase "all such data," a reference to the beginning of the provision, and specifically to (a) "any information required to be kept by" Academy under 18 U.S.C. § 923(g), and (b) any information required to be reported by Academy under 18 U.S.C. § 923(g)(7). Accordingly, the grant of discovery immunity for "all such data" protects against the disclosure of the Sales Records that 18 U.S.C. § 923(g) requires Academy to maintain, the trace requests received from law enforcement, and the responses to those trace requests that 18 U.S.C. § 923(g)(7) requires Academy to report (collectively, the Trace Records). This immunity is absolute, and Congress has not created any balancing test or exception for production under a confidentiality order.

Plaintiffs contend that the Tiahrt Amendment offers protection from disclosure only for information in the possession of the ATF. But this interpretation is directly contradicted by the language in the first part of the Tiahrt Amendment providing that it applies to "any information required to be kept *by licensees* pursuant to section 923(g) of title 18 . . . ." (emphasis added). There would be no need for this language if the immunity applied only to information being held by the ATF. Reading the language of the Tiahrt Amendment to apply only to the disclosure of records in the possession of the ATF would improperly render part of the Tiahrt Amendment superfluous. *See, e.g.*, *CFRE, LLC v. Greenville Cnty. Assessor*, 716 S.E.2d 877, 881 (S.C. 2011) ("[W]e must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'"). Further, allowing litigants to get the same records by requesting them from the licensee rather than the ATF would gut the protections and create an end-run around the Amendment's directive that the records are "immune from legal process." While very few courts have addressed this specific issue, two trial courts have concluded that the immunity from discovery under the Tiahrt Amendment applies to information held by federal firearms licensees. *See Williams v. Beemiller, Inc.*, 975 N.Y.S.2d 647 (Sup. Ct. Erie Cnty. 2013); *Chiapperini v. Gander Mountain Co., Inc.*, No. 14/5717 at 11 (NY. Sup. Ct., Monroe Co., Sept. 30, 2016).[6]

B. The Application of Discovery Immunity Under the Tiahrt Amendment is a Novel Legal Question of Significant Public Interest that Will Become Moot Once the Requested Records Have Been Produced.

This Court has found that extraordinary circumstances exist for the issuance of a writ of certiorari to review a discovery order when "[a]llowing the [discovery] *will moot* any claim petitioners could raise on appeal that the discovery was erroneously allowed." *Hollman*, 683 S.E.2d at 498 (emphasis added). This Court has also granted certiorari to prevent a discovery issue

[6] A copy of the order in *Chiapperini* is included in the appendix. (App'x at 563–581.)

involving construction of a statutory privilege from becoming moot for a later appeal. *McGee*, 439 S.E.2d at 259. In *McGee*, this Court reviewed a discovery order requiring the production of credentialing files and clinical privileges from a hospital for each defendant physician in a medical malpractice action. The issue was whether a statute protecting the confidentiality of such information prevented disclosure during discovery. This Court, applying rules of statutory construction, concluded "that the trial judge erred in ruling that the applications for staff privileges and supporting documents of appropriate training were not protected by the confidentiality statute." *Id.* at 260. Without certiorari review, the proper interpretation of the confidentiality statute would have evaded appellate review at the end of the case.

Issues relating to the Tiahrt Amendment provide a second basis for issuing a writ of certiorari. In *Laffitte*, this Court granted a petition for certiorari review of a discovery order. 674 S.E.2d at 160. This Court concluded there were exceptional circumstances because the case presented a "novel issue of significant public interest." *Id.* at 160–61. This is the situation here as Academy is unaware of any South Carolina appellate court decision addressing the Tiahrt Amendment. This would be a novel issue for the South Carolina's courts and almost every other jurisdiction in the country. Yet with simple Form 4 Orders and little written analysis, the trial court here has ruled that the Tiahrt Amendment is inapplicable and ordered that voluminous Sales Records and Trace Records be produced. (App'x at 2.) If Academy were to provide the records to Plaintiffs, then it will have mooted its argument about the proper interpretation of the Tiahrt Amendment with respect to the materials produced, regardless of whether a confidentiality order is in place. Accordingly, the trial court's orders would evade appellate review. For this reason, the Court should issue a writ of certiorari allowing for the review of the orders prior to requiring the production of records. *See Hollman*, 683 S.E.2d at 498.

Although the Tiahrt Amendment was originally introduced in 2003, few courts have squarely addressed its scope or application to discovery sought by private civil litigants from federal firearms. To be sure, several courts have addressed the application of the Amendment to Freedom of Information Act cases brought against the ATF. *See Brady Ctr. to Prevent Gun Violence v. U.S. Dep't of Just.*, 410 F. Supp. 3d 225, 241–42 (D.D.C. 2019) (rejecting FOIA request from the Brady Center seeking derivative information protected by the Tiahrt Amendment). But the parties have identified only a handful cases when courts have addressed the Amendment in civil litigation among private parties. *See, e.g.*, *Williams v. Beemiller, Inc.*, 975 N.Y.S.2d 647 (Sup. Ct. Erie Cnty. 2013); *Chiapperini*, No. 14/5717 at 11. One such case from a trial court in Wisconsin relied on by Plaintiffs, *Lopez v. Badger Guns, Inc.*, is evidenced only by the transcript of a hearing and has no written order. (App'x at 366–376.)

This issue is of significant public interest. Information protected by the Tiahrt Amendment includes trace requests for firearms made by law enforcement, and a portion of those requests would relate to criminal investigations. *See Watkins v. Bureau of Alcohol, Tobacco & Firearms*, No. CIV.A. 04-800 (GK), 2005 WL 2334277, at *1 (D.D.C. Sept. 1, 2005) (noting that in passing the Tiahrt Amendment, Congress "sought to prevent the public release of sensitive firearms trace data not so much for budgetary reasons than out of concern that such disclosures could jeopardize criminal investigations."). South Carolina and local law enforcement agencies have a strong interest in maintaining the confidentiality of their investigations so that their work is not compromised by the disclosure of a key investigative step—a firearms trace. Someone who was otherwise unknowing may learn that they are a target of a criminal investigation. Because of the expansive nationwide nature of Plaintiffs' requests for Trace Records, many of the records would relate to ongoing criminal investigations, some of which can take years to complete.

Another significant public interest arises from the potential negative perception of individuals who purchased firearms that are the subject of a trace request. The response of a firearms licensee to a law enforcement trace request will include the name and address of the firearm's purchaser. That purchaser, however, could be a completely innocent citizen. Public knowledge that the firearm has been traced could be damaging to that individual's reputation. And knowledge about an individual's gun-buying habits being provided to the Brady Center is all the more problematic.[7]

If not addressed now by this Court, other trial judges in South Carolina could adopt the same interpretation of the Tiahrt Amendment as Judge Hayes has done, and allow discovery requests or subpoenas to other firearms licensees seeking trace request information. There is no guarantee that those other proceedings would have confidentiality orders, especially if none of the litigants raise the issue. Even when confidentiality orders are in place, the terms may vary, and exceptions may be added that could put the disclosure of trace request information at risk. The Tiahrt Amendment was designed to provide a national standard that this information would be immune from discovery and thereby avoid concerns about inconsistencies with whether or how trial courts would try to protect the confidentiality of trace information produced. For all of these reasons, a writ of certiorari is appropriate. *See Laffitte*, 674 S.E.2d at 160.

[7] Four attorneys from the Brady Center represent Plaintiffs along with local counsel. The Brady Center is a national advocacy group that brings "high-impact gun industry reform lawsuits," openly advances a "national program to challenge the gun lobby in court," and whose aim is "to reform the gun industry through impactful litigation." *See* Our Work: Brady Legal, Brady Center to Prevent Gun Violence (last visited June 29, 2023), available at https://bit.ly/3JGQ6jt; About Brady, *Brady Center to Prevent Gun Violence* (last visited June 29, 2023), available at https://bit.ly/444nhWu; Resources: Litigation, *Brady Center to Prevent Gun Violence* (last visited June 29, 2023), available at https://bit.ly/3r5sjn4.

III. Academy's Objection Under The South Carolina Trade Secrets Act Would Become Moot if Not Protected by an Immediate Appellate Review.

This Court in *Laffitte v. Bridgestone Corp*., recognized that it was appropriate to issue a writ of certiorari to allow for the review of a discovery order requiring the production of trade secret information. *Laffitte*, 674 S.E.2d at 160. The Trade Secrets Act was at issue in *Laffitte,* and the Trade Secrets Act is also at issue here. The South Carolina General Assembly made it clear in the language of the Trade Secrets Act that its protections apply to discovery in any civil action. This was recognized in *Laffitte*, where this Court held "that the plain language of § 39-8-60(B) clearly indicates that trade secrets may be protected during discovery not only in misappropriation cases, but in 'any civil action' where trade secrets are sought during discovery." *Id.* at 161–62.

In *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd*., 813 S.E.2d 696 (S.C. 2018), this Court, addressing a certified question from the Fourth Circuit, held that the Trade Secrets Act creates "a qualified privilege for trade secrets" and that "a 'substantial need' [must] be shown before a trade secret holder would be compelled to disclose a trade secret." *Id.* at 700–01. A balancing test must be performed that applies a "heightened inquiry" with the party seeking discovery doing more than asserting "'unfairness'" and instead "'demonstrat[ing] with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat.'" *Id.* at 701.

As discussed below, Academy's Sales Records and Trace Records contain trade secret information. Accordingly, the balancing test mandated in *Laffitte* and *Hartsock* should have been performed. Despite Academy asking the trial court to conduct this balancing test in two briefs, the trial court did not perform the required analysis. (App'x at 459, 585.) Had it done so, Plaintiffs still would have been unable to show an "unjust result" would occur if they lacked the requested

records. These issues would be mooted by production of the records and thereby evade appellate review if a writ of certiorari is not issued, and an immediate appellate review does not occur.

A. The Sales Records and Trace Records Include Information that Qualifies as Protected Trade Secrets.

The Trade Secrets Act defines trade secrets as information that "(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(a). A trade secret need not be just a secret formula, invention, or computer algorithm, but "may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively . . . may be the basis of a marketing or commercial strategy." *Id.* § 39-8-20(5)(b). "Although many trade secrets are considered valuable assets to parties that possess them, this is not always the case, nor is it a requirement. Instead, the confidential information needs only to protect some competitive advantage for it to contain sufficient 'economic value.'" Ranee Saunders, *If I Told You Then I'd Have to Kill You: The Standard for Discovery of Trade Secrets in South Carolina*, 61 S.C. L. Rev. 717, 719 (2010) (citing Michael A. Epstein, *Epstein on Intellectual Property* § 1.02[A] (5th ed. Supp. 2009)).

"[C]ourts have found with near uniformity that lists compiling customer, pricing, product, or supplier information constitute protectable trade secrets, even where the information they contain is publicly available." *Prysmian Cables & Sys. USA, LLC v. Szymanski*, 573 F. Supp. 3d 1021, 1043 (D.S.C. 2021) (quoting *IHS Glob. Ltd. v. Trade Data Monitor, LLC*, No. 2:18-CV-01025-DCN, 2021 WL 2134909, at *7 (D.S.C. May 21, 2021)); *Vessel Med., Inc. v. Elliott*, No. 6:15-CV-00330-MGL, 2015 WL 5437173, at *8 (D.S.C. Sept. 15, 2015) (protecting "customer

lists and information"); *Uhlig LLC v. Shirley*, No. 6:08-CV-01208-JMC, 2012 WL 2923242, at *6 (D.S.C. July 17, 2012) (protecting, among other things, "historical sales and ordering information"); *cf. Pearl Ins. Grp., LLC v. Baker*, No. 0:18-CV-02353-JMC, 2018 WL 4103333, at *4 (D.S.C. Aug. 29, 2018) ("Plaintiff's customer lists, contact information, policy expiration/renewal dates, premium amounts, and customers' insurance business needs are all protected as 'trade secrets'" under the federal counterpart to the Trade Secrets Act).

The Sales Records and Trace Records at issue in these actions qualify as trade secrets under the Trade Secrets Act. Academy maintains the confidentiality of the information about customers who buy firearms; it considers those records highly confidential and limits access to them. (App'x at 594.) Academy derives independent economic value from these records not being generally known to the public or any other person who can obtain economic value from their use. (App'x at 594.) This especially includes the Brady Center. For example, if competing businesses had information about a segment of Academy's firearm purchasers, that competitor could develop a marketing or commercial strategy based on that information and target Academy's customers. (App'x at 594.) Maintaining the confidentiality of customer information and the types of firearms they purchase also has independent economic value because Academy's customers, current and prospective, have an expectation that no one other than Academy and law enforcement agencies would have access to that information. (App'x at 594.)

The Sales Records include the names and addresses of all of Academy's customers at its Greenville and Spartanburg stores for all firearms purchases in the subject time period. (App'x at 593.). The Sales Records also include the manufacturer, model, type, and caliber of all of these firearms. Academy does not publicly disclose this information for a variety of reasons, including for competitive advantage purposes, and takes reasonable measures to protect its confidentiality.

(App'x at 594.). Similarly, the Trace Records also include the name and addresses of customers who purchased the traced firearms and the manufacturer and model of the traced firearms. Accordingly, Plaintiffs are requesting the disclosure of trade secret information during discovery, and the trial court must apply the balancing test mandated in *Hartsock.*

B. The Trial Court Did Not Apply the Balancing Test Mandated in *Laffitte* and *Hartsock*.

Because the Sales Records and Trace Records include trade secret information, the trial court should have performed the balancing test mandated in *Hartsock* and then ruled whether Plaintiffs made a sufficient showing to overcome the qualified privilege created under the Trade Secrets Act. This Court in *Laffitte* explained the standard to be applied when conducting the balancing test. The party seeking discovery must first establish that the information sought is "relevant not only to the general subject matter of the litigation, but also relevant specifically to the issues involved in the litigation." *Laffitte*, 674 S.E.2d at 163. The party must then establish that the information is "necessary," meaning that the party moving to compel "must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *Id*.

Academy urged the trial court to conduct the required balancing test under *Laffitte* before ordering the production. (App'x at 459, 585.). Yet the trial court saw no need to conduct that analysis and merely ruled that the "information sought by Plaintiffs meets the definition of relevance under South Carolina law at the discovery stage." (App'x at 1.) The trial court neither required Plaintiffs to establish a "substantial need" for the discovery, nor did it determine whether the records were actually necessary for Plaintiffs to present their claims at trial. Plaintiffs' efforts to show that the requested records are minimally relevant is insufficient under *Laffitte* and *Hartsock.*

Plaintiffs simply cannot establish that their efforts to present their claims at trial would be prejudiced under the standard articulated in *Laffitte*. Any contention by Plaintiffs that they have a substantial need for the requested records is rebutted by the fact that Plaintiffs' expert, Joe Vince, submitted a 51-page expert report opining that Academy's policies and training were inadequate and that it should have known that Lawson was a straw purchaser. (App'x at 487–537.) This report was based on the substantial amount of discovery that had already occurred during the prior three years and the opinions were formed without the need for any Sales Records or any Trace Records. Academy produced the documents for each of the Lawson-related sales to Plaintiffs and also produced its firearm sales procedures and policies; Plaintiffs deposed store associates who sold firearms to Lawson and Academy's corporate representative. The records have no relevance to any element of Plaintiffs' claims and are merely sought for harassment or to bolster counsel's knowledge about Academy's sales and trace records for future cases.

C. Academy's Objection Based on the Qualified Privilege Provided Under the Trade Secrets Act Will Become Moot If the Requested Records Are Produced.

As with objections based on the Tiahrt Amendment, Academy's objections that the requested records are trade secrets and that the trial court did not perform the required balancing test will be mooted by the production of the records and evade appellate review unless the Court grants a writ of certiorari. Ensuring that Academy's qualified privilege is properly recognized and that the proper procedure is employed before ordering the disclosure of trade secret information constitutes extraordinary circumstances for the issuance of a writ of certiorari to review the trial court's discovery orders. *See Hollman*, 683 S.E.2d at 498 ("Allowing the [discovery] will moot any claim petitioners could raise on appeal that the discovery was erroneously allowed.").

IV. A Writ of Certiorari is Warranted Because the Trial Court Did Not Adequately Protect the Interests of Numerous Nonparties, Nor Did the Trial Court Address the Irreparable Harm to Academy that Would Result from the Production of Sales Records and Trace Records.

The result of the trial court's discovery orders would be the release of information relating to over 100,000 sales of firearms and numerous law enforcement trace requests related to firearms sold nationwide by Academy. Included within the requested records would be an enormous amount of highly sensitive personal information relating to tens of thousands of Academy customers who have no involvement in these actions. These customers have an expectation that their identities and the types and number of firearms they purchase will not be disclosed to anyone except law enforcement or regulatory agencies such as the ATF. They would most likely be highly concerned with, and interested in preventing, the release of this information about the exercise of their Second Amendment rights. This is especially true because the team of attorneys representing Plaintiffs includes three attorneys employed by the Brady Center to Prevent Gun Violence, a gun control lobbying group.[8] The public's negative perception of Academy for releasing this information would cause irreparable harm that could not be remedied regardless of the outcome of this litigation. The impact on nonparty customers and the potential harm to Academy warrant the issuance of a writ of certiorari providing for the immediate review of the discovery orders.

[8] The Brady Center enters into lawsuits like this one in pursuit of protected data to support its goals to publicly scrutinize compliant firearms dealers, achieve public policies that remove the firearm industry immunities that Congress enacted, and criticize the enforcement performance of federal regulators like the ATF. The Brady Center attorneys have been the ones focused on the production of the Sales Records and Trace Records

A. Nonparty Customers Have a Significant Interest in Protecting the Confidentiality of Records Relating to the Free Exercise of Their Constitutionally Protected Second Amendment Rights.

The trial court's orders require Academy to turn over sales records about firearms, the purchase of which is a constitutionally protected activity. The 4473 Forms relating to the over 100,000 firearms sales at the Greenville and Spartanburg stores contain the name and address and a number of sensitive personal identifiers of the customers as well as the type of firearm they purchased. Collectively, the 4473 Forms and the A&D Logs will reveal how many firearms each customer has purchased at the Academy stores in Greenville and Spartanburg. The firearm purchases represented by the 4473 Forms and the A&D Logs represent the exercise of the customer's enumerated constitutional right under the Second Amendment. *See D.C. v. Heller*, 554 U.S. 570, 595 (2008). In exercising that protected right, Academy's customers have a reasonable expectation that the details of their purchases will not be shared outside of Academy, nor would they expect anyone outside of Academy to be privy to the number and type of firearms they have acquired and with what frequency, with the limited exception of law enforcement and the ATF. The disclosure of this information would not only invade the privacy of customers, but it would chill the exercise of their Second Amendment rights.[9]

[9] In addition to personal identifiers, the 4473 Form also requires every customer to answer 12–15 questions, some of which are very personal in nature. *See* Firearms Transaction Record (4473 Form), U.S. Dep't Justice (Dec. 2022), available at https://bit.ly/46DcTGS. For example, the form asks the customer to indicate whether they have ever been convicted of a felony, whether they are under indictment, whether they are the subject of a restraining order, whether they use marijuana or narcotics, and whether they have been dishonorably discharged from the military. *Id.* The Form 4473 also asks about the buyer's mental health, requesting them to confirm if they have ever been adjudicated mentally defective or been committed to a mental institution—information which this Court has previously ruled to be protected from disclosure absent a heightened showing in other contexts. *Cf. State v. Blackwell*, 801 S.E.2d 713, 725 (S.C. 2017) (implementing rigorous procedure, including in camera review, of records containing mental health information before production to criminal defendants).

The disclosure of Trace Records would give rise to similar concerns. Those records would include the names and addresses of firearms purchasers as well as the type of firearms bought. Because trace requests are sometimes associated with criminal investigations, there would be a negative perception of the numerous customer names revealed. Those customers could be lawful citizens that transferred or lost possession of their firearms long ago and for a number of innocent reasons, well before the firearm was found by law enforcement and traced. It would be unfair to customers named in Academy's responses to trace requests to have their identities revealed to anyone outside of law enforcement and especially the Brady Center.

The trial court's July 10, 2023 Order provides Academy with the option of marking the records "Attorney's Eyes Only" or redacting names and addresses and providing a unique identifying number for each customer. Designating the records "Attorney's Eyes Only" would do nothing to prevent the disclosure of those documents to the Brady Center. There of course would be an enormous burden to the use of the latter option, assuming it is even feasible. The 4473 Forms for the over 100,000 firearm sales are the property of the ATF and would have to be copied before being redacted. Until more recently, they were paper forms that came in booklets with a bound left margin. It would take an enormous amount of effort to hand copy those forms and then make redactions and write in a unique code.

Regardless of the protective measures ordered by the trial court, the customers for the over 100,000 firearms at issue have a reasonable expectation that their information will remain confidential other than from regulators. Those customers will not be focused on the existence of a confidentiality order or other protective measures, including the redaction of their personal identifying information, nor would they have a complete understanding of these measures. These lay persons could easily be confused about the scope and breadth of the release of information

about their firearms purchases. By requiring the production of these records, the trial court ignored this reasonable expectation of confidentiality and caused an intrusion into the lives of these customers. There is a risk that the trial court's orders will chill Academy's customers' exercise of their Second Amendment rights, causing them to pause before buying a firearm in the future, not knowing who may eventually know the intimate details of their purchase.

B. The Production of the Records Could Cause Irreparable Harm to Academy Based on the Perceptions of its Customers.

The requested records contain the names, addresses, and other sensitive personal information of tens of thousands of Academy customers in addition to the number and types of firearms purchased. These records will be shared with the Brady Center to Prevent Gun Violence, a gun control lobbying group. This is because three Brady Center attorneys are part of the team of attorneys representing Plaintiffs, and the Brady Center's attorneys know they will have complete access to any records produced.[10] Customers who have purchased firearms at Academy would likely have significant concern about the records being in the hands of the Brady Center.

The Brady Center is a national advocacy group that brings "high-impact gun industry reform lawsuits," openly advances a "national program to challenge the gun lobby in court," and whose aim is "to reform the gun industry through impactful litigation."[11] Plain and simple, the Brady Center wants the Sales Records and Trace Records to further its advocacy objectives. Even

[10] The participation by the Brady Center attorneys explains the unlimited scope and breadth of the discovery requests at issue. While the voluminous information has no relevance or value in the lawsuits, it has great value to the Brady Center and its efforts to learn more about the operations of large federal firearms licensees.

[11] *See* Our Work: Brady Legal, Brady Center to Prevent Gun Violence (last visited June 29, 2023), available at https://bit.ly/3JGQ6jt; About Brady, *Brady Center to Prevent Gun Violence* (last visited June 29, 2023), available at https://bit.ly/444nhWu; Resources: Litigation, *Brady Center to Prevent Gun Violence* (last visited June 29, 2023), available at https://bit.ly/3r5sjn4.

in redacted form, the requested records would be of great interest to the Brady Center because the records would reveal confidential information about Academy's compliance operations. In addition, customers who purchase firearms from Academy have a reasonable expectation that their private identifying information and the number and types of firearms they own would not be disclosed to anyone other than law enforcement, and certainly not to a lobbying group that openly advocates against the firearms industry.

It is immaterial whether Plaintiff's' counsel would misuse the Sales Records and Trace Records. It is similarly immaterial whether a confidentiality order is in place governing the use of these records or that redacting or other protective measures are used. What matters is that the Brady Center would still have access to Academy's compliance operational data and Academy's customers would perceive Academy as providing their sensitive personal information and lawful, constitutionally protected purchases to the Brady Center, contrary to those customers' legitimate expectation of privacy. The customers cannot be expected to have a clear understanding of any protective measures the trial court may attempt to implement. All of this gives rise to a risk that many of those customers would be unlikely to ever buy a firearm at Academy again. The trial court erred when it ordered the production of the records in the face of this likely harm to Academy as well as the likely harm caused by giving so much information about Academy's firearms operations to a gun-control advocacy group.

C. The Trial Court Did Not Conduct the *Hollman* Balancing Test.

As mandated by this Court in *Hollman*, trial courts must conduct a balancing test before ordering discovery when there has been a showing of "particularized harm" to either a litigant or a nonparty. *Hollman*, 683 S.E.2d at 498. That balancing test requires plaintiffs to: (1) show the records are "specifically relevant to the issues involved in the litigation, not merely relevant to the

subject matter of the litigation," and (2) "demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *Id.* at 499.

Despite the particularized harm to nonparties and Academy discussed above, the trial court did not conduct the *Hollman* balancing test. Academy raised the need to conduct this balancing test in two separate briefs, (App'x at 459, 585), yet the trial court did not determine the specific relevance or how the unredacted records would impair Plaintiffs' presentation of the case. Indeed, none of these over 100,000 sales of firearms to individuals other than Lawson would help determine whether Academy knew Lawson was secretly buying firearms for Kohlhepp, or whether Academy's actions resulted in harm to the three decedents. This attenuated connection between the requested records and the allegations in the Complaints is insufficient to meet the *Hollman* balancing test that must be conducted before the production is ordered.

D. A Writ of Certiorari Is Warranted to Protect Nonparties and Academy from Harm.

In *Hollman*, this Court granted two writs of certiorari and reversed and vacated discovery orders compelling production of nonparty contact information. *See Hollman*, 683 S.E.2d at 498–99. The Court explained that extraordinary circumstances existed for addressing the discovery order (twice) before an appeal in the ordinary course because "the privacy rights of patients is an issue of significant public interest, and issues involving the release of patient information in discovery is arising more often in the courts." *Id.* at 577, 683 S.E.2d at 498. The same extraordinary circumstances involving nonparty private information exist here.

Here, the Tiahrt Amendments' protections for Academy's customers are akin to the HIPAA protections afforded to the nonparty patients in *Hollman*. Academy's customers have a legitimate expectation under federal law that the number and type of firearms they buy are not going to be

shared with anyone other than law enforcement in response a valid firearms trace. By ignoring those federal privacy protections and ordering the production to Plaintiffs without conducting the required analysis under *Hollman*, Academy's customers will be irreparably harmed—they never can claw back their private information from Plaintiffs' counsel. As a result, extraordinary circumstances exist for granting the Petition and issuing the writ.

As discussed above, delaying appellate review until after the production is made would cause Academy irreparable harm. Because the negative perception of customers from the release of records cannot easily be reversed, Academy would not be able to secure relief from appellate review at the conclusion of these actions. This also serves as grounds for granting the Petition and issuing the writ. *See also S.C. Dept. of Parks, Recreation, and Tourism v. Brookgreen Gardens*, 424 S.E.2d 465 (S.C. 1992) (granting writ under previous version of Rule 245, SCACR in light of irreparable harm that would be caused by delaying decision).

V. The Sales Records and Trace Records Lack any Relevance to the Claims or Defenses, and the Production of these Records Would Place an Undue Burden on Academy.

The trial court ordered the production of an inordinate number of irrelevant firearms records on an unprecedented scale beginning today at 1:30 p.m. If these discovery orders are not vacated, Academy will ultimately be forced to gather and produce records relating to over 100,000 firearms sales, and records of trace requests going back 16 years for firearms sold at all of its over 260 stores nationwide, none of which relate to Lawson, the alleged straw purchaser. Further, regardless of the scope or size of the production required by these discovery requests, it is equally important to note that none of these records will shed any light on whether Lawson could have been detected as a straw purchaser on the days that he visited the Academy stores. No one will be able to say whether any firearm reflected in any of the hundreds of thousands of records was sold to a straw purchaser. In the face of no discernible relevance, Academy will be forced to expend

hundreds of thousands of dollars to comply with the trial court's discovery orders. This Court has found that this level of abusive discovery warrants the issuance of a writ of certiorari to review discovery orders. In *Oncology & Hematology Associates*, the Court granted a writ of certiorari and vacated five discovery orders, concluding that the party seeking documents "abused the discovery process with its scorched-earth approach." 692 S.E.2d 920, 925 (S.C. 2010).

A. Information About 100,000 Sales to Nonparties and Nationwide Traces is Irrelevant to Whether Lawson was Detectable as a Straw Purchaser.

The central issue raised by Plaintiffs' claims is whether Academy's employees behind the gun counter should have been able to detect that Lawson was a straw purchaser. Critical to that analysis is the interaction between Lawson and the Academy employees during the purchases. Academy has identified for Plaintiffs every employee involved in the Lawson purchases, and Plaintiffs deposed four of them. Plaintiffs scheduled the depositions of another three of the employees involved in the Lawson purchases, but then cancelled them. Academy has also produced all training materials and firearms policies, including all of the materials focused on efforts to identify straw purchasers. Further, Plaintiffs extensively deposed Academy's corporate representative, the Senior Director of Compliance, for over seven hours asking every possible question about Academy's firearm selling processes and procedures.

Despite the discovery already provided over a nearly three-and-a-half-year period, Plaintiffs have impermissibly adopted a "scorched-earth approach" to discovery. *Oncology & Hematology Assocs.*, 692 S.E.2d at 924. They served three sets of requests for production totaling nearly 125 requests, and written Academy at least five letters alleging deficiencies in Academy's discovery responses. While Academy has been responsive and produced substantial relevant materials, Plaintiffs and their counsel at the Brady Center have chosen to use discovery as a sword, filing a motion to compel less than three months before the June 26, 2023 discovery deadline and

asking the trial court to compel compliance with grossly overbroad and oppressive discovery requests. The discovery requests at issue seek documents that are not remotely related to the central issue in these actions.

The Sales Records could not possibly have any relevance. They relate to more than 100,000 firearms sales to thousands of other customers. Other than the twelve firearms sold to Lawson, no one knows whether any of the other sales may have involved a straw purchaser. All of those sales may have been to lawful citizens intending to purchase the firearm for themselves. In the event the Sales Records show that a single individual purchased 10 or more firearms over any period of time, that fact would demonstrate only that they are a collector of firearms. Any other assumption would be purely speculative.

Plaintiffs claim that a disproportionate amount of trace requests in comparison to the total number of sales shows a statistical probability of inadequate firearms policies and training. (App'x at 100.) Put differently, Plaintiffs claim that a large number of traces means that Academy's policies are arming criminals. But Plaintiffs frame the issue too broadly. First, this misconception assumes that a trace means that the firearm was used in a crime and further that such firearm was obtained by straw purchase; both assumptions are simply wrong. Second, the only criminal activity alleged in the Complaints is straw purchasing—that Academy was negligent in not detecting that Lawson was secretly buying firearms for Kohlhepp. The number of firearms sales for eleven years at two stores, and the number of traces over a sixteen-year period for over 260 stores does nothing to show whether Lawson could have been detected, nor do they reflect one way or the other on the adequacy of Academy's training and practices for the detection of potential straw purchasers. Indeed, no amount of Sales Records or Trace Records could ever shed light on whether one particular sale was a straw purchase.

Plaintiffs will also argue that every traced firearm was involved in a crime. This is simply not true. There are many non-crime related reasons a firearm may be traced. A firearm could be traced because it was found abandoned; an agency may trace ten firearms to identify a firearm with a digit in the serial number obliterated; the policies for some law enforcement agencies require the tracing of all surrendered firearms. Even assuming that a crime was involved for every particular trace, there is no way of showing that the traces relate to or involve a firearm that was acquired by an alleged straw purchase. A firearm may have been used in an armed robbery, murder, or a suicide; it could have been stolen from the purchaser; it could have been one of several firearms found at the scene of a homicide; or it could have been found in a vehicle stopped for erratic driving. That there may be many traces nationwide does not prove there was ever a problem with straw purchasers at Academy.

Additionally, there is no way of knowing whether any of the traces relate to firearms that were part of a straw purchase at Academy. Every firearm that was later traced to an Academy store may have been sold to the actual purchaser years or even decades before. That sale may have been a legal sale in every respect. The legally sold firearm then may have been stolen from the customer's car, or may have been sold by that customer to a third-party (without Academy's involvement). The relation between traces and the central issue here is attenuated at best and does not meet the relevance standard under Rule 26(b)(1), SCRCP.

B. Immunity from Suit Under the Protection of Lawful Commerce in Arms Act Further Narrows Discovery in These Actions.

As explained above in the procedural background section, the PLCAA grants immunity to federal firearms licensees when sued for damages resulting from the criminal misuse of firearms by third parties. Congress expressed its findings and purposes for the PLCAA in the text of 15 U.S.C. § 7901, stating in pertinent part: "Businesses in the United States that are engaged in . . .

the lawful . . . sale to the public of firearms or ammunition products . . . are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." 15 U.S.C. § 7901(a)(5). Congress further stated that "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system[.]" *Id.* § 7901(a)(6). Accordingly, one of the stated purposes of the PLCAA was "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." *Id.* § 7901(b)(4). There can be no question that Congress intended to prevent litigants like Plaintiffs from using the civil discovery process to force firearms licensees like Academy to incur enormous expense, inconvenience, and disruption when harm caused by third-party criminal misuse of a firearm is at issue.

There are very narrow exceptions to the immunity provided under the PLCAA. One of those narrow exceptions is called the "predicate exception." Under this exception, Plaintiffs can bring a claim only if they prove that Academy "knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii).

Here, Plaintiffs must prove that Academy knowingly violated a state or federal statute applicable to the sale or marketing of firearms when it sold Lawson the firearm allegedly used to shoot the victims. Only that sale could have any relevance, because none of the others could have been a proximate cause of the harm to the victims.[12] Records related to over 100,000 other sales to other customers and records related to nationwide trace requests for firearms purchased by other customers in other parts of the country have no bearing on whether Academy knowingly violated

[12] Even the sale of the alleged murder weapon could not have been the cause-in-fact of the deaths of the victims, because Kohlhepp had other firearms in his possession that he could have used, 15 of which were from sources other than Lawson's purchases at Academy.

a state or federal statute applicable to the sale or marketing of firearms in connection with the sale to Lawson of the firearm that Plaintiffs allege Kohlhepp used to shoot the victims. Discovery should be narrowly focused on that issue as required by the immunity imposed by the PLCAA.

C. The Gathering, Redaction, and Production of the Sales Records and Trace Records Would Be Extraordinarily Time Consuming and Expensive and Requires Protection to Avoid Placing an Undue Burden on Academy.

The cost and difficulty of gathering, anonymizing, and producing the requested records exceeds any acceptable burden allowed under Rule 26(a)(iii), SCRCP. Academy explained this to the trial court using an affidavit from Perry Davis, the Senior Director of Compliance. (App'x at 478–485.) No category of Sales Records or Trace Records could be easily located, retrieved, and produced.

Academy cannot produce any of the records without first redacting the names, addresses, and personal identifying information of its customers. That would be an enormous task, especially for records maintained in paper form. The trial court, however, added an additional requirement at the request of Plaintiffs. In the July 10, 2023 Order, the trial court required Academy to replace redacted names with an anonymous identifier unique to each customer. Identifiers used for customers identified in the A&D Logs would need to match the same customers reflected in 4473 Forms and in trace requests and responses. This is a virtually impossible task, and Academy is unaware of any means of using automation as tens of thousands of records are in paper form.

The 4473 Forms requested by Plaintiffs squarely illustrate the undue burden being placed on Academy. There were over 100,000 firearm sales during the period of time reflected in Plaintiffs' discovery requests seeking Sales Records. (App'x at 479.) It was not until July 18, 2016, that Academy started keeping these records electronically. (App'x at 480.) The paper 4473 Forms are not individual sheets of paper, but instead are six-page booklets bound on the left-hand

margin. They must be scanned or run through a copier by hand, rather than being fed en masse into a scanner or copier. Federal law requires that this be done at Academy's Greenville and Spartanburg stores, because these records must be maintained at the licensed premises. Because of the sensitivity of the 4473 Forms and the stringent federal requirements applicable to them, it will be necessary for Academy to closely supervise this effort to ensure the 4473 Forms are returned to their original location and in the same order. There would be several lines of information requiring redactions, and then manual coding would need to take place so that the customer could be associated with any entries in the A&D Logs or trace requests. Just the effort to copy and redact was estimated to exceed 28,000 employee hours and would take months to complete to ensure the integrity of the storage of the forms as required by law. (App'x at 481.)

The extraordinary burden of producing the requested records is not warranted by any perceived relevance at trial. Although the South Carolina Rules of Civil Procedure do not have the same proportionality limitation as the Federal Rules of Civil Procedure, the South Carolina rules do require consideration of the burden "taking into account the needs of the case," among other factors. Rule 26(a)(iii), SCRCP. This Court has previously conducted balancing tests to determine whether discovery should be required. Here, the Court should issue a writ of certiorari to review and then vacate the trial court's discovery orders because of the lack of any relevance to the issues and the extraordinary burden of gathering and producing the requested records that would be placed on Academy. *See Oncology & Hematology Assocs.*, 692 S.E.2d at 924 ("the trial court must make an effort to impose reasonable discovery limits.").

CONCLUSION

On July 10, 2023, Academy filed a Notice of Appeal now pending with the Court of Appeals. Pursuant to Rule 204, SCACR, Academy will be filing soon a motion to certify and

transfer its appeal from the Court of Appeals to this Court. If a stay or supersedeas is not already entered by the Court of Appeals or the trial court, Academy will also file a request asking this Court to issue a writ of supersedeas or injunction pending appeal to maintain the *status quo* and prevent the disclosure of the Sales Records and Trace Records pending resolution of the appeal. Briefing under the South Carolina Appellate Court rules could then ensue before this Court in the normal course.

If this Court declines to certify and transfer the appeal, or holds that the trial court's two discovery orders are not immediately appealable, this Court should grant the Petition for Writ of Certiorari, issue a writ of supersedeas or injunction pending appeal, and vacate the trial court's orders compelling Academy to produce the Sales Records and Trace Records.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ D. Larry Kristinik*
D. Larry Kristinik
SC Bar No. 064983
E-Mail: larry.kristinik@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Matthew A. Abee
SC Bar No. 101100
E-Mail: matt.abee@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Samuel W. Outten
SC Bar No. 004295
E-Mail: sam.outten@nelsonmullins.com
2 West Washington Street, Suite 400
Greenville, SC 29601
(864) 250-2300

Attorneys for Academy, Ltd. d/b/a Academy Sports + Outdoors

Columbia, South Carolina
July 11, 2023

RECEIVED

Jul 11 2023

S.C. SUPREME COURT

The State Of South Carolina
In The Supreme Court

Appeal from Spartanburg County
Court of Common Pleas
Hon. J. Mark Hayes, Circuit Court Judge

Consolidated Civil Action No. 2018-CP-42-04297
Court of Appeals Case No. 2023-001094

Cindy Coxie, as Special Administrator for the Estate of Johnny Coxie, ...Respondent,

v.

Academy, Ltd., d/b/a Academy Sports and Outdoors; and Dustan Lawson..... Defendants,

and

Academy, Ltd. d/b/a Academy Sports + Outdoors, ...Crossclaimant,

v.

Dustan Lawson and Todd Christopher Kohlhepp,.....Cross-Defendants,

Of which Academy, Ltd. d/b/a Academy Sports + Outdoors, is the .....Petitioner.

Proof of Service

I, the partner of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors, certify that I have served all parties in this action with a copy of the document(s) set forth below by the following methods:

Document(s): **Petition for Writ of Certiorari**
Appendix to Petition

Counsel/Parties Served:

Via USPS
Todd Christopher Kohlhepp, 00372454
Lieber Correctional Institute
136 Wilborn Avenue
Ridgeville, SC 29472

Via USPS
Dustan Lawson
PO Box 184
Pauline, SC 29374

Via Email and Secure File Transfer
Robert Cross, Esquire
rcross @bradyunited.org
Erin Davis, Esquire
edavis@bradyunited.org
Jenna Tersteegen, Esquire
jtersteegen@bradyunited.org

Via Email and Secure File Transfer
J. David Standeffer, Esquire
Standeffer Law, LLC
Post Office Box 35
2124 N Hwy 81, Anderson, SC 29621
Anderson, SC 29622
dave@standefferlaw.com

Via Email and Secure File Transfer
R. Mills Ariail, Jr., Esquire
Law Office of R. Mills Ariail, Jr.
11 North Irvine Street, Suite 11
Greenville, SC 29601
mills@rmalawoffice.com

Via Email and Secure File Transfer
Mary F. Schiavo, Esquire
Motley Rice, LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
mschiavo@motleyrice.com

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ D. Larry Kristinik*

D. Larry Kristinik
SC Bar No. 064983
E-Mail: larry.kristinik@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Matthew A. Abee
SC Bar No. 101100
E-Mail: matt.abee@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Samuel W. Outten
SC Bar No. 004295
E-Mail: sam.outten@nelsonmullins.com
2 West Washington Street, Suite 400
Greenville, SC 29601
(864) 250-2300

Attorneys for Academy, Ltd. d/b/a Academy Sports + Outdoors

Columbia, South Carolina
July 11, 2023

Matt Abee

From: Matt Abee
Sent: Tuesday, July 11, 2023 8:51 AM
To: mschiavo@motleyrice.com; Mills Ariail; dave@standefferlaw.com
Cc: Robert Cross; Erin Davis; Jenna Klein; jtersteegen@bradyunited.org; crenzulli@renzullilaw.com; Scott Allan; Larry Kristinik; Sam Outten; Matt Bogan; Kelly Taylor; Kevin Werner
Subject: Service Copy: Petition for Cert. and Appendix - Coxie (No. 2018-CP-42-04297)
Attachments: 2023.07.11 - DLK Filing Letter to Supreme Court - Petition and Appendix.pdf; Petition for Writ of Certiorari - Coxie v. Academy, Ltd.pdf; Proof of Service - Supreme Court Petition and Appendix.pdf

Counsel:

For service on you by email under Supreme Court Order No. 2022-05-06-03, please find Academy's Petition for Writ of Certiorari to be filed with the South Carolina Supreme Court. The Petition Appendix will be sent to you by secure file transfer (Titan File) shortly.

Please feel free to contact me should you have any questions. Thanks.
-Matt

Please note that I will be out of the office August 3–4, 2023.

NELSON MULLINS

MATT ABEE PARTNER
matt.abee@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9335 F 803.256.7500
NELSONMULLINS.COM VCARD VIEW BIO
*Licensed in South and North Carolina.