No. ________

In The

Supreme Court of the United States

MICHELLE LANE, AMANDA WELLING,
MATTHEW WELLING, AND SECOND
AMENDMENT FOUNDATION, INC.,

Petitioners,

v.

ERIC HOLDER, JR., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Two courts of appeals have held that consumers have standing to challenge the constitutionality of federal laws regulating the sale of firearms. Another court of appeals has held that consumers wishing to access gun ranges have standing to challenge a city ordinance prohibiting range operation. But the court below held that a criminal law prohibiting gun dealers from effecting retail transactions does not cause consumers an injury-in-fact, and that consumer injuries occasioned by the prohibition are not traceable to the Government.

The question presented is:

Whether consumers have standing to challenge the constitutionality of laws regulating the sale of firearms.

PARTIES TO THE PROCEEDINGS

Petitioners Michelle Lane, Amanda Welling, Matthew Welling, and Second Amendment Foundation, Inc., were Plaintiffs and Appellants below.

Respondents Eric Holder, Jr., Attorney General of the United States; Col. W. Stephen Flaherty, Superintendent of the Virginia State Police; and the District of Columbia, were Defendants and Appellees below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Michelle Lane, Amanda Welling, Matthew Welling, and Second Amendment Foundation, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

OPINIONS BELOW

The decision of the court of appeals, reported at 703 F.3d 668, is reprinted in the Appendix (App.) at 1a-15a. The district court's unpublished order dismissing the case is reprinted at App. 22a. A transcript of the district court's opinion, delivered orally, is reprinted at App. 16a-21a.

JURISDICTION

The court of appeals entered its judgment on December 31, 2012, and denied a petition for rehearing and rehearing en banc on February 26, 2013. App. 24a-25a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Clause 1 of the United States Constitution provides: "The judicial Power

shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . – to Controversies to which the United States shall be a Party. . . ."

Title 18, United States Code, Section 922(b)(3) is reproduced in the appendix at App. 38a.

INTRODUCTION

Had the federal government prohibited bookstores from selling books to out-of-state residents, no court would hold that impacted readers lack standing to challenge such a law under the First Amendment. Barring access to the national market for books would directly inflict an injury-in-fact upon consumers. Federal courts are empowered to fully redress that injury. None of this is particularly difficult or controversial.

But substituting "handguns" for "books," and "Second" for "First" Amendment, sometimes yields different results. The lower court held that criminal prohibitions of retail handgun sales do not directly impact frustrated consumers where the prohibitions are directed at sellers. The sellers' compliance with the law in refusing to complete a prohibited transaction, and the prohibition's impact on the market, are, as far as the lower court is concerned, merely the intervening voluntary decisions of third parties.

The decision below contradicts not only decades of firmly established precedent upholding consumer standing to challenge governmental interference in the marketplace. It squarely conflicts with recent Fifth and D.C. circuit decisions upholding consumer standing to challenge various applications of the same federal statute.

Left unchecked, the opinion below threatens to shut the courthouse door on a broad range of legitimate Article III cases and controversies. This Court's review is warranted.

STATEMENT OF THE CASE

1. Consumers may purchase rifles and shotguns from any federally-licensed firearms dealer ("FFL") in the United States, provided the transaction would comply with their home state's laws and those of the dealer's state. 18 U.S.C. § 922(b)(3).[1] A dealer may not otherwise sell firearms to an individual whom the dealer has reason to know resides outside the dealer's state. *Id.* Apart from rifle and shotgun transfers complying with Section 922(b)(3), and from firearms obtained by bequest or intestate succession, an individual may not "transport into or receive in the State where he resides . . . any firearm purchased or

[1] All further statutory references are to Title 18 of the United States Code unless otherwise noted.

otherwise obtained by such person outside that State." 18 U.S.C. § 922(a)(3).

Ordinary civilian firearms consumers must complete "Form 4473, Firearms Transaction Record Part I – Over-The-Counter," administered under Respondent Holder's authority, in order to purchase a firearm. 27 C.F.R. § 478.124. Question 13 on Form 4473 provides, "What is your State of residence (if any)? ___" *See* http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf (last visited May 23, 2013).

Thus, consumers purchasing or otherwise acquiring handguns outside their home states must cause the handguns to be shipped to a home-state dealer to complete their transactions. Doing so inherently involves shipping costs, and transfer fees charged by the receiving in-state dealer. Compliance also requires consumers expend time and money associated with their additional visits to in-state dealers. But for the interstate handgun transfer prohibition, consumers shopping for handguns outside their home state would not incur these costs, as they would take handgun delivery directly from their selling FFL at the place of purchase – just as they would if purchasing rifles and shotguns.

2. No retail gun stores exist within the District of Columbia, but the city is home to a single FFL, Charles Sykes, willing to complete consumer transactions. Thus, Washington, D.C. handgun consumers must shop for handguns outside the District, cause them to be transferred to Mr. Sykes, and pay Sykes

his $125 fee per handgun to complete the transfer process through his offices. App. 27a.

District of Columbia law provides that "[a]n application for a registration certificate shall be filed (and a registration certificate issued) prior to taking possession of a firearm from a licensed dealer or [other registrant]." D.C. Code § 7-2502.06(a).[2] A District resident may transport handguns "from the place of purchase to his or her home," D.C. Code § 22-4505(a)(6), upon presenting an in-District FFL a sealed, approved registration certificate for the subject handgun. 24 DCMR § 2320.3(f) (2011). But when this litigation commenced, "in the case of a purchase from a firearms dealer located in another jurisdiction," a District resident was required to "have that firearms dealer transport the applicant's pistol to a licensed firearms dealer in the District, where the applicant will take delivery of the pistol. . . ." 24 DCMR § 2320.3(f) (2009).[3] Virginia law appeared to track the federal prohibition of handgun transfers to non-residents. Va. Code Ann. § 18.2-308.2:2.

3. On April 23, 2011, Petitioner Michelle Lane ordered two handguns from a Virginia gun store, which would be transferred to her through Sykes in

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[2] District law forbids individual-to-individual firearms transfers. D.C. Code § 7-2505.01.

[3] This regulation did not apply to long gun sales, which could (and still may) be transacted entirely through out-of-state FFLs.

compliance with Section 922(b)(3). App. 26a-27a. Before Lane could complete the transaction, Sykes lost his lease and with it, the ability to transfer handguns to District of Columbia residents, who thereby lost the ability to acquire handguns other than through inheritance. App. 27a.

4. On May 10, 2011, Lane brought suit in the United States District Court for the Eastern District of Virginia against Respondents Holder and Flaherty, challenging the constitutionality of Section 922(b)(3)'s restriction on the interstate transfer of handguns, and the apparently similar application of Va. Code Ann. § 18.2-308.2:2.

Apart from being effectively barred from acquiring handguns while the District lacked an operative FFL, Lane's injuries included the costs and burdens inherent in making additional visits to the in-state FFL, transferring handguns to the in-state FFL, and the additional fees that would necessarily be charged by the in-state FFL, in this case, $125 per handgun. Lane also declared that in the absence of the interstate handgun transfer prohibition, she would participate more frequently in the market for handguns. Simply put, Lane would engage in out-of-state transactions but for their prohibition. App. 27a-28a.

Lane was joined by Petitioner Second Amendment Foundation, Inc. ("SAF"), whose members generally suffer from the increased costs, reduced price competition, and loss of consumer choice in the

handgun market owing to the interstate handgun transfer prohibition. App. 35a.

The complaint was soon amended to include Petitioners Amanda and Matthew Welling, a young Washington, D.C. couple wishing to receive a handgun for home self-defense from Ms. Welling's father, Texas resident David Slack. App. 30a, 33a, 36a. The Wellings, too, complained of the additional burdens and costs imposed by the interstate handgun transfer prohibition, and declared their desire to participate more frequently in the handgun market but for the burdens imposed by the challenged provisions. App. 30a, 33a. The District of Columbia was added as a Defendant, and Petitioners moved for a preliminary injunction.[4]

Petitioners' substantive legal theory – not here at issue – is simple. The interstate handgun transfer ban was enacted to ensure that retail sales comply with purchasers' local gun control laws. *See, e.g.,* H.R. Rep. No. 90-1577, at 14 (1968); S. Rep. No. 90-1097, at 114 (1968). But the District of Columbia now

[4] The night before the district court argument on Petitioners' motion for a preliminary injunction, the District of Columbia averred that it would lease Sykes space to conduct his business inside the District's police headquarters. Dist. Ct. Dkt. 38. And at 6:15 pm that evening, following an emergency petition by the city's Office of Planning, the D.C. Zoning Commission held a Special Public Meeting at which it enacted an emergency amendment to the city's zoning regulations permitting firearms transfers inside the District's law enforcement and licensing agencies. *Id.*

requires (as do other jurisdictions) police pre-approval for *any* retail firearm transfer, eliminating the circumvention risk at retail by domestic residents. Additionally, Section 922(b)(3) now entrusts federal licensees with policing out-of-state long gun law compliance. FFLs can police compliance with out-of-state handgun laws as well, *e.g.*, by demanding consumers obtain necessary police authorization for handgun sales, just as they demand consumers obtain such authorization when required for long gun sales.

5. On July 15, 2011, the district court denied Petitioners' motion for a preliminary injunction and dismissed the case for lack of standing. App. 22a-23a. The district court held that the challenged provisions did not violate Petitioners' right to acquire firearms, because they did not directly prohibit gun stores in the District of Columbia. App. 19a. Since the Government did not completely ban gun sales, Petitioners "are unable to prove the injury is fairly traceable to or caused by the federal firearms laws." App. 20a. Moreover, the district court believed Petitioners had a higher standing burden because they are not the licensed, regulated entities covered by the transfer prohibition, but merely "gun purchasers." *Id.*

6. As Petitioners pursued an appeal, Respondents District of Columbia and Flaherty mooted the controversy with respect to themselves by rescinding or disclaiming their interstate handgun transfer prohibitions.

On August 19, 2011, the District of Columbia's Police Commissioner adopted an emergency measure amending 24 DCMR § 2320.3(b) (2009) and (f) to "clarify" that District law does not independently bar interstate handgun transfers. 58 D.C. Reg. 7572 (Aug. 19, 2011). "Should the federal law change, then that requirement will no longer be applicable to any District firearms registration applicant." *Id.*

> Emergency rulemaking is necessitated by an immediate need to preserve and promote the public welfare by having the amendment immediately effective so as to assist District residents in the exercise of their constitutional right to possess a handgun for self defense within their home.

Id.

The amended regulations provide that the Firearm Registration application form be provided for completion by a dealer located wherever the handgun to be purchased is located, 24 DCMR § 2320.3(b) (2011), and that upon police approval, the consumer must

> [p]resent the approved Firearm Registration application to the dealer licensed under federal law and take delivery of the applicant's pistol . . . or, if federal law such as 18 U.S.C. § 922 prohibits the dealer from delivering the pistol to the applicant because the dealer is not within the District of Columbia, have that firearms dealer transport the pistol to a dealer located within the District. . . .

24 DCMR § 2320.3(f) (2011). These emergency amendments were made permanent. 58 D.C. Reg. 8240 (Sept. 23, 2011). On October 7, 2011, the court of appeals dismissed the District of Columbia from this case.

Subsequently, during oral argument below, Virginia's Solicitor General mooted the case with respect to Flaherty by interpreting Virginia's law as depending solely on the continuation of the federal practice, and denied that Virginia independently restricted interstate handgun sales:

> The only reason why the transfer to these plaintiffs would be blocked by the state law is because . . . the transfer would violate federal law. If this Court declared the federal law unconstitutional, the Virginia law would permit the transfer absent any other disqualifiers.

Mr. Getchell, at 30:53-31:17, Oral Argument Recording, Fourth Cir. No. 11-1847, Oct. 23, 2012, available at http://coop.ca4.uscourts.gov/OAarchive/mp3/11-1847-20121023.mp3 (last visited May 24, 2013).

> THE COURT: How would you compare [the Virginia law] to the District of Columbia law that exists right now?
>
> MR. GETCHELL: I think they're about the same. Because now the District of Columbia says if it's OK with the federal government, it's OK with us. And that would be the same result under the Virginia law.

Id. at 31:40-32:03. “None of the costs are traceable to the Virginia law. They could do what they want to do. Drive across the bridge, go to Lorton, pick up the gun, but for the federal law.” *Id.* at 32:20-32:39.

7. On December 31, 2012, the court of appeals affirmed the dismissal of Petitioners’ case. The lower court found it significant that “the laws and regulations [Petitioners] challenge do not apply to them but rather to the FFLs from whom they would buy handguns.” App. 8a. Acknowledging that “[c]onsumers burdened by regulation of the sellers they transact with may be able to establish that they have suffered an injury in fact, as the Supreme Court has made clear in the context of Commerce Clause litigation,” *id.* (citing *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 286 (1997)), the lower court nonetheless found no such injury inflicted here as Petitioners were not subject to a “government-imposed assessment.” App. 9a.

Notwithstanding Petitioners’ claims that they are necessarily foregoing interstate transactions owing to the prohibition, the lower court held that Petitioners “are not prevented from obtaining the handguns they desire.” App. 9a. “At worst, they are burdened by additional costs and logistical hurdles,” which the lower court dismissed as “minor inconveniences . . . distinct from an absolute deprivation.” *Id.* “Because the challenged laws do not burden the plaintiffs directly, and because the plaintiffs are not prevented

from acquiring the handguns they desire, they do not allege an injury in fact." App. 10a.

The lower court further held that "any injury to the plaintiffs is caused by decisions and actions of third parties not before this court rather than by the laws themselves." App. 11a. The lower court did not specify how Petitioners' inability to directly buy out-of-state handguns was not directly caused by the Government's prohibition of such sales. The lower court also did not address the inherent cost of shipping handguns to in-state FFLs. Moreover, the lower court presumed that FFLs should function as charities rather than businesses. "Nothing in the challenged legislation or regulations directs FFLs to impose such charges. Because any harm to the plaintiffs results from the actions of third parties not before this court, the plaintiffs are unable to demonstrate traceability." App. 13a.[5]

On February 26, 2013, the lower court denied the petition for rehearing and rehearing en banc. App. 24a.

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the question of whether consumers have standing to challenge

[5] The lower court also rejected Petitioner SAF's claim of organizational injury, an issue not raised in this petition.

prohibitions on retail firearm transactions. This important issue is recurring, and there is no reason to suppose that the lower court's logic would remain confined to the subject of firearms. This case presents an excellent vehicle for resolving the conflict.

Moreover, the lower court's decision is plainly erroneous. Consumers have always had standing to challenge regulations prohibiting their intended transactions, limiting their choice, reducing competition, and otherwise burdening their participation in the market. This court should grant the petition to resolve the circuit conflict, and reverse the judgment below.

I. The Courts of Appeals Are Divided on the Question Presented.

Barely over a year prior to the decision below, the D.C. Circuit upheld consumer standing to challenge Section 922(b)(3) in a remarkably similar case. Indeed, the complaint here drew heavily from that filed in *Dearth* v. *Holder*, 641 F.3d 499 (D.C. Cir. 2011), which involved a challenge to the same provision by an expatriated American citizen living in Canada. Because he lacks a state of residence, the disclosure of which is required to ensure compliance with Section 922(b)(3), Dearth's attempts to purchase firearms were denied. The district court held Dearth lacked standing, but the D.C. Circuit reversed.

"We agree with Dearth that the Government has denied him the ability to purchase a firearm and he

thereby suffers an ongoing injury." *Dearth*, 641 F.3d at 502. "[H]e claims he presently suffers a cognizable injury to his constitutional rights because the federal regulatory scheme thwarts his continuing desire to purchase a firearm." *Id.* at 503 (citation omitted). "[H]is injury is present and continuing." *Id.*

Lane was barred from buying guns because she lived in the wrong "state." Dearth was barred from buying guns because he lived in no state. In both cases, the Government applied Section 922(b)(3)'s prohibition, and transactions were foiled owing to the plaintiffs' inability to satisfactorily answer the same residence question on the same government form. Yet Dearth had standing, as the Government inflicted an injury upon him, while Lane, per the lower court, was uninjured for standing purposes.

The lower court first claimed that "the law at issue precluded [Dearth] from purchasing a firearm altogether," while Petitioners had other options, App. 12a n.5, but that is not correct. In *Dearth*, the Government claimed – and prevailed (thus far) – on the theory that barring Dearth from buying guns did not violate his Second Amendment rights, since he could theoretically bring guns from Canada while visiting the United States. *Dearth* v. *Holder*, 893 F. Supp. 2d 59, 68 & 71 (D.D.C. 2012), *appeal pending*, No. 12-5305 (D.C. Cir. filed Sept. 27, 2012).

The lower court next sought to distinguish *Dearth* by asserting that traceability was not there at issue. App. 12a n.5. But this gave the D.C. Circuit too little credit. "[T]he requirements of traceability and

redressability are clearly met." *Dearth*, 641 F.3d at 501. The D.C. Circuit did not invite piecemeal litigation over each standing element.

Two days following oral argument below, the Fifth Circuit decided *NRA of Am.* v. *BATFE*, 700 F.3d 185 (5th Cir. 2012), a consumer challenge to Sections 922(b)(1) and (c)(1), barring the sale of handguns by FFLs to adults aged 18-20. The district court had rejected the Government's standing challenge:

> The Individual Plaintiffs do not own handguns, but each of them desires to obtain one for lawful purposes, including self-defense. They have all identified a specific handgun they would purchase from an FFL if lawfully permitted to do so. The FFLs from whom [two plaintiffs] would purchase their handguns have refused to sell them handguns in the past because they are under 21. Were the Court to hold that the ban is unconstitutional, it could provide the relief that Plaintiffs seek. Therefore, the Individual Plaintiffs have standing to sue even though they have not been threatened with or been subject to prosecution under the ban.

Jennings v. *BATFE*, No. 5:10-CV-140-C, slip op. at 8 (N.D. Tex. Sept. 29, 2011).

The Fifth Circuit affirmed. Although 18-20 year olds could receive handguns from parents, guardians, or "unlicensed, private sales," *NRA*, 700 F.3d at 190 (footnotes omitted),

> by prohibiting FFLs from selling handguns to 18-to-20-year-olds, the laws cause those persons a concrete, particularized injury – i.e., the injury of not being able to purchase handguns from FFLs. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 750-57, 755 n.12 (1976) (finding standing for prospective customers to challenge constitutionality of state statute prohibiting pharmacists from advertising prescription drug prices, despite customers' ability to obtain price quotes in another way – over the phone from some pharmacies).

Id. at 191-92 (parallel citations omitted). "This injury is fairly traceable to the challenged federal laws, and holding the laws unconstitutional would redress the injury." *Id.* at 192 n.5 (citation omitted). The court did not need to reach the issue of the directly-regulated dealers' standing. *Id.* at 192.

The lower court's conflict is as stark with *NRA* as it is with *Dearth*. The Fifth Circuit specifically held that prohibiting FFLs from selling handguns to consumers inflicts a directly-traceable injury upon the consumers, who have standing to sue, even if the law still provides them other means of obtaining handguns. That is precisely what the court below rejected.

Petitioners immediately provided the lower court with supplemental notice of the Fifth Circuit's opinion pursuant to Fed. R. App. Proc. 28(j), *see* Appeals Ct. Dkt. 53, but the decision below issued

two months later without mentioning *NRA*. The apparent oversight featured prominently in the petition for rehearing, but that, too, was turned aside without comment.

The opinion below also conflicts with the Seventh Circuit's recent decision in *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011), which upheld the standing of individual Chicago residents to challenge a municipal ordinance prohibiting the operation of gun ranges. "[T]he City's ban on firing ranges inflicts continuous harm to their claimed right to engage in range training and interferes with their right to possess firearms for self-defense. These injuries easily support Article III standing." *Ezell*, 651 F.3d at 695.

As with *Dearth*, the court below sought to distinguish *Ezell* by claiming that the *Ezell* plaintiffs were "prevented outright from obtaining or possessing firearms." App. 10a. And as with *Dearth*, the lower court erred in its assessment of *Ezell*'s facts. Just as the *Dearth* district court denied relief because the plaintiff could obtain guns in Canada, the *Ezell* district court denied plaintiffs relief on the theory that they could practice shooting at ranges outside the city. But the Seventh Circuit reversed, decrying the district court's reasoning as "profoundly mistaken" and "unimaginable." *Ezell*, 651 F.3d at 697.

In this sense, *Ezell* also conflicts with the lower court's determination that Petitioners may be barred from exercising their Second Amendment right to take delivery of handguns from out-of-state dealers

merely because they may do so from an in-state dealer.

II. The Question Presented Is a Recurring Issue of National Importance, and This Case Presents a Highly Suitable Vehicle for Resolving It.

The Constitution protects access to a variety of consumer goods and retail services, including books, contraceptives, abortions – and firearms. Consumer access to these and other products and services is also secured by constitutional doctrines of general application, such as the dormant Commerce Clause.

Plainly, the question of whether consumers may access Article III courts to give real effect to their constitutional rights is of national importance. Here, for example, the lower court effectively sanctioned a substantial re-imposition of the District of Columbia's handgun ban struck down in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Requiring the District of Columbia to allow handgun possession is of limited value if the Government can severely curtail, if not *de facto* ban, the transfer of handguns to Washington, D.C. residents, in a non-reviewable fashion. And while Mr. Sykes may be back in business, all Americans are still deprived of a truly national market for a consumer product, access to which the Bill of Rights literally secures.

With the conflict regarding standing to challenge firearm regulations encompassing four circuits in a

two year span, the issue presented is recurring frequently – and will continue to arise. And while today's underlying topic may be guns, tomorrow might see access to books, abortions, or any other product or service curtailed without consumer access to federal judicial relief.

This case presents an excellent vehicle for resolving the conflict. Moreover, Petitioners' underlying substantive claim is significant. The federal government maintains its interstate handgun transfer prohibition to secure the interests of state and local jurisdictions. It is thus unclear what interests are advanced when the jurisdictions encompassing the individual Petitoners' claims, the District of Columbia and Virginia, agree that Petitioners should be able to engage in these transactions, and responded to the litigation by modifying their rules and practices to welcome Petitioners' conduct.

III. The Court of Appeals Erred in Holding That the Government Does Not Directly Cause Consumers an Injury-In-Fact By Prohibiting Retail Transactions.

The decision below is clearly and profoundly erroneous. The Government need not completely ban access to goods and services before consumers are understood to suffer a constitutional injury-in-fact stemming from regulatory burdens. And precedent firmly rejects the notion that a regulation's direct subjects alone may contest its constitutionality.

As the Fifth Circuit noted, this Court's opinion in *Va. State Bd. of Pharmacy* controls the outcome of the question here presented. In that case, an "attack on the statute" barring dissemination of prescription drug prices was "made not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim that they would greatly benefit if the prohibition were lifted and advertising freely allowed." *Va. State Bd. of Pharmacy*, 425 U.S. at 753. "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.* at 757 (footnote omitted). It did not matter that consumers could obtain price information by telephoning or visiting pharmacies. *Id.* at 752; *Id.* at 782 (Rehnquist, J., dissenting).

Likewise, since Petitioners have the right to possess handguns, they necessarily have the right to acquire handguns. *See United States* v. *Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010). "The right to keep arms necessarily involves the right to purchase them. . . ." *Andrews* v. *State*, 50 Tenn. 165, 178 (1871). And when consumers have a right to acquire something, they suffer an injury-in-fact when governmental conduct – even if directed at third parties – impacts their ability to do so.

As this Court explained, striking down a law barring all but licensed pharmacists from selling contraceptives,

> The burden is, of course, not as great as a total ban on distribution. Nevertheless, the

> restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition.

Carey v. *Pop. Svs. Int'l*, 431 U.S. 678, 689 (1977); *see also Va. State Bd. of Pharmacy*, 425 U.S. at 763-64 (noting economic harm befalling consumers from limited access to commercial information); *Doe* v. *Bolton*, 410 U.S. 179 (1973) (pregnant woman's challenge to law limiting abortion services to hospitals).[6]

If "[r]estrictions on the distribution of contraceptives clearly burden the freedom to make [family planning] decisions," *Carey*, 431 U.S. at 687, restrictions on the distribution of handguns just as clearly burden the freedom to keep arms – and under Article III, those restrictions are equally actionable.

The lower court's attempt to distinguish *Carey* on grounds that the lead plaintiff in that case was a distributor, App. 8a, fails. The distributor was not exercising the right to make family planning decisions – its customers were. Accordingly, this Court

[6] As with *Ezell* and *Dearth*, the lower court sought to distinguish *Doe* on grounds that "the challenged law in *Doe* prevented the plaintiff from exercising a constitutional right." App. 10a n.3. But as in *Ezell* and *Dearth*, the *Doe* plaintiff had other options. She could have obtained an abortion in a hospital. Moreover, *Doe* notably struck down a law restricting abortions to state residents.

upheld standing based on the consumers' injury, invoking the doctrine that "vendors and those in like positions . . . have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function." *Carey*, 431 U.S. at 684 (quoting *Craig* v. *Boren*, 429 U.S. 190, 195 (1976) (other citations omitted)).[7]

Apart from the highly specific conflicts between the lower court's decision and those of the Fifth, D.C., and Seventh Circuits in *NRA*, *Dearth*, and *Ezell*, respectively, the decision below conflicts with other circuit decisions upholding consumers' standing to challenge restrictions imposed upon sellers. Directly on point, the Third and Seventh Circuits have upheld consumers' standing to challenge restrictions on interstate wine shipments. *See Freeman* v. *Corzine*, 629 F.3d 146, 154-55 (3d Cir. 2010); *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

> Some of the wines plaintiffs want to drink are not carried by Indiana resellers. That establishes injury in fact. Anyone who has held a bottle of Grange Hermitage in one hand and a broken corkscrew in the other knows this to be a palpable injury. Moreover,

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[7] In *Carey*, this Court did not reach questions related to the other plaintiffs' standing, including that of "an adult New York resident who alleges that the statute inhibits his access to contraceptive devices and information, and his freedom to distribute the same to his minor children." *Carey*, 431 U.S. at 682 n.2.

> Indiana dealers collect state excise taxes on wines that pass through their hands, while the shippers with which plaintiffs used to deal do not; this difference in price is another source of injury. Plaintiffs need not be the immediate target of a statute to challenge it.

Bridenbaugh, 227 F.3d at 849-50 (citations omitted).[8]

In *Bridenbaugh*, it made no difference whether the law purported to target only one party to a transaction. "Plaintiffs' claim . . . is direct rather than derivative: every interstate sale has two parties, and entitlement to transact in alcoholic beverages across state lines is as much a constitutional right of consumers as it is of shippers – if it is a constitutional right at all." *Bridenbaugh*, 227 F.3d at 850.

Even if Petitioners' only injuries consisted of higher prices and additional costs, they would plainly have standing to challenge the law. "Allegedly, plaintiffs spent money that, absent defendants' actions, they would not have spent. This is a quintessential injury-in-fact." *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (citing *Tracy*, 519 U.S. at 286).

[8] The lower court erred in offering that "[t]he plaintiffs in those [interstate wine] cases alleged that they were unable to acquire the wines they wished to purchase through interstate commerce," while "[h]ere, the plaintiffs are not prevented from obtaining the handguns they desire." App. 9a. Apart from the fact that Petitioners asserted injury upon reduced selection, *see, e.g.,* App. 23a, 35a, *Bridenbaugh* plaintiffs at least complained of higher prices. *Bridenbaugh*, 227 F.3d at 850.

In *Tracy*, this Court upheld a customer's standing to challenge the imposition of a tax on out-of-state natural gas.

> [T]he customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III.

Id. at 286 (citation omitted); *Bacchus Imps.* v. *Dias*, 468 U.S. 263, 267 (1984).

The lower court sought to distinguish *Tracy* by claiming that the customers in that case were directly liable for the tax, while Section 922(b)(3) does not require Petitioners to pay the Government anything. App. 9a. This is a distinction without a difference. True, the Government may not be imposing a specific assessment on Petitioners for transferring handguns across state lines, but it does directly impose the transportation and in-state FFL requirements on handgun purchasers wishing to access the national market – and neither FedEx, nor UPS, nor FFLs, can be reasonably expected to provide their services for free.

Surely the Government cannot direct individuals to hire service providers, and then wash its hands of responsibility for imposing the providers' additional costs because it does not set the price.

Moreover, the interstate handgun transfer ban does not merely impose costs on purchasers. As the D.C. and Fifth Circuits recognized, Section 922(b)(3) directly injures consumers by banning them from engaging in specific transactions. Consumers, not dealers, are required to complete Part A of Form 4473 and disclose their residence, thus participating directly in the regulatory scheme. When the Government prevented Michelle Lane from taking home her two handguns because of the way she was required to answer a question on the Government's form, App. 28a, it directly caused her a constitutional injury-in-fact. And had Lane somehow taken the handguns home anyway, she, not the FFL, would have been prosecuted under Section 922(a)(3).

In support of its claim that FFLs' compliance with Section 922(b)(3), and tendency to charge money for additional transfer services (to say nothing of shipping fees) are voluntary acts of third parties, the lower court relied heavily on *Frank Krasner Enters., Ltd.* v. *Montgomery County*, 401 F.3d 230 (4th Cir. 2005). Such reliance was misplaced.

In *Krasner*, a county government determined to withhold public funds from any venues that would host gun shows, triggering litigation from a gun show promoter, exhibitor, and others who consequently lost access to a venue. The court held that the venue merely made its choice of customers. But Section 922(b)(3) offers no "unfettered choices," *Krasner*, 401 F.3d at 235 – violations here are "fettered" by fines and incarceration. An FFL's decision to charge money

for providing transfer services is no more "voluntary" than its decision to remain solvent. And the Government is not merely using its influence as a market participant – it is imposing criminal prohibitions.

Article III contains no "law of firearms." *Seegars* v. *Ashcroft*, 396 F.3d 1248, 1254 (D.C. Cir. 2005) (citing Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 207-08 (1996)). The same law applied to pharmaceutical advertising, contraceptives, abortion, natural gas, wine, gun ranges, and in two other circuits – firearms – should have been applied below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 28, 2013

PUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

MICHELLE LANE; SECOND AMENDMENT FOUNDATION, INC.; MATTHEW WELLING; AMANDA WELLING, *Plaintiffs-Appellants*, v. ERIC H. HOLDER, JR., Attorney General of the United States; W. STEVEN FLAHERTY, Superintendent, Virginia State Police, *Defendants-Appellees*, and DISTRICT OF COLUMBIA, *Defendant*.	No. 11-1847

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(1:11-cv-00503-GBL-TRJ)

Argued: October 23, 2012

Decided: December 31, 2012

Before MOTZ, DUNCAN, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Motz and Judge Floyd joined.

COUNSEL

ARGUED: Alan Gura, GURA & POSSESSKY, PLLC, Alexandria, Virginia, for Appellants. Anisha S. Dasgupta, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Earle Duncan Getchell, Jr., OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees. **ON BRIEF:** Tony West, Assistant Attorney General, Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Neil H. MacBride, United States Attorney, Alexandria, Virginia, for Appellee Eric H. Holder, Jr. Kenneth T. Cuccinelli, II, Attorney General, Wesley G. Russell, Jr., Deputy Attorney General, Catherine Crooks Hill, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee W. Steven Flaherty.

OPINION

DUNCAN, Circuit Judge.

Michelle Lane, Amanda and Matthew Welling, and the Second Amendment Foundation ("SAF") (collectively, "the plaintiffs") filed a pre-enforcement challenge to the constitutionality of a federal statute restricting interstate transfers of handguns, 18 U.S.C. § 922(b)(3); a federal regulation implementing

that statute, 27 C.F.R. § 478.99; and a Virginia law prohibiting Virginia firearms dealers from selling handguns to non-residents of Virginia, Va. Code section 18.2-308.2:2. The district court dismissed their complaint on standing grounds. It concluded that any injury to the plaintiffs resulted from decisions made by third parties rather than the application of the challenged laws to them directly, and therefore, that they lacked standing. On appeal, the plaintiffs argue that their alleged injuries are traceable to the challenged laws. For the reasons that follow, we affirm.

I.

A.

Congress enacted the federal statute at issue, 18 U.S.C. § 922(b)(3), part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, "to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." H.R. Rep. No. 90-1577, at 6 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4411. One of the mechanisms for doing so was a requirement that interstate transfers of firearms take place through federal firearms licensees ("FFLs"). 18 U.S.C. § 922(a)(1)-(5). Under the federal statute, a buyer may purchase a handgun from an out-of-state source, but that source must be a FFL and the buyer must arrange for the handgun to be delivered to an in-state FFL, from whom the buyer

may retrieve the gun. *See id.* § 922(b). In contrast, FFLs may sell or deliver a rifle or shotgun to an out-of-state resident if the transferee meets in person with the FFL in the state where she wishes to buy the firearm and if the transfer complies with the laws of both the transferee's and transferor's states. The Bureau of Alcohol, Tobacco and Firearms issued implementing regulations that closely track the federal statute. *See* 27 C.F.R. § 478.99.

Virginia's statute likewise permits the sale or transfer of a rifle or shotgun to a non-resident of Virginia, but prohibits the direct sale or transfer of a handgun to a non-resident. Va. Code sections 18.2-308.2:2(B)(5), (C). As with the federal statute, to sell or transfer a handgun to a non-resident, the firearms dealer must send the gun to a firearms dealer in the nonresident's home state, from whom the buyer may retrieve the gun. *Id.*

B.

Lane and the Wellings are residents of Washington, D.C. who wish to acquire handguns from other states. Lane ordered two handguns from a FFL in Virginia. She was originally unable to take possession of the handguns, as Washington, D.C.'s sole FFL, Charles Sykes, had lost his lease and was no longer in business.[1] She contends that but for the interstate

[1] There was some dispute below about whether there were any FFLs in business in Washington, D.C. at the time this case

(Continued on following page)

handgun transfer prohibitions, she would have taken possession of the handguns directly in the Virginia store. Since the time of the district court's dismissal of this case, Sykes has reestablished his business, and Lane has been able to acquire one of her out-of-state handguns from him. To obtain a gun moving interstate from Sykes, Washington, D.C. residents must pay a transfer fee. The Wellings hoped to acquire a handgun from Amanda Welling's father, who wished to transfer the gun to her through a Virginia FFL. Generally, Lane and the Wellings assert that they "would participate more frequently in the market for handguns but for the interstate handgun transfer ban." Appellants' Br. at 18. They find the various transactions they must undertake to acquire a handgun "burdensome and expensive." *Id.*

SAF is a non-profit membership organization with members from across the country, including Washington, D.C. and Virginia. Its purposes include "promoting the exercise of the right to keep and bear arms; and education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control." J.A. 29. SAF contends that

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was before the district court. The district court assumed for purposes of argument that the plaintiffs were presently unable to receive interstate transfers of handguns because there were no FFLs operating in Washington, D.C. At this juncture, however, the parties agree that at least one FFL operates in Washington, D.C.

the challenged laws have caused it to expend resources in response.

II.

The plaintiffs sought injunctive and declaratory relief against Eric Holder, Jr., in his official capacity as Attorney General of the United States, and W. Stephen Flaherty, in his official capacity as Superintendent of the Virginia State Police, to prevent enforcement of 18 U.S.C. § 922(b)(3), 27 C.F.R. § 478.99, and Va. Code section 18.2-308.2:2, to the extent these laws prohibit the acquisition of handguns by out-of-state residents.[2] The plaintiffs moved for a preliminary injunction. In a hearing on that motion, the district court dismissed the case for lack of standing. The plaintiffs now appeal.

III.

To have standing, a plaintiff must be able to show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to

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[2] The complaint also challenged Washington, D.C. municipal regulations, which have since been modified. Upon Washington, D.C.'s amendment of its regulations, the plaintiffs moved to dismiss their claims against Washington, D.C., and we granted their motion.

> the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000).

We review a district court's decision to dismiss for lack of standing de novo. *See Doe v. Obama,* 631 F.3d 157, 160 (4th Cir. 2011).

A.

1.

To establish an injury in fact as required by the first prong of our standing analysis, the plaintiffs must demonstrate that their claim rests upon "a distinct and palpable injury" to a legally protected interest. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). This injury must "affect the plaintiff[s] in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n.1 (1992).

The plaintiffs assert that the challenged laws result in "a restriction on the range of retailers available to consumers of constitutionally-protected articles." Appellants' Br. at 23. This, they contend, constitutes a constitutional injury that has frequently been considered sufficient for standing by the Supreme Court. We find that because the challenged regulations do not affect the plaintiffs directly, their situation is distinguishable from the cases in which

the Supreme Court has deemed such a restriction to constitute an injury in fact.

A plaintiff who alleges an injury based on restriction of distribution channels may be able to show standing if the defendant's actions directly affect that plaintiff. For instance, the Supreme Court found that a distributor of contraceptives had standing to challenge a law barring all but licensed pharmacists from selling contraceptives. *Carey v. Pop. Servs. Int'l,* 431 U.S. 678, 682-83 (1977). In *Carey,* however, the lead plaintiff was a distributor directly regulated by the law being challenged. *Id.* The plaintiffs in this case are in a fundamentally different situation, as the laws and regulations they challenge do not apply to them but rather to the FFLs from whom they would buy handguns. It is the absence of a direct effect that distinguishes the facts before us from those in decisions on which plaintiffs seek to rely.

Consumers burdened by regulation of the sellers they transact with may be able to establish that they have suffered an injury in fact, as the Supreme Court has made clear in the context of Commerce Clause litigation. *See Gen. Motors Corp. v. Tracy,* 519 U.S. 278, 286 (1997) (holding that "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured," as is the case when a customer is liable to pay a tax when buying from an out-of-state producer). Again, however, the plaintiffs in *Tracy* were burdened directly,

as the government required them to pay a tax upon buying products from out-of-state sellers. *See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County,* 115 F.3d 1372, 1381 (8th Cir. 1997) (concluding that *Tracy* and related Commerce Clause cases "do not stand for the proposition that consumers paying the end-line cost of an economic regulation have standing to challenge the regulation under the Commerce Clause," because plaintiffs in those cases "were not alleging that they incurred a passed-on cost; rather, the plaintiffs – not the out-of-state entities – were directly assessed the challenged taxes"). No such government-imposed assessment is levied against the plaintiffs here.

In a somewhat different context, several of our sister circuits have found standing for wine consumers prevented from acquiring wine directly from out-of-state wine sellers as a result of marketplace regulation. *See Freeman v. Corzine,* 629 F.3d 146, 154 (3d Cir. 2010); *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 849-850 (7th Cir. 2000). The plaintiffs in those cases alleged that they were unable to acquire the wines they wished to purchase through interstate commerce. Here, the plaintiffs are not prevented from obtaining the handguns they desire. At worst, they are burdened by additional costs and logistical hurdles.

These minor inconveniences are distinct from an absolute deprivation. To obtain a handgun from another state, the plaintiffs must pay a transfer fee and visit multiple FFLs, but the laws do not prevent

them from exercising their Second Amendment right to bear arms. This case thus differs from those in which courts have found standing for plaintiffs prevented outright from obtaining or possessing firearms. *See, e.g., Ezell v. Chicago,* 651 F.3d 684, 695, 698 (7th Cir. 2011) (finding standing where plaintiffs complained that a ban on firing ranges within the city, accompanied by a requirement that firearm owners have completed training at a firing range, unconstitutionally impaired their Second Amendment right, emphasizing that "the occasional expense and inconvenience of having to travel to a firing range in the suburbs . . . [is] not the relevant constitutional harm"); *Dearth v. Holder,* 641 F.3d 499, 502-03 (D.C. Cir. 2011) (finding standing where a regulation prevented plaintiff from legally obtaining a firearm in the United States at all). The plaintiffs in this case do not allege such an injury. In fact, at least one of them has been able to purchase a handgun since the beginning of this litigation.[3]

Because the challenged laws do not burden the plaintiffs directly, and because the plaintiffs are not prevented from acquiring the handguns they desire, they do not allege an injury in fact.

[3] For the same reason, *Doe v. Bolton,* 410 U.S. 179 (1973), which the plaintiffs cite in arguing that a restriction in distribution channels constitutes an injury in fact, is distinguishable. As in *Dearth* and *Ezell,* the challenged law in *Doe* prevented the plaintiff from exercising a constitutional right.

2.

Even if the plaintiffs could demonstrate injury in fact, they must still establish that their alleged injury is traceable to the challenged laws.[4] The plaintiffs contend that the district court erred in finding that they failed to do so. The plaintiffs allege that their injury stems from an inability to obtain their firearms from a store in Virginia, which inhibits them from obtaining the handguns they want in the manner they desire. The plaintiffs argue that the associated burden and expense is a direct consequence of the challenged laws.

As the district court noted, however, any injury to the plaintiffs is caused by decisions and actions of third parties not before this court rather than by the laws themselves. For this reason, they face an uphill battle in establishing traceability. "[W]hen a plaintiff is not the direct subject of government action, but rather when the 'asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else,' satisfying standing requirements will be 'substantially more difficult.'" *Frank Krasner Enters., Ltd. v. Montgomery County,* 401 F.3d 230, 234-35 (4th Cir. 2005) (quoting *Lujan,* 504 U.S. at 562).

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[4] Like the district court, the plaintiffs focus on the element of traceability. Because we agree with the district court that traceability is absent, we do not reach the separate requirement of redressability.

In *Krasner,* a gun show promoter and a gun show exhibitor sought to challenge a law that would revoke a subsidy from any venue that allowed the display or sale of guns on site. *Id.* at 232. In response to the law, the venue in which the gun show promoter had regularly leased space declined to renew its lease. *Id.* We determined that the plaintiffs could not establish traceability, as the "purported injury . . . is not directly linked to the challenged law because an intermediary . . . stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain." *Id.* at 236.

In challenging laws that do not apply directly to would-be handgun purchasers, Lane and the Wellings are in a similar posture to that of the plaintiffs in *Krasner.*[5] As was true there, the costs the plaintiffs complain of are not traceable to the laws they challenge, but to the FFLs that charge transfer fees. *See Krasner,* 401 F.3d at 232; *see also San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1130 (9th Cir. 1996) (holding that plaintiffs lacked standing to

[5] The plaintiffs aver that if they take possession of handguns in Virginia, they will be arrested and prosecuted. Whether or not this is true, the law prohibits FFLs from conveying the handguns to the plaintiffs in Virginia in the first place. Moreover, the plaintiffs' attempts to analogize this case to *Dearth,* 641 F.3d 499, are unavailing. In that case, the law at issue precluded the plaintiff from purchasing a firearm altogether. *Id.* at 504. The standing question in *Dearth* was whether the plaintiff alleged an injury in fact; traceability was not at issue. *Id.*

challenge legislation that, by banning certain guns, resulted in dealers raising prices on guns and ammunition the plaintiffs wished to purchase, because "nothing in the Act directs manufacturers or dealers to raise the price of regulated weapons."); *cf. Common Cause v. Dep't of Energy,* 702 F.2d 245, 251 (D.C. Cir. 1983) (noting that "where injury is alleged to occur within a market context, the concepts of causation and redressability become particularly nebulous and subject to contradictory, and frequently unprovable, analyses"). Nothing in the challenged legislation or regulations directs FFLs to impose such charges. Because any harm to the plaintiffs results from the actions of third parties not before this court, the plaintiffs are unable to demonstrate traceability.

B.

The plaintiffs argue that even if Lane and the Wellings lack standing, SAF should still be able to bring this action.[6] In determining whether an

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[6] Because Lane and the Wellings do not have standing to sue, it follows that SAF does not have associational standing. An association has standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). SAF fails the first prong of *Hunt*'s associational standing test. Thus, if SAF were to have standing, it would be as a result of independent injury to it as an organization.

organization has standing, we must conduct the same inquiry as in the case of an individual. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378 (1982).

An organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission. *See id.* at 379. For instance, in *Havens,* an organization dedicated to promoting equal opportunity in housing sued a real estate company that allegedly practiced racial steering. Because the defendant's alleged practices "perceptibly impaired [the organization's] ability to provide counseling and referral services for low- and moderate-income homeseekers," a key component of the plaintiff organization's mission, that plaintiff suffered an injury in fact. *Id.*

The plaintiffs analogize SAF's position to that of the organization in *Havens.* Part of the harm to the organization in *Havens* took the form of a drain on its resources, and here the plaintiffs likewise assert that SAF has been injured because its "resources are taxed by inquiries into the operation and consequences of interstate handgun transfer provisions." Appellants' Br. at 33.

This "mere expense" to SAF does not constitute an injury in fact, however. Although a diversion of resources might harm the organization by reducing the funds available for other purposes, "it results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices." *Fair Emp't Council of Greater Washington, Inc. v. BMC*

Mktg. Corp., 28 F.3d 1268, 1276 (D.C. Cir. 1994). To determine that an organization that decides to spend its money on educating members, responding to member inquiries, or undertaking litigation in response to legislation suffers a cognizable injury would be to imply standing for organizations with merely "abstract concern[s] with a subject that could be affected by an adjudication." *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 40 (1976); *see BMC Mktg.,* 28 F.3d at 1277; *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees,* 19 F.3d 241, 244 (5th Cir. 1994) (noting that finding standing for an organization that redirects some of its resources to litigation and legal counseling in response to actions of another party would "impl[y] that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another"). Such a rule would not comport with the case or controversy requirement of Article III of the Constitution.

We therefore conclude that neither SAF nor the individual plaintiffs have standing.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MICHELLE LANE, et al., Plaintiffs, VS. ERIC HOLDER, et al., Defendants.	)))))))	Civil No. 11-503 July 15, 2011

MOTIONS HEARING

* * *

[25] THE COURT: Thank you. Anyone else?

All right. Let the record reflect this matter is before the Court on the plaintiffs' motion for [26] preliminary injunction, and this is a case involving Ms. Lane's attempt to purchase a weapon in Virginia for transfer to her home in Washington, D.C. and a claim brought by the Second Amendment Foundation, Incorporated.

The issues are whether the Court should grant Ms. Lane's and Second Amendment Foundation's, Matthew Welling and Amanda Welling's motion for preliminary judgment when the plaintiffs allege that the balance of harm is in plaintiffs' favor because of their inability to obtain guns in the District of Columbia, and they will prevail on the merits because they have a constitutional rights under the Second Amendment to bear arms and the federal law at issue

in this case cannot pass strict scrutiny and a preliminary injunction would serve the public interest.

I think this case turns on standing, and I'm going to deny the preliminary injunction because plaintiffs lack standing to bring this suit. They lack standing because they cannot prove causation and plaintiffs' injury here, if any is caused by independent third parties who are not joined in this case and over whom the Court cannot exercise control.

This case involves two federal laws, 18 United States Code Section 922(b)(3) and 28 – I'm sorry, 27 CFR 478.99 as well as the District of Columbia [27] Regulations – Means For Regulation, Title 24 Section 2230.3(b)(f) and Virginia Code 18.2-308.2:2.

All these regulations and laws deal with the sale of guns and transfer of guns in interstate commerce respective of the states.

The plaintiffs are all D.C. residents and apparently Ms. Lane ordered two handguns from a licensed federal firearms dealers in Lorton, Virginia. And under the law she cannot take possession of the handguns at least at the time of her purchase because the lone D.C. federal firearms licensee, Mr. Charles Sykes closed. He was out of business at the time.

Ms. Amanda Welling and Matthew Welling would like to receive a gun from Texas from Ms. Welling's father but not able to do so because there is no current D.C. federal firearms licensee. And Second

Amendment Foundation is an organization that has members in Virginia and the District of Columbia who allegedly are adversely affected by the federal laws and advocates on behalf of its members.

The standard for injunction is well known. And what is sought here is a mandatory affirmative injunction which is an extraordinary remedy. And granting an injunction in the first instance is an equitable remedy that is an extraordinary remedy.

[28] And there are four key points that have to be established under the *Winter versus Natural Resources Defense Council*, Supreme Court of United States.

First is that the plaintiff is likely to succeed on the merits. Second, that she is likely to suffered irreparable harm in the absence of preliminary relief. Third, the balance of equities tips in her favor; and four, an injunction is in the public interest.

The Fourth Circuit case is called *The Real Truth About Obama* and, the Court has to balance the plaintiff's claim of injury against the effect of granting or withholding the injunction, particularly as to the effect it will have on the public interest.

In this case, the plaintiffs cannot show standing or causation. The complaint here and plaintiffs would have to establish concrete personal injuries which must be fairly traceable to or cause by the defendant's conduct. And the injury must likely be redressed if

relief sought is granted under *Lujan*, that's L-U-J-A-N *versus Defenders of Wildlife*.

It's what's called a traceable requirement that insures that it's likely the plaintiff's injury was caused by the challenged conduct of the defendant and not by the independent action of third parties not before the Court, under *The Friends of Farrell Parkway*. That's [29] F-E-R-R-E-L-L *Parkway versus Stasko*, S-T-A-S-K-O from the Fourth Circuit.

And additionally when plaintiff is not the object of the Government action that challenges standing, it's very difficult to establish. Causation has to turn on the unfettered choices made by independent actors not before the Court and whose control are broad and legitimate discretion the courts cannot presume either to control or predict is generally insufficient.

So in this case, what we're talking about is the absence of a licensed federal firearm dealer in the District of Columbia, not an outright ban on purchase of weapons from out-of-state residents, because as counsel acknowledges, it is possible to buy a weapon in another state. It requires you to purchase the weapon in Virginia from the federally licensed firearms dealer. Then that weapon has to be transferred to a federally licensed firearm dealer in Washington, D.C., go through whatever process the District of Columbia has including ballistic testing before it's actually delivered to the purchaser.

So it seems to me what we're talking here is the action of the independent third party. It's not the

federal law that's barring Ms. Lane or Ms. Welling from obtaining a weapon. It's not the District of Columbia [30] and it's certainly not the Commonwealth of Virginia because our firearms dealer is prepared to make this sale.

So in this case, I'm going to deny the motion because plaintiffs are unable to prove the injury is fairly traceable to or caused by the federal firearms laws.

I understand the plaintiffs' position that the weapons regulation as it relates to firearms are to be comparable to that of the way transfers of shotguns and rifles is handled by federal law. But I think that argument belongs before Congress, not before the District Court, specifically the plaintiffs are challenging 18 United States Code Section 922(b) which states that, quote, "It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer or licensed collector to sale or deliver any firearm", end quote.

Plaintiffs are not licensed importers, manufacturers, dealers, or collectors. They are gun purchasers.

So, as they are challenging statutes and regulations that do not address their claims, their burden is very high. And additionally as I've stated earlier, in order to challenge a federal law and to seek a mandatory injunction, a great deal more would have to [31] be shown, and it has not been shown here.

So, for those reasons it seems to me that the law does not ban handgun sales in the District of Columbia. It does not ban handgun sales in Virginia.

And the plaintiff acknowledges that the briefs were focused on the old standard for injunction, but I do not have to reach the issue of injunction because in the absence of standing it is not appropriate for me to reach that question in any event.

I'm going to deny the District of Columbia's motion to severe because the matter is moot, and the case is now dismissed because plaintiffs lack standing to suit.

Thank you.

We're in recess.

(Proceeding concluded at 11:27 a.m.)

[Certificate Of Reporter Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Michelle Lane, et al., Plaintiffs, v. Eric Holder, Attorney General of the United States of America, *et al*., Defendants.	)))))))))	CIVIL ACTION NO. 1:11cv503

ORDER

THIS MATTER is before the Court on Plaintiffs Michelle Lane, Amanda Welling, Matthew Welling, and the Second Amendment Foundation's Motion for Preliminary Injunction. (Dkt. No. 16.) For the reasons stated in open court on July 15, 2011, it is hereby

ORDERED that Plaintiffs' Motion for Preliminary Injunction is DENIED. It is further

ORDERED that this matter is DISMISSED, and this case is now administratively closed. It is further

ORDERED that all Motions in this case are DENIED AS MOOT.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 15th day of July, 2011.

Alexandria, Virginia

/s/
Gerald Bruce Lee
United States District Judge

FILED: February 26, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1847
(1:11-cv-00503-GBL-TRJ)

MICHELLE LANE; SECOND AMENDMENT FOUNDATION, INC.; MATTHEW WELLING; AMANDA WELLING

Plaintiffs-Appellants

v.

ERIC H. HOLDER, JR., Attorney General of the United States; W. STEVEN FLAHERTY, Superintendent, Virginia State Police

Defendants-Appellees

and

DISTRICT OF COLUMBIA

Defendant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Duncan and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

MICHELLE LANE, et al.	)	Case No.
Plaintiffs,	)	1:11-CV-503-GBL/TRJ
v.	)	DECLARATION OF MICHELLE LANE
ERIC HOLDER, et al.,	)	
Defendants.	)	

DECLARATION OF MICHELLE LANE

I, Michelle Lane, am competent to state and declare the following based on my personal knowledge:

1. I currently reside in the District of Columbia.

2. I am over the age of 21, am not under indictment, have never been convicted of a felony or misdemeanor crime of domestic violence, am not a fugitive from justice, am not an unlawful user of or addicted to any controlled substance, have not been adjudicated a mental defective or committed to a mental institution, have not been discharged from the Armed Forces under dishonorable conditions, have never renounced my citizenship, and have never been the subject of a restraining order relating to a child or an intimate partner. I hold a valid Utah permit to carry a concealed handgun.

3. On April 23, 2011, I ordered two handguns from a licensed federal firearms dealer in Lorton,

Virginia: a Kahr K9 Elite, and Ruger LCR. (The complaint in this case read April 25 as the date on which I ordered the handguns, but the correct date is April 23). Prior to purchasing these handguns, I verified with the District of Columbia's Metropolitan Police Department that both handguns were legal for me to possess in the District of Columbia, as I intend to do for home self-defense. I am fully qualified to register a handgun in the District of Columbia, and in fact, had previously done so, but I found that particular handgun uncomfortable to use and do not believe it would be useful to me in case of an emergency.

4. In compliance with the law, I asked that the Lorton gun dealer transfer the handguns, upon their arrival, to Charles Sykes. I understood from my dealings with the Metropolitan Police Department that Sykes is the only licensed District of Columbia gun dealer who could then transfer me the handguns. I understood that Sykes would charge me $125 per handgun to accomplish the transfer.

5. On April 28, 2010, Charles Sykes contacted me. Sykes told me he was forbidden from accepting any more handguns for transfer to District residents because he had lost his lease.

6. I find it burdensome and expensive to make multiple trips between gun stores outside the District of Columbia, the police station, and Sykes's office (or any other location to which he would move) inside the District, just to purchase a handgun. I also find it burdensome and expensive to pay the costs of transferring guns from the out-of-District stores to Charles

Sykes, and then to pay Sykes's $125 transfer fee, just to buy a handgun.

7. But for the various rules and regulations that forbid me from doing so, I would take possession of the two handguns I had ordered directly from the Lorton store. I would comply with all other federal, state, and District firearms transfer laws, including the mandatory background check, and register my handguns in full compliance with District of Columbia law. Additionally, in the absence of restrictions on the acquisition of handguns from out-of-state, I would participate more frequently in the market for handguns.

8. I also understand that in order to complete the acquisition of these handguns, I must fill out a form on which I declare my state of residence, the District of Columbia being considered a state for these purposes. I am unwilling to provide a false answer on that form. I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 17 day of June, 2011.

/s/ [Illegible]
Michelle Lane

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHELLE LANE, et al.	)	Case No.
Plaintiffs,	)	1:11-CV-503-GBL/TRJ
v.	)	DECLARATION OF AMANDA WELLING
ERIC HOLDER, et al.,	)	
Defendants.	)	

DECLARATION OF AMANDA WELLING

I, Amanda Welling, am competent to state and declare the following based on my personal knowledge:

1. I currently reside in the District of Columbia.

2. I am over the age 21, am not under indictment, have never been convicted of a felony or misdemeanor crime of domestic violence, am not a fugitive from justice, am not an unlawful user of or addicted to any controlled substance, have not been adjudicated a mental defective or committed to a mental institution, have not been discharged from the Armed Forces under dishonorable conditions, have never renounced my citizenship, and have never been the subject of a restraining order relating to a child or an intimate partner.

3. Several homes on the Capitol Hill block where I live with my husband and infant son have been burglarized in recent years. We have experienced theft

from our patio and car. I am concerned for our family's safety, and want to have a handgun at our home for self-defense. We would like to accept the offer of my dad, David Slack of Texas, to gift us a handgun for our use in home self-defense. I have verified that the handgun, a Glock 19, is legal for us to possess in Washington, D.C. My dad would transfer the handgun to me through a federal licensee in Virginia near our home. In case of emergency, my husband could use the handgun as well.

4. I find it burdensome and expensive to make multiple trips between gun stores outside the District of Columbia, the police station, and Charles Sykes's office (or any other location to which he would move) inside the District, just to purchase a handgun. I also find it burdensome and expensive to pay the costs of transferring guns from out-of-state federal firearms licensee to Charles Sykes, and then to pay Sykes's $125 transfer fee, just to acquire a handgun.

5. But for the various rules and regulations that forbid me from doing so, I would take possession of the handgun my dad would gift me from a Virginia federal firearms licensee near our home. I would comply with all other federal, state, and District firearms transfer laws, including the mandatory background check, and register my handgun in full compliance with District of Columbia law. While the handgun from my dad would be a welcome addition in our house, I would participate more frequently in the market for handguns in the absence of restrictions on the acquisition of handguns from out-of-state.

6. I also understand that in order to complete the acquisition of a handgun from a federal licensee, I must fill out a form on which I declare my state of residence, the District of Columbia being considered a state for these purposes. I am unwilling to provide a false answer on that form.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 19th day of June, 2011.

/s/ Amanda Welling
Amanda Welling

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHELLE LANE, et al.	)	Case No.
Plaintiffs,	)	1:11-CV-503-GBL/TRJ
v.	)	DECLARATION OF MATTHEW WELLING
ERIC HOLDER, et al.,	)	
Defendants.	)	

DECLARATION OF MATTHEW WELLING

I, Matthew Welling, am competent to state and declare the following based on my personal knowledge:

1. I currently reside in the District of Columbia.

2. I am over the age of 21, am not under indictment, have never been convicted of a felony or misdemeanor crime of domestic violence, am not a fugitive from justice, am not an unlawful user of or addicted to any controlled substance, have not been adjudicated a mental defective or committed to a mental institution, have not been discharged from the Armed Forces under dishonorable conditions, have never renounced my citizenship, and have never been the subject of a restraining order relating to a child or an intimate partner.

3. Several homes on the Capitol Hill block where I live with my wife and infant son have been burglarized in recent years. We have experienced theft from our patio and car. I am concerned for our

family's safety, and want to have a handgun at our home for self-defense. We would like to accept the offer of my father-in-law, David Slack of Texas, to gift us a handgun for our use in home self-defense. I have verified that the handgun, a Glock 19, is legal for us to possess in Washington, D.C. Slack would transfer the handgun to my wife Amanda through a federal licensee in Virginia near our home. In case of emergency, I could use the handgun as well.

4. I find it burdensome and expensive to make multiple trips between gun stores outside the District of Columbia, the police station, and Charles Sykes's office (or any other location to which he would move) inside the District, just to purchase a handgun. I also find it burdensome and expensive to pay the costs of transferring guns from out-of-state federal firearms licensee to Charles Sykes, and then to pay Sykes's $125 transfer fee, just to acquire a handgun.

5. While the handgun from my father-in-law would be a welcome addition in our house, I would participate more frequently in the market for handguns in the absence of restrictions on the acquisition of handguns from out-of-state.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 19th day of June, 2011.

/s/ Matthew B. Welling
Matthew Welling

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

MICHELLE LANE, et al.	)	Case No.
Plaintiffs,	)	1:11-CV-503-GBL/TRJ
v.	)	DECLARATION OF JULIANNE VERSNEL
ERIC HOLDER, et al.,	)	
Defendants.	)	

DECLARATION OF JULIANNE VERSNEL

I, Julianne Versnel, am competent to state and declare the following based on my personal knowledge:

1. I am the Director of Operations for the Second Amendment Foundation, Inc. ("SAF").

2. SAF is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including Virginia and the District of Columbia. The purposes of SAF include promoting the exercise of the right to keep and bear arms; and education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.

3. Many of SAF's members and supporters purchase handguns for traditional lawful purposes, including self-defense.

4. As SAF's members and supporters in Virginia, the District, and throughout the United States participate in the market for handguns, they are also adversely impacted by the additional costs and loss of choice imposed by interstate handgun transfer prohibitions. Owing to SAF's mission, SAF's resources are taxed by inquiries into the operation and consequences of interstate handgun transfer prohibitions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 20th day of June 2011.

/s/ Julianne Versnel
Julianne Versnel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHELLE LANE, et al.	)	Case No.
Plaintiffs,	)	1:11-CV-503-GBL/TRJ
	)	DECLARATION OF
v.	)	DAVID SLACK
ERIC HOLDER, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF DAVID SLACK

I, David Slack, am competent to state and declare the following based on my personal knowledge:

1. I currently reside in Texas, and lawfully own various firearms.

2. I am concerned for the safety of my daughter, Amanda Welling, and the safety of her family in Washington, D.C. I want Amanda and her husband, Matt, to be able to defend themselves and my grandson in their Capitol Hill home. In order to help them exercise their right of self-defense. I would like to transfer to Amanda one of my handguns, a Glock 19.

3. I would transfer the handgun through a federal firearms licensee in Virginia, across the river from Washington, D.C., for delivery to my daughter Amanda. I refrain from doing so only because Amanda's residence in our nation's capital makes it legally impossible for her to take possession of the handgun from a federal firearms licensee in Virginia.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 29 day of May 2011.

/s/ David Slack
David Slack

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18 U.S.C. § 922(b) provides in pertinent part:

It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver –

*   *   *

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

*   *   *