

No. 11-1847

*In The United States Court of Appeals
For The Fourth Circuit*

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

Plaintiffs-Appellants,

v.

ERIC HOLDER, JR., W. STEPHEN FLAHERTY, AND
DISTRICT OF COLUMBIA,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Eastern District of Virginia
Hon. Gerald Bruce Lee, District Judge
(1:11-CV-00503-GBL-TRJ)

APPELLANTS' BRIEF

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October 3, 2011

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 11-1847 Caption: Michelle Lane, et al. v. Eric Holder, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michelle Lane who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on August 23, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Alan Gura
(signature)

August 23, 2011
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 11-1847 Caption: Michelle Lane, et al. v. Eric Holder, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Amanda Welling who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
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No. 11-1847 Caption: Michelle Lane, et al. v. Eric Holder, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Matthew Welling who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
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/s/ Alan Gura
(signature)

August 23, 2011
(date)

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APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants (“Plaintiffs”) seek declaratory and injunctive relief from laws barring the acquisition of handguns outside one’s state of residence. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

On July 15, 2011, the District Court announced that it would dismiss the action and enter judgment for the Defendants on grounds that they did not cause Plaintiffs’ injury. Joint Appendix (“JA”) 209. An order denying Plaintiffs’ preliminary injunction motion and dismissing the case was entered that day. JA 180-81.

This Court has jurisdiction per 28 U.S.C. §§ 1291, 1292 in this appeal from a final judgment, and from an order denying injunctive relief. Plaintiffs timely noticed their appeal on July 29, 2011. JA 182.

STATEMENT OF ISSUES

1. When state actors enforce laws barring individuals from engaging in specific transactions, do individuals whose transactions are thus thwarted have standing to challenge the constitutionality of the laws to which they are subjected?

2. Does the Second Amendment guarantee a responsible, law-abiding individual the right to acquire handguns outside her state of residence?

STATEMENT OF THE CASE

The relief sought by Plaintiffs in this case is exceedingly narrow. Plaintiffs—responsible, law abiding-people—seek only to acquire handguns from federally-licensed firearms dealers on the same terms currently governing the acquisition of rifles and shotguns. Provided they comply with all federal, state, and local laws, individuals are free to take possession of rifles and shotguns from federally-licensed firearms dealers anywhere in the United States.

No reason, much less a constitutionally-adequate reason, exists to confine lawful handgun acquisition to an individual's state of residence. That much is clearly demonstrated on the present facts, involving residents of a "state" that demands police pre-approval for the acquisition of firearms from any source. If licensed firearms dealers can be trusted to comply with complex laws regulating the sale and possession of long arms, they can certainly be trusted to demand the police authorization forms often required to transfer handguns prior to releasing handguns to their customers. After all, if Virginia dealers can

honor rifle transfer authorizations issued by the District of Columbia police, there is no reason to bar them from honoring identical certificates issued by the District police for handguns.

The District of Columbia responded to this litigation by repealing its version of the interstate handgun transfer ban, declaring the practice a needless impediment to the exercise of Second Amendment rights. The Court should bring the remaining Defendants into constitutional compliance with respect to the regulation of handgun sales.

Although the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) did not overturn all gun laws, neither did *Heller* challenge the only gun laws in the land that violate the Second Amendment. Not every pre-*Heller* gun law is constitutional. The interstate handgun transfer ban contradicts the common market principles underlying our national union, adding significant costs, limiting selection and competition, and imposing a severe burden on handgun consumers without adequate justification.

When this case was filed, the interstate handgun transfer ban operated to bar all retail handgun acquisition by Washington, D.C.,

residents, as no federally-licensed firearms dealers willing to transfer handguns to the public remained open for business in that city. The lower court mistook this severe consequence of the challenged laws for the injury underlying Plaintiffs' claim. Accordingly, the court dismissed the case for lack of standing, on the theory that Defendants are not responsible for Washington, D.C.'s dearth of firearms retailers. JA 209, l. 16-22.

Plaintiffs might vigorously contest the notion that the District of Columbia's government lacks responsibility for the current state of its local firearms market, but the complaint in this case makes clear that Plaintiffs' argument is not with Washington, D.C.'s lack of retailers. Rather, Plaintiffs wish to access the national market for handguns wherever they might live. They seek to engage in specific interstate handgun transactions that Defendants directly frustrate. An Article III controversy is readily apparent on these uncontested facts.

Plaintiffs Michelle Lane and the Second Amendment Foundation, Inc. ("SAF") brought this action on May 10, 2011, seeking injunctive and declaratory relief against Defendants-Appellees Eric Holder, Jr. and W. Stephen Flaherty's enforcement of 18 U.S.C. § 922(b)(3), 27

C.F.R. § 478.99, and Va. Code Ann. § 18.2-308.2:2, respectively, to the extent these laws prohibit the acquisition of handguns by out-of-state residents. On May 27, 2011, Lane and SAF amended their complaint to request relief against the District of Columbia's enforcement of former D.C.M.R. § 24-2320.3(b) and (f), which likewise imposed an interstate handgun transfer ban. With that amendment, Plaintiffs-Appellants Amanda and Matthew Welling joined the litigation. JA 8-19.

On June 20, 2011, Plaintiffs moved for a preliminary injunction. JA 20. The parties agreed that the case raised purely questions of law, and jointly moved to dispense with discovery. JA 33. In seeking preliminary injunction, Plaintiffs sought to advance the hearing to effectively function as a trial on the merits pursuant to Fed. R. Civ. Proc. 65(a)(2), and thus submitted a proposed order bracketing expiration of the requested relief. JA 32. On July 6, 2011, the District of Columbia moved to sever Plaintiffs' claim against it, and transfer the claim to the United States District Court for the District of Columbia. JA 5.

On July 15, 2011, the District Court dismissed the case for lack of standing. JA 180-81. Plaintiffs timely noticed their appeal. JA 182. On September 23, 2011, the District of Columbia repealed its version of the

interstate handgun transfer ban, mooted the dispute between it and the Plaintiffs. *See infra*. On September 27, 2011, Plaintiffs moved to dismiss the District of Columbia as a party to this appeal.

STATEMENT OF FACTS

The Interstate Handgun Transfer Prohibitions

1. *Federal Law*

Title 18 U.S.C. §§ 922(a)(3) and (5) forbid individuals from transporting into or receiving in their state of residence any firearm acquired outside that state since December 16, 1968, except for firearms acquired by bequest or intestate succession, or pursuant to a transfer from a federally-licensed dealer that complies with 18 U.S.C. § 922(b)(3). For purposes of these provisions, the District of Columbia is a “state.” 18 U.S.C. § 921(a)(2).

Title 18, U.S.C. § 922(b)(3) and 27 C.F.R. § 478.99 bar licensed federal firearms dealers from transferring firearms to individuals who do not reside within the state in which the dealers’ place of business is located. A significant exception to this prohibition allows a dealer to transfer rifles and shotguns to individuals residing out-of-state

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) . . .

18 U.S.C. § 922(b)(3). Title 27 C.F.R. § 478.96(c)(1) reiterates that interstate rifle or shotgun transactions are lawful provided:

- (i) The purchaser meets with the licensee in person at the licensee's premises to accomplish the transfer, sale, and delivery of the rifle or shotgun;
- (ii) The licensed importer, licensed manufacturer, or licensed dealer complies with the provisions of § 478.102; [requiring a background check]
- (iii) The purchaser furnishes to the licensed importer, licensed manufacturer, or licensed dealer the firearms transaction record, Form 4473, required by § 478.124; and
- (iv) The sale, delivery, and receipt of the rifle or shotgun fully comply with the legal conditions of sale in both such States.

Pursuant to 27 C.F.R. § 478.96(c)(2),

[A]ny licensed manufacturer, licensed importer, or licensed dealer is presumed, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both such States.

By operation of these provisions, individuals who want to acquire handguns at retail, or from individuals in other states, may only take

delivery of such handguns from a federal firearms licensee in the state wherein they reside. But individuals may purchase rifles and shotguns freely across state lines provided they do so in person, comply with local laws, fill out standard federal forms, and undergo a background check.

2. *Virginia Law*

Va. Code Ann. § 18.2-308.2:2 bars a firearms dealer from transferring handguns, but not rifles or shotguns, to individuals who do not reside in Virginia. However, Virginia law does not prohibit nonresidents from carrying or possessing handguns. No law bars the otherwise-lawful open-carrying of handguns in Virginia by nonresidents. Virginia allows individuals to transport concealed handguns without regard to residence. Va. Code Ann. §§ 18.2-308(B)(5), (10). Virginia also licenses the concealed carrying of handguns for self-defense by non-residents, Va. Code Ann. § 18.2-308(P1), and honors handgun carry permits issued by numerous states. *See* http://www.vsp.state.va.us/Firearms_Reciprocity.shtm (last visited October 2, 2011). In sum, Virginia allows nonresidents to do anything with handguns that its own residents might do, except take retail delivery of one.

3. *District of Columbia Law*

The District of Columbia requires that all firearms be registered, D.C. Code § 7-2502.01(a), but does not prohibit the importation of firearms. It requires only 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],”¹ and “[i]n all other cases, an application for registration shall be filed immediately after a firearm is brought into the District” within 48 hours of providing notice to the police department. D.C. Code § 7-2502.06(a). Accordingly, firearms dealers outside the District of Columbia may (and do) transfer rifles and shotguns to District residents upon presentation of approved registration certificates.²

When Plaintiffs brought suit, a different rule prevailed in the District of Columbia for handguns. Although District law specifically allows a handgun buyer to transport handguns “from the place of

¹District law forbids individual-to-individual firearms transfers. D.C. Code § 7-2505.01.

²Individuals relocating to the District may import firearms they acquired as residents of other states. D.C. Code § 7-2502.06(a),

purchase to his or her home,” D.C. Code § 22-4505, a Municipal Regulation entitled, “Procedures and Requirements for Registration of a Pistol for the Purpose of Self-Defense Within Applicant’s Home,” provides additional, superceding restrictions. D.C.M.R. § 24-2320.1. At the time Plaintiffs sued the District of Columbia, a handgun registration applicant was required to “[p]resent the Firearm Registration application to a licensed firearm dealer, whose assistance is necessary to complete the application.” D.C.M.R. § 24-2320.3(b) (2010). A “licensed firearm dealer” for purposes of this provision was, and remains, a dealer licensed by the District of Columbia. D.C.M.R. § 24-2399.

Having obtained the signature of an in-District dealer on the application form, the prospective handgun purchaser was required to return the form to the District’s police for approval. Once the handgun consumer obtained the required police seal on the handgun registration application, the consumer was required to

[p]resent the sealed Firearm Registration application to the licensed firearms dealer and take delivery of the applicant’s pistol pending completion of a ballistic identification procedure, *or, in the case of a purchase from a firearms dealer located in another jurisdiction, 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 pending completion of a ballistic identification procedure.

D.C.M.R. § 24-2320.3(f) (2010) (emphasis added).

Accordingly, to obtain a handgun in the District of Columbia, an individual was required to: (1) obtain a registration application form from the police; (2) shop for a handgun outside the District (no retail gun stores exist in the District); (3) “have that [out-of-District] dealer transport” the handgun to an in-District licensee; (4) meet the in-District licensee to complete the initial paperwork; (5) return the paperwork to the police and await approval; (6) return to the in-District licensee to take the handgun; and (7) return to the police with the handgun for ballistics testing. Buying a handgun thus required three trips to the police station, two trips to the in-District licensee, one trip to an out-of-District gun store, the costs of shipping the gun to the in-District licensee, and that licensee’s additional transfer fee—in addition to the other fees the District charges for registering and owning a gun.

Prior to the filing of the complaint, only one federal firearms licensee, Charles Sykes, was in the business of effectuating lawful

handgun transfers to Washington, D.C. residents. Sykes charged a fee of \$125 per handgun transfer. JA 23, ¶ 4. Mr. Sykes had lost his lease in the District of Columbia and accordingly, was barred from effecting handgun transfers for District of Columbia residents. JA 23, ¶5.³ As a result, by operation of 18 U.S.C. § 922(b)(3), 27 C.F.R. § 478.99, and former D.C.M.R. § 24-2320, District of Columbia residents were unable to lawfully acquire handguns other than by inheritance.

On the eve of the lower court argument, the District of Columbia filed a declaration averring that it would lease Sykes space to conduct his business inside the District's police headquarters. JA 176, ¶4. 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. JA 178-79.

On August 19, 2011, the District of Columbia's Police Commissioner published a notice of Emergency and Proposed Rulemaking, amending

³Sykes was unable to obtain a location that complied with the District's zoning restrictions for firearms transfers.

D.C.M.R. § 24-2320.3(b) and (f) to “clarify” that District residents are forbidden from acquiring handguns outside the District, and must ship any handguns purchased outside the District to an in-District dealer for final transfer, only if required by federal law: “[s]hould the federal law change, then that requirement will no longer be applicable to any District firearms registration applicant.” 58 D.C. Register, No. 33, at 007572-007573 (August 19, 2011), available at <http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?noticeid=1544548> (last visited October 2, 2011). “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, D.C.M.R. § 24-2320.3(b), 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 pending completion of a ballistic identification procedure *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, where the applicant will take delivery of the pistol pending completion of a ballistic identification procedure.*

D.C.M.R. § 24-2320.3(f) (emphasis added).

On September 23, 2011, the amendments to D.C.M.R. § 24-2320.3 were made permanent. 58 D.C. Register No. 38, at 008240-008241 (September 23, 2011), available at <http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?noticeid=1742040> (last visited October 2, 2011).

Accordingly, District of Columbia law no longer requires that individuals purchasing handguns outside the District complete their application forms in the District, nor does it require that the final transfer be accomplished by an in-District dealer unless federal law independently imposes that requirement.

Plaintiffs' Frustrated Efforts to Obtain Handguns

Plaintiffs Michelle Lane, Amanda Welling, and Matthew Welling reside in the District of Columbia. JA 22, ¶1; 25, ¶1; 27, ¶1. Plaintiff Second Amendment Foundation, Inc. ("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 the District of Columbia and Virginia. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control. JA 29, ¶2. Many of SAF's members and supporters purchase handguns for traditional lawful purposes, including self-defense. JA 29, ¶3.

Michelle Lane, Amanda Welling, and Matthew Welling are all over the age of 21, are not under indictment, have never been convicted of a felony or misdemeanor crime of domestic violence, are not fugitives from justice, are not unlawful users of or addicted to any controlled substance, have not been adjudicated mental defectives or committed to a mental institution, have not been discharged from the Armed Forces under dishonorable conditions, have never renounced their citizenship, and have never been the subject of a restraining order relating to a child or an intimate partner. JA 22, ¶2; JA 25, ¶2; JA 27, ¶2. Ms. Lane holds a valid Utah permit to carry a handgun, which is recognized in

Virginia. JA 22, ¶2; http://www.vsp.state.va.us/Firearms_Reciprocity.shtm (last visited October 2, 2011).

On April 23, 2011, Lane ordered two handguns from a licensed federal firearms dealer in Lorton, Virginia: a Kahr K9 Elite, and a Ruger LCR. Prior to purchasing these handguns, Lane verified with the District of Columbia's Metropolitan Police Department that both handguns were legal for her to possess in the District, as she intends to do. JA 22-23, ¶3. However, Lane was unable to take possession of the handguns, as the District's only federal firearms licensee, Charles Sykes, lost his lease and with it, his ability to transfer handguns to District residents. JA 23, ¶¶4, 5.⁴ But for the interstate handgun transfer prohibitions, Lane would have taken possession of the two handguns she had ordered directly from the Lorton store. JA 23, ¶7. Lane would have complied with all other federal, state, and District firearms transfer laws, including the mandatory background check, and registered her handguns in full compliance with District law. *Id.*

⁴The Bureau of Alcohol, Tobacco, Firearms and Explosives confirmed that Sykes was out of business. http://www.washingtonpost.com/local/districts-only-firearms-dealer-to-move/2011/04/29/AFvAGHHF_story.html (last visited October 2, 2011).

Several homes on the Capitol Hill block where Amanda and Matthew Welling resided with their infant son have been burglarized in recent years. JA 25, ¶3; 27, ¶3. The Wellings have experienced theft from their patio and car. *Id.* Concerned for their family's safety, the Wellings want to have a handgun at home for self-defense. *Id.*⁵

Amanda Welling's father, Texas resident David Slack, shares this concern. Slack wants the Wellings to be able to defend themselves at home, and in order to help them exercise their right of self-defense, he would transfer to Amanda Welling one of his handguns, a Glock 19. JA 31, ¶2. The Wellings would accept the transfer of Slack's handgun, JA 25-26, ¶3; 27-28, ¶3, which Amanda Welling has verified is legal for them to possess. JA 25, ¶3. But for the challenged prohibitions, Slack would transfer the handgun to Amanda Welling through a Virginia federal firearms licensee. JA 31, ¶3; JA 25-26, ¶¶3, 5. Amanda Welling would comply with all other federal, state, and District firearms transfer laws, including the mandatory background check, and register her handgun in full compliance with District law. JA 26, ¶5.

⁵The Wellings have relocated within the District of Columbia and retain their need for handguns as secured by the Second Amendment.

Quite apart from the two handguns Lane ordered in April, and the handgun Slack would send his daughter, Michelle Lane, Amanda Welling, and Matthew Welling would participate more frequently in the market for handguns but for the interstate handgun transfer ban. JA 23, ¶7; JA 25, ¶5; JA 27, ¶5. Plaintiffs 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. JA 23, ¶6; JA 26, ¶4; JA 28, ¶4. They also find it burdensome and expensive to transfer guns from the out-of-District stores to Sykes, and to pay Sykes's \$125 transfer fee, just to buy a handgun. *Id.*

SAF's members and supporters throughout the United States participate in the market for handguns, and are thus also adversely impacted by the additional costs and loss of choice imposed by interstate handgun transfer prohibitions. JA 29-30, ¶4. Owing to its mission, SAF's resources are also directly impacted by the challenged provisions. JA 30, ¶4.

SUMMARY OF ARGUMENT

All four elements required for preliminary injunctive relief are plainly established. Indeed, because the parties agree that the case presents only questions of law and have already offered to dispense with discovery, the case is uniquely suited to accelerated disposition and the entry of a permanent injunction.

An Article III case or controversy is readily manifest. Defendants enforce criminal laws threatening dealers in a heavily-regulated industry with substantial criminal penalties for transferring handguns to out-of-state residents, and also criminalize the Plaintiffs' acquisition of handguns other than through in-state licensed dealers. The notion that Defendants have *nothing* to do with Plaintiffs' inability to acquire handguns outside their state of residence—the injury for which Plaintiffs seek redress—is untenable.

In this circuit, laws burdening the core Second Amendment rights of law-abiding, responsible individuals are subject to strict scrutiny. Moreover, like many courts, this Court looks to established First Amendment frameworks to evaluate Second Amendment questions. And considering that the Second Amendment secures fundamental

rights, laws classifying individuals in their exercise of the right to keep and bear arms are subject to the most exacting standards.

Accordingly, this is a comparatively simple Second Amendment case. Neither the federal government nor Virginia have any interest advising an individual that she may take home her handgun only if it passes through the hands of a middleman within the borders of her city, while she could take possession of other firearms from licensed dealers anywhere else in the land. That much is underscored by the fact that the District of Columbia, where the individual Plaintiffs reside, has abandoned its objection to the transactions and now explicitly permits Plaintiffs to obtain handguns anywhere in the United States.

Whatever interest any government entity has in regulating the purchase of handguns can plainly be satisfied by simply imposing such regulations, without regard to where the transaction occurs—just as the law treats the acquisition of long guns. After all, the law already charges dealers with responsibility for complying with the local laws of *any* jurisdiction in which a long gun customer resides.

And at least from a dealer perspective, there is *no difference* in the District's law with respect to handguns or other firearms. If the purchaser passes federal requirements and presents a D.C. police-approved registration certificate, the firearm can be transferred anywhere in the country in full compliance with District law.

Defendants justified the interstate handgun transfer ban as a means of protecting the interests of localities in having their own gun laws enforced. Yet as the District of Columbia allows out-of-state firearms dealers to provide handguns to its residents upon police approval, the District's interest that Defendants secure by forbidding the practice remains elusive.

On the other hand, the burdens imposed by interstate transfer restrictions on individuals seeking to purchase handguns, in terms of reduced selection, increased costs, and delays, are severe. As Plaintiffs are entitled to enjoy their constitutional rights throughout the United States, the interstate handgun transfer ban must be enjoined.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

Where the appeal from an order on a motion for preliminary injunction “raise[s] only legal questions concerning the existence of subject matter jurisdiction” and related legal interpretation, *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002), review is *de novo*. In any event, “[t]he district court’s order dismissing a case on the grounds of lack of subject matter jurisdiction is a legal determination subject to *de novo* review.” *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 439 (4th Cir. 1999) (citation omitted); *Piney Run Pres. Ass’n v. County Comm’rs*, 268 F.3d 255, 262 (4th Cir. 2001) (standing).

II. DEFENDANTS PLAINLY INJURE PLAINTIFFS BY BARRING THE ACQUISITION OF HANDGUNS ACROSS STATE LINES.

Plaintiffs seek to engage in transactions that Defendants bar by enforcing criminal prohibitions. Defendants’ conduct, in prohibiting the transactions in which Plaintiffs would engage, plainly satisfies all three aspects of standing: injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Indeed, the Supreme Court has repeatedly redressed the specific type of injury alleged by Plaintiffs—a restriction on the range of retailers available to consumers of constitutionally-protected articles. It will not do to claim that A’s inability to transact with B poses no case or controversy because A might instead do business with C. Although the standard of review is *de novo*, the lower court’s refusal to recognize Defendants’ law enforcement activities as causing Plaintiffs’ injury is clearly erroneous.

In holding that Plaintiffs’ injuries are not traceable to Defendants’ law enforcement activities, the lower court did not actually suggest that individuals comply with the criminal law only of their own free will, and that law enforcement officials’ conduct is wholly unrelated to the public’s compliance with the law. Were that so, no criminal prohibition could ever be challenged in an Article III court. Rather, the lower court apparently believed—contrary to the complaint’s plain language and Plaintiffs’ unambiguous argument below—that Plaintiffs were aggrieved by the lack of firearms dealers in the District of Columbia, a situation for which Defendants were not apparently responsible. This might not have been so much an error of law (although it resulted in

legal error), but an error of comprehending Plaintiffs' basic allegations. It might also indicate a confusion between issues of standing, and issues related to the ultimate merits of the case. In any event, reversal is plainly warranted.

Of course Defendants Holder and Flaherty are not responsible for the lack of firearms dealers in Washington, D.C. The District's government does, in fact, have some culpability in the matter, but that topic is absent from the Complaint. Instead, the Complaint alleges that Michelle Lane has two handguns sitting in a Virginia gun store that she cannot pick up and take home because Defendants bar her from taking possession of handguns outside the District of Columbia. JA 10, ¶10; JA 12, ¶17. It alleges that the Wellings would take possession of a handgun in Virginia to be transferred there by Amanda Welling's father, David Slack, but for Defendants' prohibition of that transaction. JA 10, ¶11; JA 12, ¶17.

Beyond the specific details of Lane's two handguns and Slack's gift to his daughter, the Complaint alleges that the challenged provisions "prevent presently-intended firearms purchases from being completed," and "generally, unjustifiably frustrate and make more expensive

Americans’ attempts to obtain the handguns of their choice.” JA 14, ¶23. Expanding on these allegations, Lane and the Wellings each testified that they find it “burdensome and expensive” to make the multiple trips occasioned by compliance with the challenged provisions “just to purchase a handgun,” and they also find it “burdensome and expensive to pay the costs of transferring guns from” the out-of-District dealers to an in-District dealer, “and then to pay [the in-District dealer’s] \$125 transfer fee, just to buy a handgun.” JA 23, ¶6; JA 26, ¶4; JA 28, ¶4.

SAF’s Director of Operations, Julianne Versnel, testified that

[a]s 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.

JA 29-30, ¶4. Handgun consumers throughout the United States have long been frustrated by the interstate handgun transfer ban. The ban’s heightened impact in Washington earlier this year is only the most egregious manifestation of the basic problem: the disruption of the national handgun market, which should operate in the same manner as the market for rifles, shotguns, and other consumer products.

No question exists that barring a firearms transaction is a constitutional injury. *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007), *aff'd sub nom Heller*; *Bach v. Pataki*, 408 F.3d 75, 82-83 (2d Cir. 2005). Most recently, the Northern District of Texas agreed that prospective handgun purchasers had standing to challenge Defendant Holder's enforcement of the federal prohibition against the purchase of handguns by adults aged 18-20:

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, __ F. Supp. 2d ___, No. 5:10-CV-140-C, slip op. at 8 (N.D. Tex. Sept. 29, 2011).

Directly on-point is the D.C. Circuit's recent opinion discussing how Defendant Holder causes Article III injuries to prospective gun purchasers. *Dearth v. Holder*, 641 F.3d 499 (D.C. Cir. 2011). In *Dearth*, an expatriated American and Plaintiff SAF sued Defendant Holder to

overturn the federal prohibition on acquisition of firearms by Americans residing overseas. Impacted individuals could not successfully fill out an ATF Form 4473, required for all retail firearms transactions, because doing so would reveal that they are not entitled to complete the transaction based on their residence status.

The D.C. Circuit upheld Dearth's standing. "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. Holder argued that the government did not actually cause an injury to Dearth because it did not deny him a gun registration akin to that denied in *Heller*, but the D.C. Circuit disagreed: "the Government cannot so easily avoid suit when it has erected a regulatory scheme that precludes Dearth from truthfully completing the application form the Government requires for the purchase of a firearm." *Id.*

Holder also argued that Dearth's injury was conjectural, but the D.C. Circuit rejected this theory, too. "Dearth, moreover, is not alleging merely an 'injury at some indefinite future time;' he claims he presently suffers a cognizable injury to his constitutional rights because the

federal regulatory scheme thwarts his continuing desire to purchase a firearm.” *Dearth*, 641 F.3d at 503 (citation omitted). “[Dearth’s] injury is present and continuing.” *Id.*

Plaintiffs’ standing predicate is identical. Just like *Dearth*, Plaintiffs are barred from purchasing firearms on account of their residence, and the residency restriction is enforced by virtue of their inability to successfully complete Form 4473. JA 13, ¶¶21, 22; JA 24, ¶8; JA 26, ¶6. That Plaintiffs might now complete a *different* set of more expensive and burdensome transactions does not alter their injury in being barred the transactions they seek to perform.

Thus, the number of licensed firearms dealers open for retail business in the District of Columbia, or in any particular state, is irrelevant to the fact that Defendants are prohibiting *the particular transactions* in which Plaintiffs would be engaging. The ultimate availability of *some* handguns (depending on a seller’s willingness to transfer the handgun to an in-state dealer), at greatly added expense, is likewise irrelevant. Consumers enjoy value in the ability to acquire a product where they buy it and where it is offered for sale. As the

Supreme Court explained, in striking down a New York law barring all but licensed pharmacists from selling contraceptives,

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. Servs. Int'l, 431 U.S. 678, 689 (1977) (footnotes omitted); *cf. Doe v. Bolton*, 410 U.S. 179 (1973) (striking down requirement that abortions only be performed in hospitals).

Were the lower court's decision here correct, *Carey* and *Doe* should have been dismissed for lack of standing, because the plaintiffs in those cases could have obtained their contraceptives and abortions from other providers. Of course, it is no answer to plaintiffs complaining that they are restricted to shopping for a good or service in their own state that they can avail themselves of their home state market.

This Court “agree[s] with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.” *United States v. Chester*, 628 F.3d 673, 682 (4th

Cir. 2010) (citations omitted). The concept that distribution restrictions impose constitutional injuries is familiar in First Amendment law.

“[One] is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schad v. Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). Courts understand that retail prohibitions on the sales of First-Amendment-protected articles burden constitutional rights *per se*, imposing upon the government a heavy duty to justify the restrictions. For example, because “laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted.” *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2010). This Court has suggested that it would not tolerate “an unreasonable restriction on the hours of operation” of adult businesses whose wares are protected by the First Amendment. *Chesapeake B & M v. Harford County*, 58 F.3d 1005, 1013 (4th Cir. 1995) (en banc). Were the government to ban the acquisition of books outside one’s state of

residence, a challenge to such a prohibition would not fail for lack of standing based on the number of local book retailers—even if courts were to ultimately uphold the law on grounds that it allowed for ample alternative means of communications, and satisfied a compelling state interest in enforcing local community standards.

Helpfully, the Seventh Circuit has recently had occasion to apply this First Amendment concept in a Second Amendment case. *Ezell v. City of Chicago*, ___ F.3d ___, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011). In *Ezell*, the District Court denied a motion to preliminarily enjoin Chicago’s gun range ban, theorizing that plaintiffs who sought to use gun ranges were only harmed by the added expense of traveling outside the city to do so. The Seventh Circuit reversed.

Here, the judge zeroed in on the occasional expense and inconvenience of having to travel to a firing range in the suburbs, but that’s not the relevant constitutional harm. The plaintiffs contend that the Second Amendment protects the right to maintain proficiency in firearm use—including the right to train at a range—and the City’s complete ban on range training violates this right. They also claim that the range ban impermissibly burdens the core Second Amendment right to possess firearms at home for protection because the Ordinance conditions lawful possession on range training but makes it impossible to satisfy this condition anywhere in the city. If they’re right, then the range ban was unconstitutional when enacted and violates their Second Amendment rights every

day it remains on the books. These are not application-specific harms calling for individual remedies.

Ezell, 2011 U.S. App. LEXIS 14108 at *29.

Plaintiffs' claim is identically situated. To be sure, it would be specious to suggest that banning individuals from engaging in out-of-state commercial transactions only *theoretically* causes them economic injury. And at least *some* of the economic injuries wrought by the interstate handgun sales ban are directly attributable to government action. For example, when the government directs that people transport a handgun to an in-state dealer, that transportation expense and the second dealer's service fees are occasioned only by the government's mandate. But in any event, the operative Complaint speaks of "banning and otherwise burdening" protected firearm transactions, and this the Defendants unquestionably, *directly*, do.

Because the individual Plaintiffs have standing, it is unnecessary to reach the issue of SAF's standing. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977); *Ezell*, 2011 U.S. App. LEXIS 14108 at *23 n.7. However, in the interest of completeness, it bears mention that SAF

easily meet[s] the requirements for associational standing: (1) [its] members would otherwise have standing to sue in their own right; (2) the interests [SAF] seeks to protect are germane to [its] organizational purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual association members in the lawsuit.

Ezell, 2011 U.S. App. LEXIS 14108 at *22 (citing *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 553 (1996); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (other citation omitted). And as “SAF’s resources are taxed by inquiries into the operation and consequences of interstate handgun transfer prohibitions,” JA 30, ¶4, SAF also has organizational standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

Defendants are causing the injury here, which is the inability to engage in interstate handgun transactions. A justiciable case or controversy exists.

III. PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF ALLOWING THE ACQUISITION OF HANDGUNS OUTSIDE AN INDIVIDUAL’S STATE OF RESIDENCE.

To obtain preliminary injunctive relief, parties must establish the following four elements: (1) likelihood of success on the merits, (2) irreparable harm in the absence of relief, (3) a balance of the equities,

and (4) a showing that the injunction would be in the public interest.

The Real Truth About Obama, Inc. v. Federal Election Commission, 575 F.3d 342, 346 (4th Cir. 2009), *reissued*, 607 F.3d 355 (4th Cir. 2010). All four factors are present here.

Owing to the strength of their claim on the merits, and the fact that this case raises only issues of law, Plaintiffs below suggested that the case could be resolved conclusively pursuant to Fed. R. Civ. Proc. 65(a)(2), which “wisely permits the district court in an appropriate case to hear a motion for preliminary injunction and conduct a hearing on the merits at the same time.” *Gellman v. Maryland*, 538 F.2d 603, 604 (4th Cir. 1976) (quoting *Singleton v. Anson County Bd. of Education*, 387 F.2d 349, 351 (4th Cir. 1967) (per curiam)).

Plaintiffs reiterate that request here. Considering the nature of this dispute, remanding the case for discovery and trial would serve no purpose. “Civil rights cases are especially suitable for such simultaneous development.” *Singleton*, 387 F.2d at 351. Prior to Rule 65(a)(2) consolidation, “the parties should normally receive clear and unambiguous notice to that effect either before the hearing commences

or at a time which will still afford the parties a full opportunity to present their respective cases.” *aaiPharma Inc. v. Thompson*, 296 F.3d 227, 234 (4th Cir. 2002) (quoting *Gellman*, 538 F.2d at 604). However, Defendants agreed that the case “presents pure questions of law,” and that “discovery [was] not foreseeable” after the preliminary injunction motion was filed. JA 33. Notably, neither Holder nor Flaherty’s answers demanded a jury trial.

Even where a District Court erroneously failed to provide a losing party with sufficient notice prior to consolidating the injunction hearing with a trial on the merits, this Court entered a final judgment on appeal, where the aggrieved party had a full opportunity to present its claims on appeal in a case raising solely legal questions. “If we were to remand the case, we would likely find ourselves reviewing the district court’s ruling on this issue next year in light of the same record and the same arguments we have before us now.” *aaiPharma Inc.*, 296 F.3d at 235. Likewise, in this case, Defendants have already acknowledged that the case contains no factual issues, and they will have had ample time and the full benefit of this Court’s rules to present their arguments.

A. PLAINTIFFS ARE ENTITLED TO PREVAIL ON THE MERITS, AS THE INTERSTATE HANDGUN TRANSFER BAN IS UNCONSTITUTIONAL.

1. *The Constitution Secures Access to Handguns.*

There is no question that the Second Amendment secures a right to possess functional firearms, including handguns, in the home for self-defense. *Heller, supra*, 554 U.S. 570; *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *see also Patson v. Pennsylvania*, 232 U.S. 138, 143 (1914) (“pistols . . . may be supposed to be needed occasionally for self-defence.”).

The fact that other firearms may be available under terms less onerous than the ones demanded for the acquisition of handguns is irrelevant. The D.C. Circuit dismissed as “frivolous” the notion that handguns can be restricted merely because other firearms are available. *Parker*, 478 F.3d at 400. “It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined – as we have done – that handguns are ‘Arms’ referred to in the Second Amendment, it is not open to the District to ban them.” *Id.* (citation omitted).

The Supreme Court agreed:

It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.

Heller, 554 U.S. at 629. The Supreme Court then listed various reasons why a handgun might be more suitable for home self-defense than a long arm, and concluded, “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” *Id.*

Because there is a right to possess handguns, there is, necessarily, a right to acquire them. The Second Amendment does not merely protect the right to possess the guns that someone might manufacture from raw materials at home for private use (in any event, a highly-regulated activity). “[C]ertain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980). “The right to keep and bear

arms, necessarily involves the right to purchase them . . .” *Andrews v. State*, 50 Tenn. 165, 178 (1871). “Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them.” 3 THE WRITINGS OF THOMAS JEFFERSON 230 (T.J. Randolph, ed., 1830).

It would not be a serious argument to claim that because *some* “laws imposing conditions and qualifications on the commercial sale of arms” are appropriate, *Heller*, 554 U.S. at 626-27, *all* such regulations are constitutional. As the Third Circuit explained,

Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment . . . In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.

United States v. Marzzarella, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

The government can no more ban the sale of protected guns than it can ban the sale of protected books, *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988); contraceptives, *Carey, supra*, 431 U.S. 678; *Griswold v. Connecticut*, 381 U.S. 479 (1965), or perhaps even the sale

of sex toys, *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); *but see Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007).

The question is not whether Plaintiffs enjoy a fundamental right to acquire handguns, but whether the government can meet its heavy burden in justifying the mandate that all handgun acquisition be cabined to one's state of residence. It cannot.

2. *The Interstate Handgun Transfer Prohibitions Are Subject to Strict Scrutiny.*

The Second Amendment secures a fundamental right. *McDonald*, 130 S. Ct. at 3042 (plurality opinion) & 3059 (Thomas, J., concurring). “[C]lassifications affecting fundamental rights are given the most exacting scrutiny.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citation omitted). Yet “as has been the experience under the First Amendment, we might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented.” *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

This Court applies strict scrutiny to test regulations implicating the core rights secured by the Second Amendment. In *Chester, supra*, 628

F.3d 673, this Court confronted a Second Amendment challenge to the federal firearms prohibition against domestic violence misdemeanants. “[W]e conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons,” because “his claim is not within the core right identified in *Heller*—the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense.” *Chester*, 628 F.3d at 683 (emphasis original); cf. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 n.5 (1980) (an intermediate standard of review may apply to an enumerated right under circumstances where the right’s exercise is “of less constitutional moment.”). “As we observe that any law regulating the content of speech is subject to strict scrutiny, we assume that any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.” *Masciandaro*, 638 F.3d at 470. “[W]e find the application of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home.” *Id.*, at 471; see also *United States v.*

Engstrum, 609 F. Supp. 2d 1227, 1331-32 (D. Utah 2009) (applying strict scrutiny in Second Amendment analysis).

This Court is not alone in taking this approach to the Second Amendment. In *Marzzarella*, the Third Circuit affirmed the federal ban on obliteration of serial numbers under intermediate scrutiny, explaining that the law “is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights,” that is, with firearms that bear serial numbers. *Marzzarella*, 614 F.3d at 97. Analogizing from the First Amendment doctrine regarding time, place, and manner, the Third Circuit concluded the law “should merit intermediate, rather than strict, scrutiny.” *Id.* The unmistakable import of this logic is that strict scrutiny applies to laws impacting the Second Amendment right’s core.

In *Ezell*, the Seventh Circuit essentially followed this Court’s approach, raising raise the level of scrutiny in a case where the claimants are law-abiding, responsible citizens, and the case involves “a serious encroachment on . . .an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.” *Ezell*,

2011 U.S. App. LEXIS 14108 at *60. As the Seventh Circuit explained,

First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Ezell, 2011 U.S. App. LEXIS at *59. Accordingly, the Seventh Circuit demanded that Chicago offer “a more rigorous showing than that demanded [under intermediate scrutiny]” to justify its gun range ban, “if not quite ‘strict scrutiny.’” *Ezell*, 2011 U.S. App. LEXIS 14108 at *60. Pending such a showing, the Seventh Circuit ordered that a preliminary injunction issue against Chicago’s gun range ban.

Unlike Mr. Chester, but like Ms. *Ezell*, Plaintiffs are law-abiding, responsible citizens. And whatever the scope of the Second Amendment right in other contexts, the right to have a handgun at home for personal self-defense is within the core of the Second Amendment. It follows that the interstate handgun transfer ban burdening Plaintiffs’ access to handguns is subject to strict scrutiny.

3. *The Interstate Handgun Transfer Ban Violates Plaintiffs' Rights.*

Under strict scrutiny, the government carries the burden of proving the law “furthers a compelling interest and is narrowly tailored to achieve that interest,” *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citation omitted), a burden that cannot be met where less restrictive alternatives are available. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

It is unclear what is so compelling about ensuring that handgun transfers go through a local middleman who does absolutely nothing that the initial federal firearms licensee cannot do as well—other than generate the cost of additional shipping, and charge an exorbitant fee. Federal law already charges gun dealers selling rifles and shotguns with adherence to the laws of other jurisdictions when selling firearms to out-of-state residents. If a federal licensee can follow an out-of-state rifle law, he or she can follow an out-of-state handgun law. Courts are rightfully skeptical of state residency restrictions based on the concept that the people of one state cannot gain sufficient knowledge of laws or conditions in another state. *Cf. O'Reilly v. Bd. of Appeals*, 942 F.2d 281

(4th Cir. 1991) (non-resident taxi driver can prove familiarity with out-of-state geography). Attorneys, for example, are required to know and uphold the laws of the various jurisdictions in which they are barred, yet that does not allow states to restrict bar membership to in-state residents. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985).

The notion that local handgun laws are necessarily more complicated, to the point of being unknowable by out-of-state firearms dealers, is specious. Few laws have vexed courts as much as regulations seeking to ban particular rifles as “assault weapons.” *See, e.g. Peoples Rights Org. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (striking down five definitions of “assault weapon” as unconstitutionally vague); *Springfield Armory v. City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994) (rifle “ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge”); *Harrott v. County of Kings*, 25 Cal.4th 1138, 1153, 25 P.3d 649, 659 (2001) (adopting saving construction of California Assault Weapons Control Act provisions

raising “serious and doubtful constitutional questions as applied to ordinary citizens”). And yet as a matter of federal law, and in Virginia, as a matter of state law, licensed firearms dealers are entrusted to sell long arms in compliance with all state and local laws throughout the United States, to the residents of any American city.

Defendants below asserted that interstate handgun transactions must be banned, because their background check computer systems do not have access to all state and local handgun disqualifiers. This is an impermissible post-hoc justification, as the distinction between interstate handgun and long gun sales predates the National Instant Criminal Background Check System (“NICS”).

Moreover, imperfection is widely known to plague the computerized databases of disqualifying characteristics not linked to specific types of firearms (e.g., mental health and criminal records). Federal law acknowledges the system’s limitations, and affords aggrieved individuals an avenue for relief when state actors decline to correct background check errors. 18 U.S.C. § 925A. Defendants’ argument is an argument for improving the background check system, not for banning gun sales. The government may choose to improve its background check

system, but it cannot choose to violate fundamental rights as a simpler alternative. Until very recent times—and for most of American history—NICS itself was not technologically feasible. The system’s lack of feasibility in 1791 or 1868 would not have justified prohibitions on the sale of handguns.

In any event, the District of Columbia is among the jurisdictions that remove all hypothetical guesswork from handgun transactions by requiring police pre-approval of any handgun transfer. D.C. Code § 7-2502.06(a); *see also, e.g.* Haw. Rev. Stat. § 134-2; Mich. Comp. Laws § 28.422(1); N.C. Gen. Stat. § 14-402(a). If the District has satisfied itself that an individual may acquire and bring home a handgun, following its famously rigorous handgun registration procedures, it should not matter—and to the District government, it no longer matters—whether a dealer delivers the handgun inside or outside the District. As Defendants can accept a Virginia gun dealer honoring an approved rifle registration certificate from the District of Columbia’s Metropolitan Police Department, it is illogical for them to resist allowing Virginia gun dealers to honor identical District Police certificates issued for handguns.

Balanced against the tenuous, if not illusory governmental interest in banning interstate handgun transfers is the heavy burden visited upon handgun consumers. As discussed *supra*, courts accept that limiting retail access to constitutionally-protected goods and services causes significant injuries. This Court would not hesitate to strike down laws restricting access to books, contraceptives, or abortions on account of state residence. Handguns are no different.

However compelling might be Defendants' interests in assuring that handgun consumers comply with their local firearms laws, that interest is adequately satisfied in the same manner that Defendants satisfy their interest in promoting compliance with local long gun laws: by mandating that licensed firearms dealers follow local laws. And Defendants have no valid independent regulatory interest, compelling or otherwise, in assuring compliance with local firearms laws where the consumers' local authorities pre-approve handgun transactions. Nor does the government have an interest in prohibiting firearms transactions simply because it has voluntarily chosen to refrain from improving its background check system to cover the particular transactions. Given licensed dealers' ability to follow the law, the

feasability of adequate background check systems, and the existence of local pre-transfer approval procedures which Defendants already accept with respect to other firearms, prohibiting all interstate handgun transfers is obviously not a narrowly-tailored solution to any problem. To the extent the evasion of local handgun laws may be a problem, far less restrictive yet no less effective alternatives are already in place.

The interstate handgun transfer prohibition violates Plaintiffs' fundamental Second Amendment right to acquire handguns.

B. RESTRICTING PLAINTIFFS' ACCESS TO HANDGUNS INFLICTS IRREPARABLE HARM.

"[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction."

Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987) (citation omitted).

"The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right." *Henry v. Greenville Airport Com.*, 284 F.2d 631, 633 (4th Cir. 1960) (per curiam); cf. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted).

No constitutional right is so directly linked to one's immediate physical well-being as is the right to keep and bear arms. The interest in self-defense is the "*central component* of the [Second Amendment] right itself," *Heller*, 554 U.S. at 599 (emphasis original). Plainly, the inability to access constitutionally-protected arms profoundly impacts one's sense of security—to say nothing of the irreparable harm resulting from a successful criminal attack that could have been averted with access to a firearm. As the Seventh Circuit explained,

The loss of a First Amendment right is frequently presumed to cause irreparable harm based on "the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." The Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment's central component is the right to possess firearms for protection. Infringements of this right cannot be compensated by damages.

Ezell, 2011 U.S. App. LEXIS 14108 at *32 (citations and footnote omitted). There is simply no way to quantify, in terms of money damages, the inability to shoot back at a home invader.

In a different context, Judge Wilkinson observed, "[t]his is serious business. We do not wish to be even minutely responsible for some

unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”

Masciandaro, 638 F.3d at 475. Accordingly, caution here warrants the granting of injunctive relief. After all, the Constitution enshrines as fundamental the right to keep handguns for self-defense, and the government shoulders a heavy burden in justifying its restriction. Miscalculating as to Second Amendment rights deprived Plaintiffs of the sense of security to which they are constitutionally entitled, and could leave Plaintiffs vulnerable without adequate arms for their defense at a moment of great need.

C. INJUNCTIVE RELIEF WILL NOT HARM DEFENDANTS.

As Defendants have long entrusted federally-licensed firearms dealers to ensure compliance with local firearms laws pertaining to long guns, there is no reason to suppose that said dealers cannot ensure compliance with local handguns laws. At the very least, enjoining enforcement of the interstate handgun transfer ban against individuals such as Plaintiffs here, who must obtain their local authority’s permission to acquire handguns, cannot possibly harm Defendants’ interest in assuring compliance with local handgun laws.

D. AN INJUNCTION WOULD SERVE THE PUBLIC INTEREST.

“Surely, upholding constitutional rights serves the public interest.”

Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir.

2003) (citation omitted). While some people believe that handguns are a social evil, the Constitution reflects a different judgment. It is inherently in the public interest that responsible, law-abiding individuals be able to access the means of preserving their lives and the lives of their loved ones against criminal attack.

CONCLUSION

Heller and *McDonald* do not signal the end of all gun regulations.

But they do signal the end of these most pointless, burdensome regulations. Plaintiffs were entitled to at least a preliminary injunction below. There being no possible factual disputes, and as the Defendants would have ample opportunity to present their legal claims before this Court, Plaintiffs respectfully request that the judgment be reversed, and the case remanded with instructions to enter a permanent injunction in Plaintiffs' favor.

STATEMENT REQUESTING ORAL ARGUMENT

Plaintiffs respectfully request oral argument, which they believe could aid the Court's determination of this important matter.

Dated: October 3, 2011

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ADDENDUM

U.S. Const. amend. II:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

18 U.S.C. § 922(b)(3):

(b) 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;

27 C.F.R. § 478.96(c):

(1) A licensed importer, licensed manufacturer, or licensed dealer may sell or deliver a rifle or shotgun, and a licensed collector may sell or deliver a rifle or shotgun that is a curio or relic to a nonlicensed resident of a State other than the State in which the licensee's place of business is located if --

(i) The purchaser meets with the licensee in person at the licensee's premises to accomplish the transfer, sale, and delivery of the rifle or shotgun;

(ii) The licensed importer, licensed manufacturer, or licensed dealer complies with the provisions of § 478.102;

(iii) The purchaser furnishes to the licensed importer, licensed manufacturer, or licensed dealer the firearms transaction record, Form 4473, required by § 478.124; and

(iv) The sale, delivery, and receipt of the rifle or shotgun fully comply with the legal conditions of sale in both such States.

(2) For purposes of paragraph (c) of this section, any licensed manufacturer, licensed importer, or licensed dealer is presumed, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both such States.

27 CFR § 478.99(a):

a) Interstate sales or deliveries. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm to any person not licensed under this part and who the licensee knows or has reasonable cause to believe does not reside in (or if a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business or activity is located: Provided, That the foregoing provisions of this paragraph (1) shall not apply to the sale or delivery of a rifle or shotgun (curio or relic, in the case of a licensed collector) to a resident of a State other than the State in which the licensee's place of business or collection premises is located if the requirements of § 478.96(c) are fully met, and (2) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes (see § 478.97).

Va. Code Ann. § 18.2-308.2:2:

A. Any person purchasing from a dealer a firearm as herein defined shall consent in writing, on a form to be provided by the Department of State Police, to have the dealer obtain criminal history record information. Such form shall include only the written consent; the name, birth date, gender, race, citizenship, and social security number and/or any other identification number; the number of firearms by category intended to be sold, rented, traded, or transferred; and answers by the applicant to the following questions: (i) has the applicant been convicted of a felony offense or found guilty or adjudicated delinquent as a juvenile 14 years of age or older at the time of the offense of a delinquent act that would be a felony if committed by an adult; (ii) is the applicant subject to a court order restraining the applicant from harassing, stalking, or threatening the applicant's child or intimate partner, or a child of such partner, or is the applicant subject to a protective order; and (iii) has the applicant ever been acquitted by reason of insanity and prohibited from purchasing, possessing or transporting a firearm pursuant to § 18.2-308.1:1 or any substantially similar law of any other jurisdiction, been adjudicated legally incompetent, mentally incapacitated or adjudicated an incapacitated person and prohibited from purchasing a firearm pursuant to § 18.2-308.1:2 or any substantially similar law of any other jurisdiction, or been involuntarily admitted to an inpatient facility or involuntarily ordered to outpatient mental health treatment and prohibited from purchasing a firearm pursuant to § 18.2-308.1:3 or any substantially similar law of any other jurisdiction.

B. 1. No dealer shall sell, rent, trade or transfer from his inventory any such firearm to any other person who is a resident of Virginia until he has (i) obtained written consent and the other information on the consent form specified in subsection A, and provided the Department of State Police with the name, birth date, gender, race, citizenship, and social security and/or any other identification number and the number of firearms by category intended to be sold, rented, traded or transferred and (ii) requested criminal history record information by a telephone call to or other communication authorized by the State Police

and is authorized by subdivision 2 of this subsection to complete the sale or other such transfer. To establish personal identification and residence in Virginia for purposes of this section, a dealer must require any prospective purchaser to present one photo-identification form issued by a governmental agency of the Commonwealth or by the United States Department of Defense, and other documentation of residence. Except where the photo-identification was issued by the United States Department of Defense, the other documentation of residence shall show an address identical to that shown on the photo-identification form, such as evidence of currently paid personal property tax or real estate tax, or a current (a) lease, (b) utility or telephone bill, (c) voter registration card, (d) bank check, (e) passport, (f) automobile registration, or (g) hunting or fishing license; other current identification allowed as evidence of residency by Part 178.124 of Title 27 of the Code of Federal Regulations and ATF Ruling 2001-5; or other documentation of residence determined to be acceptable by the Department of Criminal Justice Services, that corroborates that the prospective purchaser currently resides in Virginia. Where the photo-identification was issued by the Department of Defense, permanent orders assigning the purchaser to a duty post in Virginia, including the Pentagon, shall be the only other required documentation of residence. For the purposes of this section and establishment of residency for firearm purchase, residency shall be deemed to be the permanent duty post of a member of the armed forces. When the photo-identification presented to a dealer by the prospective purchaser is a driver's license or other photo-identification issued by the Department of Motor Vehicles, and such identification form contains a date of issue, the dealer shall not, except for a renewed driver's license or other photo-identification issued by the Department of Motor Vehicles, sell or otherwise transfer a firearm to the prospective purchaser until 30 days after the date of issue of an original or duplicate driver's license unless the prospective purchaser also presents a copy of his Virginia Department of Motor Vehicles driver's record showing that the original date of issue of the driver's license was more than 30 days prior to the attempted purchase.

* * *

* * *

5. Notwithstanding any other provisions of this section, rifles and shotguns may be purchased by persons who are citizens of the United States or persons lawfully admitted for permanent residence but residents of other states under the terms of subsections A and B upon furnishing the dealer with proof of citizenship or status as a person lawfully admitted for permanent residence and one photo-identification form issued by a governmental agency of the person's state of residence and one other form of identification determined to be acceptable by the Department of Criminal Justice Services.

* * *

D.C. Code § 7-2502.06(a):

(a) An 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 from any person or organization holding a registration certificate therefor. In all other cases, an application for registration shall be filed immediately after a firearm is brought into the District. It shall be deemed compliance with the preceding sentence if such person personally communicates with the Metropolitan Police Department (as determined by the Chief to be sufficient) and provides such information as may be demanded; provided, that such person files an application for a registration certificate within 48 hours after such communication.

D.C.M.R. § 24-2320.3:

An applicant seeking to register a pistol he or she will purchase from a firearms dealer pursuant to this section shall:

* * *

(b) Obtain assistance necessary to complete the application by presenting the Firearm Registration application to a firearms dealer licensed under federal law either:

(1) Located inside the District if the firearm is purchased within the District; or

(2) Located outside the District if the firearm is purchased outside the District.

* * *

(f) Present the approved Firearm Registration application to the dealer licensed under federal law and take delivery of [*7573] the applicant's pistol pending completion of a ballistic identification procedure 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, where the applicant will take delivery of the pistol pending completion of a ballistic identification procedure.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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