No. 12-1401

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the Second Amendment right to keep and bear arms for all citizens.

STATEMENT OF THE CASE

Federal law provides, with certain exceptions, that any person may not "transport into or receive in the State where he resides . . . any firearm purchased or otherwise obtained by such person outside that State." 18 U.S.C. § 922(a)(3). In the case of rifles and shotguns, consumers can purchase them from any federally licensed firearms dealer ("FFL") in the United States, as long as the purchase complies with the laws of the seller's state and of the buyer's state. 18 U.S.C. § 922(b)(3). Any firearm may also be transferred across state lines by bequest or intestate succession.

Otherwise, to purchase a handgun out of state, the purchased firearm must be transferred to an FFL in the buyer's home state, where the buyer can then go pick it up. That imposes on the buyer the costs of the transfer to the in-state FFL, and the time and money to make an extra trip for the pick up.

Not one retail gun store even exists within the District of Columbia. All purchases of handguns from any state by a District resident can only go through a single FFL in the District, an individual named Charles Sykes. That means that any District resident that wants to get any handgun at all must

purchase it from a dealer outside the District, and pay the $125 transfer fee charged by Mr. Sykes. App.27a.

But even before the consumer may pick up the transferred handgun in the District, DC 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). A District resident may only transfer the purchased handgun from the District FFL to his or her home after presenting a sealed, approved, registration certificate for the handgun. D.C. Code § 7-2502.06(a); 24 DCMR § 2320.3(f) (2011).

Petitioner and District of Columbia resident Michelle Lane ordered two handguns from a Virginia gun store on April 23, 2011. But before she could complete the transaction and take delivery from Sykes, Sykes closed his FFL business due to a lease problem. This meant at that point that District of Columbia residents could not legally buy any handguns at all, since there were no gun shops in the District, and District residents could not then buy any handguns across state lines.

Lane filed suit on May 10, 2011 in the United States District Court for the Eastern District of Virginia against Respondents U.S. Attorney General Eric Holder, Jr., and Col. W. Stephen Flaherty, Superintendent of the Virginia State Police, who were responsible for administering the applicable federal and state laws. The suit alleged that the restriction of the federal and state statutes on the

interstate transfer of handguns violated Plaintiff's Constitutional rights under the Second Amendment.

The alleged injuries went beyond the current effective lack of any means of legally purchasing handguns for District residents, with no within District gun shops, or FFL for transfers. They included the additional costs for transfers to any District FFL, the additional time and costs to pick up the transferred handguns from any FFL, and the denial of any opportunity for more frequent interstate handgun transactions. App.27a-28a. Petitioner Second Amendment Foundation (SAF) joined Lane in the suit, alleging the same injuries for its members, plus reduced price competition and consumer choice due to the restrictions on interstate sales of handguns. App.35a.

Also joining in the suit were Petitioners Amanda and Matthew Welling, District residents who wanted to receive a handgun for home self-defense from Texas resident David Slack, who is the father of Ms. Welling. App.30a, 33a, 36a. Their injuries also included the additional burdens and costs imposed by the statutes on interstate gun transfers, and the lost opportunity to participate more frequently in the market for interstate gun sales.

After the District of Columbia was added as a defendant, the Plaintiff Petitioners moved for a preliminary injunction. The Plaintiff Petitioners argued that the restrictions on interstate sales of handguns were enacted to ensure that purchasers complied with the gun regulations of their home

states, and not use interstate sales to circumvent those requirements. *See, e.g.,* H.R. Rep. No. 90-1577, at 14 (1968); S. Rep. No. 90-1097, at 114 (1968). But the District now follows the practice of many other jurisdictions in requiring an approved registration permit for any gun transfer where the gun is to be carried into the District, as mentioned above. So the District can stop any interstate sale that would circumvent the District's gun laws, by denying the registration permit for such sale.

Moreover, the federal statute relies on the FFLs to ensure that the buyer complies with any out-of-state requirements for interstate sales of rifles and shotguns, by requiring that the buyer obtain any required authorization or permit from the seller's home state for such sales. The FFLs can be relied upon to do the same for the interstate sale of handguns.

The day before the oral argument on the preliminary injunction motion, the District rented space to Sykes in the District's police headquarters to reopen as the District's sole FFL. Dist. Ct. Dkt. 38. But that did not remove all of the injuries to the Plaintiff Petitioners.

The District Court, however, denied the preliminary injunction and dismissed the case for lack of standing, on July 15, 2011. App.22a-23a. The court held that since the challenged provisions did not ban gun stores in the District, Petitioners "are unable to prove the injury is fairly traceable to or caused by the federal firearms laws." App.19a-20a. Moreover, the court said, the Petitioners as gun purchasers were

not actually regulated at all by the challenged provisions, which apply to gun dealers.

On appeal, both the District and Virginia sought to clarify by interpretive regulatory actions that their local legal requirements did not restrict interstate sales of handguns independently of the federal law. 58 D.C. Reg. 7572 (Aug. 19, 2011); 24 DCMR §§ 2320.3(b), 2320.3(f) (2011); Mr. Getchell, at 30:53-31:17, 31:40-32:03, 32:20-32:39, Oral Argument Recording, Fourth Cir. No. 11-1847, Oct. 23, 2012, available at http://coop.ca4.uscourts.gov/OAarchive/mp3/11-1847-20121023.mp3.

The Fourth Circuit U.S. Court of Appeals affirmed the dismissal of Petitioners' case on December 31, 2012, saying, "the laws and regulations [Petitioners] challenge do not apply to them but rather to the FFLs from whom they would buy handguns." App. 8a. The court concluded that Petitioners "are not prevented from obtaining the handguns they desire . . . At worst, they are burdened by additional costs and logistical hurdles," which the court dismissed as "minor inconveniences . . .distinct from an absolute deprivation." *Id.* As a result, "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 concluded 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, and "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.

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

SUMMARY OF ARGUMENT

Regulation can violate the Constitutional rights of consumers by burdening the sale of goods or services that they want to buy, without actually banning such sales. Moreover, precedents hold that consumers have standing to challenge such regulatory burdens even where the regulations apply to the sellers and not to them.

In the present case, since Petitioners have the right to possess handguns, they unquestionably have the right to purchase them. Moreover, when consumers have a right to purchase something, they have a right to challenge unconstitutional government conduct that burdens their freedom to do so.

Indeed, injuries alone of higher prices and additional costs have been found sufficient to grant standing.

The central issue in this case at this point – whether consumers have standing to challenge prohibitions or burdens on the sale of goods and services, is raised not only by the sale of firearms, but of every good or service whose sale and purchase

is protected by the Constitution, such as books, contraceptives, abortion, etc. That is why this case presents a recurring issue of national importance. This case is also an ideal vehicle for resolving this issue.

The decision of the court below is directly in conflict with decisions on the same issue in the Third, Fifth, Seventh, and D.C. Circuits.

REASONS FOR GRANTING THE PETITION

I. The Court Below Erred in Holding that Prohibiting or Burdening Retail Transactions Does Not Directly Cause Consumers an Injury in Fact.

The decision of the court below is contrary to both logic and precedent. Regulation can violate the Constitutional rights of consumers by burdening the sale of goods or services that they want to buy, without actually banning such sales. Moreover, precedents hold that consumers have standing to challenge such regulatory burdens even where the regulations apply to the sellers and not to them.

In *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), a statutory regulation barred pharmacists from advertising or disseminating prescription drug prices. But consumers were found to have standing to challenge that regulatory restriction as a violation of their First Amendment rights. This Court recognized that the legal challenge to the statutory regulation was brought "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." 425 U.S. at 753. Nevertheless, the Court found "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.

In the present case, since Petitioners have the right to possess handguns, they unquestionably have the right to purchase them, as recognized by the court in *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. . . ." *ACCORD: Andrews* v. *State*, 50 Tenn. 165, 178 (1871). Moreover, when consumers have a right to purchase something, they have a right to challenge unconstitutional government conduct that burdens their freedom to do so.

As this Court recognized in *Carey* v. *Pop. Svs. Int'l*, 431 U.S. 678, 689 (1977), where it struck down a law prohibiting 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."

See also Va. State Bd. of Pharmacy, 425 U.S. at 763-64 (consumers suffer legally cognizable economic harm from limited access to commercial information); *Doe* v. *Bolton*, 410 U.S. 179 (1973) (pregnant woman can challenge law limiting abortion services to hospitals).

Just as "[r]estrictions on the distribution of contraceptives clearly burden the freedom to make [family planning] decisions," as this Court recognized in *Carey*, 431 U.S. at 687, restrictions on the distribution of handguns just as clearly burden the freedom to keep and bear arms under the Second Amendment. Here too the regulation restricts the distribution channels to a small fraction of the total number of possible retail outlets for handguns. And Petitioners here just as clearly have standing to challenge those restrictions as the Plaintiffs in *Carey*.

Carey cannot be distinguished on the grounds that the lead plaintiff in that case was a distributor, as the lower court argued. App.8a. *Carey* was decided on the right of consumers to make family planning decisions, not on the right of the distributor to sell to them. What this Court said in *Carey*, in upholding standing based on the injury to *consumers* was, "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)).

The decision of the court below is in direct conflict with *Dearth* v. *Holder*, 641 F.3d 499 (D.C. Cir. 2011). In that case, Dearth was an American citizen living in Canada. Because he could not claim any American state of residence, he did not qualify to purchase a handgun across state lines under Section 922(b)(3). Dearth sued claiming that Section 922(b)(3) was unconstitutional under the Second Amendment as applied to him.

While the District Court ruled that Dearth had no standing on similar grounds to the court below, the D.C. Circuit reversed, saying, "We agree with Dearth that the Government has denied him the ability to purchase a firearm and he thereby suffers an ongoing injury." 641 F.3d at 502. The court added, "[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.…[H]is injury is present and continuing." *Id.* at 503.

The decision below is similarly in conflict with *NRA of Am.* v. *BATFE*, 700 F.3d 185 (5th Cir. 2012), where consumers challenged Sections 922(b)(1) and (c)(1), because the Sections barred the sale of handguns by FFLs to adults aged 18-20. The District Court ruled the plaintiffs had standing, saying,

> "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, saying that even though 18-20 year olds could receive handguns from parents, guardians, or through unlicensed, private sales,

> 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. The court added, "This injury is fairly traceable to the challenged federal laws, and holding

the laws unconstitutional would redress the injury." *Id.* at 192 n.5

The decision below conflicts as well with *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011). In that case, Chicago residents challenged a municipal ordinance prohibiting the operation of gun ranges as unconstitutional under the Second Amendment. The District Court ruled that plaintiffs did not have standing because they could practice shooting at ranges outside the city. But the Seventh Circuit reversed, finding the district court's reasoning "profoundly mistaken" and "unimaginable." 651 F.3d at 697. The court said, "[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." *Id.* at 695.

The court in *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000) analogously upheld the standing of consumers to challenge restrictions on interstate wine shipments, saying

> 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, 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.

227 F.3d at 849-50. It did not matter to the court in *Bridenbaugh* that the law purported to target only one party to the 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."

227 F.3d at 850. A quite similar ruling is found in *Freeman* v. *Corzine*, 629 F.3d 146 (3d Cir. 2010).

Indeed, injuries alone of higher prices and additional costs have been found sufficient to grant standing. The court in *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) concluded, "Allegedly, plaintiffs spent money that, absent defendants' actions, they would not have spent. This is a quintessential injury-in-fact." The regulation in the present case similarly imposes additional costs on gun purchasers, for fees to the in-state FFL, and for the time and money for the extra trip to the in-state FFL to pick up the purchased, transferred gun.

A similar result was found in *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997), where this Court upheld a customer's standing to challenge the imposition of a tax on out-of-state natural gas, saying,

> [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. *ACCORD: Bacchus Imps.* v. *Dias*, 468 U.S. 263 (1984). In the present case, the government similarly imposed analogous additional costs on Petitioners by requiring them to bear additional transfer and shipping costs, and pay for the services of additional third party FFLs.

These precedents and their logic should have governed the decision of the court below.

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

The central issue in this case at this point – whether consumers have standing to challenge prohibitions or burdens on the sale of goods and services, is raised not only by the sale of firearms, but of every good or service whose sale and purchase is protected by the Constitution, such as books, contraceptives, abortion, etc. That is why this case presents a recurring issue of national importance.

Whether consumers have access to Article III courts to defend the practical effectiveness of their constitutional rights is plainly of national

importance. This case shows how central to the effective reality of constitutional rights this issue is. This Court recognized and vindicated the Second Amendment right of individuals to keep and bear arms in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). But the constitutionally protected freedom to choose to own and possess a firearm has no practical effect if the government can severely burden or curtail, or *de facto* ban, the transfer of firearms to Washington D.C. residents *with no opportunity for these citizens even to seek review of the effective restriction.* And while Mr. Sykes may be back in business for D.C. residents for now, all Americans are today effectively deprived of a national market for the sale and purchase of a product the ownership of which is literally protected by the Bill of Rights.

The issue of standing to challenge regulations on the sale and distribution of firearms has arisen in four circuits in two years, and will undoubtedly arise frequently again, not just in regard to firearms, but other constitutionally protected articles and products as well. So the question presented will be recurring.

This case is also an ideal vehicle for resolving this issue. The issue is squarely presented, and the underlying claim is substantively important and illuminative. The federal regulation restricting interstate handgun transfers is maintained to protect and help enforce the regulatory interests of state and local governments. But in this case, the state and local jurisdictions — the District of Columbia and Virginia — are supportive of the freedom of Petitioners to engage in these interstate transactions, and have actually modified their own regulatory

requirements to accommodate the transactions sought by Petitioners.

III. The Circuit Courts Are Split Over the Question Presented.

The decision of the court below is directly in conflict with decisions on the same issue in the Third, Fifth, Seventh, and D.C. Circuits, as discussed above. *Dearth* v. *Holder*, 641 F.3d 499 (D.C. Cir. 2011); *NRA of Am.* v. *BATFE*, 700 F.3d 185 (5th Cir. 2012); *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000); *United States* v. *Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *Freeman* v. *Corzine*, 629 F.3d 146 (3d Cir. 2010).

In all those cases, the courts found that consumers have standing to challenge prohibitions and burdens on sales to them of firearms or other products they wished to buy. Indeed, regulation causing higher prices and additional costs alone have been found sufficient to grant standing to challenge the regulation in the Ninth Circuit. *Maya* v. *Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011).

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant the requested Writ.

Respectfully sub mitted,

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