

No. 11-1847

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

MICHELLE LANE, et al.,

Plaintiffs-Appellants,

v.

ERIC HOLDER, et al.,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF VIRGINIA**

BRIEF OF APPELLEE W. STEVEN FLAHERTY

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-1847 Caption: Michelle Lane v. Eric Holder, et al.

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BRIEF OF APPELLEE W. STEVEN FLAHERTY

COMES NOW Appellee W. Steven Flaherty (“Flaherty”), the Superintendent of the Virginia State Police, by counsel, pursuant to F.R.A.P. 31 and Local Rule 31, and for his Brief, states as follows:

INTRODUCTION

This case involves a challenge to a Virginia statute that prohibits a Virginia firearms dealer from transferring possession of a handgun purchased from that dealer directly to a non-resident buyer. Virginia Code § 18.2-308.2:2 requires a Virginia firearms dealer to transfer that handgun to another firearms dealer located in the buyer’s home state, who then may transfer possession of the handgun to the buyer. Like the corresponding

federal laws also challenged here,¹ the Virginia statute is one of many Virginia regulatory measures designed to ensure that guns are sold only to those persons who are authorized by law to purchase and possess them.

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, conferring appellate jurisdiction on final orders of United States District Courts. The district court's dismissal of this matter is a final judgment over which this court has jurisdiction pursuant to 28 U.S.C. § 1291. *See, e.g., Gillins v. Berkeley Elec. Coop.*, 148 F.3d 413, 415 (4th Cir. 1998). Plaintiffs timely filed their notice of appeal on July 29, 2011.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Plaintiffs do not have standing to sue, for at least two reasons: (1) their alleged injury is not traceable to nor caused by the conduct of Flaherty, and (2) a favorable decision will not redress Plaintiffs' injuries because Flaherty is not a proper party.²

¹ 18 U.S.C. § 922 (b)(3) and 27 C.F.R. § 478.99.

² On brief, Plaintiffs identify two issues for review: (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?" and (2) "Does the Second Amendment guarantee a responsible, law-abiding individual the right to acquire handguns outside her state of residence?" Appellants' Brief at 1-2. As explained below, Flaherty has not and does not prevent Plaintiffs

STATEMENT OF THE CASE

Plaintiffs below are Michelle Lane (“Lane”), Matthew and Amanda Welling (“the Wellings”), and Second Amendment Foundation, Inc. (“SAF”). They filed suit on May 10, 2011, against Flaherty, challenging the constitutionality of Va. Code § 18.2-308.2:2.³

On May 27, 2011, Plaintiffs filed an Amended Complaint in which they challenged Va. Code § 18.2-308.2:2 as unconstitutional by “banning and otherwise burdening access to handguns whose possession is protected by the Second Amendment.” Joint Appendix (“JA”) 15. They also challenge the statute on the basis that it “improperly classifies individuals according to their residence status in violation of the Fourteenth Amendment right to equal protection of the law.” JA 16.

On June 20, 2011, Plaintiffs moved for a preliminary injunction. JA 20. Following a hearing on July 15, 2011, the district court dismissed the

from purchasing handguns outside their home state. Furthermore, Plaintiffs’ second issue presented for review was not addressed by the district court below, and this Court should not reach that issue in the first instance.

³ Plaintiffs also challenged the constitutionality of 18 U.S.C. § 922(b)(3), 27 C.F.R. § 478.99 and District of Columbia Municipal Regulation 24-2320.3(b), and (f), naming Eric Holder (“Holder”), the Attorney General of the United States, and the District of Columbia (“D.C.”) as Defendants. Holder’s Motion for Leave to File a Separate Brief was granted by this Court, and Plaintiffs dismissed D.C. on September 27, 2011, based upon the District’s revision of D.C.M.R. § 24-2320.3(b) and (f). Appellants’ Brief at 5-6. Accordingly, this Brief is filed on behalf of Defendant-Appellee Flaherty only.

suit for lack of standing. JA 180-81. Plaintiffs timely noted their appeal. JA 182.⁴

As explained below and as found by the district court, Plaintiffs lack standing to bring this suit. While Plaintiffs' Opening Brief focuses primarily on their request for preliminary injunctive relief and the merits of their constitutional challenge,⁵ the district court did not reach that issue. JA 214. Instead, the district court dismissed the matter on standing. *Id.* Accordingly, the sole issue before this Court is whether Plaintiffs have standing to sue in this matter. As the answer to that question is no, the district court's decision should be affirmed.

STATEMENT OF FACTS

Lane and the Wellings, residents of D.C., wish to take possession of certain handguns. JA 8, 10. On April 23, 2011, Lane purchased two handguns for self-defense from a Virginia firearms dealer. JA 10; 22-23. The Wellings wish to take possession of a firearm to be given to them by a family member who lives in Texas. JA 10; 25 and 27. The Wellings wish to

⁴ On September 27, 2011, Plaintiffs moved to dismiss D.C. as a party to this appeal, and this Court granted that motion. Plaintiffs' assertion that D.C. has "abandoned" its objection to such out-of-state handgun transfers, Appellants' Brief at 20, goes too far. D.C.'s law as revised now simply defers to federal law, Appellants' Brief at 13, which of course it must under principles of supremacy.

⁵ In fact, Plaintiffs' summary of argument makes no mention of standing. *See* Appellants' Brief at 19-21.

use a Virginia firearms dealer to make the transfer. *Id.* Plaintiffs complain that the Virginia statute (as well as the corresponding federal law) prohibits a Virginia firearms dealer from transferring possession of a handgun purchased from that dealer to a non-resident buyer directly. JA 11. Instead, a Virginia firearms dealer must transfer that handgun to another firearms dealer located in the buyer's home state - in this instance D.C. - then his home state dealer may transfer possession of the handgun to him. Va. Code § 18.2-308.2:2. According to the Plaintiffs, the only federally licensed firearms dealer operating in D.C., Charles Sykes, lost his lease, and therefore cannot assist in the transfer of the handguns to Lane, or the transfer of the firearm given to the Wellings. JA 12-13.⁶

As of July 15, 2011, the D.C. Zoning Commission approved providing office space (either within the D.C. police department or the D.C. Department of Consumer and Regulatory Authority) for a federally licensed firearms dealer, such as Sykes. JA 196; *see also* JA 176-79.

⁶ Apparently Mr. Sykes is not the only federally licensed firearms dealer in D.C. *See* JA 155 (identifying six individuals or entities licensed as federal firearms dealers in D.C.).

THE VIRGINIA STATUTE

Virginia Code § 18.2-308.2:2(A) requires a person purchasing a firearm⁷ from a firearms dealer doing business in Virginia to “consent in writing, on a form to be provided by the Virginia State Police (“State Police”), to have the dealer obtain criminal history record information [about that purchaser.]” The statute also requires the dealer to obtain certain information about the purchaser, including name, birthdate, sex, race, citizenship, and social security and/or other identification number, and the number of firearms by category intended to be sold, rented, traded or transferred” Va. Code § 18.2-308.2:2(B)(1). That sub-section prohibits a firearms dealer from selling, renting, trading or transferring a firearm from his inventory, without first obtaining the consent described above and the information about the purchaser, and then submitting that information to the State Police for review and evaluation. *Id.*

Once the information is transmitted to the State Police, the State Police must “(1) review its criminal history record information to determine if the buyer or transferee is prohibited from possessing or transporting a firearm by state or federal law, [and] (2) inform the dealer if its record indicates that the buyer or transferee is so prohibited” Except in certain

⁷ “Firearm” is defined as “any handgun, shotgun, or rifle” Va. Code § 18.2-308.2:2(G).

enumerated circumstances, a firearms dealer may complete the sale or transfer only upon receipt of the required authorization from the State Police. Va. Code § 18.2-308.2:2(B)(1) and (2). These requirements apply in all transactions involving any type of firearm, whether that firearm is a rifle, shotgun, or handgun.

While Virginia law permits the sale or transfer of a rifle or shotgun to a non-resident of Virginia, Va. Code § 18.2-308.2:2(B)(5), a Virginia firearms dealer is prohibited from selling or transferring a handgun to a non-resident of Virginia.⁸ Va. Code § 18.2-308.2:2(C). The sale or transfer of a handgun to a non-resident of Virginia may be accomplished only by utilizing the services of a firearms dealer in the buyer's home state acting as a "middle-man" in the transaction.⁹

SUMMARY OF ARGUMENT

Flaherty, as Superintendent of the Virginia State Police, has done nothing to prevent Plaintiffs from buying a handgun in Virginia. In addition, even assuming Plaintiffs have suffered an actual injury, a favorable decision

⁸ Handgun is defined as "any pistol or revolver or other firearm originally designed, made and intended to fire single or multiple projectiles by means of an explosion of a combustible material from one or more barrels when held in one hand." Va. Code § 18.2-308.2:2(G).

⁹ 18 U.S.C. § 922(a)(3) permits a licensed firearms dealer to receive a firearm from an out-of-state licensed firearms dealer. Significantly, it is that firearms dealer in the buyer's home state who performs the background check required by federal law and their own state law. JA 69.

in this case will not redress their injury. Accordingly, Plaintiffs lack standing to sue, and the district court's decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal of Plaintiffs' claims for lack of standing. *See Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999).

II. PLAINTIFFS LACK STANDING TO SUE

Pursuant to Article III, Section 2 of the United States Constitution, federal courts are limited to deciding only actual cases and controversies. Standing is "perhaps the most important" of the doctrines developed over the years to address Article III requirements. *Allen v. Wright*, 468 U.S. 737, 750 (1984). A constitutional limitation on the jurisdiction of the federal courts, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998), standing requires Plaintiffs to plead and prove that they have "a sufficient personal stake in the outcome of a dispute to render judicial resolution of it appropriate." *Friends for Ferrell Parkway v. Stasko*, 282 F.3d 315, 319 (4th Cir. 2002).

To establish standing, Plaintiffs must show, at a minimum, 1) an injury in fact, *i.e.*, an imminent invasion of a legally protected right, 2) a

causal connection between that injury and the conduct complained of, and 3) it must be likely that the injury will be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As decided by the district court, Plaintiffs fail to meet this three-part test.

A. There is no causal connection between Plaintiffs' alleged injury and Flaherty that is redressable against him.

Under *District of Columbia v. Heller*, 554 U.S. 570 (2008), Plaintiffs have an individual right to keep and bear a firearm, unconnected with service in the militia, and to use that firearm for traditionally lawful purposes. However, Plaintiffs have no constitutional right to take possession of handguns directly from a Virginia dealer.

In any event, as the district court properly held, Plaintiffs lack the requisite causation between their alleged injury and Flaherty's conduct. As explained by the district court, "because at the time the Complaint was filed, Ms. Lane contends that there was no licensed federal firearms dealer in Washington, D.C. to receive the weapon [that she purchased in Virginia; therefore,] she was being deprived of her right to buy a gun for self-defense." JA 189. Yet, there is no "outright ban on [the] purchase of weapons from out-of-state residents, because, as counsel acknowledges, it is possible to buy a weapon in another state." JA 212. "It's not the federal law that's barring Ms. Lane or Ms. Welling from obtaining a weapon... and it's

certainly not the Commonwealth of Virginia because our firearms dealer is prepared to make this sale.” JA 212-13. Furthermore, Flaherty is not responsible for the lack of a federally licensed firearms dealer in D.C. Simply put, Plaintiffs have not and cannot show that their alleged injuries are fairly traceable to the challenged action of the Defendants, including Flaherty. *Friends for Ferrell Parkway*, 282 F.3d at 320 (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC)*, 528 U.S. 167, 180-81 (2000)).

As the district court noted, Plaintiffs must show that their injuries were “caused by the challenged conduct of the defendant and not by the independent action of third parties not before the Court.” JA 211 (citation omitted). The Virginia statute is not a ban on the purchase of handguns by non-residents. Rather, the Virginia statute requires such handguns to be transferred to a federally licensed firearms dealer in the buyer’s home state. As a practical matter, Plaintiffs’ harm, if any, is caused by the lack of a federal firearms licensee in their home state, or, more specifically, that the lone D.C. federal firearms licensee is or was temporarily out of business.

Even if the complaint that this process is one that “frustrate[s] and make[s] more expensive” acquiring a handgun states a claim, Appellants’ Brief at 24-25, any alleged injury arising out of the costs associated with a

D.C. resident purchasing a handgun in Virginia is not attributable to Flaherty. *See, e.g., Frank Krasner Enterprises v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005) (gun show promoter and exhibitor lacked standing to challenge county law denying public funding to venues that display and sell guns). In *Krasner*, this Court found that plaintiffs could not meet the requisite showing of causation for standing, since the alleged injuries were “not directly linked to the challenged law because an intermediary...stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain.” *Id.* at 236. This Court held that it could not order the venue to lease space to the plaintiffs, nor could it compel the county to subsidize the venue. *Id.* Similarly, this Court cannot order firearms retailers to sell guns at prices and in a way that is convenient for Plaintiffs.

In *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996), the Ninth Circuit denied standing to plaintiffs who challenged a federal gun control law on the basis that it made the guns they wanted to buy more expensive. In doing so, the court stated that “nothing in the Act directs manufacturers or dealers to raise the price of regulated weapons.” *San Diego County Gun Rights*, 98 F.3d at 1130. Instead, “third parties such as weapon dealers and manufacturers broke the chain of causation by *independently charging higher prices.*” *Krasner*, 401 F.3d at 235 (citing

San Diego County Gun Rights, 98 F.3d at 1130)(emphasis added). The same is true here. Neither Flaherty nor the challenged Virginia statute does anything to prohibit federally licensed firearms dealers from charging fair prices, or prices more desirable for Plaintiffs. Plaintiffs' difficulty in acquiring handguns, if any, is a result of the economics of the marketplace, not any conduct that could be attributed to Flaherty. *See Warth v. Seldin*, 422 U.S. 490, 506-07 (1975) (taxpayers have no standing to challenge town's zoning ordinance). In *Warth*, the Court held that plaintiffs' inability to live in the town was the consequence of the economics of the area housing market, not the any alleged illegal acts of the defendants. *Id.* Simply put, the district court cannot order firearms retailers to sell guns to Plaintiffs or anyone else at a price suitable for them; therefore, Plaintiffs cannot establish that a favorable decision likely will redress their injury.

Plaintiffs want (1) to have handguns treated the same as other firearms under the law, and (2) specifically, to be able to purchase a handgun directly from a Virginia dealer.¹⁰ Appellants' Brief at 2. In support, Plaintiffs argue that they "would like to engage in a handgun transaction with the dealer in

¹⁰ Plaintiffs now claim the existence of a federally licensed firearms dealer in D.C. is irrelevant to their constitutional challenge. JA 200-01; Appellants' Brief at 28; *but see* ¶¶ 18-19 of Amended Complaint ("Mr. Sykes has recently lost his lease... As a result... District of Columbia residents were unable to lawfully acquire handguns other than by inheritance."). JA 12-13.

Lorton, Virginia, and that transaction is prohibited by all three defendants.” JA 199. However, Flaherty has done nothing to prevent Plaintiffs from purchasing a handgun in Virginia, nor would an injunction against the paperwork he oversees result in a transfer of a handgun.

Lane claims that she purchased two handguns for self-defense from a Lorton, Virginia, firearms dealer on April 23, 2011, but cannot take possession of those handguns due to the absence of a D.C. firearms dealer needed to complete the sale. JA 22-23. She would have known at the time of the purchase that absent a D.C. firearms dealer with which to complete the sale, she could not take possession of the firearms. Moreover, she also should have been aware that under Virginia law, she could not purchase more than one handgun in any thirty-day period, absent having undergone an enhanced background check, which she has not alleged she could pass. *See* Va. Code § 18.2-308.2:2(P). Finally, while her declaration is less than clear on the point, Lane already appears to own a handgun, although she “finds it uncomfortable to use and do[es] not believe it would be useful to [her] in case of an emergency.” JA 23.

The Wellings claim that because of non-violent crime occurrences in their neighborhood (burglaries from several homes, and thefts from their car and patio), JA 25 and 27, they want the gun from Mrs. Welling’s father.

However, the Wellings have not identified a Virginia firearms dealer who would be ready, willing, and able to act as the conduit for the transfer of the firearm from Mrs. Welling's father in Texas, so that they would even be in a position to complain about the Virginia statute.

SAF claims that its "resources are taxed by inquiries into the operation and consequence of interstate handgun transfer prohibitions." *Id.* SAF fails to identify the extent of its resources which are utilized in making such inquiries, let alone whether they relate to inquiries directed at Virginia and its statutory scheme specifically. Moreover, these claims are too remote and indirect to confer standing to assert the Second Amendment claims advanced here. *San Diego Gun Rights Comm.*, 98 F.3d at 1130.

In sum, Plaintiffs' alleged "harms" are not traceable to or caused by Flaherty, the Superintendent of the Virginia State Police. On the contrary, Flaherty has done nothing to prevent Plaintiffs from buying a gun in Virginia, in the District of Columbia, or anywhere else for that matter. Accordingly, Plaintiffs lack standing to sue and the district court's decision should be affirmed.

B. SAF has not established organizational standing.

A review of the Amended Complaint and SAF's affidavit reveals that SAF has failed to demonstrate that any of its members has standing to sue.

In order to establish organizational standing, three elements must be met: (1) the organization's members would have standing to sue in their own right, (2) the interests that the organization seeks to protect are germane to its purposes, and (3) neither the claims asserted nor the relief requested requires the participation of each of the organization's individual members. *Friends of Ferrell Parkway*, 282 F.3d at 320 (citations omitted).

As previously stated, SAF claims that its "resources are taxed by inquiries into the operation and consequence of interstate handgun transfer prohibitions." JA 29-30. SAF also claims that its members and supporters "participate in the market for handguns," and are "adversely impacted by the additional costs and loss of choice imposed" by the challenged laws. JA 29-30. These claims are too vague, remote, and indirect to confer organizational standing.

CONCLUSION

The claims asserted here are too remote and causally unrelated to Flaherty to create standing in a case ripe for decision. Plaintiffs do not have standing to sue and the judgment of the district court should be affirmed.

Oral argument is respectfully requested.

W. STEVEN FLAHERTY

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