No. 11-1847

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHELLE LANE, AMANDA WELLING, MATTHEW WELLING, and the SECOND AMENDMENT FOUNDATION, INC.,

Plaintiffs-Appellants,

v.

ERIC HOLDER, JR., in his official capacity as Attorney General of the United States, and W. STEPHEN FLAHERTY, in his official capacity as Superintendent of the Virginia State Police,

Defendants-Appellees.

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

BRIEF FOR APPELLEES

TONY WEST
Assistant Attorney General

NEIL H. MacBRIDE
United States Attorney

MICHAEL S. RAAB
(202) 514-4053
ANISHA S. DASGUPTA
(202) 514-5428
Attorneys, Appellate Staff
Civil Division, Room 7237
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Constitution:

Statutes:

Regulations:

Rules:

Legislative Materials:

Other Authorities:

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STATEMENT OF JURISDICTION

Plaintiffs-appellants invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2201. JA 9. On July 15, 2011, the district court dismissed plaintiffs' suit for lack of standing. Id. at 213-14. Plaintiffs filed a timely notice of appeal on July 29, 2011 Id. at 182; Fed. R. App. P. 4(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

Whether plaintiffs have standing to bring this suit.

STATEMENT OF THE CASE

Plaintiffs – three individuals and the Second Amendment Foundation, Inc. – filed this pre-enforcement challenge to the constitutionality of a federal criminal statute restricting non-resident transfers of handguns by federal firearms licensees, 18 U.S.C. § 922(b)(3), a federal regulation implementing that statutory provision, 27 C.F.R. § 478.99, and a Virginia law prohibiting Virginia firearms dealers from selling or transferring a handgun to a non-resident of Virginia, Va. Code § 18.2-308.2:2(B)(5). See JA 14-15.[1] The district court concluded that plaintiffs lacked standing to sue and accordingly dismissed their action. Id. at 214. This appeal followed.

STATEMENT OF THE FACTS

A. Statutory And Regulatory Background.

1. Congress has found "that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." Omnibus Crime

[1] Plaintiffs' complaint also challenges certain District of Columbia municipal regulations regulating the transfer of handguns purchased outside the District. JA 16. The District of Columbia subsequently amended these regulations, see infra 12-13 and on October 7, 2011, this Court granted plaintiffs' motion to dismiss their claims against the District of Columbia, see Lane v. Holder, No. 11-1847 (4th Cir.).

Control and Safe Streets Act of 1968 ("Omnibus Crime Control Act"), Pub. L. No. 90-351, Title IV, § 901(a)(1), 82 Stat. 225. Accordingly, Congress has enacted a comprehensive framework for regulating commerce in firearms.

Congress enacted the Omnibus Crime Control Act following a multi-year investigation of violent crime, which revealed "the serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State and without the knowledge of their local authorities." S. Rep. No. 89-1866, at 19 (1966). Subsequently, Congress built on this regulatory framework in enacting the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, the "principal purpose" of which was "to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." H.R. Rep. No. 90-1577, at 6 (1968).

Congress's investigations revealed that "[n]ot only is mail order a means of circumventing State and local law, but the over-the-counter sale of firearms, primarily handguns, to persons who are not residents of the locale in which the dealer conducts his business, affords similar circumvention." S. Rep. No. 89-1866, at 3. Congress established that "[c]ircumvention of the laws of the District of Columbia was easily effected by" interstate transfers of handguns and that "[t]his situation is not peculiar or confined to the Washington, D.C. area." Id. at 61. "[I]n the Maryland suburban

area of Washington D.C.," 58 percent of one firearms dealer's handgun sales were to residents of the District of Columbia, and "[s]ubsequent criminal records checks on these purchasers reveal[ed] that 40 percent of them have criminal records." Ibid. Another firearms dealer in Maryland made 40 percent of its handgun sales to residents of the District of Columbia, 23 percent of whom were subsequently found to have criminal records in the District of Columbia. Ibid, In Massachusetts, the state police "traced 87 percent of the concealable firearms used in crimes in Massachusetts to out-of-State purchases." Id. at 54.

Congress thus found that "concealable weapons" presented a particular challenge for state and local law enforcement authorities, Pub. L. No. 90-351, Title IV, § 901(a)(2), (4), (5), (6), 82 Stat. at 225, and that "the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms," id. § 901(a)(5), 82 Stat. at 225. Congress found "that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made

possible." Id. § 901(a)(3), 82 Stat. at 225.

To that end, Congress included, in both the Omnibus Crime Control Act and the Gun Control Act, statutory provisions "designed to prevent the avoidance of State and local laws controlling firearms by the simple expediency of crossing a State line to purchase one." H. Rep. No. 90-1577, at 14 (1968); see also S. Rep. No. 90-1097, at 14 (1968). These provisions include 18 U.S.C. §§ 922(a)(1)-(5), which require interstate transfers of firearms to take place through federal firearms licensees, and 18 U.S.C. § 922(b)(3), which regulates the interstate transfer of firearms by federal firearms licensees.

Under Section 922(b)(3), federal firearms licensees may sell or deliver "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." Id. § 922(b)(3)(A). A licensee may also provide "the loan or rental of a firearm to any person for temporary use for lawful sporting purposes." Id. § 922(b)(3)(B). Otherwise, the licensee may not transfer firearms "to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located." Id. § 922(b)(3).

2. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is authorized to issue "such rules and regulations as are necessary to carry out" title 18's provisions relating to firearms. 18 U.S.C. § 926(a); National Rifle Ass'n v. Brady, 914 F.2d 475, 477 (4th Cir. 1990) ("The Secretary of the Treasury was authorized to promulgate regulations to facilitate the enforcement of the Gun Control Act" and "[t]his responsibility was delegated within the Department of the Treasury to the Bureau of Alcohol, Tobacco and Firearms.").

The implementing regulations promulgated by ATF include 27 C.F.R. § 478.99(a), which closely tracks Congress's limitations on interstate transfers of firearms by federal firearms licensees, 18 U.S.C. § 922(b)(3).[2] ATF has also provided that federal firearms licensees "shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any [transferee who is not federally licensed] unless the licensee records the transaction on a firearms transaction record, Form 4473." 27 C.F.R. § 478.124(a); see also 27 C.F.R. § 478.96 (imposing same restrictions with

[2] The regulation at 27 C.F.R. § 478.99(a) provides that a federally-licensed importer, manufacturer, dealer, or 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 . . . the State in which the licensee's place of business or activity is located." Ibid. The regulation does not "apply to the sale or delivery of a rifle or shotgun" if ATF's requirements for mail order sales, id. § 478.96(c), "are fully met." Id. § 478.99(a)(1). The regulation also does not "apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes." Id. § 478.99(a)(2).

respect to mail order sales). The Form 4473 establishes the transferee's identity as well as his or her eligibility to possess a firearm by documenting "the transferee's name, sex, residence address," "date and place of birth," "height, weight and race," "country of citizenship," "State of residence," and the transferee's certification that he or she "is not prohibited by the Act from transporting or shipping a firearm in interstate or foreign commerce or receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce." 27 C.F.R. § 478.124(c)(1) (emphasis added).

Under this regulatory framework, a person who is eligible to possess a handgun may purchase a handgun through an in-state federal firearms licensee or obtain a handgun from an out-of-state source, by arranging for the handgun to be delivered to an in-state firearms dealer, from whom the purchaser may retrieve the handgun directly. 18 U.S.C. § 922(b) (providing that "[p]aragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between" federal firearms licensees).

B. Facts And Prior Proceedings.

1. This is an action for injunctive relief filed by plaintiffs Michelle Lane, Matthew Welling, Amanda Welling, and the Second Amendment Foundation, Inc., "on behalf of itself and its members." JA 8, 17. Plaintiffs challenge the constitutionality of a federal statute restricting non-resident transfers of handguns by

federal firearms licensees, 18 U.S.C. § 922(b)(3), an ATF regulation implementing that statutory provision, 27 C.F.R. § 478.99, and a Virginia law prohibiting Virginia firearms dealers from selling or transferring a handgun to a non-resident of Virginia, Va. Code § 18.2-308.2:2(B)(5). See JA 14-15.

The Second Amendment Foundation is "a non-profit membership organization" whose "purposes . . . include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control." Id. at 8, 29. The individual plaintiffs are residents of the District of Columbia who wish to receive interstate transfers of handguns through federal firearms licensees in Virginia. Id. at 8, 10, 22-28. Michelle Lane has ordered two handguns from a licensed dealer in Virginia. Id. at 10, 22. Amanda Welling and Matthew Welling "would like to accept the offer of Amanda Welling's father, David Slack of Texas, to gift them a handgun for their use in home self-defense" via "a federal licensee in Virginia." Id. at 10, 25-28. The Wellings state that "[i]n order for Plaintiffs to take possession of the handguns, they must first have their registration forms filled out in the District of Columbia, and the Virginia dealer, and Slack, must arrange to transfer the various handguns to a federal firearms licensee in the District of Columbia, who could, in turn, transfer the handguns to Plaintiffs." Id. at 12.

The complaint alleges that "[u]ntil recently, only one federal firearms licensee,

Charles Sykes, was in the business of effectuating lawful handgun transfers to District of Columbia residents," ibid., that "Mr. Sykes has recently lost his lease in the District of Columbia," id. at 13, and that "as of this writing, [Sykes] is barred from effecting handgun transfers for District of Columbia residents," ibid. The complaint further alleges that "[a]s a result, by operation" of the challenged federal and state laws, "District of Columbia residents are unable to acquire handguns." Ibid.

2. Five weeks after filing their suit, plaintiffs moved for a preliminary injunction. Id. at 1, 20. All three individual plaintiffs declared that it was "burdensome and expensive to make multiple trips between gun stores outside the District of Columbia, the police station, and Charles Sykes's office (or any other location to which he would move) inside the District, just to purchase a handgun," and "burdensome and expensive to pay the costs of transferring guns from an out-of-state federal firearms licensee to Charles Sykes, and then to pay Sykes's $125 transfer fee, just to acquire a handgun." Id. at 23, 26, 28. The plaintiffs declared that "[b]ut for the various rules and regulations that forbid [them] from doing so, [they] would take possession of" handguns from federal firearms licensees in Virginia. Id. at 23, 26; see also id. at 28. They further declared that they "would participate more frequently in the market for handguns in the absence of restrictions on the acquisition of handguns from out-of-state." Id. at 26, 28; see also id. at 23.

Michelle Lane declared that she was "fully qualified to register a handgun in the District of Columbia, and in fact, had previously done so, but [she] found that particular handgun uncomfortable to use and [did] not believe it would be useful to [her] in case of an emergency." Id. at 23. The Wellings declared that "[s]everal homes on the Capitol Hill block where [they] live . . . have been burglarized in recent years" and they "have experienced theft from [their] patio and car." Id. at 25, 27. The Wellings stated that they were "concerned for [their] family's safety, and want to have a handgun at [their] home for self-defense." Id. at 25, 27. The Second Amendment Foundation, through its Director of Operations, Julianne Versnel, declared that the Foundation's members and supporters "participate in the market for handguns" and "are also adversely impacted by the additional costs and loss of choice imposed by interstate handgun transfer prohibitions," and that "[o]wing to SAF's mission, SAF's resources are taxed by inquiries into the operation and consequences of interstate handgun transfer prohibitions." Id. at 29-30.

3. The district court denied plaintiffs' motion for a preliminary injunction and dismissed their suit for lack of standing. Id. at 209, 213-14. The court noted that the challenged laws merely regulated interstate transfers, rather than imposing "an outright ban on purchase of weapons from out-of-state residents, because as counsel acknowledges, it is possible to buy a weapon in another state." Id. at 212.

The court assumed for purposes of argument that plaintiffs correctly alleged they were presently unable to receive interstate transfers of handguns because there was "no current D.C. federal firearms licensee." Id. at 210.[3] But the court concluded that these allegations were legally insufficient to support standing because "plaintiffs' injury here, if any[,] is caused by independent third parties who are not joined in this case and over whom the Court cannot exercise control," id. at 209. The court determined that "plaintiffs are unable to prove the injury is fairly traceable to or caused by the federal firearms laws." Id. at 213.

The court concluded that plaintiffs' other alleged injuries were similarly insufficient to support their challenge to 18 U.S.C. § 922(b)(3)'s limitations on interstate handgun transfers. JA 213. The court noted that Section 922(b)(3) regulates the actions of federal firearms licensees, and "[p]laintiffs are not licensed importers, manufacturers, dealers, or collectors. They are gun purchasers." JA 213. Because plaintiffs are challenging the government's regulation of third parties not before the court, id. at 212, "their burden is very high," id. at 213. The court explained that "in order to challenge a federal law and to seek a mandatory injunction, a great deal more

[3] The United States, in opposition to plaintiffs' motion, submitted a declaration from the Chief of the Federal Firearms Licensing Center of ATF, which stated that "[a]s of June 2011, there were six individuals or entities licensed as Federal firearms dealers in the District of Columbia" and "one entity licensed as an importer of firearms." Id. at 155.

would have to be shown, and it has not been shown here." Id. at 213-14. Accordingly, the court denied plaintiffs' motion for a preliminary injunction "because plaintiffs are unable to prove [their] injury is fairly traceable to or caused by" the challenged federal laws, id. at 213, and dismissed plaintiffs' suit "because plaintiffs lack standing" to sue, id. at 214. The court declined to consider the merits of plaintiffs' request for preliminary and permanent injunctive relief "because in the absence of standing it is not appropriate . . . to reach that question . . . ." Ibid.

4. While this case was before the district court, the District of Columbia was finalizing arrangements for the District's law enforcement and licensing agencies to provide space for federal firearms licensees needing a location to conduct their business. Id. at 176-79. After plaintiffs filed this appeal, the District of Columbia amended the municipal regulations challenged in plaintiffs' complaint, making 18 U.S.C. § 922(b)(3)'s restrictions on interstate transfers of handguns a prerequisite to the District's restrictions on the transfer of handguns purchased outside the District. Compare id. at 16 (challenging 24 D.C.M.R. § 2320.3(b), (f)) with 58 D.C. Register 008240 (Sept. 23, 2011) (amending 24 D.C.M.R. § 2320.3(b), (f).[4] Plaintiffs therefore

[4] At the time this suit was filed, District of Columbia residents seeking to receive a handgun purchased outside the District were required to complete their handgun registration application with the assistance of a firearms dealer licensed by the District of Columbia, 24 D.C.M.R. § 2320.3(b) (June 5, 2009), and to take delivery of the handgun through "a licensed firearms dealer in the District," id. § 2320.3(f) (June 5,

moved this Court to dismiss their appeal against the District of Columbia, and this Court granted the motion. Lane v. Holder, No. 11-1847 (4th Cir. Oct. 7, 2011).

SUMMARY OF ARGUMENT

1. Plaintiffs seek preenforcement review of a federal statute and regulation providing that federal firearms licensees may transfer handguns only to residents of the state where the licensee does business. 18 U.S.C. § 922(b)(3); 27 C.F.R. § 478.99, As the district court correctly explained, plaintiffs lack standing because the challenged provisions regulate third parties not before the court, and the injuries asserted by plaintiffs are not fairly traceable to or caused by those provisions.

The individual plaintiffs, residents of the District of Columbia who wish to acquire handguns and who have made arrangements to obtain handguns from federal firearms licensees in Virginia, object to paying to transfer the handguns to a licensee in the District of Columbia and then paying the in-District licensee's transfer fee. The

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2009). As amended, 24 D.C.M.R. § 2320.3 provides for a handgun registration applications to be completed with the assistance of a firearms dealer "[l]ocated outside the District if the firearm is purchased outside the District," Id. § 2320.3(b) (Sept. 23, 2011), and requires District of Columbia residents to take delivery of the handgun through a firearms dealer in the District only "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," id. § 2320.3(f) (Sept. 23, 2011). See 58 D.C. Register 008240-41 (Sept. 23, 2011), available at http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?noticeid=1742040 (last visited October 25, 2011).

individual plaintiffs also object to the burden and expense entailed in making multiple trips between gun stores outside the District of Columbia, their local police stations, and the office of an-in District licensee.

But the challenged provisions do not require plaintiffs to incur these asserted burdens in order to acquire a handgun. Those provisions allow plaintiffs to obtain handguns from a District of Columbia licensee; to the extent that plaintiffs lack an in-District source from whom they may purchase handguns, plaintiffs acknowledge that this circumstance was not caused by the defendants in this suit. The statute also allows plaintiffs to purchase a handgun from an out-of-state source in a single trip by ordering the handgun via the internet from a licensed dealer located anywhere in the United States and arranging for the handgun to be delivered to an in-state firearms dealer, from whom plaintiffs may retrieve the handgun directly. Plaintiffs therefore cannot rely on fees imposed by independent third-party firearms dealers or the added costs of interstate travel in order to establish their standing to sue.

Because the Second Amendment Foundation does not assert the existence of any additional injuries suffered by its members, the Foundation lacks standing to sue for the same reasons that the individual plaintiffs lack standing to sue. The Foundation cannot establish standing to sue on its own behalf merely by claiming that it expends resources responding to inquiries about the operation and consequences of

interstate handgun prohibitions. That diversion of resources from the Foundation's other programs results from the Foundation's own budgetary choices, not from the federal government's promulgation of the challenged federal laws. The Foundation makes no showing that the challenged federal laws require the Foundation to respond to inquiries it might not otherwise receive, or hinder the activities of the Foundation in any other regard.

2. Because plaintiffs lack standing, the district court properly dismissed their suit without considering their request for a preliminary injunction. A remand is therefore appropriate if this Court disagrees with the district court's determination that plaintiffs lack standing to sue. In any event, plaintiffs have not shown any entitlement to a preliminary injunction. Section 922(b)(3) and 27 C.F.R. § 478.99 place geographical conditions on the sale and transfer of firearms by federally licensed firearms dealers. These provisions are "laws imposing conditions and qualifications on the commercial sale of arms," and therefore among the "presumptively lawful regulatory measures" expressly identified by the Supreme Court in District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008), and McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (plurality).

The conduct regulated by these provisions falls outside the scope of the Second Amendment, which does not address the ability to sell or purchase firearms in any

particular forum but provides instead that "the right of the people to keep and bear Arms, shall not be infringed," U.S. Const. amend. II. Indeed, plaintiffs acknowledge that they claim a right not directly addressed by the Second Amendment, inviting this Court to infer that the Second Amendment guarantees immediate access to a national market in handguns. Plaintiffs recognize that this right is at least two steps removed from the individual right to keep and bear Arms recognized in Heller, and at least one step removed from any right to acquire handguns for self-defense in the home.

In addition, even if plaintiffs' suit implicates their Second Amendment rights, the challenged federal laws all readily withstand heightened scrutiny. These provisions, which are part of a comprehensive scheme regulating commerce in firearms, support the government's interest in public safety separately and as part of that larger scheme.

Based on a multi-year investigation into violent crime, Congress found that concealable weapons such as handguns were disproportionately used in violent crimes and "that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms," Pub. L. No. 90-351, Title IV, § 901(a)(5), 82 Stat. at 225.

Accordingly, Congress enacted statutory provisions "designed to prevent the avoidance of State and local laws controlling firearms by the simple expediency of crossing a State line to purchase one." H. Rep. No. 90-1577, at 14 (1968); see also S. Rep. No. 90-1097, at 14 (1968). These provisions include 18 U.S.C. §§ 922(a)(1)-(5), which require interstate transfers of firearms to take place through federal firearms licensees, and 18 U.S.C. § 922(b)(3), which regulates the conditions under which licensed dealers may transfer handguns to individuals residing outside a dealer's state.

Congress's requirement that handgun transfers take place through in-state licensed dealers limits circumvention of state handgun controls by ensuring that handgun transfers are made only by dealers who are well-acquainted with and required to follow a State's handgun laws, allowing States to monitor more effectively the enforcement of state gun laws by focusing on dealer compliance. There is thus at least a "reasonable fit" between the challenged federal laws and the government's interest in public safety, which the Supreme Court has recognized as "compelling," United States v. Salerno, 481 U.S. 739, 750 (1987); see also Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 376 (1997) (referring to the "significant governmental interest in public safety"). Accordingly, Section 922(b)(3) and 27 C.F.R. § 478.99 plainly pass constitutional muster even under heightened scrutiny and plaintiffs cannot establish a likelihood of success on the merits of their

challenge.

STANDARD OF REVIEW

The court "review[s] de novo the district court's decision to dismiss for lack of standing," Doe v. Obama, 631 F.3d 157, 160 (4th Cir. 2011), and "can affirm on any basis fairly supported by the record," Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220, 222 (4th Cir. 2002).

ARGUMENT

The District Court Properly Dismissed Plaintiffs' Suit For Lack Of Standing.

A. Plaintiffs Lack Standing To Bring This Suit.

1a. As the district court correctly explained, both 18 U.S.C. § 922(b)(3) and 27 C.F.R. § 478.99 regulate federal firearms licensees, not would-be purchasers of firearms. JA 213. Section 922(b)(3) provides that, with certain specified exceptions, "[i]t shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located." The regulation closely tracks the statutory language, providing that "[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 . . . the State in which the licensee's place of business or activity is located," subject to the exceptions set forth in Section 922(b)(3). 27 C.F.R. § 478.99(a).

As this Court has explained, "when a plaintiff is not the direct subject of government action, but rather when the 'asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else,' satisfying standing requirements will be 'substantially more difficult.'" Frank Krasner Enterprises, Ltd. v. Montgomery County, 401 F.3d 230, 234-35 (4th Cir. 2005) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)). "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction — and perhaps on the response of others as well." Lujan, 504 U.S. at 562. The district court properly rested its analysis on these principles. JA 213 (noting that because plaintiffs are challenging the government's regulation of third-party federal firearms licensees, "their burden is very high").

Plaintiffs contend that Section 922(b)(3)'s regulation of federal firearms licensees makes plaintiffs' intended handgun purchases more "burdensome and expensive." JA 23, 26, 28. They object to "pay[ing] the costs of transferring guns

from an out-of-state federal firearms licensee to Charles Sykes," a federal firearms licensee located in the District of Columbia, and then "pay[ing] Sykes's $125 transfer fee, just to acquire a handgun." Id. at 26, 28; see also id. at 23.

These added costs, however, result from fees imposed by the independent third-party firearms dealers, not from the challenged federal laws. Plaintiffs thus "lack standing for failure to establish the causation and redressability prongs" of Article III standing. Frank Krasner Enterprises, 401 F.3d at 236. "The purported injury here . . . is not directly linked to the challenged law because an intermediary . . . stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain." Ibid.

As this Court explained in Krasner, added costs imposed on a plaintiff by a regulated third party do not provide the plaintiff with standing to challenge the regulations encumbering that third party, where the third party is an independent actor with regard to the costs imposed. In Krasner, a gun-show promoter and gun-show exhibitor challenged a county law denying public funding to venues that display and sell guns. 401 F.3d at 232. The Court "acknowledge[d] that the law makes it more expensive — perhaps prohibitively so — for" a local venue to lease space to the plaintiffs, such that the venue "would need to charge [plaintiffs] or any other gun show proprietors an amount at least equal to what it estimates it would lose from

Montgomery County in grants." Id. at 236. The Court nonetheless concluded that plaintiffs lacked standing to sue, observing that the challenged law "only indirectly" raised plaintiffs' costs because the local venue "stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain." Ibid.

The Court in Krasner noted with approval the similar conclusion of the Ninth Circuit in San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121 (9th Cir. 1996). There "the Ninth Circuit denied standing to plaintiffs who alleged, among other things, that the Crime Control Act, which banned certain guns (but 'grandfathered' in others) made the guns and ammunition the plaintiffs wished to purchase more expensive." Krasner, 401 F.3d at 235. "Even granting that the law restricted supply and that the purported economic injury was an 'injury in fact,'" the Ninth Circuit "found it to be a 'fatal flaw' in the plaintiff's standing argument that 'nothing in the Act directs manufacturers or dealers to raise the price of regulated weapons.'" Ibid. (quoting 98 F.3d at 1130). As the Ninth Circuit observed, "third parties such as weapon dealers and manufacturers broke the chain of causation by independently charging higher prices." Ibid.[6]

[6] The Ninth Circuit's decision in San Diego County Gun Rights Committee predates the Supreme Court's recognition that the Second Amendment protects "an individual right to keep and bear arms," District of Columbia v. Heller, 554 U.S. 570, 595 (2008), but the Ninth Circuit's conclusion that the plaintiffs' alleged economic injuries were not "fairly traceable" to the challenged federal law, 98 F.3d at 1130, is

The economic injuries claimed by plaintiffs in this suit are similarly attributable to the independent actions of third-party firearms dealers, not to the challenged federal laws. Neither 18 U.S.C. § 922(b)(3) nor 27 C.F.R. § 478.99 direct firearm dealers to charge transfer fees. Plaintiffs cannot therefore rely on these transfer fees to establish their standing to sue.

Plaintiffs also state that they "find it burdensome and expensive to make multiple trips between gun stores outside the District of Columbia, the police station, and [the office of a federal firearms licensee] inside the District, just to purchase a handgun." JA 26, 28; see also id. at 23. Plaintiffs are mistaken, however, in contending that federal regulations on interstate handgun transfers require them to make these trips in order to purchase a handgun.

Neither Section 922(b)(3) nor ATF's regulation at 27 C.F.R. § 478.99 require plaintiffs to make multiple trips in order to purchase a handgun. To the extent that plaintiffs lack an in-District source from whom they may purchase handguns, plaintiffs now acknowledge that "[d]efendants Holder and Flaherty are not responsible for the lack of firearms dealers in Washington, D.C." (Pl. Br. 24).[7] In addition, federal

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unaffected by Heller's analysis.

[7] Plaintiffs thus disclaim reliance on the inability to acquire handguns (Pl. Br. 23-24) that they asserted in their complaint, which alleges that plaintiffs are "unable to acquire handguns" because the District of Columbia lacks a federal firearms licensee

law permits an individual to purchase a handgun from an out-of-state source in a single trip by ordering the handgun via the internet from a licensed dealer located anywhere in the United States and arranging for the handgun to be delivered to an in-state firearms dealer, from whom the purchaser may retrieve the handgun directly. 18 U.S.C. § 922(b) (providing that "[p]aragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between" federal firearms licensees).

In any event, a handgun purchaser who physically travels to an out-of-state firearms dealer may need to make more than one trip independently of Section 922(b)(3), depending on the outcome of the National Instant Criminal Background Check ("NICS") check or state law. For example, Virginia law prohibits the sale of a handgun without a criminal background check, and Virginia firearms dealers may be required to wait up to three business days for the criminal background check to be completed by Virginia's Firearms Transaction Center. JA 67 (Tate Affidavit); see also 27 C.F.R. § 478.102(a)(2)(ii) (requiring firearms dealers to delay the sale of a firearm to a purchaser for three business days if a NICS background check on the purchaser cannot be immediately accomplished). Plaintiffs are not asking to be

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capable of "effectuating lawful handgun transfers to District of Columbia residents," JA 12-13. In any event, this claim has been mooted by the District of Columbia's arrangements for the District's law enforcement and licensing agencies to provide operating space for Charles Sykes and other federal firearms licensees needing a place to conduct business. See id. at 176-79 (O'Meara Affidavit, Schellin Affidavit).

excused from these mandatory background check requirements (Pl. Br. 17).

b. Plaintiffs erroneously contend that "[w]ere the lower court's decision here correct, [Carey v. Population Services International, 431 U.S. 678 (1977)] and [Doe v. Bolton, 410 U.S. 179 (1973)] should have been dismissed for lack of standing, because the plaintiffs in those cases could have obtained their contraceptives and abortions from other providers" (Pl. Br. 29). In Carey, a "nonprofit corporation disseminating birth control information and services" challenged a New York law making it a crime "(1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives." 431 U.S. at 681-82.

The non-profit plaintiff in Carey was directly regulated by the law being challenged and "[v]arious New York officials [had] advised [it] that its activities violate New York law." Id. at 682. The Supreme Court concluded that the non-profit therefore had standing to sue and determined that there was "no occasion to decide the standing of the other appellees." Ibid.[8]

[8] Plaintiffs make the same error of reasoning in relying (Pl. Br. 30) on Schad v. Mt. Ephraim, 452 U.S. 61, 64 (1981) (adult bookstore challenging conviction for violation of a zoning ordinance), Schneider v. New Jersey, 308 U.S. 147 (1939) (individuals

In Doe, a state law requiring "advance approval by [a hospital] abortion committee" in order "for an abortion to be authorized or performed as a noncriminal procedure," 410 U.S. at 183-84, was challenged by physicians who were directly regulated by the law, and a pregnant woman who established that "[b]ecause her application was denied, she was forced either to relinquish her right to decide when and how many children she will bear or to seek an abortion that was illegal under the Georgia statutes," id. at 185-86. Thus, neither Carey nor Doe support plaintiffs' standing to bring this suit.

Plaintiffs' reliance on Dearth v. Holder, 641 F.3d 499 (D.C. Cir. 2011) is misplaced in light of their acknowledgment that the challenged federal laws regulate only the terms on which they may purchase handguns from an out-of-state source, not whether they may acquire handguns at all (Pl. Br. 28). In Dearth, the D.C. Circuit concluded that standing to sue was established by the plaintiff's allegation that he was prohibited from purchasing a handgun in any United States forum because he lacked a U.S. state of residence and therefore could not complete ATF Form 4473. 641 F.3d

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challenging convictions for violating anti-leafleting ordinances); Annex Books,Inc. v. City of Indianapolis, 581 F.3d 460, 461 (7th Cir. 2009) ("firms defined as 'adult entertainment businesses'" challenging municipality's "adult-business ordinances"); and Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005 (4th Cir. 1995) (en banc) (adult bookstore challenging constitutionality of county adult bookstore licensing law).

at 501-02 (noting that "Dearth is an American citizen who resides in Canada and no longer maintains a residence in the United States," and that Dearth "argues the Government denied him the ability to buy a firearm by requiring, via Question 13 on Form 4473, that he reside in a state as a condition of making such a purchase"). Here, the challenged federal laws do not prevent plaintiffs from acquiring new handguns. Plaintiffs may acquire handguns from a local source directly. They may also acquire handguns from anywhere in the United States as long as they arrange to retrieve the handguns from a federal licensee doing business in the District of Columbia.

Because Section 922(b)(3) does not require plaintiffs to travel to a different jurisdiction in order to exercise their right to possess firearms in the home for self-defense, their circumstances are readily distinguishable from those of the individual plaintiffs in Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011). In Ezell, the Seventh Circuit found standing to sue based on the individual plaintiffs' showing that the challenged municipal ordinance "severely burdens the core Second Amendment right to possess firearms for self-defense because it conditions possession on range training but simultaneously forbids range training everywhere in the city." 651 F.3d at 690; see also id, at 695 ("[T]he range ban impermissibly burdens the core Second Amendment right to possess firearms in the home for self-defense because it prohibits, everywhere in the city, the means of satisfying a condition the City imposes for lawful

firearm possession."). Here, as noted above, the challenged federal laws permit Plaintiffs to acquire handguns from a local source.

2. The complaint does not assert the existence of any additional injuries suffered by the Second Amendment Foundation or its members. Thus, the Foundation lacks standing to sue for the same reasons that the individual plaintiffs lack standing to sue.

The Foundation's reliance on Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), is misplaced (Pl. Br. 33). In Havens, the plaintiff organization alleged that the defendant's unlawful housing practices "frustrated" the organization's efforts "to assist equal access to housing" and further alleged that it "had to devote significant resources to identify and counteract" the defendant's unlawful housing practices. 455 U.S. at 379. Here, the Foundation offers only a statement that "[o]wing to SAF's mission, SAF's resources are taxed by inquiries into the operation and consequences of interstate handgun prohibitions." JA 30 (Versnel Affidavit)

An organization's expenditure of resources in connection with challenged conduct does not inevitably establish an "'injury in fact' fairly traceable to" that conduct. Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp, 28 F.3d 1268, 1276 (D.C. Cir. 1994). In Fair Employment Council, the D.C. Circuit concluded that the plaintiff organization had standing to sue based on its showing that

the defendant's "pattern of discrimination . . . has made the [organization's] overall task more difficult," for example, by "reduc[ing] the effectiveness of any given level of outreach efforts." Ibid. (emphasis added). The D.C. Circuit distinguished between these allegations, "which closely track the claims that the Supreme Court found sufficient in Havens," and the plaintiff's more general allegations of resource expenditure, which the D.C. Circuit found insufficient to support standing as a matter of law. Ibid.[9] The D.C. Circuit explicitly rejected the organization's suggestion that the expense of monitoring the defendant's conduct gave the organization standing to sue. Ibid. The D.C. Circuit explained that, although this "diversion of resources . . . might well harm the Council's other programs," that "particular harm is self-inflicted; it results not from any actions taken by [the defendant], but rather from the Council's own budgetary choices." Ibid. As the D.C. Circuit observed, "[o]ne can hardly say that [the defendant] has injured the Council merely because the Council has decided that its money would be better spent by testing [the defendant] than by counseling or

[9] See also Abigail Alliance For Better Access to Developmental Drugs v. Eschenbach, 469 F.3d 129, 132-33 (D.C. Cir. 2006) (organizational standing based on allegation that the challenged regulations "frustrated" the organization's "efforts to assist its members and the public in accessing potentially life-saving drugs and its other activities, including counseling, referral, advocacy, and educational services . . . because the organization has had to divert significant time and resources from these activities toward helping its members and the public address the unduly burdensome requirements" imposed).

researching." Id, at 1277.

Here, the Second Amendment Foundation makes no showing that the challenged federal laws require the Foundation to respond to inquiries it might not otherwise receive, or make the activities of the Amendment Foundation more difficult in any other regard. Thus, to the extent the Foundation expends any resources in connection with the challenged federal laws, this "particular harm is self-inflicted; it results not from any actions taken by [the defendant], but rather from the [Foundation's] own budgetary choices," Fair Employment Council, 28 F.3d at 1276.

Contrary to the Foundation's assertions (Pl. Br. 32-33), Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), does not support the Second Amendment Foundation's standing to bring this suit. In Ezell, individual members of the Foundation had standing to sue, 651 F.3d at 696, and the activities of the Foundation were actively thwarted by Chicago's firing range ban, id. at 692 (noting the organizational plaintiffs' presentation of testimony that they had "made arrangements to try to bring a mobile firing range to Chicago").

B. The District Court Properly Declined To Consider Plaintiffs' Request For A Preliminary Injunction, And Plaintiffs' Claims Lack Merit In Any Event.

Because plaintiffs lack standing, the district court properly dismissed their suit without considering their request for a preliminary injunction. If this Court were to

conclude that plaintiffs have standing, the Court should remand this suit to the district court for the district court to consider the propriety of preliminary injunctive relief in the first instance.

"A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court." Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 345 (4th Cir. 2009), reissued on remand, 607 F.3d 355 (4th Cir. 2010). Its "traditional" purpose "is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003) (citation omitted). Plaintiffs here seek the particularly extraordinary remedy of a preliminary injunction that would alter the status quo by enjoining the enforcement of an existing federal statutory and regulatory scheme.

"Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by 'a clear showing'" that "it is likely to succeed on the merits at trial." Real Truth About Obama, 575 F.3d at 345-36 (quoting Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 376 (2008)). The party seeking the preliminary injunction must also "make a clear showing," id. at 346, that "it is likely to be irreparably harmed absent preliminary relief," id. at 347, "that the balance of equities

tips in [its] favor," id. at 346, and "that an injunction is in the public interest," ibid. "The standard of review on appeal is whether the record shows an abuse of discretion by the district court, not whether the appellate court would have granted or denied the injunction." Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980).

Here, the district court properly declined to consider plaintiffs' request for a preliminary injunction in light of its conclusion that plaintiffs lack standing to sue. JA 214. A remand for further proceedings is therefore appropriate if this Court disagrees with the district court's determination that plaintiffs lack standing to sue. Nor should the court accept plaintiffs' invitation to advance to the merits, as "it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits." Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

In any event, plaintiffs' constitutional challenges lack merit. In District of Columbia v. Heller, the Supreme Court provided a non-"exhaustive" list of "presumptively lawful regulatory measures," including "laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27 & n.26. The Court "made it clear in Heller that [its] holding did not cast doubt" on such measures and "repeat[ed] those assurances" in McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (plurality).

Heller thus recognized that "the right to keep and bear arms, like other Constitutional rights, is limited in scope and subject to some regulation." United States v. Chester, 628 F.3d 673, 676 (4th Cir. 2010). McDonald, in turn, "reaffirmed that Second Amendment rights are far from absolute, reiterating that Heller had 'assur[ed]' that many basic handgun regulations were presumptively lawful." United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011).

As plaintiffs acknowledge, Section 922(b)(3) and 27 C.F.R. § 478.99 are "laws imposing conditions and qualifications on the commercial sale of arms," Heller, 554 U.S. at 626-27. The challenged federal laws are therefore among the "presumptively lawful regulatory measures" expressly identified in Heller, 554 U.S. at 626-27, and McDonald, 130 S. Ct. at 3047. Plaintiffs thus cannot demonstrate a likelihood of success on the merits because the challenged federal laws are plainly constitutional.

1. The Challenged Federal Laws Do Not Burden Conduct Protected By The Second Amendment.

The challenged federal laws place geographical conditions on the sale and transfer of firearms by federally licensed firearms dealers. They therefore regulate conduct falling outside the scope of the Second Amendment, which does not address the ability to sell or purchase firearms in any particular forum but provides instead that "the right of the people to keep and bear Arms, shall not be infringed," U.S. Const.

amend. II.

Laws enacted around the time the Constitution was ratified confirm that the Second Amendment was not intended to address regulations on the commercial sale of weaponry. For example, laws regulating how sellers of gun powder could store and transport their goods were adopted by Philadelphia in 1782, New York in 1784, and Boston in 1792. See Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 511-12 (2004) (citing Act of Dec. 6, 1783, Ch. MLIX, 11 Pa. Stat. 209; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; Act of June 26, 1792, ch. X, 1792 Mass. Acts 208).

Plaintiffs acknowledge that they claim a right not directly addressed by the Second Amendment (Pl. Br. 37), inviting this Court to infer that the Second Amendment guarantees consumers the ability to "acquire a [firearm] where they buy it and where it is offered for sale" (Pl. Br. 28). Plaintiffs appear to recognize that the right to be inferred is at least two steps removed from the individual "right to keep and bear Arms" recognized in Heller, and at least one step removed from any "right to acquire" handguns, asserting that "[t]he ultimate availability of some handguns" is "irrelevant" to this Court's analysis of the challenged federal laws (Pl. Br. 28).

Plaintiffs' argument finds no support in the constitutional text or this Court's approach to Second Amendment analysis. This Court, when rejecting a request to

explore "whether and to what extent the Second Amendment right recognized in Heller applies outside the home," found it "prudent to await direction from the [Supreme] Court itself." Masciandaro, 638 F.3d at 474-75. As this Court observed, "[t]o the degree that we push the right beyond what the Supreme Court in Heller declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee." Id. at 475. Firearms regulations, the Court noted, are a "serious business," and the Court did 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." Ibid.

2. Even If Plaintiffs' Suit Implicates Their Second Amendment Rights, The Challenged Federal Laws Are Constitutional.

This Court should reject plaintiffs' challenge to Section 922(b)(3) and 27 C.F.R. § 478.99 because these are "laws imposing conditions and qualifications on the commercial sale of arms," Heller, 554 U.S. at 627 n.26, and therefore do not run afoul of the Second Amendment. But to the extent that the Court concludes that the conduct at issue here is protected by the Second Amendment at all, the Court should reject plaintiffs' constitutional challenges. As explained below, the challenged provisions

all readily withstand intermediate scrutiny.[10]

a. At Most This Court Should Apply Intermediate Scrutiny.

In urging this Court to apply strict scrutiny to Section 922(b)(3) and 27 C.F.R. § 478.99, plaintiffs overlook the Supreme Court's admonition that "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful regulatory measures," McDonald, 130 S. Ct. at 3047; Heller, 554 U.S. at 626-27 & n.26. Strict scrutiny contemplates that a law is "presumptively invalid." See, e.g., Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1098 (2009) ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny."); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 497 n.4 (1981) (Stevens, J. dissenting) ("Racial classifications, which are subjected to 'strict scrutiny,' are presumptively invalid because there is seldom, if ever, any legitimate reason for treating citizens differently because of their race."). Thus, in light of "public safety interests," this Court has declined to apply strict scrutiny even to claims that come much closer to implicating the core of the Second Amendment right. Masciandaro, 638 F.3d at 470; see also id. at 467 (Niemeyer, J. concurring) (noting

[10] The challenged federal laws would also satisfy strict scrutiny for the reasons set forth below and because they are "presumptively lawful." Heller, 554 U.S. at 527 n.26. In any event, as explained below, this Court should apply intermediate scrutiny at most.

plaintiff's claim that "because he regularly slept in his car, as much as three to five days a week while traveling on business, his arrest for carrying or possessing a handgun" in his car "ran afoul of Heller's core protection of the right 'to use arms in defense of hearth and home'"). As the Court explained in Masciandaro: "Were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to prevent armed mayhem in public places, and depriving them of a variety of tools for combating that problem." 638 F.3d at 471 (brackets, quotation marks, and citation omitted).

Strict scrutiny is also inappropriate because the challenged laws merely regulate the geographical conditions under which federally licensed firearms dealers may sell and transfer firearms. Plaintiffs remain free to purchase handguns from an in-state source, or to procure handguns from an out-of-state source as long as they arrange to retrieve the handguns from an in-state federal licensee. As this Court has observed, "[t]he Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right." Masciandaro, 638 F.3d at 470 (quoting Chester, 628 F.3d at 682). "[L]ess severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified." Ibid. (quoting

Chester, 628 F.3d at 682) (quotation marks omitted).

Other courts of appeals have similarly concluded that strict scrutiny is not triggered by a law that is "neither designed to nor has the effect of prohibiting the possession of any class of firearms." United States v. Marzzarella, 614 F.3d 85, 97 (3rd Cir. 2010). In Marzzarella, the Third Circuit applied intermediate scrutiny to a law prohibiting possession of a firearm with an obliterated serial number, 18 U.S.C. § 922(k), explaining that "[t]he burden imposed by the law does not severely limit the possession of firearms" because the law "leaves a person free to possess any otherwise lawful firearm he chooses — so long as it bears its original serial number." Ibid.

The federal laws challenged here likewise do not "severely limit the possession of firearms," ibid., because they "leave[] a person free to possess any otherwise lawful firearm he chooses," ibid., as long as he complies with the applicable regulations on interstate transfers and sales. Section 922(b)(3) does not prohibit individuals from acquiring or possessing handguns, and Congress plainly did not intend Section 922(b)(3) to have that effect. As Congress declared, "it is not the purpose of this [law] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity," and the law "is not intended to discourage or eliminate the private

ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. No. 90-618, § 101, 82 Stat. at 1213-14; see also Pub. L. No. 90-351, § 901(b), 82 Stat. at 226. Rather, Congress's "principal purpose" was "to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." H.R. Rep. No. 90-1577, at 6; see also Navegar, Inc. v. United States, 192 F.3d 1050, 1063 (D.C. Cir. 1999) (recognizing this Congressional purpose); United States v. Petrucci, 486 F.2d 329, 331 (9th Cir. 1973) (same).

Thus, the challenged federal laws do not trigger strict scrutiny and may not even warrant intermediate scrutiny. As the Ninth Circuit has observed, "[t]he Supreme Court's reasoning in Heller and McDonald suggests that heightened scrutiny does not apply unless a regulation substantially burdens the right to keep and to bear arms for self-defense." Nordyke v. King, 644 F.3d 776, 783 (9th Cir. 2011). Here, the challenged federal laws permit plaintiffs to purchase firearms from an in-state federal firearms licensee or obtain a handgun from an out-of-state source, by arranging for the handgun to be delivered to an in-state firearms dealer, from whom they may retrieve the handgun directly. 18 U.S.C. § 922(b) (providing that "[p]aragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between" federal firearms licensees). The challenged federal laws therefore "leave[] law-abiding citizens with

reasonable alternative means for obtaining firearms sufficient for self-defense purposes," Nordyke, 644 F.3d at 787.

b. The Challenged Federal Laws Satisfy Intermediate Scrutiny.

To satisfy intermediate scrutiny, the government must demonstrate "that there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective." Chester, 628 F.3d at 683. "[I]ntermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question." Masciandaro, 638 F.3d at 474. Applying intermediate scrutiny here, Plaintiffs cannot show a likelihood of success on the merits because the federal laws are plainly constitutional.

The challenged federal laws are part of a comprehensive scheme regulating commerce in firearms. Based on a multi-year investigation into violent crime, Congress found "that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." Pub. L. No. 90-351, Title IV, § 901(a)(1), 82 Stat. at 225. Congress accordingly enacted the Omnibus Crime

Control Act, Pub. L. No. 90-351, 82 Stat. 225, and the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

Congress found "that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms." Pub. L. No. 90-351, Title IV, § 901(a)(5), 82 Stat. at 225. Congress's investigations revealed a "serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State and without the knowledge of their local authorities." S. Rep. No. 89-1866, at 19. The investigation established that "[n]ot only is mail order a means of circumventing State and local law, but the over-the-counter sale of firearms, primarily handguns, to persons who are not residents of the locale in which the dealer conducts his business, affords similar circumvention." Id. at 3.

Congress's investigations revealed that "[c]ircumvention of the laws of the District of Columbia was easily effected by" interstate transfers of handguns and that "[t]his situation is not peculiar or confined to the Washington, D.C. area." Id. at 61. "[I]n the Maryland suburban area of Washington D.C.," 58 percent of one firearms dealer's handgun sales were to residents of the District of Columbia, and

"[s]ubsequent criminal records checks on these purchasers reveal[ed] that 40 percent of them have criminal records." Id. at 61. Another Maryland firearms dealer made 40 percent of its handgun sales to residents of the District of Columbia, 23 percent of whom were subsequently found to have criminal records in the District of Columbia. Ibid. The Massachusetts State Police "traced 87 percent of the concealable firearms used in crimes in Massachusetts to out-of-State purchases." Id. at 54. In New Jersey, "of 1,815 arrests for the illegal carrying of concealed weapons (handguns) only 15 of the guns involved had been purchased legally" in New Jersey. Id. at 62. In New York City, an investigation of "2,676 deliveries of concealable firearms by common carrier" revealed that "1,439 deliveries . . . were consigned to persons who would not have been authorized to receive them under the laws of the State of New York." Id. at 57. "[O]f the 300 guns received by Philadelphians via mail order, 54 of [the recipients] had police records." Ibid. "[A]n investigation of 4,069 consignees of mail-order firearms in Chicago, who had purchased and received their firearms from just 3 California-based mail-order firearms dealers" revealed "that 948 consignees had arrest records." Id. at 56-57.

Congress therefore concluded "that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem

be properly dealt with, and effective State and local regulation of this traffic be made possible." Pub. L. No. 90-351, Title IV, § 901(a)(3), 82 Stat. at 225.

To that end, Congress included, in both the Omnibus Crime Control Act and the Gun Control Act, statutory provisions "designed to prevent the avoidance of State and local laws controlling firearms by the simple expediency of crossing a State line to purchase one." H. Rep. No. 90-1577, at 14; see also S. Rep. No. 90-1097, at 114. These provisions include 18 U.S.C. §§ 922(a)(1)-(5), which require interstate transfers of firearms to take place through federal firearms licensees, and 18 U.S.C. § 922(b)(3), which regulates the interstate transfer of firearms by federal firearms licensees.

In enacting these provisions, Congress declined to "indiscriminately place further restrictions on the acquisition of all types of firearms." S. Rep. No. 89-1866, at 4. "Rather, in seeking to reduce the criminal use of firearms," Congress "especially concern[ed] itself with the particular type of weapon that is predominantly used by the criminal." Ibid. The handgun's "size, weight, and compactness make it easy to carry, to conceal, to dispose of, or to transport," and "[a]ll these factors make it the weapon most susceptible to criminal use." Ibid. "The evidence before" Congress, moreover, "overwhelmingly demonstrated that the handgun is the type of firearm that is principally used in the commission of serious crime." Id. at 7. For example, the FBI

reported that "handguns were used in 70 percent of the murders committed with firearms" during the preceding year, id. at 5, and in 78 percent of the firearm-related homicides of police officers killed in the line of duty, see Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary, 90th Cong. 873 (1967) ("1967 Hearings").[11] The Vice-President of the National Rifle Association confirmed that "generally speaking, the handgun has been the principal problem of crime in America," and "therefore we felt that this is the proper place to regulate." 1967 Hearings at 560 (statement of Franklin Orth, Vice-President, National Rifle Association of America).[12]

Congress determined "that the lawmakers of each State are best able to determine the conditions and needs within their own borders and to pass appropriate

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[11] Available at http://www.lexisnexis.com/congcomp/getdoc?HEARING-ID=HRG-1967-SJS-0031

[12] Homicide statistics reveal the disproportionate threat that handguns continue to pose to the public safety. From 2005-2009, at least 70 percent of those killed by firearms across the country were killed by handguns. See Federal Bureau of Investigation, Uniform Crime Reports ("FBI Crime Reports"), table 8, available at http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_08.html (last visited Nov. 7, 2011). In 2009, at least 70 percent of the people murdered by firearms in the District of Columbia were killed with handguns. See FBI Crime Reports, table 20, available at http://www2.fbi.gov/ucr/cius2009/data/table_20.html (last visited Nov. 7, 2011). Handguns were used in 72 percent of the 490 firearm-related felony homicides of law enforcement officers killed in the line of duty from 2000 through 2009. See FBI Crime Reports, table 27, available at http://www2.fbi.gov/ucr/killed/2009/data/table_27.html (last visited Nov. 7, 2011).

legislation in regard to the use of handguns." S. Rep. No. 89-1866, at 5. Accordingly, Congress "endeavored to draft legislation which would give State and local officials notice of the flow of handguns into their jurisdictions so as to enable them to regulate their use as dictated by applicable local laws." Ibid. Under Section 922(b)(3), federal firearms licensees may provide "the loan or rental of a firearm to any person for temporary use for lawful sporting purposes." 18 U.S.C. § 922(b)(3)(B). A licensee may also sell or deliver "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." Id. § 922(b)(3)(A). But the licensee may not transfer a handgun to a non-licenseholder whom "the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located." Id. § 922(b)(3).

Congress enacted different requirements for the transfer of handguns, as opposed to rifles and shotguns, because it found that "concealable weapons" presented a particular challenge for state and local law enforcement authorities, Pub. L. No. 90-351, Title IV, § 901(a)(2), (4), (5), (6), 82 Stat. at 225, and that "the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business

are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms," Id. § 901(a)(5), 82 Stat. at 225.

As Congress's investigations revealed, there is a "much greater extent of control over handguns by the States" and substantial variation in the types of handgun controls imposed by different States. See, e,g., S. Rep. No. 89-1866, at 4-5.[13] Thus it cannot be presumed that "licensees will be able to familiarize themselves with the often complex laws of other states and jurisdictions." H.R. Rep. No. 99-495 (1986),

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[13] State controls on handguns continue to differ substantially from State to State, and state controls on handguns continue to be more extensive than state controls on shotguns and rifles. For example, in Maryland, handguns but not rifles and shotguns are considered "regulated firearms" subject to extensive controls. Md. Code Ann. § 5-101(p) (definition of "regulated firearms"); id. § 5-123(a) (7-day waiting period); id. § 5-128(b) (one gun per month restriction); id. § 5-132(c) (restrictions on sale/transfer without safety devices); id. § 5-133(d) (restrictions on possession by those under 21). In comparison, there appear to be a total of three Maryland laws regulating long guns. See, e.g. id. § 5-203 (prohibition on possession of short barreled long guns); id. § 5-204 (purchase of out of state long guns limited to adjacent states); id. § 5-205 (allowing possession of a long gun by a person with a mental disorder if the person "possesses a physician's certificate that the person is capable of possessing a rifle or shotgun without undue danger to the person or to another"). Virginia regulates handguns differently than Maryland, but more extensively than Virginia regulates long guns. Compare Va. Code Ann. § 18.2-308 (regulating the carrying of pistols and revolvers), § 18.2-308.7 (prohibiting those under 18 from possessing handguns), and § 18.2-309 (permitting counties and cities to make it unlawful to transfer a handgun to a minor) with Va. Code Ann. § 15.2-915.2 (making it unlawful to transport a loaded shotgun or rifle in any vehicle on a public street, road, highway unless a person "reasonably believes that a loaded rifle or shotgun is necessary for his personal safety in the course of his employment or business").

at 9. "A State could not have any ability to prosecute dealers whose sales are made out of State and which violate that State's law—the burden of such enforcement would be solely upon the Federal government." Ibid. And although "[s]ales which do not fully comply with applicable state and local law would violate Federal law," if the failure to comply "was due to a mistake of law or fact or due to negligence on the part of the licensee, the violation of the law most likely would not be punishable." Ibid. Congress's requirement that handgun transfers take place through in-state licensed dealers, 18 U.S.C. §§ 922(a)(1)-(5), 922(b)(3), accordingly limits circumvention of state handgun controls by ensuring that transfers are made only by dealers who are well-acquainted with and required to follow a State's handgun laws, allowing States to monitor more effectively the enforcement of state gun laws by focusing on dealer compliance.

There is thus at least a "reasonable fit," Chester, 628 F.3d at 683, between the challenged federal laws and "the government's interest in public safety," Masciandaro, 638 F.3d at 473, which the Supreme Court has recognized as "compelling," United States v. Salerno, 481 U.S. 739, 750 (1987); see also Schenck v. Pro-Choice Network, 519 U.S. 357, 376 (1997) (referring to the "significant governmental interest in public safety"); Masciandaro, 638 F.3d at 473 ("Although the government's interest need not be 'compelling' under intermediate scrutiny, cases

have sometimes described the government's interest in public safety in that fashion."). Plaintiffs are mistaken in contending that the federal laws would be invalid if the government's interests could feasibly be served by permitting interstate transfers of handguns on the same terms that interstate transfers of long guns are permitted. "[I]ntermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective . . ." Masciandaro, 638 F.3d at 474. And, in any event, as explained above, the record before Congress rebuts the premise of plaintiffs' argument. Accordingly, Section 922(b)(3) and 27 C.F.R. § 478.99 plainly pass constitutional muster under intermediate scrutiny, and plaintiffs cannot establish a likelihood of success on the merits of their challenge.

3. The Balance Of Harms Weighs Decidedly Against A Preliminary Injunction.

Moreover, contrary to plaintiffs' contentions, the balance of harms and the public interest weigh heavily against entry of an extraordinary preliminary injunction that would suspend the operation of a presumptively valid Act of Congress. See Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers) ("The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing

hardships.")

Indeed, the interim invalidation of the statute would itself cause recognized injury. See New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

By contrast, plaintiffs have identified no substantial harm that would warrant the extraordinary injunctive relief they request. Plaintiffs' mere allegation of a violation of their Second Amendment rights does not result in irreparable harm per se. "[I]n cases involving a claim by movant of interference with protected freedoms or other constitutional rights, the finding of irreparable injury cannot meaningfully be rested on a mere contention of a litigant." Del. & H. Ry. Co. v. United Transp. Union, 450 F.2d 603, 619 (D.C. Cir. 1971). Rather, such a finding "depends on an appraisal of the validity, or at least the probable validity, of the legal premise underlying the claim of right in jeopardy of impairment." Id. at 619-20. Here, there has been no purposeful suppression of plaintiffs' Second Amendment rights by the federal government. To the contrary, the challenged federal laws explicitly permit the acquisition of handguns.

The public interest also weighs heavily against the grant of a preliminary

injunction. As explained above, the statute that plaintiffs seek to enjoin forms part of a comprehensive scheme that Congress enacted to address the problem of violent crime. Enjoining the challenged provisions would threaten to render large portions of the framework unworkable and could result in significant portions of the interstate firearm market being unregulated.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

TONY WEST
Assistant Attorney General

NEIL H. MacBRIDE
United States Attorney

MICHAEL S. RAAB
(202) 514-4053
/s/ Anisha S. Dasgupta
ANISHA S. DASGUPTA
(202) 514-5428
Attorneys, Appellate Staff
Civil Division, Room 7237
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 11,622 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

/s/ Anisha S. Dasgupta
Anisha S. Dasgupta
anisha.dasgupta@usdoj.gov
Attorney, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

CERTIFICATE OF SERVICE

I certify that on November 7, 2010, I filed the foregoing brief with the Court by using the appellate CM/ECF system, and by causing eight paper copies to be sent to the Court by overnight delivery. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Anisha S. Dasgupta
Anisha S. Dasgupta
anisha.dasgupta@usdoj.gov
Attorney, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001