No. 12-1401

In The
Supreme Court of the United States

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

Petitioners,

v.

ERIC HOLDER, JR., et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

ALAN GURA
Counsel of Record
GURA & POSSESSKY, PLLC
101 N. Columbus Street
Suite 405
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 statement contained in the Petition for a Writ of Certiorari remains accurate.

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INTRODUCTION

1. The Government's opposition, based on theories this Court has rejected, makes plain this case's suitability for summary reversal. To establish standing, Article III requires that defendants' conduct *caused* injury, not that defendants' conduct *operated directly* against plaintiffs. A *reasonable fear* of prosecution, not a *specific threat* of imminent prosecution, would trigger pre-enforcement standing. These are not subtle distinctions.

Three times in the last three years, the Government has offered the same standing argument before three federal appellate courts considering consumer challenges to retail firearm prohibitions in 18 U.S.C. § 922(b).[1]

Twice, courts correctly rejected the Government's standing theory. See *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185 (5th Cir. 2012), *petition for cert. pending*, No. 13-137 (filed July 29, 2013) ("*NRA*"); *Dearth* v. *Holder*, 641 F.3d 499 (D.C. Cir. 2011). In this case, the Government (thus far) prevailed.

By any logic, this set of circumstances – same federal statute, same standing arguments, different results – represents a circuit split on a profoundly important issue, and demonstrates that the problem

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

recurs frequently. Of course, the split is not limited to Section 922(b) challenges – until now, courts have rejected the Government's theory in *all* consumer contexts.

2. Even were the Government's theories correct, its factual presentation is materially incomplete. The regulation at issue does, in fact, operate directly against Petitioners. Handgun sales in Washington, D.C. were, in fact, effectively prohibited when the Government suspended the District's only outlet for handgun transfers. And even that prohibition merely manifested, but did not exclusively comprise, Petitioners' injuries.

3. At a minimum, this petition should be considered alongside the petition implicating the circuit split's other side, *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 13-137 (filed July 29, 2013) ("*NRA* Petition").

ARGUMENT

I. The Government Misstates Precedent.

1. This Court need only recite, not reconsider, a rudimentary Article III principle to dispose of this case. Standing requires "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant. . . .'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted).

The requirement that injury be "fairly traceable" to the defendants' conduct stands light years apart from the Government's demand that the defendants' conduct "operate directly" on the plaintiffs. BIO 5, 8. The latter has never been required.

Indeed, this Court rejected direct operation as a standing requirement. While standing "is ordinarily 'substantially more difficult' to establish" if "the plaintiff is not himself the object of the government action or inaction he challenges," *Lujan*, 504 U.S. at 562 (citation omitted), "standing is not precluded" in such circumstances. *Id.*

The distinction between "direct operation" and "fairly traceable causation" is most evident when, as here, the Government prohibits Seller from selling to Buyer. Even accepting the Government's difficult premise that such prohibition does not operate against Buyer – a proposition courts reject, see, *e.g.*, *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000) – is Buyer not injured, in a manner *caused* by, and *fairly traceable* to, the Government's sales prohibition?

Until now, every case examining the issue acknowledged the obvious answer: yes. See, *e.g.*, *Carey* v. *Pop. Svs. Int'l*, 431 U.S. 678 (1977); *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Doe* v. *Bolton*, 410 U.S. 179 (1973); *NRA*, supra, 700 F.3d 185; *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *Dearth*, supra,

641 F.3d 499; *Freeman* v. *Corzine*, 629 F.3d 146 (3d Cir. 2010); *Bridenbaugh*, supra.

The Government's efforts to distinguish so much contrary precedent ranges from merely ineffectual to positively misleading. Particularly egregious are the Government's efforts to explain *NRA* and *Dearth*, which, like this case, involved consumer challenges to Section 922(b)'s prohibitions of particular transactions.

The Government seeks to distinguish this case from *NRA* by offering that *NRA* plaintiffs "were prevented from purchasing a firearm at all by operation of the challenged provision." BIO 9.

That is false – as recounted by *the Government's* briefing in that case, arguing that plaintiffs lacked standing because "these laws do not bar other channels of firearm acquisition by persons who are 18 to 20 years old." Appellees' Br., *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, Fifth Circuit No. 11-10959 ("Government *NRA* Br.") at 19. "Plaintiffs thus have not demonstrated any injury-in-fact in light of these available alternative means for obtaining handguns and handgun ammunition for the purpose of self-defense." *Id.* at 23.

The Fifth Circuit rejected the argument. Dismissing the availability of alternative channels, including private sales, the court held that "by prohibiting FFLs [federal firearms licensees] from selling handguns to 18-to-20-year-olds, the laws cause those persons a concrete, particularized injury – i.e., the injury

of not being able to purchase handguns *from FFLs*." *NRA*, 700 F.3d at 191-92 (citation omitted) (emphasis added).

It does not matter that Petitioners can (sometimes, at great additional cost) obtain handguns from in-state FFLs; they suffer the concrete, personalized injury of not being able to purchase handguns from out-of-state FFLs, and there is no way to distinguish that injury from *NRA*'s.

Likewise, the Government claims *Dearth* is different because there, "the relevant provisions" – including the same provision at issue here, Section 922(b)(3) – "completely prevented that plaintiff from purchasing a firearm in the United States." BIO 9.

But nothing in *Dearth*'s standing analysis hinged on the prohibition's extent. Dearth twice tried, but failed, to purchase firearms, owing to his residence – the same problem facing Petitioners here. *Dearth*, 641 F.3d at 501. "We agree with Dearth that the Government has denied him the ability to purchase a firearm and he thereby suffers an ongoing injury." *Id.* at 502. "A" firearm, not "all" firearms:

> "[A] license or permit denial pursuant to a state or federal administrative scheme" that can "trench upon constitutionally protected interests" gives rise to "an Article III injury"; "the formal process of application and denial,

> however routine," suffices to show a cognizable injury.

Id. (quoting *Parker* v. *District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia* v. *Heller*, 554 U.S. 570 (2008)).

Lane – like Dearth – experienced purchase denials owing to Form 4473's Question 13, as required to implement Section 922(b)(3). And all Petitioners, like Dearth, suffer on-going injury because they are prevented from acquiring firearms outside their home state.

Regarding *Va. Pharmacy*, the Government passively offers that "the consumer plaintiffs challenging a state-law ban on advertising prescription drug prices asserted their own First Amendment right to receive information from advertisers, a right that was directly infringed by the challenged law." BIO 8 (citation omitted). That is Petitioners' (and in *NRA*, the Fifth Circuit's) point – the challenged law did not force consumers to cover their ears, it forced advertisers to silence their speech – and yet, the government caused *consumers* an injury fairly traceable to the prohibition.

The Government distorts or glosses over the facts of other conflicting cases. For example, it asserts that in *Freeman* and *Bridenbaugh*, plaintiffs were only "prevented from obtaining the product they sought." BIO 10 n.4. Not so. In *Bridenbaugh*, "difference in price [was] another source of injury," as "Indiana dealers collect state excise taxes on wines that pass

through their hands, while the shippers with which plaintiffs used to deal do not." *Bridenbaugh*, 227 F.3d at 849-50. *Freeman* plaintiffs challenged a law prohibiting them from importing more than one gallon of wine each 24 hours, absent a $50 permit, *Freeman*, 629 F.3d at 152 & n.2, because "traveling to distant wineries in order to return with small quantities of wine is highly impracticable." *Id.* at 154.

Petitioners' claims are indistinguishable. They complain of the added expense and impracticability of purchasing out-of-state handguns, Pet. App. 27a-28a, 30a, 33a, 35a, and likewise complain of the attendant "loss of choice." *Id.* at 35a.

Contrary to the Government's selective description, *Doe* did not merely involve the generalized fact that a woman was denied an abortion. *Doe* plaintiffs successfully challenged a law criminalizing abortion *for non-residents*. *Doe*, 410 U.S. at 184 & 200. The instant case is, for all intents and purposes, *Doe* for guns. Had Lane been barred from crossing state lines to obtain an abortion, would any federal court seriously hold that she lacked standing to challenge that prohibition, because the law ostensibly operated only against the abortion provider? It was not the abortion provider in *Doe* who had his right to an abortion denied.

The Government also misstates *Ezell*'s basic facts. In *Ezell*, plaintiffs (including Petitioner SAF) did *not* challenge Chicago's range-training prerequisite to gun ownership. BIO 9-10. They challenged

only Chi. Mun. Code § 8-20-280 (2010), which provided that "Shooting galleries, firearm ranges, or any other place where firearms are discharged are prohibited"; and various provisions "banning the loan, rental, and borrowing of functional firearms at ranges open to the public," Complaint, *Ezell* v. *City of Chicago*, N.D. Ill. No. 1:10-CV-5135, Dkt. 1 at ¶47. These provisions were not "imposed on" the individual plaintiffs, but as the Government notes, they "impermissibly burdened [the individual's] right to possess firearms," BIO 10, and the individuals thus had standing.

Unsurprisingly, the Government fails to cite a single precedent supporting its incredible "direct operation" proposition that when consumer transactions are criminalized, consumers who would engage in those transactions or, as in this case, were in the process of engaging in transactions when thwarted, suffer no redressable injury traceable to the Government.

2. Perhaps nowhere is displacing Article III's traceability requirement with the Government's "direct operation" concept more difficult than when considering *Carey*, where this Court held that "the restriction of distribution channels to a small fraction of the total number of possible retail outlets" grants consumers standing, as such restriction "renders [products] considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition." *Carey*, 431 U.S. at 689 (footnotes omitted).

Accordingly, the Government shifts gears, and endorses another theory rejected by this Court: that pre-enforcement standing cannot exist absent an imminent – as opposed to a *credible* – threat of prosecution. BIO 7-8.

Setting aside the facts that Section 922(b)(3) imposes on-going harm, *Dearth*, 641 F.3d at 501, and that the statute was applied against Lane, this Court rejected the Government's imminent threat theory. A "plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Medimmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Reviewing pre-enforcement standing precedent, this Court explained:

> In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do. . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced.

Id. at 129. A pre-enforcement injury's touchstone is thus not an "imminent threat of prosecution," *id.*, but "a *credible* threat of prosecution." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added).

Accordingly, many landmark opinions have come in cases initiated immediately upon a statute's enactment. See, *e.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 861

(1997) ("immediately after the President signed the statute, 20 plaintiffs filed suit against the Attorney General of the United States and the Department of Justice") (footnote omitted); *Carhart* v. *Gonzales*, 413 F.3d 791, 792 (8th Cir. 2005) ("[t]he day the President signed the Act into law, plaintiffs filed suit"), *rev'd on other grounds*, 550 U.S. 124 (2007); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 845 (1992) (litigation "[b]efore any of [the challenged] provisions took effect").

Were the Government correct, no pre-enforcement challenge could ever be brought so long as the Government remained coy about its prosecutorial intent, leaving individuals to either obey an unconstitutional law or guess at whether they might be prosecuted for violating it. That "predicament – submit to a statute or face the likely perils of violating it – is precisely why the declaratory judgment cause of action exists." *Mobil Oil Co.* v. *Attorney Gen. of Va.*, 940 F.2d 73, 74 (4th Cir. 1991).

Thus, even were Petitioners not suffering an ongoing injury, they could launch a pre-enforcement action against Section 922(b)(3), as the provision is decidedly "not moribund." *Doe*, 410 U.S. at 188.

Carey is indistinguishable from the instant case.

II. Section 922(b)(3) Directly Operates Against Consumers.

Building on its substitution of "direct operation" for traceability, the Government offers a materially incomplete recitation of the relevant regulatory regime. Although "direct operation" is not and has never been the law, Section 922(b) does, in fact, "operate directly" against Petitioners.

First, as bears reiterating, Petitioners' claim to engage in prohibited interstate sales

> is direct rather than derivative: every interstate sale has two parties, to transact . . . across state lines is as much a constitutional right of consumers as it is of shippers – if it is a constitutional right at all.

Bridenbaugh, 227 F.3d at 850.

Moreover, the Government's recitation of the relevant regulatory scheme is materially incomplete. Section 922(b)(3) does not exist in a vacuum, but rather is one cog of a comprehensive regulatory machine. *Petitioners*, not dealers, are barred from importing firearms into their home states, unless those firearms were "obtained" – by Petitioners – "in conformity with subsection (b)(3)." 18 U.S.C. § 922(a)(3)(B). Petitioners challenge those aspects of Section 922(b)(3) that, by foiling their transactions, would leave them exposed to Section 922(a)(3)'s criminal liability.

Finally on this point, *Petitioners* – not dealers – are required to disclose their state of residence under

penalty of perjury, to enable enforcement of Section 922(b)(3)'s state residency requirement. 27 C.F.R. § 478.124(a) & (c). Lane could not pick up her handguns because *she* could not provide a satisfactory answer on the government form enabling Section 922(b)(3)'s operation.

The Government's attempt to minimize Petitioners' injury is both irrelevant – gradations of injury go to damages, not standing – and substantially misleading.

Notwithstanding the matter's discussion by *amicus curiae* Community Association for Firearms Education, the Government persists in misrepresenting the facts regarding District of Columbia residents' accessability to FFLs by claiming that the District had not one, but six FFLs. BIO 4 n.2.

The Government knows better. Of the six individual FFLs then in existence, two were held by theatrical companies, the Shakespeare Theater and Arena Stage, for the purpose of obtaining stage props; one was obtained for "research" purposes by the founder and Executive Director of the Violence Policy Center, an organization opposed to private firearms ownership; and another by a self-described "jobber" and "middleman" who "never see[s] the guns."[2] See Mark Segraves, *D.C. still feeling a little gun-shy*,

[2] The firearms import license referenced by the Government is likewise irrelevant.

WTOP Living, available at http://www.wtop.com/?sid=1437663&nid=695 (last visited Sept. 20, 2013); Brief for CAFÉ as *Amicus Curiae* 6-7. A fifth FFL, Second Amendment Safety & Security LLC, never opened its doors to the public (on information and belief, owing to zoning difficulties) and no longer appears on the Government's list of District FFLs. See https://www.atf.gov/sites/default/files/assets/ffls-2013-july/0713-ffl-list-district-of-columbia.txt (last visited Sept. 20, 2013).

Charles Sykes was thus the only District FFL dealing with consumers, App. 27a, a position he retains today. When the Government shut Sykes down because he lost his lease, handgun sales in the District of Columbia ceased.

Of course, the injury here is not merely that Washington, D.C. handgun sales are subject to Sykes's monopolistic $125 transfer fee and related shipping expenses. Rather, the injury is that Americans throughout the United States are suffering increased costs and loss of consumer choice owing to the constriction of retail outlets – a classic injury-in-fact. *Carey*, 431 U.S. at 689.

III. This Petition Should Be Considered With *NRA* v. *BATFE*, No. 13-137.

A strong petition for certiorari has now been filed in *NRA*, representing the circuit split's other side with respect to standing. As NRA relates, "quite remarkably, the government has consistently insisted throughout this litigation that *no one* has standing to

challenge the federal ban" on selling 18-20-year-olds handguns, including the frustrated consumers. *NRA* Petition 35 (emphasis original). "In [the Government's] view," consumers "are not injured by the ban *at all* because, among other things, it does not foreclose *every conceivable* means by which they might obtain handguns." *Id.* (citations omitted) (emphasis original).

Decrying this "dubious logic," *id.*, NRA declares that "[t]he government's extraordinary efforts to prevent law-abiding adults from even asserting – let alone vindicating – their Second Amendment rights confirm the need for this Court to grant certiorari" in that case. *Id*. at 35.

As noted supra, the Government's explanations of *NRA* differ greatly. Before the Fifth Circuit, the Government claimed NRA petitioners lacked standing because they had "other channels" and "alternative means of acquiring handguns." Government *NRA* Br. 19, 23. But here, the Government claims NRA petitioners were found to have standing because they "were prevented from purchasing a firearm at all." BIO 9.

The Government fails to indicate whether, in *NRA*, it would renew its standing theories "insisted throughout [that] litigation," *NRA* Petition 34, which are the same theories at issue here. Inescapably, the standing issue here, is a threshold issue there. *Any* decision on *NRA*'s merits would presuppose jurisdiction, meaning, necessarily, that the Fourth Circuit

had jurisdiction to hear Petitioners' claim on the merits below. Thus, at a minimum, this case should be held pending this Court's decision on whether to hear *NRA*.

Of course, summary reversal of the decision below would clear the way for this Court's consideration of *NRA* on that case's significant merits, thereby conserving judicial and litigation resources.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ALAN GURA
Counsel of Record
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com

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