No. 12-1401

In the Supreme Court of the United States

MICHELLE LANE, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MICHAEL S. RAAB
ANISHA S. DASGUPTA
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioners, who wish to purchase handguns, have standing to bring a pre-enforcement challenge to 18 U.S.C. 922(b)(3), which prohibits federal firearms licensees from transferring handguns to individuals who reside outside the State where the licensee does business.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 4
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Bridenbaugh v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), cert. denied 532 U.S. 1002 (2001) 10
Carey v. *Population Servs. Int'l,* 431 U.S. 678 (1977) 7, 8
Dearth v. *Holder,* 641 F.3d 499 (D.C. Cir. 2011) 9
District of Columbia v. *Heller*, 554 U.S. 570 (2008) 1
Doe v. *Bolton*, 410 U.S. 179 (1973) 8
Ezell v. *Chicago,* 651 F.3d 684 (7th Cir. 2011) 9, 10
Freeman v. *Corzine*, 629 F.3d 146 (3d Cir. 2010) 10
General Motors Corp. v. *Tracy,* 519 U.S. 278 (1997) 8
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 6
NRA 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) 9
Simon v. *Eastern Ky. Welfare Rights Org.,* 426 U.S. 26 (1976) 6
Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 8

Constitution and statutes:

U.S. Const.:
Art. III 5, 6
Amend. I 8

Constitution and statutes—Continued: Page

Amend. II 1, 2, 3

18 U.S.C. 922 2

18 U.S.C. 922(a)(1)-(5) 2

18 U.S.C. 922(b) 2, 5

18 U.S.C. 922(b)(3) 2, 3, 4, 5, 6

18 U.S.C. 922(b)(3)(A) 2

18 U.S.C. 922(b)(3)(B) 2

In the Supreme Court of the United States

No. 12-1401

MICHELLE LANE, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 703 F.3d 668. The order of the district court (Pet. App. 22a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2012. A petition for rehearing was denied on February 26, 2013 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on May 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Consistent with the Second Amendment generally, federal law includes "longstanding * * * conditions and qualifications on the commercial sale of [fire]arms." *District of Columbia* v. *Heller*, 554 U.S. 570, 626-627

(2008). Those statutory provisions include 18 U.S.C. 922, which prohibits the interstate sale of firearms except through federal firearms licensees (FFLs), see 18 U.S.C. 922(a)(1)-(5), and imposes restrictions on the interstate transfer of firearms by FFLs, see 18 U.S.C. 922(b)(3).

Section 922(b)(3) generally prohibits an FFL from "sell[ing] or deliver[ing] * * * 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." 18 U.S.C. 922(b)(3). The statute provides several exceptions to the general prohibition. First, the sale or delivery by an FFL of "any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located" is exempt from the general prohibition "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." 18 U.S.C. 922(b)(3)(A). Second, the statute exempts the "loan or rental" by an FFL "of a firearm to any person for temporary use for lawful sporting purposes." 18 U.S.C. 922(b)(3)(B). Finally, "transactions between" FFLs are also exempt. 18 U.S.C. 922(b). An individual who is eligible to possess a handgun may therefore obtain one from an out-of-state source by arranging for the gun to be delivered from an out-of-state FFL to an in-state FFL from whom the purchaser may retrieve the gun.

2. a. Petitioners are three residents of the District of Columbia who wish to receive handguns directly from FFLs in Virginia, and a non-profit membership organization seeking to promote the exercise of Second Amendment rights. Pet. App. 4a-6a. Petitioners claim

injuries arising from the restrictions on the interstate transfer of handguns, including the additional cost and inconvenience associated with using an in-state FFL to acquire a handgun from an out-of-state FFL. See *id.* at 4a-10a.

Petitioner Lane ordered two handguns from an FFL in Virginia, but for a time was unable to take possession of them because, she alleges, the only FFL in D.C. lost his lease and was temporarily out of business. Pet. App. 4a-5a; see note 1, *infra*. When the D.C. FFL petitioner Lane referenced reestablished his business, Lane took possession of one of the handguns from him after paying a transfer fee. Pet. App. 5a; see *id.* at 27a-28a. Petitioners Amanda and Matthew Welling hoped to acquire a handgun from Amanda Welling's father, who sought to transfer the gun to her through a Virginia FFL. *Id.* at 5a. They allege that they were also temporarily prevented from doing so because of the same D.C. FFL's business closure. See *id.* at 17a. All three individual petitioners have asserted that they would participate more frequently in the market for handguns if there were no restrictions on the acquisition of handguns from out of state. *Id.* at 28a, 30a, 33a. Petitioner Second Amendment Foundation (SAF) contends that its members and supporters throughout the country are "adversely impacted by the additional costs and loss of choice imposed by interstate handgun transfer prohibitions." *Id.* at 34a-35a.

b. Petitioners filed a pre-enforcement challenge to 18 U.S.C. 922(b)(3), its implementing regulations, and a provision of Virginia law, alleging violation of their Second Amendment rights. Pet. App. 2a-3a, 16a-17a. The district court dismissed petitioners' claims, concluding that petitioners lacked standing to challenge the

laws at issue. *Id.* at 16a-23a. The court explained that petitioners' "injury here, if any is caused by independent third parties." *Id.* at 17a.[1]

c. The court of appeals affirmed. Pet. App. 1a-15a. The court noted that petitioners "are not prevented from acquiring the handguns they desire," *id.* at 10a, and that "the costs [petitioners] complain of are not traceable to the laws they challenge, but to the FFLs that charge transfer fees," *id.* at 12a. The court recognized that "[a] plaintiff who alleges an injury based on restriction of distribution channels may be able to show standing if the defendant's actions directly affect that plaintiff," but observed that petitioners "are in a fundamentally different situation, as the laws and regulations they challenge do not apply to them but rather to the FFLs from whom they would buy handguns." *Id.* at 8a.[2]

DISCUSSION

Petitioners contend (Pet. 12-26) that they have standing to bring a pre-enforcement challenge to 18 U.S.C. 922(b)(3) because that provision's restrictions on the interstate transfer of handguns burden petitioners' participation in the market for handguns. Review of

---

[1] The district court assumed for purposes of argument that petitioners correctly alleged there was at the time no FFL in D.C. from whom petitioners could receive interstate transfers of handguns. Pet. App. 4a-5a n.1, 17a. However, the record before the district court included a declaration from the Chief of the Federal Firearms Licensing Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives, stating 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," C.A. App. 155.

[2] The court of appeals also rejected petitioner SAF's claims of organizational standing. Pet. App. 14a-15a. Petitioners do not challenge that determination. Pet. 12 n.5.

that argument is not warranted because the court of appeals correctly rejected it and because the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly affirmed the district court's determination that petitioners lack Article III standing to assert a pre-enforcement challenge to 18 U.S.C. 922(b)(3).

Section 922(b)(3) governs the circumstances in which an FFL may transfer a firearm to a non-license holder "who the [FFL] knows or has reasonable cause to believe does not reside in * * * the State in which the licensee's place of business is located." 18 U.S.C. 922(b)(3). As relevant here, an FFL may not transfer a handgun directly to a resident of another State (other than on a temporary basis for lawful sporting purposes), but must instead transfer any handgun through an FFL licensed in the recipient's State of residence. See *ibid.* Section 922(b) does not restrict the transfer of firearms between FFLs who reside in different States (or the same State). 18 U.S.C. 922(b). Petitioners are not FFLs in any State or territory. Rather, petitioners are individual residents of the District of Columbia who wish to receive handguns directly from FFLs in Virginia (and a membership organization with members who are presumably in a comparable position). Thus, Section 922(b)(3) does not operate directly on petitioners. Petitioners instead allege injury as a result of Section 922(b)(3)'s restrictions on interstate handgun transfers due to "the costs and burdens inherent in making additional visits to the in-state FFL, transferring handguns to the in-state FFL, and the additional fees that would necessarily be charged by the in-state FFL." Pet. 6-7; see Pet. App. 4a-5a.

The court of appeals correctly held that petitioners lack standing to challenge Section 922(b)(3) because the injuries they allege are "not directly linked to the challenged law," but arise instead from "the FFLs that charge transfer fees." Pet. App. 12a. In order to establish Article III standing, a plaintiff must demonstrate "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (brackets and ellipses omitted). Petitioners cannot do that here.

As the court of appeals explained, neither Section 922(b)(3) nor its implementing regulations imposes a fee or assessment on petitioners, see Pet. App. 7a-9a, and "[n]othing in the challenged legislation or regulations directs FFLs to impose such charges," *id.* at 13a. The costs of which petitioners complain are therefore not directly caused by the provision they seek to challenge. Similarly, because 18 U.S.C. 922(b)(3) does not apply to transactions between FFLs, it does not require petitioners to make multiple trips to acquire a firearm from an out-of-state FFL. Petitioners may 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 FFL from whom petitioners may retrieve the handgun directly. Petitioners therefore cannot rely on alleged costs of additional travel in order to establish their standing to sue.

2. Review is also not warranted because the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals.

a. Petitioners contend (Pet. 20-24) that the court of appeals' decision conflicts with decisions of this Court concluding that consumers had standing to challenge other types of commercial regulations. But, as the court of appeals explained, the very standing element petitioners lack—a direct connection between the challenged law and the injuries they allege—distinguishes this case from those in which this Court has found standing. See Pet. App. 7a-8a.

In *Carey* v. *Population Services International,* 431 U.S. 678 (1977), for example (see Pet. 20-22), a "corporation primarily engaged in the mail-order retail sale of nonmedical contraceptive devices" challenged a 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 681-682. Before filing suit, the plaintiff in *Carey* had been advised by state officials that its advertisements violated the challenged law and had been threatened with legal action if the plaintiff corporation did not conform its activities to the law. *Id.* at 682-683. The Court concluded that the plaintiff had standing to challenge the law at issue "not only in its own right but also on behalf of its potential customers." *Id.* at 683. Unlike petitioners, the plaintiff in *Carey* had suffered an injury directly traceable to the challenged law because it "ha[d] violated the challenged statute in the past, and continue[d] to violate it in the regular course of its business" and because "it

ha[d] been threatened with prosecution" for such actions. *Id.* at 683 n.3. Petitioners cannot identify any comparable direct effect of Section 922(b)(3) on them.

The other decisions of this Court on which petitioners rely similarly involved plaintiffs who were directly affected by the challenged law. In *General Motors Corp.* v. *Tracy,* 519 U.S. 278 (1997) (Pet. 24), the challenged law was a state sales tax on purchases from out-of-state vendors of natural gas, and the plaintiff was a customer of such vendors who was directly "liable for payment of the tax." 519 U.S. at 285-286. In contrast, as discussed, Section 922(b) does not impose any tax or assessment on petitioners (or on anyone else). In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (Pet. 20), 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. 425 U.S. at 753-754, 756-757. And in *Doe* v. *Bolton*, 410 U.S. 179 (1973) (Pet. 21), physicians challenged a state criminal law that operated directly against physicians and required "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 183-184, 188-189.[3] Because all of those cases involved plaintiffs who were directly, rather than tangentially,

---

[3] The law in *Doe* was also challenged by a pregnant woman who established that, "[b]ecause her application [for an abortion] 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." 410 U.S. at 185-186. Petitioners have not established that they face any comparable choice.

affected by the challenged laws, they do not conflict with the court of appeals' decision in this case.

b. Petitioners also argue (Pet. 13-18) that the court of appeals' decision conflicts with decisions of other courts of appeals. That is incorrect.

First, petitioners rely (Pet. 13-15) on *Dearth* v. *Holder*, 641 F.3d 499 (2011), in which the D.C. Circuit held that a Canadian resident had standing to challenge Sections 922(a)(9) and (b)(3) insofar as those provisions prohibit an American citizen who lives in a foreign country and does not maintain a United States residence from purchasing a firearm in the United States. *Id.* at 500-501. The injury alleged in *Dearth* is unlike the injury alleged by petitioners, however, because the relevant provisions in *Dearth* completely prevented that plaintiff from purchasing a firearm in the United States. In contrast, Section 922(b)(3) does not prevent petitioners from purchasing the firearms of their choice.

Second, petitioners rely (Pet. 15-17) on the Fifth Circuit's decision in *NRA* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (2012), petition for cert. pending, No. 13-137 (filed July 29, 2013), which held that plaintiffs between the ages of 18 and 20 had standing to challenge Sections 922(b)(1) and (c)(1)'s prohibition on selling handguns to persons under the age of 21. *Id.* at 188. There, too, the plaintiffs were prevented from purchasing a firearm at all by operation of the challenged provision. See *id.* at 191-192. That is not so of petitioners.

Finally, petitioners erroneously contend (Pet. 17-18) that the Seventh Circuit's decision in *Ezell* v. *Chicago*, 651 F.3d 684 (2011), conflicts with the decision below. In *Ezell*, the plaintiffs challenged a municipal ordinance that simultaneously required training at a firing range

as a prerequisite to owning a gun and completely banned firing ranges within city limits. *Id.* at 689-690. The court of appeals found that the individual plaintiffs had standing to challenge the ordinance because it impermissibly burdened their right to possess firearms. *Id.* at 695-696. Unlike petitioners, however, those plaintiffs were directly subject to the challenged provisions; the burdens of which they complained were imposed on them by the challenged ordinance and did not depend on the decisions or actions of any independent third party. As with *Dearth* and *NRA*, therefore, *Ezell* does not conflict with the court of appeals' decision in this case.[4] Review of the court of appeals' decision is unwarranted.

---

[4] Petitioners' contention (Pet. 22-23) that the court of appeals' decision conflicts with decisions of the Third and Seventh Circuits upholding consumers' standing to challenge restrictions on their direct purchase of wine through interstate shipments similarly lacks merit. See *Freeman* v. *Corzine,* 629 F.3d 146, 154-157 (3d Cir. 2010); *Bridenbaugh* v. *Freeman-Wilson,* 227 F.3d 848, 849-850 (7th Cir. 2000), cert. denied, 532 U.S. 1002 (2001). The consumer plaintiffs in those cases were prevented from obtaining the product they sought (there, particular bottles of wine). *Freeman*, 629 F.3d at 154-155 (noting that plaintiffs were "directly constrained" by the challenged provisions); *Bridenbaugh*, 227 F.3d at 850 (noting that plaintiffs' claim "is direct rather than derivative" because they are prevented from purchasing wines from out-of-state vintners).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
MICHAEL S. RAAB
ANISHA S. DASGUPTA
Attorneys

SEPTEMBER 2013