No. 19-1469

In The
United States Court of Appeals
For the Fourth Circuit

MARYLAND SHALL ISSUE, INCORPORATED; ATLANTIC GUNS, INCORPORATED; DEBORAH KAY MILLER; SUSAN BRANCATO VIZAS,

Plaintiffs-Appellants,

ANA SLIVEIRA; CHRISTINE BUNCH,

Plaintiffs,

v.

LAWRENCE HOGAN, in his capacity as Governor of Maryland; WILLIAM M. PALLOZZI, in his capacity as Superintendent, Maryland Secretary of State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (No. 1:16-cv-3311-ELH)

BRIEF OF AMICI CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AND MARYLAND STATE RIFLE & PISTOL ASSOCIATION, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 19-1469 Caption: Maryland Shall Issue, Inc. v. Lawrence Hogan

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Rifle Association of America, Inc.
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ David H. Thompson Date: July 1, 2019

Counsel for: National Rifle Association of America

CERTIFICATE OF SERVICE

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I certify that on 07/01/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 19-1469 Caption: Maryland Shall Issue, Inc. v. Lawrence Hogan

Pursuant to FRAP 26.1 and Local Rule 26.1,

Maryland State Rifle and Pistol Association, Inc.
(name of party/amicus)

who is Amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Counsel for: Maryland State Rifle & Pistol Ass'n

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INTEREST OF AMICI CURIAE

The National Rifle Association of America, Inc. ("NRA") is the oldest civil rights organization in America and the Nation's foremost defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians.

The Maryland State Rifle and Pistol Association, Inc. ("MSRPA") is a group organized to defend the right of Maryland residents to keep and bear arms. MSRPA has members who reside in Maryland and are affected by the challenged laws. NRA and MSRPA have a strong interest in this case because its outcome will affect the ability of their many members who reside in Maryland to exercise their fundamental right to defend themselves and their families with the quintessential self-defense firearm: the handgun.

Pursuant to Federal Rule of Appellate Procedure 29, amici certify that this brief was not written in whole or in part by counsel for any party, that no party or party's counsel made a monetary contribution to the preparation and submission of this brief, and that no person or entity other than amici, their members, and their counsel has made such a monetary contribution. All parties have consented to the filing of this brief.

INTRODUCTION

The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), and the Supreme Court has cautioned that this right may not "be singled out for special—and specially unfavorable—treatment," *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778–79 (2010). The court below ignored these instructions, adopting a standing analysis that waters down the rights protected by the Second Amendment by barring the courthouse door to individuals who wish to acquire handguns "for the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, but are impeded by the State from doing so. In any other context, the injuries suffered by Plaintiffs would suffice to establish their standing.

Plaintiffs—an expressive association, four individuals, and a licensed firearm dealer—challenge Maryland's requirement that any person wishing to "purchase, rent, or receive a handgun" must first obtain "a valid handgun qualification license" from Defendants. MD. CODE PUB. SAFETY § 5-117.1(c) (the "Handgun License requirement"). The process of obtaining a handgun qualification license is costly, lengthy, and burdensome. An applicant must pay a series of fees totaling around $200, must arrange for her fingerprints to be taken and a background check to be conducted, and must spend a half-day attending a safety-training course mandated

by the State. Defendants are allowed 30 days, by statute, to make a decision on the application—but in practice, they sometimes blow past the deadline. For ordinary Marylanders, these are the costs of exercising a constitutional right.

In any other context, the injury caused by these burdensome provisions would be beyond dispute. If the State required its citizens to apply and pay for a permit before reading the newspaper or saying family prayers, there would be no question that an individual who wished to engage in these activities and objected to such an odious prior restraint would at least *have standing* to bring the challenge. The analysis can be no different under the Second Amendment. Yet the district court dismissed precisely such a challenge for lack of standing—adopting an approach that effectively required Plaintiffs to prove that they *could not afford* the surcharge imposed by Defendants, and *could not endure* the procedural gauntlet the challenged licensing regime has erected, before their challenge may even be considered. That reasoning cannot stand.

The court below also maintained that Plaintiffs lacked standing because they had not *applied* for an HQL. This fundamentally misunderstands the nature of their claims. Perhaps if Plaintiffs challenged the way in which the Handgun License requirement was being *implemented or applied*, they would have to go through the application process in order to show that they had been injured by it. But Plaintiffs do not challenge the details or implementation of the license requirement; *they*

challenged the constitutionality of requiring a license at all. Under well-settled standing principles, they do not have to *submit themselves* to the very requirement they claim is categorically unconstitutional in order to challenge it.

The decision below is based on a standing analysis that would be unthinkable in any other context—an approach to standing designed bespoke to result in shutting out Second-Amendment claims at the threshold. The effect is to treat the right to keep and bear arms "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). This Court should reverse.

ARGUMENT

The "irreducible constitutional minimum of standing contains three elements": Plaintiffs must (1) identify an "injury-in-fact"; (2) trace a "causal connection between the injury and the conduct complained of"; and (3) show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561 (1992) (quotation marks omitted). The Court need only determine that a single Plaintiff has standing to conclude that its jurisdiction is secure, and it need not proceed to examine the standing of other Plaintiffs once it makes that determination. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Here, the Individual Plaintiffs (Ana Silveira, Deborah Kay Miller, Susan Brancato Vizas, and Christine Bunch), associational

plaintiff (MSI), and vendor plaintiff (Atlantic Guns, Inc.) have all plainly satisfied these elements. Indeed, in any context but the Second Amendment their standing would be uncontroversial.

I. The Individual Plaintiffs have standing to challenge the Handgun License requirement under well-settled principles of law.

The three Individual Plaintiffs have established that the Handgun License requirement injures them in a variety of direct and immediate ways. First, and most fundamentally, the requirement injures them as a *per se* matter because it burdens their Second Amendment right to acquire a handgun—the "the quintessential self-defense weapon"—for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 629, 630. Plaintiffs assert that requiring law-abiding citizens to seek a permit before obtaining a handgun is *itself* a constitutional violation—a proposition the court below, and this court, must accept for purposes of the standing analysis. *See Warth v. Seldin*, 422 U.S. 490, 500–02 (1975). And individual Plaintiffs have in fact *refrained* from exercising that right—declining to purchase common self-defense firearms—rather than submitting to the unconstitutional Handgun License requirement. JA 0273–74, 0279, 0249; *see also* JA 1373, 1374 (Opinion 8, 9). That alone is enough to assure their standing to challenge the imposition of the permit requirement that, they claim, is itself unconstitutional. After all, "an injury to a constitutional right is clearly a basis for standing." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3 (6th ed. 2012).

This conclusion would be clear enough in any other context. Under the First Amendment, for instance, the courts have repeatedly held that because "[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement," *International Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 357 n.13 (5th Cir. 2010) (quotation marks omitted), a plaintiff who challenges a permit requirement as unconstitutional *need not apply for the permit and be denied* to have standing to raise the challenge. In *A.N.S.W.E.R. Coalition v. Salazar*, for example, an advocacy organization wishing "to engage in political dissent during the Presidential Inaugural Parade" challenged certain National Park Service restrictions on political demonstrations during the parade. 915 F. Supp. 2d 93, 96 (D.D.C. 2013), *aff'd*, 845 F.3d 1199 (D.C. Cir. 2017). Because the plaintiff's permit application had only covered the use of a particular plaza, the Government argued that it had no standing to challenge its restrictions as applied "to other areas along Pennsylvania Avenue." *Id.* at 99. The court disagreed, concluding that "by alleging . . . that it plans to engage in protests along Pennsylvania Avenue" the plaintiff had established "standing to challenge the regulations as applied to sidewalk areas outside of Freedom Plaza." *Id.* at 101. Because "[a] permit denial . . . *is not a prerequisite to establish standing*," the court held that the fact that the plaintiff "did not apply for, and thus was not denied, a permit for sidewalk space

along Pennsylvania Avenue does not bar [it] from establishing standing with respect to its lack of access to those areas." *Id.* at 103 (emphasis added).

The Eleventh Circuit's decision in *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011), is to much the same effect. In that case, an evangelical minister visited Georgia Southern University "to broadcast his evangelical message." *Id.* at 1225. After the plaintiff had begun speaking, he was arrested by the campus police, because after they informed him that "he was required to seek and obtain a permit" before speaking on campus, he "refused to comply with the permitting process, deeming it an 'affront' to his beliefs and arguing that it violated his basic constitutional freedoms." *Id.* The Eleventh Circuit held that the minister had "suffer[ed] an injury in fact that is both concrete and imminent with respect to his ability to speak throughout the GSU campus" because he "wanted to speak at various locations on the GSU campus without obtaining a permit or otherwise having his expressive conduct limited, and the Speech Policy prevented him from so doing." *Id.* at 1228, 1229.

Similarly, it is well established that a plaintiff alleging the unconstitutional infringement of his privacy rights has suffered a cognizable injury in fact "at the time of an unreasonable governmental intrusion." *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)). In *ACLU*, the Second Circuit thus held that the

plaintiffs had standing to challenge the government's collection of their telephone metadata merely because the very *fact* of the data collection inflicted a constitutional injury. The Plaintiffs, the court reasoned, "challenge the telephone metadata program as a whole, alleging injury from the very collection of their telephone metadata," and "[w]hether or not such claims prevail on the merits, [they] surely have standing to allege injury from the collection, and maintenance in a government database, of records relating to them." *Id.* After all, as the D.C. Circuit has explained, "the loss of a constitutionally protected privacy interest itself . . . qualif[ies] as a concrete, particularized, and actual injury in fact." *In re United States OPM Data Sec. Breach Litig.*, No. 17-5217, 2019 WL 2552955, at *5 (D.C. Cir. June 21, 2019).

As in these cases, so too here. While the Individual Plaintiffs have not yet applied for a Handgun License, that is no bar to their ability to challenge its constitutionality: "[a] permit denial . . . is not a prerequisite to establish standing." *A.N.S.W.E.R. Coalition*, 915 F. Supp. 2d. at 103. Indeed, like the minister in *Bloedorn*, Plaintiffs' claim is that *the permit requirement itself* is unconstitutional—that requiring them to obtain a license to acquire a handgun is an "affront" to their "basic constitutional freedoms." 631 F.3d at 1225 (quotation marks omitted). As in *Bloedorn*, they need not *comply* with this unconstitutional requirement to challenge

its constitutionality.[1] The district court noted Plaintiffs' reliance on *A.N.S.W.E.R.*, and it accurately acknowledged that that case held that " '[t]he fact that the plaintiff 'did not apply for, and thus was not denied, a permit for sidewalk space' did not bar it 'from establishing standing.' " JA 1390 (Opinion 25) (quoting *A.N.S.W.E.R.*, 915 F. Supp. 2d at 103. It never explained its decision to not follow this reasoning.

Even if this constitutional injury could be set aside, the Individual Plaintiffs would still have standing, because Maryland's Handgun License requirement also injures them in a number of specific and tangible ways. Most obviously, the required licenses cost money. As the court below acknowledged, anyone applying for a Handgun License must make "a payment of a non-refundable application fee in an amount not to exceed $50." JA 1369 (Opinion 4); *see* MD. CODE PUB. SAFETY § 5-117.1(g). They also must submit their fingerprints and obtain a background check, for an additional fee of about $38—plus another $16.50 service fee that goes to the FBI. MD. CODE REGS. 12.15.01.15 And they must also certify that they have completed a firearms safety-training course—which necessitates payment of yet another fee, this one around $75. JA 0290–21.

[1] To be sure, Bloedorn's refusal to comply with GSU's permit requirement ultimately resulted in his arrest. But that does not suffice to distinguish the case, since it is a bedrock principle of standing law that "it is not necessary that [plaintiffs] expose [themselves] to actual arrest or prosecution to be entitled to challenge a statute that [they] claim[ ] deters the exercise of [their] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

These monetary costs—no matter the amount—are the very paradigm of injury-in-fact. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("[A] loss of even a small amount of money is ordinarily an 'injury,' "); *see also McGowan v. Maryland*, 366 U.S. 420, 430–31 (1961) (finding that plaintiff who was fined five dollars had standing); *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) ("While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms."). The district court *acknowledged* that the monetary expense of obtaining a Handgun License had deterred at least one of the Individual Plaintiffs from exercising her constitutional right to obtain a handgun, JA 1374 (Opinion 9), and it nowhere explained why this obvious, archetypical injury did not establish standing. The court below did note that at least one plaintiff could "afford the cost of an HQL"; and it generally denied standing because the Individual Plaintiffs had not shown that it would be "*impossible*" for them to obtain licenses. JA 1373, 1389 (Opinion 8, 24). But it is far too late in the day to argue that a plaintiff can challenge the imposition of a fee on the exercise of a constitutional right *only if he cannot afford to pay it*. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14

(1973) (observing that to establish injury-in-fact, plaintiffs' interest in the case need not measure more than an "identifiable trifle").

The injuries inflicted by Maryland's license requirement do not end with the license's cost. The License Requirement also imposes a wide variety of other burdens that, though non-monetary, are very real. Running the procedural gauntlet of Maryland's license application requirement is burdensome and time consuming. Applicants for a license must locate a vendor approved by the State to take fingerprints, travel to the vendor, and have their fingerprints taken. JA 0750–51. They must complete a time-consuming application online. And they must locate, schedule, and attend the required live-fire safety-training course, JA 0320–21, 0322—which by statute must include at least four hours of instruction. MD. CODE PUB. SAFETY § 5-117.1(d)(3)(i).

The burdens imposed by the Handgun License Requirement are akin to the injuries this Court found sufficient to support standing in *Hutton v. National Board of Examiners in Optometry, Inc.*, 892 F.3d 613, 622 (4th Cir. 2018). There, victims of a data breach brought tort and contract claims against an organization that maintained the compromised database, alleging that it had failed to adequately safeguard their personal information. The district court dismissed their claims for lack of standing, but this Court reversed, concluding that the plaintiffs had suffered adequate injury-in-fact "based on the harm from the increased risk of future identity

theft and the cost of measures to protect against it." *Id.* at 621. One plaintiff, for example, had alleged that "[s]he had to spend time and resources to repair her credit." *Id.* at 622. Another "suffered time lost in seeking to respond to fallout from the NBEO data breach." *Id.* These burdens, this Court concluded, "readily show sufficient injury-in-fact to satisfy the first element of the standing to sue analysis." *Id.*; *see also New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (plaintiff had standing to challenge lobbyist disclosure requirements because "providing additional information" as required by the challenged law "would greatly increase its administrative burden").

Plaintiffs are also injured by the *delays* imposed by the License Requirement. By statute, Defendants have up to 30-days to make a decision on an HQL application, MD. CODE PUB. SAFETY § 5-117.1(h)(1), but in practice, they sometimes exceed this period, JA 0741–42. For a citizen who needs to obtain a handgun for self-defense, this delay could quite literally mean the difference between life and death. Criminal assailants do not politely wait to perpetrate their attacks while Defendants collect fingerprints, review safety-training results, and process administrative paperwork. Being forced to undergo this delay before exercising a core constitutional right is itself a sufficient injury-in-fact to establish Plaintiffs' standing. *See Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1256 (10th Cir. 2004) (plaintiff whose permit application was delayed had standing to

challenge the permitting scheme even thought it "was able to overcome any logistical difficulties caused by the delay," since "[i]f [plaintiff] is correct on the merits, it was entitled to receive an answer to its permit application long before [it did]"). To be clear, even absent a delay waiting for the 30-day deadline itself constitutes injury-in-fact.

Plaintiffs have accordingly suffered numerous injuries—any one of which independently satisfies Article III. Nor can there be any doubt that the other two elements of standing are met. The challenged license requirement is the direct and but-for cause of each of Plaintiffs' injuries—were it not for that requirement, Plaintiffs would not be forced to pay the fees, endure the delay, and bear the time-consuming burdens imposed by state law before exercising their fundamental constitutional rights. For the same reasons, if Plaintiffs obtained the injunctive relief they seek—and the Handgun License requirement could no longer be enforced—those injuries would be wholly redressed. Plaintiffs have standing.

Because the Individual Plaintiffs have standing, the Associational Plaintiff—MSI—has standing as well. To establish standing on an associational theory, a plaintiff must meet three elements: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington*

State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). The second and third elements of this test cannot plausibly be disputed; indeed, the only reason given by the court below for denying MSI standing was that "none of MSI's individual members have shown standing to sue in his or her own right." JA 1399 (Opinion 34). But the individual members of MSI—including Plaintiff Miller—*do* have standing, for the reasons just explained. MSI thus has standing as well.

The district court's reasons for resisting these conclusions do not withstand scrutiny. The principal reason advanced by the court for denying the Individual Plaintiffs' standing was the notion that "to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy." JA 1387 (Opinion 22). But all that the cases applying this rule show is that a plaintiff who challenges the *application* of a government policy must show that he has been actually injured by the challenged features of the policy. The criminal defendant in *United States v. Decastro*, for example, argued that New York's handgun licensing scheme *operated* in such a way as to effectively prevent him from obtaining a handgun in New York. 682 F.3d 160, 164 (2d Cir. 2012). But *Decastro* did not challenge the constitutionality of the *licensing scheme itself*.

The other cases cited by the district court are to the same effect. The court below noted *Southern Blasting Services., Inc. v. Wilkes County., N.C.*, 288 F.3d 584 (4th Cir. 2002), found the plaintiffs there lacked standing to challenge the process

for obtaining an explosive materials permit because they had "never even applied for a permit, much less been denied one." *Id.* at 595. But the *Southern Blasting* plaintiffs brought a procedural due process claim challenging the *way the permit requirement was being applied*. Similarly, the plaintiff in *Westfall v. Miller*—an individual who wished to obtain a permit from the Bureau of Alcohol, Tobacco, and Firearms to possess a machinegun—lacked standing to challenge the ATF's requirement that he first obtain a certification from a particular type of local official because he had "made no effort to obtain certifications from [several of] these officials," such that it remained a live possibility that one of those officials would *grant* him the certification, leaving him with no "injury of which to complain." 77 F.3d 868, 872 (5th Cir. 1996); *see also Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997) (holding that plaintiff who had not submitted to challenged registration requirement could not challenge its application, but noting that he did not challenge "the constitutionality of the registration requirement" itself). That is not the case here—even if the plaintiffs applied for and obtained a permit, their injury would remain unredressed, because the permit requirement itself is harming them.

In the cases cited by the district court, the plaintiffs lacked standing because they sought to challenge particular *features* of a permitting process they had not undergone. But here, Plaintiffs challenge the constitutionality *of the permit requirement itself*. Put differently, the plaintiffs in these cases *wanted* the permits in

question and argued that those permits were being improperly denied; by contrast, Plaintiffs' claim in this case is that *no permit may be required in the first place.* These cases are thus inapposite. Instead, this case is controlled by the precedent cited above, holding that where a plaintiff challenges a permit requirement as *itself* unconstitutional, "[a] permit denial . . . is not a prerequisite to establish standing." *A.N.S.W.E.R. Coalition*, 915 F. Supp. 2d. at 103.

Indeed, the district court's logic would have the unacceptable result of immunizing claims like Plaintiffs' here—challenging the constitutionality of a permit requirement *per se*—from any judicial review *whatsoever*. For on the reasoning adopted below, a plaintiff would not have standing to raise such a claim *before* applying for the allegedly unconstitutional permit; and she also would not have standing to bring the challenge *after having been granted* the permit, since the challenge would then be moot. Article III does not impose such a "Catch-22" approach.

The district court also reasoned that Plaintiffs' lacked standing because they had failed to "articulate[ ] any burden as a result of the law," JA 1391 (Opinion 26)—based on the court's earlier opinion, on the State's motion to dismiss, which had reasoned that the plaintiffs would have standing only if they "are affected by aspects of the [License Requirement] other than time and cost," JA 0053 (MTD Opinion 15). *Neither* opinion *ever* explains why "time and cost" are not *themselves* sufficient

injuries-in-fact to confer standing. And as discussed above, numerous cases hold precisely the opposite. *See, e.g.*, *McGowan*, 366 U.S. at 430–31; *Hutton*, 892 F.3d at 622. Indeed, having to bear "costs" is *the classic* injury in fact. *Czyzewski*, 137 S. Ct. at 983.

The individual plaintiffs have been deterred from exercising their fundamental Second Amendment rights by the costs, delays, and tangible burdens imposed by the State's license requirement. Those injuries are *caused* directly by the challenged laws and would be *redressed* if those laws were set aside. In any other context, their standing would be beyond dispute.

II. Atlantic Guns also has standing.

Supreme Court case law makes clear that where a vendor faces imminent economic injury due to a law restricting the ability of its customers to purchase goods or services that they have a constitutional right to acquire, the vendor may bring suit to vindicate its customers' rights. This doctrine is established by multiple Supreme Court cases. In *Eisenstadt v. Baird*, for instance, the Court held that a vendor of contraceptives had standing to assert the rights of unmarried persons who were denied access to contraceptives. 405 U.S. 438, 446 (1972); *see also Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965). The Court employed the same principle in *Craig v. Boren*, where it held that a vendor of alcoholic beverages had third-party standing to assert its customers' constitutional claims. 429 U.S. 190, 196–97 (1976).

The lower federal courts have applied this rule in myriad other situations. The Ninth Circuit, for instance, has allowed wedding planners to sue on behalf of the couples seeking their services, noting that "[v]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Kaahumanu v. Hawaii*, 682 F.3d 789, 797 (9th Cir. 2012) (quotation marks omitted). The Seventh Circuit allowed "a supplier of firing-range facilities" to vicariously vindicate the Second Amendment rights of its customers under the very same reasoning. *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011). And the Fifth Circuit has allowed adult novelty retailers to sue on behalf of customers wishing to buy "sexual devices," noting that "Supreme Court cases hold that businesses can assert the rights of their customers and that restricting the ability to purchase an item is tantamount to restricting that item's use." *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743 (5th Cir. 2008).

While the district court opined that Atlantic Guns could not assert its *own* rights in this case, based on the theory that "the Second Amendment does not confer a freestanding right . . . upon a proprietor of a commercial establishment to sell firearms," it ultimately conceded that this was beside the point because under this well-settled case law, Atlantic Guns may sue to vindicate *its customers'* rights to acquire handguns. JA 1400, 1403 (Opinion 35, 38) (quoting *Teixeira v. County of*

Alameda, 873 F.3d 670, 682 (9th Cir. 2017)). Instead, it dismissed Atlantic Guns' claims because, it thought, "Atlantic Guns has not established that it suffered any economic injury as a result of the HQL requirement." JA 1403 (Opinion 38). That is not so.

As discussed above, "a loss of even a small amount of money is ordinarily an 'injury' " sufficient to confer standing. *Czyzewski*, 137 S. Ct. at 983. Here, the record evidence leaves no doubt that the Handgun License requirement has caused an appreciable decline in Atlantic Guns' sales. Indeed, Defendants' *own records* establish that Atlantic Guns' handgun sales plunged during the four years since the challenged laws took effect in the latter part of 2013. JA 1192. Moreover, the record shows that Atlantic Guns has had to turn down hundreds of handgun sales, foregoing those potential profits, as a result of the Handgun License requirement. JA 1412. Even if Plaintiff's overall sales *had not* decreased (and they did), these specific lost profits alone would be sufficient injury-in-fact to establish standing. After all, "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." *Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 222 (2d Cir. 2008); *see also Aluminum Co. of Am. v. Bonneville Power Admin.*, 903 F.2d 585, 590 (9th Cir. 1989) (utilities had standing to challenge statutory electricity rates because "[t]here is harm in paying rates that may be excessive, no matter what the California utilities may have saved").

"[S]tanding analysis is not an accounting exercise . . . ." *NCAA v. Governor of New Jersey*, 730 F.3d 208, 223 (3d Cir. 2013), *abrogated on other grounds by Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

The district court also gave another reason for concluding that Atlantic Guns lacks standing. "In the other third party standing cases," it opined, the business's customers "were completely prohibited from availing themselves of the businesses' services," while Atlantic Guns has not shown that the License Requirement places "any regulatory burden . . . on its customers' Second Amendment rights." JA 1404 (Opinion 39). That reasoning fails for three independent reasons. First, it is simply an inaccurate description of the case law. The law challenged in *Kaahumanu*, for example, was a permit requirement, not a "categorical prohibition." JA 1404 (Opinion 39); *see Kaahumanu*, 682 F.3d at 794. The burdens at issue in this case are indistinguishable from the ones there.

Second, the district court's reasoning on this score also fails because it confuses Plaintiffs' standing with the merits of their claims. If Plaintiffs cannot show that the Second Amendment rights of Atlantic Guns' customers have been burdened by the Handgun License requirement, then their Second Amendment claim might fail on the merits. But the courts "must not confuse standing with the merits." *Covenant Media Of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 429 (4th Cir. 2007). And third, even if it *was* appropriate to inquire, at the standing stage,

whether the constitutional rights of Atlantic Guns' customers have been burdened, Plaintiffs would *satisfy* any such inquiry. For as explained above, the Handgun License requirement imposes a serious and tangible burden on the core right to acquire a handgun for self-defense.

Finally, the court below maintained that Atlantic Guns could not bring suit on behalf of its customers because those customers themselves were not "hindered" from "challeng[ing] the HQL provision" themselves. JA 1405 (Opinion 40). That reasoning is in error, too. As an initial matter, no "hindrance" requirement exists in the context of vendor standing. Indeed, in *Craig*, the Court held that a licensed vendor of alcohol had standing to challenge the enforcement of a liquor law that allegedly deprived the vendor's potential customers of equal protection, even though it did not dispute the dissent's observation that there was "no barrier whatever" to the customers bringing an independent claim. 429 U.S. at 216 (Burger, J., dissenting). As the Supreme Court has explained, no "barrier" to suit by the third-party in question need be shown when "enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of [the] third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (citing *Griswold*, 381 U.S. 479). That is plainly the case here. The Handgun License requirement *directly bars* Atlantic Guns from selling handguns to customers who lack a state-issued license,

and that requirement necessarily results in the alleged violation of the Second Amendment rights of those customers.

Even if Atlantic Guns were required to show that its customers faced a barrier to bringing suit themselves, any such burden has been satisfied, because those customers *do* face an impediment to bringing suit in their own name. It is the same impediment at issue in *Griswold* and *Eisenstadt*: the customers' desire to keep highly sensitive, personal information private. Few issues of public policy are as controversial and politically polarizing as the private possession and use of firearms, and the ongoing debate over regulation of firearms arouses passionate beliefs among the partisans on both sides. Understandably, therefore, individuals who own—or wish to purchase—handguns may wish to keep that sensitive information *private*, and out of the public eye. Maryland has itself *recognized* this interest, by exempting records pertaining to HQL possession from the State's general Public Information Act. MD. CODE GEN. PROVIS. § 4-325(a)(1).

Indeed, for two reasons this interest in privacy is of fundamental, constitutional dimension. First, individuals have an "individual interest in avoiding disclosure of personal matters" that is grounded "in the Fourteenth Amendment's concept of personal liberty." *Whalen v. Roe*, 429 U.S. 589, 598 n.23, 599 (1977). "Proliferation in the collection, recording and dissemination of individualized information has made the public, Congress and the judiciary increasingly alert to the

threat such activity can pose to one of the most fundamental and cherished rights of American citizenship, falling within the right characterized by Justice Brandeis as 'the right to be let alone.' " *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 576 (3d Cir. 1980). Among the types of personal information held to be encompassed by this constitutional right of confidentiality are:

- the medications one has been prescribed;[2]
- one's personal relationships, interactions, and activities within one's home and family;[3]
- one's personal and family wealth, investments, taxes, income, and other financial information;[4]
- one's health and medical status and records;[5]

[2] *See, e.g.*, *Whalen*, 429 U.S. at 593.

[3] *See, e.g.*, *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457–59 (1977).

[4] *See, e.g.*, *Statharos v. New York City Taxi and Limousine Comm'n*, 198 F.3d 317, 322–23 (2d Cir. 1999); *In re McVane*, 44 F.3d 1127, 1136–40 (2d Cir. 1995); *Igneri v. Moore*, 898 F.2d 870, 871–72 (2d Cir. 1990); *Eisenbud v. Suffolk Cty.*, 841 F.2d 42, 43 (2d Cir. 1988).

[5] *See, e.g.*, *Weisberg v. Riverside Twp. Bd. of Educ.*, 180 F. App'x 357, 365 (3d Cir. 2006); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998); *Doe v. City of New York*, 15 F.3d 264, 267–69 (2d Cir. 1994); *Westinghouse Electric*, 638 F.2d at 576–77.

- one's personal relationships, sexual relations, and marital, parental and family status;[6] and
- identifying names, addresses, or phone numbers when included in files containing other sorts of information (e.g., health records, financial records) which the government has been held entitled to collect for important governmental purposes.[7]

Given the controversial and personal nature of the decision to own a firearm, this information plainly belongs in the same class.

Second, disclosure of this sensitive information would also implicate constitutional concerns because it "would have the practical effect of discouraging the exercise of constitutionally protected . . . rights." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (quotation marks omitted). It does not matter whether the government's disclosure of private personal information is "an effort to suppress" the constitutional right in question. *Id.* Indeed, "[t]he governmental action challenged may appear to be totally unrelated to protected liberties." *Id.* What matters is the "practical effect" of the compelled disclosure on the free exercise of constitutional rights. If public disclosure of personal information would "suppress,"

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[6] *See, e.g.*, *Walls v. City of Petersburg*, 895 F.2d 188, 193–94 (4th Cir. 1990); *Thorne v. City of El Segundo*, 726 F.2d 459, 469–70 (9th Cir. 1983); *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 458–59 (E.D. Pa. 1979).

[7] *See, e.g.*, *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 538, 552–53 (9th Cir. 2004); *Statharos*, 198 F.3d at 320.

"curtail[ ]," "discourag[e]," "dissuade," or otherwise "deter[ ]" the "free exercise" of "protected liberties," then disclosure is barred. *Id.* at 461–63. Information about citizens choosing to exercise a politically divisive, controversial or unpopular constitutional right—such as, in this case, the Second Amendment right to own a firearm—thus "must be protected in a way that assures anonymity," because an individual may become "reluctant" to exercise her right "if there exists a possibility that her decision and her identity will become known publicly." *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766–67 (1986), *overruled in part on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

Accordingly, individuals who are impeded from purchasing handguns by the challenged license requirement may face an intolerable choice: bring suit to challenge that requirement and therefore forfeit their fundamental, constitutional right to keep their private information private; or preserve their privacy and succumb to the unconstitutional burden on their Second Amendment rights. That plainly poses an obstacle to their ability to bring suit; as in *Eisenstadt* and *Griswold*, allowing firearm dealers like Atlantic Guns to vindicate those Second Amendment rights instead avoids this dilemma.

For the same reasons, the district court erred in faulting Plaintiffs for failing to "identify any specific customer who decided not to purchase a gun as a result of

the FSA." JA 1403 (Opinion 38). Requiring a vendor to identify the customers whose rights it is vindicating would *obliterate* the very privacy protections this type of representative suit is designed to *protect*. Accordingly, there is simply no requirement that a vendor plaintiff "identify" specific customers. *See, e.g.*, *Craig*, 429 U.S. at 192 (alcohol vendor had standing to vindicate rights of unspecified "males 18-20 years of age"); *Ezell*, 651 F.3d at 696 (supplier of firing-range facilities had standing to assert rights of unidentified customers); *Reliable Consultants*, 517 F.3d at 743 (adult novelty store had standing to vindicate rights of "those who wish to use sexual devices"). The record evidence makes clear that at least *some* individuals have been deterred by the license requirement from purchasing handguns. *See* JA 0273–74, 0279, 0249, 1412. And as discussed above, Atlantic Guns has further demonstrated that the obstacles created by the challenged laws have *diminished its handgun sales*. JA 1192. That suffices to establish its standing.

Like the Individual Plaintiffs, Atlantic Guns has also obviously shown causation and redressability. The economic harm it has suffered is the direct result of the challenged license requirement, which chokes off the ability of its customers to purchase the handguns it sells; and because Atlantic Guns' injury is *caused* by the Handgun License requirement, invalidating that requirement would *redress* its injury—allowing it to return to business as normal.

Atlantic Guns has standing, and the district court was wrong to dismiss this case.

CONCLUSION

For the reasons given above, Amici Curiae respectfully submit that the district court's judgment should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,324 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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 proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: July 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on July 1, 2019. I certify that service will be accomplished by the appellate CM/ECF system on all parties or their counsel.

Dated: July 1, 2019

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