No. 19-1469

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARYLAND SHALL ISSUE, INC., *et al.*,

Plaintiffs-Appellants,

v.

LAWRENCE HOGAN, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland
(Ellen L. Hollander, District Judge)

BRIEF OF APPELLEES

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August 6, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1469 Caption: Maryland Shall Issue, Inc., et al. v. Lawrence Hogan, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Lawrence Hogan, in his capacity as Governor of Maryland
(name of party/amicus)

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

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If yes, identify all parent corporations, including all generations of parent corporations:

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(a)(2)(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/ Jennifer L. Katz Date: 5/2/2019

Counsel for: Appellees

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I certify that on 5/2/2019 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., et al. v. Lawrence Hogan, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

William M. Pallozzi, in his capacity as Superintendent, Maryland State Police
(name of party/amicus)

---

who is appellee, 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

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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JURISDICTIONAL STATEMENT

Plaintiffs-appellants Maryland Shall Issue, Inc. ("MSI"), two individual members of MSI, and Atlantic Guns, Inc., filed this suit against Maryland Governor Lawrence Hogan and Superintendent of Maryland State Police William Pallozzi, challenging the constitutionality of Maryland's law requiring that most Marylanders obtain a Handgun Qualification License ("License" or "HQL") prior to purchasing a handgun. Plaintiffs alleged that the challenged law violated the Second Amendment to the United States Constitution and was void for vagueness under the Due Process Clause of the Fourteenth Amendment. Plaintiffs also alleged that various aspects of the regulations implementing the License law are ultra vires under Maryland law.

After completing discovery, the parties cross-moved for summary judgment. On March 31, 2019, the district court issued a final judgment granting Defendants' motion and denying Plaintiffs' motion. (J.A. 1364.) The district court concluded that Plaintiffs failed to satisfy their evidentiary burden at the summary judgment stage to establish standing as to any of their claims. Plaintiffs noted a timely appeal on April 25, 2019. (J.A. 1409.) Because Plaintiffs lacked standing, the district court did not have subject matter jurisdiction to adjudicate their claims. This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly conclude that the individual Plaintiffs lacked standing to bring their Second Amendment challenge because neither individual Plaintiff had applied for a License or shown that attempted compliance would be futile?

2. Did the district court correctly conclude that MSI lacked associational standing because it failed to identify any member who was injured by the License requirement, and that MSI lacked organizational standing because it failed to present any evidence that the License law impeded MSI's mission?

3. Did the district court correctly conclude that Atlantic Guns lacked standing to challenge the License law because it failed to show that its customers were harmed by the law and made no evidentiary showing that it suffered a loss of business because of the License requirement?

4. Did the district court correctly dismiss Plaintiffs' vagueness challenge on standing grounds where Plaintiffs did not allege that they were subject to a credible threat of prosecution under the law?

5. Did the district court correctly dismiss the state law claims on standing grounds where no Plaintiff demonstrated a special injury distinct from that of the general public?

STATEMENT OF THE CASE

Maryland's Enactment of the Handgun Qualification License Requirement

Maryland's Firearm Safety Act of 2013 (the "FSA") was a comprehensive effort to advance the State's "compelling" "interest in the protection of its citizenry and the public safety." *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017). Among other safety measures, the FSA requires that most Marylanders obtain a License before they can purchase, rent, or receive a handgun. To obtain a License, applicants are required to submit their fingerprints for a background investigation and satisfy the law's firearm safety training requirement. Since the FSA's enactment and up through the first quarter of 2018, nearly 100,000 Marylanders had complied with these requirements and successfully obtained a License. (J.A. 175.)

The License requirements are set forth in § 5-117.1 of the Public Safety Article of the Maryland Code. (J.A. 71-75.) Subject to certain exemptions, the License law provides that one person may not "sell, rent, or transfer a handgun" to a second person, and the second person may not "purchase, rent, or receive a handgun" from the first person, unless the second person presents a valid License. Md. Code Ann., Pub. Safety § 5-117.1(b)-(c) (LexisNexis 2018). Under the law, the Secretary of the Maryland Department of State Police ("MSP") must issue a License to an applicant who: (i) is at least 21 years old; (ii) is a Maryland resident; (iii) has

completed a firearms safety training course meeting certain criteria within three years of applying for a License; and (iv) based on an investigation by MSP, is not prohibited from owning a firearm. Within 30 days of receiving a complete application, the Secretary must issue either a License or a written denial accompanied by a statement of the reason for the denial and notice of appeal rights. Pub. Safety § 5-117.1(h).

The required firearms safety training course must include at least four hours of instruction by a qualified handgun instructor, including classroom instruction on home firearm safety and the mechanisms and operation of handguns and "a firearms orientation component that demonstrates the person's safe operation and handling of a firearm." Pub. Safety § 5-117.1(d)(3).[1] The training requirement is waived for a person who, among other exemptions, has completed certain other training courses or already lawfully owns a "regulated firearm," Pub. Safety § 5-117.1(e), which by statute is defined to include a handgun, Pub. Safety § 5-101(r).

The FSA requires the Secretary of MSP to apply to the Maryland Department of Public Safety and Correctional Services ("DPSCS") for a State and national criminal history records check for each License applicant. Pub. Safety § 5-117.1(f)(2). The application must include "a complete set of the applicant's legible

[1] MSP maintains a searchable database of licensed instructors on its website, at https://emdsp.mdsp.org/verification/ (last visited, August 6, 2019).

fingerprints taken in a format approved by" DPSCS and the Federal Bureau of Investigation. Pub. Safety § 5-117.1(f)(3)(i). In accordance with fingerprint rules promulgated by DPSCS in 2012, License applicants must submit their fingerprints to DPSCS via livescan technology.[2] (J.A. 120, 195-96.) If DPSCS receives criminal history information "after the date of the initial criminal history records check," it must provide that information to MSP. Pub. Safety § 5-117.1(f)(7).

The General Assembly authorized the Secretary of MSP to adopt regulations to carry out the License provisions. Pub. Safety §§ 5-105, 5-117.1(n). MSP adopted such regulations, which appear at 29.03.01.26—.41 of the Code of Maryland Regulations ("COMAR"). (J.A. 219-26.) The regulations further detail the statutory elements of the required training course. Implementing the FSA's requirement that the training component include a demonstration of "the person's safe operation and handling of a firearm," the regulations require that the training must include "a practice component in which the applicant safely fires at least one round of live ammunition." COMAR 29.03.01.29(C)(4). In response to requests, MSP has approved the use of alternative ammunition in the form of non-lethal, marking projectiles to satisfy the live-fire requirement. (J.A. 121, 212-17.)

[2] MSP provides a link to a list of commercial fingerprinting services, at http://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Fingerprinting.aspx (last visited, August 6, 2019).

The Public Safety Benefits of the Fingerprint Background Check and Firearm Safety Training Requirements

Contrary to Plaintiffs' contention, the License's fingerprint-based background check and firearm safety training requirements are not redundant of prior Maryland law. In fact, the requirements are more robust than prior requirements for handgun purchase and have been found by social science researchers and law enforcement experts to enhance public safety. (J.A. 372-79, 533-39, 541-46.) In legislative hearings, the General Assembly heard testimony from the Director of the Johns Hopkins Center for Gun Policy and Research, Daniel W. Webster, ScD, that under the State's prior regulatory regime, which did not require a fingerprint background check, Maryland's "system [was] especially vulnerable to illegal straw purchases and individuals using false identification in their applications to purchase regulated firearms." (J.A. 77.) Professor Webster relayed the findings of a study conducted by the United States General Accounting Office, concluding that background checks based on photographic identification were inadequate to "ensure that the prospective purchaser [of firearms] is not a felon." (J.A. 77, 83-104).) Professor Webster further outlined his peer-reviewed research showing the positive effects on public safety of state laws with requirements similar to Maryland's License law. (J.A. 77-81.)

Record evidence demonstrates that requiring prospective handgun purchasers to undergo a fingerprint-based background check makes it more difficult for a prohibited person to obtain access to a firearm (J.A. 374, 543). *See Heller v. District*

of Columbia, 801 F.3d 264, 276-77 (D.C. Cir. 2015) (relying on similar evidence demonstrating that "background checks using fingerprints are more reliable than background checks conducted without fingerprints, which are more susceptible to fraud"). Robust background checks based on proper identification of an applicant animate the State's policy of keeping firearms out of the possession of felons, a "presumptively lawful" and longstanding firearms restriction. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008) (*Heller I*).

The General Assembly also heard testimony from then-Baltimore County Police Chief James W. Johnson, who testified that the fingerprint requirement, although not "an inconvenience" for law-abiding Marylanders, "will decrease illegal gun sales and purchases by ensuring that all licensees are eligible to possess firearms under Federal and State law." (J.A. 108.) Empirical studies have linked gun licensing fingerprint requirements with a reduction in the flow of guns to criminals. (J.A. 374-79, 428-36, 428-36, 457-531.)

Unlike a background check based solely on photographic identification, a fingerprint record can be used to determine if a Licensee is convicted of a disqualifying offense subsequent to passing the initial background investigation. That identification enables MSP to revoke the disqualified person's License and, where necessary, retrieve unlawfully possessed firearms. (J.A. 120, 198-207, 1243-45.) It is undisputed that this aspect of the License requirement promotes public

safety by enhancing the State's ability to identify and disarm individuals who are not eligible to possess firearms. (J.A. 117, 181, 549 (plaintiffs' expert agreeing that this advantage of the fingerprint requirement promotes public safety).)

Chief Johnson further testified that the four-hour training course would "reduce the number of non-intentional shootings by ensuring that gun owners know how to safely use and store firearms"; would deter straw purchasers; and was an improvement over the "insufficient" prior requirement that handgun purchasers view a 30-minute video. (J.A. 109.) Similarly, then-Baltimore City Police Commissioner Anthony Batts testified before the General Assembly that both the fingerprinting and training requirements would deter straw purchasers. (J.A. 112-13.) Based on decades of experience with firearm safety training, law enforcement experts believe that the firearm safety training makes Marylanders safer by reducing access of firearms to prohibited persons, including minors, and instructing applicants on the safe handling of a firearm. (J.A. 535-38, 544-46.)

Plaintiffs

Plaintiff Deborah Kay Miller, although generally unfamiliar with the costs associated with the License requirement, testified that she can afford to obtain a License but has not taken any steps to initiate the process. (J.A. 240-42, 244, 249.) Although she contends that a back injury would make it difficult for her to sit through the safety training, Ms. Miller has not sought an accommodation from MSP, nor has

she contacted an instructor to inquire as to whether she can periodically stand during the training, as she does at work where she otherwise sits for many hours a day. (J.A. 249-52.) Ms. Miller testified that she decided to purchase a handgun only recently in 2017, after this lawsuit was filed, because she believes the License law makes it illegal for her to use her husband's handguns to defend herself in the event of a home invasion. (J.A. 234-35.)[3] These are the same handguns that Ms. Miller had used for target practice before the law was enacted and for years after the law was enacted, including after this lawsuit was filed. (J.A. 231-33, 235, 238, 254.) Ms. Miller has not decided on what caliber or brand of handgun she wishes to purchase or a price that she is willing to spend, nor has she done any research to determine what handgun would best serve her needs. (J.A. 236-38.)

Plaintiff Susan Brancato Vizas has taken a hunter safety training class and, thus, is exempt from the License training requirement (J.A. 19 ¶ 16), but has taken no steps to obtain a License (J.A. 270-71). Ms. Vizas became interested in purchasing a handgun for target practice when her daughter expressed interest in target shooting rifles, but Ms. Vizas does not know what type of handgun she would purchase or whether she could afford to purchase a handgun. (J.A. 262-67, 271.) Ms. Vizas identified only the cost of training, from which she is exempt, as a

[3] As discussed below at pages 48-50, a published MSP advisory makes clear that the FSA does not criminalize this sort of temporary possession of a handgun.

potential deterrent to obtaining a License, but she has done no research on the subject and incorrectly believes the training course is 12-hours long and requires proficiency in firing. (J.A. 270, 279-81.)

Neither Ms. Miller nor Ms. Vizas has contacted a training instructor or any fingerprint vendor to investigate or initiate the process of obtaining a License (J.A. 241-42, 244, 270-71), and neither Plaintiff has asserted that she lacks access to a livescan fingerprint vendor, training instructor, or firing range.

Plaintiff MSI is an organization that is "dedicated to the preservation and advancement of gun owners' rights in Maryland" and "seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public." (J.A. 20 ¶ 25.) When this lawsuit was initiated, MSI had "approximately 772 members." (J.A. 20.) During the pendency of this lawsuit, that membership has grown to over 1,100 members, a nearly 40 percent increase in membership. (J.A. 558.) Of those members, MSI identified only three, aside from the named plaintiffs, who purportedly have been deterred from obtaining a License. (J.A. 283-85.) However, two have been "deterred" solely by their own unwillingness to comply with the License requirement as a matter of principle (J.A. 301, 312), and MSI has abandoned any reliance on their assertions to establish standing on appeal. The third identified member has taken no steps to initiate the application process despite being able to

afford it. (J.A. 324-27.) She alleges that a disability would prevent her from completing the firearm safety training, but she is not familiar with the actual training requirements, and has not sought any accommodation or otherwise made any inquiries with MSP. (J.A. 322, 324-26.)

Plaintiff Atlantic Guns is a Maryland-based, federally-licensed firearms dealer. (J.A. 21 ¶ 26.) Despite alleging that it has lost sales due to the License requirement, Atlantic Guns could not provide any "factual basis" to support this allegation (J.A. 339-40) or identify even a single customer who has been deterred by the License requirement from purchasing a handgun (J.A. 337-38, 342-43, 348). Atlantic Guns' inability to identify any lost or discouraged customer was confirmed by the testimony of the company's owner and Federal Rule of Civil Procedure 30(b)(6) designee, Stephen Schneider:

> [QUESTION:] As Atlantic Guns' designee can you identify any potential customers of Atlantic Guns that have been deterred from completing the HQL application process because of the expense and inconvenience of the HQL requirements?
>
> [ANSWER:] Are you asking me can I identify them by specific name?
>
> [QUESTION:] Correct.
>
> [ANSWER:] No, I cannot.

(J.A. 337-38.) Despite Atlantic Guns' sworn testimony in the record admitting that it cannot identify any customers deterred by the License requirement, Plaintiffs' opening brief to this Court asserts that Atlantic Guns "has turned away, and thus lost

business from, hundreds of handgun customers because they lack a Handgun License." Appellants' Br. 10. For this assertion, the brief cites only the uncorroborated declaration of Mr. Schneider. *Id.* Atlantic Guns goes on to suggest that in discovery it produced documentary evidence of this loss of sales in emails with customers names redacted, *id.*, but the brief does not document that suggestion with any citation to the Joint Appendix or to the summary judgment record in the district court. Although Atlantic Guns produced in discovery emails with customer names redacted, those emails did not support Atlantic Guns' professed loss of sales, which likely explains why Plaintiffs did not rely on the emails on summary judgment and certainly explains why the Defendants did not object to the irrelevant redactions.

Although Atlantic Guns' handgun sales dipped in 2014 and 2015, after an undisputed spike in gun sales in 2012 and 2013, Atlantic Guns' handgun sales in 2016 and 2017 are on par with their handgun sales prior to 2012, before the License law was enacted. (J.A. 1413.) Overall, Maryland experienced robust handgun sales in 2017. (J.A. 1239.)[4] Plaintiff MSI itself tweeted earlier this year about the recent marked increase in firearms background checks that have occurred in Maryland,

[4] Although data in this exhibit (J.A. 1239) contain some discrepancies in coding as to the specific type of handgun that was transferred in 2014, 2015, and 2016, those discrepancies have no effect on the data for 2017 handgun transfers. (J.A. 1216-17.) As of January 1, 2017, firearms transfer data is no longer entered manually from applications, but instead is taken directly from the newly-required digital application for firearm transfers. (J.A. 1219-20.)

based on data compiled by the Federal Bureau of Investigation, showing thousands of handgun background checks each month (J.A. 1241). *See also* https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view.

Procedural History

Plaintiffs filed their initial complaint on September 30, 2016 (J.A. 5) and three months later filed an amended complaint alleging (1) that the License law violates the Second Amendment; (2) that the law's application to individuals who "receive" a handgun is void for vagueness; and (3) that various aspects of the regulations implementing the License law are ultra vires under Maryland law. (J.A. 16-38.) As to the Second Amendment claim, Plaintiffs claimed that they and their members and customers were deterred from purchasing handguns because of "the expense and inconvenience of the HQL application process and its constituent parts." (J.A. 19-21 ¶¶ 14, 19, 25, 26.)

Defendants moved to dismiss the amended complaint in its entirety on standing grounds and for failure to state a claim on which relief can be granted. (J.A. 7; ECF 18.) The district court denied the motion, for the most part, and concluded that, at least for the pleading stage, Plaintiffs had sufficiently alleged injury-in-fact

to give them standing. (J.A. 39.)[5] The district court observed, however, that "[u]ltimately, to prevail, Plaintiffs must prove the identity of specific individuals who are personally injured or deterred by each contested aspect of the challenged requirements in order to have standing." (J.A. 54.)

After completing discovery, the parties cross-moved for summary judgment. (J.A. 69, 554.) The district court granted Defendants' motion and denied Plaintiffs' motion. (J.A. 1364.) The district court concluded that Plaintiffs failed to meet their evidentiary burden at summary judgment to establish standing sufficient to confer subject matter jurisdiction under Article III of the Constitution. As to the individual Plaintiffs, the district court concluded that they failed to present any evidence that they were precluded from applying for a License or that an application would be futile; consequently, they lacked standing to challenge the License requirement and its associated costs. (J.A. 1387-93.) Similarly, the district court concluded that MSI failed to identify any member of the organization that had been harmed by the License law and, further, that MSI had not presented any facts to demonstrate that the organization's mission had been harmed by the law. (J.A. 1396-99.) The district

[5] The district court dismissed Plaintiffs' claim that the License law violates due process because of the law's reliance on private handgun instructors to provide the firearm safety training. The court determined the claim was both not ripe and wholly speculative because Plaintiffs had not alleged facts showing the deprivation of any right, and the regulations did not vest handgun instructors with discretionary power. (J.A. 62-63.) Plaintiffs have not challenged that ruling on appeal.

court concluded that Atlantic Guns had failed to identify any customer that had been harmed by the law, and the court further determined that the retailer presented no evidence that the law caused him to suffer economic injury. (J.A. 1399-1405.) The district court also found Plaintiffs lacked standing to bring their vagueness challenge because they failed to demonstrate any credible threat of prosecution against them. (J.A. 1393-96.) Finally, because no Plaintiff demonstrated any specific injury distinct from that of the general public, the district court concluded that Plaintiffs lacked standing to bring their state law ultra vires claim. (J.A. 1405-07.)

SUMMARY OF ARGUMENT

The district court properly concluded that it lacked jurisdiction, because Plaintiffs failed to present any facts at the summary judgment stage to satisfy their burden to demonstrate Article III standing.

Neither of the individual Plaintiffs produced any facts to support her allegations that she was deterred from purchasing a handgun due to the License requirements and their associated costs. Indeed, both individual Plaintiffs were generally unfamiliar with the requirements and associated costs, and were confused or simply wrong as to what some of the requirements were. Neither Plaintiff demonstrated that attempted compliance with the License law would be futile, nor did either individual Plaintiff demonstrate that she suffered any actual or imminent injury to her Second Amendment rights. Similarly, MSI failed to identify even a

single member who has been burdened by the License requirement, and instead identified members who were unfamiliar with the requirements or simply wished not to comply with them. MSI also failed to present any facts to show that the License law has impeded its efforts to carry out its mission. Atlantic Guns failed to identify any customer who was deterred from purchasing a handgun due to the License requirement, and failed to establish the other elements required for third-party standing.

The district court also properly concluded that no Plaintiff had standing to bring a vagueness challenge because there has been no threatened or actual enforcement of the statute in the illogical and unreasonable manner Plaintiffs purport to fear. Finally, because no Plaintiff has articulated any basis for Article III standing or any special injury distinct from that of the general public, the district court properly concluded that Plaintiffs lacked standing to challenge the MSP's regulations as ultra vires under state law.

ARGUMENT

I. THE STANDARD OF REVIEW REQUIRES DE NOVO ASSESSMENT OF STANDING.

This Court reviews de novo the district court's conclusion that Plaintiffs lacked standing. *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017). Plaintiffs "bear[] the burden of establishing the three 'irreducible minimum requirements' of Article III standing." *Id.* The first required element is that Plaintiffs "must have

suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks, citations and footnote omitted). Second, "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (citations omitted; alterations in original). Third, Plaintiffs must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* (citations omitted).

"In determining whether an organization has standing," this Court "conduct[s] the same inquiry as in the case of an individual." *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). "An organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission." *Lane*, 703 F.3d at 674 (citing *Havens*, 455 U.S. at 379). An association has standing to bring suit on behalf of its members when the association can demonstrate that "(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).

"To overcome the prudential limitation on third-party standing, a plaintiff must demonstrate: (1) an injury-in-fact; (2) a close relationship between herself and the person whose right she seeks to assert; and (3) a hindrance to the third party's ability to protect his or her own interests." *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002).

"[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Thus, at the summary judgment stage, plaintiffs cannot rely on "'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,'" to demonstrate standing. *Id.* at 561 (citing Fed. R. Civ. P. 56(e)); *see also Beck*, 848 F.3d at 270.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE INDIVIDUAL PLAINTIFFS LACKED STANDING TO BRING THEIR SECOND AMENDMENT CLAIM.

A. The Individual Plaintiffs Failed to Establish Standing to Challenge the License Requirement, Because Neither of Them Submitted to the Challenged Policy and Neither Demonstrated that Attempted Compliance Would be Futile.

As discussed above, neither individual Plaintiff has taken any affirmative step to apply for a License. Although the individual Plaintiffs alleged that they were deterred by the License requirements and their associated costs, neither of them had sought any information about the requirements from MSP, a handgun instructor, or

a fingerprint vendor. They both lacked specific knowledge as to what the requirements would entail and, as to some components of the License law, were simply mistaken as to what was required.

As the district court recognized, generally "to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy." *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997)); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-71 (1972) (plaintiff who had never applied for membership lacked standing to challenge organization's discriminatory membership policies); *Southern Blasting Servs., Inc. v. Wilkes County, NC*, 288 F.3d 584, 595 (4th Cir. 2002) (finding plaintiffs lacked standing where they "ha[d] never even applied for a permit, much less been denied one" and, thus, could not demonstrate an actual injury from permitting scheme); *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) ("[A] plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit.").

In *Decastro*, the Second Circuit held that a plaintiff challenging New York's gun licensing laws as applied to him lacked standing because he had failed to apply for a license. 682 F.3d at 164; *see also Westfall v. Miller*, 77 F.3d 868, 872 (5th Cir. 1996) (holding that a plaintiff lacked standing to challenge a federal gun certification

law without first completing the certification process); *cf. Kwong v. Bloomberg*, 876 F. Supp. 2d 246, 251 (S.D.N.Y. 2012) (holding plaintiffs had standing to challenge $340 residential handgun license fee as unconstitutional because they had paid the fee). Here, too, the individual Plaintiffs lack standing to challenge the License requirement because they have failed to make any attempt to comply. Discovery revealed that they are not even familiar with the costs and the specific requirements associated with the License application process that allegedly had deterred them.

Nor has either individual Plaintiff made a "substantial showing," *Jackson-Bey*, 115 F.3d at 1096, that an attempt to apply for a License "would be futile," *Hamilton v. Pallozzi*, 848 F.3d 614, 621 (4th Cir.), *cert. denied*, 138 S. Ct. 500 (2017) (holding that the plaintiff was not required to submit to a regulatory scheme that precluded him from obtaining a permit to establish standing). As discussed above at pages 8-10, neither Ms. Miller nor Ms. Vizas has investigated the costs or initiated the process of obtaining a License. (J.A. 241-42, 244, 270-71.) Despite being exempt from the training requirement, Ms. Vizas identified only the cost of the training as a potential deterrent to obtaining a License, yet is unfamiliar with the actual requirements. (J.A. 279-81.) Ms. Miller has not sought any accommodation from MSP or any firearm safety trainer for her asserted back injury. (J.A. 249-52.)

As the district court concluded, such "unsupported claim[s] of futility [are] not enough to excuse a plaintiff's failure to apply." (J.A. 1391 (quoting *Jackson-*

Bey, 115 F.3d at 1096)). *See Jackson-Bey*, 115 F.3d at 1096 ("[W]e are unable to say that, if Jackson-Bey had followed the simple procedure of filling out the one-page form to register as an MST member at the time of his father's funeral, he would not have received the accommodation of his religious needs."). Further, because Ms. Miller has neither sought an accommodation for her disability nor been denied a License because of her disability, any as-applied challenge based on her disability is not ripe for adjudication.[6] *See Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013) ("[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (citation omitted)).

Plaintiffs incorrectly contend that the holding in *Dearth v. Holder*, 641 F.3d 499 (D.C. Cir. 2011), would relieve them of the need to attempt compliance with the licensing statute as a prerequisite for injury-in-fact, because, Plaintiffs say, they are asserting not a right to a License, but rather the right to possess a handgun for in-home self-defense. In stark contrast to this case, however, the plaintiff in *Dearth* was challenging a federal statutory and regulatory scheme that "together ma[d]e it

[6] The district court noted that pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, the Attorney General has promulgated regulations that forbid public entities from "administer[ing] a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(6).

impossible for a person who lives outside the United States lawfully to purchase a firearm in the United States." *Id.* at 501 (emphasis added). The plaintiff in *Dearth*, a U.S. citizen living in Canada, twice had attempted to buy a firearm in the United States but was unable to complete either transaction. *Id.* The government argued that the plaintiff lacked standing, because the government had not affirmatively denied his application for a handgun and because the plaintiff was not claiming a right to a government-issued permit or license to acquire a handgun. *Id.* at 502. The D.C. Circuit rejected those arguments and held that because "the Government has denied [the plaintiff] the ability to purchase a firearm . . . he thereby suffers an ongoing injury." *Id.* at 502. Thus, it was of no moment that the plaintiff was not claiming a right to a permit or license in that case; the plaintiff had standing to "raise[] a constitutional challenge to the regulatory and 'statutory classifications' that *bar* him from acquiring a firearm." *Id.* (emphasis added; citation omitted); *see also id.* ("the challenged provisions have . . . thwarted [the plaintiff's] best efforts to acquire a firearm").

Here, in contrast, Maryland has not denied Plaintiffs *the ability* to purchase a handgun, or thwarted their best efforts to acquire a handgun, or barred their ownership of a handgun for in-home self-defense. Both individual Plaintiffs retain the ability to purchase a handgun if they comply with the License requirements. Their satisfaction of those requirements cannot be deemed "impossible," *Dearth*,

641 F.3d at 501, because neither individual Plaintiff has presented any evidence that attempted compliance would be futile. *Cf. Hamilton*, 848 F.3d at 621 (citing *Dearth* for proposition that "plaintiffs are not required to undertake futile exercises in order to establish ripeness, and may demonstrate futility by a substantial showing").

B. Neither Individual Plaintiff Has Presented Specific Facts to Demonstrate that Her Alleged Injury Is Actual or Imminent.

Further, unlike the plaintiff in *Dearth*, neither individual Plaintiff has presented specific facts to demonstrate that her alleged injury is actual or imminent, as opposed to being merely speculative. *Lujan*, 504 U.S. at 560-61. In their pleadings, the individual Plaintiffs alleged that "the expense and inconvenience of the HQL application process and its constituent parts" have deterred them from purchasing a handgun. (J.A. 19 ¶¶ 14, 19.) But, as discussed above, the individual Plaintiffs failed to set forth specific facts to demonstrate that the actual costs or alleged inconvenience of the HQL requirement has deterred them from obtaining a License. Further, neither individual Plaintiff set forth specific facts to demonstrate that the License requirement, rather than other factors, has deterred her from purchasing a handgun.

As discussed above at pages 8-10, neither individual Plaintiff has done any research to determine what handgun would best serve her needs; nor has she decided what caliber or brand of handgun she wishes to purchase, or a price that she is willing

to spend. (J.A. 236-38, 262, 263-67, 271.) "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury" required to establish standing. *Lujan*, 504 U.S. at 564. Plaintiffs' mere assertions that, but for the License requirement, they may purchase some yet-to-be identified or researched firearm are far too speculative and conclusory to establish imminence. *See id.* at 564 n.2 ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes . . . ."). Further, because neither Plaintiff presented any factual basis to support her allegation that the License requirement, rather than other circumstances, has deterred her from purchasing a handgun, neither Plaintiff has shown that her decision not to do what is necessary to purchase a handgun is traceable to the License law or that an adjudication in Plaintiffs' favor would resolve what has deterred her from purchasing a handgun. *See Lujan*, 504 U.S. at 560-61.

C. The First Amendment Prior Restraint Cases Cited by Plaintiffs Do Not Relieve Them of the Need to Comply with the License Law to Establish Standing.

Plaintiffs principally rely on distinguishable First Amendment cases for their argument that they need not establish futility in order to challenge the License requirement as facially unconstitutional. They cite *Shuttlesworth v. City of*

Birmingham, Alabama, 394 U.S. 147 (1969), and similar cases, which hold that plaintiffs need not apply for a permit to establish standing to challenge permitting statutes that threaten to chill First Amendment-protected expression.

Such reliance on First Amendment precedent has been deemed inappropriate in a Second Amendment challenge. This Court has expressed reluctance "to import substantive First Amendment principles wholesale into Second Amendment jurisprudence." *Woollard v. Gallagher*, 712 F.3d 865, 883 n.11 (4th Cir. 2013) (prior restraint doctrine); *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011) (overbreadth doctrine). The Second Circuit also has rejected arguments that "the principles and doctrines developed in connection with the First Amendment apply equally to the Second," and has warned that "an incautious equation of the two amendments . . . could well result in the erosion of hard-won First Amendment rights." *Kachalsky v. County of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012). Notably, Plaintiffs do not cite any authority applying these substantive First Amendment doctrines in the context of a Second Amendment challenge.

This case does not present the concerns that prompted the Supreme Court's holding that individuals faced with a licensing law that threatens to chill First Amendment expression may challenge its constitutionality without first "yield[ing] to its demands." *Shuttlesworth*, 394 U.S. at 151. As the Court has explained, a law that conditions First Amendment freedoms "upon the uncontrolled will of an

official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.* at 151 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988) ("[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."). This threat of censorship of expressive activity—imposed by a government official or the speaker himself to avoid government reprisal—animates the prior restraint doctrine. *See City of Lakewood*, 486 U.S. at 757-59; *see also Lovell v. Griffin*, 303 U.S. 444, 451 (1938) ("[Prior restraints] strike[] at the very foundation of the freedom of the press by subjecting it to license and censorship").

First Amendment prior restraint principles have no application in the context of firearm ownership, which does not implicate expressive conduct. Unlike in the First Amendment context where a state can "adequately serve[]" its interests by imposing "penalties . . . after freedom to speak has been so grossly abused that its immunity is breached," *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180-81 (1968), the State has no similar "adequate[]" remedy in the Second Amendment context, where abuse of the right may well result in an "unspeakably

tragic act of mayhem," *Masciandaro*, 638 F.3d at 475-76. *Heller I* acknowledges these public safety concerns, by enumerating a non-exhaustive list of constitutionally-permissible restraints, including regulation on the commercial sale of firearms and bans on firearm possession by felons and the mentally ill. 555 U.S. at 626-27. Far from suggesting such measures faced a "heavy presumption against [their] validity," as would "prior restraints," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), the Court noted they were "presumptively lawful." *Heller I*, 554 U.S. at 626.[7]

Moreover, unlike in the prior restraint cases, Plaintiffs have never alleged that the Secretary of MSP is vested with discretion to deny an applicant a License when all of the objective statutory and regulatory requirements are met. They do not argue that the License requirement is unfairly applied or lacks objective standards; rather, "they simply do not like the [requirement]." *See Woollard*, 712 F.3d at 883 n.11 (rejecting prior restraint argument in challenge to Maryland's requirement that applicants for a wear-and-carry handgun permit demonstrate a good and substantial reason for carrying in public (quoting *Kachalsky*, 701 F.3d at 92)).

[7] Plaintiffs are similarly wrong to rely on *Green v. City of Raleigh*, 523 F.3d 293 (4th Cir. 2008), which involved a facial challenge to an ordinance on grounds of overbreadth, a claim that was not alleged here and one that this Court has rejected in the Second Amendment context. *See Masciandaro*, 638 F.3d at 474 (declining to "entertain[] the novel notion that an overbreadth challenge could be recognized 'outside the limited context of the First Amendment'" (citation omitted)).

Finally as discussed above, unlike plaintiffs in First Amendment cases who engaged in or had plans to engage in First Amendment-protected expression, neither Ms. Vizas nor Ms. Miller has demonstrated any imminent injury to her exercise of a Second Amendment right.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT MSI LACKED ASSOCIATIONAL AND ORGANIZATIONAL STANDING.

A. MSI Failed to Identify Any Member Who Has Been Precluded from Exercising His or Her Second Amendment Rights Because of the License Requirement.

Aside from vague allegations about cost and inconvenience (J.A. 20), Plaintiffs alleged that, in some areas of the State, lack of access to fingerprint vendors, training instructors, and firing ranges disadvantaged the "citizens of Maryland" who live in those areas. (J.A. 26 ¶ 46.) After discovery, however, MSI failed to identify even a single member of the 1,100+ member organization who has been precluded from exercising his or her Second Amendment rights because of these alleged burdens. Accordingly, as the district court concluded, MSI lacks associational standing to challenge the License requirement.

On appeal, to establish associational standing MSI relies on the testimony of only one of its members, Dana Hoffman, despite her admitted unfamiliarity with the License requirements and their associated costs; she does not claim to seek handgun ownership for in-home self-defense, but instead cites only a desire to possess a handgun to defend herself in public. (J.A. 322-26, 327, 332-33.) Ms. Hoffman

testified that she can afford to comply with the License requirements (J.A. 327-28), and she has not asserted that she lacks access to a firing range, a firearm safety trainer, or a fingerprint vendor.

Rather, MSI seizes on Ms. Hoffman's testimony that she would have difficulty completing the firearm safety training, particularly the live-fire requirement, because of a hearing disability that makes it painful for her to experience loud noises. Like Ms. Miller, however, Ms. Hoffman has not sought any accommodation for her hearing disability, nor has she attempted to apply for a License. (J.A. 322-26, 327, 332-33.) Further, although MSI baldly alleges, with no supporting evidence, that requesting an accommodation would have been futile for Ms. Hoffman, the undisputed record evidence demonstrates that MSP has approved requests to modify the live-fire requirement when that modification was sought. (J.A. 1392 (highlighting MSP's approval of satisfying the live-fire requirement with alternative ammunition, which does not require presence at a firing range and is significantly quieter to shoot than traditional ammunition); *see also* J.A. 121, 213.)[8] In any event, like Ms. Miller, because Ms. Hoffman has not been denied a License

[8] Contrary to Plaintiffs' contention, the district court did not improperly find as fact that Ms. Hoffman could have satisfied the live-fire requirement through the use of simunition rounds. Appellants' Br. 26. Rather, the district court concluded that the record did not demonstrate that seeking an accommodation would have been futile, and noted MSP's approval of alternative ammunition to demonstrate that MSP has made modifications in response to requests. (J.A. 1392.)

based on her disability or sought any accommodation, any as-applied challenge based on her disability is not yet ripe for review.

Because MSI has failed to identify any member with standing to challenge the License requirement, MSI has not met its burden to establish the first required element of associational standing. Moreover, some MSI members are qualified handgun instructors (J.A. 286), and thus personally benefit from the License training requirement that MSI is challenging in this litigation. These "conflicting interests" among MSI members provide an additional rationale for finding MSI lacks associational standing. *See Maryland Highways Contractors Ass'n, Inc. v. State of Maryland*, 933 F.2d 1246, 1253 (4th Cir. 1991) (holding association failed to meet *Hunt* test where some members benefitted from the challenged statute).

B. MSI Failed to Demonstrate Organizational Standing to Challenge the License Law.

MSI has failed to show that the License law has impeded its efforts to carry out the organization's mission, which is to "endorse[], promote[] and encourage[] law-abiding adults . . . to acquire and to become proficient in the use of handguns for lawful self-defense purposes" and "to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public." (JA 558, 561.) MSI's corporate designee and

president, Mark Pennak, conceded that the License law does not impact MSI's ability to communicate its issues of concern or to promote its views. (J.A. 364-66.)

Nor has MSI established injury-in-fact through its bare assertion that it must divert its resources to new efforts, such as "educating and assisting members and the public on how to satisfy the many and complex requirements imposed by the Handgun License Regulation." Appellants' Br. 37. This Court rejected such claims in *Lane*, where the Second Amendment Foundation's allegations that its "resources [were] taxed by inquiries into the operation and consequences of interstate handgun transfer provisions," were not sufficient to survive a motion to dismiss for lack of standing. *Lane*, 703 F.3d at 675. As this Court explained, to find that an organization has suffered "a cognizable injury" arising from its decisions to "spend its money on educating members, responding to member inquiries, or undertaking litigation in response to legislation . . .would be to imply standing for organizations with merely 'abstract concern[s] with a subject that could be affected by an adjudication.'" *Id.* (quoting *Simon v. East Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)); *see also Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990) ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.").

MSI incorrectly relies on distinguishable cases in which a direct-services organization demonstrated standing by showing it was forced to divert resources *from* providing direct mission-driven services *to* counteracting and correcting illegal activities that impacted those services, and did so to the detriment of those services. *Havens*, 455 U.S. at 379; *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993). MSI has made no such showing here.

MSI also has failed to present any factual support for Mr. Pennak's unsubstantiated assertions that the organization experienced a decline in membership after the enactment of the FSA and that the License requirement has made it more difficult to attract new members. Appellants' Br. 38-39 (citing J.A. 561). MSI failed to produce *any* records showing a decline in membership and did not identify any members who left the organization after the FSA was enacted or indicate any reason why any member purportedly left. On the contrary, since this lawsuit was initiated, MSI has seen its membership grow from 770 members to over 1,100 members, an increase of over 40 percent. (J.A. 20, 558.) On appeal, MSI asserts, with no supporting evidence, that this considerable growth in membership "simply suggests that existing gun owners in Maryland are willing to support this lawsuit, but establishes nothing about the effect of the Handgun License Requirement on MSI's ability to recruit new members from among non-gun owners." Appellants' Br. 39-40. This unsupported speculation, presented for the

first time in an appellate brief, is belied by the testimony of MSI members Deborah Miller and Scott Miller, neither of whom owns a handgun, and both of whom joined MSI *after* the FSA was enacted. (J.A. 245, 291-92.) Indeed, Mr. Miller testified that he joined MSI mainly *because* of the law's enactment. (J.A. 292.) Further, the record does not support MSI's assertion that its membership has suffered because the License requirement burdens handgun ownership. MSI itself has acknowledged a considerable increase in the number of background checks for handgun purchases in Maryland, even as MSI's membership grew. (J.A. 1241.) To the extent MSI has problems attracting new members, it has not shown that such difficulties are traceable to the License requirement or that an adjudication in Plaintiffs' favor would cure those difficulties. *See Lujan*, 504 U.S. at 560-61.

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ATLANTIC GUNS HAS FAILED TO DEMONSTRATE STANDING.

A. Atlantic Guns Does Not Have a Second Amendment Right to Sell Handguns.

For the first time on appeal, Atlantic Guns contends that because *individuals* have the right to possess handguns for self-defense, and thus must be able to acquire handguns, any regulation on the sale of handguns injures the *retailer's* Second Amendment right to sell handguns. *See* Appellants' Br. 41-42. That contention finds no support in applicable law. Neither this Court nor any other circuit has recognized a retailer's right to *sell* firearms. Rather, expressly rejecting that notion,

the Ninth Circuit has held that "the Second Amendment does not confer a freestanding right, wholly detached from any customer's ability to acquire firearms, upon a proprietor of a commercial establishment to sell firearms." *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc), *cert. denied sub nom. Teixeira v. Alameda County, Cal.*, 138 S. Ct. 1988 (2018). This Court in an unpublished opinion likewise found no authority "that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to *sell* a firearm. Indeed, although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding right to sell a firearm." *United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011) (emphasis in original).

In *Teixeira*, the Ninth Circuit relied on the Supreme Court's discussion in *Heller I* of "presumptively lawful regulatory measures," which include "laws imposing conditions and qualifications on the commercial sale of arms." 873 F.3d at 682-83. The court went on to conduct "a full textual and historical review" of the Second Amendment. *Id.* at 682-87. Examining the Amendment's text, particularly "the right of the people to keep and bear Arms, shall not be infringed," U.S. Const. amend. II, the Ninth Circuit concluded that the Amendment "confers a right on the 'people' who would keep and use arms, not those desiring to sell them." *Teixeira*, 873 F.3d at 683. Looking to historical British and American materials, the Ninth

Circuit went on to conclude that the right to bear arms "under both earlier English law and American law at the time the Second Amendment was adopted, was understood to confer a right upon individuals to have and use weapons for the purpose of self-protection, at least in the home" and found that "no historical authority suggests that the Second Amendment protects an individual's right to *sell* a firearm unconnected to the rights of citizens to 'keep and bear' arms." *Id.* (emphasis in original; footnotes omitted).[9] This Court should adopt the Ninth Circuit's thorough and well-reasoned analysis and hold, as in *Chafin*, that the Second Amendment does not protect a right to sell firearms.

Plaintiffs erroneously contend that *Teixeira* is distinguishable because, in holding that the challenged ordinance did not meaningfully inhibit any customer's ability to acquire firearms, the Ninth Circuit upheld a requirement that affected only one potential retailer, 873 F.3d at 682, whereas the HQL law applies to all Maryland firearm retailers. Appellants' Br. 43-44. Plaintiffs overlook that *Teixeira*'s holding specifically addressed an individual's ability to *acquire* firearms, and the Ninth Circuit separately proceeded "to disentangle an asserted right of retailers to sell

[9] The Ninth Circuit rejected reliance on Thomas Jefferson's 1793 statement, cited by Plaintiffs, that "[o]ur citizens have always been free to make, vend, and export arms," because that "was a factual statement . . . not a prescriptive one. Jefferson's observation does not support the conclusion that the Founders understood the right to sell arms was to be independently protected by the Second Amendment." *Teixeira*, 873 F.3d at 687 n.20.

firearms from the rights of potential firearm buyers and owners to acquire them," and held retailers had no such freestanding right. *Id.* at 687.[10]

Plaintiffs again inappropriately rely on cases involving First Amendment rights, where the Supreme Court has held that selling literature and other means of creative expression is a constitutionally protected right. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990); *Lovell*, 303 U.S. at 447, 452. *Teixeira* properly rejected that analogy, recognizing that "whereas the Second Amendment identifies 'the people' as the holder of the right that it guarantees, the First Amendment does not state who enjoys the 'freedom of speech,' nor does it otherwise specify or narrow the right." 873 F.3d at 688-89. Further, "bookstores and similar retailers who sell and distribute various media, unlike gun sellers, are *themselves* engaged in conduct directly protected by the First Amendment" because "speech necessarily entails communication with other people—with listeners" and, thus, "[s]elling, publishing, and distributing books and other written materials is . . . *itself* expressive activity." 873 F.3d at 688–89 (citations omitted; emphasis in original).

[10] Plaintiffs erroneously state with no citation that "*Teixeira* noted correctly that a right to acquire arms comes with the right to sell them." Appellants' Br. 44. What the Ninth Circuit actually stated is that "[c]ommerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense." *Teixeira*, 873 F.3d at 682. Acknowledging the role of commerce in the individual's right to possessing firearms is a far cry from recognizing a retailer's independent right to sell them.

Finally, Plaintiffs rely on an unpublished opinion from the District Court for the Northern Mariana Islands, which ruled that a categorical ban on the sale of firearms violated the Constitution, and suggested that the Second Amendment "must protect an eligible individual's right to purchase a handgun, as well as the complimentary [*sic*] right to sell handguns." *Radich v. Guerrero*, No. 1:14-CV-00020, 2016 WL 1212437, at *7 (D. N. Mar. I. Mar. 28, 2016). The only support for that statement is a citation to the Third Circuit's observation in *United States v. Marzzarella*, 614 F.3d 85, 92 n.9 (3d Cir. 2010), that commercial regulations on the sale of firearms are not categorically exempt from constitutional review. But *Marzarella* merely explained that "an overall ban on gun sales 'would be untenable under *Heller*,' because a total prohibition would severely limit the ability of citizens to *acquire* firearms." *Teixeira*, 873 F.3d at 687–88 (emphasis in *Teixeira*). Unlike the complete ban in *Radich*, Maryland's License requirement places no such categorical ban on acquiring handguns.

B. Atlantic Guns Has Not Demonstrated an Injury Traceable to the License Law Sufficient to Establish Third-Party Standing.

Atlantic Guns has failed to present any specific facts to support its assertions that it has lost revenue and business opportunities due to the License law. Instead, undisputed record evidence demonstrates that Atlantic Guns experienced an unprecedented surge in handgun sales in 2012 and 2013 (J.A. 1413-14), as did many

retailers during the run up to the enactment of the FSA (J.A. 368-70, 1239). Nevertheless, despite having profited during this two-year spike in sales, Atlantic Guns posits that because it experienced a dip in handgun sales in 2014 and 2015 following the unprecedented surge, that subsequent decline in sales evidences an injury arising from the License requirement. That argument fails for at least three reasons.

First, Atlantic Guns failed to offer any explanation for how it was injured by an unprecedented, dramatic two-year spike in sales that was followed by a two-year decline in sales and a return to its average pre-surge sales numbers. Second, because Atlantic Guns seeks "declaratory and injunctive relief," it "must establish an ongoing or future injury in fact," *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018), and "may not rely on prior harms" to establish standing, *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018). As the district court explained, Atlantic Guns' sales data demonstrated that their sales figures in 2016 and 2017 were on par with or even surpassed sales figures in the years prior to the unprecedented surge in sales. (J.A. 1413-14, 1453.)[11] Atlantic Guns has not presented any evidence to show that its

[11] Contrary to Atlantic Guns' assertion, the district court did not improperly weigh evidence at the summary judgment stage. Appellants' Br. 49. The district court did nothing more than assess the undisputed sales data contained in the summary judgment record by performing basic calculations to find average sales and revenue figures (that Atlantic Guns does not dispute) and compare those figures across years. (J.A. 1453.) The district court did not credit one set of sales figures over another or make any economic assumptions about the sales data. Rather, based

current operations are restricted or that its sales are depressed because of the License law.

Third, Atlantic Guns failed to produce *any* admissible evidence that this temporary dip in handgun sales resulted from the License requirement. In his declaration, Atlantic Guns' owner Mr. Schneider baldly asserts that Atlantic Guns has turned away hundreds of customers who did not have a valid License. The district court correctly found this submission insufficient to establish standing. When serving as Atlantic Guns' Rule 30(b)(6) designee, Mr. Schneider was unable to identify even a single customer that Atlantic Guns turned away because of the License requirement. Indeed, the only customer he could even describe obtained a License and purchased a firearm from Atlantic Guns. (J.A. 345.)

Mr. Schneider's subsequent contradictory, uncorroborated, and self-serving statement lacking any specificity does not meet Atlantic Guns' evidentiary burden to establish standing at the summary judgment stage. "[I]nconsistencies between [a

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on a straightforward comparison, the court concluded that Atlantic Guns had not met its burden of proof to show that it suffered an economic injury that would confer standing. In any event, this Court "review[s] a district court's jurisdictional findings of fact on any issues that are not intertwined with the facts central to the merits of the plaintiff's claims under the clearly erroneous standard of review and any legal conclusions flowing therefrom *de novo*." *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347–48 (4th Cir. 2009). Atlantic Guns has made no showing of clear error in the district court's purported fact finding as to its sales figures, which are not central to the merits of the Second Amendment claim.

plaintiff's] prior testimony and his affidavit" do not provide grounds for reversing summary judgment, because '"[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct.'" *Stevenson v. City of Seat Pleasant, Md.*, 743 F.3d 411, 422 (4th Cir. 2014) (quoting *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984)). Moreover, Mr. Schneider's statement cannot suffice to establish standing because it relies entirely on inadmissible hearsay, i.e., the truth of the statements provided to him by these alleged potential customers. *See Maryland Highways Contractors Ass'n*, 933 F.2d at 1251 (holding association could not rely on "hearsay evidence" to "show a sufficient injury in fact" at summary judgment stage). Mr. Schneider's conclusory statement is also entirely speculative as to whether these unidentified customers ultimately obtained a License, as the one customer he described was able to do; whether these potential customers were otherwise prohibited persons; or whether these individuals ultimately decided not to purchase handguns for reasons other than the License requirement.[12] As discussed above, although Plaintiffs' brief asserts that Atlantic Guns produced emails with its

[12] For these reasons, Plaintiffs find no support from *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), where the Supreme Court found the district court did not clearly err by crediting evidence that states would suffer harm if a citizenship question were added to the census and the theory of standing did "not rest on mere speculation about the decisions of third parties."

customers to corroborate Mr. Schneider's statement, Plaintiffs' brief does not cite any pertinent record evidence; indeed, no such emails were produced.

Unlike the licensed beer vendor in *Craig v. Boren*, 429 U.S. 190, 191-92 (1976), who was found to have standing to challenge an Oklahoma law prohibiting vendors from selling certain beer to males between 18 and 21 years of age, Atlantic Guns has not "incurr[ed] direct economic injury through the constriction of [its] buyers' market." *Id.* at 194. Atlantic Guns is free to continue to sell handguns to the entirety of its customer base so long as each customer obtains a License. There is no fixed class of persons to whom Atlantic Guns is prohibited from selling handguns, and any law-abiding Marylander who is otherwise eligible may apply for and be issued a License. Still, a person may decide not to purchase a handgun from Atlantic Guns for any number of reasons, including because he or she recently purchased a handgun, decided to patronize a different retailer, decided to use the money to purchase a different good or service, decided owning a handgun in the home posed greater risks than potential benefits, or any other number of reasons. It is entirely speculative to suggest that a firearms retailer has incurred direct economic injury through constriction of its buyers' market due to a single aspect of the FSA, which encompassed various firearms regulations. *Cf. Teixeira*, 873 F.3d at 674, 678 (holding vendor had third-party standing on behalf of its potential customers to challenge zoning ordinance that made it "impossible" to open a gun shop); *Ezell v.*

City of Chi., 651 F.3d 684, 689 (7th Cir. 2011) (permitting a firing range to assert third-party standing on behalf of customers in its challenge to a city ordinance prohibiting all firing ranges in the city).

Finally, Plaintiffs incorrectly rely on cases where a commercial plaintiff lost any chance of conducting business with part of its previous universe of potential customers. *See, e.g.*, *CC Distribs., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) (holding contractors who had operated supply stores for the Air Force had standing to challenge the Department of Defense's decision to take the operation in-house); *Lepelletier v. F.D.I.C.*, 164 F.3d 37, 42 (D.C. Cir. 1999) (holding that a money finder was denied the opportunity to develop a business relationship with individuals with unclaimed funds, when the F.D.I.C. refused to release the individuals' names before the funds were forfeited). Because the License law does not prohibit any otherwise eligible individual from obtaining a License and purchasing a handgun, to establish an injury-in-fact Atlantic Guns was required to identify potential customers who were deterred from a handgun purchase *because of* the License requirement. They failed to do so.[13]

[13] Although Plaintiffs failed to identify any individual who has been deterred from purchasing a handgun due to the License requirement, they point to the raw number of applications that have been initiated but not yet completed as evidence that some unidentified persons have been deterred. The raw data Plaintiffs cite cannot be used to speculate as to why any particular application was not completed, however, because there is no way to determine why an application was not

C. Atlantic Guns Has Failed to Satisfy the Prudential Requirements for Third-Party Standing.

In addition to its failure to satisfy the injury-in-fact that is required for third-party standing under Article III, Atlantic Guns has failed to satisfy the prudential requirements for third party standing: a close relationship with the individuals whose rights the litigant is asserting, and a hindrance faced by those individuals in bringing suit on their own. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Freilich*, 313 F.3d at 215. Nor does this case fit into either of the circumstances in which the Supreme Court has said it may relax the requirements for third-party standing: when the restricted activity falls within the First Amendment, or when "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Kowalski*, 543 U.S. at 130. "Beyond these examples . . . [courts] have not looked favorably upon third-party standing." *Id.*

1. Enforcement of the License Law Against Atlantic Guns Does Not Indirectly Violate Individuals' Rights.

Atlantic Guns' inability to sell handguns to individuals who have not obtained a License does not fit into the class of cases where courts have permitted third-party standing to challenge a restriction that indirectly violates third parties' rights. In those cases, the challenged regulation has been exclusively, or at least primarily,

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completed or whether an initiated application will eventually be finalized. (J.A. 889-90, 1233-37.)

directed at the retailer's conduct, such that the retailer is the "least awkward challenger." *Craig*, 429 U.S. at 196 (permitting a beer vendor to assert third-party standing on behalf of potential male customers ages 18 to 20 in its challenge to a statute prohibiting the vendor from selling certain beer to such males, but not outlawing consumption by such males); *see also Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (1972) (permitting a vendor of contraceptives to assert third party standing on behalf of users in its challenge to a statute barring the vendor's distribution of the contraceptive, but not use of the contraceptive, noting an especially strong argument for third-party standing because "unmarried persons denied access to contraceptives . . . are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights."); *Teixeira*, 873 F.3d at 674, 678 (retailer challenge to zoning ordinance); *Ezell*, 651 F.3d at 689 (retailer challenge to ban on firing ranges).

Here, unlike the restrictions in cases where the prudential requirements were relaxed, the restriction at issue does not prohibit Atlantic Guns from selling firearms to any fixed class or make it impossible for Atlantic Guns to operate or continue its business practices. Further, unlike in those cases, law-abiding individuals who were previously qualified to purchase a handgun can independently satisfy the License law by taking the necessary steps to obtain a License. The lack of any record evidence that the License requirement has deterred *anyone* from exercising their

Second Amendment rights, confirms that continued enforcement of the License law against Atlantic Guns will not "materially impair the ability of" Marylanders to purchase handguns. *Craig*, 429 U.S. at 196 (quoting *Eisenstadt*, 405 U.S. at 446)).

2. Atlantic Guns Has Not Demonstrated a Close Relationship with Potential Customers or that They Would Be Hindered from Bringing Suit on Their Own.

Atlantic Guns has failed to demonstrate that it satisfies the prudential requirements of third-party standing. First, Atlantic Guns has not demonstrated a close relationship with its potential customers. In *Kowalski*, 543 U.S. at 131, the Supreme Court held that an attorney's potential relationship with an unidentified client was not enough to meet the prudential requirement for third-party standing. Here, too, Atlantic Guns' vague allegations that it has turned away unidentified potential customers fails to demonstrate the requisite closeness.

Nor can Atlantic Guns demonstrate that its customers are unlikely or unable to assert their own rights by bringing suit on their own because of potential privacy concerns about firearms ownership. Indeed, the presence of individual plaintiffs in this case, as well as those in numerous other suits challenging firearm regulations, belies any suggestion that potential litigants have such overpowering privacy concerns regarding their actual or desired firearm ownership that they are unlikely to bring suit asserting their Second Amendment rights. *See, e.g.*, *Kolbe*, 849 F.3d 113 (plaintiffs seeking to purchase assault weapons and large-capacity magazines);

Hamilton, 848 F.3d 614 (plaintiff seeking permit for public wear-and-carry); *Woollard*, 712 F.3d 865 (same).

The individual Plaintiffs in this case testified about their own purported interest in purchasing handguns, their husbands' firearm ownership, their experiences firing handguns, and a minor child's target shooting, and none of this testimony was given under any request for confidentiality. This stands in stark contrast to the cases where privacy concerns of rights holders have been recognized as a hindrance to filing suit, such as cases involving access to contraception, *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Eisenstadt*, 405 U.S. at 446; the ability to secure an abortion, *Singleton v. Wulff*, 428 U.S. 106, 117 (1976); and association membership in a suit contesting the very production of a list of member names, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459–60 (1958).

The best Plaintiffs can do is point to how states' public records laws treat information about firearms ownership and records of firearms dealers. *See Mager v. State, Dep't of State Police*, 460 Mich. 134 (1999) (holding the Michigan State Police correctly decided to withhold names and addresses of registered firearm users requested under the Michigan Freedom of Information Act); Md. Code Ann., Gen. Prov. § 4-325(a)-(b) (LexisNexis 2014) (prohibiting public records custodians from disclosing records of firearm dealers). But a state's policy decision to protect certain information from public disclosure says nothing about the ability or willingness of

individuals to bring lawsuits to protect their rights. Maryland's Public Information Act also prohibits disclosure of certain library records, letters of reference, personnel records, retirement records, student records, and much more. *See* Md. Code Ann., Gen. Prov. §§ 4-308, 4-310–313. Plaintiffs can cite no authority for the proposition that laws limiting government disclosure of certain records suffice to establish that an individual has sufficient privacy concerns that would hinder filing a lawsuit to protect related rights or interests.

V. THE DISTRICT COURT CORRECTLY CONCLUDED PLAINTIFFS LACK STANDING TO BRING A VAGUENESS CHALLENGE, BECAUSE THEY HAVE NOT SUFFERED A CREDIBLE THREAT OF PROSECUTION.

Plaintiffs rely on the relaxed standing requirements for bringing a vagueness challenge under the First Amendment, but even under those standards, the district court properly concluded that Plaintiffs fall far short of demonstrating Article III standing. To establish injury-in-fact in a vagueness challenge, a plaintiff must present specific facts to show "[1] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [2] there exists a credible threat of prosecution thereunder.'" *Kenny*, 885 F.3d at 288 (*quoting Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A credible threat of prosecution exists only if it "is not 'imaginary or wholly speculative,'" '"chimerical,'" or '"wholly conjectural.'" *Id.* (citations omitted).

Plaintiffs' vagueness challenge rests on their alleged fear that the License law's prohibition on the "receipt" of a handgun without a valid License can be read to criminalize a mere *temporary* gratuitous exchange or loan of a handgun. Plaintiffs rely on the testimony of one individual plaintiff, Ms. Miller, who testified that she fears prosecution if she were temporarily to possess her husband's handguns in her home to defend herself, though she admits to having used those same handguns for target practice for years after the law was enacted and after this lawsuit was filed. Plaintiffs further rely on Mr. Pennak's claim that he and other MSI members who are handgun instructors are confused as to whether they can temporarily lend their handguns to trainees, despite the lack of any evidence that any HQL instructor or applicant has been threatened with prosecution for temporarily lending or possessing a handgun to perform the live-fire requirement. Notably, neither Ms. Miller nor Mr. Pennak has asserted that anyone has been threatened with enforcement of the License law in this way.

This absence of proof is unsurprising. Since the FSA was enacted in 2013, MSP and the Office of the Attorney General of Maryland have construed the terms "receive" and "receipt" to be synonymous with the term "transfer," which the Court of Appeals of Maryland has interpreted to require a *permanent* gratuitous exchange. (J.A. 120-21, 209, 211, 1280-81); *Chow v. State*, 393 Md. 431 (2006). Contrary to Plaintiffs' suggestion, this interpretation was not developed merely to defend this

litigation. Instead, since 2013, MSP has published a Frequently Asked Question on its HQL webpage, with an answer making clear that a person does not need a License to fire at a gun range, and further stating that a License is "only required to purchase, rent or transfer a firearm." (J.A. 1256-57, 1280-81.)[14] MSP has since published a formal Advisory of this long-standing interpretation. (J.A. 209.)

MSP's consistent interpretation is, thus, a far cry from the "litigation position" taken in the case cited by Plaintiffs, where arguments made by the plaintiff's counsel were not "eligible for any deference." *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018). In contrast, this Court has held that it "must 'consider any limiting construction that a state court or enforcement agency has proffered'" before finding a statute's terms vague. *Martin v. Lloyd*, 700 F.3d 132, 136 (4th Cir. 2012) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1983)); *see also Kolbe*, 849 F.3d at 149 (deferring to an MSP advisory when resolving a vagueness challenge to a different FSA provision). Given MSP's Advisory, there is no "credible threat" of enforcement against Plaintiffs to generate standing. *Kenny*, 885 F.3d at 288

Nor can Plaintiffs generate standing by speculating that a law enforcement officer or prosecutor may act in direct contravention of this Advisory, *see*

[14] The "Handgun Qualification License" FAQ is available on MSP's website, https://mdsp.maryland.gov/Pages/FAQs.aspx (last visited, August 6, 2019).

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007) (recognizing that an action by the government must be "threatened" to confer standing without actual injury), or by relying on their subjective fears of prosecution that have no basis in fact. As the district court concluded, Plaintiffs have failed to demonstrate that the threat of enforcement rises above pure "speculation" and "conjecture." *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) (dismissing as "conjecture" the notion that police will routinely enforce the law unconstitutionally and as "speculation" the possibility that the plaintiff would be subjected to a future unlawful traffic stop).

The much different cases Plaintiffs cite offer nothing to contradict the district court's conclusion. In *Kenny*, a First Amendment case, this Court found that students challenging two South Carolina disorderly conduct statutes had standing because they regularly attended schools "where they allege there may be future encounters with school resource officers or other law enforcement; they have been prosecuted under the laws in the past; and the defendants have not disavowed enforcement if plaintiffs engage in similar conduct in the future." 885 F.3d at 289; *see also Davidson v. Randall*, 912 F.3d 666, 678-79 (4th Cir. 2019) (holding there was a "credible threat of enforcement" of a governmental actor's social media policy where the official had "previously blocked" the plaintiff from an official Facebook Page and "ha[d] not 'disavowed' future enforcement"). Here, in contrast, MSP has

never applied the statute to the temporary gratuitous exchange of a handgun and has expressly disavowed that the statute applies in that way.

VI. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS LACK STANDING TO BRING THE STATE LAW CLAIMS.

As discussed above, the district court properly concluded that the individual Plaintiffs failed to present any specific facts showing how any of the challenged statutory or regulatory provisions had caused either Plaintiff injury-in-fact, as required for standing to bring a Second Amendment challenge. Because the Second Amendment right is the only legal right alleged by Plaintiffs to have been infringed by the regulations at issue, the individual Plaintiffs also have failed to establish Article III standing to bring their state law declaratory judgment action in federal court. It is axiomatic that the federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Thus, it is immaterial whether Plaintiffs have sufficiently demonstrated standing under Maryland's Declaratory Judgment Act to bring an action in a *state court* of general jurisdiction. They have failed to present facts to demonstrate Article III standing in federal court, and that ends the matter. In any event, as described below, Plaintiffs also have failed to demonstrate standing to seek a declaratory judgment under Maryland law.

By statute, the jurisdiction of a state circuit court to "determine the validity of any regulation" is limited to instances where "it appears to the court that the regulation or its threatened application interferes with or impairs or threatens to interfere with or impair a legal right or privilege of the petitioner." Md. Code Ann., State Gov't § 10-125(b) (LexisNexis 2014). In Maryland, a person has standing to "invoke the aid of a court of equity to restrain the action of a public official, which is illegal or ultra vires . . . only when some special damage is alleged and proved, or a special interest is shown distinct from that of the general public." *Inlet Assocs. v. Assateague House Condominium Ass'n*, 313 Md. 413, 440-41 (1988).

The individual Plaintiffs erroneously contend that they have shown a special interest distinct from that of the general public because License applicants face an increased burden in having to satisfy the "live-fire" training and livescan fingerprinting requirements. Appellants' Br. 33-34. Critically, however, neither individual Plaintiff falls within the category of License applicants—neither has applied for a License or testified that she has any intention of doing so. Moreover, neither individual Plaintiff testified that any of the regulations alleged to be in conflict with the statute—the live-fire requirement, or the livescan fingerprint requirement, or any aspect of the on-line registration requirement (J.A. 34-35 ¶ 80)—posed any obstacle to her ability to obtain a License. Merely objecting to regulatory requirements that are part of a licensing scheme with which the

complainant has no intention of complying does not suffice to establish a special interest distinct from the general public.

Also unavailing is the individual Plaintiffs' attempt to rely on the alleged impairment of rights of MSI members who are qualified training instructors and must comply with the regulatory requirements associated with the training. Notably, neither individual Plaintiff claims to be a training instructor. Further, although MSI has not expressly raised the issue on appeal, MSI cannot assert associational standing under Maryland law to challenge the Secretary's actions as ultra vires. Rather, for an organization to establish standing to challenge an action by a state agency, it must have "a property interest of its own—separate and distinct from that of its individual members," and also must have "suffered some kind of special damage from such wrong differing in character and kind from that suffered by the general public . . . ." *Voters Organized for the Integrity of City Elections v. Balt. City Elections Bd.*, 451 Md. 377, 396-97 (2017) (citations and quotations omitted). MSI has not asserted any interest in the state regulations that is distinct from its members. Moreover, Plaintiffs point to no record evidence to establish the asserted injury of increased costs to handgun instructors, which they claim interferes with or impairs a legal right. Understandably so. Plaintiffs made no such allegations in the complaint, and have raised this asserted injury for the first time on appeal.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that on August 6, 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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