

No. 10-5062
ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN DEARTH, ET AL.,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR.,

Defendant-Appellee.

Appeal from a Judgment of the
United States District Court for the District of Columbia
The Hon. James Robertson, District Judge
(Dist. Ct. No. 1:09-cv-00587-JR)

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

INTRODUCTION

The government opens its brief by seeking to defend its laws on the merits, but the only issue in this appeal is Plaintiffs-Appellants' standing. Plaintiffs would welcome the opportunity to respond to the government's contentions in the forum where these contentions should have first been raised—the District Court, to which this case should be remanded for such proceedings.

SUMMARY OF ARGUMENT

Both Stephen Dearth and the Second Amendment Foundation (“SAF”) have suffered actual and ongoing impairment of their constitutional rights as a consequence of government action—specifically, the prohibition of the acquisition of firearms by American citizens residing abroad, violating the Second Amendment right to bear arms, the Fifth Amendment right of international travel, and Fifth Amendment equal protection principles. These injuries give Plaintiffs standing to pursue their claims in this case.

To establish an injury-in-fact, a party must show it has a legally protected interest which is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Where an injury occurs prior to enforcement of the regulation causing the injury, one must show a credible threat of prosecution under the regulation. *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979).

This Stephen Dearth has done. His legally protected right to possess a firearm for lawful purposes has been suppressed by excessive governmental regulation. Dearth presently and continuously wishes to exercise his Second Amendment right, JA 15, ¶ 11, and could do so but for the government’s interference, JA 17, ¶ 19. The chilling of Dearth’s right is ongoing, as the government is unlikely to repeal its regulations without judicial intervention.

These laws are routinely enforced, as evidenced by two cancelled firearms transactions in which Dearth was engaged because he could not truthfully supply an in-country residence, as requested by the required government form. *Id.* at ¶¶ 17-18; JA 18, ¶¶ 22-23. Under the current

scheme, the only way for Dearth to exercise his rights is to violate the regulations, for which he faces a very credible threat of prosecution.

This the law does not require, and cannot tolerate, for the exercise of a fundamental right. Accordingly, Dearth has met the Supreme Court's criteria for pre-enforcement standing.

Dearth has also demonstrated an actual injury-in-fact, in that his firearm purchase attempts were denied pursuant to the laws here at issue. The government cannot wash its hands of involvement in those denials by claiming these denials were made by private parties. The sellers were compelled to enforce federal law.

SAF likewise has standing. The resources it must expend—financial, administrative, and otherwise—to answer questions from its members and the general public regarding these firearms regulations, and to educate about the impact of the laws is no slight cost. The Supreme Court has routinely found such expenditures provide grounds for organizational standing. Further, SAF has representational standing because its members, among them Dearth, have standing to pursue their rights, the rights implicated are at the core of SAF's mission, and

the assertion of these rights and the requested relief does not require individual members' participation.

ARGUMENT

I. Dearth's Injury-In-Fact Is The Inability To Exercise His Constitutional Rights.

Dearth has experienced an actual, concrete injury-in-fact, as required to establish standing in this suit. *See Lujan*, 504 U.S. at 560 (citations omitted). His rights are currently and continuously being suppressed by governmental regulation, notwithstanding the government's misidentification of some of these fundamental rights.

American citizens have "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008). This is true regardless of whether citizens actually use the weapons which they have acquired. The right is "fundamental." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 179 L. Ed. 2d 894, 921 (2010) (majority op.) & 938 (THOMAS, J., concurring). It is not "in any manner dependent upon [the Constitution] for its existence." *Heller*, 128 S. Ct. at 2797. It is, in fact, a right that predates the

Constitution, one which the Constitution commands “shall not be infringed.” *Id.*; U.S. CONST. amend. II.

Despite the government’s claims to the contrary, this fundamental right that Dearth asserts—and has been hindered from exercising—is the right to possess a gun for these lawful purposes, including for self-defense and, as the federal law here provides, for sport. *See* 18 U.S.C. § 922(a)(5), (a)(9), (b)(3)(B).

Of course, even if Dearth were merely claiming “a right to purchase firearms,” Appellee’s Br. 26, that would plainly state a claim. The cases are clear: when the Constitution protects the right to possess something, it protects the right to buy and sell that article.

[C]ertain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Richmond Newspapers v. Virginia, 448 U.S. 555, 579-80 (1980).

A complete ban on gun commerce “would be untenable under *Heller*.” *United States v. Marzzarella*, 2010 U.S. App. LEXIS 15655 at *15 n.8 (3d Cir. July 29, 2010). The federal government can no more ban the complete sale of protected guns than it can ban the sale of protected

books, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988); contraceptives, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965), or perhaps even the sale of sex toys, *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); *but see Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007). “Our citizens have always been free to make, *vend* and export arms. It is the constant occupation and livelihood of some of them.” 3 THE WRITINGS OF THOMAS JEFFERSON 230 (T.J. Randolph, ed., 1830) (emphasis added).

An individual’s exercise of the Second Amendment right is almost always effectuated by the purchase or transfer of a commercially-manufactured arm (as opposed to its home manufacture). Dearth suffers ongoing injury because he cannot acquire new weapons, unless for sport, despite the government’s rather arbitrary allowance for him to possess any weapons previously acquired.¹ This injury is tangible and extends to

¹The government also mistakenly asserts that Dearth is claiming standing based upon the threat of prosecution as his injury-in-fact, namely his fear of providing false residency information on the governmentally required forms for the purchase of a firearm. Appellee’s Br. 18, 32. The government claims that the conduct affected by its regulation somehow centers around this speech. But Dearth is not claiming a right to provide a false statement, nor is Dearth’s injury and basis for standing an impairment of his statement of residency, but

the present day, having both the “immediacy and reality” required by the Supreme Court. *See Golden v. Zwickler*, 394 U.S. 103, 109 (1969). It is not a speculative, “some day” injury. *See Lujan*, 504 U.S. at 564.

Dearth also asserts that the laws impose unconstitutional conditions, in forcing him to choose between his Second Amendment right, and his fundamental Fifth Amendment right of international travel. *Kent v. Dulles*, 357 U.S. 116 (1958). The expatriate classification does not withstand equal protection scrutiny given that these are fundamental rights. *Banner v. United States*, 428 F.3d 303, 307 (D.C. Cir. 2005) (per curiam).

Moreover, the injury Dearth asserts is not a “generally available grievance about government.” *See Appellee’s Br. 26; Lujan*, 504 U.S. at 573-74. One could dismiss any civil rights lawsuit under such a characterization. The government does not dispute—nor could it—that the challenged laws apply to Dearth, specifically, and have had the impact of altering his conduct, and continue to impact his conduct.

rather his ability to exercise his Second Amendment rights, which he would otherwise be entitled to do as a U.S. resident.

Anyone suing the government is, by definition, unhappy with the government for some reason, but that does not mean that *Lujan* bans all lawsuits against the government. This case did not arise because Dearth is unhappy with the government. Dearth is disappointed with his government because he tried to purchase a firearm, and his government interfered with that transaction, and told him that he could not purchase firearms. This very specific and personal interference in Dearth's affairs caused him to seek legal redress, and the Courts are empowered to hear his case.

II. Dearth's Injury Is Current And Ongoing.

It is unsurprising, given the government's failure to recognize the scope of Dearth's Second Amendment claim, that it would also deny the occurrence of any current or ongoing injury. However, the ongoing loss of the ability to fully exercise constitutional rights has continuing adverse effects and is not a mere past injury. The effects of these laws are not frozen in one moment of time, similar to an ongoing injury from the suppression of speech rights even though the government's denial of those rights occurs at one discrete, past point in time.

The cases cited by the government to conclude there is no present injury are inapposite. In *Golden v. Zwickler*, 394 U.S. 103, 109 (1969), the inability to distribute election literature about a politician was not an injury-in-fact because it “was neither real nor immediate” that the candidate would be involved in another campaign. However, in that case the ability to exercise the right only occurred at a particular moment in time—during the candidate’s run for office. Here, citizens have the right at all times to possess guns for self-defense, sport, and other lawful purposes, assuming no constitutionally sound time, place, or manner restrictions apply. Likewise, the plaintiffs in *Lujan* and *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987), lacked standing because the challenged policies involved travel to foreign lands where the plaintiffs “might one day” visit or return. *Lujan*, 504 U.S. at 564; *Haase*, 835 F.2d at 911.

In the instant case, there is no question that Dearth will return to the United States. *See* JA 15, ¶ 10. It is also not speculative that he will purchase a firearm for his personal possession; this he would have already done were it not for the challenged regulations. *See* JA 15, ¶ 11;

JA 18, ¶¶ 22-23. And, as discussed *infra* in section III, standing cannot require Dearth to have perpetual travel plans to the United States nor an appointment with a gun dealer to prove the immediacy and reality of his injury.

III. Dearth Possesses The Requisite Present Intent To Engage In The Exercise Of His Rights.

Dearth presently intends to acquire a gun for lawful purposes, and he would have been able to enjoy this freedom were it not for the government's arbitrary statutes, which prevented him twice from purchasing a firearm. JA 15, ¶ 11; JA 18, ¶¶ 22-23. He also is prepared to again attempt this purchase once the offending regulations are struck down. *See* JA 15, ¶ 11. This is precisely the sort of present intent needed for pre-enforcement challenges, as the Supreme Court described in *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979). Like the union representatives in *Babbitt*, Dearth stands ready to exercise his constitutional rights but for the law at issue, a fact sufficient to confirm standing. 442 U.S. at 300. However, unlike the *Babbitt* Court's denial of standing for an injury—denial of access to employer facilities—the occurrence of which was at best conjectural, *id.* at 304, this Court does

not have to guess that Dearth's injury will come to pass. The two-time denial of a firearm purchase has already occurred and will continue to occur unless this law is overturned.

The government's claim that Dearth lacks a present intent because he is not currently in the country and does not have immediate travel plans or specific details about a future firearm purchase does not impact his standing. It would be ridiculous to require Dearth to remain in the United States for the pendency of this litigation simply to prove he presently intends to and will attempt a third gun purchase, even though he knows he cannot succeed under current law. In fact, to put such a requirement on Dearth would violate his Fifth Amendment right to international travel, conditioning his access to the courts on forfeiting that right.

IV. But For A Credible Threat Of Prosecution, Dearth Would Be Able To Exercise His Rights.

Given Dearth's present intent to exercise his constitutional rights, to establish pre-enforcement standing, the Supreme Court requires he show a genuine or credible threat of prosecution preventing this exercise. *Babbitt*, 442 U.S. at 298. Once a threat exists, standing is

established even when the threat is eliminated by coerced compliance on the part of the injured party. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). The government agrees that coerced compliance provides an injury-in-fact where the “threat of enforcement is sufficiently concrete to force the plaintiff’s abandonment of the proposed conduct.” Appellee’s Br. 12.

In the instant case, Dearth faced a “literal dilemma” when asked to fill out the residency section of the firearms purchase form: either tell the truth and lose his Second Amendment rights or submit a false statement on a federal document, commit a crime, and be subject to prosecution. *Cf. Epperson v. Arkansas*, 393 U.S. 97, 99-100 (1968) (noting a “literal dilemma” sufficient for standing where a teacher had to use a controversial textbook in her classroom to perform her job, but for which doing so would be a crime leading to her dismissal). Dearth’s conduct was coerced. He intended to behave one way—purchasing a gun as a U.S. citizen residing out of the country—but was forced to abandon this conduct for fear of criminal sanctions. This shift resulted from current enforcement of the law at issue. Both of Dearth’s firearm

purchases were cancelled because he could not meet the residency criteria. JA 18, ¶¶ 22-23. Thus, he was not faced with just prospective enforcement; enforcement actually occurred and caused his injury.²

The government asserts that there was no administrative denial of Dearth's rights as a consequence of enforcing these federal laws. However, cancellation of Dearth's multiple gun transactions is just such a denial. The merchants acted as agents of the government responsible for enforcing and carrying out federal policy. Were it not for their application of and compliance with these federal laws, Dearth currently would be possessing another firearm. And were it not for the government's directives, the transactions would have proceeded.

Indeed, under the government's rubric, Dearth could only challenge the law as a criminal defendant. But such behavior is not required to confirm standing. *Medimmune, Inc.*, 549 U.S. at 129 (permitting a plaintiff to challenge a criminal law without first having to "expose

² The government contends that the acts necessary to make Dearth's injury happen are within his control. Appellee's Br. 24. However, Dearth's ability to possess a firearm is not within his control precisely because of the government's regulations. Were it not for these laws, he would already be in possession of a firearm because previous attempts to purchase one would have been successful.

himself to liability” via prosecution). Dearth’s coerced abandonment of intended conduct resulting from governmental enforcement, and the actual enforcement of the challenged laws resulting in the cancellation of transactions, satisfies both the Supreme Court and this Court’s standing criteria.

V. SAF Has Both Organizational And Representational Standing.

A. SAF’s Expenditure Of Resources Fulfills The Supreme Court’s Organizational Standing Requirement.

SAF possesses the requisite standing to pursue this case. The Supreme Court has found that where government action requires an organization to expend resources to deal with that particular conduct, organizational standing exists. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This Court has held the same. *See, e.g., Abigail Alliance For Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132-33 (D.C. Cir. 2006); *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28 (D.C. Cir. 1990).

The government cites to these cases for precisely this point, yet fails to connect SAF's mission and accompanying use of resources to its grounds for standing. Similar to the organizations in the cited cases, SAF has been forced to expend financial, administrative, and other resources to "identify and counteract" the government's discriminatory behavior, *Havens*, 455 U.S. at 379; *Fair Employment Council*, 28 F.3d at 1276; *Spann*, 899 F.2d at 28; to "increase[] education efforts to inform the public about laws prohibiting" this violation of constitutional rights, *Spann*, 899 F.2d at 28; and to assist "its members and the public [to] address the unduly burdensome requirements" imposed by the regulations, *Abigail Alliance*, 469 F.3d at 132-33. These activities are necessary to fulfill SAF's mission to serve, educate, and inform the public about gun control policies, and thus go beyond a mere "setback to the organization's abstract social interests," *Havens*, 455 U.S. at 379. Accordingly, SAF's standing as an organization is firmly established.

B. SAF Has Standing To Represent Its Members, One Of Whom Is A Party To The Litigation.

SAF has representational standing in this case. To establish representational standing, SAF's members must otherwise have

standing to sue as individuals, the rights asserted must be germane to SAF's purpose, and neither the constitutional claims nor the request for a permanent injunction must require SAF's members to individually participate. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996). Given SAF's educational and informational mission to promote Second Amendment rights, this case clearly is germane to SAF's purpose. However, any individual who is harmed by these regulations and can establish standing could bring suit, so it is not necessary for individual SAF members to be personally involved in this case. And, despite the government's incorrect assertion that none of SAF's members are affected by this law, Appellee's Br. 30, Dearth, himself a SAF member, was injured and has individual standing to sue, as established above. *See Appellant's Br. 47* (discussing the individual standing of "Dearth and *other* SAF members") (emphasis added). Therefore, SAF may bring suit in its representational capacity.

CONCLUSION

Stephen Dearth has suffered a concrete, ongoing impairment of his Second Amendment right to possess firearms for a lawful purpose. He presently intends to obtain a firearm as a U.S. citizen residing abroad, and faces a credible threat of prosecution from the government if he pursues this action.

Indeed, Dearth has already been compelled to forgo his constitutional rights as a result of the challenged laws. These facts establish that he has suffered an injury-in-fact sufficient to support his standing in this lawsuit.

Similarly, the interests at stake in this case directly relate to SAF's organizational purpose and have caused SAF to expend valuable resources as a consequence of the government's actions. SAF therefore has standing to represent itself and its members in this suit.

Accordingly, the judgment below should be reversed and the case remanded for resolution of the case on its merits.

Dated: September 3, 2010 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,163 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Corel WordPerfect X4 in 14-point Century Schoolbook font.

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Dated: September 3, 2010

CERTIFICATE OF SERVICE

I certify that, on this, the 3rd day of September, 2010, I filed the foregoing Appellants' Reply Brief electronically with the Clerk of the Court using the CM/ECF System. On September 3, 2010, I served two true and correct copies of the foregoing Appellants' Reply Brief on the following by Federal Express:

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I further certify that on this, the 3rd day of September, 2010, I served the electronic copy of the foregoing Appellants' Reply Brief on above-listed counsel by e-mail to anisha.dasgupta@usdoj.gov.

The brief was also filed this day by dispatch to the Clerk via Federal Express.

I declare under penalty of perjury that the foregoing is true and correct. Executed this the 3rd day of September, 2010.

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