No. 18-663

IN THE

Supreme Court of the United States

FREDRIC RUSSELL MANCE, JR.; TRACEY AMBEAU HANSON; ANDREW HANDSON; AND CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS,

PETITIONERS,

V.

MATTHEW G. WHITAKER,
ACTING U.S. ATTORNEY GENERAL, ET. AL,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does prohibiting interstate handgun sales to consumers whose home jurisdictions authorize such transactions, violate the Second Amendment and the equal protection component of the Fifth Amendment's Due Process Clause?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case interests Cato because it concerns the fundamental individual right to keep and bear arms. Its resolution could help curb longstanding abuses of an important constitutional right.

INTRODUCTION AND SUMMARY OF ARGUMENT

Closely divided and over strong dissent, the Fifth Circuit denied en banc rehearing of this case, which "involves a question of exceptional importance—the proper scope of the Second Amendment." *Mance v. Sessions*, 896 F.3d 390, 399 (5th Cir. 2018) (Ho, J., dissental). Yet federal law criminalizes *all* interstate handgun sales, preventing or burdening the ability of many Americans to obtain handguns—the most common type of arm used for self-defense. The government claims that allowing such sales would violate state firearm laws. This interest is not illegitimate, but when the solution so heavily burdens the ability to buy a handgun—a purchase essential for many Americans

[1] Rule 37 statement: All parties received timely notice of intent to file this brief and have consented. No counsel for any party authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

to have an effective means of self-defense—it cannot justify a complete ban in all cases involving all states.

The law has put the national firearms market into an irrational state, where dealers are trusted to make transfers and follow the law of multiple states in transactions involving rifles and shotguns, but categorically forbidden from doing the same with the most common arms in the country. It regulates commerce in arms as if the Founders hadn't literally been driven to war by arms-trade embargoes, and exclusively limits the arms which Americans—and this Court—have indicated are the most crucial for their defense.

In an area of the law where the lower courts diverge substantially on an important civil right, this Court needs to step in and help set the course. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49–50 n.10 (1961) (comparing "the commands of the First Amendment" to "the equally unqualified command of the Second Amendment"). This case is an ideal vessel in which to do so, as its resolution would not disturb the nation's diverse tapestry of gun laws, but instead help equip the lower courts with the tools needed to properly map the metes and bounds of the Second Amendment.

ARGUMENT

I. INTERSTATE ARMS TRADING WAS OF PARAMOUNT IMPORTANCE TO THE FOUNDERS

The Fifth Circuit panel seemed to be of the opinion that Americans should feel lucky that Congress didn't ban all interstate firearm sales. *Mance v. Sessions*, 896 F.3d 699, 708 (5th Cir. 2018) (analogizing to the First Amendment to find that "the plaintiff's reliance on the

disparate treatment federal law accords handguns and long guns does not carry the day. . . . [The Supreme Court has] upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.'") (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1663 (2015)). That is a fine general sentiment—that Congress need not invade as much of a right as it can, lest it be forced to restrict "all or nothing at all"—but it doesn't address the argument that the justification for restricting part of a right (interstate sale of handguns) is belied when the asserted harm (violation of state gun laws) doesn't occur in the context of the right left alone (interstate sale of long guns). All the more so when a historically grounded right is at issue.

Specifically, restricting interstate handgun sales contravenes the Founding-era understanding that the Second Amendment protects the right to sell arms in common use for self-defense. The 1774 English order to seize gunpowder in Charleston nearly sparked war. Colonists "began to collect in large bodies, with their arms, provisions, and ammunition, determining by some means to give check to a power which so openly threatened their destruction, and in such a clandestine manner rob them of the means of their defence." Unsigned report, Sept. 5, 1774, in 1 Am. Archives, 4th ser., at 762 (Peter Force ed., 1843). Where "the powder seizure proved beyond doubt that the colonists were prepared to fight," the idea that a total ban on arms sales would be constitutionally permissible seems foreign. Robert Richmond, *Powder Alarm* 24 (1971).

Indeed, the arms trade itself was manifestly dear to the Founders. On October 19, 1774, King George prohibited the importation of arms and ammunition

into America. 5 Acts of the Privy Council of England, Colonial Series, A.D. 1766–1783, at 401 (2005) (James Munro & Almeric Fitzroy eds., 1912). These import restrictions sparked Americans to reclaim previously confiscated arms by force. Gov. Wentworth, letter to Gov. Gage, Dec. 14, 1774, *in* 18 The Parliamentary History of England, from the Earliest Period to The Year 1803, at 145 (T.C. Hansard: 1813). The restrictions were then summarily ignored, with Benjamin Franklin working in secret to import arms from the Spanish, French, and Dutch. Pennsylvania Reporter, Apr. 24, 1775, at 2, col. 1 (report from London, Feb. 16, 1775 (three ships recently sailed from Holland, and three more from France "with arms and ammunition and other implements of war, for our colonies in America, and more preparing for the same place."))

Following this drama, South Carolina's legislature declared that "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them." 1 John Drayton, Memoirs of the American Revolution 166 (1821). The British plan to ban commerce in arms completely was no secret, as it was published in their plan to prevent future rebellions (if they won the Revolutionary War):

> The Militia Laws should be repealed and none suffered to be re-enacted, [and] the Arms of all the People should be taken away ... nor should any Foundery or manufactuary of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence.

William Knox, *Considerations on the Great Question, What Is Fit to be Done with America*, Memorandum to the Earl of Shelburne, *in* 1 Sources of American Independence: Selected Manuscripts from the Collections of the William L. Clements Library 140 (Howard Peckham ed., 1978).

American colonists took up arms, sacrificed their homes, their lives, and their relationship with their mother country in no small part because of restrictions in the commerce of arms. Severe restrictions on the interstate traffic of the most common arms in use would strike the founding generation as eerily similar to the policies of King George III.

II. THE LAW AT ISSUE HAS PUT THE NATIONAL FIREARMS MARKET INTO AN IRRATIONAL STATE

As it stands, federal law prohibits individuals from receiving firearms "purchased or otherwise obtained" out-of-state. 18 U.S.C. §922(a)(3). The law prohibits holders of a Federal Firearms License (FFLs) from transferring any firearms to non-residents but carves out an exception for interstate sales of long guns (rifles and shotguns), so long as the transactions are accomplished in person and comply with the laws of the dealer's and the buyer's respective states. 18 U.S.C. § 922(b)(3); 27 C.F.R. §§ 478.96(c), 478.99.

In interstate transactions involving long guns, however, the law presumes that the involved FFLs have "actual knowledge of the State laws and published ordinances of both States." 27 C.F.R § 478.96(c)(2). To assist FFLs in following these laws, the ATF Director "shall annually revise and furnish [FFLs]…with a compilation of [relevant] state laws

and published ordinances." 27 C.F.R. § 478.24(a). These books—which are now of dubious utility in an era where the average person has virtually instant access to the entire body of the nation's laws through her phone—were thought to be enough to allow FFLs to remain compliant in interstate firearm sales, but somehow not for handguns.

As a result, if an individual cannot find a handgun that suits his needs in his home jurisdiction—or happens to find a handgun he wants to buy while out-of-state—he must either live without it or be prepared to jump through expensive hurdles. First, the out-of-state FFL must be willing to work with him, which is often not the case. Then the individual must find an FFL in his home jurisdiction who will accept the transfer. He must then pay the out-of-state FFL to ship the handgun to the in-state FFL and then pay the in-state FFL a transfer fee. The in-state FFL will then perform the same background check and release the firearm through the same procedures the out-of-state FFL would have performed had the purchase been of a bolt-action hunting rifle or a .22 caliber "squirrel gun" rifle.

III. THE LAW AT ISSUE EXCLUSIVELY REGULATES THE ARMS MOST VITAL TO AMERICAN LIVES

By focusing on handguns, the transfer ban targets "an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense," which is "central to the Second Amendment right." *D.C. v. Heller*, 554 U.S. 570, 628 (2008). So important are handguns for self-defense that "the American people have considered the handgun to be the quintessential self-defense weapon." *Id.*

The code sections at issue here provide that holders of a Federal Firearms License may only transfer rifles and shotguns to interstate customers. 18 U.S.C. § 922(b)(3). Handguns, those arms deemed so vital to self-defense, though, must be purchased through an in-state intermediary, regardless of what state law has to say on the matter.

A. Limiting Consumer Choice in Handguns Harms Americans

Just in terms of new guns, there are hundreds of models of handgun available for sale in the United States. Additionally, there are thousands of firearm models in used and surplus markets. The interstate handgun sale ban necessarily limits consumer choice by penalizing consumers who might look outside their jurisdiction. With handguns, which Americans use for self-defense, consumer choice is most important. Selecting a firearm for self-defense is an important choice in which Americans should not be so limited.

Not only are there myriad handgun models to choose from, but different chamberings, configurations, and sizes. Handguns, particularly, are so nuanced and varied that the process of selecting one has inspired the writing of numerous lengthy articles and guides. *See*, *e.g.*, Jeff Levant, "6 Steps in Choosing Your First Handgun," *The Daily Caller*, https://bit.ly/2Bcvc7Z. The mass and diversity of firearms available means there is no way a single jurisdiction could provide a complete selection—especially where some firearms, such as those designed for people with disabilities, are understandably rare.

By requiring out-of-state dealers to ship customers' desired firearms to dealers in their home jurisdictions,

who will then charge arbitrary—and sometimes prohibitive—prices to transfer them to the end users, the federal government punishes Americans for selecting the guns best suited to their needs if those guns happen not to be available in their home states. This dynamic is difficult to square this with *Heller*'s discussion of handguns. *Heller*, 554 U.S. at 629

While consumers can contact an out-of-state dealer to ship the firearm in-state, the added cost, time, and complexity in doing so places a discriminatory burden on residents of jurisdictions like D.C., where licensed dealers are limited. *Mance*, 896 F.3d 701–02.

B. The Law Creates a Discriminatory Waiting Period for Handgun Purchases

One effect of the interstate handgun transfer ban is clear: it functions as a mandatory waiting period on handgun transfers for all D.C. residents and for anyone else who wishes to legally procure a handgun in interstate commerce. Anyone who wants to buy a handgun from outside their home jurisdiction must tolerate what seems to be an arbitrary—and costly—inhibition in having the firearm transferred from one FFL to another, solely on the concern that out-of-state FFLs might not be competent in the laws they are nonetheless obligated to follow.

There are two primary problems with this. First, whether a jurisdiction has an additional waiting period on firearm sales should be a question for the state legislature, not a function of which businesses choose to operate there. This is especially true where courts have already recognized that waiting periods related to exercises of constitutional rights must be justified by a compelling government interest. *See, e.g.,*

Planned Parenthood Arizona, Inc. v. Humble, 753 F. 3d 905, 917 (9th Cir. 2014) (invalidating an Arizona abortion law partially because "many women will be delayed in" seeking an abortion); *Kev, Inc. v. Kitsap County*, 793 F. 2d 1053, 1060 (9th Cir. 1986) (invalidating a 5-day waiting period for a nude-dancing license because it "unreasonably prevents a dancer from exercising first amendment rights while an application [was] pending" and the county "failed to demonstrate a need for [the] five-day delay period."); *see*, *also*, *Silvester v. Becerra*, 138 S. Ct. 945, 951–52 (2018) (Thomas, J., dissental) (comparing 10-day handgun waiting period to "10-day waiting period for abortions," "10-day waiting period on the publication of racist speech," or "even a 10-minute delay of a traffic stop").

Second, the law's interstate discrimination is suspect, even absent its Second Amendment implications:

> [A] central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Granholm v. Heald, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)). *See also Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1 (1986).

Our Constitution looks down on playing favorites between residents of different states. *See*, *e.g.*, *Shelby Cty v. Holder*, 570 U.S. 529, 544 (2013). Yet that is the very effect the transfer ban has had on the District of

Columbia and the national handgun market. That is not to say Congress lacks the power to regulate the interstate trade in arms; it most certainly does. But arms regulations that subject certain Americans, based on their residences, to cumbersome restrictions on a constitutional right must be justified by compelling reasons that the government has failed to offer.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO CLARIFY THE SCOPE AND STRINGENCY OF THE SECOND AMENDMENT

It is no secret that this Court has been gun-shy as of late. *See*, *e.g.*, *Silvester v. Becerra*, 138 S. Ct. 945 (denial of certiorari on challenge to 10-day waiting period for subsequent gun purchases); *Teixeira v. County of Alameda,* 873 F.3d 670, 681 (9th Cir. 2017) (en banc) (rejecting a gun seller's argument for his right to sell arms), *cert. denied,* 138 S. Ct. 1988 (2018). While letting lower courts wrestle with arms-related questions made sense in 2008, a decade later it is clear that the only thing to emerge from the lowers courts in this context has been further confusion. *Silvester*, 138 S. Ct. at 951 ("Our continued refusal to hear Second Amendment cases only enables . . . defiance. We have not heard argument in a Second Amendment case for nearly eight years. And we have not clarified the standard for assessing Second Amendment claims for almost 10.") (Thomas, J., dissental) (cleaned up).

The issue presented here is narrow—a federal ban on interstate handgun purchases—and thus its resolution would not disturb the nation's diverse and expansive tapestry of firearm laws. The strictness or laxity of any given state's firearm regulations would not be

affected one whit. This case thus presents an opportunity for this Court to assist the circuit courts in deciding an increasing number of Second Amendment-based challenges to state and federal gun laws.

And of course, as this Court knows well, the circuit courts have applied wildly divergent analyses to laws that impinge on a right this Court has affirmed to be fundamental. *McDonald v. Chicago*, 561 U.S. 742, 767–70 (2010). The right is clearly important, but the circuit courts have been unable to harmonize fundamental threshold issues—such as whether the Second Amendment even applies in some situations—and thus have come to different conclusions in similar cases that purport to apply the same level of scrutiny. *Compare Peruta v. County of San Diego*, 824 F. 3d 919, 939 (9th Cir. 2016) ("[T]he right to keep and bear arms does not include, in any degree, the right…to carry concealed firearms in public.") *with Moore v. Madigan,* 702 F.3d 933, 936 (7th Cir. 2012) ("[O]ne doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense . . . could not rationally have been limited to the home."); *see also Kolbe v. Hogan*, 849 F.3d 114, 155 (4th Cir. 2017) (Traxler, J., dissenting) (chiding the majority's failure to apply the Second Amendment to a ban on certain types of rifles).

This case presents an excellent vehicle for the Court's intervention: it is procedurally sound and does not turn on either particular factual findings or the misapplication of a properly stated rule of law. Unlike the state of the legal landscape before *Heller*, there is no need to vindicate a previously unexplored right. Instead, its resolution depends only on the clarification of the proper analysis to be applied to the clearly established Second Amendment right to bear arms.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari. This Court should give federal courts needed guidance in an important, yet barren, area of the law.

Respectfully submitted,

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