No. 17-342

IN THE
Supreme Court of the United States

JEFF SILVESTER; BRANDON COMBS; THE CAL-GUNS FOUNDATION, INC., A NON-PROFIT ORGANIZATION; AND THE SECOND AMENDMENT FOUNDATION, INC., A NON-PROFIT ORGANIZATION,

PETITIONERS,

V.

XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

RESPONDENT.

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

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

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October 26, 2017

QUESTIONS PRESENTED

1. Did the Ninth Circuit apply an appropriate level of scrutiny to an as-applied challenge to California's 10-day waiting period for subsequent purchasers of firearms?

2. What is the appropriate minimum level of scrutiny to be applied to a law that unquestionably implicates individual rights under the Second Amendment?

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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 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

California requires most firearm purchasers to wait 10 days before they can take possession of a firearm, irrespective of whether that person already owns a firearm. That restriction also applies to those who currently lawfully own guns and are listed in the Automated Firearms System, who have a valid Certificate of Eligibility, or who possess a Carry Concealed Weapon license. The Ninth Circuit, purporting to apply intermediate scrutiny but actually using something closer to the rational basis test, overturned a district court decision that correctly found that applying the 10-day waiting period to current firearm owners violates the Second Amendment.

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[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.

Since this Court decided *District of Columbia v. Heller* nearly a decade ago, 554 U.S. 570 (2008), many questions about the scope and function of the Second Amendment have arisen. This case presents an opportunity to provide guidance on a relatively small but significant constitutional question. Guidance from this Court on a narrow issue would help the lower courts as they deal with larger issues like magazine-capacity restrictions and "assault weapon" bans.

The Ninth Circuit engaged in an unrestrained analysis resembling no form of heightened scrutiny ever used outside the Second Amendment context and relied almost entirely on speculation in upholding California's law. Because the facts here are so straightforward, the error below so clear, and the issue so significant, this Court should grant certiorari.

ARGUMENT

I. THIS COURT'S SECOND AMENDMENT GUIDANCE IS DESPERATELY NEEDED

Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the circuit courts have struggled—and often failed—to develop a workable framework to analyze laws that impinge on Second Amendment rights. *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) ("On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself."); *Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) (refusing to explore whether right to bear arms exists outside the home and describing the whole area as a "vast terra incognita that courts should enter only upon necessity and only then by small degree."); *but*

see, *e.g.*, *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("[T]hat 'vast terra incognita' has been opened to judicial exploration by *Heller* and *McDonald*. There is no turning back by the lower federal courts"). Little circuit consensus has developed as to what constitutes an impermissible infringement.

Of course, whether state legislatures like it or not, the Second Amendment protects an individual's right to keep and bear arms. *Heller*, 554 U.S. at 591–93. After *Heller*, the metes and bounds of this right would of course have to be fleshed out over time; it would have been quite the feat for even this Court to develop an entire area of law in a single decision! In practical effect, all *Heller* and *McDonald* seems to have told circuit courts is that they may not acquiesce in complete and total denial of a constitutional right. *Id.* at 628 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster"). When it has come to anything less than complete abridgement, though, the circuits have exhibited a disturbing level of complicity. *See, e.g. United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (determining that "marginal, incremental, or even appreciable restraint[s] on the right to keep and bear arms" necessitate nothing more than rational basis review); *Kachalsky v. City of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (allow state officials to refuse handgun-carry permits solely because they oppose the idea of ordinary citizens' carrying arms for protection).

That barren state of precedent has enabled—if not encouraged—the development of an unintelligible

and wildly divergent body of law. This Court needs to establish clear ground rules for evaluating Second Amendment claims that would enable the lower courts to develop a coherent and consistent approach to the array of issues that will continue to occur. This case presents an opportunity to provide just such guidance, without delving too deeply into the particulars of the regulatory mire gun owners have found themselves in since 1934.[2]

A. "Intermediate Scrutiny" Means Something Different in Almost Every Circuit When Applied to the Second Amendment

Heller tells us that rational basis is not to be used for evaluating laws that abridge the Second Amendment, 554 U.S. at 628, leaving courts to wonder what level of scrutiny they should apply. *See*, *e.g.*, *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012) (grappling with the appropriate scrutiny standard and finding that the only guidance is to avoid rational basis review); *NRA v. BATFE*, 700 F.3d 185, 195 (5th Cir. 2012) (same); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (same).

The Ninth Circuit generally tackles Second Amendment questions by first asking whether the law "comes to the core of the Second Amendment right," *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960–61 (9th Cir. 2013), balanced against the "severity of the law's burden on the right." *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). This

[2] The National Firearms Act (NFA), 73 Pub. L. No. 474, 48 Stat. 1236 (1934), could be regarded as the genesis of the modern state of firearms regulation. In the years before the NFA, anyone could purchase a Colt-Browning "potato digger" machine gun at their local hardware store for a surplus price.

approach is doubly problematic because it allows the Court to engage in interest-balancing before touching the level of scrutiny. A court seeking to justify a particular restriction thus has multiple opportunities to influence the outcome by characterizing the law affected as distant from the "core" of the Second Amendment, and then is allowed a second bite at the apple, downplaying severity by comparing it to a mythical total ban on usable arms.[3]

This preliminary interest-balancing is unworkable and constitutionally impermissible. "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. The malleable goalposts of the "core" of the right to bear arms balanced against their "severity" make mincemeat of the Second Amendment in the hands of even a slightly motivated court.

What the law in this area most desperately needs is the assignment of a clear level of scrutiny for abridgements of the Second Amendment—and some idea of when strict scrutiny should kick in. Since *Heller* and *McDonald*, the circuits have varied wildly in how to approach these issues. The Seventh and Ninth circuits first punted the issue of requisite scrutiny, reasoning that it was not required when the Supreme Court laid out no specific test. *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (the government's concession saved the court from "get[ting] more deeply into the 'levels of scrutiny' quagmire"); *United States*

[3] The court below engaged in this exact type of analysis: it drew the line at the most extreme end possible, an outright ban. It then proceeded to contrast petitioner's injury in condescending terms, as "very small." *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016).

v. Vongxay, 594 F.3d 1111, 1119 (9th Cir. 2010). The D.C., First, Second, Third, Fourth, Fifth, Sixth, and eventually Ninth Circuits all purported to adopt a form of intermediate scrutiny, which in virtually all cases conveniently escapes clearly articulable definition. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (requiring a "strong showing" to justify a ban on possession of arms by domestic violence misdemeanants); *Decastro*, 682 F.3d 160, 166 (laws which "substantially burden" Second Amendment rights are afforded "some form of heightened scrutiny," while laws that are burdensome, but not "substantially" so, receive only rational basis review); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (likening a law prohibiting possession of a firearm with an obliterated serial number to a regulation on the manner of speech, and purporting to apply intermediate scrutiny in kind to uphold the law); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011) (reasoning that restrictions on semi-automatic rifles and "high capacity" magazines were "minimal" invasions of the Second Amendment right, drawing from *Marzzarella*); *NRA v. BATFE*, 700 F.3d 185 (5th Cir. 2012) (upholding a statute prohibiting the sale of handguns to people ages 18–20 under intermediate scrutiny, despite the severity of an almost total prohibition on a class of adults bearing handguns).

Courts seeking to disentangle the web spun by *Heller* and *McDonald* have flocked to the most deferential form of review they could by way of a vague conception of "intermediate scrutiny." We know that, at minimum, intermediate scrutiny as applied by this Court requires some degree of means-ends fit that is more concrete than inventing merely conceivable justifications. *See*, *e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770–

71 (1993); *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2011) (government may not rely on "anecdote and supposition" in supporting of a law under intermediate scrutiny). Still, the Ninth Circuit has implemented its version of intermediate scrutiny in a way that is practically indistinguishable from rational basis and has emphasized that the test for "fit" in the circuit "is not a strict one." *Silvester*, 843 F.3d at 827.

B. This Case Presents an Excellent Opportunity for Guidance and Clarification

The issue presented here is rather narrow—applying an arbitrary wait time to subsequent firearm purchases—and so its resolution would not shock the nation's diverse and expansive tapestry of firearm laws. This is not a facial challenge to the California law, but an opportunity for the Court to assist lower courts in deciding an increasing number of Second Amendment-based challenges to state and federal laws.

As discussed *supra* Part IA, the circuit courts have applied wildly divergent analyses to laws that burden a right this Court has held to be fundamental. Lower courts have been unable to harmonize the most basic threshold issues—such as whether the Second Amendment even applies in a particular situation—and therefore 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) (en banc) ("the right to keep and bear arms does not include, in any degree, the right…to carry concealed firearms in public.") *with Moore,* 702 F.3d 933 at 936 ("[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 because it is procedurally sound and does not turn on 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, this case's resolution depends only on the clarification of the proper analysis to be applied to the now-established right to keep and bear arms.

II. THE NINTH CIRCUIT ABUSED PETITIONERS' FUNDAMENTAL RIGHTS BY MISAPPLYING INTERMEDIATE SCRUTINY

Intermediate scrutiny requires more than a tortured web of "what-ifs." Some substantial evidence is required to indicate that the regulation will alleviate the asserted harm to a "material degree," and the onus is on the government to bring such evidence. *Edenfield*, 507 U.S. at 771. Nevertheless the Ninth Circuit skipped the requirements of heightened scrutiny in determining whether California's insistence on a 10-day waiting period passed constitutional muster.

The district court actually examined evidence and came to the conclusion that there was "no evidence that a 'cooling off period,' such as that provided by the 10-day waiting period, prevents impulsive acts of violence by individuals who already possess a firearm." *Silvester v. Harris*, 41 F. Supp. 3d 927, 965–66 (E.D. Cal. 2014). The Ninth Circuit, on the other hand, seemed to hardly require the government to meet the

burden of proof. While it is understandable that an appellate court can disagree with a trial court's analysis, here the analytical gap is wider than normal.

A. The Ninth Circuit Laid Out the Test for Intermediate Scrutiny, Then Ignored It

Instead of properly applying heightened scrutiny, the Ninth Circuit sustained the state law at issue by glazing over the government's burdens and citing the same inconclusive studies the lower court found wanting. *Silvester*, 843 F.3d at 828. The panel directed that the regulation should "reasonably fit" within the legislative objective, without much more. As petitioners explain, the circuit court failed to engage in the question as to whether the waiting period passed muster *as applied to persons who already own guns*, which was, of course, the core question in the case. Instead, the court ruminated on whether the law in general was justified, citing the "common sense understanding that urges to commit violent acts or self-harm may dissipate after there has been an opportunity to calm down." *Id*.

As the lower court's analysis continued, it became less clear what standard it applied. At one point, a purported intermediate scrutiny was diluted to the state's being required to "show only that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id*. at 829. This is does not resemble heightened scrutiny in any context where this Court has applied it.

B. California Failed to Demonstrate Any Means-Ends "Fit"

Assuming *arguendo* that intermediate scrutiny is appropriate in the context of the Second Amendment,

the lower courts should not be allowed to inject vagaries into the analysis to legitimize unrestrained deference to the legislature. With any form of heightened scrutiny, more than a transient or fanciful reason is required to justify the government action. California's requiring purchasers to wait 10 days to lawfully receive a second or third firearm does little more than bully gun enthusiasts, and "bullying" is not a state interest sufficient to satisfy any form of scrutiny.

Following this Court in *Edenfield*, courts in the Ninth Circuit frame questions of intermediate scrutiny as whether there exists "reasonable fit between the challenged regulation and the government's asserted objective." *Silvester v. Harris*, 41 F. Supp. 3d 927 at 934 (E.D. Cal. 2014) (citing *Edenfield*, 507 U.S. 761, 770–71). What separates this inquiry from rational basis, however—and what the Ninth Circuit gave short shrift—is that requirement of "fit." Indeed, the concept of "fit" is all that meaningfully separates intermediate scrutiny from simple rational basis review—so it is essential that this Court remind the circuits that the right to bear arms requires heightened scrutiny.

To demonstrate such "fit," a restriction cannot be broader than necessary to achieve the important interest asserted by the government. In making its case, the government "cannot rely on 'mere speculation or conjecture,'" and the restriction "'may not be sustained if it provides only ineffective or remote support for the government's purpose,' rather there must be an indication that the regulation will alleviate the asserted harms to a 'material degree.'" *Edenfield*, 507 U.S. at 771 (internal citations omitted). "[A]necdote and supposition" cannot satisfy this burden. *Carter*, 669 F.3d

at 418. Yet the Ninth Circuit and other lower courts have persistently relied on nothing more than supposition. Although the government presented *no* evidence related specifically to subsequent firearm purchasers, the Ninth Circuit found this non-evidence sufficient to confirm a "common sense understanding" as to a broadly contentious question of policy. *Silvester,* 843 F.3d at 828. The panel went on to claim that "waiting ten days may deter subsequent purchasers from buying new weapons that would be better suited for a heinous use." *Id.* at 826. Such conjectural reasoning would satisfy the rational basis test, but that—purportedly—is not the standard being applied here. The phrase "may deter," absent any evidence, underscores that nothing more than speculation is afoot.

C. The Ninth Circuit Fundamentally Misunderstood Petitioners' Injury

In its haughty characterization of petitioners' injury—being arbitrarily forced to wait 10 days after purchasing a firearm to take possession of it—the Ninth Circuit suggested that petitioners have little to complain about in having to wait for delivery of their newly purchased defensive tools. Why did it so conclude? Because in the 18th century, purchasers of firearms might have had to wait for their new Kentucky flintlock rifle to be carted in from Pennsylvania. *Id.* at 827. The court posited that there is "nothing new in having to wait for delivery of a weapon" and proceeded to discuss 18th-century delivery methods as opposed to modern "superhighways." *Id.*

But the fact that, to use the lower court's language, technological advances like "superstores and superhighways" have enabled faster commercial transactions does nothing to justify the entirely arbitrary

waiting period that California imposes. The fact that a sick horse might have delayed a firearm's delivery in 1795 does not lower the burden that California must meet to justify a law that arbitrarily forces dealers to hold paid-for inventory and consumers to wait for a tool that might better protect their lives.[4]

In upholding the restriction, the Ninth Circuit repeated the importance of the state's being allowed sufficient time to complete its background check. *Id*. But that is not a relevant state concern. After all, petitioners do not claim that they should be exempt from background checks. They claim only that there is no substantial state interest to keep guns from those who already own guns after passing a background check.

The Ninth Circuit needs to be reminded that the Fourteenth Amendment prevents states from regulating away fundamental rights willy-nilly. The people of California have a fundamental interest in preserving their own lives; a second or third gun could prove to be an essential tool in that preservation. *Silvester*, 41 F.Supp.3d at 955 (referencing a study in evidence where 40 firearm purchasers were murdered within the first month of obtaining their handgun).

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[4] And besides, the Fourteenth Amendment—which extended the right to keep and bear arms to the states—was ratified in 1868, so steamboats and railroads are at issue, not horses. *See* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 Geo. J. L. & Pub. Pol'y 1, 52–53 (2010) (discussing "originalism at the right time").

CONCLUSION

The Second Amendment is not a "second-class" right for the circuit courts to "single[] out for special—and specially unfavorable—treatment." *McDonald v. Chicago*, 561 U.S. at 778, 80. For the forgoing reasons, the petition should be granted.

Respectfully submitted,

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