No. 17-342

IN THE

Supreme Court of the United States

JEFF SILVESTER; BRANDON COMBS;
THE CALGUNS 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, IN HIS OFFICIAL CAPACITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly rejected petitioners' as-applied challenge to California's statutory 10-day waiting period for taking delivery of a newly-purchased firearm.

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STATEMENT

1. In California, a purchaser must wait 10 days before taking delivery of a newly-purchased firearm. Cal. Penal Code §§ 26815(a), 27540(a). California has had some waiting period in effect since 1923, when it adopted a model law promoted by the U.S. Revolver Association. Pet. App. A12, B9. As many as 43 States and the District of Columbia have had waiting period laws over the past century; presently, ten do. Over time, the California Legislature has experimented with waiting periods ranging from one day to 15 days. *Id*. at A13-A15, B28-B30. The current period of 10 days was adopted in 1996. *Id*. at A14, B30.

During the waiting period, the Bureau of Firearms within the state Department of Justice conducts a background check of the prospective purchaser. Pet. App. A15-A17, B31-B39. The Bureau also checks whether the firearm has been reported lost or stolen. *Id*. at A16, B35. The waiting period also affords law-enforcement agents additional time to investigate suspected straw purchases, in which a non-prohibited person purchases a firearm on behalf of a prohibited purchaser. *Id*. at B24, B52-B54. Each year, the Bureau completes about one million background checks, and approves nearly as many firearm transactions. *Id*. at B45.

Under California's statutory scheme, all purchases are subject to the 10-day waiting period, even if the Bureau of Firearms is able to complete a particular background check in fewer than 10 days. Apart from providing a uniform rule, this standard period gives a purchaser who might be considering impulsive use of the new firearm time to "cool off" before receiving delivery. *See* Pet. App. A13, A15, B49. One peer-reviewed academic study found that waiting periods

cause a statistically significant decrease in the rates of handgun suicides—typically impulsive acts—in people 55 years of age and older. *Id*. at B12, B51 (citing Jens Ludwig and Phillip Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 J. Am. Med. Ass'n 585 (Aug. 2, 2000)).[1] (Similarly, a new, comprehensive study, analyzing 45 years of data from 43 States and the District of Columbia, found that a waiting period of a few days leads to a 17-percent reduction in the rate of handgun homicides. Michael Luca, et al., *Handgun Waiting Periods Reduce Gun Deaths*, 114 PNAS 12162 (Nov. 14, 2017).)[2]

2. In this lawsuit, petitioners alleged that California's uniform 10-day waiting period violated the Second Amendment as applied to purchasers whose background checks cleared the State's system in less than 10 days and who already owned a firearm or possessed a concealed-carry permit. Pet. App. A1-A2, B21. The district court agreed, holding that the State had failed to establish a reasonable fit between the uniform waiting period as applied to petitioners and the objectives of protecting public safety and minimizing firearm violence. *Id*. at B79, B84. The court held that California's waiting period implicated the Second

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[1] *See also* Michael Anestis and Joyce Anestis, *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, 105 Am. J. Pub. Health 2049 (Oct. 2015) (replicating findings). Another study focused on suicide rates for firearm purchasers in California, finding that such purchasers have a substantially increased risk of committing suicide by firearm in the first week after purchase, while a heightened risk persists for several years after acquisition. Garen Wintemute, et al., *Mortality Among Recent Purchasers of Handguns*, 341 New England J. Med. 1583 (Nov. 18, 1999) (cited at Pet. App. B51-B52.)

[2] Available online at http://www.pnas.org/content/114/46/12162 (last visited Nov. 29, 2017).

Amendment as historically understood, because it found no "statute or regulations from 1791 or 1868 that imposed waiting periods between the time of purchase and the time of delivery." *Id.* at B67; *see also id.* at B7-B10, B26, B69. Nor were there "historical materials or books that discuss waiting periods or attitudes toward waiting periods between 1791 and 1868." *Id.* at B26, B67. For the same reason, the court held (*id.* at B67-B68) that waiting-period laws were not presumptively lawful conditions on the commercial sale of firearms under *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008). The district court enjoined enforcement of the 10-day waiting period as applied to people who passed the state background check in less than 10 days and who had previously lawfully purchased a firearm in California (as recorded in a state database) or who had a valid concealed-carry license. *Id.* at B88-B90.[3]

3. The court of appeals reversed. Pet. App. A2, A26. It concluded that "the 10-day waiting period is a reasonable safety precaution for all purchasers of firearms . . . ." *Id.* at A2.

The court found it unnecessary to address the State's threshold arguments that its waiting period is a longstanding, presumptively lawful regulation on the commercial sale of arms and that, in any event, temporary delays in obtaining firearms do not implicate the Second Amendment as historically understood. *See* Pet. App. A2-A3, A19-A20. Assuming that the uniform waiting period implicated the Second Amendment and was not presumptively valid, the

[3] The order also applied to a third category of individuals, those with a valid "certificate of eligibility" who had also previously lawfully purchased a firearm in California. As petitioners note, this category is functionally redundant with the first category and not separately at issue. Pet. 4 n.1.

court reasoned that the burden imposed on petitioners was "very small," involving only a temporary incremental delay in delivery after whatever period was necessary to complete the background check on a given purchaser. *Id.* at A21. Because any burden on Second Amendment rights was not substantial, the court applied intermediate scrutiny, assessing the importance of the government's objectives and whether the waiting period was reasonably suited to achieve them. *Id.* at A22. The parties agreed that the State's objectives of "promoting safety and reducing gun violence" were important." *Id.* The sole dispute was therefore whether the uniform waiting period "reasonably fit with the stated objectives." *Id.* Relying on evidence in the record, legislative history, and common sense, the court of appeals concluded that it did. *Id.* at A22-A25.

The court of appeals rejected the argument that intermediate scrutiny required empirical evidence specifically addressing the effect of a waiting period on a purchaser who has previously purchased another firearm. Pet. App. A23-A24. The court observed that the studies cited by the State related to all purchasers, and "confirmed 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.* at A23. It rejected the contention that there could be no deterrent effect on a current prospective purchaser simply because that person had previously purchased a firearm, because there was no warrant for the assumption "that all subsequent purchasers who wish to purchase a weapon for criminal purposes already have an operable weapon suitable to do the job." *Id.* Thus, the minimal burden of a uniform waiting period was reasonably tailored to serve the State's interests by "provid[ing] time not only for a background check, but also for a cooling-off period to

deter violence resulting from impulsive purchase of firearms." *Id.* at A25.

Chief Judge Thomas joined the court of appeals' opinion, but concurred separately to note that the State's waiting period could also be sustained as "a longstanding qualification on the commercial sale of arms" that is "presumptively lawful" under *Heller*. Pet. App. A26; *see generally id.* at A26-A33.

The court of appeals denied petitioners' request for rehearing or rehearing en banc, without dissent or any request for a vote. Pet. App. C2.

ARGUMENT

No one disputes the importance of California's interests in promoting public safety and reducing gun violence. The modest, uniform waiting period that the State requires before a purchaser may take possession of a firearm is reasonably tailored to serve those interests, providing both a standard time for the completion of background checks and any other investigation that may be indicated and a cooling-off period to deter impulsive acts of violence. The court of appeals correctly applied standard intermediate-scrutiny analysis in rejecting petitioners' novel as-applied challenge to the uniform application of that waiting period to all purchasers. Its decision creates no conflict, and there is no reason for further review.[4]

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[4] Because the court of appeals concluded that uniform application of California's waiting period satisfies intermediate scrutiny, it had no occasion to consider the State's threshold arguments that the waiting-period requirement is a longstanding regulation of the commercial sale of arms that is presumptively lawful under *Heller*, 554 U.S. at 626-627, and indeed that temporary delays in obtaining firearms do not implicate the Second Amendment as historically understood. *See* Pet. App. A2-A3, A19-A20; *see also id.* at A26-A33 (Thomas, C.J., concurring).

1. Petitioners contend principally that the court of appeals' decision "dilutes or ignores" the proper standard for intermediate scrutiny. Pet. 13; *see also id.* at 14-21. That is incorrect. Using phrasing similar to that in *Edenfield v. Fane*, 507 U.S. 761, 768 (1993), to which petitioners point (*see, e.g.*, Pet. 14), the court of appeals gave a routine formulation of the standard: whether the government's objectives are "significant, substantial, or important," and whether there is a "reasonable fit" between the challenged regulation and those objectives. Pet. App. A8; *see also, e.g.*, *id.* at A22. In applying the standard, the court recognized that "intermediate scrutiny does not require the least restrictive means of furthering a given end." *Id.* at A22. "The State is required to show only that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at A25 (citation omitted).

These formulations flow directly from this Court's cases. "[W]hat is required is a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . ." *McCutcheon v. Fed. Elec. Comm'n*, 134 S. Ct. 1434, 1456 (2014), quoting *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). A regulation is permissible if it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 67 (2006) (citation omitted).

These arguments were, however, fully preserved below (*see* Pet. App. B7-B10, B22-B24), and they would be available for the State to advance as alternative grounds for affirmance if this Court were to grant review.

The Ninth Circuit's approach to intermediate scrutiny standard also matches that of other courts of appeals. *See, e.g.*, *Naser Jewelers, Inc. v. Concord*, 513 F.3d 27, 31 n.1 (1st Cir. 2008) (First Amendment case, restating reasonable-fit aspect of test); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126-1127 (10th Cir. 2015); *Moore v. Brown*, 868 F.3d 398, 404 (D.C. Cir. 2017) (First Amendment case, restating achieved-less-effectively aspect of test); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (Second Amendment case, restating reasonable-fit aspect of test); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (same); *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (same); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 693 (6th Cir. 2016) (same); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (same); *Heller v. Dist. of Columbia*, 801 F.3d 264, 272 (D.C. Cir. 2015) (Second Amendment case, restating achieved-less-effectively aspect of test). To the extent that there are differences in the ways different courts articulate the applicable test, petitioners make no showing that any other court would have applied the standard differently to the challenge presented in this case.

2. Petitioners argue that, as applied to them, California's uniform 10-day waiting period violates intermediate scrutiny because it is overly broad. Pet. 17-19. This is also incorrect.

First, petitioners' proposed distinction between first-time purchasers and those who are shown in a database as having lawfully purchased a firearm at some time in the past or having a concealed-carry permit is not one that the state legislature was required to accept. As the court of appeals recognized, people who are noted in a database as having previously pur-

chased a firearm are not necessarily people who presently possess a working, accessible firearm, suitable for whatever purpose they may have immediately in mind. *See* Pet. App. A23-A24. Databases are not perfect; a firearm possessed at some time in the past may easily have been lost, stolen, transferred, or perhaps taken away by a friend or family member; and in any event one firearm already possessed may not be suitable for a particular, now-desired purpose. Similarly, individual purchasers are not necessarily immune from having some current impulse toward violence, potentially deterrable through a short waiting period, because they have previously qualified for the issuance of a concealed-carry permit.

In any event, intermediate scrutiny requires a reasonable fit between means and objectives, not a perfect one. In order to achieve an important objective, a "regulation[] may incidentally, even deliberately, restrict a certain amount of" ordinarily constitutionally protected conduct "not thought to contribute significantly to the danger with which the Government is concerned." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999) (citations omitted). Moreover, if a legislative body "carefully calculated the costs and benefits associated with the burden" imposed by a regulation, then that calculation informs the analysis whether the regulation reasonably fits with the governmental objectives it seeks to advance. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993); *accord Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001), *superseded by statute on other grounds, as stated in Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence*, 731 F.3d 71, 80 (1st Cir. 2013). Here, the court of appeals correctly noted California's long history of adjusting the length of its waiting period to improve efficacy while

limiting any burden on firearm purchases to what is reasonable to protect public safety. *See* Pet. App. A15.

These principles all support the court of appeals' refusal to limit application of California's uniform 10-day waiting period to those shown in available records as first-time purchasers. The decision below reasonably applies settled principles in a way that properly respects the state legislature's balancing of a minimal burden on the timing of gun purchases with important concerns about public safety.

3. Finally, petitioners argue that the court of appeals improperly reweighed evidence and revisited factual findings made by the district court. Pet. 21-27. Here, however, the district court failed to acknowledge that the State could properly satisfy intermediate scrutiny by relying on a combination of unrebutted testimony, academic studies, and legislative history. While evidence supporting the "fit" between ends and means in this context cannot consist of "shoddy data or reasoning," it need only "fairly support the [government's] rationale for its [regulation]." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002) (plurality opinion). Further, courts should give some deference to the government's evidence. *Id.* at 440. Moreover, it is appropriate to use "logic and common sense" in assessing the fit. *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011). The court of appeals properly applied these legal standards to the record in this case in sustaining the judgments made by the state legislature.

In any event, this case dealt with legislative and social facts, not historical or adjudicative ones. The trial judge did not have to gauge any witness's credibility, or to construct a true account of completed conduct from conflicting narratives. The district court

and the court of appeals were thus equally well-situated to evaluate the evidence in the record here, for example by reading and drawing conclusions from published academic studies about the effects of waiting-period laws. This case is thus quite unlike *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015), on which petitioners rely (Pet. 23). Indeed, *Teva* expressly distinguished the sort of "subsidiary factual disputes" at issue there (*see* 135 S. Ct. at 839) from the sort of "factfinding that underlies statutory interpretation" (*id.* at 840).

The court of appeals' decision in this case is the first since *Heller* to consider a waiting period for taking possession of a newly-purchased firearm. *See* Pet. App. A20. In rejecting petitioners' challenge to California's uniform application of its 10-day waiting period to all purchasers, the court of appeals appropriately articulated and applied an intermediate scrutiny standard. The decision's as-applied analysis does not conflict with that of any other court, and there is no reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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