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,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

After a waiver, a CFR, and an extension of time, the Brief in Opposition illustrates perfectly the contempt into which the Ninth Circuit has brought this Court's precedents. A candid response would have confessed error and moved on. The response filed by the California Attorney General instead demonstrates a near complete lack of concern for precedent, procedure, or the risk of correction by this Court.

Neither the Ninth Circuit nor respondent even remotely apply the well-developed standards of intermediate scrutiny. Whether we pretend the opinion involves a merely erroneous change in the legal standards for intermediate scrutiny – in conflict with precedent from this and other courts on such standards – or candidly acknowledge the Ninth Circuit's open resistance to and disregard for this Court's Second Amendment precedent, this Court should take corrective action.

A grant would give this Court an opportunity to be fully briefed on the ways in which intermediate scrutiny is being distorted in this and other Second Amendment cases and allow it to provide more detailed guidance regarding the standards and application of intermediate scrutiny in such cases.

A summary disposition of the case would be more efficient and is more than justified considering the non-compliance of the decision below and the emptiness of the Brief in Opposition.

I. The Decision Below Applies an Improperly Lenient Level of Constitutional Scrutiny.

Indulging the assumption that the Ninth Circuit believed itself to be applying intermediate scrutiny, there is little question it has meaningfully reduced the standards for such scrutiny.

Gone is any requirement for reasonable tailoring to a genuine and substantial state interest or any requirement that the restriction directly and materially advance such a genuine interest. *Edenfield v. Fane*, 507 U.S. 761, 767, 770-71 (1993); Pet. at 7-9, 10-13 (contrasting district and circuit court reasoning). Gone is the burden of proof on the government to provide more than "mere speculation or conjecture," but rather to "*demonstrate* that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 507 U.S. at 771 (emphasis added). And gone is the principle that a purported state interest will not be deemed genuine where the regulatory scheme is riddled with exceptions. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 190 (1999).[1]

The BIO, at 6-7, offers the tepid defense that the Ninth Circuit *said* it was applying intermediate scrutiny, "[u]sing phrasing similar to that in *Edenfiled*," and hence there is no conflict. But merely saying it does not make it so, and the Ninth Circuit never even cited *Edenfiled* or the other parts of the intermediate

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[1] As noted in the Petition, at 19 n. 8, there are numerous exceptions to the 10-day waiting period, mostly for persons who already have access to firearms, Pet. App. B61.

scrutiny standard relating to the burden of proof on the government and the deficiency of speculation.

That the Ninth Circuit parroted the common top-line articulation of intermediate scrutiny means nothing where it then proceeds to ignore all subsidiary standards for what constitutes a reasonable fit and what constitutes adequate proof. *See* Pet. at 15-21. The refusal to follow this Court's prohibitions against speculation or its demand for direct and effective advancement of an asserted government interest is not a mere fact-bound application problem, but rather the wholesale abandonment of the very legal standards that make intermediate scrutiny meaningful. Even the most rigorous nominal standard can be satisfied easily if the government and a reviewing court are allowed to make up and balance speculative facts and interests at will, without regard to proof or fit. Indeed, such an *ad hoc* approach to restrictions on Second Amendment rights was expressly rejected in *Heller*. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

Respondent, at 7-9, tries to defend the decision below by arguing a variety of factual points it pretends support the waiting period as applied here, entirely ignoring the findings of the district court. For example, respondent speculates, at 8, that perhaps a subsequent purchaser might not in fact possess a firearm or might want one more suitable to a nefarious purpose. Such raw speculation, parroting comparable speculation by the Ninth Circuit, Pet. App. A23-A24, is barely the stuff of rational basis review, and, as the district court held, certainly not sufficient for intermediate scrutiny. Pet. App. B76. Furthermore, the

district court expressly found that the only witness to testify on the latter aspect of that speculation could give only one inapt example and admitted that a cooling-off period did not work in such case. Pet App. B75 n. 35. As to the former aspect of respondent's speculation, the panel below expressly noted that any dispute over the accuracy of gun-ownership databases is not "material because the legal issues can be decided on the assumption that Plaintiffs are justified in relying on the accuracy of the system." Pet. App. A18. Respondent's attempt to resurrect such factual matters here is disingenuous.[2]

Respondent's further argument, at 8, that a law may restrict constitutional activity that does not significantly contribute to the interest it seeks to vindicate meaningfully distorts *Greater New Orleans Broadcasting*, and highlights the disregard of intermediate scrutiny in this case.

In *Greater New Orleans*, this Court recognized that the government might sometimes favor a uniform restriction that advanced its interests, even if it might otherwise have chosen a narrower restriction. 527 U.S. at 194-95. But it refused to allow the government such leeway in that case because there, like here, the statutory scheme was riddled with exceptions and inconsistencies. *Id.* at 195; *see also id.* at 190 ("We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under *Central Hudson*, however,

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[2] And, of course, the district court made express fact-findings on this very issue, App. B76-B77 & n. 36, holding that the database was accurate and that any hypothetical concerns could be easily cured through a modification of the application process.

because the flaw in the Government's case is more fundamental: The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.").

Furthermore, the *dicta* underlying the government's assertion of broad regulatory leeway has been questioned and cabined by this Court such that it is of questionable validity at best. In *Greater New Orleans*, the Court noted that "dictum" implying that broader-than-needed restriction might be permissible "does not support the validity of the speech restriction in this case." 527 U.S. at 194 n. 8. And *Greater New Orleans*'s citation to *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989), is of doubtful effect given the relevant passage of *Fox* in turn relies on *Posadas de Puerto Rico Associates v. Tourism Co. of P. R.*, 478 U.S. 328 (1986), which this Court called into question in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 531-532 (1996) ("Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny. * * * In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech

restriction directly advances its interest and is narrowly tailored.").

Respondent's suggestion, at 8-9, that California has carefully balanced its waiting period law and affirmatively chosen to cover the as-applied challengers in this case is likewise disingenuous. The *only* interest relevant to the challenge in this case is a supposed desire for a cooling-off period. There is not a shred of evidence that the legislature considered or balanced any need for cooling-off periods in general, much less considered the distinction between initial and subsequent purchasers. Pet. App. B31 (noting only a single passing reference to a "cooling off" period in the legislative history of the 1996 law and finding that "no legislative history related to the 1996 law has been cited that deals with specific findings or evidence related to the 'cooling off' period"). Indeed, all of the supposed evidence cited by respondent in support of a waiting period – again never considering the distinction between initial and subsequent purchasers – is from *after* the relevant revision and hence could not have been considered by the State. BIO at 2 & n. 1 (citing inapt studies from 2000, 2015, and 2017, and, absurdly, a 1999 study of firearm suicides in California that shows the ineffectiveness of the waiting period, not its necessity).

Finally, respondent's suggestion, at 9-10, that the Ninth Circuit may disregard the findings of the district court because it did not involve conflicting testimony and "dealt with legislative and social facts" is as outrageous as it is wrong.

Federal Rule of Civil Procedure 52(a)(6) provides, in relevant part, that "[f]indings of fact, whether

based on oral or other evidence, must not be set aside unless clearly erroneous." This Court has explained that the Rule "sets forth a 'clear command'" that "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-37 (2015) (citations omitted). Furthermore, the district court did consider specific testimony regarding the issue of impulsive acts with a new or additional weapon. Pet. 9 n. 4; Pet. App. B75 n. 35. The testimony of the State's witness was indeed undisputed on that point because, in the only example given, that witness admitted that a 10-day cooling-off period did not work. *Id*.

Respondent's claim that this case is "quite unlike *Teva*" because it involves legislative and social facts is false as to both its premise and its reasoning. The facts at issue are whether the class of challengers pose any meaningful risk that justifies regulation via a cooling-off period beyond that needed to run a background check. That is a factual question like any other, no different than the factual questions in *Edenfield*. And there is no suggestion that the California legislature ever considered or addressed evidence regarding the need for a cooling-off period either generally or, more relevantly, for those who already own a gun. Indeed, the legislature's inclusion of a myriad of exceptions based largely on preexisting access to firearms suggests that they saw minimal danger in precisely the as-applied circumstances being challenged here. Finally, *Edenfield* al-

so involved broader factual claims – there about the supposed consequences of personal solicitation of clients – yet this Court nonetheless enforced a rigorous and fact-centric burden of proof. 507 U.S. at 770-72.

Respondent's suggestion that the Ninth Circuit properly took it upon itself to review *de novo* the facts found by the district court, and that it did so with deference to unsupported factual claims proffered by the State, simply demonstrates how far that circuit has diverged from this and other courts on the standards for intermediate scrutiny. If we are to believe that this is how the Ninth Circuit now defines intermediate scrutiny, including in First Amendment cases, then the decision below is indeed in conflict with decisions of this and numerous other courts. *Cf. Amicus* Brief of The Cato Institute, at 4-7 (Oct. 26, 2017) (discussing Ninth Circuit dilution of supposed intermediate scrutiny in Second Amendment cases and confusion in other courts).

II. This Court Should Exercise Its Supervisory Authority to Cabin the Continuing Resistance to Its Second Amendment Rulings.

Looking beyond the Ninth Circuit's window-dressing claim of having applied intermediate scrutiny, a more serious problem is evident. Respondent does not meaningfully deny that the Ninth Circuit and other courts are engaged in sustained and intentional resistance to this Court's Second Amendment precedent. *See* Pet. 21-25; *Amicus* Brief of Firearms Policy Foundation, *et al.*, at 7-14 (Oct. 26, 2017). Indeed, the BIO engages in many of the same tactics of legal and factual distortion to reach a predetermined

outcome. For example, it slyly suggests that the State has an interest in the "uniform" application of a waiting period, BIO 1, 3, 5, failing to acknowledge that uniformity was not claimed to be an important government interest and that the law is not uniform at all, but contains 18 exceptions (largely based on existing access to firearms) that render the genuineness of the State's overall interests questionable at best. Pet. App. B2, B61; *Greater New Orleans Broadcasting*, 527 U.S. at 190. It likewise implies the added time is needed for background checks, ignoring that the challenge here is only by those who pass their background checks in less time. And, outrageously, respondent attempts to introduce new supposed evidence of the need for waiting periods, never even attempting to address the fallacy of division that makes reliance on such studies as applied to the challenge here completely pointless. Pet. 16 & n. 7; *Amicus* Brief of Crime Prevention Research Center, at 11, 16 (Oct. 6, 2017).

This Court has seen many examples of such resistance in Second Amendment cases, but so far has been reluctant to grant full review. Perhaps those issues were thornier, or perhaps the Court was hoping further percolation might see the lower courts move beyond their early hostility to *Heller* and *McDonald*. Unfortunately, allowing percolation in this area has not seen a return to principled review, but has instead emboldened the Ninth Circuit and other courts to ignore or cripple the standards of review under the Second Amendment.

This case is a glaring example of the fruits of judicial resistance ignored. In the Ninth Circuit, the gov-

ernment no longer bears the burden of proof as a practical matter, speculation and conjecture now trump a trial court's thorough and detailed findings of fact, and, we are told, the government deserves deference regarding legislative and social "facts" even where there is no evidence that it reviewed or considered such supposed facts. The reality is that the decision below has either gutted or ignored the intermediate scrutiny it claims to have applied. We can either go along with the fiction of constitutional scrutiny – what lovely garments you have, oh west-coast emperors – or we can candidly acknowledge that the imperial Ninth Circuit has no constitutional clothes. *Cf*. Hans Christian Anderson, THE EMPEROR'S NEW CLOTHES (Trans. by Jean Hersholt) (available at http://andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html) (" 'But he hasn't got anything on,' a little child said. * * * 'But he hasn't got anything on!' the whole town cried out at last.").

As noted in the Petition, this case is a good vehicle should the Court decide the time has come for review of a Second Amendment case. The procedural posture, after trial and findings of fact and law, is extremely clean, the standards of appellate review cabin the arguments in the case, and the legal flaws are glaring. Furthermore, the narrow as-applied challenge is not even remotely as contentious as some issues in this area, perhaps allowing greater focus on the legal issues presented.

Alternatively, should this Court still be reluctant to take a Second Amendment case for full review, this case is also a suitable candidate for a summary GVR. Faced with a flagrant disregard for *Heller*, this Court

took precisely such an approach in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016). The decision below is comparable in its disregard of the standards for intermediate scrutiny, notwithstanding the lip service it gave to such scrutiny. If, for whatever reason, this Court is hesitant to commit to full briefing and consideration of a Second Amendment case at this time, it still can plant a stake against obstruction in the lower courts via such summary disposition. A firm reminder that courts must apply law and precedent, even in Second Amendment cases, would be a good first step, and might remove some of the complacency regarding the chances of reversal that may have emboldened courts and regulators in their resistance to this Court's Second Amendment precedents.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari and either summarily vacate and remand the decision below or set the case for full briefing.

Respectfully submitted,

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