No. 18-843

In The Supreme Court of the United States

IVAN PENA, DONA CROSTON, ROY VARGAS, BRETT THOMAS, SECOND AMENDMENT FOUNDATION, INC., AND CALGUNS FOUNDATION, INC.,

Petitioners,

v.

MARTIN HORAN, DIRECTOR, CALIFORNIA DEPT. OF JUSTICE BUREAU OF FIREARMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent claims that certiorari is not warranted because laws mirroring California's unique handgun prohibition scheme have not been struck down elsewhere. The argument is insubstantial.

Respondent also offers, contrary to countless opinions, that the Ninth Circuit's approach to Second Amendment cases is no different than that seen elsewhere. That claim is simply not reflected by the lower court's persistent resistance to *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). It is highly doubtful that many of the other circuits would have written an opinion of the type seen below.

Respondent dwells on its fact-specific defense of California's broad handgun prohibition, while conceding that the case has little to do with whether one of California's design restrictions is even feasible. That is a feature, not a flaw in this case. Not everything that is feasible is thereby constitutional.

Finally, Respondent notes that this case may be held pending the outcome in *New York State Rifle & Pistol Ass'n* v. *City of New York*, No. 18-280 (Jan. 22, 2019) ("*NYSRPA*"). But *NYSRPA* is a complementary case, whose outcome, even if correct, would not resolve the issue here. This petition, like *NYSRPA*, should be granted for argument.

I. The Specific Details Of State Law Do Not Guide This Court's Review.

Respondent complains that "[p]etitioners do not contend that there is any conflict in the lower courts *over the validity of the specific sort of state requirements at issue in this case*." BIO 10 (emphasis added). Of course not. That is not the standard for certiorari review.

As other litigants stated, it is also true that "no court struck down the law upheld in *NYSRPA*, or ruled on any law remotely like it. For that matter, the handgun ban at issue in [*Heller*] was equaled in only one other jurisdiction (Chicago), and *Heller*'s functional firearms ban was unique. No court had split from the D.C. Circuit on adjudicating the constitutionality of such laws, yet the case merited certiorari review." Reply Br., *Mance* v. *Barr*, No. 18-663 at 2-3.

Respondent's approach "would leave countless important issues unaddressed, and immunize statutory outliers and popular errors from judicial review." *Id.* at 3. The court below decided this case in a way very different than that which would have been seen in other courts, and the matter is one of exceptional importance. The decision below merits review.

II. The Ninth Circuit Approach To The Second Amendment Differs Greatly From That Of Other Circuits.

While *Heller* offers the correct approach to resolving categorical handgun bans, the lower courts decided

this case using the two-step interest balancing methodology that petitioners argued in the alternative. And so, the wide circuit conflicts that attend the two-step test—including whether to apply a threshold substantial burden test, the level of deference contained in allegedly "heightened" review, and when to use the two-step test—are all at issue here.

Respondent's denial that these conflicts exist, belied by countless opinions and perhaps by the grant of certiorari in *NYSRPA*, merit no further response. But Respondent's larger point—that this case would have turned out the same way in any other circuit, does. Is it really true that "the Seventh Circuit's approach does not vary from the Ninth's"? BIO 8.

Since *Heller*, a Ninth Circuit panel expanded or acknowledged Second Amendment rights on six occasions. In five of those six cases, the en banc Ninth Circuit vacated the panel opinion. See *Young* v. *Hawaii*, 915 F.3d 681 (9th Cir. 2019) (en banc) (vacating panel holding that restriction on carrying handguns violates the Second Amendment); *Teixeira* v. *Cnty. of Alameda*, 854 F.3d 1046 (9th Cir. 2016) (en banc) (vacating panel holding allowing a Second Amendment challenge to restrictive gun store zoning); *Peruta v. County of San Diego*, 781 F.3d 1106 (9th Cir. 2015) (en banc) (vacating panel holding striking down handgun carry restrictions), *together with Richards* v. *Prieto*, 782 F.3d 417 (9th Cir. 2015) (en banc) (same); *Nordyke* v. *King*, 664 F.3d 774 (9th Cir. 2011) (en banc) (vacating panel decision allowing leave to pursue Second Amendment claim); *Nordyke* v. *King*, 575 F.3d 890 (9th Cir. 2009)

(en banc) (vacating holding that the Fourteenth Amendment incorporates the Second Amendment).

All of these Second Amendment claimants, who had prevailed before their panels—lost—with exception of the plaintiff in the most recent en banc case that has yet to be decided. The plaintiff in that case may wish to hold off on ordering champagne.

The sixth such case, where en banc review has not (yet) occurred, only underscores the Ninth Circuit's hostility to the Second Amendment. In *Duncan* v. *Becerra*, 742 Fed. Appx. 218 (9th Cir. 2018), a divided panel upheld the granting of a preliminary injunction against a California ban on firearm magazines. *Sua sponte*, a Ninth Circuit judge called for a vote on whether to rehear the case en banc. Order, *Duncan* v. *Becerra*, Ninth Cir. No. 17-56081, Dkt. 101 (Aug. 22, 2018). Only after the state opposed rehearing, on grounds that the panel opinion was non-precedential, and that the injunction would be mooted by an intervening final judgment, did the Ninth Circuit relent and withdraw the en banc request. *Duncan* v. *Becerra*, No. 17-56081, 2018 U.S. App. LEXIS 31051 (9th Cir. Oct. 31, 2018).

No Second Amendment case has ever survived the Ninth Circuit's en banc gauntlet. No attorney can responsibly counsel clients on Second Amendment matters in the Ninth Circuit without having a hard discussion about the reality of that court's disposition. The impact is seen not only in the Ninth Circuit's lamentable Second Amendment output, but in the cases

and clients that never appear, and the violations that the right's opponents are emboldened to press.

The Seventh Circuit, in contrast, may not be perfect, but it has published at least three Second Amendment opinions that are unthinkable in the Ninth Circuit: *Ezell* v. *City of Chicago*, 846 F.3d 888 (7th Cir. 2017) (striking down gun range regulations); *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012) (striking down ban on carrying handguns for self-defense); *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (striking down gun range ban).

Given their very different Second Amendment approaches, and the very different results reached, the circuits might as well be operating under different constitutions.

III. Feasability Is Largely Irrelevant To Constitutionality.

Respondent notes that Judge Bybee's dissent focused only the feasability of microstamping, a "fact-bound question [that] does not warrant further review, particularly on the record here." BIO 13. Since petitioners never rested their constitutional claim on the feasability of complying with one detail of the comprehensive scheme they challenged (even if that is the scheme's most striking feature), respondent appears to be arguing that this petition should not be granted because petitioners did not elicit a dissent on their actual claims.

There is no requirement that petitioners obtain a dissent below on the points they would argue here. Petitioners' "strategic and tactical choices," *id.*, were to make a Second Amendment claim. That is not the sort of claim to which many Ninth Circuit judges would warm, but petitioners are confident that California's scheme is unconstitutional because the Second Amendment entitles them to obtain handguns of the kind in common use for traditional lawful purposes, regardless of what *other* kinds of handguns California's legislature might imagine. Other litigants challenged microstamping's feasability exclusively, and obtained the predictable result in the California Supreme Court. *National Shooting Sports Found.* v. *State of California*, 5 Cal. 5th 428 (2018). That decision was wrong, but it is only tangential to the issue before the Court here.

There is no doubt that California prohibits handguns of the kind in common use in the United States, including all new semiautomatic handguns introduced since 2013. Pretending that the law merely regulates handguns, by defining how handguns *should* be designed, does not alter the essential fact that California prohibits many if not most handguns that *do* exist. Were California to require that henceforth, all new cars must be powered by self-contained solar panels, the state could not deny that it was banning access to existing cars lacking such technology. The state could not defeat a challenge to such a law, brought under an enumerated right to drive cars, on the grounds that car manufacturers are simply lazy and that the

challengers haven't shown that such cars are, in fact, infeasible.

Feasability is not the same as constitutionality. This Court stressed the point in *Reno* v. *ACLU*, 521 U.S. 844 (1997), rejecting the claim that access to First Amendment speech could be restricted using expensive or cumbersome, but demonstrably feasible technology. The government argued that effectively requiring credit card or adult verification to access pornographic websites, "verification [that] is not only technologically available but actually is used by commercial providers of sexually explicit material," satisfied First Amendment scrutiny. *Id.* at 881. But the district court had found that "it is not economically feasible for most noncommercial speakers to employ such verification. Accordingly, this defense would not significantly narrow the statute's burden on noncommercial speech." *Id.* at 881-82.

Here, the lower court asserted that microstamping does not exist only because it is economically infeasible, and held that such a fact would be irrelevant to the constitutional claim. "The reality is not that manufacturers cannot meet the standard but rather that they have chosen not to." Pet. App. 26a. Putting aside the lower court's assessment of "reality," and whether the record supports that view, the court below nearly admitted that microstamping is unconstitutional under *Reno*. The issue plainly warrants more careful review.

IV. This Case And *NYSRPA* Are Complementary. Both Cases Should Be Heard On The Merits.

What the *Mance* petitioners offered with respect to *NYSRPA* holds equally true here. These cases are complementary. They raise overlapping yet unique Second Amendment problems, and the resolution of one such case will not necessarily decide the others. More importantly, there is a value in having this Court demonstrate that the Second Amendment is predictably reviewable here.

> When facing petitions in cases whose outcome would potentially be controlled by the outcome in a case pending on the merits, this Court's normal practice is to either hold the petitions pending that outcome, or to grant them as well. Given both cases' nature, and the precedential landscape, the best course of action is to grant this petition for argument on the merits alongside *NYSRPA*.

Reply Br., *Mance* v. *Barr*, No. 18-663 at 10-11.

There is no need to repeat here the entirety of *Mance* petitioners' argument on this point, as the cases are likely to be considered in the same conference. But petitioners here do stress the factors that make this case and *NYSRPA* complementary.

In *NYSRPA*, the Second Circuit purportedly applied "intermediate" scrutiny to sustain an irrational law. The petitioners in that case persuasively argue that "[t]his Court should not let . . . the Second Circuit's indefensible version of 'heightened scrutiny'

stand." Petition for Certiorari, *New York State Rifle & Pistol Ass'n* v. *City of New York*, No. 18-280 (Jan. 22, 2019) at 3. They further offer, correctly, that "a restriction that is expressly designed to make it harder to exercise core Second Amendment rights cannot plausibly withstand any level of constitutional scrutiny." *Id.* at 10.

To be sure, the Second Circuit's version of "heightened" "scrutiny" is not much different than the Ninth's. These are the only two circuits that have adopted the threshold substantial burden test, and the Second Amendment is equally dead in both courts. But if all that this Court might do would be to remand this case in light of a heightened scrutiny decision in *NYSRPA*, it would be wasting its time and that of the litigants. It is difficult to imagine how stronger "scrutiny" language would break the Ninth Circuit's resistance, especially in a case that, perhaps unlike *NYSRPA*, should not be decided under any form of means-ends scrutiny at all. This case—entering its second decade—would return here in a year or three.

The Ninth Circuit made many errors. But its overarching error was the decision to apply a two-step, interest-balancing, means-ends level of scrutiny. This case might be capable of decision under such a framework, but that is not what *Heller* prescribes. In contrast, *NYSRPA* may be decided as a matter of text, history and tradition, or it may be decided under means-ends review. The Second Circuit should be reversed, of course, under either approach. But *NYSRPA* does not contain a challenge to the categorical prohibition of an

arm. Unlike this case, it does not implicate *Heller*'s common use test, which should be employed here. *NYSRPA* can provide much needed and welcome insight, but it cannot address the core issue in this case.

Moreover, a point made in *Mance* is especially true here. *NYSRPA*

> presents a restriction whose stated goal may be nothing less than the subversion of the Second Amendment's exercise. This Court should declare such rationales illegitimate. But if that suffices to resolve *NYSRPA*, the decision might prove to be of limited use in the more common contexts where, as here, the government claims to advance a legitimate goal.

Reply Br., *Mance* v. *Barr*, No. 18-663 at 13.

"It is too early to know exactly how either case might turn out. This Court should give itself every opportunity to restore the Second Amendment." *Id.* At a minimum, this case should be held for the outcome of *NYSRPA*. But the optimal course of action is to grant this petition for argument on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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