App. No. 18A-___

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.

Stephen Lindley, Director, California Bureau of Firearms,

Respondent.

ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioners Ivan Pena, Dona Croston, Roy Vargas, Brett Thomas, Second Amendment Foundation, Inc., and Calguns Foundation, Inc.,[1] respectfully request that the time to file a Petition for Writ of Certiorari in this matter be extended for sixty days to and including December 31, 2018. The Court of Appeals issued its opinion on August 3, 2018. See App., *infra*. Absent an extension of time, the petition would therefore be due on November 1, 2018. Petitioners are filing this

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[1]Petitioners have no parents, and there are no publicly held companies that hold any stock of Petitioners. S. Ct. R. 29.6.

application at least ten days before that date. See S. Ct. R. 13.5. This Court would have jurisdiction over the judgment per 28 U.S.C. § 1254(1).

Background

Only legislative grace forecloses, for now, a California handgun ban as potentially expansive as that struck down in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

1. California bars the importation and sale of all handguns as presumptively "unsafe," unless those handguns have been placed on the state's roster of handguns "determined not to be unsafe." Cal. Penal Code §§ 31910, 32000. Originally, a handgun could be proven to be "not unsafe" if it had a safety mechanism, and passed tests assuring its reliability and resistance to accidental discharge. These aspects of the rostering scheme are not at issue.

But the handgun rostering law evolved from a mechanism weeding out unreliable or truly unsafe handguns, to one intended to conform handguns to the legislature's idealized design notions. As the market cannot or will not produce handguns that the legislature chooses to tolerate, including for reasons of technical impossibility, handguns of the kind in common use for traditional lawful purposes throughout the United States are disappearing from California.

2. California requires handgun consumers to pass a written handgun safety test. Cal. Penal Code § 31610, et seq. That test (sensibly) teaches that all handguns should be treated as loaded, and that the only truly safe way to ensure a semi-automatic handgun is unloaded is to remove the magazine and visually inspect the

chamber. ER 165, 168-72.[2] Nonetheless, the legislature began requiring, as a condition of being rostered, that semi-automatic handguns include a chamber-loaded indicator (CLI) and a magazine-disconnect mechanism (MDM)—features then-available on perhaps 14% and 11%, respectively, of semi-automatic handguns. Cal. Penal Code §§ 31910(b)(5), 31910(b)(6), 32010(d)(2), 32010(d)(3); ER 159-61, 163.[3]

The CLI and MDM requirements ban from California's market many common handguns, including "the overwhelming majority" of Smith & Wesson's semiautomatic handguns, ER 126, two of Ruger's most popular models, ER 129, and all Glocks beginning with that design's previous generation, introduced in 2008. See Br. Amicus Curiae of Glock, Inc., Dist. Ct. R. 66 at 1.

3. As of May 17, 2013, no new semiautomatic handguns may be rostered unless they employ so-called "microstamping technology," by which "a microscopic array of characters that identify the make, model, and serial number of the pistol" are imprinted on each fired cartridge from two or more places within the gun. Cal. Penal Code § 31910(b)(7)(A); ER 43-45.

Gun manufacturers and the state dispute whether microstamping technology is unfeasible or merely inconvenient, but for this case's purpose, the most salient fact is that *no such guns exist*. Thus, no new semi-automatic handgun designs have been approved for sale in California for over five years, and none are forthcoming.

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[2]ER refers to the Excerpts of Record in the Ninth Circuit below.

[3]Their relative scarcity aside, California does not accept the adequacy of all CLIs.

Manufacturers had challenged the microstamping requirement on grounds that "[t]he law never requires impossibilities," Cal. Civil Code § 3531, but California's Supreme Court foreclosed that claim, holding that the bar on impossibilities does not authorize an exception to legislative mandates, *National Shooting Sports Found*. v. *State of California*, 5 Cal. 5th 428 (2018).

4. Previously rostered handguns remain grandfathered, and manufacturers may submit identical designs for testing that contain only minor cosmetic differences, Cal. Penal Code § 32030, but any change to a manufacturing process or to the metallurgic composition of any part triggers all current mechanical requirements, ER 38. Handguns may also fall off the roster for reasons unrelated to safety, if their manufacturer declines to continue supporting the older model by paying the required annual listing fees. Cal. Penal Code § 32015(b)(2).

Thus, the total number of handguns on the roster, and the number of semiautomatics, specifically, has precipitously declined in recent years. App. 17 n.9. Manufacturers are abandoning the California market. "[T]he microstamping requirement is now forcing Ruger to cease semi-automatic handgun sales in California as its handguns are forced off the roster." ER 127. Smith & Wesson, which has already stopped selling many of its more popular handguns in California, believes that "it may be unrealistic" for it to maintain semiautomatic handgun sales in the state. ER 130. As noted *supra*, Glock cannot sell any handgun introduced since 2008.

5. Petitioners Ivan Pena, Dona Croston, Roy Vargas, and Brett Thomas, sought to import into California, for their personal use, four handguns that were not rostered for various reasons (including the very make and model handgun that Dick Heller fatefully sought to register in Washington). On April 30, 2009, together with the Second Amendment Foundation and the Calguns Foundation, they brought suit in the United States District Court for the Eastern District of California challenging the handgun rostering law as a violation of the Second and Fourteenth Amendments.

On February 26, 2015, the district court denied Petitioners' motion for summary judgment, and granted Respondent's motion for summary judgment. *Pena* v. *Lindley*, No. 2:09-CV-01185, 2015 U.S. Dist. LEXIS 23575; 2015 WL 854684 (E.D. Cal. Feb. 26, 2015). Over Judge Bybee's partial dissent, a Ninth Circuit panel affirmed on August 3, 2018, see *Pena* v. *Lindley*, No. 15-15449, __ F.3d __, 2018 U.S. App. LEXIS 21565, 2018 WL 3673149 (9th Cir. Aug. 3, 2018) (App.).

Reasons for Granting an Extension of Time

1. The panel's decision defies *Heller* in two critical respects.

a. This Court directly considered—and rejected—the proposition that the state may ban handguns on an interest-balancing rationale. "[T]he American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms . . . ." *Id*. at 582; *Caetano* v. *Massachusetts*, 136 S. Ct. 1027, 1027 (2016) (per curiam). Justice Breyer's dissent called for interest-balancing to sustain Washington, D.C.'s handgun ban. This Court's majority responded, "We know

of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634.

All handguns are inherently dangerous. But if the Second Amendment means anything, it means that the state cannot ban, without more, whichever arms it has unilaterally determined to be too dangerous for society. After all, "the sorts of weapons protected [by the Second Amendment are] those 'in common use at the time,'" *id*. at 627 (internal quotation marks omitted), "the sorts of lawful weapons that [citizens] possessed at home." *Id*. That describes perfectly the overwhelming majority of handguns that, notwithstanding their lawful prevalence throughout the United States, do not satisfy the California legislature's narrow opinion of which handguns it would grudgingly "allow" people to obtain.

Of course California can ban defective handguns—handguns that do not function in the manner that might be expected by a reasonably-competent, responsible consumer. And California is free to ban "those weapons not typically possessed by law-abiding citizens for lawful purposes," *id*. at 625, including "sophisticated arms that are highly unusual in society at large," *id*. at 627. But the Second Amendment, whatever it encompasses, is already "the very product of an interest balancing by the people." *Id*. at 635.

The Ninth Circuit nevertheless upheld the roster scheme on an interest-balancing approach. Some Justices might be surprised to learn that "[w]hether the [Unsafe Handgun Act] violates Purchasers' Second Amendment rights is framed by a two-step inquiry *established in Heller*." App. 10. (emphasis added). The court below

even titled this, "The Supreme Court's *Heller* Framework." *Id*. Of course *Heller* established no such two-step, interest-balancing framework.

But the Ninth Circuit continued, "assum[ing] without deciding" that the challenged provisions only vaguely implicate the Second Amendment because "defining the parameters of the Second Amendment's individual right in the context of commercial sales" is a "constitutional obstacle course" to be avoided. App. 13. That vagueness led the Ninth Circuit to apply a test it calls "intermediate scrutiny."

So-called "intermediate scrutiny" was held appropriate because though the challenged provisions ban acquisition of the overwhelming majority of handguns in America, including *all* semi-automatic designs since 2013, they "do not substantially burden any such right" of "self defense of the home." App. 14 (internal quotation marks omitted). "The statute does not restrict *possession* of handguns in the home or elsewhere . . . ." App. 15.[4] Indeed, though the handgun roster scheme plainly determines which arms may be acquired, and which may not, the Ninth Circuit stated that it is a "regulation of the manner of use, not possession—and thus affects Second Amendment rights less severely." *Id*. (citation omitted).

The Ninth Circuit then explained its "intermediate scrutiny" approach in terms that are effectively indistinguishable from rational basis review. "[L]egislative

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[4]It is unclear what the Ninth Circuit intended in offering, "Nor are out-of-state sales regulated." *Id*. Individuals cannot buy handguns across state lines. 18 U.S.C. §§ 922(a)(3), b(3). The statute's plain text bars importation for sale of unrostered handguns into California, Cal. Penal Code § 32000(a), and each individual Petitioner identified an out-of-state handgun that he and she would have imported into California for sale to him- and herself but for the challenged provision.

judgment" does not involve the weighing of "'evidence' in the technical sense." App. 19 (citation omitted). "Nor do we substitute our own policy judgment for that of the legislature," which is entitled to "deference." *Id.* (citations omitted). Nowhere in this equation is there a role for any policy settled by constitutional amendment, such as the policy that people have a right to acquire handguns. U.S. Const. amend. II.

Judge Bybee concurred in the majority's basic approach, and in most of its opinion. But he dissented for fifty pages from the decision to uphold the microstamping requirement, as he would have remanded for more evidence respecting the technology's feasability. Given the lack of new semi-automatic handgun designs, the impossibility of microstamping would work "a totally perverse result" by which Californians may acquire only older, less-safe designs, without advancing any regulatory purpose. App. 38.

b. There is no limit to the "interest balancing" license that the Ninth Circuit has granted California over gun designs. Microstamping, though non-existent, may be required of semi-automatic handguns so that the police might have evidence at a crime scene (assuming a criminal does catch or pick up expended cartridges, or has not obliterated the microstamping imprint). But revolvers, when fired, do not eject spent cartridges at all. Can revolvers thus be banned? Assuming that at least one (microstamping) semi-automatic handgun is offered for sale, the Ninth Circuit would apparently approve a revolver ban. It reduced the level of "scrutiny" in the case precisely because the Petitioners can still buy handguns, "just not the exact gun they want." App. 16.

But "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Likewise, the state cannot ban *one* handgun, or all handguns but one, simply because it deems other alternatives sufficient.

2. The forthcoming petition for a writ of certiorari will present a complex matter of exceptional importance. Several Justices have recently signaled an interest in clarifying the Court's Second Amendment jurisprudence. See, e.g., *Silvester* v. *Becerra*, 138 S. Ct. 945, 951-52 (2018) (Thomas, J., dissenting from denial of certiorari); *Binderup* v. *Sessions*, 137 S. Ct. 2323 (2017); *Peruta* v. *California*, 137 S. Ct. 1995, 1999-2000 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari). This case presents an excellent vehicle by which to do so.

3. An extension of time is needed to adequately complete this petition, in light of counsel's other pressing deadlines.

In addition to the petition in this matter, Petitioners' counsel is preparing to file the petition for a writ of certiorari from the Fifth Circuit's decision in *Mance* v. *Sessions*, No. 15-10311, __ F.3d __, 2018 U.S. App. LEXIS 20270 (5th Cir. July 20, 2018), *rehearing en banc denied*, __ F.3d __, 2018 U.S. App. LEXIS 20271 (5th Cir. July 20, 2018), currently due October 18, 2018—only two weeks before the date that the petition in this case is due. *Mance*, a challenge to the federal interstate handgun transfer ban which divided the Fifth Circuit 8-7, raises some issues that overlap those

present here. Petitioners in *Mance* are contemporaneously applying to Justice Alito for a sixty-day extension to prepare the petition in that case.

Petitioners' counsel in these cases is also counsel for the Plaintiff in *Libertarian National Committee, Inc.* v. *Federal Election Commission*, D.C. Cir. 18-5227, a constitutional challenge to recent amendments to the Federal Election Campaign Act, and to certain FEC practices extending the Act's limitations to testamentary bequests. On June 29, 2018, the United States District Court for the District of Columbia certified three questions of law in that case to the en banc D.C. Circuit, upon 178 factual findings, pursuant to 52 U.S.C. § 30110.

On August 10, 2018, the D.C. Circuit scheduled that case for argument en banc on November 30, 2018, and ordered that Plaintiff's opening and reply briefs be due September 12 and October 26, 2018, respectively. "Because the briefing is keyed to the date of oral argument, the court will grant requests for extension of time limits only for extraordinarily compelling reasons." Order, *Libertarian National Committee, Inc.* v. *Federal Election Commission*, D.C. Cir. 18-5227, Aug. 10, 2018, at 2.

Petitioners' counsel is also counsel for the Plaintiff-Appellant in *Medina* v. *Sessions*, D.C. Cir. 17-5248, set for oral argument on September 11, 2018. *Medina* raises critical constitutional issues regarding the Second Amendment's limitations on application of 18 U.S.C. § 922(g)(1), an issue that has divided not only the circuits, but also Justices of this Court, *see Binderup*, supra (denying the Solicitor General's petition for a writ of certiorari 7-2).

These are not counsel's only professional obligations, but they suffice to render the preparation of the petition for a writ of certiorari in this case unduly challenging absent the requested extension. The requested extension would not prejudice Respondent, who prevailed below and is not currently enjoined from enforcing the challenged provisions.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended by sixty days to and including December 31, 2018

Dated: August 16, 2018

Respectfully submitted,

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PROOF OF SERVICE

I, Alan Gura, counsel for Petitioners and a member of the bar of this Court, certify that on August 16, 2018, a copy of the Application to Extend Time to File A Petition for Writ of Certiorari in the above-entitled case was sent, via Federal Express, to Anthony R. Hakl, Deputy Attorney General, 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, 916.322.9041, counsel for respondent herein. I further certify that all parties required to be served have been served.

/s/ Alan Gura
Alan Gura

Appendix