

App. No. 18A-____

In the
Supreme Court of the United States

Fredric Russell Mance, Jr.; Tracey Ambeau Hanson; Andrew Hanson; and
Citizens Committee for the Right to Keep and Bear Arms,

Petitioners,

v.

Jefferson B. Sessions, III, U.S. Attorney General; and Thomas E. Brandon,
Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,

Respondents.

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

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

Alan Gura*
Gura PLLC
916 Prince Street, Suite 107
Alexandria, Virginia 22314
703.835.9085
alan@gurapllc.com

August 16, 2018

*Counsel of Record

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the
United States and Circuit Justice for the United States Court of Appeals for the Fifth
Circuit:

Petitioners Fredric Russell Mance, Jr., Tracey Ambeau Hanson, Andrew
Hanson, and Citizens Committee for the Right to Keep and Bear Arms¹ 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 17, 2018. The Court of Appeals

¹The Committee has no parents, and there are no publicly held companies that
hold any stock of the Committee. S. Ct. R. 29.6.

issued its revised opinion on July 20, 2018. See App. B, *infra*. The same day, by a vote of 8-7, the Court of Appeals denied Petitioners' request for rehearing en banc. See App. C, *infra*. Absent an extension of time, the petition would therefore be due on October 18, 2018. Petitioners are filing this 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

Notwithstanding the fundamental right to possess handguns for traditional lawful purposes, *District of Columbia v. Heller*, 554 U.S. 570 (2008), Congress has abolished the national market for handguns. Interstate transactions of other firearms are lawful, but consumers cannot purchase and take delivery of handguns outside their state of residence—even where doing so is authorized by their home state and the state of the selling dealer. See 18 U.S.C. §§ 922(a)(3) and 922(b)(3); 27 C.F.R. § 478.99(a). Consequently, any handgun that a consumer would purchase out-of-state must be shipped (at the consumer's expense) to a federally-licensed firearms dealer ("FFL") in the consumer's home state, who then completes the transaction, typically for a fee.

This scheme severely limits consumer choice and price competition, imposes additional shipping and transaction costs, and causes significant delays. The harm is particularly acute for Washington, D.C. residents, such as petitioners Tracey and Andrew Hanson, whose "state" has no firearms retailers and only a single FFL willing to perform interstate handgun transfers (at monopolistic prices).

The only rationale advanced to support this scheme—to prevent the circumvention of local firearms laws—appears strained when the law is applied in a jurisdiction, such as Washington, D.C, that licenses the possession of each handgun before it may be acquired. Presented with police authorization to transfer a handgun, a licensed dealer can rest assured that the transfer is lawful. And with respect to rifle and shotgun transfers, the government achieves its anti-circumvention interest not by prohibiting the national market for those arms, but by mandating background checks and compliance with all state laws. 18 U.S.C. § 922(b)(3).

Texas FFL Fredric Mance, Washington, D.C. couple Tracey and Andrew Hanson, and the Citizens Committee for the Right to Keep and Bear Arms, brought suit in the United States District Court for the Northern District of Texas, alleging that the federal interstate handgun transfer ban violates the Second Amendment right to keep and bear arms, as well as the equal protection components of the Fifth Amendment’s Due Process Clause.

On February 11, 2015, the district court granted Petitioners’ motion for summary judgment and struck down the ban, on its face and as-applied to Petitioners. *Mance v. Holder*, 74 F. Supp. 3d 795 (N.D. Tex. 2015). A fractured Fifth Circuit panel reversed on January 19, 2018, with Judge Owen concurring separately in her opinion for the panel. *Mance v. Sessions*, 880 F.3d 183 (5th Cir. 2018) (App. A).

Petitioners sought rehearing en banc. On July 20, 2018, a member of the original panel having since retired, the remaining panel issued an amended opinion, and Judge Owen amended her concurring opinion. *Mance v. Sessions*, __ F.3d __, 2018

U.S. App. LEXIS 20270 (5th Cir. Jul. 20, 2018) (App. B). The Fifth Circuit denied the petition for rehearing en banc by a vote of 8-7, with Judge Higginson concurring, and all seven dissenters joining separate dissenting opinions by Judges Elrod, Willett, and Ho. *Mance v. Sessions*, __ F.3d __, 2018 U.S. App. LEXIS 20271 (5th Cir. Jul. 20, 2018) (App. C).

Reasons for Granting an Extension of Time

1. “The core issue in this case is undeniably weighty: Does the federal criminalization of interstate handgun sales offend We the People’s ‘inherent right of self-defense?’ This merits question turns upon a method question: What level of judicial scrutiny applies to laws burdening the Second Amendment?” *Mance*, 2018 U.S. App. LEXIS 20271 at *12 (Willett, J., dissenting) (footnote omitted); App. C 12. As the majority, concurring, and dissenting opinions, and the lower court’s 8-7 vote on rehearing en banc reveal, the forthcoming petition for a writ of certiorari will present significant constitutional issues.

The district court, and all seven Fifth Circuit dissenters joining Judge Ho’s opinion, stressed that the interstate handgun transfer ban cannot survive the strict scrutiny to which it should be subjected. The dissenters also all joined Judge Elrod’s opinion, which would have struck down the ban under “a test rooted in the Second Amendment’s text and history—as required under *Heller* and *McDonald*— rather than a balancing test like strict or intermediate scrutiny.” *Mance*, 2018 U.S. App. LEXIS 20271 at *9 (Elrod, J., dissenting); App. C 9.

Judge Elrod’s categorical test-and-history analysis is subsumed in the Fifth Circuit’s interest-balancing test, the first part of which requires the court to determine whether the challenged restriction “harmonizes with the historical traditions associated with the Second Amendment guarantee.” App. B 7 (footnote omitted); *see also* App. B 25 (Owen, J., concurring) (describing the categorical approach as the two-step approach minus the “latter inquiry” of interest-balancing). The district court rejected the notion that the interstate handgun transfer ban is historically rooted. “Defendants have not presented, and the Court cannot find, any [pre-1909] evidence of longstanding interstate, geography-based, or residency-based firearm restrictions.” *Mance*, 74 F. Supp. 3d at 805. The panel elided the historical analysis by “assum[ing], without deciding, that [the challenged provisions] are not ‘longstanding regulatory measures’ and are not ‘presumptively lawful regulatory measures.’” App. B 7 (footnotes omitted). However, Judge Owen wrote separately at some length to reject the government’s historical arguments as “not well-taken.” App. B 22 (Owen, J., concurring).

As for the strict scrutiny analysis, Judge Owen offered that “[t]he district court’s reasoning is thoughtful, and it is correct in many respects.” App. B 30 (Owen, J., concurring). Petitioners submit that the district court’s opinion is also correct in the ultimate respect, as is Judge Ho’s opinion for the seven dissenters confirming the same essential points. “To start off with, the Government does not purport to have an interest in banning all interstate handgun sales. Rather, it asserts a more limited interest—preventing only the fraction of interstate handgun sales that would violate a

legitimate state handgun law.” App. C 19 (Ho, J., dissenting). “In other words, the federal interstate handgun ban is a prophylactic rule,” subject to a heavy strict scrutiny burden. *Id.* at 20.

“[T]he Government does not cite a single case in which regulatory complexity,” the only reason offered to ban all interstate handgun transfers, “justifies a prophylactic rule under strict scrutiny.” *Id.* at 21. And “there are plenty of less restrictive alternatives that further the Government’s interest in ensuring compliance with state handgun laws, short of a categorical ban.” *Id.* at 23. “Finally, the ban on interstate handgun sales is not only over-inclusive—it is under-inclusive as well,” in that federal law presumes that FFLs can learn and comply with all state laws governing long gun sales. *Id.* at 25.

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.

2. 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 Ninth Circuit’s decision in *Pena v. Lindley*, No. 15-15449, __ F.3d __, 2018 U.S. App. LEXIS 21565 (9th Cir. Aug. 3,

2018), currently due November 1, 2018—only two weeks after the date that the petition in this case is due. *Pena*, a challenge to California’s handgun rostering program, divided a Ninth Circuit panel and raises some issues that overlap those present here. Petitioners in *Pena* are contemporaneously applying to Chief Justice Roberts 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 Respondents, who prevailed below on appeal and are 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 17, 2018.

Dated: August 16, 2018

Respectfully submitted,

/s/ Alan Gura
Alan Gura*
Gura PLLC
916 Prince Street
Suite 107
Alexandria, Virginia 22314
703.835.9085
alan@gurapllc.com

*Counsel of Record

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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 Noel Francisco, Solicitor General, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, 202.514.2217, counsel for all the respondents herein. I further certify that all parties required to be served have been served.

/s/ Alan Gura
Alan Gura

Appendix Table of Contents

Appendix A,
Slip opinion in *Mance v. Sessions*,
880 F.3d 183 (5th Cir. 2018)..... A-1

Appendix B,
Slip opinion in *Mance v. Sessions*,
No. 15-10311, 2018 U.S. App. LEXIS 20270 (5th Cir. July 20, 2018). B-1

Appendix C,
Order Denying Petition for Rehearing En Banc, *Mance v. Sessions*,
No. 15-10311, 2018 U.S. App. LEXIS 20271 (5th Cir. July 20, 2018). C-1