No. 18-_____

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.

MATTHEW G. WHITAKER, ACTING U.S. ATTORNEY GENERAL; AND THOMAS E. BRANDON, DEPUTY DIRECTOR, HEAD OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085
alan@gurapllc.com

November 19, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Federal law bars consumers from acquiring handguns outside their home state. This prohibition limits choice and price competition, and forces many handgun buyers to arrange and pay for the handguns' shipment to in-state federal firearms licensees ("FFLs"). The government theorizes that the prohibition is necessary to combat the circumvention of state and local handgun laws. Yet some jurisdictions allow interstate handgun sales, or preclude the circumvention of handgun laws through retail channels by requiring police authorization for all handgun transfers. Meanwhile, federal law allows FFLs to sell rifles and shotguns to non-residents, so long as they comply with state and local laws.

Washington, D.C. residents Tracey and Andrew Hanson sought to buy handguns from Fredric Mance, a Texas-based FFL. The District lacks firearm retailers, but it authorizes interstate handgun sales, and requires that all firearm purchases be authorized by police prior to consumers taking delivery. Reflecting various divisions among the courts of appeals regarding the Second Amendment's application, the Fifth Circuit divided 8-7 as to whether and how the federal interstate handgun transfer ban is unconstitutional on its face or as-applied to the Hanson-Mance transactions.

The question presented is whether prohibiting interstate handgun sales, facially or as-applied to consumers whose home jurisdictions authorize such transactions, violates the Second Amendment and the equal protection component of the Fifth Amendment's Due Process Clause.

RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Citizens Committee for the Right to Keep and Bear Arms.

LIST OF PARTIES

Petitioners are Fredric Russell Mance, Jr., Tracey Ambeau Hanson, Andrew Hanson, and Citizens Committee for the Right to Keep and Bear Arms, who were plaintiffs and appellees below.

Respondents are Matthew G. Whitaker, Acting Attorney General of the United States; and Thomas E. Brandon, Deputy Director and Head of the Bureau of Alcohol, Tobacco, Firearms and Explosives. Brandon; his predecessor, B. Todd Jones; and the three preceding Attorneys General, Jefferson B. Sessions III, Loretta Lynch, and Eric H. Holder, Jr.; were defendants and appellants below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

No. 18-_____

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.

MATTHEW G. WHITAKER, ACTING U.S. ATTORNEY GENERAL; AND THOMAS E. BRANDON, DEPUTY DIRECTOR, HEAD OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Fredric Russell Mance, Jr., Tracey Ambeau Hanson, Andrew Hanson, and the Citizens Committee for the Right to Keep and Bear Arms, respectfully petition this Court to review the judgment of the United States

Court of Appeals for the Fifth Circuit in this case below.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's final opinion, App. 1a-43a, is reported at 896 F.3d 699. The Fifth Circuit's initial opinion, App. 44a-73a, is reported at 880 F.3d 183. The Fifth Circuit's order denying rehearing en banc, including Judge Higginson's concurrence, and the dissents of Judges Elrod, Willett, and Ho, App. 111a-44a, is reported at 896 F.3d 390. The district court's opinion, App. 74a-110a, is reported at 74 F. Supp. 3d 795.

JURISDICTION

The court of appeals entered its judgment on January 19, 2018. Petitioners timely filed a petition for rehearing en banc. On July 20, 2018, the court of appeals issued a revised panel opinion and denied rehearing en banc by a vote of 8-7. On August 17, 2018, Justice Alito extended the time for filing this petition to and including November 19, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Second Amendment, the Fifth Amendment, and relevant provisions of Title 18 of the United States Code, Title 27 of the Code of Federal Regulations, the District of Columbia Code, and the District of Columbia Municipal Regulations are reproduced at App. 145a-56a.

STATEMENT

Our Nation's capital lacks gun stores. Tracey and Andrew Hanson, Washington, D.C. residents who wish to buy handguns, have no choice but to shop for handguns outside the city while nonetheless complying with its famously strict gun laws. The city enables the Hansons' gun-shopping trips. It specifies that residents may take possession of newly-purchased handguns by presenting police-issued registration certificates to federally-licensed firearm dealers (federal firearms licensees, or "FFLs") anywhere in the United States.

While visiting Texas, which does not forbid selling firearms to non-residents, the Hansons agreed to buy handguns from FFL Fredric Mance. But the federal government, ostensibly protecting Washington, D.C.'s (non-existent) interests, frustrates what would otherwise be lawful, highly-regulated transactions. It mandates that the Hansons pay for an expensive in-town middleman who holds the same license, and would perform the same function, as Mance.

A national consumer marketplace—the ability to shop freely across state lines for goods and services—lies at the core of our Union and helps define the American experience. The costs to consumers of losing access to a national market for any product are severe, even prohibitive. This Court has recognized as much when it comes to goods whose acquisition enables the exercise of fundamental rights. Of course, ensuring that people comply with local gun laws is important. But completely prohibiting a national retail market for handguns is not and cannot be a constitutionally-measured means of preventing the circumvention of state handgun transfer laws.

This severe prohibition is on its face irrational. Some jurisdictions allow interstate handgun sales. Some jurisdictions ensure that handgun buyers comply with all legal requirements by licensing or registering handgun sales. And the federal government has long acknowledged that its anti-circumvention interest is secured by requiring FFLs to comply with all relevant laws. The government even provides FFLs state and local law compendiums, and asks them to work with state and local authorities before transferring firearms to non-residents.

However much the interstate handgun transfer ban might improve compliance with state and local laws, it also subverts their operation, thereby undermining the regulatory balance struck by states and localities. And it does so while imposing a "remedy" that federal law demonstrates to be excessive, given the regulations applied to other firearm sales.

Nonetheless, nine of the seventeen judges who considered this challenge to the federal interstate handgun transfer ban believed that it satisfied *strict* scrutiny, with the en banc tally reading 8-7. The vote underscored the significant uncertainty clouding the Second Amendment field. The lower court reflected the circuits' divisions as to whether and when Second Amendment disputes call for means-ends scrutiny; and whether means-ends scrutiny has any teeth, or functions as a rubber stamp, when employed in Second Amendment cases.

More critically, the decision below is but the latest in a long line of cases establishing that ten years after *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), many judges simply will not or cannot enforce the Second Amendment. This continuing resistance—widely acknowledged, even celebrated in some corners—does not merely deprive Americans of a fundamental enumerated right. It undermines public confidence in this Court's authority. This case presents an exceptional vehicle by which this Court can and should restore not just *Heller*, but the concept of vertical precedent—with this Court at the apex.

A. The Regulatory Framework

1. Federal law bars individuals from transporting into or receiving in their home state any firearm "purchased or otherwise obtained" out-of-state. 18 U.S.C. § 922(a)(3). The law exempts inherited firearms, firearms acquired before the Gun Control Act's 1968

effective date, and firearms acquired in compliance with 18 U.S.C. § 922(b)(3). *Id.* The District of Columbia is a "state" for purposes of this provision. 18 U.S.C. § 921(a)(2).

In turn, 18 U.S.C. § 922(b)(3) provides that FFLs may sell rifles and shotguns—but not handguns—to consumers who do not reside in the FFL's state. It achieves this result by barring FFLs from transferring firearms to non-residents, and then carving out an exception for the transfers of rifles and shotguns. Such interstate long-gun sales are authorized so long as the transactions are accomplished in person and comply with the laws of both the dealer's and the consumer's state. 18 U.S.C. § 922(b)(3); *see also* 27 C.F.R. §§ 478.96(c), 478.99.

The law presumes that FFLs "have had actual knowledge of the State laws and published ordinances of both States." *Id.* To assist FFLs in following local firearm laws, the ATF Director "shall annually revise and furnish Federal firearms licensees," free of charge, "with a compilation of [relevant] State laws and published ordinances." 27 C.F.R. § 478.24(a). In his "special message" accompanying the compilation's current release, Deputy Director Brandon advises that

> this book will help you make lawful over-the-counter sales of rifles and shotguns to out-of-State residents, transactions that must meet the legal requirements of both your the Federal firearms licensee's (FFL's) and the purchaser's States of residence.

Special Message from ATF: State Laws and Published Ordinances, available at https://www.atf.gov/firearms/special-message-atf-state-laws-and-published-ordinances (last visited Nov. 16, 2018).

Brandon further advises gun dealers that "[w]hen deciding whether to make a sale, you should first consult the full text of the State requirements and, if appropriate, contact State and local authorities before making a decision." *Id.*

2. Texas does not forbid the sale of handguns to non-residents.

3. The District of Columbia requires that all firearms be registered. D.C. Code § 7-2502.01(a). "An application for a registration certificate shall be filed (and a registration certificate issued) *prior* to taking possession of a firearm from a licensed dealer. . . ." D.C. Code § 7-2502.06(a) (emphasis added). The term "firearm" encompasses rifles, shotguns, and handguns. D.C. Code § 7-2501.01(9).

D.C. law acknowledges the federal interstate handgun transfer ban, but specifies that the city does not itself independently prohibit interstate handgun transfers. A handgun buyer must "[o]btain assistance necessary to complete the [registration] application by presenting the firearm registration application to a firearms dealer licensed under federal law . . . (2) [l]ocated outside the District if the firearm is purchased outside the District." D.C.M.R. § 24-2320.3(b) (2018). Following approval, the buyer must:

> Present the approved firearm registration application to the dealer licensed under federal law or, if federal law such as 18 U.S.C. § 922 prohibits the dealer from delivering the pistol to the applicant because the dealer is not within the District of Columbia, have that firearms dealer transport the pistol to a dealer located within the District, where the applicant will take delivery of the pistol.

D.C.M.R. § 24-2320.3(f) (2018).

Accordingly, but for the federal interstate handgun transfer ban, Washington, D.C. residents are legally authorized to take delivery of handguns they purchase across state lines by presenting their firearm registration certificates to licensed dealers anywhere, just as they take delivery of rifles and shotguns outside the city.

This was not always the case. District law once required that all handgun sales be processed through a D.C.-based licensed dealer. *See* D.C.M.R. § 24-2320.3(f) (2010). But in 2011, the District of Columbia's Police Commissioner amended the regulation to "clarify" that District residents are forbidden from acquiring handguns outside the District, and must ship any handguns purchased outside the District to an in-District dealer for final transfer, *only* because federal law so provides. "Should the federal law change, then that requirement will no longer be applicable to any District firearms registration applicant." 58 D.C. Register 7572 (Aug. 19, 2011).

The Police Commissioner amended the regulation on an emergency basis, owing to "an immediate need to preserve and promote the public welfare by having the amendment immediately effective so as to assist District residents in the exercise of their constitutional right to possess a handgun for self defense within their home." *Id.* The amendment is now permanent. 58 D.C. Register 8240 (Sept. 23, 2011).

B. The Hanson-Mance Transactions

The District of Columbia has no federally-licensed firearm retailers who maintain an inventory for sale to the public. The only District-based FFL who transfers firearms to consumers, shipped to him by FFLs outside the District, charges $125 for the service. App. 3a; R.284, 287.[1]

Washington, D.C. residents Tracey and Andrew Hanson traveled to Texas to purchase handguns from Fredric Mance, an Arlington, Texas-based FFL. App. 2a. All three individuals are members of petitioner Citizens Committee for the Right to Keep and Bear Arms. *Id.* "It is undisputed that the Hansons would be eligible under the laws of Texas and the District of Columbia to own and possess the handguns they selected from Mance's inventory." *Id.*

The Hansons each selected a handgun from Mance's inventory, but declined to incur the additional

[1] Citations to "R.p" refer to pages of the Fifth Circuit record on appeal.

costs associated with a D.C.-based transfer. Instead, the Hansons and Mance filled out the District's registration papers in each other's presence as required by District law, and agreed to complete the transaction in the event that the only obstacle to doing so—the federal interstate handgun transfer ban—were lifted. R.284-85; R.287-88; App. 3a.

C. Proceedings Below

1. Mance, the Hansons, and the Committee brought suit in the United States District Court for the Northern District of Texas, challenging the federal interstate handgun transfer ban on its face and as-applied to them on Second Amendment and Fifth Amendment equal protection grounds. The complaint initially targeted only 18 U.S.C. § 922(b)(3) and 27 C.F.R. § 478.99, which bar the interstate purchase transaction, prompting the government to argue that complete relief could not be had absent a challenge to 18 U.S.C. § 922(a)(3), which would bar the Hansons from bringing their Texas-acquired handguns home. Plaintiffs thus amended their complaint to encompass the latter section. The government moved to dismiss the amended complaint, and plaintiffs moved for summary judgment.

The district court denied the government's motion to dismiss, granted the plaintiffs' motion for summary judgment, and enjoined the challenged provisions.

The court began by rejecting the government's argument that the Hansons lacked standing because the

sales prohibition applied only to Mance. The government had, after all, conceded that the Hansons are injured in being barred from acquiring handguns from Mance. App. 82a-83a. Since the Hansons had standing, it followed that the Committee to which they belonged had associational standing. App. 83a-84a. And Mance, injured by being prohibited from selling handguns to his non-resident customers, could assert their constitutional interests in the sales. App. 84a-85a. When pressed at oral argument, the government abandoned its claim that Mance had nothing to fear by unlawfully selling handguns. App. 85a n.4.

Turning to the merits, the district court applied the familiar two-step framework by which courts first ask whether a challenged provision implicates Second Amendment rights and, if so, apply some form of means-ends scrutiny to resolve the claim. The court found no evidence of Framing Era thinking that would place interstate handgun sales outside the Second Amendment's scope. "Defendants have not presented, and the Court cannot find, any [pre-1909] evidence of longstanding interstate, geography-based, or residency-based firearm restrictions." App. 89a-90a. The court thus determined that the Second Amendment covers interstate handgun sales, and proceeded to a step-two analysis. App. 90a-91a.

At the second step, the district court rejected the government's argument that heightened scrutiny should not apply because the burden is allegedly insubstantial. Although some courts follow such an

approach, the Fifth Circuit was not apparently among them. App. 92a n.6. Moreover, as the D.C. Circuit withholds heightened scrutiny only if the challenged law is "longstanding," the prohibition's recent vintage sufficed to foreclose this path. App. 92a. Instead, the district court followed *Carey* v. *Pop. Servs. Int'l*, 431 U.S. 678, 689 (1977), and held that "[r]estricting the distribution channels of legal goods protected by the Constitution to a small fraction of the total number of possible retail outlets requires a compelling interest that is narrowly tailored." App. 93a.

Applying strict scrutiny, the district court held that the interstate handgun transfer ban is facially unconstitutional. App. 104a. The government relied only on Congressional findings from 1968, but "current burdens on constitutional rights must be justified by current needs." App. 100a (internal quotation marks omitted). It failed to account for the advent of modern background checks, incorporated into the federal Gun Control Act in 1993, and the creation of a better-tailored system for interstate long gun sales. The court also found that the ban was unconstitutional as applied to the plaintiffs, considering that their proposed transactions are fully legal under District of Columbia and Texas law. App. 104a-05a. And it found that the interstate handgun transfer ban would also be unconstitutional, on its face and as applied to plaintiffs, under intermediate scrutiny. App. 105a-08a. The district court also held that as a residency-based classification impinging on fundamental rights, the challenged scheme failed strict scrutiny under the Fifth Amendment Due

Process Clause's equal protection component. App. 108a-10a.

2. The government appealed its loss on the merits, but abandoned its standing arguments on appeal. Appellants' Br. at 10 n.5.[2] Over two years following oral argument, a fractured Fifth Circuit panel reversed, with Judge Owen separately concurring in her opinion for the panel. App. 44a-73a. Plaintiffs timely petitioned for en banc rehearing, prompting the remaining panel members (one judge had retired in the interim) to issue a revised panel opinion. App. 1a-43a.

a. The panel eschewed historical analysis. Because it would hold that the challenged provisions withstand strict scrutiny, the panel "assume[d], without deciding, that they are not 'longstanding regulatory measures' and are not 'presumptively lawful regulatory measures.'" App. 9a-10a (footnote omitted). It "also assume[d], without deciding, that the strict, rather than intermediate, standard of scrutiny is applicable." App. 10a (footnote omitted).[3]

---

[2] One week before oral argument, the panel nonetheless asked the parties to argue standing. *See* Clerk's Letter to Counsel, Dec. 31, 2015. Plaintiffs filed two supplemental letters addressing the issue. At argument, the government conceded that plaintiffs have standing. The panel opinion did not address the matter.

[3] The panel also "assume[d] . . . without deciding, that a facial challenge is presented," App. 10a (footnote omitted), yet found that plaintiffs "additionally" raised an as-applied challenge, App. 11a. The complaint specified both facial and as-applied claims, R.414, ¶36, as did the Appellees' Brief, at 53 ("even were the interstate handgun transfer ban constitutional on its face, Plaintiffs asserted, and the District Court approved of, an as-applied

The panel agreed that "current burdens on constitutional rights must be justified by current needs." App. 13a (internal quotation marks and footnote omitted). It acknowledged that FFLs cannot sell handguns to consumers without either contacting the national instant criminal background check system ("NICS") or, where applicable, relying on a state-issued permitting system. App. 14a. Nonetheless, it upheld the complete ban of interstate handgun sales because it is "unrealistic" that all FFLs "can become, and remain knowledgeable about" all state and local handgun laws throughout the United States. App. 15a.

"It is reasonable, however," for an FFL to "master and remain current on the firearms laws of [one] state." App. 17a.

The panel rejected the relevance of the government's experience with interstate long gun sales. First, it asserted that some states may regulate handguns more pervasively than they regulate other firearms. Second, it suggested that the federal government might as well also ban interstate long gun sales. Rather than view the long gun regime as an example of a less-restrictive alternative, it viewed the absence of a similar prohibition impacting long guns as evidence

---

challenge"). Among the revisions in its latter opinion, the panel abandoned a novel theory, challenged by petitioners on rehearing, that the regulations' purported facial validity barred consideration of their circumstances in an as-applied context. *See* App. 60a-61a.

that the handgun prohibition is a permissible half-measure. App. 18a-19a.

The panel then rejected an argument not made by petitioners: the notion that the federal government could compel states to inform FFLs whether a purchaser is qualified, or compel state officials to update their background check systems. App. 19a-20a.[4] The panel thus concluded that banning all interstate handgun sales is "the least restrictive means" of assuring compliance with state laws, that it leaves "ample access to handguns," and that delays inherent in in-state transfers are "de minimis." App. 20a.

Turning to petitioners' as-applied claims, the panel asserted that Mance could not be trusted to learn that the District of Columbia requires a registration certificate to transfer a firearm, and that Mance could neither verify a registration certificate with the District's police nor be expected to honor the District's ten day waiting period. App. 22a-23a.

Finally, the panel rejected petitioners' equal protection claim by declaring that the challenged prohibition "does not discriminate on the basis of residency." App. 25a. "[It] does not favor or disfavor residents of any particular state. Rather, it imposes the same restrictions on sellers and purchasers of firearms in each state and the District of Columbia." App. 26a. The panel did not

---

[4] Contrary to the panel's assertion, petitioners never advanced that argument; they disclaimed it. *See* Appellees' Br. at 52 ("Of course, this case does not challenge the refusal of any state to provide national access to its background check system").

acknowledge that the challenged laws treat handgun buyers differently based on their residence.

b. Judge Owen concurred in her opinion for the plurality. She began by referencing two decisions that had upheld convictions involving unlawful interstate handgun transactions. App. 28a-29a. In *United States* v. *Decastro*, 682 F.3d 160 (2d Cir. 2012), the Second Circuit refused to apply any level of heightened scrutiny where an individual brought home a handgun acquired out-of-state in violation of state law and 18 U.S.C. § 922(a)(3). That court reasoned that the law did not substantially burden Second Amendment rights. And in *United States* v. *Focia*, 869 F.3d 1269 (11th Cir. 2007), the court upheld a conviction under 18 U.S.C. § 922(a)(5), a law not here at issue, for the selling of handguns by unlicensed individuals.

Departing from the plurality's assumptions, Judge Owen addressed the government's historical arguments at some length, and found them "not well-taken." App. 29a. Rejecting the notion that Founding-Era thinking is irrelevant to the Second Amendment's scope, App. 29a-31a, Judge Owen explained that "even if it is appropriate to consider only 20th century laws," an in-state sales requirement was neither historically traditional nor even common. App. 31a-32a. None of the statutes the government identified prohibited interstate firearm sales. App. 32a-33a.

Judge Owen also offered that rational basis review is unavailable in Second Amendment cases, App. 34a-35a, and that strict scrutiny may be available even

where a regulation falls short of enacting a complete ban, App. 36a. She stressed that the challenged provisions are not responsible for the lack of handgun retailers in Washington, and do not require FFLs to charge money for their transfer services. App. 36a-37a. Offering that this Court "held that the law at issue in *Heller* was unconstitutional under both strict and intermediate scrutiny, it is prudent first to apply strict scrutiny," although "it is unnecessary to resolve whether strict scrutiny is *required*." App. 37a.

Judge Owen next offered that allowing sales to non-residents approved by their home states to purchase handguns would not eliminate an FFL's need to follow other state laws. App. 37a-40a. But she added that "[t]he district court's reasoning is thoughtful, and it is correct in many respects." App. 40a. While she opined that the district court's "conclusion is not entirely supported by the record," App. 41a, Judge Owen also found that "not all of the Government's arguments are well-taken," App. 42a. Judge Owen concluded by citing to various statistics supporting the government's interest in regulating handguns. App. 42a-43a.

3. The Fifth Circuit denied the petition for rehearing en banc by a vote of 8-7. Judge Higginson concurred in that decision, while all seven dissenting judges joined dissenting opinions by Judges Elrod, Willett, and Ho.

a. Judge Higginson asserted that the panel "gave petitioners the benefit of the doubt at every step," in assuming that the challenged laws are not

presumptively lawful and in purportedly applying strict scrutiny. App. 114a. "In my view, the panel opinion needed not concede either step." *Id.* (citations omitted). Judge Higginson otherwise echoed the panel opinion, and rejected the dissentals' call for deciding the case on an historical and textual basis, rather than by using tiered scrutiny. App. 115a-19a.

b. Judge Elrod would have evaluated 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." App. 119a (citing *Heller*, *supra*, and *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010)). She noted that the two-step Second Amendment approach is itself historically rooted. App. 119a-20a. As required by the first-step analysis, petitioners and amici had "argued that the regulations at issue cannot be characterized as longstanding," a point that the panel plurality assumed and that Judge Owen determined to be correct. App. 122a-23a n.3. Judge Elrod offered that nothing more was required to strike down the prohibition.

c. Judge Willett lamented the courts' pervasive hostility to Second Amendment rights, which are no less fundamental, enduring, and enumerated than other rights. App. 123a-24a. Given the "undeniably weighty" question of whether the interstate handgun transfer ban violates the Second Amendment, and the methodological conflicts raised by the case, Judge Willett observed that the case "hits the en banc bull's-eye,

posing 'question[s] of exceptional importance.'" App. 126a (footnote omitted).

d. Judge Ho explained why the interstate handgun transfer ban fails strict scrutiny. "[T]he district court deserves recognition for standing against the tide" that relegates the Second Amendment to "second class" status. App. 129a.

"The ban on interstate handgun sales demonstrably burdens the ability of countless law-abiding citizens like the Hansons to obtain a handgun," imposing both a "*de facto* waiting period," and a "*de facto* tax on interstate handgun sales, in the form of shipping costs and transfer fees." App. 130a-31a. Judge Ho noted that the government has no interest in banning all interstate handgun sales, only those that would violate state law. As a prophylactic measure, the ban is especially suspect under strict scrutiny. App. 133a-34a.

Judge Ho noted that regulatory complexity does not justify prophylactic rules under strict scrutiny. App. 135a. At any rate, FFLs could choose to learn and comply with the laws of particular states whose customers they wish to serve. "A Texas dealer near the Oklahoma border might very well be eager to master the laws of both Texas and Oklahoma." App. 136a. "The Government presents no evidence that gun dealers cannot comply with the laws of multiple states." App. 137a.

"[T]here 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.* Judge Ho offered that states may regulate in-state and out-of-state dealers identically. App. 137a-38a. "In addition, some states require their residents to obtain a police pre-approval certification before buying a handgun. If in-state dealers can use police pre-approval to ensure compliance with state law, so can out-of-state dealers." App. 138a (citing, inter alia, D.C. Code § 7-2502.06(a)). Judge Ho further noted that 36 states rely on NICS exclusively to vindicate their background check interests. App. 139a. And he pointed out that the interstate handgun transfer ban is underinclusive, as the federal government has an interest in ensuring compliance with rifle and shotgun laws as well, yet it trusts FFLs to comply with all state laws pertaining to long gun sales. App. 141a-43a.

Judge Ho neatly catalogued the prohibition's reasons for failing strict scrutiny:

> [A] categorical ban is precisely the opposite of a narrowly tailored regulation. It applies to all citizens, not just dangerous persons. Instead of requiring citizens to comply with state law, it forbids them from even trying. Nor has the Government demonstrated why it needs a categorical ban to ensure compliance with state handgun laws. Put simply, the way to require compliance with state handgun laws is to require compliance with state handgun laws.

App. 143a.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts Are Profoundly Divided As To Whether The Second Amendment Secures Any Meaningful Rights.

Judge Elrod offered a technically sound, but charitable description of the Second Amendment disputes dividing the lower federal courts: "Disagreement abounds . . . on a crucial inquiry: What doctrinal test applies to laws burdening the Second Amendment—strict scrutiny, intermediate scrutiny, or some other evaluative framework altogether?" App. 120a (citations omitted).

The circuits are indeed intractably split as to whether and when Second Amendment cases require interest-balancing; whether heightened scrutiny, in any form, should be required in Second Amendment cases and if so, when; and how heightened scrutiny functions in the right-to-arms context. But at bottom, these conflicts mask the more fundamental dispute: whether the Second Amendment is optional.

According to this Court, it is not. But then, as everyone well knows, this Court has not much policed adherence to its word on the subject. And so "the passage of time has seen *Heller*'s legacy shrink to the point that it may soon be regarded as mostly symbolic." Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921, 962-63 (2016). Six years have passed since observers could persuasively document the fact that Second Amendment decisions tend to reflect Justice Breyer's dissent, not *Heller*'s majority opinion.

Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703 (2012). "The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message." *Silvester* v. *Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

These circuit splits require resolution along the theme that the Second Amendment right "is *really worth* insisting upon." *Heller*, 554 U.S. at 634. In many federal courts—and especially in the circuits that encompass the strongest hostility to Second Amendment rights—attorneys cannot responsibly advise clients that they have a meaningful chance of prevailing on Second Amendment claims. At least in the Second, Fourth, and Ninth Circuits, and anywhere else depending on the panel composition, the odds are no higher than they were in 2007.

To start, most circuits at least proclaim that heightened scrutiny is required where Second Amendment rights are implicated. But Judges Owen and Higginson both endorsed the Second Circuit's decision in *Decastro*, which held that "we do not read [*Heller*] to mandate" heightened scrutiny in all cases. *Decastro*, 682 F.3d at 166. "Rather, heightened scrutiny is triggered *only* by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a *substantial* burden on [Second Amendment rights]." *Id.* (emphasis added). The Ninth Circuit has recently climbed aboard this train, holding that a Second Amendment claim is not stated unless people are

"*meaningfully* constrained" or "inhibit[ed]" from accessing the right, or "that [an] ordinance *actually or really* burdens" Second Amendment rights. *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670, 680 & n.14 (9th Cir. 2017) (en banc) (citations omitted) (emphasis added).

In other words, if a judge feels a restriction is no big deal, the government need not justify it. For example, the Second Circuit suggested that charging over $100 a year to possess a handgun merited *no* constitutional scrutiny because the tax was not a "marginal, incremental or even appreciable restraint" on Second Amendment rights, especially where it was not specifically attacked as "*prohibitively* expensive." *Kwong* v. *Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013) (citation and footnote omitted) (emphasis added). Would that court employ such reasoning to excuse the government from justifying a $100 abortion tax, or a $100 fee to obtain voter identification?

The threshold test allows courts to avert otherwise guaranteed government losses. In *Teixeira*, zoning authorities conclusively determined that the plaintiffs' proposed gun store should be approved, but the county's political leaders summarily banned it anyway. Given its own study, the county could never have carried its burden to show that banning the store advanced any regulatory purpose. So the en banc Ninth Circuit simply declared, at the pleading stage, that no one would miss the store.

The Seventh Circuit explicitly rejects the threshold substantial burden test. "In *McDonald* the Court

cautioned against treating the Second Amendment as a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' The City's proposed 'substantial burden' test as a gateway to heightened scrutiny does exactly that." *Ezell* v. *City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) (citation omitted). Other circuits apparently foreclose a threshold inquiry by requiring some form of purportedly heightened scrutiny. *See*, *e.g.*, *Tyler* v. *Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686 (6th Cir. 2016) (en banc) ("unless the conduct at issue is categorically unprotected, the government bears the burden of justifying the constitutionality of the law under a heightened form of scrutiny"); *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (this Court "would apply some form of heightened constitutional scrutiny if a historical evaluation did not end the matter").

But then, the Ninth Circuit had also repeatedly declared its fealty to heightened scrutiny, reducing the standard of review to no lower than intermediate where the burden is allegedly insubstantial—until, in *Teixeira*, that would have meant vindicating Second Amendment rights. That court's adoption of the threshold test, enabling rational basis review of Second Amendment claims, overruled three precedents mandating heightened scrutiny. *See Silvester* v. *Harris*, 843 F.3d 816, 827 (9th Cir. 2016) ("we apply intermediate scrutiny when a challenged regulation does not place a substantial burden on Second Amendment rights"); *Jackson* v. *City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) ("if a challenged law . . .

does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny"); *United States* v. *Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) ("some sort of heightened scrutiny must apply"). The Fifth Circuit's endorsement below of *Decastro*'s threshold test, and its characterization of the burdens facing handgun buyers as "de minimis," App. 20a, cast serious doubt on its commitment to apply heightened scrutiny in Second Amendment cases, even (as it did here) in name only.

Courts are also divided as to whether and when to utilize interest-balancing. Some follow this Court's example in *Heller*, and hold that a law is unconstitutional if it effects a "total ban" or "destruction" of a Second Amendment right. *Wrenn* v. *District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017). "It's appropriate to strike down such 'total ban[s]' without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right." *Id.* at 665 (citation omitted). Others are divided as to whether they may ever depart from interest-balancing. *Compare Binderup* v. *Attorney Gen'l*, 836 F.3d 336, 344 (3d Cir. 2016) (en banc) *with id.* at 363-64 (Hardiman, J., concurring). And some judges, like the seven dissenters below, would dispense with tiered scrutiny altogether in favor of a text- and history-based approach. App. 121a-22a; *see also Heller* v. *District of Columbia*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

This Court should significantly cabin the lower courts' use of interest-balancing in Second Amendment

cases, if not abolish the practice altogether. On rare occasions, heightened scrutiny proves meaningful, as courts engage in constitutional adjudication rather than reflexive deference to regulatory assertions. *See*, *e.g.*, *Ezell*, *supra*, 846 F.3d 888. But for the most part, as exemplified below, the past ten years have proven Justice Thomas's observation that there exists a "tendency to relax purportedly higher standards of review for less-preferred rights." *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) (citations omitted). The use of rational basis review, masquerading as some form of heightened scrutiny, "is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right." *Silvester*, 138 S. Ct. at 945 (Thomas, J., dissenting from denial of certiorari).

For example, the Second Circuit explained that New York's triannual $340 handgun tax "easily survives 'intermediate scrutiny' . . . because the fee is designed to recover the costs attendant to the licensing scheme." *Kwong*, 723 F.3d at 168-69 (internal quotation marks omitted). The Ninth Circuit employed "intermediate scrutiny" to uphold California's prohibition of innumerable handguns, including all semiautomatic handguns introduced since 2013, for failing to include design features that are either largely rejected by the marketplace or nonexistent. *Pena* v. *Lindley*, 898 F.3d 969 (9th Cir. 2018), *certiorari petition forthcoming*, *see* No. 18A-178.

And various courts have used "intermediate scrutiny" to balance not Second Amendment rights against regulatory interests, but the various interests weighing upon the question of whether the right to bear arms should exist at all, as though they were presiding over a constitutional convention. Deferring to governmental claims that the right is intolerably dangerous, courts have used "intermediate scrutiny" to sanction rationing the right as a rare administrative privilege. *See*, *e.g.*, *Woollard* v. *Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky* v. *Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). These decisions conflict not only with those using heightened scrutiny in the traditional sense, weighing the right against regulatory interests, but with the D.C. Circuit's decision in *Wrenn*, *supra*, which resolved the same question without resort to interest-balancing.

This Court has various ways of resolving these conflicts. It may (again) dispense with interest-balancing altogether. It may direct that the two-step approach should be the last resort, not the first, deployed only where text and history do not resolve the question. It should overrule the threshold test that increasingly tempts courts to apply rational basis review in Second Amendment cases. It can clarify that any balancing is between defined rights and regulatory interests, and not a balancing of various interests informing whether the right exists. It can better define heightened scrutiny, making it something more than a set of malleable adjectives.

But it is not too soon for this Court to resolve the essential dispute as to whether *Heller* and *McDonald* remain good law.

II. This Case Presents Recurring Issues Of Significant And Immediate National Importance.

This Court's decade of Second Amendment silence casts a cloud of uncertainty over every case addressing the right to keep and bear arms. If the Second Amendment question was sufficiently important to address in *Heller*, it has only become more so now that the Nation expects—but does not see—the implementation of this fundamental, enumerated right.

The recurring methodological disputes, and the larger question of the Second Amendment's continuing vitality, arise here in the context of an issue that is "undeniably weighty: Does the federal criminalization of interstate handgun sales offend We the People's 'inherent right of self-defense?' " App. 124a (footnote omitted). This issue, too, is specifically recurring—not just in the context of the occasional prosecution for unlawful interstate handgun transfers, but every single time that a consumer anywhere in the United States buys a handgun without the benefit of a national retail marketplace improving choice and price competition. The issue most pointedly recurs every single time a Washington, D.C. resident, seeking to make real this Court's decision in *Heller*, absorbs the delays, inconvenience, shipping costs, and transfer fees inherent in the

pointless use of an in-District middleman FFL, in derogation of the Police Chief's considered judgment to allow interstate handgun sales.

As the seven dissenters below determined, this case "pos[es] questions of exceptional importance." App. 126a (internal brackets and footnote omitted). It warrants this Court's review.

III. The Lower Court Seriously Erred In Upholding The Abolition Of A National Retail Handgun Market.

Regardless of the methodology employed, this should not have been a difficult case. If, as Judge Elrod argued, the prohibition of interstate handgun sales should be evaluated on the basis of text and history, the case is easy enough: Not one of the seventeen judges who passed on the matter could explain how prohibiting all interstate handgun sales reflects a traditional understanding of the right to arms. Writing for the panel plurality, Judge Owen simply assumed that the challenged scheme lacks historical pedigree. Writing for herself, Judge Owen joined the district court in demolishing the claim that such a restriction might be historically rooted. The government cited an impressive array of regulations in support of its historical argument, but they all suffered from two flaws: none of them predated the 20th century—and none of them had any connection to banning interstate handgun sales.

As Judge Ho and the district court explained, the interstate handgun sales ban cannot survive any form of heightened scrutiny. The government simply lacks any anti-circumvention interest when it comes to jurisdictions, including the District of Columbia, that authorize interstate sales—especially where the sales are police-approved. Considering the millions of Americans who live under such legal regimes, abolishing the entire national retail market to prevent local-law circumvention cannot be narrowly, closely, or even remotely tailored to the perceived harm. The prohibition makes no sense as applied to Mance and the Hansons, whose transactions are perfectly legal under their respective state and local laws, especially considering the severe burdens that the interstate sales ban imposes on District residents.

The panel's two-and-a-half-year struggle to issue its final, fractured opinion was not worth the wait. The opinion rests on the incredible assertion that FFLs cannot be expected to comply with the handgun laws of more than one state. "FFLs are not engaged in the practice of law, and we do not expect even an attorney in one state to master the laws of 49 other states in a particular area." App. 16a-17a. But attorneys and other professionals are allowed to practice in more than one state. "[C]ourts have generally rejected the notion that citizens are incapable of learning the laws of other states—or that such inability would justify otherwise unconstitutional laws." App. 135a (citations omitted).

Allowing interstate sales would not require an FFL to adopt the burden of complying with a state's laws if the FFL declines to serve that state's residents. For its part, the ATF already instructs FFLs to "contact State and local authorities before making a decision" to sell a firearm "if appropriate." ATF Special Message, *supra*.

Contrary to the panel's suggestion, there is nothing especially difficult about handgun laws relative to long gun laws. The latter are often more complex. Few laws have vexed courts as much as regulations seeking to ban particular rifles as "assault weapons." *See, e.g.*, *Peoples Rights Org.* v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (striking down five definitions of "assault weapon" as unconstitutionally vague); *Springfield Armory* v. *City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994) (rifle "ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge"); *Harrott* v. *Cnty. of Kings*, 25 Cal.4th 1138, 1153, 25 P.3d 649, 658-59 (2001) (adopting saving construction of California Assault Weapons Control Act provisions raising "serious and doubtful constitutional questions as applied to ordinary citizens"). Washington, D.C.'s law is relatively simple: Mance can lawfully give the Hansons any firearm—rifle, shotgun, or handgun—identified in a D.C. firearms registration certificate.

Faced with the fact that FFLs successfully address circumvention concerns with respect to long gun sales, the panel majority cited *Williams-Yulee* v. *Florida Bar*,

135 S. Ct. 1656, 1668 (2015) for the proposition that "[a] State need not address all aspects of a problem in one fell swoop." App. 19a. The panel's unstated but necessary underlying assumption is that petitioners should be thankful that Congress has not abolished *all* interstate firearm sales, which are the "problem."

Whatever criticism may legitimately be directed at *Williams-Yulee*, *see*, *e.g.*, App. 141a-43a, the panel misread that opinion. *Williams-Yulee* does not stand for the proposition that every regulation is constitutional so long as a more oppressive regulation might be imagined. Rather, *Williams-Yulee* suggests that a half-measure may be acceptable in lieu of an equally-acceptable full-measure. A complete ban on interstate firearm sales would also be unconstitutional, because the radically less-restrictive alternative of allowing FFLs to follow state and local laws would still be present. The fact that Congress allows the partial demonstration of a less-restrictive alternative *confirms* the alternative's viability; it does not suddenly constitutionalize a broader unconstitutional regime.[5]

The panel's remaining arguments are equally unpersuasive. True, "the federal government cannot compel state law enforcement officials to provide, and timely update, information as to whether a particular person is authorized under state and local laws to

[5] Under the panel's misreading of *Williams-Yulee*, a challenge to the prohibition of all interstate firearm sales would be successfully met with the argument that Congress could have banned all firearm sales.

purchase and possess a particular handgun," App. 19a-20a (footnote omitted), but how is that relevant here? If state law enforcement officials are satisfied that an FFL has all the necessary information to proceed with a sale to its resident, why should Congress override that judgment—ostensibly, to advance the state's interests?

The panel found that current handgun access is "ample" and that the delays inherent are "de minimis." App. 20a. Would it have made that determination if a state had banned interstate contraceptive sales?

> The burden [would be], of course, not as great as that under a total ban on distribution. Nevertheless, the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition.

Carey, 431 U.S. at 689 (citation and footnotes omitted). Nor was it logical to suppose that shippers and in-state FFLs would provide their services free of charge. The harm may be particularly acute in the District, but every handgun sale is burdened by the lack of a national retail market.

The panel's unfair conjecture that Mance might not follow District law undermines the rationale of the federal Gun Control Act, which depends utterly on the trust it places in FFLs to follow the law. If FFLs cannot

be trusted to follow the law, why are they provided their function? The hypothetical risk that FFLs engaging in intra- or interstate sales might be fooled with fraudulent D.C. firearms registration certificates, or handgun purchase licenses from Hawaii, Michigan, North Carolina, etc., must have occurred to licensing officials in the various jurisdictions who nonetheless issue such documents. But there is no reason to suppose that the District's police department would not verify a firearm registration certificate's validity for any FFL about to transfer *any* firearm to a District resident.

Finally, the panel erred in reversing petitioners' judgment on their equal protection claim. That the law applies to everyone equally just means that everyone is deprived of equal protection when classified as non-residents. Everyone is a non-resident somewhere, but residency-based classifications, especially when used to restrict the exercise of fundamental rights, warrant strict scrutiny.

IV. This Case Presents An Excellent Vehicle To Resolve The Lower Courts' Second Amendment Conflicts.

The revolt against *Heller* has entered its second decade. The divisions are stark. There is nothing to be gained by further percolation in the lower courts.

Ten years of rational basis masquerading as intermediate scrutiny are now turning into rational basis masquerading as strict scrutiny—when it does not

appear undisguised, on judicial assertions that Second Amendment burdens are insignificant. Only rarely do heightened scrutiny or categorical text-and-history analyses seriously test compliance with the Second Amendment. The damage to confidence in the rule of law itself, not merely to Second Amendment rights, is significant. The public may not always be conversant in the finer academic points of constitutional law, but it knows when rights are illusory. And in time, "watering [strict scrutiny] down here w[ill] subvert its rigor in the other fields in which it is applied." *Employment Div., Dept. of Human Resources of Or.* v. *Smith*, 494 U.S. 872, 888 (1990).

This case is well-constructed to address these concerns. Jurisdiction is straightforward—Mance and the Hansons are all directly regulated, and the government confirmed that their fear of prosecution is well-founded. Owing to the Fifth Circuit's two-step formulation, the parties exhaustively litigated the challenged laws' historical roots, and so this Court could decide the case on those grounds alone or proceed to means-ends analysis. Six judges have authored seven opinions at all stages of the case—one at the district court, two at the panel stage, and four on rehearing—leaving nothing unturned. The time is right for this Court to resolve this matter, and the various significant conflicts it reflects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085
alan@gurapllc.com

November 19, 2018