NO. 18-663

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 Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

This case involves the prohibition on the sale of handguns by law-abiding and licensed retailers to law-abiding citizens who do not reside in the same state as the licensed retailer. The Court should grant the petition to address whether 18 U.S.C. §§ 922(a)(3), (a)(5) and (b)(3), and 27 C.F.R. § 478.99(a) (together, the "interstate handgun sales ban") impermissibly burden the Second Amendment rights of law-abiding citizens. As the trade association for the firearms, ammunition, hunting, and shooting sports industry, *Amicus* The National Shooting Sports Foundation, Inc. ("NSSF") is deeply concerned with this case. As explained in the attached brief, the full realization of the fundamental right embodied in the Second Amendment to keep and bear arms, including handguns, requires the recognition of a protected right for law-abiding citizens to acquire such handguns. Since this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010), however, the lower courts have failed to give Second Amendment rights full standing within the Constitution. That relegation of the Second Amendment to the "second class" status it was afforded prior to *Heller* continued in the decision below, where the Fifth Circuit stretched to justify the burden imposed on law-abiding citizens by the interstate handgun sales ban. *Amicus*'s participation will aid the Court by addressing more broadly the existing regulatory framework that demonstrates why the interstate handgun sales

ban is not narrowly tailored to the professed government compelling interest.

Through counsel, *Amicus* notified the Office of the Solicitor General by emailed letter on December 10, 2018, of its request for consent to submit this *amicus* brief. Petitioners separately provided their consent to the filing of this brief by email the same day. Respondents have not responded to *Amicus* counsel's letter, either to consent or object. Therefore, pursuant to Supreme Court Rule 37.2(b), *Amicus* respectfully moves the Court for leave to file the attached *amicus* brief in support of Petitioners.

NSSF is a Connecticut non-profit tax-exempt corporation with several thousand member-firearms manufacturers, distributors, and retailers; sportsmen's organizations; shooting ranges; gun clubs, and publishers. With a mission to promote, protect and preserve hunting and shooting sports, NSSF provides trusted leadership in addressing industry challenges; advances participation in and understanding of hunting and the shooting sports; reaffirms and strengthens its members' commitment to the safe and responsible use of their products; and promotes a political environment that is supportive of America's traditional hunting and shooting sports heritage and firearms freedoms. As the guardian of the industry that supports our nation's rich hunting and shooting traditions, NSSF believes that lawful commerce in firearms and firearms-related products is and must be protected—and that, in particular, no law or regulation should unreasonably limit the lawful transfer of firearms to law-abiding adults who have a constitutional right guaranteed by the Second Amendment to the United

States Constitution to purchase, own, possess and use such firearms. NSSF has regularly advocated in federal and state courts with respect to issues that affect its membership.

Amicus is well-suited to address the importance of commerce related to arms to the exercise of the Second Amendment right and the regulatory framework within which licensed retailers and manufacturers operate, including the changes in the law and regulatory system implemented by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, as well as changes since, particularly the National Instant Criminal Background Check System put in place as part of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). *Amicus* is also able to address the unsupported assumption by the government that a licensed retailer can sell long guns consistent with the laws of its own state and the laws of the buyer's home state, but cannot do the same with respect to handguns. *Amicus* therefore respectfully requests leave to file the attached *amicus* brief urging this Court to grant the petition.

Respectfully submitted,

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DECEMBER 21, 2018

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BRIEF FOR *AMICUS CURIAE* THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the National Shooting Sports Foundation, Inc. ("NSSF"), is the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, NSSF is a Connecticut non-profit tax-exempt corporation with several thousand member-firearms manufacturers, distributors, and retailers; sportsmen's organizations; shooting ranges; gun clubs, and publishers. NSSF's mission is to promote, protect and preserve hunting and shooting sports. NSSF provides trusted leadership in addressing industry challenges; advances participation in and understanding of hunting and the shooting sports; reaffirms and strengthens its members' commitment to the safe and responsible use of their products; and promotes a political environment that is supportive of America's traditional hunting and shooting sports heritage and firearms freedoms. As the guardian of the industry that supports our nation's rich hunting and shooting traditions, NSSF believes that lawful commerce in firearms and firearms-related products is and must be protected—and that, in particular, no

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no party, party's counsel or any person other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission.

law or regulation should unreasonably limit the lawful transfer of firearms to law-abiding adults who have a constitutional right guaranteed by the Second Amendment to the United States Constitution to purchase, own, possess and use such firearms.

NSSF's interest in this action derives principally from the fact that its firearms manufacturer, distributor, and retailer members provide for the lawful commerce in firearms that makes the exercise of Second Amendment rights possible, and include the Federal Firearms Licensees ("FFLs" or "licensed retailers") who are currently prohibited by the challenged statutes and regulations from selling handguns directly to qualified citizens who reside outside the states where the licensed retailers are located. Petitioners have ably demonstrated in the Petition for Certiorari that consideration by this Court is warranted to resolve the widespread confusion among the lower courts regarding the framework for analyzing Second Amendment challenges and to reaffirm the message from the Court's precedent that has apparently been lost—that the rights guaranteed by the Second Amendment are fundamental and deserving of as much protection as any other constitutional rights routinely upheld by the lower courts.

NSSF submits this brief to emphasize the important shift to today's understanding of the protections guaranteed by the Second Amendment and how those guarantees must extend to the lawful sale of protected firearms. NSSF also seeks to expand upon the discussion of today's FFL system and instant background check, which address the concerns raised in 1968 about interstate handgun sales much more directly without stepping on the constitutional rights of law-

abiding, qualified handgun buyers and the licensed retailers who seek to sell handguns to them. Against this backdrop, NSSF believes that Petitioners have demonstrated that this case is an excellent vehicle for the Court to address the confusion among lower courts as to the proper analytical framework for reviewing regulations that burden the fundamental rights guaranteed by the Second Amendment.

SUMMARY OF ARGUMENT

Until this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Congress and the lower courts in this country approached the Second Amendment's right to keep and bear arms not as an individual right worthy of full constitutional protection, but as a privilege to be dispensed by the government under constraints designed to discourage rather than enhance the exercise of those rights. In *Heller*, the Court held that a ban on handguns could not be squared with the constitutional protection accorded an individual's right to own, possess and use firearms, including handguns, for self-defense. The Court later characterized the right to keep and bear arms as "among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). Because the average citizen cannot manufacture firearms, the full realization of the rights guaranteed by the Second Amendment must necessarily carry with it access to a market in which a qualified purchaser can acquire such arms, including handguns.

In this case, a licensed and law-abiding firearms retailer in Texas was precluded from selling handguns to law-abiding citizens resident in the District of Columbia by 18 U.S.C. §§ 922(a)(3), (a)(5) and (b)(3), and 27 C.F.R. § 478.99(a) (together, the "interstate handgun sales ban"). While the Fifth Circuit purported to apply the strict standard of scrutiny, App.10a, it nonetheless proceeded to abandon any real requirement that the interstate handgun sales ban be "narrowly tailored" to further the government's compelling interest. Instead, the court indulged the government's speculation regarding the assumed inability of FFLs to comply with the laws of multiple states related to handguns even in the face of the irrefutable fact that the federal regulatory scheme assumes those very same FFLs can lawfully maneuver multiple state laws with respect to the sale of long guns. App.15a-19a.

The court's conclusions ultimately reflect the reality that the lower courts have lost their way in dealing with the Second Amendment, reverting to a pre-*Heller* approach that does not give Second Amendment rights full effect, especially when it comes to handguns. Instead, courts across the country continue to limit the ability to exercise this particular constitutional right based on the courts' policy decisions regarding what they view as an unwise constitutional right. That simply cannot be how our government—defined and structured by the Constitution—must function. And it stands in stark contrast to how courts routinely approach other individual rights protected by the Constitution.

The interstate handgun sales ban unquestionably encroaches on the core right to keep and bear arms,

because it limits the ability of law-abiding citizens to obtain, and licensed retailers to sell, the very firearms that are the subject of the constitutional protection, restricting individuals' exercise of this fundamental constitutional right to the state where they live. This restriction is not narrowly tailored, and none of the purported justifications for the interstate handgun sales ban meet the strict standard of scrutiny purportedly applied by the Fifth Circuit. The Court should accept the Petition for Certiorari in order to reaffirm the principle that has been lost since *Heller* and *McDonald*—that the Second Amendment's protection for individuals to keep and bear arms is a fundamental right due full respect and protection by the courts of this country.

ARGUMENT

The action below challenged the interstate handgun sales ban, encompassed within 18 U.S.C. §§ 922 (a)(3), (a)(5) and (b)(3), and 27 C.F.R. § 478.99(a), which prohibits licensed retailers from selling and transferring handguns to legally qualified buyers simply because they do not reside in the same state as where the FFL does business. The interstate handgun sales ban unreasonably infringes upon the Second Amendment rights of individuals who are otherwise qualified to purchase handguns and violates their Fifth Amendment right to equal protection under the law.

I. THE SECOND AMENDMENT GUARANTEE OF THE RIGHT OF LAW-ABIDING CITIZENS TO KEEP AND BEAR HANDGUNS FOR SELF-DEFENSE MUST INCORPORATE THE RIGHT OF QUALIFIED PURCHASERS TO ACQUIRE THOSE HANDGUNS

The Second Amendment to the United States Constitution preserves "the right of the people to keep and bear Arms" and declares that this right "shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court made abundantly clear that a ban on the possession of handguns—an "entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]"—runs afoul of this constitutional provision. 554 U.S. at 628. And in extending the Second Amendment's protection from governmental infringement to the states under the Fourteenth Amendment, the Court found it "clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35. Thus, some restrictions on the scope consistent with how the right to keep and bear arms was understood when adopted may still be constitutional, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places

such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. While restrictions with founding-era counterparts could be "presumptively lawful," *id.* at 627 n.26, no such laws or regulations imposing interstate restrictions have been identified here. Indeed, the earliest law referenced by Respondents was from 1909, and even that 20th Century law was not a restriction on interstate purchases, but rather a provision of West Virginia law requiring a state license to possess firearms. *See Mance v. Holder*, 74 F. Supp. 3d 795, 805 & n.5 (N.D. Tex. 2015), *rev'd and vacated sub nom. Mance v. Sessions*, 880 F.3d 183 (5th Cir. 2018), *withdrawn and superseded on denial of reh'g en banc*, 896 F.3d 699 (5th Cir. 2018), and *rev'd and vacated sub nom. Mance v. Sessions*, 896 F.3d 699 (5th Cir. 2018). Based on this, the Fifth Circuit assumed without deciding that the interstate handgun sales ban was not comprised of "longstanding regulatory measures" that might have been presumptively valid under *Heller*. App.10a.

"Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("*Ezell I*"). Moreover, laws representing "'serious encroachments' on 'important corollar[ies] to the meaningful exercise of the core right to possess firearms for self-defense' are substantial burdens that deserve more stringent scrutiny than intermediate scrutiny." *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 938 (N.D. Ill. 2014) ("*IAFR*")

(quoting *Ezell I*, 651 F.3d at 708). The Seventh Circuit characterized this showing as "a strong form of intermediate scrutiny" requiring "a close fit" between the restriction and the public interests it purportedly serves, and that the public interests "are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) (quoting *Ezell I*, 651 F.3d at 708-09).

Of particular importance to NSSF's constituents—in particular the licensed retailers across the country whose business is the lawful commerce in firearms and ammunition—is the basic principle that the constitutionally protected right to possess and use a handgun is meaningless absent the right to purchase or otherwise acquire a handgun. The Seventh Circuit recognized a similar link with respect to range training, holding that "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell I*, 651 F.3d at 704; *see also Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (finding right to possess firearms for protection includes right "to obtain the bullets necessary to use them"); *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010) (recognizing that a law "prohibiting the commercial sale of firearms" is "a result [that] would be untenable under *Heller*").

Consistent with the recognition of the inherent link between the right to keep and bear arms and the right to acquire those arms, a district court struck

down the City of Chicago's municipal ordinance, adopted following this Court's decision in *McDonald*, banning the sale of firearms within the city. *IAFR*, 961 F. Supp. 2d at 946. In so ruling, the court found that the ban interfered with what the court characterized as "the most fundamental prerequisite of legal gun ownership—that of simple acquisition." *Id.* at 938 (emphasis in original).

There can be no serious argument that banning the purchase of items whose possession and use is constitutionally protected interferes with the exercise of the constitutional right. For example, the Court has recognized that "[r]estrictions on the distribution of contraceptives clearly burden the freedom to make [constitutionally protected decisions in matters of childbearing]." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977). Thus, "[l]imiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so." *Id.* at 689. This approach is consistent with the Court's prior ruling in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court recognized that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . ." *Id.* at 482. As the Court stated, "[w]ithout those peripheral rights the specific rights would be less secure." *Id.* at 482-83.

Based on these decisions, the Fifth Circuit has likewise recognized that restrictions on commercial transactions necessary for the exercise of constitutionally protected rights are burdens on the exercise of those rights:

> [W]e hold that the Texas law burdens this constitutional right [to engage in private intimate conduct of his or her choosing]. An individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right.

Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008). The court recognized that "restricting commercial transactions" can—and in that case did—impose unconstitutional burdens on the exercise of fundamental constitutional rights. *Id.*

Respect for the individual rights guaranteed by the Second Amendment demands that the same approach apply here, and that the commercial transactions in which NSSF's members engage are entitled to constitutional protection under the Second Amendment.

II. THE INTERSTATE HANDGUN SALES BAN IS AN UNCONSTITUTIONAL INTERFERENCE WITH THE RIGHTS GUARANTEED BY THE SECOND AMENDMENT

While the Court of Appeals cloaked its discussion in the cover of the strict scrutiny standard, its analysis reflects "a distressing trend: the treatment of the Second Amendment as a disfavored right." *Peruta v. Cal.*, 137 S.Ct. 1995, 1999, 198 L.Ed.2d 746 (2017)

(Thomas, J., dissenting from denial of certiorari). Indeed, beyond just this case, the lower courts since 2010 have almost uniformly sought to relegate the Second Amendment to a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald*, 561 U.S. at 780, despite this Court's direction that the Second Amendment protects a fundamental right that may not be "singled out for special—and specially unfavorable—treatment," *id.* at 778-79. *See also Peruta*, 137 S.Ct. at 1999 (Thomas, J., dissenting from denial of certiorari) ("The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights.").

The "strict scrutiny" approach used by the Fifth Circuit with respect to the Second Amendment stands in sharp contrast to how that standard is applied when invoked with respect to other fundamental constitutional rights, such as the freedom of speech. For example, earlier this year, the Court reviewed a content-based requirement in California for notice to be given by licensed family planning facilities. The Court noted that "[a]s a general matter, such laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371, 201 L.Ed.2d 835 (2018) (quoting *Reed v. Town of Gilbert*, 576 U.S. ___, ___, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015)). In reviewing whether the regulation at issue was justified by the state's interest in providing women information about state-sponsored services, the Court concluded it could

not even pass intermediate scrutiny, in part because it was "wildly underinclusive," excluding a wide range of clinics from the notice requirement. *Id.*, 138 S.Ct. at 2375-76. The Court also found that the state could inform low-income women without burdening clinics with unwanted speech. *Id.* at 2376. And in response to the state's argument that the other efforts had not been effective, the Court stated "the First Amendment does not permit the State to sacrifice speech for efficiency." *Id.* (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988)).

By contrast, the Fifth Circuit's approach to analyzing the interstate handgun sales ban reflects a result-oriented review that seeks to uphold the restriction on Second Amendment rights absent a strong showing that the burdens on the fundamental right are excessive. That is not "strict scrutiny" and does not afford the Second Amendment its due. Instead the court's approach reflects the era when the interstate handgun sales ban was adopted and the Second Amendment was believed by many—incorrectly—to pose no significant hurdle to prohibitions and significant restrictions on law-abiding individuals acquiring or keeping firearms, especially handguns. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213; *see also, e.g., Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing *United States v. Miller*, 307 U.S. 174 (1939), as having held that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'").

While many lower courts and Respondents might prefer a return to that era, after *Heller*, it should have been clear that burdens on Second Amendment rights must be justified as narrowly tailored to a compelling interest. Yet the jurisprudence over the past eight years reflects a continued insistence that citizens justify their desire to exercise their Second Amendment rights in the face of what is presumed to be a legitimate government interest in restricting those rights. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 752 (2012) ("An intermediate scrutiny analysis applied in a way that is very deferential to legislative determinations and requires merely some logical and plausible showing of the basis for the law's reasonably expected benefits, is the heart of the emerging standard approach.").

In *Ezell I*, the Seventh Circuit found that a high level of scrutiny was appropriate for review of the ban on firing ranges within Chicago:

> [T]he plaintiffs are the "law-abiding, responsible citizens" whose Second Amendment rights are entitled to full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right. The City's firing-range ban is not merely regulatory; it prohibits the "law-abiding, responsible citizens" of Chicago from engaging in target practice in the controlled environment of a firing range. This is a serious encroachment on the right to maintain proficiency in firearm use, an important

> corollary to the meaningful exercise of the core right to possess firearms for self-defense.

651 F.3d at 708 (emphasis in original). Here, too, Petitioners are "law-abiding, responsible citizens" who are qualified to purchase and licensed to sell a handgun, but who are simultaneously prohibited from doing so by the interstate handgun sales ban. Thus, the prohibition on their right to make interstate purchases or sales of handguns should be subject to strict review in practice and not just in name.

The court below identified the compelling interest as preventing the circumvention of handgun laws, and it concluded that the "restrictions applicable to interstate transfers of handguns are the least restrictive means of insuring that the handgun laws of states are not circumvented." App.20a. This conclusion simply cannot be reconciled with the evidence before the district court and the analysis the Court of Appeals was required to make.

A. Speculation That Interstate Handgun Sales Undermine Enforcement of State Firearms Laws Does Not Justify the Ban

The Court of Appeals looked to the Congressional findings that were part of the basis for the passage of the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, which identified "a 'serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State,'" done "'without the knowledge of . . . local authorities.'" App. 12a (quoting S. Rep. No. 89-1866, at 19 (1966); *see also* App.12a (citing S. Rep. No. 90-1097, at 80 (1968))

(criminals and juveniles crossing State lines to purchase firearms in order to circumvent the laws of their State of residence). Yet the court recognized that "current burdens on constitutional rights 'must be justified by current needs.'" App.13a (quoting *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013)). Rather than turn to current needs, however, the court reviewed the same needs proffered in 1968 and whether subsequent changes in firearm laws and regulations undercut the need identified in 1968 for the interstate handgun sales ban. Despite the court's failure to require a showing of current needs, the plain fact is that other provisions of the 1968 laws and the subsequently enacted Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (the "Brady Act"), undermine the stated 1968 rationale for the ban.

1. Criminals and Juveniles Crossing State Lines

The stated concern that criminals and juveniles can escape restrictions on their ability to purchase firearms by crossing state lines is met in at least two ways that do not require the infringement of the Second Amendment rights of law-abiding, responsible citizens. First, the Gun Control Act of 1968 expanded the categories of prohibited persons who are not qualified to purchase firearms anywhere in the United States. Thus, it became illegal for licensed retailers to sell or transfer firearms to anyone the FFL knows or has reasonable cause to believe is a person who (i) has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; (ii) is a fugitive from justice; (iii) is

an unlawful user of or addicted to any controlled substance; (iv) has been adjudicated as a mental defective or committed to a mental institution; (v) is an alien illegally or unlawfully in the United States; (vi) has been discharged from the Armed forces under dishonorable conditions; (vii) having been a citizen of the United States, has renounced U.S. citizenship; (viii) is subject to a court order that restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner; or (ix) has been convicted in any court of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(d). It is also illegal for persons in any of those categories to ship, possess or receive firearms. 18 U.S.C. § 922(g).

Second, the Brady Act requires licensed retailers to perform background checks on individuals before a firearm can be purchased, unless a valid exception applies, *e.g.*, a state permit to purchase firearms. In the immediate aftermath of the enactment of the Brady Act, the FFL was required, among other things, to provide notice to the law enforcement officer of the place of residence of the buyer and wait up to five days for a response from the chief law enforcement officer regarding whether the transfer to the potential buyer would violate federal, state or local law. 18 U.S.C. § 922(s). Thereafter, the federal government put in place the National Instant Criminal Background Check System ("NICS"). 18 U.S.C. § 922(t); 27 C.F.R. § 478.124. Under NICS, a licensed retailer is required to wait up to three business days for the system to respond, and unless notified that the transfer would

violate federal law or state law, the sale may take place.[2] 18 U.S.C. § 922(t)(1), (2).

Consistent with the overall statutory framework, licensed retailers are required to fill out a Firearms Transaction Record—ATF Form 4473—for every transaction. This form requires a name, address, date of birth, government-issued photo identification, NICS transaction number (received after completion of the background check signifying that the transaction will not violate federal or state law), and an affidavit stating that the purchaser is eligible to purchase a firearm under federal law.[3] The FFL who verifies the identity of the buyer must also sign and keep a copy of the form for at least 20 years after the date of the sale or disposition.[4] *See* 27 C.F.R. § 478.129(b). Further, FFLs must keep a permanent registry of all firearms sales in an ATF-approved "bound book"[5] or

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[2] While the FFL may make the transfer after three business days without notice that the sale is prohibited, as a matter of business policy, the licensed retailer may also choose to wait until notified that the individual has affirmatively been cleared to purchase the firearm.

[3] Form 4473 is available at http://www.atf.gov/forms/download/atf-f-4473-1.pdf. After completing the required ATF Form 4473, FFLs contact NICS—maintained by the FBI—to request a background check with the Form 4473's descriptive information.

[4] When retiring or otherwise discontinuing its business, an FFL is required by law to send its records to the ATF's Out-of-Business Records Center. 18 U.S.C. § 923(g)(4); 27 C.F.R. §§ 478.57 and 478.127.

[5] A "bound book" is a permanently bound or orderly arrangement of pages that must be maintained on the business premises. The format must follow that prescribed in the regulations and the

computerized equivalent. 27 C.F.R. §§ 478.22, 478.121, 478.125. The ATF is allowed to inspect these records as part of a criminal investigation or upon a trace request. 18 U.S.C. § 923(g)(7); 27 C.F.R. § 478.25a. In addition, licensed retailers must report the sale of multiple handguns within five consecutive business days to the ATF and the state police or local law enforcement agency where the sale occurred. ATF Form 3310.4.[6]

The court noted that for various reasons, the information in the NICS database may not be complete, potentially limiting the effectiveness of the background check. In response to the proposition that states could be compelled to provide complete information as a more narrowly tailored response, the court answered, without explanation, that "[w]e conclude that the Government has demonstrated that the in-state sales requirement is narrowly tailored, notwithstanding the information that is available to all FFLs under federal laws and regulations." App.15a. Like so many lower courts since 2010, the court reverted to the same pre-*Heller* thinking used to justify the interstate handgun sales ban in the first place, concluding that the Second Amendment must yield. But surely a right cannot so easily be cast aside when it is fundamental in character, making it "deeply rooted in this Nation's history and tradition" and one "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Wash. v.*

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pages must be numbered consecutively. 27 C.F.R. §§ 478.121 and 478.125.

6 *Available* at http://www.atf.gov/forms/download/atf-f-3310-4.pdf.

Glucksberg, 521 U.S. 702, 721 (1997) (describing concept of fundamental rights with respect to substantive due process) (internal quotation marks omitted). The Court has made clear that the rights guaranteed by the Second Amendment are precisely such fundamental rights. *See McDonald*, 561 U.S. at 778.

Even assuming that states elect not to make the NICS background check system as complete as it could be, that choice and the resulting inefficiency cannot be used as a rationale for limiting the Second Amendment rights of law-abiding citizens who are qualified to purchase firearms but who are prevented from doing so simply because they want to exercise their rights in the national marketplace and outside their state of residence. *See Carey*, 431 U.S. at 690-91 (rejecting argument that the challenged statute should stand because it "facilitates enforcement of the other provisions of the statute," finding "the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights"). As the district court concluded here, while the government arguably presented evidence that criminal acquisition of handguns remains a problem today, it failed to show that in the era of federal background checks the interstate handgun sales ban served any meaningful purpose in the prevention of crime, especially when measured against the restriction on the exercise of recognized constitutional rights by law-abiding citizens. *See Mance*, 74 F. Supp. 3d at 810-11; *see also Heller*, 554 U.S. at 636 (acknowledging the problem of handgun violence but refusing "to pronounce the Second Amendment extinct" and recognizing that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," including the

prohibition on the possession of handguns for self-defense).

2. Licensed Retailers' Assumed Inability to Comply with Other States' Law

The court also accepted the government's contention that "[i]t is unrealistic to expect that each [FFL] can become, and remain, knowledgeable about the handgun laws of the 50 states and the District of Columbia, and the local laws within the 50 states and the District." App.15a. But why is this unrealistic, and how can such an assumption about the FFLs' ability to comply with the law form the basis for eviscerating constitutional rights?

Certainly Congress did not believe that such an assumption was valid. While Congress prohibited handgun sales by a licensed retailer to a resident of another state, it enacted a different rule as to rifles and shotguns. For those firearms, the licensed retailer may transfer the rifle or shotgun to a resident of another state if (1) they meet in person and (2) "the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States . . . ." 18 U.S.C. § 922(b)(3). Moreover, Congress specifically made it the law that "any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States." *Id.* If an FFL is not certain that a sale would be legal in the buyer's home state, it is not obligated to make the sale, and the government points to no evidence that such a system has led to widespread illegal sales or trafficking

of long guns, nor do they provide evidence that the same system cannot work for handguns.

The court notes that "at least some states have regulated the sale of handguns more extensively than they have regulated the sale of long guns," App.18a, but some state laws regarding long guns, particularly those commonly known as "assault weapons," are particularly complex. *See*, *e.g.*, *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994) (finding rifle ordinance "impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge"). The court's broad generalization is the opposite of requiring a regulation be narrowly tailored as strict scrutiny requires. The court's misplaced reliance on the principle of "underinclusivity" also does not justify its approval of the interstate handgun sales ban. App.19a. As Petitioners note, the issue here is not whether Congress could adopt additional interstate regulations that improperly infringe on the Second Amendment, but whether the one they have in place now can be justified. It cannot. There is no legitimate basis for a distinction between the requirement that FFLs comply with laws of all states for long guns and the assumption that they cannot do so with respect to handguns, other than the government's modern disdain for handguns. But this Court precluded such discrimination against handguns, recognizing that they are the overwhelming weapon of choice for law-abiding citizens and deserving of full constitutional protection under the Second Amendment. *Heller*, 554 U.S. at 629.

B. Law Abiding Citizens Cannot Be Barred from Exercising Their Constitutional Rights in Forty-Nine States

In the end, the court finds that the burden imposed by the interstate handgun sales ban does little harm because the restrictions "allow ample access" to handguns, and any delay is "de minimis." App.20a. But the fact that qualified buyers may be able to buy handguns from licensed retailers in their home states (and licensed retailers can sell directly to in-state buyers) is irrelevant to the question of whether law-abiding, qualified buyers can be prohibited from acquiring handguns from licensed retailers in the other 49 States and the District of Columbia (and licensed retailers from selling directly to qualified out-of-state buyers). Fundamental constitutional rights are ones that individuals carry with them wherever they go. These rights are not checked at the state border to be reacquired once the individual returns home.

Indeed, no serious argument could be made that courts would permit regulations that limited a citizen's right to assembly to his state of residence but prohibited him from assembling in any other state. Restrictions on the press limiting their ability to publish to the state where the papers are printed or limiting a citizen's right to purchase a newspaper to her own state of residence would be unthinkable. While those freedoms have always been revered and respected, however, they are no more fundamental in the Constitution than the Second Amendment. As with all other constitutional rights, the Second Amendment is not and cannot be geographically limited, so this argument too must fail.

In *Ezell I*, the Seventh Circuit addressed those aspects of the City ordinance that required training at a firing range but prohibited operation of any firing ranges within the Chicago city limits. The district court had ruled that "for at least some—perhaps many—Chicago residents, complying with the range-training requirement did not appear to pose much of a hardship at all," but indeed "might actually be easier for some . . . ." *Ezell I*, 651 F.3d at 697. The Seventh Circuit rejected this sort of approach:

> This reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction. That's a profoundly mistaken assumption. . . . It's hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs. That sort of argument should be no less unimaginable in the Second Amendment context.

Ezell I, 651 F.3d at 697; *see also IAFR*, 961 F. Supp. 2d at 939 ("the fact that Chicagoans may travel outside the City to acquire a firearm does not bear on the validity of the ordinance inside the City") (emphasis in original); *cf. Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (with respect to the First Amendment, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (internal quotation marks omitted).

In this case, because the interstate handgun sales ban is not restricted to isolated groups who may be thought to present a particular risk of using handguns in an illegal manner, but instead is imposed indiscriminately to prohibit every legal handgun purchaser and licensed retailer across the country from participating in a national handgun market, the ban is not narrowly tailored to a compelling state interest, and as a result, the ban violates the rights protected by the Second Amendment, as well as the Due Process Clause of the Fifth Amendment.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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