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.

WILLIAM P. BARR, 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

REPLY BRIEF FOR PETITIONERS

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The government fails to explain why, exactly, federal firearms licensees ("FFLs") can be entrusted to learn and apply laws regulating rifle sales in any state, but are incapable of learning and applying laws regulating handgun sales outside their own state. It fails to explain why Fredric Mance loses his ability to apply a firearm registration law that is neutral as to the type of firearm, whenever the subject firearm takes the shape of a handgun.

And, in the face of petitioners' amicus support by seventeen states—who surely do not want their laws circumvented—the government fails to explain how a federal interest in barring the circumvention of state and local laws is advanced by barring transactions that many states and localities welcome.

Unable or unwilling to engage with the petition's merits, the government contrives prudential issues that are at turns illogical or simply belied by the record. While respondents are generally expected to contest petitions, opposition should be based on the reality of a case's posture. The government should have acknowledged, not resisted, circumstances that make this case a compelling vehicle for resolving significant constitutional issues. Jurisdiction has been thoroughly vetted. Mootness is not on the horizon. The basic facts were never contested, and the legal arguments were all not merely preserved, but tested at length by the district court, by multiple panel opinions, and by

no fewer than four separate opinions on petition for rehearing en banc. The petition relates to circuit splits regarding a critically important topic that this Court has not addressed for a decade, but on which it just granted a complementary petition for certiorari.

Instead, the government advances a novel certiorari standard that would put this Court largely out of business; denies the existence of matters briefed, argued and ruled on below; raises irrelevant and baseless arguments that misrepresent the case's scope; and even urges that the Court should not await the outcome of the plainly complementary *New York State Rifle & Pistol Ass'n* v. *City of New York*, No. 18-280 (Jan. 22, 2019) ("*NYSRPA*").

The petition for certiorari should be granted.

I. This Court Never Requires Hyper-Specific Circuit Splits On Identically-Worded Laws.

The government's suggestion that certiorari should be denied because no circuit has struck down the exact law upheld below, BIO 13, 15, is not serious. After all, no court struck down the law upheld in *NYSRPA*, or ruled on any law remotely like it. For that matter, the handgun ban at issue in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) was equaled in only one other jurisdiction (Chicago), and *Heller*'s functional firearms ban was unique. No court had split from the D.C. Circuit on adjudicating the

constitutionality of such laws, yet the case merited certiorari review.

Were certiorari suitable only for cases presenting identical facts, the writ would almost never be granted. Insistence on such hyper-specific splits as predicates for certiorari would leave countless important issues unaddressed, and immunize statutory outliers and popular errors from judicial review.

There is only one federal interstate handgun sales ban. As the numerous opinions in this case establish, the courts here have more than sufficiently vetted it. And there is no serious dispute that the lower courts are badly fractured on the essential aspects of how Second Amendment cases should be reviewed, all of which are implicated here. Ironically, the government relies upon *United States* v. *DeCastro*, 682 F.3d 160 (2d Cir. 2012) for the proposition that no circuit split exists as to what it calls the "in-state sales requirement." But unlike here, *DeCastro* involved the circumvention of state law—and it applied a threshold "substantial burden" test to withhold any form of alleged heightened scrutiny. The lower court's *DeCastro* endorsement is a reason to grant, not deny the petition. Pet. 25. Any application of a threshold substantial burden test contravenes *Heller*'s instruction that "even the Third Branch of Government [lacks] the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

Further percolation of the issues would be pointless. As they enter *Heller*'s second decade, the

American people should have the benefit of this Court's judgment regarding the continued prohibition of the national retail handgun market.

II. The Courts Below Decided Petitioners' Facial Challenge.

"[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United* v. *FEC*, 558 U.S. 310, 331 (2010). "[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases." *Id.* (internal quotation marks omitted).

Nonetheless, the government pursues the counterfactual speculation that first appeared in the second panel opinion's dictum, to the effect that petitioners may not have "properly raised the facial aspect of their Second Amendment challenge at all." BIO 15 (citing Pet. App. 9a-10a).

The record is otherwise.

The operative complaint alleged that the interstate handgun sales ban "violates Plaintiffs' Second Amendment rights, **(1) facially**; (2) as applied in the context of handgun sales that do not violate any state or local laws; and (3) as applied in the context of handgun sales where state or local laws require a license, pre-registration, or other form of state or local

governmental approval to proceed with the handgun sale." ROA.414 (emphasis added).

The District Court understood the claim, and ruled directly on the facial challenge. *See* Pet. App. 86a, 104a. The panel's first opinion did not stumble on the issue.

Only in its second opinion did the panel pause to offer that petitioners accepted the interstate handgun sales ban's application against categories of properly prohibited individuals. That is inaccurate. Petitioners assailed the interstate handgun sales ban because "it targets everyone. *All* handgun consumers are severely impacted by being denied a national market for handguns." Pet. C.A. Br. 46. *Of course* violent felons, juveniles, and the mentally ill may be barred from buying handguns anywhere. But those cases are addressed by different laws not here at issue.

In any event, the panel overcame its confusion. Like the District Court, it ruled on the challenge that petitioners plainly brought, briefed, and argued. The seven Fifth Circuit dissenters, like the District Judge, did not see the problem. And even had petitioners never brought a facial challenge, the as-applied challenges here—covering situations where state and local laws allow for interstate sales, and provide specific forms of approving interstate sales—would more than make for a compelling petition upon which this Court could issue broader relief. In any event, it is quite a

stretch to deny that petitioners advanced a facial challenge, which the courts below decided.[1]

III. The Courts Below Decided Petitioners' Text, History, And Tradition Argument.

The government chides petitioners for not specifically advocating a "text, history and tradition" approach, because they "affirmatively argued that the case was 'well-suited' for" the two-step test required by Fifth Circuit precedent. BIO 13 (quoting Pet. C.A. Br. 18-19) (other citations omitted). But the quote comes from petitioners' argument that the two-step process should *not* be mandatory. And in the Fifth Circuit, text, history, and tradition comprise the first step.

"[W]e look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (citations omitted). "[A] longstanding measure that harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee." *Id*. at 196.

Judge Elrod's dissent, joined by six of her colleagues, stressed that historical understanding is "the

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[1] Petitioners are constrained to depart from some of the amici's broader visions of this case. This has always been, and will remain, a challenge to federal laws under the Second and Fifth Amendments. The Fourteenth Amendment is not at issue.

first prong" of the two-step test. Pet. App. 120a. And it noted that petitioners and their amici argued the point. *Id.* at 122a n.3. The government is disingenuous in claiming that this case "would be a poor vehicle for considering whether and how a different interpretive approach would apply," BIO 13, considering that approach comprised a substantial portion of petitioners' briefing below, and generated lengthy opinions on the subject. Indeed, Judge Owen adopted petitioners' arguments in detailing (as did the district court) why the government's historical argument was "not well-taken." Pet. App. 29a, 63a.

It would have been folly for petitioners to argue only one step in a two-step court. But petitioners' second-step argument did not erase their (substantial) first-step argument. Seven judges below would have ruled for petitioners having heard half their argument. This Court is presented a thorough record for doing so if it wishes.

IV. The District Of Columbia's Laws Are Irrelevant.

The panel's second opinion erroneously sought to shift the blame for petitioners' injury to the District of Columbia's government. Naturally, the government seizes on these errors, BIO 15, but they are belied by the record. Even were these assertions true, they would be irrelevant.

1. The panel offered that "[t]he evidence in the record reflects that the sole FFL authorized to sell

handguns to the public in the District" only facilitates out-of-state transfers, and that petitioners "have contended that this is a consequence of laws or regulations promulgated by the District." Pet. App. 24a. The first assertion is false. The second assertion is at best misleading.

Charles Sykes is the only District FFL who *chooses* to transfer firearms to consumers, but he is not the only District FFL holding a Type 1 license authorizing consumer sales. *See* ATF, Federal Firearms Listings, https://www.atf.gov/firearms/listing-federal-firearms-licensees (July 2018, the most recent listing for the District of Columbia). As petitioners described him below, Sykes is "the only licensee willing to effect a transfer [to consumers]." Pet. C.A. Br. 12 (citing ROA.283, ROA.284, ROA.286, ROA.287).

Petitioners' briefing below, like the petition here, detailed the relevant District of Columbia firearm laws relating to interstate transfers. Nothing in those laws prohibits the operation of gun stores. Petitioners may have suggested that the dearth of firearm retailers is, in part, a vestige of the District's pre-*Heller* laws, but that is a far cry from claiming that the District prohibits Sykes or anyone else from maintaining a retail inventory. The District offers a license for gun stores. *See* D.C. Code §§ 7-2504.01(b), 7-2504.02 *et seq*. The license anticipates that gun dealers will maintain an inventory. *Id.* § 7-2504.04.

Were the District's laws somehow relevant, the government should have explained that below. It did

not. At a minimum, even here, it should have identified *which* D.C. law, exactly, is allegedly to blame for petitioners' predicament. The government failed to do so because no such laws exist. It might well be interesting to speculate as to the historical, market, and perhaps legal forces that may be responsible for the city's current lack of gun stores. Perhaps it is only a matter of time before someone seizes the market opportunity: Only ten years have passed since *Heller*, and the right to carry a handgun in self-defense became available in Washington barely two years ago. Whatever the reason, the District's gun laws are unconnected to the injury caused—in the District and everywhere else in the United States—by the *federal* interstate handgun transfer ban.

2. Just because the individual consumers in this case happen to reside in Washington, D.C. does not mean that the case turns on Washington, D.C.'s laws. The District could have the Nation's most thriving local handgun market, and still its residents—like all Americans—would be harmed by the obliteration of a *national* handgun market.

The government ignores *Carey* v. *Pop. Servs. Int'l*, 431 U.S. 678 (1977), but that precedent crystalizes the sort of injury petitioners suffer, and it controls the merits. It bears repeating: In *Carey*, it simply did not matter that New York retained some retail outlets for contraceptives. "[T]he 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." *Id.* at 689 (citations and footnotes omitted). What is true for contraceptives (or any other retail products) is no less true for firearms.

The prohibition of a national retail handgun market visits the most acute harm on individuals residing in areas with fewer retail outlets, of which Washington, D.C. is a prime example. It is altogether natural that this law be challenged, and it only makes sense that the challenge be brought, at least in part, by the people most deeply impacted.

But the Hansons are not the only people before the Court. The Committee stands here on behalf of its members nationwide—and *all* American handgun consumers are injured by the prohibition of a national retail handgun market.

Moreover, one of the Committee's other members is Texas-based Mance. And the Hansons are not Mance's only out-of-state customers, on whose behalf he has standing to vindicate the right to buy handguns. Mance does not restrict his business to Texans and Washingtonians.

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

When facing petitions in cases whose outcome would potentially be controlled by the outcome in a case pending on the merits, this Court's normal

practice is to either hold the petitions pending that outcome, or to grant them as well. Given both cases' nature, and the precedential landscape, the best course of action is to grant this petition for argument on the merits alongside *NYSRPA*.

1. a. As a general matter, the Court should be open to deciding multiple Second Amendment cases. Doing less would not slow resistance to *Heller*.

This Court has not forever resolved all First or Fourth Amendment issues with a single opinion. *Heller* confirmed that it would be unrealistic for this Court to do so with respect to the Second Amendment. "[O]ne should not expect" *NYSRPA* "to clarify the entire field, any more than" did *Heller*, even if some might claim that it left the area "in a state of utter uncertainty." *Heller*, 554 U.S. at 635.

Heller necessarily left many questions unanswered, but it elevated Second Amendment law to a state much higher than "utter uncertainty." The problem is not *Heller*'s alleged lack of clarity, but the lower courts' lack of fidelity to that opinion. Much of the "uncertainty" in this area is voluntary. The granting of certiorari in *NYSRPA* is welcome, but only as a good start, not as the case to end all cases. The preceding decade-long experience teaches that a single opinion of this Court, no matter how forceful or precise, is no substitute for the prospect of review—especially on a topic where the lower courts can be expected to resist this Court's guidance. Awareness that Second Amendment

cases are reviewable here may be at least as valuable as any particular rule of decision.

b. If anything, the granting of certiorari in *NYSRPA* only makes this already-compelling petition more so, as the cases are complementary. It is far from clear that *NYSRPA* would resolve the issues presented here. Moreover, the *NYSRPA* parties—and more importantly, the country—should not be deprived of this case's precedential potential, merely owing to the happenstance of *NYSRPA*'s earlier appearance on the calendar.

In *NYSRPA*, the Second Circuit purportedly applied "intermediate" scrutiny to sustain an irrational law. The petitioners in that case persuasively argue that "[t]his Court should not let . . . the Second Circuit's indefensible version of 'heightened scrutiny' stand." Petition for Certiorari, *New York State Rifle & Pistol Ass'n* v. *City of New York*, No. 18-280 (Jan. 22, 2019) at 3. They further offer, correctly, that "a restriction that is expressly designed to make it harder to exercise core Second Amendment rights cannot plausibly withstand any level of constitutional scrutiny." *Id.* at 10.

Should the Court be inclined to resolve *NYSRPA* narrowly, perhaps by remanding for the application of strict scrutiny, the "strict scrutiny" decision here shows such an outcome would be a waste of time. Any prescription for "scrutiny" should include an example that differentiates labels from deeds. The petition here is thus useful for having captured a rare specimen of

what would pass for "strict" scrutiny among *Heller*-resistant courts. And as the *NYSRPA* petition notes, that case presents a restriction whose stated goal may be nothing less than the subversion of the Second Amendment's exercise. This Court should declare such rationales illegitimate. But if that suffices to resolve *NYSRPA*, the decision might prove to be of limited use in the more common contexts where, as here, the government claims to advance a legitimate goal.

It is too early to know exactly how either case might turn out. This Court should give itself every opportunity to restore the Second Amendment.

2. The government should have conceded that at a minimum, logic requires that the petition be held for the outcome in *NYSRPA*. If *NYSRPA*'s guidance would leave the outcome here unchanged, that would be seen soon enough. But if *NYSRPA* would cast doubt on the opinion below here, the Fifth Circuit should not be left with a potentially erroneous precedent, sowing confusion and uncertainty as to its remaining validity and requiring additional en banc proceedings—especially while the people of this country continue to suffer an unconstitutional prohibition of the national retail handgun market.

It would be illogical to deny certiorari without even waiting for *NYSRPA*'s resolution. Circumstances warrant hearing both cases—and as many others as may be needed to repair the damage of *Heller*'s first, largely lost decade.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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