No. 18-843

In the Supreme Court of the United States

IVAN PENA, *et al.*,

Petitioners,

v.

MARTIN HORAN, DIRECTOR, CALIFORNIA DEPARTMENT OF JUSTICE BUREAU OF FIREARMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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March 6, 2019

QUESTION PRESENTED

Whether certain provisions of California's Unsafe Handgun Act, Cal. Penal Code § 31900 *et seq.*, requiring new models of semiautomatic handguns manufactured or sold in the State to include certain safety features, violate the Second Amendment because they prohibit the manufacture or sale in California of some models of handguns that may be made or sold in other States.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

STATEMENT

1. The California Legislature enacted the Unsafe Handgun Act "in response to the proliferation of … low cost, cheaply made handguns known as 'Saturday Night Specials,'" which raised serious public-safety concerns. *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895, 912 (2008). The Act makes it unlawful to manufacture or commercially sell in California any "unsafe handgun," defined in relevant part as "any pistol, revolver, or other firearm capable of being concealed upon the person" and lacking certain safety features. Cal. Penal Code § 31910.

Every model of handgun manufactured or commercially sold in California must "be tested … by an independent laboratory" to determine whether it satisfies the Act's safety requirements. Cal. Penal Code § 32010(a). The Act directs the California Department of Justice to "compile, publish, and thereafter maintain a roster listing all of the handguns" that have been tested in this manner and "have been determined not to be unsafe handguns," and therefore may be manufactured or commercially sold in the State. *Id.* § 32015. As of March 2017 the roster contained 744 models of handguns, of which 496 were semiautomatics. Pet. App. 16a n.9.

Over time, the Legislature has amended the Unsafe Handgun Act to require new models of handguns to include additional features in order to be added to the roster. These requirements apply only to new models; models that are already on the roster at the time a new requirement goes into effect may remain there. *See* Cal. Penal Code § 31910(b)(5)-(7). The requirements apply to handguns manufactured; commercially sold; or imported for sale, kept for sale, or offered for sale in California. *Id.* § 32000(a). The Act

expressly exempts certain categories of handguns, including guns sold, loaned, or transferred between private parties through a licensed dealer, *id.* §§ 32110(a), 28050; guns sold to certain federal, state, and local law enforcement officials, *id.* §§ 32000(b)(4), (b)(6); guns "listed as curios or relics," *id.* § 32000(b)(3); guns "designed expressly for use in Olympic target shooting events," *id.* § 32105; and guns "to be used solely as a prop [in] a motion picture, television, or video production," *id.* § 32110(h).

This case involves three of the Act's requirements for new listings on the roster. First, since 2007, all new models of semiautomatic pistols must have "a chamber load indicator." Cal. Penal Code § 31910(b)(5). A "chamber load indicator" is "a device that plainly indicates that a cartridge is in the firing chamber." *Id.* § 16380. It helps to prevent accidental handgun discharges.

Second, also since 2007, all new models of semiautomatic pistols with "a detachable magazine" must have "a magazine disconnect mechanism." Cal. Penal Code § 31910(b)(5). A magazine disconnect mechanism "prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted." *Id.* § 16900. This feature too helps to prevent accidental discharges.

Third, since 2013, all new models of semiautomatic pistols must include a feature often called "microstamping."[1] Each semiautomatic pistol must be

[1] This requirement went into effect after the state Department of Justice certified that microstamping technology was "available to

"equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol." Cal. Penal Code § 31910(b)(7)(A). These characters must be "transferred by imprinting on each cartridge case when the firearm is fired." *Id.* This feature is intended to allow law enforcement officers to connect a discharged shell casing with the gun that fired it, a significant tool for solving crimes. Pet. App. 6a.[2]

2. In 2009, petitioners filed suit in the U.S. District Court for the Eastern District of California, raising two constitutional claims. *See* Pet. App. 93a, 103a-106a. First, they argued that the challenged provisions of the Act violate the Second Amendment because they "bar[] the purchase of certain handguns that are 'in common use' and therefore, constitutionally protected under *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008)." Pet. App. 104a. Second, they argued that the Act violates the Equal Protection Clause of the Fourteenth Amendment because its exceptions allow some people to acquire handguns that others may not. *Id.* at 106a.

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more than one manufacturer unencumbered by any patent restrictions." Pet. App. 6a n.3; *see* Cal. Penal Code § 31910(b)(7)(A). That certification addressed only the issue of patent restrictions. *See* Pet. App. 55a-56a, 101a-102a.

[2] As an alternative to microstamping, the Act permits the state Attorney General to "approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a firearm from spent cartridge casings discharged by that firearm." Cal. Penal Code § 31910(b)(7)(B). No such method has been approved.

The district court granted summary judgment to the State on both claims. Pet. App. 93a-135a. After hearing oral argument, the court requested supplemental briefing on the technological feasibility of the Act's microstamping requirement. *See id*. at 107a-108a. Ultimately, however, the court did not address that issue. Rather, as relevant here, it held that the challenged provisions of the Act "[did] not burden plaintiffs' Second Amendment rights," because they "allow[] the purchase of nearly 1000 types of rostered firearms" and because they constitute "'conditions and qualifications on the commercial sale of arms'" that are "'presumptively lawful.'" *Id.* at 121a, 125a, 127a (quoting *Heller*, 554 U.S. at 627 & n.26).

3. The court of appeals affirmed. Pet. App. 1a-37a. Unlike the district court, it assumed for purposes of its decision that the challenged provisions of the Act "burden conduct protected by the Second Amendment." *Id*. at 12a. It then considered to what extent the Act's restrictions affected "the core Second Amendment right of self defense of the home." *Id*. at 14a (internal quotation marks omitted). Observing that there was "no evidence in the record that the hundreds of firearms available for purchase [under the Act] are inadequate for self-defense," the court concluded that the Act "does not effect a substantial burden" on that core right. *Id*. at 17a; *see id*. at 13a-17a. It accordingly applied intermediate, rather than strict, scrutiny to the challenged restrictions. *Id*. at 13a-14a, 17a-18a.

The court first addressed the chamber load indicator and magazine disconnect mechanism requirements. Pet. App. 20a-24a. It reasoned that that the public-safety interests underlying these requirements

were clearly substantial, *id.* at 20a, and that the requirements "reasonably fit" those interests, *id.* at 21a; *see id.* at 21a-24a.

The court next considered the Act's microstamping requirement. Pet. App. 24a-34a. Again, the public interest in preventing and solving gun crimes was clearly substantial. *Id.* at 24a. And again the court concluded that the State had established a "reasonable fit" between the requirement and those interests. *Id.* at 24a; *see id.* at 33a-34a.

The court rejected petitioners' challenge to the Legislature's judgment that microstamping would "*effectively*" address the problem of unsolved gun crimes. Pet. App. 25a. It also rejected petitioners' related argument, pressed for the first time in the supplemental briefing ordered by the district court and then on appeal, that compliance with the microstamping requirement would be "impracticable." *Id.* at 26a. Pointing to evidence in the legislative record and submitted by the State in response to the district court's order, the court deferred to the Legislature's "predictive … judgment" that it would be technologically feasible to produce compliant guns. *Id.* at 29a; *see id.* at 27a-31a.

The court also observed that the microstamping requirement "implicate[s] the rights of gun owners far less than laws directly punishing the possession of handguns," such as the law invalidated in *Heller*. Pet. App. 33a. It noted that the Act "does not ban possession or use of guns manufactured without microstamping features," and that the requirement applies only to "new models of semiautomatic weapons offered for sale in California after May 2013," leaving many existing models available for purchase. *Id.*; *see id.* at 26a-27a. The court concluded that "California is entitled to 'a reasonable opportunity to experiment with

solutions to admittedly serious problems.'" *Id.* at 33a-34a (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).[3]

Judge Bybee concurred in part and dissented in part. Pet. App. 37a-92a. He agreed with the majority "that intermediate scrutiny applies to [petitioners'] Second Amendment challenge" and "that there is a reasonable fit between the [chamber load indicator] and [magazine discharge mechanism] requirements and the State's substantial interest in enhancing public safety." *Id.* at 37a. "Both mechanisms help prevent accidental handgun discharges by decreasing the likelihood that a person will mistakenly believe that the firing chamber is empty." *Id.* at 38a. But he would have reversed the district court's grant of summary judgment with respect to the microstamping requirement. *Id.*

Judge Bybee explained that whether or not microstamping would help solve crimes was a matter for the Legislature, and that as to technical feasibility there could be "little doubt" that the technology "*generally* works." Pet. App. 42a-43a; *see id.* at 39a. His "sole" basis for dissenting was his conclusion that there was "conflicting evidence" about whether the microstamping requirement, as implemented in regulations issued by the state Department of Justice, "can be satisfied by any gun manufacturer." *Id.* at 43a. In his view, the existence of an evidentiary conflict made the validity of the microstamping requirement, as applied, "inappropriate for decision on summary judgment." *Id.* at 54a. He reasoned that if the

[3] The court of appeals also affirmed the district court's rejection of petitioners' equal protection claim. Pet. App. 34a-37a; *see also id.* at 38a n.2 (Bybee, J., concurring on that issue). Petitioners do not renew that claim in this Court.

microstamping requirement were "impossible" for gun manufacturers to comply with, then it would "impose[] a burden without advancing any state interest," and thus fail intermediate scrutiny. *Id.* at 57a.

Because Judge Bybee would have held that the State had failed to establish that the microstamping requirement survived intermediate scrutiny, he proceeded to consider whether that requirement burdened conduct protected by the Second Amendment (which the majority had assumed it did). Pet. App. 70a-92a. He noted that it was a "difficult question" how to determine which state regulations constitute "'laws imposing conditions and qualifications on the commercial sale of arms,'" which this Court has described as "'presumptively lawful.'" *Id.* at 74a (quoting *Heller*, 554 U.S. at 626-627 & n.26). Ultimately, Judge Bybee concluded that the microstamping requirement was not presumptively lawful and burdened conduct protected by the Second Amendment, so he would have reversed the grant of summary judgment and remanded for further proceedings on the factual question regarding the feasibility of microstamping. *Id.* at 42a, 88a-92a.

ARGUMENT

1. Petitioners first contend that the lower courts are deeply divided over how to analyze Second Amendment cases. Pet. 21-24. That is not correct. Rather, as petitioners go on to acknowledge, "virtually all courts" use the same "two-step" approach that the court below applied in this case. Pet. 21-22. They ask, first, whether the "challenged law burdens conduct protected by the Second Amendment." Pet. App. 9a. If so, they select an "appropriate level of scrutiny"—generally strict scrutiny if a law "'implicates the core of the Second Amendment right and severely burdens

that right,'" and otherwise intermediate scrutiny. *Id.* at 12a-13a (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). Every circuit that has adopted a test for resolving Second Amendment claims follows essentially the same approach.[4]

Petitioners contend in passing (Pet. 22) that the Second and Ninth Circuits apply a "threshold 'substantial burden' test" to dismiss some Second Amendment claims without further analysis, while the Seventh Circuit does not. Even if that were correct, the court of appeals in this case did not reject petitioners' claims based on any such "threshold" test. It applied intermediate scrutiny and rejected the claims on the merits. Pet. App. 11a-12a, 18a-34a. Petitioners cite no decision applying any materially different analytical approach to regulations of the sort at issue here.

In any event, the Seventh Circuit's approach does not vary from the Ninth's. Both courts ask whether a law "substantially burden[s]" Second Amendment rights in order to determine what level of scrutiny to apply—not as a basis for rejecting claims outright.

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[4] *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 670-671 (1st Cir. 2018); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 259-260 (2d Cir. 2015); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (en banc); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195, 205 (5th Cir. 2012); *Stimmel v. Sessions*, 879 F.3d 198, 204, 206 (6th Cir. 2018); *Horsley v. Trame*, 808 F.3d 1126, 1130-1131 (7th Cir. 2015); *United States v. Reese*, 627 F.3d 792, 800-802 (10th Cir. 2010); *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017); *Heller v. District of Columbia*, 670 F.3d 1244, 1252-1253 (D.C. Cir. 2011) ("*Heller II*").

Pet. App. 14a ("Because the restrictions do not substantially burden any [Second Amendment] right, intermediate scrutiny is appropriate."); *Ezell v. City of Chicago*, 846 F.3d 888, 892-893 (7th Cir. 2017). Indeed, the very Seventh Circuit decision petitioners cite (Pet. 22) notes that the two courts follow the same approach. *See Ezell*, 846 F.3d at 893 (citing *Jackson v. City & County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)). So does the Second Circuit. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 254.[5]

Likewise, petitioners assert that the D.C. Circuit "dispense[s] with [the] two-step approach if the challenged provision completely destroys a right." Pet. 22 (citing *Wrenn v. District of Columbia*, 864 F.3d 650, 655-656 (D.C. Cir. 2017)). But the provisions at issue here do not "completely destroy" any right. They require new models of semiautomatic pistols manufactured or commercially sold in California to include certain safety features, while leaving many existing models available for sale. And there is no circuit conflict on this issue either. Petitioners cite no decision upholding any total handgun ban since *Heller*. Such a law would be "unconstitutional under any level of scrutiny," including in the Ninth Circuit. *Jackson*, 746 F.3d at 961; *see also* Pet. App. 14a-15a (noting the "distinction between laws that regulate the manner in

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[5] Petitioners cite *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012) (cited at Pet. 22), but fail to mention *New York State Rifle & Pistol Ass'n v. Cuomo*, which postdates *Decastro* by three years and clarifies that the Second Circuit applies the same "two-step rubric" used by other courts, including the "Seventh [and] Ninth … Circuits." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 254; *see also United States v. Jimenez*, 895 F.3d 228, 232-234 (2d Cir. 2018) (following the same approach).

which individuals may exercise their Second Amendment right, and laws that amount to a total prohibition of the right").[6]

Petitioners do not contend that there is any conflict in the lower courts over the validity of the specific sort of state requirements at issue in this case. The few other courts that have considered Second Amendment challenges in similar contexts have also rejected them. *See Draper v. Healey*, 98 F. Supp. 3d 77, 85 (D. Mass. 2015) (upholding Massachusetts statute requiring chamber load indicator and magazine disconnect mechanism on handguns sold in that state), *aff'd on other grounds*, 827 F.3d 1 (1st Cir. 2016); *cf. Marzzarella*, 614 F.3d at 87 (upholding federal law prohibiting possession of any handgun with an obliterated serial number). In the absence of any such conflict, there is no reason for further review in this case.

This Court recently granted certiorari in *New York State Rifle & Pistol Ass'n v. City of New York*, No. 18-280, which presents the question whether a New York City law prohibiting the transport of a licensed, locked, and unloaded handgun to a home or shooting range outside the City violates the Second Amendment, the Commerce Clause, or the constitutional right to travel. No. 18-280 Pet. i. If the Court believes

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[6] Petitioners also cite *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc), arguing that the Third Circuit is internally "divided" on this issue. Pet. 22. Any such division would not be a matter for this Court to resolve. Moreover, although the Third Circuit plurality and Judge Hardiman's concurrence in that case took somewhat different approaches to the challenge to federal felon-in-possession laws at issue there, both opinions indicate that "a law that 'completely eviscerates the Second Amendment right'" would be unconstitutional under *Heller*. *Binderup*, 836 F.3d at 345 (plurality opinion); *compare id.* at 363-364 (Hardiman, J., concurring).

that its decision in *New York State Rifle & Pistol Ass'n* may significantly change the framework that the lower courts have developed for addressing Second Amendment claims, it may wish to hold the petition here pending its decision in that case. Under current law, however, petitioners' asserted conflict provides no basis for further review.

2. Petitioners also argue that the court of appeals' decision is incorrect. Pet. 24-27. They contend that California has no power to bar the sale of new handgun models that are permitted in some other States, because "[b]anning *any* handgun of the kind in common use for traditional lawful purposes, that is not dangerous and unusual, violates the Second Amendment." Pet. 25; *see* Pet. i. That sweeping contention does not warrant review in this case.

This Court has made clear that the individual right the Second Amendment protects is "fundamental to our scheme of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). "Like most rights," however, it "is not unlimited." *Heller*, 554 U.S. at 626. As the Court has emphasized, "[t]he Constitution leaves" States and localities "a variety of tools for combating" the "problem of handgun violence in this country." *Id.* at 636. In particular, States have long "impos[ed] conditions and qualifications on the commercial sale of arms," *id.* at 626-627, and adopted "public-safety laws" that do not impermissibly impair the basic ability of individuals to obtain and use handguns for lawful purposes, *id.* at 633-634; *see also Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting) ("[H]istory and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right[.]").

The California new-model requirements at issue in this case are public-safety measures of this type. A chamber load indicator "lets someone know that a gun is loaded without … having to pick it up to check" and "acts as a red flag for those handling the gun who may have forgotten that it was loaded." Pet. App. 21a. A magazine disconnect mechanism "prevents a firearm from shooting unless a magazine is inserted," preventing discharges in cases where someone handling the gun may not realize that there is still a bullet in the chamber even though no magazine is inserted. *Id.* Both features "help prevent accidental handgun discharges by decreasing the likelihood that a person will mistakenly believe that the firing chamber is empty." *Id.* at 38a (Bybee, J., concurring in part).

The microstamping requirement is likewise a public-safety measure. Fully implemented, microstamping would provide a valuable tool for law enforcement, "limiting the availability of untraceable bullets" and thus helping prevent unsolved gun crimes. Pet. App. 24a; *see also id.* at 38a-39a (Bybee, J., dissenting in part).

Petitioners do not seek this Court's review on the issue addressed in Judge Bybee's dissent, namely whether it is feasible for gun manufacturers to comply with California's microstamping requirement. Indeed, they expressly argue that the dissent "misse[s] the point" because it does not adopt their broader theory that the Second Amendment guarantees them the right to obtain "*any* handgun of the kind in common use for traditional lawful purposes." Pet. 25.

Moreover, the sole basis for Judge Bybee's dissent was his conclusion that summary judgment was inappropriate because of "conflicting evidence" regarding

the feasibility of California's microstamping requirement. Pet. App. 43a. That fact-bound question does not warrant further review, particularly on the record here. Petitioners litigated this case in the district court based on their broader Second Amendment theory, not based on any challenge to the feasibility of California's microstamping requirement.[7] Petitioners adduced evidence regarding feasibility only after the district court asked for supplemental briefing on the issue, and even then they relied on "conclusory" affidavits from representatives of gun manufacturers. Pet. App. 26a; *see also id.* at 53a (Bybee, J., dissenting in part) (acknowledging that the affidavits are "lacking in detail"). Those strategic and tactical choices would make this case a poor vehicle for addressing any question of technical feasibility.[8]

Petitioners' other criticisms of the decision below are misguided. Petitioners first mischaracterize the Act as "a broad handgun ban." Pet. 24. It is not. Because the challenged provisions of the Act apply only to the manufacture and commercial sale of *new* models of semiautomatic handguns, they do not affect the ability of petitioners or anyone else to lawfully purchase many of the most well-established and popular

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[7] *See, e.g.*, No. 2:09-cv-1185-KJM-CKD (E.D. Cal.) Dkt. 61-1 at 14 (petitioners' summary judgment motion) ("This case begins and ends with the fact that California will not roster handguns lacking features which are missing from many, if not the vast majority, of handguns of the kind in common use throughout the United States."); Dkt. 53 at 10 (second amended complaint).

[8] Some of petitioners' amici nonetheless urge the Court to grant review to address the feasibility of the microstamping requirement, citing extensive non-record evidence on the issue. *See, e.g.*, Cato Institute Br. 3-7. The Court should not grant review to address an issue raised only by amici. *See* Sup. Ct. R. 14.1(a); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

models of handguns. As of March 2017, California's roster of firearms approved for sale contained 744 models of handguns and 496 semiautomatics. Pet. App. 16a n.9. Petitioners do not dispute that a wide variety of handguns, including semiautomatics, are available for Californians to obtain and possess lawfully.

Petitioners also contend that the court of appeals "utiliz[ed] the method *Heller* expressly rejected: interest-balancing." Pet. 24. That argument misreads both *Heller* and the decision below. The *Heller* Court declined to adopt the "freestanding 'interest-balancing' approach" it read Justice Breyer's dissent to be proposing. 554 U.S. at 634. But it did not foreclose the two-step approach applied by the court of appeals in this case (and by every other circuit to have considered the matter, *see supra* at 8 & n.4). To the contrary, the Court suggested Second Amendment claims should be evaluated in a manner similar to First Amendment claims, 554 U.S. at 635, where courts also consider whether a challenged law burdens constitutionally protected conduct, and if so, apply an appropriate tier of scrutiny.

Further, it is by no means clear that the ultimate result in this case would be any different if the analysis focused on history and tradition. *See* Pet. 21. California's microstamping requirement is at least arguably a law "imposing conditions and qualifications on the commercial sale of arms" of the type that this Court has said is "presumptively lawful." *See Heller*, 554 U.S. at 626-627 & n.26. And it is at least arguably analogous to the longstanding federal prohibition on the possession of firearms with "'removed, obliterated, or altered' serial numbers." *Marzzarella*, 614 F.3d at 93 (quoting 18 U.S.C. § 922(k)); *see Heller*

II, 670 F.3d at 1275 (Kavanaugh, J., dissenting) (noting that where courts confront laws addressing "new weapons or modern circumstances … the proper interpretive approach is to reason by analogy from history and tradition").

Petitioners next speculate that the reasoning of the decision below might lead the Ninth Circuit in some other case to uphold a law "more restrictive" than the Act itself, such as a law barring the sale of any handgun. Pet. 25. That conjecture is unfounded. The court of appeals considered it "[i]mportant[]" that a wide variety of models of semiautomatic handguns remain available for lawful sale and possession in California. Pet. App. 14a; *see id.* at 33a. Nothing in the decision below suggests that the court of appeals would uphold the sorts of more draconian restrictions that petitioners posit.

Finally, petitioners argue that "the Ninth Circuit's version of 'intermediate scrutiny' amounted to nothing more than the rational basis review *Heller* prohibits." Pet. 27. That too is incorrect. The court of appeals relied upon well-established precedent, including from this Court, defining the parameters of intermediate scrutiny. Pet. App. 18a-20a. The court did not speculate as to what evidence or theories could have rationally supported the Act. Rather, it held the State to its burden of establishing a "reasonable fit between the government's stated objective and the regulation," in light of "the legislative history of the enactment" and "studies" and other evidence "in the record." *Id.* at 18a. In the absence of any conflict among the lower courts, that determination does not warrant further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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