No. _____

In The

Supreme Court of the United States

JEFF SILVESTER; BRANDON COMBS; THE CALGUNS FOUNDATION, INC., a non-profit organization; and THE SECOND AMENDMENT FOUNDATION, INC., a non-profit organization,

Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit applied improperly lenient scrutiny in a Second Amendment challenge to the application of California's full 10-day waiting period to firearm purchasers who pass their background check in fewer than 10 days and already own another firearm or have a concealed carry license?

2. Whether this Court should exercise its supervisory powers to cabin the Ninth Circuit's concerted resistance to and disregard of this Court's Second Amendment decisions?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Jeff Silvester and Brandon Combs were the plaintiffs in the district court and the appellees in the Ninth Circuit. Petitioners the Calguns Foundation, Inc., and the Second Amendment Foundation, Inc., are non-profit corporations and were also plaintiffs in the district court and appellees in the Ninth Circuit. Neither corporate petitioner is publicly traded and neither has a parent corporation.

Respondent Xavier Becerra is the current Attorney General of California and the successor to Kamala Harris, the Attorney General of California at the time of the litigation in the courts below. General (now Senator) Harris, was the defendant in the district court and was the appellant in the Ninth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court for the Eastern District of California and its order granting judgment in favor of Petitioners are available at 41 F. Supp.3d 927 and are attached at Appendix B1-B91.

The decision of the Ninth Circuit reversing the district court is available at 84 F.3d 816 and is attached at Appendix A1-A33. The Ninth Circuit's order denying the petition for rehearing or rehearing *en banc* is unpublished but available on PACER, Case Number 14-16840, DktEntry 90, and is attached at Appendix C1-C2.

JURISDICTION

The Ninth Circuit issued its order denying rehearing and rehearing *en banc* on April 4, 2017. Justice Kennedy granted Petitioners an extension of time to file this Petition to and including September 1, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

California Penal Code § 26815 provides, in relevant part:

> No firearm shall be delivered:
>
> (a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to Section 28225, whichever is later.

California Penal Code § 27540(a) provides, in relevant part:

> A dealer, * * * shall not deliver a firearm to a person, as follows:
>
> (a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to Section 28225, whichever is later.

The Second Amendment, U.S. CONST. AMEND. II, provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

STATEMENT OF THE CASE

1. California requires most purchasers of a firearm to wait 10 days before they can take possession of the firearm, regardless whether their background checks are completed in less time. This case involves a challenge to the application of California's full 10-day waiting period to those purchasers who already own a firearm or have a license to carry a concealed weapon, and who clear a background check in fewer than 10 days.

Forbidding delivery of a firearm to such "subsequent" purchasers for longer than it takes to complete their background checks is an arbitrary and irrational burden on their Second Amendment rights. California's only purported justifications for applying the full waiting period to such persons – having time to ensure eligibility to purchase a firearm and providing a "cooling off" period to guard against rash use of the newly purchased firearm – lack any factual or logical support as applied to the class of purchasers at issue here. And such asserted justifications certainly do not satisfy any form of heightened scrutiny under the Second Amendment. The district court, after a bench trial, agreed, but the Ninth Circuit nonetheless reversed, a result that is as unsupportable as it is unsurprising.

2. Individual Petitioners are two California residents who already own firearms, desire to purchase firearms in the future, and have a reasonable expectation that they would easily pass any subsequent background checks in fewer than 10 days. The organizational Petitioners are two non-profit groups that advocate in defense of Second Amendment rights and

which have members that, like the individual Petitioners, already own firearms, desire to purchase additional firearms in the future, and would pass background checks in fewer than 10 days.

Petitioners challenged the application of California's full 10-day waiting period to persons who passed their background checks in less time and who already lawfully possess a firearm as confirmed in California's Automated Firearms System ("AFS"), who lawfully possess a firearm and a valid Certificate of Eligibility ("COE") to purchase a firearm, or who possess a valid Carry Concealed Weapon ("CCW") license. App. B2.[1] As to such persons, Petitioners argued that enforcing the full 10-day waiting period had no plausible justification and hence violates, *inter alia*, the Second Amendment.[2] Such persons, by definition, would have already passed their background checks and been found eligible to purchase a firearm. And persons who already own a firearm cannot be pre-

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[1] As the case was litigated and decided in the district court, the latter two groups overlapped with the broader initial group of existing owners who promptly passed their background checks. The group of COE holders eventually was limited to those who already owned a firearm and thus need not be discussed separately at this stage. App. B85-B87. And while most CCW license holders can be expected already to own a firearm, to the extent they might not, they were analyzed as a separate low-risk category because that group already would have passed the rigorous requirements for obtaining a CCW license. App. B80-B85.

[2] Petitioners also raised a Fourteenth Amendment claim that was not reached by either the district or circuit court. App. B88. That claim is not at issue here.

vented from taking *impulsive* violent action by making them wait 10 days for a subsequent purchase.

3. The district court held a 3-day bench trial on Petitioners' claims. After hearing testimony, taking evidence, and full briefing, the court agreed with Petitioners that the challenged application of the waiting period violated the Second Amendment. App. B2-B3.

The court found that virtually all background checks are completed in less than the full 10-day period. App. A17; App. B48. It further found that 20% of background checks are automatically approved based on computerized searches confirming an applicant's eligibility to purchase a firearm. Such automatic approvals are generally completed in less than an hour. App. A17; App. B47.

As to purchasers who pass their background check in fewer than the full 10 days, the only non-frivolous justification offered by the State for depriving them of possession of the firearm for the full 10 days is to provide a cooling-off period in case the firearm is being purchased pursuant to some impulsive but transitory intent to commit violence (whether suicide or crime) that might be reconsidered during the period of delay.

Petitioners argued, however, that such rationale has no application to subsequent purchasers who already own a firearm and hence already have the means to act immediately on such supposedly transitory impulses to violence against themselves or others. And CCW license holders, having been deemed sufficiently trustworthy and stable to carry a concealed weapon, pose no demonstrable risk of such

rash behavior that would be mitigated by a cooling off period. Enforcement of the full 10-day waiting period as applied to such purchasers has no plausible or rational relation to the supposed purposes of the law.

Based on extensive findings of fact and conclusions of law, the district court determined that the application of the full 10-day waiting period in this case fell within the scope of the Second Amendment and was not a presumptively valid regulation. App. B3. After finding that all parties had standing and rejecting some largely frivolous and unsupported assertions by the State speculating about potential updates to a completed background check, App. B13-B20, B72-B74, the court turned to whether rigid application of the full waiting period in this case materially advanced the State's interest in preventing impulsive acts of violence or self-harm by providing a cooling-off period.

Having recognized that, for claims properly within the scope of the Second Amendment, "rational basis review is not to be used," App. B64 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 n. 27 (2008)), the district court analyzed the case using intermediate scrutiny.[3]

The court acknowledged that preventing suicide or violence was a legitimate government interest, so the only question remaining was whether application of the full waiting period after subsequent purchasers

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[3] Petitioner's preserved the argument that strict scrutiny should apply, but agreed that it was unnecessary to decide between intermediate and strict scrutiny given that California's application of its waiting period in this case could not survive any form of heightened scrutiny. App. B21, B70.

had cleared their background checks meaningfully advanced that interest. In the Ninth Circuit, the question often is framed as whether there is a "reasonable fit between the challenged regulation and the government's asserted objective." App. B65 (citing cases). The court noted, however, that to demonstrate such a "fit," the challenged restriction "must not be substantially broader than necessary to achieve the government's interest," the government "cannot rely on 'mere speculation or conjecture,' " and that a restriction " 'may not be sustained if it provides only ineffective or remote support for the government's purpose,' rather there must be an indication that the regulation will alleviate the asserted harms to a 'material degree.' " App. B65 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

Turning to whether application of the full waiting period to subsequent purchasers and CCW license holders materially advanced the government's cooling-off interest, the court concluded it did not.

Regarding whether the scope of the asserted problem – impulsive acts of violence with a newly and lawfully purchased firearm – aligned with the restriction imposed, the court found that "[n]o evidence has been submitted regarding current or historical California suicide statistics or 'time to crime' statistics," which is "the elapsed time from a lawful sale of a firearm to the time of a crime committed with that firearm." App. B50. And reviewing the proffered studies regarding firearm suicide attempts, the court found that suicidal thoughts were transitory and were acted upon within 24 hours or often within one hour. *Id.* One study suggested that for " 'a suicidal

person *who does not already own a handgun*, a delay in the purchase of one allows time for suicidal impulses to pass or diminish.' " App. B50 (emphasis added). The study did not address the length of delay needed to serve such a purpose. Ultimately, the court found that studies of the relationship between suicide and homicide rates and waiting period laws are generally considered "inconclusive," did not find "statistically significant differences between treatment states and controls states * * * as to either homicide rates or suicide rates" for victims aged 21 to 55, and for individuals over the ages of 55 an observed reduction in gun suicide rates was "at least partially offset by an increase in non-gun suicides, which makes it less clear that the waiting period reduced overall suicides for those over age 55." App. B50-B51.

In addition to the lack of evidence of a general problem involving impulse crimes or suicides occurring within 10 days of the application to purchase a lawful firearm, the court also observed that many supposed benefits from a waiting period would accrue in any event: "Because 80% of DROS applications are not auto-approved, a waiting period of at least 1-day will naturally occur because" the government will need to conduct further manual review. App. B74. And for those still inclined to impulsive violence, the court observed that if "a person already possesses a firearm, then that person will generally have access to that firearm and may commit impulsive acts of violence with it." App. B75.

Based on its review of the studies and arguments proffered by the State, the court concluded that there "is no evidence that a 'cooling off period,' such as that

provided by the 10-day waiting period, prevents impulsive acts of violence by individuals who already possess a firearm." *Id.* [4]

The court rejected the State's imagined theories on how an existing gun owner might need a new gun to commit an impulsive act of violence or self-harm, noting that the State offered "no evidence" in support of its "unduly speculative" theory. App. B76 (citing *Edenfield*, 507 U.S. at 770-71). It thus reiterated its holding that there "has been no showing that applying the 10-day waiting period to all individuals who already possess a firearm will materially prevent impulsive acts of violence." App. B76.[5]

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[4] The court rejected, as unsupported, the State's speculation that "because some firearms are better suited for certain purposes than other firearms, a waiting period may prevent an impulsive act of violence with the new weapon." The court noted that the only testimony offered in support of this speculation demonstrated, as the State's witness admitted, that "any cooling off period created by the 10-day waiting period did not work." No other examples were offered by the State. App. B75 n. 35.

[5] Regarding purchases by the limited subset of CCW license holders who might not currently possess a firearm, the court made findings concerning the rigorous requirements for obtaining and keeping such a license. App. B57-B59. As to such highly vetted persons, the court found that there was no evidence regarding the incidence or timing of suicide attempts by such persons and no studies supported applying a 10-day waiting period "to individuals who must meet the type of requirements of a CCW license." App. B81-83. The court held that the "nature and unique requirements of CCW licenses are such that it is unlikely that CCW license holders would engage in impulsive acts of violence." App. B82. The court thus concluded that because the State has already determined that a CCW licensee "has demonstrated that he or she can be expected and trusted to carry a concealed handgun in public for 2 years, * * * [i] Imposing

Having determined that application of the full 10-day waiting period to subsequent purchasers and CCW license holders did not reasonably or materially advance the State's claimed interests in a cooling-off period beyond the time required for a background check, the district court held that the waiting period, as applied, failed intermediate scrutiny and violated the Second Amendment. App. B84.[6]

4. The Ninth Circuit reversed and remanded with instructions to enter judgment for the defendant.

The court of appeals "assume[d], without deciding, that the regulation is within the scope of the [Second] Amendment and is not the type of regulation that must be considered presumptively valid." App. A20. The court of appeals then purported to apply intermediate scrutiny, claiming to have imported "the test for intermediate scrutiny from First Amendment cases" and listing two requirements of such scrutiny: "(1) the government's stated objective must be significant, substantial, or important; and (2) there must be a 'reasonable fit' between the challenged regulation and the asserted objective." App. A8. The court made no mention of the government's burden of proof to show such a fit, no mention that the challenged law must significantly, and not trivially, advance the government's interest, and no mention of the inadequacy of

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the 10-day waiting period as a cooling off period on a CCW license holder is speculative and its effects appear remote at best." App. B83.

[6] Because the Second Amendment claim was dispositive, the court did not need to reach the Fourteenth Amendment claim. App. B88.

mere speculation when it comes to satisfying the government's burden of proof. And, indeed, the court thereafter made no further pretense of applying anything resembling intermediate scrutiny.

Addressing the State's cooling-off period justification, the court of appeals merely cited the generic and inconclusive studies proffered by the State, claiming that such studies demonstrated the risk of suicide immediately following a firearm purchase and the supposedly beneficial effects of waiting periods on gun suicides among the elderly. App. A23. Regarding the district court's finding that such studies did not distinguish between first-time and subsequent purchasers, the court of appeals offered the non-sequitur that "the studies related to all purchasers." App. A23. It offered no explanation, much less evidence, suggesting that any of the supposed effects on suicide could be attributed to subsequent purchasers who already had the means to shoot themselves, as opposed to being entirely attributable to first-time purchasers who did not otherwise have such means until after the purchase. Rather than concern itself with the absence of actual evidence, the court cited to the supposedly "common sense understanding that urges to commit violent acts or self harm may dissipate after there has been an opportunity to calm down." *Id*. It then asserted, without the slightest reasoning or proof, that "[t]his is no less true for a purchaser who already owns a weapon and wants another, than it is for a first time purchaser." *Id*.

The court noted the district court's conclusion "that a cooling-off period would not have any deterrent effect on crimes committed by subsequent pur-

chasers, because if they wanted to commit an impulsive act of violence, they already had the means to do so," but then proceeded to invert the applicable burdens of proof. The court of appeals chided the district court for supposedly "assum[ing] that all subsequent purchasers who wish to purchase a weapon for criminal purposes already have an operable weapon suitable to do the job," and suggested that an "individual who already owns a hunting rifle, for example, may want to purchase a larger capacity weapon that will do more damage when fired into a crowd. A 10-day cooling-off period would serve to discourage such conduct." App. A23-A24.

The court identified no instance of such a scenario ever having happened, cited no testimony as to its likelihood, and gave no evidence as to why such a planned, as opposed to impulsive, desire to commit mass murder would be impacted in the slightest by an extra few days wait beyond that necessary to conduct a background check. The court of appeals likewise gave no deference to, nor made mention of, the district court's many findings of fact that California's AFS database was an accurate source of information regarding firearm ownership, that the State's evidence linking gun purchases to imminent crime was inconclusive at best, that there was not a single example of a crime that would have been prevented by a 10-day waiting period, and that the studies regarding suicide among the elderly were of little value. App. B34-35, B49-B52, B74-B77

The court of appeals, having offered only speculation on how delaying delivery of a firearm to lawful subsequent purchasers might serve the State's

claimed interests to an insignificant and unproven degree, then concluded, without apparent irony, that:

> "The State is required to show only that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' *Fyock*, 779 F.3d at 1000 (citation and quotation marks omitted). The State has established that there is a reasonable fit between important safety objectives and the application of the [waiting period laws] to Plaintiffs in this case. The waiting period provides time not only for a background check, but also for a cooling-off period to deter violence resulting from impulsive purchases of firearms. The State has met its burden.

App. A25.

5. Petitioners sought rehearing or rehearing *en banc*, which the Ninth Circuit denied.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for a writ of certiorari because the decision below, contrary to the decisions of this Court, dilutes or ignores the intermediate scrutiny that is the minimum scrutiny applicable in Second Amendment challenges. And because such lax scrutiny appears to be the result of a concerted effort in the Ninth Circuit and elsewhere to circumvent this Court's Second Amendment cases, this Court should exercise its supervisory power to ensure faithful, as opposed to obstructionist, application of those precedents.

I. The Decision Below Applies an Improperly Lenient Level of Constitutional Scrutiny.

This case offers this Court the opportunity to address the minimum level of constitutional scrutiny required in Second Amendment cases in a situation where the requirements of intermediate scrutiny and their application to the facts should be easy, yet nonetheless turned out wrong.

The as-applied challenge here was rejected by the court of appeals because the standards and burdens the Ninth Circuit applied were not even close to intermediate scrutiny as applied under the First Amendment or other constitutional provisions. Although the Ninth Circuit claimed it was applying such intermediate scrutiny, if we take that court at its word, its view of intermediate scrutiny conflicts with the standards applied by this Court and pretty much every other court to apply such scrutiny outside the Second Amendment context.

For example, in the First Amendment context, intermediate scrutiny requires that restrictions on commercial speech must be "tailored in a reasonable manner to serve a substantial state interest." *Edenfield*, 507 U.S. at 767. But this Court has made abundantly clear that such "reasonable" tailoring requires a considerably closer fit than mere rational basis scrutiny, and requires evidence that the restriction directly and materially advances a *bona fide* state interest.

The test under intermediate scrutiny for whether a regulation is reasonably tailored to substantial state interests is "whether the challenged regulation advances these interests in a direct and material way,

and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Id.* Under the tailoring element of intermediate scrutiny, " 'the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.' " *Id.* at 770 (quoting *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)). Furthermore, the government bears the burden of justifying its restriction on constitutional rights, and that "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71.

The district court below correctly applied the standards from *Edenfield* and held that the State's evidence was deficient regarding the existence of any harm from the narrow group at issue here. The district court, as the finder of fact, rejected the State's hypothesized harms and solutions as speculative, and hence inadequate under intermediate scrutiny. App. B49-B52, B74-B77, B81-B83, B87.

The Ninth Circuit, by contrast did exactly what this Court, and intermediate scrutiny, forbid: It relied on "evidence" that did not even remotely address the challenge at issue and speculated as to both the existence of risk and the benefits of the restriction as applied to subsequent purchasers and CCW licensees. Indeed, ignoring the district court's factual findings, the Ninth Circuit offered only two incoherent responses. The first was that a study concerning sui-

cide among older purchasers of firearms reviewed all purchasers and hence its conclusions were valid as to the subgroup of subsequent purchasers as well. App. A23. The district court, however, noted that such studies provided little support even when taken at face value, and further held that any supposed effect did not distinguish between first-time and subsequent purchasers. It requires only the barest moment of reflection to recognize the flaw in the Ninth Circuit's logic – all of the supposed increase in suicide rate could have come from first-time purchasers, and the inclusion of subsequent purchasers in the denominator tells us nothing about whether they are represented at all in the numerator.[7]

The Ninth Circuit's second proffered response – the assertion that "waiting ten days *may* deter subsequent purchasers from buying new weapons that would be better suited for a heinous use," App. A19 (emphasis added) – is the very definition of speculative. The district court found that there was no evidence at all providing time-to-crime data or supporting the supposed effectiveness of waiting periods in preventing "heinous" crimes. App. B50-B52. And it is difficult to imagine a subsequent purchaser needing a new and specialized weapon to commit suicide.

Even assuming, *arguendo*, that cooling-off periods might reduce impulsive acts of violence or self-harm, there is no evidence that a period of 10 days has any

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[7] For example, if 17-year-olds in general have an X-percent chance of becoming pregnant, the inclusion of 17-year-old boys in the denominator does not tell us that boys have a significant risk of becoming pregnant themselves.

marginal benefit over the shorter, but inevitable, wait for the 80% of purchasers not automatically, but eventually, clearing their background check. Furthermore, a person with a violent impulse who already has the means to implement that impulse will simply do so. If the person is instead planning an act of violence with sufficient forethought to purchase a subsequent weapon better suited for heinous use, that is premeditated, not impulsive, and there is no suggestion that waiting periods have any effect on such planned acts of violence.

This Court has held under intermediate scrutiny that restrictions on constitutional rights must be analyzed in their specific context, and "will depend upon the identity of the parties and the precise circumstances of the" protected activity. *Edenfield*, 507 U.S. at 774. Even where this Court has spoken of the general potential dangers of a protected activity, it has emphasized that such generalized risk does not warrant restrictions as to all persons. Instead, "a preventative rule" aimed at such generic hazards "was justified only in situations 'inherently conducive to' " the specific dangers identified. *Id.* (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978)).

Similarly, in *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 185-95 (1999), this Court assumed the accuracy of a causal chain from casino advertising to the social ills resulting from increased gambling, but still found the government regulation failed intermediate scrutiny. Having ignored numerous confounding factors and its own inconsistent policies towards gambling, the govern-

ment failed to distinguish between the advertising it allowed and the advertising it restricted. Accordingly, it could not demonstrate that its policy had "directly and materially furthered the asserted interest." 527 U.S. at 189.

Had the Ninth Circuit faithfully applied the correct standards of intermediate scrutiny, it could not have upheld the challenged applications of the waiting period laws in this case. Far from posing the same risk of impulsive violence as hypothesized for first-time firearm purchasers, subsequent purchasers and CCW licensees pose little or no risk, and certainly no demonstrated risk, of the harms the State seeks to reduce. Just as the regulators in *Edenfield* and *Greater New Orleans Broadcasting* failed to distinguish between general claims of harm and remedy, and specific evidence that the group being regulated posed a threat or would add to the solution, so too the State has failed here.

None of the government's evidence distinguishes between first-time and subsequent purchasers or CCW licensees. The hypothesized danger being addressed – impulsive violence enabled by a new firearm purchase – on its face does not apply to those who already have a firearm, and there is nothing to suggest that such group or CCW holders pose even the slightest threat of such violent behavior. Likewise, the notion that a marginal increase in wait-time beyond that needed to clear a background check would have any impact on the incidence of such imagined harms is itself speculative and illogical. Where a purchaser has a transient impulse to commit violence to himself or others, and already has the means

to fulfill that impulse, there is no reason to imagine that a waiting period for an additional weapon will prevent or cause reconsideration of such impulsive action. Whatever the argument as to first-time buyers, the government's failure to justify its restrictions as to the distinct groups here, who pose little or no danger of the hypothesized harms, is fatal under intermediate scrutiny.[8]

This Court has rejected such inadequate proof and speculation under intermediate scrutiny. In *Edenfield*, the regulatory body presented "no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." 507 U.S. at 771. The lack of comparative data from other States was significant in *Edenfield*, *id*., and is likewise significant here. The vast majority of States do not have waiting periods laws, and most of the existing waiting period laws are for fewer than 10 days. App. B27. Yet California offered no meaningful comparative data on the supposed danger from subsequent purchasers or CCW licensees or the supposed effectiveness of waiting periods as to that group. In short, there is no evidence that the harm alleged in this case is real, and no evidence that the challenged application of the full waiting period materially advances the State's alleged in-

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[8] Additionally, the fact that there are numerous exceptions to the 10-day waiting period – mostly for persons who already have access to firearms, App. B61 – cuts against the government's claim of reasonably advancing its interests by applying the full waiting period in the circumstances here. *Greater New Orleans Broadcasting*, 527 U.S. at 190

terests in a " 'direct and effective way.' " *Edenfield*, 507 U.S. at 773 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). Even accepting the Ninth Circuit's speculation in its entirety, the vague possibility that an existing and previously law-abiding owner might seek an additional firearm to commit an impulsive act of violence, would seek to lawfully purchase such a weapon, would act on the impulse in fewer than 10 days, but would not use the firearm he already possessed and instead cool off and reconsider his intended crimes in the period between clearing the background check and the remainder of the 10-day wait, is preposterous. It certainly does not represent a real or meaningful danger or a significant advancement of the broader cooling-off interest. As the district court found, the State has not proffered a single instance from anywhere in the country where a lengthier waiting period for a subsequent purchaser would have had any positive effect at all.

Lacking sufficient evidence to satisfy actual intermediate scrutiny, the Ninth Circuit instead diluted the standard from whether a regulation directly and materially advances the proffered interest to whether the regulation merely " 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " App. A25 (quoting earlier Ninth Circuit case). That formulation is more like rational basis than intermediate scrutiny. Under intermediate scrutiny the State retains "the obligation to demonstrate that it is regulating [protected activity] in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that

problem." *Edenfield*, 507 U.S. 776. The State cannot even come close to meeting that standard here.

If we assume that the Ninth Circuit believes its analysis here was in fact intermediate scrutiny, the legal standard applied in this case is a severe retrenchment of such scrutiny as heretofore understood, conflicts with the articulation of such scrutiny by this and other courts, and poses a threat not merely to Second Amendment rights, but to First and Fourteenth Amendment rights as well. This Court should grant certiorari to resolve that conflict in the standards for intermediate scrutiny and to enforce the requirement under this Court's Second Amendment cases that burdens on the right to keep arms are subject to more than rational basis scrutiny.

II. This Court Should Exercise Its Supervisory Authority to Cabin the Continuing Resistance to Its Second Amendment Rulings.

Although the prior section allows for the possibility that the Ninth Circuit genuinely thought it was applying intermediate scrutiny, even if it failed to recognize and apply the elements and burdens of such scrutiny, another possibility is that the court perfectly understood what intermediate scrutiny entails but refused to apply it here.

It is no secret that various lower courts, and the Ninth Circuit especially, are engaged in systematic resistance to this Court's *Heller* and *McDonald* decisions. Several Justices of this Court have noted as much. *See Peruta v. California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., dissenting from denial of cert.) ("The approach taken by the *en banc* court is

indefensible, and the petition raises important questions that this Court should address."; "The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("We treat no other constitutional right so cavalierly"); *Friedman v. Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari) ("Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case."); *cf. Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (GVR of State court opinion that gave essentially no respect to this Court's decision in *Heller*); *id.* at 1030, 1033 (Alito, J., concurring) ("Although the Supreme Judicial Court [of Massachusetts] professed to apply *Heller*, each step of its analysis defied *Heller*'s reasoning."; "The lower court's ill treatment of *Heller* cannot stand.")

Judges on the Ninth Circuit itself likewise have recognized the disfavored treatment given to Second Amendment challenges in that court. *Silveira v. Lockyer*, 328 F.3d 567, 568-69 (2003) (Kozinski, J., dissenting from the denial of rehearing *en banc*) ("It is wrong to use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. * * * Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as

federal judges to constitutionalize our personal preferences."), *cert. denied*, 540 U.S. 1046 (2003).

This case provides an obvious example of such judicial resistance and a clean and concise vehicle for this Court to set an example and reestablish the proper administration of justice in Second Amendment cases. As noted in the previous section, the Ninth Circuit, though purporting to apply intermediate scrutiny, did nothing of the sort. It requires no imagination to infer that such ill treatment of the Second Amendment was not merely an error in the legal standard used. Although this Court's decision in *Edenfield* sets the baseline for intermediate scrutiny and was relied upon extensively by the district court, the Ninth Circuit does not cite or quote that case at all. Had it done so, it would have been impossible to maintain any pretense that it actually was engaging in intermediate scrutiny.

Further indication that the result in this case was not mere error, but instead active circumvention, is the Ninth Circuit's utter disregard for the district court's findings of fact. Rule 52(a)(6) "sets forth a 'clear command'" that "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-37 (2015) (citations omitted). Put simply, "when reviewing the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Id.* at 837 (citations omitted).

When a district court rules *against* a Second Amendment challenge, the Ninth Circuit is quick to discuss the lower court's findings of fact, to defer to such findings, and to conclude that it "cannot say that the district court's weighing of the evidence or credibility determinations were clearly erroneous, and we decline to substitute our own discretion for that of the district court." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000-01 (9th Cir. 2015).

In this case, by contrast, when reviewing a disfavored decision sustaining a Second Amendment challenge, such deference and limited review were not even mentioned, much less applied. Rather, the Ninth Circuit derided express findings by the district court as mere assumptions it could ignore, and substituted its own speculative assessment of the potential harms for the district court's findings that the State had failed to meet its burden of proof. The sheer irregularity of having abandoned both the standards for intermediate scrutiny and the standard of review of trial findings provides a strong inference that the decision below was merely cover for a preordained outcome rather than an application of the rule of law and this Court's precedents.

The Ninth Circuit's shabby treatment of Second Amendment claims here is nothing new. Many of the Second Amendment cert. petitions coming to this Court arise from the Ninth Circuit and have provoked strong dissents from denial of cert. *See supra*, at 21-22. And when, by some happenstance, a Second Amendment challenge succeeds before a panel, the *en banc* Ninth Circuit is quick to dispose of the outlier. *See Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th

Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 1995 (2017). That the Ninth Circuit and many other courts are openly hostile to the Second Amendment and unwilling faithfully to apply this Court's cases on the issue, is hardly news to this Court. Indeed, such undisguised circumvention already has inspired a unanimous GVR in a case from Massachusetts. *Caetano*, 136 S. Ct. at 1028. More, however, is needed. The Second Amendment is meaningless if restrictions will be covered by that Amendment, but the level of scrutiny and the standard of review are rigged.

Petitioners recognize this Court's seeming reluctance to engage further in the contentious development of Second Amendment jurisprudence. The question in this case is whether it is now time to overcome that reluctance and whether this case is a good vehicle for reestablishing the ground rules for Second Amendment cases.

First, Petitioners respectfully suggest that the time has come to put an end to the mass resistance among the courts of appeals to *Heller* and *McDonald*. Whatever the institutional and systematic harms that come from lingering circuit splits, they pale in comparison to those caused by active non-compliance with, and circumvention of, this Court's precedents. If the credibility and fairness of the legal system is diminished by divergent – though good-faith – legal standards and results that vary by circuit, surely credibility and fairness are at their lowest when various courts of appeals decide that their own views trump Supreme Court precedent.

Nor does it matter that members of this Court might continue to disagree on the particular merits or

standards to be applied in various Second Amendment cases; whatever this Court eventually decides under the Second Amendment, the lower courts must be obliged to follow. The behavior of the Ninth Circuit and other obstructionist courts systematically undermines the credibility of the entire legal system and feeds the view that the courts are engaged in politics, not the law. The Ninth Circuit in this and other Second Amendment cases is not neutrally calling balls and strikes, it is the proverbial hometown umpire. If judicial credibility and the rule of law mean anything, this trend is a direct and continuing threat to such interests. This Court has waited long enough on the lower courts, and should now reassert that the rule of law applies to the Second Amendment as much as to the First, Fourth, and Fourteenth Amendments.

Second, this case provides a good vehicle for clarifying and enforcing the most basic notions of constitutional scrutiny and faithfulness to this Court's cases. The facts are straightforward and not genuinely subject to dispute. The State's burden of proof, the bench trial before the district court, and the appellate standard of review make application of the law to such facts straight-forward. And the particular application of the full 10-day waiting period to firearms purchasers who pass their background checks and already possess another firearm or a CCW license involves no meaningful risk to public safety. In short, the erroneous legal analysis below is open and notorious, the facts are limited and straightforward, and the risk of adverse public consequences are effectively non-existent. This case thus has the potential to al-

low this Court to focus on the law, rather than on contentious public-policy issues, and might allow greater agreement regarding uniform and genuine standards of constitutional scrutiny and respect for this Court's precedents.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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