No. 17-342

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 a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF FIREARMS POLICY FOUNDATION, FIREARMS POLICY COALITION, MADISON SOCIETY FOUNDATION, AND GUN OWNERS OF CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF GRANTING CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Firearms Policy Foundation (FPF) is a 501(c)3 nonprofit organization. It is interested in this case because FPF's mission is to protect and defend the Constitution of the United States and the People's rights, privileges, and immunities deeply rooted in this Nation's history and tradition, especially the inalienable, fundamental, and individual right to keep and bear arms under the Second Amendment.

Firearms Policy Coalition (FPC) is a 501(c)4 nonprofit organization. It is interested in this case because FPC's mission is to protect and defend the Constitution of the United States, especially the fundamental, individual Second Amendment right to keep and bear arms.

Madison Society Foundation (MSF) is a 501(c)3 nonprofit organization. MSF is interested in this case because its mission is to serve and protect the Second Amendment rights of the law-abiding residents of the United States.

Gun Owners of California (GOC) is a 501(c)4 nonprofit organization, which is also interested in this case because GOC's central mission is similarly to support the rights of all law-abiding residents of the United States to keep and bear arms as guaranteed by the Second Amendment.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to written consent of the petitioners and written consent of the respondent. All parties were notified of *amici's* intent to file this brief more than 10 days prior to its filing date.

SUMMARY OF ARGUMENT

Petitioners are spot on in saying that the Ninth Circuit's reversal of the district court's opinion "is as unsupportable as it is unsurprising." Pet. for Writ of Cert., *Silvester v. Becerra*, No. 17-342, at 3. The Ninth Circuit's decision speaks for itself in revealing the error of its ways – and loudly. *Amici* come to this Court in support of Petitioners for the very reason that this outcome is indeed "unsurprising." As prejudicially erroneous as it is in this individual case, even more alarming is that the decision is emblematic of a widespread epidemic in the lower courts. Their case law is systematically eroding the constitutional right to "keep and bear arms" under the Second Amendment, with opinions that time and again directly contravene and effectively block implementation of the core protections that this Court declared individual and fundamental in its landmark decisions of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

This epidemic of judicial obstructionism is certain to continue unless and until this Court reclaims and reasserts the power of its precedents as the final word in the matter of constitutional rights. Otherwise, as the recent *per curiam* opinion in *Caetano v. Mass.*, 554 U.S. 570 (2016) [136 S.Ct. 1027] highlights, this flouting of the Court's precedents "poses a grave threat to the fundamental right of self-defense" and to "the safety of all Americans" potentially "left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe." *Id.* at 1033 (Alito, J., concurring).

Now seven years out from *McDonald* – the last time the full Court engaged in an in-depth analysis of the Second Amendment – the need for such review could not be more pressing. Unlike the jurisprudence concerning other core constitutional provisions, such as the First and Fourth Amendments, which is well-defined and now requires only occasional fine tuning, the jurisprudence interpreting the constitutional guarantees of the Second Amendment remains in its infancy. Clarification of those guarantees through this case would provide the much-needed opportunity to stem the ever-growing tide of obstructionism in the lower courts, without which decisions like the one in this case will not only continue to be commonplace but also enjoy the alarming status of "unsurprising."

ARGUMENT

I. Review is Necessary to Reestablish the Rule of Law and Halt the Trend of Judicial Obstructionism Currently Jeopardizing the Core Constitutional Protections of the Second Amendment

The prevailing forms of Second Amendment judicial obstructionism abound in the lower courts. All are embodied in one way or another in the Ninth Circuit's tossing aside of the district court's well-reasoned Findings of Fact and Conclusions of Law following discovery and trial here, which found that California's enforcement of a 10-day waiting period for all firearm purchases, Cal. Pen. Code §§ 26815, 27540(a), violated the Second Amendment when applied to those like Petitioners, who are either known to already own a firearm or are credentialed to carry

a concealed firearm *and* pass the background check before the 10-day waiting period expires.

The typical analysis begins, as it did in the Ninth Circuit here, by setting the stage with a narrow construction of the Second Amendment that confines its significance to a limited context and places most firearm regulations beyond the "core" of the Amendment's protections. Then, the court claims to do the right thing, by avoiding the sort of "rational-basis" review this Court emphatically rejected as improper in *Heller* and *McDonald*, and ostensibly invoking "intermediate scrutiny" as traditionally understood and applied in resolving constitutional challenges. However, what the court actually does is proceed to blithely accept (or conjure up its own) generic governmental purposes as "important" or "substantial" justifications and then accept (or conjure up its own) speculative reasons for how the means are sufficiently tailored to achieve the ostensible purposes, with little or no evidence to support either conclusion.

In other words, in the end, whatever the lip-service they may give to this Court's pronouncements in *Heller* and *McDonald*, these courts are essentially analyzing the core Second Amendment guarantees in precisely the manner this Court has expressly forbidden: through a "watered-down, subjective version of the individual guarantees" embodied within the Second Amendment. *McDonald*, 561 U.S. at 785-86. The steps of this fundamentally flawed analysis in contravention of the Court's precedents are discussed in turn through the case illustrations set out below.

A. Obstructionistic Courts Are Setting Their Stages by Applying Overly Narrow Interpretations of the Second Amendment's Scope and Purpose that Directly Conflict With This Court's Interpretation of the Amendment

Percolating up through the lower federal courts is a recurring general theme that the Second Amendment as originally framed and as construed by this Court in *Heller* and *McDonald* captures only a limited sphere of protected conduct within its "core" – essentially, just self-defense within the home.

These courts have employed this conception as the underpinning for their analyses upholding various restrictions, just as the Ninth Circuit did here, in portraying the regulated activity as beyond the home-bound self-defense context to which the "core" protections are ostensibly limited. *Silvester v. Harris*, 843 F.3d 816, 820 (9th Cir. 2016) ("The core of the *Heller* analysis is its conclusion that the Second Amendment protects the right to self defense in the home."); *accord Drake v. Filco*, 724 F.3d 426, 436 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012). The First Circuit has even suggested that the Second Amendment solely preserves a home-bound right of self-defense in instances of immediate danger. *Powell v. Tompkins*, 783 F.3d 332, 347 (1st Cir. 2015) (*Heller* and *McDonald* simply "establish that states may not impose legislation that works a complete ban on the possession of operable handguns in the home by law-abiding, responsible citizens for use in immediate self-defense"); *see also Peruta v. California*, 824 F.3d 919, 926 (9th Cir. 2016) (italics added) ("the Second Amendment right

to keep and bear arms does not include, *in any degree*, the right of a member of the general public to carry concealed firearms in public").

Nowhere in *Heller* or *McDonald* did this Court engraft such constraints onto the Second Amendment. The right to "keep" and "bear" arms necessarily involves "'something more than mere keeping'" by the bedside, *Ezell v. City of Chicago*, 846 F.3d 888, 896 (7th Cir. 2017) (quoting *Heller*, 554 U.S. at 617-18); it includes, "necessarily, the right to use arms for all ordinary purposes, and in all ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace," *Heller* at 614; *see also Caetano*, 554 U.S. at 1028 (Alito, J., concurring) (the Second Amendment "vindicate[d]" Caetano's "'basic right' of 'individual self-defense'" by ensuring her right to wield a stun gun in an encounter with her violent ex-boyfriend *outside* her home).

That this right of self-defense is "most acute" within the home, *Heller* at 628-29; *McDonald* at 727, certainly does not mean all such activity outside the home falls beyond the core of the right. *See Wrenn v. District of Columbia*, 864 F.3d 650, 656 (D.C. Cir. 2017) ("the fact that the need for self-defense is most pressing in the home doesn't mean that self-defense at home is the only right at the Amendment's core," because its "'core lawful purpose' is self-defense, [citations], and the need for that might arise beyond as well as within the home"). Given the breadth of this fundamental right, in reality, "the Amendment's core generally covers carrying in public for self-defense," and (absent some express prohibition) this is true "even in populated areas" and "even without special need," such as an immediate danger. *Id.* at 659, 664.

By employing myopically narrow constructions of the Second Amendment in contravention of this authority, obstructionistic courts are setting the stage for pre-ordained results hostile to the Amendment.

B. Central to This Judicial Obstructionism is the Very "Rational-Basis" Review that This Court Has Expressly Forbidden – Merely Dressed Up with the Label of "Intermediate Scrutiny"

This Court has flatly rejected as improper any "rational-basis" review of laws curtailing the protections of the Second Amendment, as well as "interest-balancing" that would render the nature of the constitutional guarantee dependent upon a future court's subjective assessment of its usefulness, which "is no constitutional guarantee at all." *McDonald*, 561 U.S. at 785-86; *Heller*, 554 U.S. at 634-35. This means that, *unlike* under rational-basis review, the law does *not* "come to us bearing a strong presumption of validity," those attacking the law do *not* "have the burden to negative every conceivable basis which might support it," the actual justification for the law is *not* "irrelevant" since the legislature *must* actually "articulate its reasons" for enacting the law, and the legislative choice may *not* "be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications,* 508 U.S. 307, 314-15 (1993) (explaining "rational-basis" review).

The lower courts have inevitably acknowledged the denouncements of "rational-basis" review and judicial "interest-balancing" that stand out in *Heller* and *McDonald* like red flags impossible to ignore. And they give the obligatory nod to the Court here. But, just as there is an underground movement afoot

to emasculate the Second Amendment generally through overly narrow interpretations of its scope, it is evident that there is a concerted effort among the federal circuits to flout these strong admonitions. The artifice here is to pay lip-service to the Court's precedents while crafting results-oriented analyses designed to uphold onerous firearm restrictions that could not survive proper constitutional scrutiny.

1. The Ninth Circuit's *Silvester* Opinion Poignantly Illustrates the Emerging Trend of Stealthily Flouting the Controlling Standards of Constitutional Review

The case currently before the Court is a prime example of this clandestine obstructionism. Right out of the gate, the Ninth Circuit claims it has heeded this Court's direction in *Heller* and *McDonald* by "import[ing] the test for intermediate scrutiny from First Amendment cases." *Silvester*, 843 F.3d at 822. The standards for that test are, in reality, quite rigorous. In contrast to the rational-basis test, this test "does not permit us to supplant the precise interests put forward by the State with other suppositions," nor to "turn away if it appears that the stated interests are not the actual interests served by the restriction." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Rather, the government bears the burden of proving that the restriction "'directly advance[s] the stated interest involved.'" *Id.* at 770 (quoting *Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 564 (1980)). Mere speculation or conjecture will not suffice; the government must prove "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71. And the restriction can-

not be "more extensive than necessary to serve the interests that support it," but must be "narrowly tailored to achieve the desired objective." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001).

However, as Petitioners cogently explain, in upholding California's waiting period laws against their as-applied constitutional challenges, the Ninth Circuit "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." Pet. for Writ of Cert. at 15. Indeed, the court did not hold California to any real burden; it simply accepted the generic government interests of "promoting safety and reducing gun violence" as having "undisputedly satisfied" the first step of its two-step "intermediate scrutiny" test. *Silvester*, 843 F.3d at 827. Then, it essentially gave the state a free pass on the "second step" of the ostensible test – designed to ensure a reasonable fit between the stated interests and the means – by merely determining for itself that "the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 829.

Other than the label of "intermediate scrutiny" that the court employed, this analysis in no way, shape, or form resembles a permissible degree of constitutional scrutiny under this Court's precedents. This is particularly true given that, despite the highly lenient form of "scrutiny" applied, the court was still required to indulge in groundless leaps of logic and an "utter disregard for the district court's findings of fact" in order to arrive at its targeted conclusions. *See* Pet. for Writ of Cert. at 15-16, 23.

This is not the first time the Ninth Circuit has played "fast and loose" with the Court's Second Amendment jurisprudence to fend off constitutional claims – nor will it be the last if this Court does not step in. Just a few months ago, in *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017), the Ninth Circuit rejected a constitutional challenge to California's firearm transfer fees, once again under the auspices of "intermediate scrutiny" but through an analysis that really demanded nothing more than the court's own subjective conclusion that the fees were sufficiently related to the general interest of promoting "public safety." *Id.* at 1223-24. There was indeed no evidence that the means would "in fact alleviate" any "real" harms. *Edenfield v. Fane*, 507 U.S. at 770-771.

In an even more egregious example, just two weeks ago, the Ninth Circuit rejected a Second Amendment challenge to a San Francisco County ordinance prohibiting the establishment of firearm retail stores within certain residential and school zones, on the basis that the County's general interest in protecting the residents' "health and safety" justified the restriction under "intermediate scrutiny" standards. *Teixeira v. County of Alameda*, ___ F.3d ___ (9th Cir., No. 13-17132, Oct. 10, 2017) [2017 U.S. App. LEXIS 19795*], *6-7. As one of the dissenting justices tellingly observed, the County had not only failed to prove the existence of any such "risk of harm," but it was clear that the County itself "d[id]n't even believe" the purported justification existed; the majority was "merely speculat[ing] that the proximity of guns, in a gun store, threaten[ed] the County residents' 'health and safety.'" *Id.* at 57-59, 60 (Bea, J., dissenting).

2. This Intolerably Lenient Form of Constitutional Scrutiny in Contravention of the Court's Authority is Crystallizing into the Established Law of a Growing Number of Federal Circuits

This form of judicial obstructionism by stealth is turning into a trend establishing the law of the circuits, as at least three other circuits have published cases with veiled "rational-basis" reviews of firearm restrictions masquerading as rulings that tested for constitutionality under "intermediate scrutiny."

In *Kachalsky v. County of Westchester*, 701 F.3d 81, the Second Circuit claimed that, consistent with "the approach taken by [its] sister circuits," it was subjecting to intermediate scrutiny New York's "good cause" limitation on concealed carry licenses. *Id.* at 93. However, the court proceeded to essentially abdicate its entire role in the review process by simply relying upon the state's broad "governmental interests in public safety and crime prevention" and then completely deferring to New York's "public policy judgments" that the law advanced the interests, because it was "far better equipped" to make those judgments. *Id.* at 97. And the Second Circuit went even further in its thinly veiled efforts to circumvent this Court's precedents for purposes of upholding the concealed carry requirement of a "special need for self-protection." It flouted the clear interpretation of the Second Amendment in *Heller* and *McDonald* by construing the "core" right of self-defense enshrined in the Amendment as only applying when "objective circumstances justify the use of deadly force." *Id.* at 100.

It is a similar story with the Third Circuit's opinion in *Drake v. Filco*, 724 F.3d 426, upholding New

Jersey's "justifiable need" requirement for concealed carry licenses – although even more alarming. While purporting to use the yardstick of "intermediate scrutiny," *id.* at 435-37, the court quickly fell back on the general state interest of "ensur[ing] the safety of all of its citizenry" to find the state had an "undoubtedly" "significant, substantial, and important" governmental purpose. *Id.* at 437. Then, astonishingly, the court outright conceded that New Jersey did not present *any* evidence that the state had even considered data concerning whether the law supported this purpose – much less evidence that demonstrated an actual causal connection. *Id.* But, even more astonishingly, this concession – which would necessarily be fatal to the licensing requirement under any form of actual intermediate scrutiny, *Edenfield v. Fane*, 507 U.S. at 768 – was of no concern to the court. The court made no moment of it through the preposterous assertion that no such showing was necessary because the state could not have foreseen that this Court would declare a right of self-defense requiring states to support firearm restrictions with concrete reasons and appropriately tailored means. *Drake* at 437-39.[2]

Remarkable as this is, the Fourth Circuit has gone to similarly spurious lengths to uphold firearm re-

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[2] To be sure, this spurious rationale – which would give the government a free pass on any firearm restriction no matter how unconstitutional so long as it was enacted before the Second Amendment was incorporated against the states in *McDonald* – failed to garner unanimous support. Rather, it spurred a vehement dissent that took the majority to task for disingenuously "absolving" New Jersey of its duty to support its claimed justification with evidence of a need for the restriction and to demonstrate a reasonable fit between that justification and the restriction. *Id.* at 442, 452-58 (Hardiman, J., dissenting).

strictions under the guise of heightened scrutiny. Seizing upon the same sort of broad purpose any government could claim as a motivator behind its entire body of laws – "protecting public safety" – the Fourth Circuit upheld Maryland's scheme of prohibitions against so-called "assault weapons" and standard-capacity firearm magazines that hold more than 10 rounds of ammunition. *Kolbe v. Hogan*, 849 F.3d 114, 141 (4th Cir. 2017). Like the Third Circuit, the court purported to apply "intermediate" scrutiny in reaching its conclusion but merely acceded to the state's desires, wholesale, saying that the legislature was better equipped to make such "policy judgments." *Id.*[3]

As in *Drake*, the untenable analysis in *Kolbe* inevitably sparked in-fighting through a hostile dissent, in which the dissenter accused the other judges of circumventing this Court's precedent because they "simply do not like *Heller's* determination that firearms commonly possessed for lawful purposes are covered by the Second Amendment." *Kolbe*, 849 F.3d

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[3] The Fourth Circuit alternatively concluded that the firearms at issue were not even protected under the Second Amendment, because they were "like" M-16 rifles, "most useful in military service," which *Heller* said "*may* be banned" without violating the Second Amendment. *Kolbe*, 849 F.3d at 136 n. 10, 142, 146 (italics added). In doing so, the court discarded this Court's "dangerous and usual" test as "unnecessary" in light of its conclusion that identifying a weapon as "like" an M-16 was enough to declare it constitutionally unprotected. *Id.*; *see Caetano*, 136 S.Ct. at 1031 (Alito, J., concurring) (italics original) (a weapon must be *both* "dangerous *and* unusual" to be subject to a total ban). This reasoning allowed the court to avoid the crucial analysis of whether the weapons were in common use for lawful purposes, and thus further evinces a concerted effort to circumvent the strictures of this Court's precedents in order to reach a preferred outcome.

at 155 n. 3 (Traxler, J., dissenting). Indeed, as the dissenting judge aptly pointed out, the majority's strained opinion that any weapon "most useful in military service" falls outside the purview of the Second Amendment directly conflicts with this Court's opinion in *Heller*, which "expressly reject[ed] the view that 'only those weapons useful in warfare are protected.'" *Id.* at 156 (quoting *Heller*, 554 U.S. at 624).

C. It is Time for the Second Amendment to Regain Its True Status as the Fundamental Individual Right This Court Has Declared It to Be

When *First* Amendment free speech rights are at stake, the federal circuits are quick to not only apply true "intermediate scrutiny" but to strike down restrictions as unconstitutional – including those courts that have used tortured versions of that test to reject claims when Second Amendment rights are at stake. *See e.g., El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 112-17 (1st Cir. 2005); *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104 [2017 U.S. App. LEXIS 15935, *22-27] (2d Cir. Aug. 22, 2017); *Pitt News v. Pappert*, 379 F.3d 96, 107-113 (3d Cir. 2004); *Kiser v. Kamdar*, 831 F.3d 784, 787-792 (6th Cir. 2016); *Western States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1093-98 (9th Cir. 2001); *Sorenson Communs. v. F.C.C.*, 567 F.3d 1215, 1225-28 (10th Cir. 2009).

This is more evidence that "the Ninth Circuit and other obstructionist courts [are] systematically undermin[ing] the credibility of the entire legal system" by "engag[ing] in politics, not the law," and playing "the proverbial hometown umpire," "not neutrally calling balls and strikes," when the constitutional

claim arises under the Second Amendment. Pet. for Writ of Cert. at 26. As those courts and judges not yet infected by this epidemic of obstructionism have cautioned, it is just as crucial in this context to faithfully enforce the "demanding" burden of intermediate scrutiny squarely upon the government, requiring it to prove with substantial evidence that the law is designed to achieve the stated ends. *See e.g., Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 693-94 (6th Cir. 2016); *Ezell v. City of Chicago*, 846 F.3d at 892; *Wrenn v. District of Columbia*, 864 F.3d at 661-64; *Teixeira v. County of Alameda*, ___ F.3d ___, 2017 U.S. App. LEXIS 19795, *59-60 (Bea, J. dissenting).

That Second Amendment challenges raise controversial issues or that "gun violence is a serious problem" provides no justification for courts to set it aside as "outmoded" or "extinct" and substitute their own "assessments of its usefulness." *Heller*, 554 U.S. at 634-35, 636. "All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes" will potentially involve "controversial public safety implications." *McDonald*, 561 U.S. at 783. Just like the rest of the constitutional guarantees enshrined in the Bill of Rights, the Second Amendment must be interpreted and applied as the "fundamental," "deeply rooted," and broad "individual right to keep and bear arms" the framers originally intended, *McDonald*, 561 U.S. at 768, "whether or not future legislatures or (yes) even future judges think that scope too broad," *Heller*, at 635; *Silveira v. Lockyer*, 328 F.3d 567, 568 (9th Cir. 2013) (then-Chief Judge Kozinski, J., dissenting from denial of rehearing en banc) ("It is wrong to use some constitutional provisions as springboards for major social change

while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us.").

It is high time for this Court to step back into this arena and purge the legal system of the ever-growing judicial obstructionism seriously eroding the fundamental protections of the Second Amendment. Left unchecked, these courts will "continue to slowly carve away the fundamental right to keep and bear arms," with each decision "further lacerat[ing] the Second Amendment, deepen[ing] the wound, and resembl[ing] the Death by a Thousand Cuts." *Teixeira v. County of Alameda*, ___ F.3d ___, 2017 [U.S. App. LEXIS 19795], *52 (Owens, J. dissenting).

CONCLUSION

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

Respectfully submitted,

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