No. 17-342

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 *AMICUS CURIAE* CRIME PREVENTION RESEARCH CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit, in joining with the Second Circuit but breaking with the other circuits, improperly diluted its intermediate scrutiny analysis of a Second Amendment challenge to a firearms waiting period prescribed by California law by eliminating the government's evidentiary burden of proof?

2. Whether the Ninth Circuit, in joining with the Second Circuit but breaking with the other circuits, properly modified the intermediate scrutiny examination of California's "cooling off" requirement by refusing to consider less restrictive alternatives?

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INTEREST OF *AMICUS CURIAE*[1]

The Crime Prevention Research Center ("CPRC") is a research and education organization dedicated to conducting academic quality research on the relationship between laws regulating the ownership or use of guns, crime, and public safety, educating the public on the results of such research, and supporting other organizations, projects, and initiatives that are organized and operated for similar purposes. CPRC's primary goals are to: (1) advance the scientific understanding of the relationship between laws regulating the ownership or use of guns, crime, and public safety; (2) improve the awareness and knowledge of this scientific understanding among the public, journalists, judiciary and policy makers; and (3) enhance public safety through these scientific advances and improved awareness and knowledge. The CPRC's Academic Board of Advisors includes top academics from Harvard, University of Chicago, Wharton Business School at the University of Pennsylvania, and Emory University.

This case concerns CPRC because it addresses the role of evidence and scientific research in evaluating gun regulations generally and specifically as to whether the waiting period law here passes Constitutional muster.

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[1]No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for the parties were given timely notice of *amicus'* intent to file this brief and gave their consent.

SUMMARY OF ARGUMENT

This Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) established that the Second Amendment safeguards an individual right to keep and bear arms. The majority concluded that the outright ban on handguns at issue in that case failed constitutional muster under any level of possible scrutiny, but the decision left for future evaluation whether other gun regulations would be subject to strict scrutiny or intermediate scrutiny (or some other scrutiny more rigorous than the rationale basis test), and how those levels of scrutiny would be applied. *Id.*, 626-27, 128 S.Ct. 2783.

After nearly ten years, however, the lower courts have struggled to apply the *Heller* decision. Most of the circuits have adopted a form of intermediate scrutiny for regulations that do not include a wholesale ban on a type of firearm. But even then, the standards applied by the lower courts vary widely. Some circuits, specifically the Second Circuit and the Ninth Circuit, have demonstrated ongoing hostility to the core concept of *Heller* that the right to bear arms is an important individual right and, while purporting to apply a level of intermediate scrutiny borrowed from other areas of constitutional jurisprudence – primarily free speech cases – have weakened their constitutional jurisprudence to approve restrictions on Second Amendment rights that would not be allowed for other rights.

As a research and education organization, CPRC is concerned by decisions, such as the Ninth Circuit's decision here, that pay lip service to a

heightened level of scrutiny for gun regulations, but that end up wholly ignoring the evidentiary standards and academic research that inform the appropriate breadth of other constitutional rights.

Here, the Ninth Circuit reversed the evidentiary findings of the trial court and supplanted the evidence that the trial court received and weighed with its own non-empirical views of what it thought was reasonable. The trial court received and evaluated numerous studies that were offered at trial and found, as the trier of fact and with full support in the record, that *none* of the studies provided even a scintilla of evidence that a gun purchase waiting period beyond the time required to complete a background check enhanced safety or reduced gun violence *for those who already owned a gun*. This evidence-free approach is inconsistent with other circuits (excepting in part the Second Circuit) and with the constitutional evaluation of other constitutional rights.

Also, by replacing the weighing of evidence with its own view of what was reasonable, the Ninth Circuit effectively nullified the burden of proof that is supposed to apply to any form of heightened scrutiny, watering down the intermediate scrutiny test to little more than a rational basis review with a different name.

Similarly, an appropriate intermediate scrutiny analysis requires that a law not burden more of the right "than is reasonably necessary." *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010). Accordingly, under an intermediate scrutiny review, a

court should consider reasonable, but less restrictive, alternatives. And in the context of First Amendment rights, the Ninth Circuit agrees. *Menotti v. City of Seattle*, 409 F.3d 1113, 1171 (9th Cir. 2005).

The Ninth Circuit here, and the Second Circuit in *New York State Rifle and Pistol Ass'n Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015), however, have determined that this protection need not apply to Second Amendment challenges. Rather, laws that infringe upon rights guaranteed by the Second Amendment are upheld in the Ninth Circuit and the Second Circuit if they promote safety, even if narrower laws would provide the same level of safety.

This case presents an opportunity to ensure uniformity among the circuits and respect for the core principle that the right to keep and bear arms is an important individual right deserving of the same rigorous protections as other individual rights recognized by the United States Constitution.

ARGUMENT

I. A HEIGHTENED SCRUTINY OF GUN LAWS AND REGULATIONS MUST INCLUDE THE WEIGHING OF *EVIDENCE* THAT DEMONSTRATES THE FIT BETWEEN THE GOVERNMENT'S OBJECTIVES AND THE CHALLENGED LAWS AND REGULATIONS

For too long, municipalities, states and the federal government have justified restrictions on individual ownership or possession of firearms as resting on "common sense" without the need for evidence, study or data-driven analyses. That approach should have changed with the *Heller* decision and with the growing body of academic research concerning the impacts of different types of gun laws and regulations on public safety. Unfortunately, in some circuits *Heller* has not made a notable difference.

This Court in *Heller* determined that the regulation of guns that impact the core constitutionally protected right of an individual to keep and bear arms for protection of home and family may not be sustained merely because the government is able to provide a rational basis for its regulations. A heightened level of scrutiny is thus required. 554 U.S at 628 fn. 27. The Ninth Circuit here purported to apply intermediate scrutiny to a waiting period law enacted by the State of California, but did not do so in practice.

One of the fundamental differences between rational basis scrutiny and intermediate scrutiny of challenged governmental action is in the evidence that is required to be produced by the government to sustain its actions, regulations or laws. With rational basis review, the burden rests with the challenger to negate every conceivable basis that might support a challenged law. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973). Moreover, for a rational basis review, evidence is not required:

> a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

When a heightened level of scrutiny is used, however, the requirements are supposed to change and rational speculation is no longer good enough. For intermediate scrutiny, the *government* bears the burden of proof and must justify the fit between a law or regulation that has been challenged and the objective that the law or regulation seeks to advance. To meet its burden, the government must provide *evidence* that the trier of fact believes is relevant to the issue at hand. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

The trial court followed this requirement and insisted that the State of California provide some evidence that a waiting period to purchase a gun *after*

the purchaser has already passed a background check promotes public safety *for purchasers who have already owned a gun*. The government argued that a waiting period, even in these circumstances, served the public policy of promoting safety by creating a "cooling off" period so that purchasers "do not obtain a firearm in a state of anger and make impulsive decisions to commit acts of violence against themselves or others." *Silvester v. Harris*, 41 F.Supp.3d 927, 954-955 (E.D. Cal. 2014).

For those buying a second or third gun, however, a cooling off period does not serve any obvious purpose. If such purchasers are prone to rash impulsive action, then they already have at their disposal another firearm to use. And by having previously passed a background check, secured a first gun, and then prudently and safely handled a first gun so that they could again pass a background check, such prior purchasers fall within a class of proven, responsible gun owners who are unlikely to benefit from another "cooling off" period.

The trial court thus required that the government support its burden of proof with evidence. The State provided numerous studies in its effort to meet its burden, but none of the studies addressed the issue at hand – the fit between the goal of public safety and the imposition of a cooling off period for prior gun owners that lasts up to ten days *after* the purchaser has already passed a new background check. Lacking any evidence that this waiting period, as applied to prior gun owners, had an impact on public safety, the trial court determined that the government had not met its burden of proof:

> If an individual already possess[es] a firearm and then passes the background check, this indicates a history of responsible gun ownership. 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.

Id., 41 F.Supp.3d at 966.

In reversing the trial court, the Ninth Circuit simply abolished the evidentiary standard and burden of proof that in all other constitutional contexts is required by intermediate scrutiny. In lieu of evidence, the Ninth Circuit opted for its view of "common sense" or "rational speculation." But this is precisely the type of interest-balancing that the *Heller* majority opinion rejected. *See*, Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 706-707 (2012) (the lower courts "have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.")

Here, the Ninth Circuit started by determining, without any evidentiary support, that "the actual effect of the [Waiting Period Laws] on Plaintiffs is very small." *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016). How did the Ninth Circuit reach this

conclusion? Through speculation – speculation that *it* considered rational but that others might not.

Consider Carol Browne who became afraid of her ex-boyfriend, secured a restraining order against him and applied to purchase a gun. During the waiting period to receive the gun, she was killed after an encounter with the ex-boyfriend. http://www.nj.com/camden/index.ssf/2015/06/berlin_murder_victim_told_neighbor_about_gun_permi.html#incart_river. Of course, one or even a dozen examples may not provide strong proof of the downside of waiting period laws. But real examples are better than the "rational speculation" employed by the Ninth Circuit. And better yet are scientifically rigorous studies that assess the impact on public safety of gun laws and regulations.

In disdaining evidence in favor of speculation, the Ninth Circuit improperly reverted to a rational basis review of California's law, just using a different name.

And there is no doubt that the Ninth Circuit's evidence-free conclusion that the burden on plaintiffs from California's waiting period law was "very little" infected the rest of its analysis. For the Ninth Circuit also adopts a "sliding scale" approach to scrutiny of gun laws and regulations, requiring less of a fit between a challenged restriction and the public objective that the restriction attempts to promote when there is less of an injury. *See, e.g.*, *Bauer v. Becerra,* 858 F.3d 1216, 1224 (9th Cir. 2017).

In other words, in the Ninth Circuit, a minor burden on Second Amendment rights need only be justified by the government with a minor explanation, to the point that if the burden is deemed (without evidence) to be minor enough, then the government's justification can amount to nothing more than rational speculation. And that is what the Ninth Circuit did here, replacing the trial court's evidence-based approach with evidence-free speculation.

Indeed, the Ninth Circuit only endeavored to look at one piece of the trial level evidence that the trial court had concluded was unhelpful to the government. That one piece was a pair of studies reviewed by the trial court that showed a slight correlation overall between waiting periods and a reduction in immediate post-purchase acts of violence or suicide (at least for the elderly). The trial court correctly noted that the study provided no information on whether the reduction in impulsive post-purchase acts of violence or suicide applied to those who already had a gun at hand.

The Ninth Circuit decided that its own rationalization was just as good as actual evidence, writing that "the studies [finding a reduction in post-purchase violence or suicide with a waiting period] related to all purchasers." And since the class of purchasers who already owned a gun was part of the class of "all purchasers," the Ninth Circuit reasoned, then it was only "common sense" that the reduction in violence and suicide found by the study applied to prior gun owners too. *Id.*, 843 F.3d at 828.

The Ninth Circuit blatantly replaced evidence with its own "common sense." And in the process, it fell into a form of a common logical error known as the Fallacy of Division.

The Fallacy of Division is committed when an argument is presented "[a]ssuming that what is true of a whole is therefore true of each of the parts of that whole." T. Edward Damer, Attacking Faulty Reasoning: A Practical Guide to Fallacy-Free Arguments 151 (7th Edition 2012). Professor Damer provides as an example the argument that because a Boeing 747 can fly unaided across the ocean, and because a Boeing 747 has jet engines, each jet engine can fly unaided across the ocean.

Applied here, just because the whole of all gun owners may have the characteristic of benefitting from a waiting period does not mean that all subsets of gun owners likewise benefit. What the Ninth Circuit saw as common sense was actually a common logical fallacy. And in such mistakes we see the need to rely on evidence, and not rational speculation.

The Ninth Circuit's evidence-free approach stands in contrast to other circuits. In *Heller v. District of Columbia,* 801 F.3d 264 (D.C. Cir. 2015) (*Heller III*), for example, the District of Columbia Circuit confronted the Firearms Registration Amendment Act adopted by the District of Columbia after this Court invalidated its wholesale ban on handguns. That law required that individuals wishing to bear arms apply for a permit in person, provide fingerprints and a photograph, bring the firearms to be registered with them, re-register every

three years, pay a fee of $13 per firearm and $35 for fingerprinting, complete education on gun use and on gun laws, and limit registration of guns to no more than one gun per month.

To assess these requirements, the District of Columbia Circuit applied intermediate scrutiny, writing:

> For a challenged provision to survive intermediate scrutiny, the District has to show, first, that it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation," and second, that "the means chosen are not substantially broader than necessary to achieve that interest. [Citations.] To meet the first requirement, the District must demonstrate that the harms to be prevented by the regulation "are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

Id., 801 F.3d at 295-296.

The D.C. Circuit then proceeded to evaluate each part of the law, which had been upheld by the trial court at the summary judgment stage, and for each provision required that the government present *evidence* to support its burden.

> We next address whether the District has, with regard to each challenged

> registration provision, offered substantial evidence from which it could reasonably have concluded the provision will mitigate various threats to public safety "in a direct and material way."

Finding a lack of evidentiary support in the record, the D.C. Circuit invalidated the requirement that a gun to be registered be brought to the Metropolitan Police Department, the requirement for re-registration every three years, the requirement that a registrant be educated on gun laws and the limit on registering only one gun per month. For these aspects of the law, the court reversed, finding the District's Firearms Registration Amendment Act to be unconstitutional. *Id.*, 801 F.3d at 280.

Here, by weakening its Second Amendment review to eliminate the need for evidence, the Ninth Circuit applied a rational basis review under the name of intermediate scrutiny. The Ninth Circuit was more blatant in its disregard of evidence in favor of "common sense" than other circuits. But the effort to shield the government from having to actually meet an evidentiary burden of proof in gun cases extends to other circuits as well. Thus in *New York State Rifle and Pistol Ass'n Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), the Second Circuit relaxed the burden of proof on the government in Second Amendment cases, writing that the courts should defer to the government's proffered evidence and rely on that evidence if it "fairly supports" the government's contentions.

This tilts the field to the government from the outset. Indeed, the studies in the field of gun regulations and their impact on safety are often contradictory (a situation that CPRC is dedicated to ameliorating) such that by providing deference to the government, the judiciary ensures that the government's efforts to curtail Second Amendment rights will prevail.

This makes a mockery of the intermediate scrutiny burden of proof established by this Court in the First Amendment case of *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). That case places the initial burden on the government to support the fit between its stated purpose and the laws or regulations it seeks to enforce. If the government succeeds, then the plaintiffs get the chance to counter the government's showing.

In the present case, the Ninth Circuit did away with the evidentiary burden altogether. The Second Circuit eased the burden of proof to tilt the field in the government's favor and make the plaintiffs' evidence meaningless. Both approaches are wrong. Both approaches impinge on the constitutional rights guaranteed by this Court in *Heller*.

The Court should accept this opportunity to clarify the application of *Heller* and resolve the differences among the circuits.

II. INTERMEDIATE SCRUTINY REVIEW REQUIRES THAT THE GOVERNMENT CONSIDER LESS RESTRICTIVE ALTERNATIVES

The Ninth Circuit here, and the Second Circuit in *New York State Rifle and Pistol Ass'n* as well, have also weakened the requirements for intermediate scrutiny of gun regulations and laws by relieving the government of its obligation to consider less restrictive alternatives that accomplish the same public objectives, but with a lesser intrusion on constitutional rights.

Under a strict scrutiny analysis, the government must always adopt the least restrictive means necessary to advance the government's legitimate interest. *McCullen v. Coakley,* 134 S. Ct. 2518, 2530 (2014). With intermediate scrutiny – at least in cases not involving Second Amendment rights – the government does not have to adopt the least restrictive means possible, but it must still consider reasonable alternatives and not substantially burden more of a right "than is necessary to further the government's legitimate interests." *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 662 (1994). See also *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 813 (2000).

It is axiomatic that to assess whether a restriction unreasonably burdens a constitutional right when another alternative would do, the government must consider reasonable alternatives; and a reviewing court must likewise allow a party challenging a law or regulation to show that the

government's interests could be just as effectively attained with a lesser burden. Many of the circuits understand this, and apply the standard to Second Amendment cases. *See, e.g.*, *Marzzarella*, 614 F.3d at 89; *United States v. Reese*, 672 F.3d 792 (10th Cir. 2010); *Bonidy v. U.S. Postal Service*, 799 F.3d 1121 (10th Cir. 2015). The Ninth Circuit also understands this aspect of intermediate scrutiny in *other* contexts.

Just last year, an *en banc* panel of the Ninth Circuit analyzed and invalidated a law that criminalized the wearing of military medals that the wearer had not earned. This law was, the Ninth Circuit held, an infringement of free speech. *U.S. v. Swisher*, 811 F.3d 299 (9th Cir. 2016). The Ninth Circuit analyzed the law under the intermediate scrutiny standard and found it lacking, in part because the government failed to consider as an alternative publishing the names of those who had earned military medals, so that people would not be misled. Such a registry would, the Ninth Circuit concluded, be "equally effective to meet the government's stated goals . . . to preserve the integrity of the military honors system and protect the symbolic value of military medals." *Id.*, 811 F.3d at 317.

Here, however, the Ninth Circuit jettisoned the intermediate scrutiny requirement that reasonable alternatives be considered. The sole study that the Ninth Circuit addressed (and which it considered under the Fallacy of Division) was one that found "that firearm purchasers face the greatest risk of suicide immediately after purchase, but the risk declines after one week." *Silvester*, *supra*, 843 F.3d at 828.

Even if this study could be extrapolated to those who already own a gun, it begs the question of why a ten-day waiting period is reasonable, rather than a seven-day waiting period. The Ninth Circuit neither itself considered this or any other alternatives; nor did it remand to the trial court to consider reasonable alternatives. Instead, the Ninth Circuit stated that "[t]he State is required to show *only* that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.*, 843 F.3d at 829, emphasis added.

For the Ninth Circuit, the only question was whether the ten-day waiting period was more effective than nothing, with no consideration of alternatives. The Ninth Circuit's "it's better than nothing" approach once again smacks of a rational basis review, rather than the true heightened scrutiny that *Heller* demands.

CONCLUSION

The Court has an opportunity to re-assert the principles of *Heller*, eliminate the confusion that has plagued lower courts, resolve the conflicts among the circuits and prevent courts from applying rational basis review under the name of intermediate scrutiny. The Court should therefore grant the petition.

Respectfully submitted,

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