No. 18-663

In The
Supreme Court of the United States

FREDERIC RUSSELL MANCE, Jr., et al.,
Petitioners,

v.

MATTHEW G. WHITAKER,
ACTING ATTORNEY GENERAL, et al.,
Respondents.

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

AMICI CURIAE BRIEF OF THE MADISON SOCIETY FOUNDATION, INC., THE CALGUNS FOUNDATION, FIREARMS POLICY COALITION, INC., AND FIREARMS POLICY FOUNDATION, in support of PETITION FOR WRIT OF CERTIORARI filed by MANCE, et al.

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QUESTIONS PRESENTED

Can federal law prohibit the interstate purchase of arms without violating the Second Amendment?

1. Is the Second Amendment infringed when a federal law/regulation forbids a resident of one state from purchasing a handgun in another state, while traveling in or temporarily residing in the other state?

2. When the Second Amendment is at issue, how should the lower courts resolve the case or controversy?

CORPORATE DISCLOSURE STATEMENT

The Madison Society Foundation, Inc., has no parent corporations. No publicly traded company owns more than 10% of amicus corporation's stock.

The Calguns Foundation, has no parent corporations. No publicly traded company owns more than 10% of amicus corporation's stock.

The Firearms Policy Coalition, Inc., has no parent corporations. No publicly traded company owns more than 10% of amicus corporation's stock.

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Dated: December 20, 2018

/s/ Donald Kilmer
Counsel for Amici Curiae

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I. INTEREST OF AMICI[1]

The Madison Society Foundation, Inc., (MSF) is a not-for-profit 501(c)(3) corporation based in California. It seeks to promote and preserve the Constitution of the United States, in particular the right to keep and bear arms. MSF provides the general public and its members with education and training on this important right. MSF contends that this right includes the right of a law-abiding citizen to purchase firearms in all states and territories subject to federal law.

The Calguns Foundation (CGF) is a 501(c)(3) non-profit organization incorporated under the laws of California with its principal place of business in Sacramento, California. CGF is dedicated to promoting education for all stakeholders about California and federal firearm laws, rights and privileges, and defending and advancing the rights of California gun owners. CGF contends that this right includes the right of a law-abiding citizen to purchase firearms in all states and territories subject to federal law.

Firearms Policy Coalition, Inc. (FPC) is a 501(c)(4) non-profit organization incorporated under the laws of Delaware with its principal place of business in Sacramento, California, with members throughout the

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[1]No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and and have been given at least 10 days notice of amici's intention to file.

United States. FPC serves its members and the public through direct legislative advocacy, grassroots advocacy, legal efforts, research, education, and other programs. The purposes of FPC include defending the United States Constitution and the People's rights, privileges, and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms. FPC contends that this right includes the right of a law-abiding citizen to purchase firearms in all states and territories subject to federal law.

Firearms Policy Foundation (FPF) is a 501(c)(3) non-profit organization incorporated under the laws of Delaware with its principal place of business in Sacramento, California, with members residing throughout the United States. FPF seeks to defend and advance constitutional rights through charitable purposes, with a focus on the fundamental, individual right to keep and bear arms. FPF contends that this right includes the right of a law-abiding citizen to purchase firearms in all states and territories subject to federal law.

II. ARGUMENT SUMMARY

Law-abiding citizens of the United States, who can pass federal background checks and otherwise comply with all other federal laws, should not be prohibited by 18 U.S.C. § 922(a)(3) and (b)(3) from purchasing a firearm in any of the other states or territories they travel to, travel through, or in any state or territory where they may temporarily reside.

Any federal law and/or regulation imposing such a prohibition violates the Second Amendment to the United States Constitution under any theory of interpretation.

III. STATEMENT OF FACTS

Andrew and Tracy Hanson, who are residents of the District of Columbia, traveled to Texas desiring to purchase two handguns from Mance, a federally licensed firearms dealer (FFL) in Arlington, Texas.

It is undisputed that the Hansons would be eligible under the laws of Texas and the District of Columbia to own and possess the handguns that they selected from Mance's inventory. Because the Hansons are not Texas residents, Mance, a Texas FFL, cannot lawfully sell handguns to them. Such a transaction is prohibited by 18 U.S.C. § 922(a)(3) and (b)(3), which states:

> (a) It shall be unlawful — [. . .]
>
> (3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful

for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter. . . .

[...]

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver — [...]

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and

> (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes. . . .[2]

The federal regulations on this issue states:

> (a) Interstate sales or deliveries. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm to any person not licensed under this part and who the licensee knows or has reasonable cause to believe does not reside in (or if a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business or activity is located: Provided, That the foregoing provisions of this paragraph (1) shall not apply to the sale or delivery of a rifle or shotgun (curio or relic, in the case of a licensed collector) to a resident of a State other than the State in which the licensee's place of business or collection premises is located if the requirements of § 478.96(c) are fully met, and (2) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes (see § 478.97).[3]

As interpreted, federal law would have permitted Mance to transfer the handguns to the FFL in the District of Columbia so that the Hansons could purchase the firearms from that FFL. Federal law does

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[2] 18 U.S.C. § 922(a)(3), (b)(3).

[3] 27 C.F.R. § 478.99.

not impose or even allude to a fee if such a transfer occurs, but the FFL in the District of Columbia would have charged the Hansons a transfer fee of $125 for each handgun, above and beyond the purchase price.

The Hansons declined to pursue this method of obtaining the firearms because they objected to the additional fees and to shipping charges. They could not purchase the handguns of their choosing from the sole FFL in the District of Columbia because that dealer has no inventory and only sells firearms transferred from FFLs outside of the District.

IV. ARGUMENT

A. This Court Should Grant Certiorari to Correct Misinterpretations of *District of Columbia v. Heller*.

The most persuasive illustrations (and arguments) on this point have already been penned by various justices from this Court dissenting from certiorari denials. Several circuit courts (with a cluster of cases from the Ninth Circuit) have issued Second Amendment decisions that have drawn rebukes. These recalcitrant circuits have been called out for their lack of conformity with this Court's mode of analysis in *District of Columbia v. Heller*, 554 U.S. 570 (2008), on issues as diverse as:

1. Ammunition bans and "so called" safe-storage laws. *Jackson v. City & Cnty. of San Francisco*, ___ U.S. ___, 135 S. Ct. 2799 (2015);

2. Arms definitions. *Friedman v. City of Highland Park*, ___ U.S. ___, 136 S. Ct. 447 (2015);

3. The right to bear (carry) a firearm in public for self-defense. *Peruta v. California*, ___ U.S. ___, 137 S. Ct. 1995 (2017); and

4. Arbitrary waiting periods to purchase a firearm. *Silvester v. Becerra*, ___ U.S. ___, 138 S. Ct. 945 (2018). Justice Thomas also noted that the circuit court in this particular case seemed willing to bend the Federal Rules of Civil Procedure and ordinary principles of appellate review to reach a result that is contraindicated by Supreme Court precedent. *Id.*, at 950-52.

For good or ill, the Second and Fourteenth Amendments share a similar treatment by the factions that debate the meaning of our constitutional commandments, including the factions within our Courts. The underlying political philosophy, along with the intended and unintended consequences of both of these Amendments (self-defense against all usurpers, and equal treatment under a system of law that guarantees due process for all) have seen both calm seas and turbulent storms in our national discourse.

There have been periods, both modern and ancient, when the consequences of vigorous enforcement seemed almost uncontroversial; and other periods when that same allegiance and strict adherence to original meanings foreshadowed civil unrest, if not outright civil war. They both have gone through periods of dormancy, misunderstanding, resistance, and resurrection.

The Second and Fourteenth Amendments have more in common than the latter's incorporation of the former as explained in *McDonald v. City of Chicago*,

561 U.S. 742 (2010). The Fourteenth Amendment, ratified after a great conflagration, promised due process, equal protection, and a universal participation in the privileges and/or immunities for all who live in our republic. Though almost a century late to the constitutional lexicon, it purported to enshrine already existing natural rights that enure to the benefit of all Americans. *See*: Blackman, Symposium: Libertarian Legal Thought: Back to the Future of Originalism, 16 Chap. L. Rev. 325, Winter, 2013. *Cf.,* Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907 (1993).

"When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men – yes, black men as well as white men – would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness..." MLK Speech, Civil Rights March, Washington, D.C., 28 August 1963.

Dr. King could have been lamenting the dormancy of those pre-existing natural rights that were betrayed in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), with its finding that decedents of African Slaves lack standing in federal courts to adjudicate rights: "to go where they pleased at every hour of the day or night [...], the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." *Id.,* at 417.

Or, he could have been calling out the foul and false way that fundamental rights appeared to be almost purposefully misunderstood and then misconstrued to the detriment of minorities' rights in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), *United States v. Cruikshank*, 92 U.S. 542 (1875), and *Presser v. Illinois*, 116 U.S. 252 (1886).

That speech might have been a anti-eulogy to the passive-aggressive abdication of justice set forth in *The Civil Rights Cases*, 109 U.S. 3 (1883). Next came the final abandonment at any pretext of a coherent interpretive theory of the Fourteenth Amendment: *Plessy v. Ferguson*, 163 U.S. 537 (1896). The sophistry of "separate but equal" substituting for the plain language of "equal protection of the law" looked like the final death rattle of the Fourteenth Amendment. That judicial slight of hand justified government sanctioned discrimination for several generations.

The Fourteenth Amendment would only begin its resuscitation and eventual resurrection from its *Plessy*-Phase dormancy 58 years later in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Whether that resurrection is complete (or ongoing) is still an open question more than 60 years later. See *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584 (2015).

The Second Amendment shares much with its constitutional cousin. In the case that woke up the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court found that the text guaranteed an "[I]ndividual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the

Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ." *Id.*, at 592.

In other words, the right to be armed in the Second Amendment, and the substantive and/or procedural rights in the Fourteenth Amendment, are *a priori* rights. They are metaphysically independent of our Declaration of Independence and our Constitution and its Amendments.

Of course, some of the reasons for the Second Amendment's constitutional dormancy in our courts until 2008 (and 2010) are somewhat different from the betrayal, revival, betrayal, slumber, and current revival of the rights protected by the Fourteenth Amendment – at least when cataloguing the life-cycle of those rights for the majority (and mostly white) population. But in the case of minorities seeking to exercise these fundamental rights, they are mirror images of each other that march lock-step through history. *See*: Justice Thomas' concurring opinion in *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010).

The Second Amendment even has its own rogues' gallery of cases that misconstrued the underlying right

of self-defense. Part of the strange journey that the Fourteenth and Second Amendments share is their overlap in these (and other) cases that have been both canon and anti-canon at one time or another. In addition to the cases cited above (e.g., *Dred Scott*, *Cruikshank*, and *Presser)*, where the Second overlaps with the Fourteenth Amendment, it would be neglectful to exclude *United States v. Miller*, 307 U.S. 174 (1939).

Miller was the only U.S. Supreme Court case that came close to (mis)interpreting the Second Amendment until 2008's *Heller* decision. *Miller* was a poorly written and poorly reasoned decision, yet it had come to stand for the proposition that the Second Amendment was a collective right, available only to members of a state-sanctioned militia.

This theory, made up out of whole cloth, nearly morphed into constitutional canon, as it became employed by several circuit courts all too eager to nullify a right that was predominantly advanced by criminal defendants. The "collective-rights" judicial slight of hand nearly snuffed out a fundamental right in the same way that *Plessy's* "separate but equal" put the Fourteenth Amendment into a coma for three generations.

The *Heller* Court not only rejected the collective rights theory of the Second Amendment, it rejected the idea that the collective rights theory was even the holding in the *Miller* case:

> *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a

> Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was not that the defendants were "bear[ing] arms" not "for. . . military purposes" but for "nonmilitary use," post, *at* 637, 171 L. Ed. 2d, at 685. Rather, it was that the type of weapon at issue was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S., *at* 178, 59 S. Ct. 816, 83 L. Ed. 1206 (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Ibid.* Beyond that, the opinion provided no explanation of the content of the right.
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> *District of Columbia v. Heller*, *at* 621.

The *Heller* Court went on:

> This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.
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> *District of Columbia v. Heller, at* 622

This mode of analysis, so clear and concise to all of us now in 2018, did not prevent the Ninth Circuit from misconstruing the Second Amendment in: *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); *Hickman v. Block*, 81 F.3d 98 (9th Cir.1996); and *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

And while the Ninth Circuit might demur on their utter failure to understand the constitutional text and history of the Second Amendment, and complain that all of these cases were – after all – decided before *Heller*. That demur should be overruled.

Even after the Supreme Court issued its *Heller* decision, the entire Ninth Circuit went on to vacate a 3-judge panel's opinion finding the Second Amendment was incorporated against state actors through the Fourteenth Amendment, based upon its status as a fundamental right. It did so in a rare – sua sponte –

call for an en banc rehearing. *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009)(en banc). That particular case languished until *McDonald v. City of Chicago*, 561 U.S. 742, was published in 2010. The *McDonald* Court went on to hold that the original 3-judge panel in the Ninth Circuit had gotten incorporation of the Second Amendment essentially correct.

Nor has Second Amendment second-guessing by that circuit abated even after being shown how, why, and when to accord the Second Amendment the same respect as the other amendments to the Constitution. *See: Jackson v. City & Cnty. of San Francisco*, ___ U.S. ___, 135 S. Ct. 2799 (2015); *Peruta v. California*, ___ U.S. ___, 137 S. Ct. 1995 (2017); *Silvester v. Becerra*, ___ U.S. ___, 138 S. Ct. 945 (2018).

The Ninth Circuit has become to the Second Amendment, what the Deep South was to the Fourteenth Amendment – a place where no effort or artifice is spared when favored rights are at issue. Those enjoy careful nurturing and therapeutic vocabulary to be upheld, extended, and presumed valid. Disfavored rights receive triage and only palliative care in the hope that they die a quiet death. Except this case (*Mance*) comes to this Court from the Fifth Circuit, which means the infection is spreading.

The only remedy to the spread of defective legal reasoning is the substitution of superior legal reasoning by a controlling legal authority. This Court must grant certiorari in this case, or stand by and watch its precedents undermined and abrogated by recalcitrant circuit courts. More than just one-tenth of the original Bill of Rights is in jeopardy.

B. <u>This Court Should Grant Certiorari to Correct the Lower Court's Misapplication of the Equal Protection Claim</u>.

The parties' briefs and other amici will undoubtably address scrutiny methodology along with the text and history of the Second Amendment relevant to the facts of this case. Amici herein would direct this Court to a different contention. Namely, that a holistic reading of any legal text (including constitutions), should strive to yield consistent results when interpreting any of the parts of the whole. *United Sav. Ass'n of Tex v. Timbers of Inwood Forest Assocs.,* 484 U.S. 365, 371 (1988).[4]

This is doubly true when a court is analyzing substantive rights at the same time it is scrutinizing ancillary rights related to those substantive rights. Collateral doctrines like "due process", "equal protection", and the ghost of "privileges or immunities" should not just function as alternate theories of a particular claim or defense. These collateral analyses can also act as an interpretive checksum for understanding the constitutional history and text of the underlying substantive right.

An alternative way of presenting the question of this case: Does a law-abiding United States citizen, while traveling among the various states of our nation, have the right to directly purchase a handgun from a federally licensed firearms dealer in a state different

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[4] *See also:* Scalia and Garner, *Reading the Law: The Interpretation of Legal Texts* (2012), Chap 24: Whole-Text Canon. Pg. 167-169.

from the one our traveler calls home? The Fifth Circuit has ruled that a federal statute (18 U.S.C. § 922(a)(3) and (b)(3)) forbids it, and then goes on to find that its holding does not offend the equal protection component of the Due Process Clause. [Pet.App. 25a]

Amici herein contend, this was the wrong inquiry. The more useful question is whether a "right to travel" under the Privileges or Immunities Clause of the Fourteenth Amendment, has anything to say about the government's interference with the exercise of an enumerated right. In *Saenz v. Roe,* 526 U.S. 489 (1999), this Court found that a "right to travel" (and relocate) to another state, was among the "privileges or immunities" that guaranteed to our wandering citizen the immediate receipt of welfare benefits in her new state, without regard to the laws of the state where she started her journey. "Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States." *Id*., at 507-508.

For an academic take on how rights that have constitutional context and contemporaneous roots should be protected by a recuperating Privileges or Immunities Clause *See*: Blackman, Josh and Shapiro, Ilya, Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States (November 10, 2009). Georgetown Journal of Law & Public Policy, Vol. 8, 2010.

For a persuasive Supreme Court writing, that the *Mance* Court should have at least acknowledged, *see*:

Justice Thomas' concurring opinion in *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010). Here we find an explanation and mode of analysis for, understanding the "privileges or immunities" protected by the Fourteenth Amendment. And it conveniently includes a reference to the Second Amendment.

The Militia Act of 1792 (May 8, 1792) required all eligible persons to furnish their own arms, ammunition, and accouterments when reporting for duty. Presumably, while actually under arms, or undergoing training, these citizens might lose or need to replace their personal arms and equipment.

It would be a strange reading of the Second Amendment, ratified only one year earlier than the Militia Act, if the federal statute at issue in this case (18 U.S.C. § 922(a)(3) and (b)(3)) could compel a Massachusetts militiaman, standing a post in Virginia, to travel back to this home state to replace a lost, damaged, or malfunctioning musket.

It would be equally strange today to compel a law-abiding citizen, living out her golden years touring this great land in a recreational vehicle, substituting that mobile domicile for a permenant address, to be denied the right to purchase arms in the state where she temporarily finds herself. Even if she maintains a physical presence in a home state, but is on the road for 6 or 7 months out of the year, why should she have to interrupt her "right to travel" and return home to replace a lost or malfunctioning firearm? Or does our Constitution tolerate a statute that would compel a forfeiture of her "right to keep and bear arms" while exercising her "right to travel"?

This Court should take this opportunity to complete the resuscitation of the Fourteenth Amendment's "privilege or immunities" clause initiated by Justice Thomas' concurrence in *McDonald*. A resuscitation now, with the concrete and undisputed facts in this case, would prevent a reanimation along the more radical and progressive lines suggested by the *Pandora's Box* scenario in the Blackman and Shapiro article cited above. And an explication of the rights protected by that clause in this case will provide a collateral, and therefore more contextual, interpretive model of the Second Amendment.

V. CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted on December 20, 2018,

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