

Trials & TRIBULATIONS

Supreme Court denies certiorari in case challenging California gun laws, but not without a rare and critical dissent to the denial by Justice Thomas

While it is not unusual for the U.S. Supreme Court to deny certiorari, it is unusual for a Justice to issue a written dissent to the denial of certiorari, as Justice Thomas did in the recent case of *Silvester v. Becerra, Attorney General of California*, 583 U.S. __ (February 20, 2018). *Silvester* was commenced by firearms purchasers and advocacy organizations (Plaintiffs) challenging the constitutionality of two California statutes that impose a 10-day waiting period between the purchase of a gun and the time the purchaser can physically take possession of the gun.

Specifically, Plaintiffs asserted that the statutes violate the Second Amendment of the U.S. Constitution with respect to individuals who (1) already lawfully possess a firearm and are listed in the Automated Firearms System (AFS), (2) have a Carry Concealed Weapon (CCW) license or (3) have a Certificate of Eligibility (COE). Plaintiffs did not challenge the constitutionality of the statutes with respect to first-time gun purchasers and did not per se challenge a waiting period, but asserted that they should be permitted to obtain their guns immediately upon passing a background check.

The legislative history behind the statutes suggests that the 10-day waiting period exists to provide sufficient time to conduct a background check and to provide a “cooling off” period in order to “provide a person with the opportunity to gather their [sic] emotions.” *Silvester v. Harris*, 41 F Supp 3d 927, 954-955 (E.D. CA 2014).

In the Ninth Circuit, the standard for evaluating legislation alleged to have



By VICTORIA GLEASON
Daily Record
Columnist

violated the Second Amendment is two-fold. First, the court must determine whether the law in question implicates conduct protected by the Second Amendment. If the answer is yes, the court then determines whether the law meets the requisite level of scrutiny, which is either strict or intermediate scrutiny in Second Amendment cases.

The U.S. District Court for the Eastern District of California determined that the statutes at issue burdened the Second Amendment. It then used intermediate scrutiny to examine the statutes at issue. Under the intermediate scrutiny standard, a court must determine that “(1) the government’s stated objective must be significant, substantial, or important, and (2) that there is a reasonable fit between the challenged regulation and the government’s asserted objective.” *Id.* at 961.

After a three-day bench trial and subsequent briefings, the District Court held that the 10-day waiting period violated the Second Amendment with respect to the first and second categories of individuals listed above because the purchaser of a gun could not use it for at least 10 days, and in some instances the waiting period prevented people from obtaining a gun at all due to additional costs and schedule disruptions. With respect to the third

category, the District Court found that the waiting period was also unconstitutional as to those holding a COE and a firearm as listed in the AFS if the background check was completed prior to the end of the 10-day waiting period.

The Attorney General of the State of California appealed and, in a case of first impression, the U.S. Court of Appeals for the Ninth Circuit reversed, finding that the laws did not violate the Second Amendment because the 10-day wait was “a reasonable precaution for the purchase of a second or third weapon, as well as for a first time purchaser.” *Silvester v. Harris*, 843 F.3d 816, 819 (9th Cir. 2016).

The Ninth Circuit agreed with the District Court that the law implicated conduct protected by the Second Amendment and, further, agreed that the District Court properly used the intermediate scrutiny standard. However, the Ninth Circuit did not agree with the District Court’s finding that the full 10-day waiting period served no legislative purpose as to those individuals who already owned a gun. Instead, the Ninth Circuit determined that in 1996, when the challenged laws imposing the 10-day waiting period were passed, the legislature indicated that the waiting period was meant to provide a “cooling off” period at a time when handgun-related crimes were on the rise.

In addition, the state provided studies to the District Court, which demonstrated that a waiting period can reduce the risk of a person’s urge to commit violent acts toward others or themselves. Moreover,

Continued on next page

Continued from previous page

the Ninth Circuit reasoned that even if an individual already owns a gun, he may be seeking to purchase a more powerful weapon to maximize harm, which a cooling off period could help to avoid. In sum, the Ninth Circuit held that the state met its burden of demonstrating that there is a reasonable fit between important safety objectives and the 10-day waiting period as applied to Plaintiffs.

Plaintiffs thereafter petitioned the U.S. Supreme Court for certiorari, which was denied. However, Justice Thomas penned a lengthy dissent, asserting that “the Second Amendment is a disfavored right in this Court” and that the “right to keep and bear arms is apparently this Court’s constitutional orphan.” He indicated that it has been approximately eight years since the Supreme Court has heard a case involving Second Amendment rights.

Justice Thomas asserted that although the Ninth Circuit indicated that it used intermediate scrutiny to uphold the 10-day

waiting period, it instead applied rational basis scrutiny. This is because, according to Justice Thomas, the Ninth Circuit permitted the state to prove its case using speculation as opposed to demonstrating harms that are real as required by the intermediate scrutiny standard.

For example, Justice Thomas noted that the state presented no evidence regarding its assertion that the 10-day waiting period could prevent persons who already own a gun from purchasing a gun capable of inflicting more damage when fired into a crowd. However, the Ninth Circuit wholly adopted this assertion. Justice Thomas further indicated that the Ninth Circuit ignored the District Court’s post-trial factual findings and failed to undertake any meaningful analysis of whether the waiting period was reasonably tailored to California’s objective in passing the laws.

One can imagine that given the current environment surrounding the gun issue, and President Donald Trump’s vow to institute more stringent background checks

in the wake of the Parkland, Florida school shooting, many more challenges involving Second Amendment rights will be forthcoming. States that do not have waiting periods in place may decide to implement such measures, or pass other laws addressing the purchase or ownership of guns.

For example, in the wake of the Florida shooting, a package of bills has been approved by the Florida State House and Senate budget committees, which, if passed, would raise the minimum age to purchase rifles from 18 to 21 and impose a 3-day waiting period between purchasing and obtaining most guns. It is possible that we have reached the point where the Supreme Court will have no choice but to address the “orphaned” Second Amendment rights.

Victoria S. Gleason is an associate at The Wolford Law Firm LLP, where she practices in the areas of commercial and employment litigation.