No. 17-____

In The
Supreme Court of the United States

JOHN TEIXEIRA, et al.,

Petitioners,

v.

COUNTY OF ALAMEDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A zoning board issued petitioners a conditional use permit to open a full-service gun store, upon finding that the proposed store is "required by the public need" and would "not materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare." Following anti-gun protests, the county's board of supervisors revoked the permit without comment.

The majority of a three-judge panel held that petitioners stated a claim for the violation of Second Amendment rights. An en banc panel majority disagreed. It held that petitioners could assert their customers' right to acquire firearms, but had failed to state a claim for relief because the county had not "meaningfully constrained" that right in banning their store. The en banc majority also held that petitioners lack a Second Amendment right to sell arms.

The courts of appeals are divided 8-2 as to whether Second Amendment claims are subject to a threshold substantial or meaningful burden test before the government must justify its conduct under heightened scrutiny.

The questions presented are:

1. When Second Amendment claims are suitable for means-ends scrutiny, must courts apply some form of heightened scrutiny, or might rational-basis review suffice?

2. Does the Second Amendment secure a right to sell firearms?

RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Calguns Foundation, Inc., Second Amendment Foundation, Inc., or the California Association of Federal Firearms Licensees.

LIST OF PARTIES

The petitioners are John Teixeira; Steve Nobriga; Gary Gamaza; Calguns Foundation, Inc.; Second Amendment Foundation, Inc.; and California Association of Federal Firearms Licensees, who were plaintiffs and appellants below.

Respondents are the County of Alameda, California; the Alameda County Board of Supervisors, as a policy making body; Wilma Chan, in her official capacity; Nate Miley, in his official capacity; and Keith Carson, in his official capacity. All respondents were defendants and appellees below.

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John Teixeira, Steve Nobriga, Gary Gamaza, Calguns Foundation, Inc., Second Amendment Foundation, Inc., and California Association of Federal Firearms Licensees respectfully petition this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Alameda County's planning department identified a public need for petitioners' proposed full-service gun store. Having studied and determined the store's safety and compatibility with neighboring land uses, a zoning board authorized the store's opening. The County's Board of Supervisors banned the store anyway, bowing to the Bay Area's prevailing animus against gun rights.

Businesses that provide constitutionally-protected products and services routinely litigate the constitutionality of zoning regulations targeting their function. It should not have been surprising that a panel majority found that petitioners stated a claim for relief. Discovery and trial would reveal the extent to which, if any, the County's prohibition of petitioners' gun store advanced the requisite government interest.

But the Ninth Circuit routinely convenes en banc panels to undo the work of any three-judge panel that deigns to secure Second Amendment rights. This case was no different. The en banc panel imposed the burden on *petitioners*—at the pleading stage—to assert that the County had "actually or really" or "meaningfully" infringed upon their customers' Second Amendment rights before obtaining any level of heightened scrutiny. Petitioners could not satisfy that burden, because the court assumed that denying consumers access to petitioners' business was acceptable, without regard to any justification for Alameda County's

prohibition. For good measure, the court added that the Second Amendment secures no right to sell arms.

This Court has declared that the presumption of constitutionality does not shield laws squarely implicating Second Amendment rights. *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). It stressed that Second Amendment rights are fundamental. *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010). Eight circuits understand this precedent to require some form of heightened scrutiny in deciding means-ends Second Amendment questions. Two courts, including the Ninth Circuit, disagree. The court below deepened the split by no longer pretending to require any governmental justification for infringing the right to arms. So long as the court might trivialize the infringement, the government need not justify its action at all. Further defying *Heller*, the en banc Ninth Circuit held that the right to keep and bear arms does not include a corollary right to sell arms.

When courts no longer require the government to justify its infringement of a fundamental right, the "right" has ceased to exist. And if any regulatory history automatically negated a right to engage in the regulated activity, there would be no rights at all. The decision below calls out for this Court's review.

OPINIONS AND ORDERS BELOW

The en banc panel's opinion (App., *infra*, 1a-64a) is reported at 873 F.3d 670. The three-judge panel's opinion (App. 65a-102a) is reported at 822 F.3d 1047. The district court's opinion dismissing the case with prejudice (App. 103a-132a) is unpublished, but available at 2013 U.S. Dist. LEXIS 128435. The district court's initial opinion on respondents' motion to dismiss (App. 133a-148a) is unpublished, but available at 2013 U.S. Dist. LEXIS 36792.

JURISDICTION

The court of appeals entered its judgment on October 10, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, Section 1 of the Fourteenth Amendment, and relevant provisions of the Alameda County Code, are reproduced at App. 149a-154a.

STATEMENT

A. Alameda County's Approval, and Disapproval, of Petitioners' Full-Service Gun Store.

Buoyed by market research, petitioners sought to open a full-service gun store in Alameda County, California. Other county retailers sell guns, but petitioners envisioned a type of store not present in the area, offering not just guns but firearm safety training and certification, gun smithing and repairs, and consignment and appraisal services, among other features. App. 6a; ER37.[1]

The County's planning department advised petitioners that gun stores (where allowed by zoning) require a conditional use permit. App. 6a; Alameda Cty., Cal., Code ("Zoning Ordinance") § 17.54.131. In deciding whether to issue a conditional use permit, the County conducts a "special review and appraisal" to determine whether the proposed use is necessary and appropriate for the location at issue, considering nearby land uses and facilities, any health or safety concerns, and the intent and function of the particular zoning district. Zoning Ordinance § 17.54.130.

Alameda County gun stores face additional conditional use permitting requirements, including a requirement "[t]hat the subject premises is not within five hundred (500) feet of any of the following: Residentially zoned district; elementary, middle or high school;

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[1] "ER__" refers to the excerpts of record filed with the Ninth Circuit.

pre-school or day care center; other firearms sales business; or liquor stores or establishments in which liquor is served." Zoning Ordinance § 17.54.131(B). The County advised petitioners that the 500-foot measurement would be taken from the proposed gun store's closest door to the front door of any disqualifying property. App. 68a-69a, 106a. Accordingly, petitioners leased a property satisfying the distancing requirement when so measured. *Id.*

Petitioners' plan sparked opposition among two neighborhood associations. Some declared that they "are opposed to guns and their ready availability and therefore believe that gun shops should not be located within our community." ER85. Others expressed "strong feelings in opposition," offering that "we don't have many Sheriff's [sic] living our [sic] area, so they should be [sic] guns in their own neighborhood," "[t]his is not the kind of business we want," and "IT IS GOING TO ATTRACT what we DON'T want." ER94-95.

Planning department staff scheduled a hearing on petitioners' permit application, adding consideration of a variance they deemed would be necessary: measured "from the closest exterior wall of the gun shop to the closest property line of a residentially zoned district," the store would stand 446 feet from residences in two directions. App. 106a.

But the staff had also found a public need for licensed gun sales. App. 107a. Staff further found that petitioners' store related to nearby land uses and facilities, and would not "materially affect adversely the

health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood." *Id.* The store would, however, "be detrimental to persons or property in the neighborhood or to the public welfare" on account of its location less than 500 feet from one of the residential districts. *Id.*

The report did not explain why the location was detrimental, beyond citing to the 500-foot rule's existence. ER67. Based on this distance issue, the staff recommended denying the variance and permit. *Id.* A revised report acknowledged different methodologies for measuring the required 500-foot distance, but asserted that the location failed the distance rule under all approaches and maintained the recommendation to deny approval. App. 108a.

The local zoning board authorized the operation of petitioners' store. *Id.* It issued a variance from the 500-foot distancing rule, as the store "will not be detrimental to persons or property in the neighborhood or to the public welfare" should it operate according to the prescribed conditions. ER179. The Board issued the conditional use permit, as it found that there was a "public need" for the store, and that "[t]he necessary number of firearms sales establishments to serve the public need is left up to the market." *Id.* It agreed that the store properly related to other land uses and facilities, and that the store was appropriate for its mixed use commercial/retail zoning district. *Id*.

And citing petitioners' 38 years of experience in owning a gun store, as well as their federal and state firearms dealing licenses, the Zoning Board determined that the store would "not materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injuries [sic] to property or improvements in the neighborhood." ER180.

However, the Board of Supervisors sustained a neighborhood association's untimely appeal, thereby revoking the conditional use permit and variance, and barring the operation of petitioner's full-service gun store. App. 109a.

B. District Court Proceedings

Petitioners brought suit asserting that the 500-foot distancing requirement, on its face and as applied against them, violated the Second Amendment.[2] Petitioners moved for a preliminary injunction, while respondents moved to dismiss the case.

The parties did not dispute that the store stood within 500 feet as measured by the County. App. 138a. The district court found that the administrative proceedings did not involve petitioners' Second Amendment claims, which were thus not precluded. App. 140a. But it found that the distancing requirement is

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[2] Petitioners also alleged that respondents had violated their Fourteenth Amendment right to equal protection. This petition does not encompass that claim.

a presumptively lawful "restriction on gun sales and purchases in or near sensitive places." App. 145a. "The Ordinance is not a total ban on gun sales or purchases in Alameda County and therefore does not implicate" the Second Amendment. *Id.*

The district court thus dismissed the complaint, but gave petitioners leave to amend. App. 147a. But it granted respondents' subsequent motion to dismiss without leave to amend. The court declined to revisit its earlier holding, and reiterated that the Second Amendment claim failed at step one: "the Ordinance is part of the Supreme Court's non-exhaustive list of regulatory measures that are constitutional under the Second Amendment." App. 117a. The district court asserted that higher courts "have not extended the protections of the Second Amendment to the sale or purchase of guns," and that petitioners had not explained how restricting their store burdened the right to keep a gun "or any right they have to sell or purchase guns." *Id.*

The district court added that "any analysis under the second step in the Second Amendment inquiry" was "unnecessary," but offered that the distancing restriction would pass "any applicable level of scrutiny." App. 120a. "While keeping a gun store 500 feet away from a residential area does not guarantee that gun-related violence or crimes will not occur, the law does not require a perfect match between the Ordinance's means and objectives, nor does the law require the Ordinance to be foolproof." App. 121a. The district court also rejected the as-applied challenge because, while

some customers may prefer a full-service gun store, the County had not banned all gun stores, or the services petitioners would offer. App. 124a.

C. Panel Proceedings

1. A Ninth Circuit panel majority "reverse[d] the dismissal of Teixeira's well-pled Second Amendment claims and remand[ed] for the district court to subject Alameda County's 500-foot rule to the proper level of scrutiny." App. 99a-100a.

After finding that petitioners had standing to challenge the ordinance on behalf of their customers, App. 75a n.2, the panel majority conducted an historical analysis, concluding that the Second Amendment secures a right to engage in firearms commerce. "Our forefathers recognized that the prohibition of commerce in firearms worked to undermine the right to keep and to bear arms." App. 77a (citation omitted). The panel majority also inferred the right to firearms commerce as a matter of logic. "If 'the right of the people to keep and bear arms' is to have any force, the people must have a right to acquire the very firearms they are entitled to keep and to bear." App. 79a. The panel majority also found that the Second Amendment secured the training, instruction, and other firearms services petitioners would offer. "The Ordinance's potential interference with such services was therefore a proper basis for Teixeira's Second Amendment challenge." App. 82a-83a (citation omitted).

The panel majority then observed that this Court's exemption of "laws imposing conditions and qualifications on the commercial sale of arms" from Second Amendment scrutiny, *Heller*, 554 U.S. at 626-27, could not be categorical, as it could then sustain a complete prohibition on arms sales. App. 84a. "The proper question . . . is whether Alameda County's ordinance is the type of longstanding 'condition' or 'qualification on the commercial sale of arms' whose interference with the right to keep and to bear arms historically would have been tolerated." App. 85a (citation and internal punctuation omitted). To escape heightened scrutiny, the government must show that a regulation impacting Second Amendment rights is "both longstanding and closely match[es] a listed prohibition, or, alternatively, there must be persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." App. 85a-86a (internal quotation marks omitted).

As zoning regulations of any kind did not exist prior to 1916, the distancing requirement could not have been longstanding. App. 87a. The distancing requirement would therefore be subjected to some form of heightened scrutiny depending on the type of burden it imposed. App. 88a.

"The district court's characterization of 'residentially-zoned districts' as 'sensitive areas' is incongruous with *Heller*, which assumed that firearms could be restricted in sensitive places 'such as schools and government buildings,' *specifically in contrast to*

residences, where firearms could *not* be prohibited." App. 93a (citation omitted). While the district court "properly identified at least some interests" that might warrant regulation, App. 94a, it did not explain how the distancing requirement fit those interests. "[T]he district court failed to explain how a gun store would increase crime in its vicinity. The court instead simply accepted the County's assertion without exacting it to any scrutiny, in a fashion that more closely resembled rational basis review." *Id.*

The district court "should have . . . required at least some evidentiary showing that gun stores increase crime around their locations. Likewise, the record lacks any explanation as to how a gun store might negatively impact the aesthetics of a neighborhood. The district court simply did not bother to address how the Ordinance was related to such an interest." App. 96a. With respect to petitioners' as-applied claim, the panel majority cautioned that "something more exacting than intermediate scrutiny will be warranted" should the evidence "confirm that the Ordinance, as applied, completely bans new gun stores (rather than merely regulates their locations)." App. 98a (citation omitted).

2. Judge Silverman dissented on grounds that the County had not completely banned firearm sales. App. 100a-02a.

D. En Banc Proceedings

1. a. On rehearing en banc, a majority agreed that "the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms." App. 15a (internal quotation marks omitted). It also agreed that "Teixeira, as the would-be operator of a gun store . . . has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers." App. 16a (citations omitted).

But the en banc majority faulted petitioners for not alleging "that Alameda County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular." *Id.* "[G]un buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained." App. 19a-20a (citations omitted). "Teixeira fails to state a plausible claim on behalf of his potential customers that the ordinance *meaningfully* inhibits residents from acquiring firearms within their jurisdiction." App. 21a (footnote omitted) (emphasis added). The en banc majority was also unmoved by petitioners' plan to offer a range of firearm services. "The Zoning Ordinance limits the location of premises conducting 'firearm sales.' It does not concern businesses providing firearms instruction and training services." App. 22a (citation omitted).

b. The en banc majority also rejected the existence of a right to sell firearms. "Nothing in the text of the Amendment, as interpreted authoritatively in *Heller*, suggests the Second Amendment confers an independent right to sell or trade weapons." App. 27a. "Governmental involvement in the provision, storage, and sale of arms and gunpowder is consistent with the purpose of maintaining an armed militia capable of defending the colonies." App. 31a. "[C]olonial government regulation included some restrictions on the commercial sale of firearms." *Id.* "The British embargo [on arms] and the colonists' reaction to it suggest only that the Founders were aware of the need to preserve citizen *access* to firearms in light of the risk that a strong government would use its power to disarm the people." App. 34a. "[N]o historical authority suggests that the Second Amendment protects an individual's right to *sell* a firearm unconnected to the rights of citizens to 'keep and bear' arms." App. 35a.

The en banc majority rejected analogizing First and Second Amendment commercial activity. "If Teixeira were a bookseller aiming to open up shop in Alameda County, the fact that there were already ten other booksellers indeed would not matter. But he is a gun seller. . . ." App. 38a. The en banc majority asserted that "whereas the Second Amendment identifies 'the people' as the holder of the right that it guarantees, the First Amendment does not state who enjoys the 'freedom of speech,' nor does it otherwise specify or narrow the right." *Id.* It also offered that "[s]elling, publishing, and distributing books and other written

materials is . . . *itself* expressive activity." App. 39a. "[G]un sellers are instead in an analogous position to medical providers in the Fourteenth Amendment context," in that they may allegedly assert their customers' rights to access their constitutionally-protected function, but not their own rights. App. 41a.

2. Judge Owens concurred, except as to the discussion of a right to sell firearms that he viewed as unnecessary. App. 43a-44a.

3. Judge Tallman concurred in the rejection of petitioners' facial challenge. The existence of other gun stores demonstrated that the ordinance was not unconstitutional in all of its applications, the standard that he applied. App. 45a.

But Judge Tallman dissented from the rejection of petitioners' as-applied claim. He found that the regulation was not a longstanding, presumptively lawful measure, adding that "[t]he record here establishes beyond cavil the animus of the Alameda County Board of Supervisors to Second Amendment rights." App. 47a. Even had the law been presumptively lawful, Judge Tallman offered that petitioners were entitled to seek to overcome that presumption. *Id*.

Judge Tallman credited petitioners' claim that a full-service gun store is fundamentally different than a more limited operation. "[T]he ability of lawful gun owners to find a reasonably available source to buy, service, test, and properly license firearms is an attendant right to the fundamental right to bear arms." App. 48a (footnote omitted). He also offered that

"[h]istory supports the view that the Second Amendment must contemplate the right to sell firearms" if people have a right to keep arms. App. 50a (citation omitted).

Judge Tallman viewed the decision as part of the Ninth Circuit's "continuing infringement" of Second Amendment rights. App. 52a.

4. Judge Bea also dissented. First, he criticized the majority for imposing a threshold test on the regulatory burden's severity as a condition of applying heightened scrutiny. The complaint asserted a burden on accessing a full-service gun store. The majority characterized this claim as seeking "a particular 'retail experience,'" App. 56a, but Judge Bea found that "[t]his characterization of the services to be offered by Appellants pooh-poohs the alleged needs and demands of the firearm buyers. . . ." *Id*.

"The burden exists and was sufficiently alleged." App. 57a. Per Judge Bea, that triggered heightened scrutiny of some sort, which the majority improperly sidestepped with its threshold test. *Id.*

As Judge Bea then noted, the County had admitted that the gun store's location posed no material adverse impact to the community. App. 58a. "No sociological study is needed to assert that gun buyers and gun sellers constitute a 'politically unpopular group' in Alameda County." App. 59a (citation omitted). The revocation of petitioners' variance and conditional use permit was "purely political." *Id.* "[T]here is nothing in the record which intimates that locating a gun store

within 500 feet of a residence creates any risk to the residents." *Id*.

Judge Bea then emphasized "that evidence the regulations are 'longstanding' is required to claim *Heller*'s carve-out for 'presumptively lawful' 'conditions and qualifications on the commercial sale of arms.'" App. 63a (citation omitted). The record lacks such evidence. App. 64a.

REASONS FOR GRANTING THE PETITION

I. The Circuit Courts are Split 8-2 as to Whether Rational-Basis Review May Decide Second Amendment Cases.

1. As *Heller* demonstrated, not all Second Amendment cases require the application of means-ends scrutiny. But with very rare exceptions, courts are magnetically attracted to interest-balancing when adjudicating Second Amendment claims. The now-standard two-step approach, pioneered in *United States* v. *Marzzarella*, 614 F.3d 85 (3d Cir. 2010), first asks whether the challenged regulation implicates Second Amendment rights. If not, the challenge fails. But if the regulation impacts Second Amendment rights, the court employs an appropriate standard of review.

There is no one-size-fits-all standard of review. "[T]he prevailing view [holds] that the appropriate level of scrutiny depends on the nature of the conduct

being regulated and the degree to which the challenged law burdens the right." *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) ("*NRA*") (internal quotation marks and citations omitted).

But the lower courts are deeply divided as to whether they may apply rational-basis review in Second Amendment cases. Most courts agree that some form of heightened scrutiny must apply. These courts thus insist that the government justify its regulations, even if, in the final analysis, they afford the government substantial deference in regulating arms. The Ninth Circuit has now joined the minority position allowing that the government may be altogether excused from justifying acknowledged infringements of Second Amendment rights.

2. *Heller* is unambiguous on the subject of rational-basis review. The test "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms." *Heller*, 554 U.S. at 628-29 n.27 (citation omitted).

> If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

Id.

3. a. Eight circuits follow this instruction. The First Circuit acknowledged "that a rational basis alone would be insufficient to justify laws burdening the Second Amendment." *United States* v. *Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (citation omitted). It requires "some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective." *Id.* (citation omitted). Reading *Heller* as a balancing-test case, the Third Circuit offered that "some form of heightened scrutiny must have applied." *Marzzarella*, 614 F.3d at 96.

The Fourth Circuit understands that this Court "would apply some form of heightened constitutional scrutiny if a historical evaluation did not end the matter. The government bears the burden of justifying its regulation in the context of heightened scrutiny review." *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010). "Our task . . . is to select between strict scrutiny and intermediate scrutiny." *Id.* at 682. The Fifth Circuit agrees. When a regulation implicates Second Amendment rights at step one, "the second step is to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny." *NRA*, 700 F.3d at 194 (citations omitted).

The Sixth, Seventh and Tenth Circuits are in accord. "[U]nless the conduct at issue is categorically unprotected, the government bears the burden of justifying the constitutionality of the law under a heightened form of scrutiny." *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686 (6th Cir. 2016) (en banc). "[W]e

know that *Heller*'s reference to 'any standard of scrutiny' means any *heightened* standard of scrutiny; the Court specifically excluded rational-basis review." *Ezell* v. *City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) ("*Ezell I*"); *United States* v. *Reese*, 627 F.3d 792, 801 (10th Cir. 2010) ("we must apply some level of heightened scrutiny"). So too stands the D.C. Circuit. "*Heller* clearly does reject any kind of 'rational basis' or reasonableness test," and thus, the choice is "between strict and intermediate scrutiny." *Heller* v. *District of Columbia*, 670 F.3d 1244, 1256, 1257 (D.C. Cir. 2011) ("*Heller II*").[3]

b. The Second and Ninth Circuits take a different view. "[W]e do not read [*Heller*] to mandate" heightened scrutiny in all cases. *United States* v. *Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). "Rather, heightened scrutiny is triggered *only* by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Id.* (emphasis added). Accordingly, the Second Circuit offered that charging people over $100 a year to possess a handgun did not substantially burden Second Amendment rights because the tax was not

[3] The D.C. Circuit employs a substantial burden test to elevate the standard of review where a challenge might fail at step one. When challenging a longstanding, presumptively-lawful regulation, "[a] plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right." *Heller II*, 670 F.3d at 1253.

"prohibitively expensive." *Kwong* v. *Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013) (footnote omitted).[4]

The Ninth Circuit adopted this approach below. It acknowledged that petitioners may assert their customers' right to acquire arms, and that prohibiting petitioners' store impacted this right. But it nonetheless declined to apply any form of heightened scrutiny and affirmed the dismissal of petitioners' claim because it believed that petitioners' customers were not "meaningfully inhibit[ed]" from acquiring arms. App. 21a.

As Judge Bea noted, the en banc court overruled circuit precedent that applied heightened, if intermediate scrutiny, to allegedly insubstantial burdens. App. 54a; see *Silvester* v. *Harris*, 843 F.3d 816, 827 (9th Cir. 2016), *cert. pending*, No. 17-342 (filed Sep. 1, 2017) ("we apply intermediate scrutiny when a challenged regulation does not place a substantial burden on Second Amendment rights"); *Jackson* v. *City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) ("if a challenged law . . . does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny"); *United States* v. *Chovan*, 735 F.3d

[4] The Eleventh Circuit's position, though plainly hostile to Second Amendment rights, is unclear. That court recently upheld the licensing of gun dealers as both a presumptively lawful regulatory measure reaching unprotected conduct, and as imposing an insubstantial burden on the right to bear arms. *United States* v. *Focia*, 869 F.3d 1269, 1286-87 (11th Cir. 2017).

1127, 1137 (9th Cir. 2013) ("some sort of heightened scrutiny must apply").[5]

The decision below does not merely contravene the prevailing views of eight circuits. It stands in direct and irreconcilable conflict with the Seventh Circuit's decisions in *Ezell I*, *supra*, and *Ezell II*, *Ezell* v. *City of Chicago*, 846 F.3d 888 (7th Cir. 2017), which rejected a threshold substantial burden test and applied heightened scrutiny to strike down firing range restrictions.

In *Ezell I*, Chicago sought to justify its range ban by claiming that residents would merely be inconvenienced by having to access ranges outside the city. The Seventh Circuit rejected the "profoundly mistaken assumption" that rights may be violated in one place because they may be exercised elsewhere. *Ezell I*, 651 F.3d at 697. When Chicago re-regulated, *Ezell II* struck down a law nearly identical to that challenged here—Chicago's restriction of firing ranges as special uses within manufacturing districts, and further barring ranges from locating "within 500 feet of any [residential] district," among other distancing restrictions. *Ezell II*, 846 F.3d at 891.

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[5] The majority answered that petitioners "fail[ed] to plead that the ordinance *actually or really* burdens these residents' Second Amendment rights." App. 20a n.14 (emphasis added); but see *Heller*, 554 U.S. at 634 (courts lack "power to decide on a case-by-case basis whether the right is *really worth* insisting upon").

Chicago asked the court to revisit *Ezell I* and adopt a threshold substantial or undue burden test. The court refused. "In *McDonald* the Court cautioned against treating the Second Amendment as a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' The City's proposed 'substantial burden' test as a gateway to heightened scrutiny does exactly that." *Id.* at 893 (citation omitted). The court "not[ed] for good measure that most other circuits . . . require some form of heightened scrutiny when evaluating the government's justification for a law challenged on Second Amendment grounds." *Id.* (citations omitted).

Accordingly, the Seventh Circuit "require[d] the City to establish a close fit between the challenged zoning regulations and the actual public benefits they serve—and to do so with actual evidence, not just assertions." *Id.* at 894 (citation omitted). Chicago failed to do so.

The Seventh Circuit first rejected the notion that a residential area is a sensitive place from which guns can be distanced. "[A]ny suggestion that firearms are categorically incompatible with residential areas—recall that residential districts are included in the City's buffer-zone rule—is flatly inconsistent with *Heller*, which was explicit that possession of firearms in the home for self-defense is the core Second Amendment right." *Id.* at 895 (citation omitted). Turning to the evidence, the court accepted Chicago's legitimate interests in crime- and fire-prevention and environmental protection. But "[t]he City's *own witnesses* testified to

the lack of evidentiary support for . . . assertions" of constitutional fit. *Id.* "They *repeatedly admitted* that they knew of no data or empirical evidence to support any of these claims." *Id.* The Seventh Circuit therefore struck down the ordinance.

The court below sought to distinguish the *Ezell* cases on grounds that the restrictions there at issue operated more severely. App. 22a-23a. But it did not acknowledge *Ezell*'s rejection of a threshold substantial burden test or Chicago's arguments regarding the availability of nearby ranges. Moreover, contrary to *Ezell I*, the court below reiterated its belief that the ability to exercise Second Amendment rights in nearby jurisdictions may vitiate the harm. "[T]he proper inquiry regarding accessibility may not be limited to a particular jurisdiction." App. 17a n.9.

In the Seventh Circuit, or in any of the other seven courts that (for now) apply heightened scrutiny at Second Amendment step two, the decision below would have been impossible.

II. The Ninth Circuit Has Profoundly Erred in Deciding Important Questions of Law Contrary to This Court's Decisions.

1. *Heller* did not asterisk its prohibition of rational-basis review in Second Amendment cases. This Court did not bar rational-basis review in *some*, or even in *most*, Second Amendment cases. This Court did not require heightened scrutiny in Second Amendment cases that are subject to means-ends review,

unless judges felt the right is "not *really* worth insisting upon," *Heller*, 554 U.S. at 634, or, in the Ninth Circuit's formulation, the right is not "meaningfully" or "actually or really" burdened, App. 20a n.14. The decision below cannot be reconciled with *Heller*'s prohibition of rational-basis review, or with *McDonald*'s holding that Second Amendment rights are fundamental.

Where fundamental rights are burdened, courts must ask the government to justify its behavior. If the government can establish some constitutionally-adequate reason for the restriction, so be it. But even under intermediate scrutiny, the burden is always the government's. *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989). Courts cannot opt out of enforcing fundamental rights wherever, in *their* view, the burdens are not "meaningful." *The People* have decided that the right—all of it—is "meaningful," by ratifying its protection in constitutional text.

The en banc majority rooted its decision on the assertion that all gun stores are fungible, a view it might not have expressed about other retailers. The majority then assumed the mantle of central-planners and, contrary to the Zoning Board's findings, deemed petitioners' store unnecessary. The dissenters understood that petitioners offer a unique value proposition in their full-service store. The planning department staff offered a yet-more basic truth: *the market* would decide how many gun stores should operate and who should operate them. Petitioners might fail, join the ranks of existing retailers, or even displace incumbents. And if

they truly succeed, petitioners might unlock net additional gun sales—a broader exercise of fundamental rights—in Alameda County.

In any event, under this Court's precedent, whether petitioners' store is "actually or really" necessary, or whether its loss is "meaningful," are the wrong questions. The correct question is: what justifies barring petitioners' store from locating within 446 feet of a residence?

Gun stores do not emit pollution, noise, or radiation. It is well within judicial notice that guns have always been sold not only at gun stores, but also at sporting goods stores, hardware stores, and general retailers of every description wherever commerce is permitted. Singling out gun sales for restrictive zoning is odd, considering that while any criminal or lunatic may conduct business at a gas station, bookstore, or grocery, shopping at (and operating) gun stores requires passing background checks. App. 59a.

The County would be hard-pressed to show that any would-be home invader has ever been deterred for lack of finding homes within 500 feet of a gun store. Any criminal plan initiated upon a lawful firearm purchase might well involve over 500 feet of travel. Moreover, California gun stores may only deliver firearms that are "unloaded and securely wrapped or unloaded and in a locked container." Cal. Penal Code § 26815(b).

And of course, guns cannot be excluded from homes, so why should gun stores, specifically, be

distanced from residential areas? As Judge Bea noted, "[t]he closer the store to residences, the easier for residents to buy guns and the safer the residences." App. 60a.

Even if gun stores did somehow impact residential districts, there would still exist the significant point that the Zoning Board awarded petitioners a variance. *Their* store would "not materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injuries [sic] to property or improvements in the neighborhood." ER180.

2. The lower court's denial of the right to sell firearms likewise contravenes this Court's established approach to identifying the Second Amendment's scope. The court below held that there is no right to sell guns because "colonial government regulations included *some* restrictions on the commercial sale of firearms." App. 31a (emphasis added). "The colonies regulated the sale of weapons *to some degree*." App. 35a (emphasis added). But *Heller* rejected the notion that "various restrictive law in the colonial period" could be read broadly to negate the right they regulated. *Heller*, 554 U.S. at 631. The existence of gunpowder storage laws, and laws restricting the public discharge of firearms, were not inconsistent with a right to keep and use guns for self-defense. *Id.* at 631-34. Neither does the regulation of firearms commerce suggest that this activity is unprotected.

The lower court's other reasons for rejecting the right to sell firearms are also spurious. Of course neither the Second Amendment's text, nor that of its founding era analogues, refer explicitly to a right to "sell" arms. App. 27a-28a. Neither does the constitutional text refer to a right to *acquire* guns, but the lower court acknowledged at least this aspect of the right. App. 15a; *Marzzarella*, 614 F.3d at 92 n.8. Common sense dictates that the Framers were not required to spell out every possible dimension of an enumerated right. "[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579-80 (1980) (footnote omitted). Thus, the First Amendment secures a right to attend criminal trials, notwithstanding its text's silence on that specific question. *Id.*

The lower court's bifurcation of the right to firearms commerce into a right to acquire, which it recognized, and a right to sell, which it rejected, is artificial and arbitrary. As a logical matter, commerce inherently involves buyers as well as sellers, who may have equal constitutional rights in the transaction. Cf. *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). More importantly, as "[t]he panel opinion persuasively lays out[,] the historical evidence demonstrat[es] that the right to sell firearms is part and parcel of the historically recognized right to keep and bear arms." App. 61a (internal quotation marks omitted). As

the panel majority, Judge Tallman, and Judge Bea found, the historical record supports the Second Amendment's protection of a right to sell arms.

"Throughout history and to this day the sale of arms is ancillary to the right to bear arms." App. 51a (footnote omitted). "As British subjects, colonial Americans believed that they shared equally in the enjoyment of [the English right to arms], and that the right necessarily extended to commerce in firearms." App. 77a. Provided one early colonial law, "[i]t is ordered that all persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony. . . ." Laws of Virginia, February, 1676-77, Va. Stat. At Large, 2 Hening 403 (1823). And Thomas Jefferson offered that "[o]ur citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them." Thomas Jefferson, 3 *Writings* 558 (H.A. Washington ed., 1853). The colonies did not receive the British arms embargo well. App. 51a, 78a.

It does not matter that the Framing Era lacked "commentary suggest[ing] that the right codified in the Second Amendment independently created a commercial entitlement to sell guns if the right of the people to obtain and bear arms was not compromised." App. 34a. The Framers could not have anticipated every argument of twenty-first century judges hostile to the Second Amendment right. Individuals seeking to enforce their rights need not disprove, as an historical matter, every negative proposition concocted by the right's opponents.

3. The lower court's parsimonious reading of the Second Amendment's scope is also at odds with this Court's typically expansive approach to fundamental rights. The Second Amendment, securing the interests of self-defense and the preservation of bodily integrity, is no less rooted in the sphere of personal autonomy than are the rights to abortion, intimate relations, marriage, or freedom from cruel and unusual punishment. The Ninth Circuit would never treat those rights in the same fashion. This Court, however, has rejected the notion "that the Second Amendment should be singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778-79.

III. This Court's Intervention Is Required to Preserve Not Only the Second Amendment, but This Court's Role in Resolving Constitutional Questions.

1. The lower courts rarely decide Second Amendment cases on an historical or textual basis. Virtually all Second Amendment cases are decided using means-ends scrutiny. If courts are allowed to apply rational-basis review in Second Amendment cases, simply by finding that the law's burden is not "significant" or "meaningful," this fundamental right is finished. Nor would the Second Amendment retain any practical scope if every historical regulation would negate one of the right's aspects.

2. a. Perhaps more critically, this Court should secure its role atop a system of vertical precedent by

correcting acts of direct resistance. The "grudging" summary reversal in *Caetano* v. *Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (per curiam) (Alito, J., concurring in the judgment), was a good start. But more is needed.

The decision below reflects the low regard in which some courts view *Heller*. As detailed *supra*, this Court explicitly barred the use of rational-basis review in Second Amendment cases, using language over which most courts have not stumbled. This Court has also made clear that in asking whether the Second Amendment secures an activity, the mere fact of historical regulation does not negate constitutional protection. Rights, after all, are not absolute.

But that was almost ten years ago. "[T]he passage of time has seen *Heller*'s legacy shrink to the point that it may soon be regarded as mostly symbolic." Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L. J. 921, 962-63 (2016). Five year have passed since observers could persuasively document the fact that a *Heller* dissent, not the case's majority opinion, is effectively controlling. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703 (2012). And if the lower courts know that they can get away with narrowing *Heller* from below, why not ignore it wholesale?

b. Judge Tallman called out the decision below for "perpetuat[ing] our continuing infringement on the fundamental right of gun owners enshrined in the Second Amendment." App. 52a. Recounting his court's

history of ratifying Second Amendment infringements, Judge Tallman likened the Ninth Circuit's approach to "the Death by a Thousand Cuts." App. 53a. Indeed, the Ninth Circuit stands among *Heller*'s staunchest resisters. That court encompasses among the most pervasively arms-restrictive jurisdictions in the country, yet it has somehow never seen a Second Amendment violation.

That is not because every firearm law in the Ninth Circuit, on its face and in every application against a fifth of the nation's population, happens to be constitutional. As this Court's Justices have observed, the en banc Ninth Circuit's approach to the Second Amendment has been "indefensible." *Peruta* v. *California*, 137 S. Ct. 1995, 1997 (2017) (Thomas, J., dissenting from denial of certiorari). This latest decision showcases three Second Amendment avoidance strategies, raising the question of whether the Ninth Circuit would ever tolerate a rights-enforcing Second Amendment outcome.

i. This case marks the fourth time in which a Ninth Circuit panel expanded or acknowledged Second Amendment rights, only to be vacated en banc, leading to a loss for the regulated. See *Peruta* v. *County of San Diego*, 781 F.3d 1106 (9th Cir. 2015) (en banc) (vacating panel holding striking down handgun carry restrictions), *together with Richards* v. *Prieto*, 782 F.3d 417 (9th Cir. 2015) (en banc) (same); *Nordyke* v. *King*, 664 F.3d 774 (9th Cir. 2011) (en banc) (vacating panel decision allowing leave to pursue Second Amendment claim); *Nordyke* v. *King*, 575 F.3d 890 (9th Cir. 2009)

(en banc) (vacating holding that the Fourteenth Amendment incorporates the Second Amendment).

The Ninth Circuit has never reheard one of its numerous panel decisions declining to find a Second Amendment violation.

ii. Facts need not matter much in Second Amendment cases. When a district court rejects a Second Amendment challenge, the Ninth Circuit defers completely to the lower court's factual findings. See, *e.g.*, *Fyock* v. *City of Sunnyvale*, 779 F.3d 991, 1000-01 (9th Cir. 2015). But when a district court struck down a firearm law following a three-day bench trial, the Ninth Circuit simply ignored the trial's results and reversed based on its own assumptions. See *Silvester*.

Here, the Zoning Board determined that the store "will not be detrimental to persons or property in the neighborhood or to the public welfare," that there was a "public need" for the store, and that the store properly related to its environment. ER179. Recounted in the complaint, these facts must have been viewed in the light most favorable to petitioners, and suggested a tough road for the County under any form of heightened scrutiny. So the en banc court tossed these facts aside as irrelevant by avoiding any heightened scrutiny at all. Heads (weak facts) the government wins, tails (strong facts) the challengers lose.

iii. Courts occasionally offer the prospect of meaningful Second Amendment scrutiny in cases where the government's victory is assured, only to limit or overrule that precedent in cases where that

precedent would actually matter. For example, the Fourth Circuit repeatedly held out the prospect of as-applied relief from firearm dispossession laws in cases involving those who did not qualify for relief. See, *e.g.*, *United States* v. *Pruess*, 703 F.3d 242, 245 (4th Cir. 2012); *United States* v. *Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012); *United States* v. *Moore*, 666 F.3d 313, 319 (4th Cir. 2012). But faced with such a challenge by a non-violent felon who had become a Homeland Security Federal Protective Service Officer, that court suddenly required a pardon or defect in the underlying conviction—rare factors that would obviate the need for relief in the first place. *Hamilton* v. *Pallozzi*, 848 F.3d 614 (4th Cir. 2017).

Likewise, the Ninth Circuit had consistently promised heightened scrutiny for Second Amendment claims, including cases where the burden would be deemed insubstantial. But it did so where the government could offer at least colorable arguments to which the court could defer. Here, the record establishes an acknowledged infringement and little prospect of a substantive defense. And so, the Ninth Circuit's heightened scrutiny precedent proved worthless.

As Judge Bea noted, App. 54a-55a, the Ninth Circuit whipsawed from "some sort of heightened scrutiny must apply," *Chovan*, 735 F.3d at 1137—and even, inside of a year, from "we apply intermediate scrutiny when a challenged regulation does not place a substantial burden on Second Amendment rights," *Silvester*, 843 F.3d at 827—to an amorphous "meaningfully," "actually or really" test for applying heightened scrutiny

to an acknowledged infringement, App. 20a n.14. The facts always change from case to case. But if the Second Amendment is at issue, so might the law. The result—denial of Second Amendment relief—is the constant variable.

* * *

What the protestors lacked in terms of a rationale for banning petitioners' store, they sufficiently made up in the votes among the County's Board of Supervisors. The Ninth Circuit's record, culminating in the decision below, suggests that it may operate on the same calculus. The lower courts' effective repeal of the Second Amendment is a matter of significant public concern. It should concern this Court.

IV. This Case Presents an Excellent Vehicle to Restore This Court's Precedent, and Its Primacy in Settling Questions of Constitutional Law.

Heller settled the questions of whether rational-basis review applies in Second Amendment cases, and whether "some" historical regulation may broadly negate the right to arms. If these questions were ripe for this Court's consideration in 2008, they are ever more so now as the lower courts' revolt approaches its second decade.

There is nothing to be gained by further percolation in the lower courts. Left unchecked, the Ninth Circuit's abrupt abandonment of heightened scrutiny, where it would have made a difference, is probably just

the first such reversal. Other courts that only grudgingly acknowledged the hypothetical application of heightened scrutiny in Second Amendment cases would view this case, if left unchecked, as a green light to reverse course as well. The public may not always be conversant in the finer academic points of constitutional law, but it knows when rights are illusory. The damage to confidence in the rule of law itself, not merely to Second Amendment rights, is significant.

This case is well constructed to address these concerns. Jurisdiction is straightforward—the County banned petitioners' store—and the case arrives here on a clean record, comprised of a complaint's factual assertions. Reversal would still afford the County a chance, however improbable, to defend its action. This Court is not asked to resolve the ultimate merits of petitioners' case, but only to resolve straightforward if profoundly important questions of constitutional law. It should act on this opportunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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