No. 17-982

In The Supreme Court of the United States

JOHN TEIXEIRA, et al.,

Petitioners,

v.

ALAMEDA COUNTY, CALIFORNIA, et al.,

Respondents.

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

BRIEF OF AMICUS CURIAE THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS JOHN TEIXEIRA, ET AL.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae The National Shooting Sports Foundation, Inc. ("NSSF") is the national trade association for the firearms, ammunition, and hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association with its principal place of business in Newtown, Connecticut. NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment that is supportive of America's hunting and shooting heritage and Second Amendment freedoms.

NSSF has a membership of over 10,000 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; and endemic media. At

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[1] The National Shooting Sports Foundation, Inc. respectfully submits this amicus curiae brief in support of Petitioners pursuant to Supreme Court Rule 37.2. Amicus certifies counsel of record for all parties received timely notice of the intent to file this brief and they have given written consent to its filing. Amicus further certifies, pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, nor did any party or its counsel make a monetary contribution to fund its preparation or submission.

present, NSSF has more than 1,000 members in the State of California.

NSSF's interest in this case derives principally from the fact that its federally licensed firearms manufacturer, distributor and retail dealer members engage in the lawful commerce of firearms and ammunition in California and throughout the United States, which makes the exercise of an individual's constitutional right to keep and bear arms under the Second Amendment possible. The Second Amendment protects NSSF members and others from regulations and statutes seeking to ban, restrict or limit the exercise of important Second Amendment rights – including the Alameda County ordinance at issue here – which impair the ability of responsible and law-abiding citizens to acquire firearms and ammunition, obtain education and training in safe firearms handling and use, and otherwise exercise their Second Amendment rights. As such, the affirmation of a Second Amendment right to lawfully sell firearms and ammunition products, as well as the determination of whether a state or local regulation burdens the exercise of that right – and the appropriate standard to be applied in making such a determination – is of great importance to NSSF and its members in California and throughout the United States. NSSF, therefore, submits this brief in support of Petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case lays bare the apparent disdain a growing number of California's political subdivisions have for those engaged in the lawful commerce of firearms, ammunition and related products and services. Sadly, it also highlights the lengths to which a sympathetic Circuit Court of Appeal will go to further restrict what it plainly sees as a second class right, including a newly minted standard of review in Second Amendment cases which allows judges to decide, in the first instance, if the right has been "meaningfully" burdened. When an appellate court has become so openly hostile to an enumerated right, as evidenced in the majority *en banc* decision herein, the aggrieved parties have no other place to turn than the certiorari power of this Court.

NSSF strongly urges this Court to grant Petitioners' Petition for Writ of Certiorari to review (and correct) the Ninth Circuit's Opinion in this action and make clear that our courts "may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights." *See Jackson v. City & Cty. of San Francisco*, 135 S.Ct. 2799, 2802 (2015) (Thomas, J., dissenting) (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008) ["*Heller*"]). As this Court pronounced in its seminal *Heller* decision, "The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis what is really worth insisting upon." 554 U.S. at 634.

Here, the *en banc* panel's majority Opinion analyzes the Second Amendment rights at issue as second class rights and affirms the District Court's dismissal of Petitioners' First Amended Complaint for failure to state a claim. To reach its questionable decision, the Circuit Court of Appeal incorrectly applied the two-step inquiry it adopted in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) ("*Chovan*") to determine whether Alameda County Ordinance section 17.54.131, which includes distance limitations precluding firearms retailers from locating within 500 feet of residences, certain schools, liquor stores and other listed businesses, should be upheld. In answering the first inquiry – whether the challenged law burdens conduct the Second Amendment protects – the Ninth Circuit determined whatever burden existed was not "meaningful." Finding no "meaningful" burden, the Ninth Circuit dispenses altogether with the second *Chovan* inquiry – determining the appropriate level of scrutiny to apply.

As a further error, the majority *en banc* panel summarily concludes the Second Amendment does not even include, let alone protect, a "freestanding" or "independent" right to sell firearms. *See generally Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017). But the Second Amendment right to keep and bear arms necessarily includes both the right to purchase *and the right to sell* firearms and ammunition. Without such rights, the Second Amendment would be meaningless. And the Alameda County ordinance at issue, whether substantially so or otherwise,

does indeed burden those rights – further evidence of a modern trend to enact local zoning regulations designed to severely limit and restrict accessibility to firearms and ammunition. Because the subject ordinance burdens the right to purchase *and* the right to sell firearms and ammunition, *Heller* requires something more than a rational basis level of scrutiny be applied and NSSF encourages the Court to accept this matter for review to provide further guidance and clarification on how lower courts should analyze laws infringing on Second Amendment rights.[2]

ARGUMENT

It is well-established the Second Amendment protects the fundamental, individual right to keep and bear arms which extends to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald v.*

[2] In the instant action, the district court dismissed Petitioners' lawsuit at the initial pleading stage per Respondents' Motion to Dismiss. In reaching its decision, the district court found the Second Amendment claim failed at the first step under *Chovan*: "the Ordinance is part of the Supreme Court's non-exhaustive list of regulatory measures that are constitutional under the Second Amendment." Appendix at 117a. The district court went on to say, "any analysis under the second step in the Second Amendment inquiry" was "unnecessary." It then summarily concluded the distancing restriction would pass "any applicable level of scrutiny." Appendix at 120a. Thus, the district court never allowed the action to proceed past the initial pleading stage and did not allow Petitioners to conduct discovery to determine whether the County could justify the stated reasons for the subject ordinance under a heightened level of scrutiny.

City of Chicago, 561 U.S. 742 (2010). As the Ninth Circuit *en banc* panel recognized, this includes a right to *purchase* firearms and ammunition. *Teixeira*, 873 F.3d at 673–76. However, rather than accept what is implicit in *Heller* – that there is an ancillary right to *sell* firearms, ammunition and related services – the Ninth Circuit pivots and concludes, erroneously, the Second Amendment "does not confer a freestanding right to sell firearms. . . ." *Id.* at 687.

Despite a number of opportunities to do so, there has been no guidance from this Court since 2010 on how lower courts should evaluate laws which infringe on Second Amendment rights; absent such guidance, more and more courts are emboldened, like the Ninth Circuit here, to treat Second Amendment rights as a "second-class right, subject to an entirely different body of rules than other *Bill of Rights* guarantees." *McDonald*, 561 U.S. at 780.

For those engaged in the lawful commerce in firearms, ammunition and related products and services, a disturbing trend has emerged in recent years, due in part to the promotion of "model laws" within cities and counties in California (and other states),[3] to adopt

[3] *See*, *e.g.*, The Giffords Law Center to Prevent Gun Violence "Model Laws for a Safer America," providing suggested ordinance language which prohibits firearms dealers from operating in residential neighborhoods and near other "sensitive" areas [Model Law, Chapter 1 – "Regulating Firearms Dealers and Ammunition Sellers" – Section 17(b): dealers "shall not be located in any district or area that is zoned for residential use, or within 1,500 feet of any . . . residentially zoned district or area."] (www.lawcenter.giffords.org/resources/model-laws).

more and more restrictive zoning regulations directed at firearms dealers.[4] Such zoning laws can be extraordinarily effective tools to severely reduce the number of – or eliminate altogether – firearms and ammunition dealers from the local landscape. In firearm unfriendly areas in California, for example, of which there are many, all that is required are a handful of like-minded city councilmembers or county supervisors to adopt arbitrary – or worse, carefully drawn – distance limitations or other zoning regulations which will have the desired effect. Thus, in the still of an otherwise dreary planning commission meeting, purveyors of firearms, ammunition and related services are zoned out of existence by restrictions and buffer-zones of varying sizes which have no relationship to governmental interests such as public health and safety.[5] *See*,

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[4] *See*, *e.g.*, Cathedral City, CA, Municipal Code § 5.32.040(A) (excluding firearms dealers within 1,000 feet of a " . . . residence, residential zoned area, private or public park . . . " among other uses); Hercules, CA, Municipal Code § 4-14.06(i) (excluding firearms dealers within 150 feet of a residential use district); Oakland, CA, Municipal Code § 5.26.070(i) (excluding firearms dealers within 1,000 feet of residential use district); Pleasant Hill, CA, Municipal Code § 18.25.160(A)(2) (excluding firearms dealers within 150 feet of any residence); San Bruno, CA, Municipal Code § 608.070(H)(2) (excluding firearms dealers within 250 feet of residential use district). This list is by no means exhaustive and merely provides a sampling of current local zoning ordinances restricting potential locations for firearms dealers.

[5] With regard to the conditional use permit and variance Petitioners sought here, the Zoning Board initially issued the requested permit and variance finding the proposed 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. Excerpts of Record ["ER"] at 179. The board even found

e.g., *Ezell v. City of Chicago*, 846 F.3d 888, 895–896 (7th Cir. 2017) ("*Ezell II*") (City of Chicago utterly unable to offer actual evidence supporting 500-foot residential buffer-zone for firing ranges when public health justifications were: (1) firing ranges attract gun thieves; (2) cause airborne lead contamination; and (3) carry a risk of fire); *see also Tony Kole & Ghost Indust., LLC v. Vill. of Norridge*, 2017 U.S. Dist. LEXIS 17824, 38–42 (N.D. Ill. 2017) (Village unable to support public safety and crime reduction justifications for hodge-podge of distance limitations and zoning restrictions which effectively prohibited new firearms retailer).

Therefore, the time is ripe for much-needed guidance as to the scope of Second Amendment protection for firearms and ammunition dealers. More than ever, this Court is poised to provide direction on such issues as: (1) Second Amendment protection for the right to sell firearms/ammunition and provide related services and products; (2) affirmation of a "two-step Second Amendment inquiry" which does not, as the initial inquiry, determine the *extent* of the infringement but rather *whether there has been* an infringement; and (3) the level of scrutiny to apply when cities and counties adopt zoning regulations (which are not the sort of presumptively lawful "longstanding firearms regulations"

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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*. Further, 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." ER at 180.

identified in *Heller*) restricting where such businesses may be located.

I. The Second Amendment Necessarily Includes the Right to Sell Firearms and Ammunition and the Ninth Circuit's Determination Otherwise is in Error.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. As set forth in *Heller* and *McDonald*, the right to keep and bear arms is a fundamental – and enumerated – individual right applicable to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald*, 561 U.S. 742. Such a right is "fundamental to our scheme of ordered liberty" and should be afforded the same respect as rights guaranteed by the First, Fourth and Fifth Amendments. *See generally McDonald*, 561 U.S. at 767.

Heller makes clear the *core* Second Amendment right is for individuals to "keep and bear arms" for self-defense. Following *Heller*, lower courts, including the Ninth Circuit, have concluded the Second Amendment "wouldn't mean much" without the ability to acquire firearms needed to exercise that right, *Teixeira*, 873 F.3d at 677–78, citing *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F.Supp.2d 928, 930 (N.D. Ill. 2014), and that same right includes the ability to acquire ammunition, as "without bullets, the right to bear arms would be meaningless." *Jackson v. City & Cty. of San*

Francisco, 746 F.3d 953, 967 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 2799 (2015). Moreover, courts have held "the right to possess firearms for protection implies a corresponding right to . . . maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective" or the ability to learn "to handle and use them." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("*Ezell I*") (the individual right of armed defense includes a corresponding right to acquire and maintain proficiency in firearm use through target practice at a range).[6] Thus, while it appears without controversy an individual has the Second Amendment right to *purchase* both a firearm and the ammunition necessary to make it function as such, the Ninth Circuit majority *en banc* panel somehow concludes there is no corresponding right to *sell* firearms.

In finding no such right under the Second Amendment, the court below makes two crucial mistakes. First, it ignores the realities of life in 1791, as they related to the availability of firearms at least, and also side-steps this Court's decision in *Heller*. Unlike the

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[6] More recently, *Ezell II* addressed a zoning ordinance with distance limitations very similar to the ones at issue here. The City of Chicago enacted a zoning restriction only allowing gun ranges as special uses in manufacturing districts and a zoning restriction prohibiting gun ranges within 100 feet of another range or within 500 feet of a residential district and multiple other uses. The Seventh Circuit considered those regulations together and found they "dramatically limit the ability to site a shooting range within city limits." Because "Chicagoans' Second Amendment right to maintain proficiency in firearm use via target practice at a range" was severely limited, the ordinance was found unconstitutional. *Id.* at 890.

ready availability of sophisticated machinery in modern times, including the wide array of tools and equipment found at the neighborhood Home Depot or Lowe's, the average Colonist living at the time of the Second Amendment's ratification had neither the tools nor materials to make firearms to defend hearth and home, or muster for the militia with their firearm as the law generally required at the time. Unless one was a skilled blacksmith with unique boring tools and lathes capable of machining hardened steel, there would be no conceivable way for citizens to obtain a firearm unless it was purchased. To conclude otherwise is to ignore the realities of Colonial America.

Second, the majority *en banc* panel misreads a key passage in *Heller*, which has garnered much commentary and debate: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on [1] the possession of firearms by felons and the mentally ill, or [2] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or [3] laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27. Upon even a casual reading, it is obvious each of the three categories of laws listed are *exceptions* to the core Second Amendment individual right to keep and bear arms. But they also provide illuminating "guidance about the scope of the right itself." *See* D. Koppel, *Does the Second Amendment Protect Firearms Commerce?*, 127 Harv. L. Rev. 230 (2014). While the first two categories presume the right to possess and carry firearms, the third category presumes

the right to engage in the commercial sale of firearms. If there was no such right in the Second Amendment, why was there a need to call out longstanding laws "imposing conditions and qualifications" on such sales? Therefore, while there may be little debate the right to commercial sales implicit in this Court's *Heller* decision can be qualified, for example by requiring that commercial transactions of firearms be handled by federal firearms licensees (18 U.S.C. § 923), it is apparent the right to sell is as much a part of the scope of the Second Amendment as the right to acquire and possess the firearms one may choose to buy.

There is no real distinction between the right to *purchase* firearms and ammunition and the right to *sell* them. It is self-evident one cannot purchase firearms or ammunition unless there are those who are able to sell them. *See generally Jackson*, 746 F.3d at 960; *see also Ezell I*, 651 F.3d 684; *Ezell II*, 846 F.3d 888. This Court's review is needed to correct the Ninth Circuit *en banc* panel's further erosion of those rights guaranteed to Petitioners under the Second Amendment – including the right to *sell* firearms and ammunition.

II. The Subject Alameda County Ordinance is Not the Type of Presumptively Lawful Regulation of Commercial Sales of Firearms Referenced in *Heller*.

The Ninth Circuit *en banc* panel suggests the language in *Heller* "regarding the regulation of 'the

commercial sale of arms'" is opaque. *Teixeira*, 873 F.3d at 682–83. Even if true, it is difficult to conceive that *Heller*'s presumptively lawful "longstanding prohibitions" on the commercial sale of firearms could include zoning regulations such as Alameda County Ordinance section 17.54.131. *See Heller*, 554 U.S. at 626–27. In fact, existing appellate case law suggests such ordinances are *not* entitled to presumptive validity. *See generally Ezell II*, 846 F.3d at 891–93 (evaluating the constitutionality of a distance limitation for shooting ranges under intermediate scrutiny and finding such a limitation implicated Second Amendment rights).

While there may be legitimate debate as to whether *Heller*'s "conditions and qualifications" on commercial firearms sales were intended to describe certain federal laws imposing varied restrictions on firearms retailers, including federal licensing requirements, record keeping requirements, and other similar regulations, *Heller* was surely not referring to "mundane" and relatively "recent" zoning regulations like the one at issue here. As Justice Tallman observes in his *Teixeira* dissent, "Justice Scalia's footnote in *Heller* could not have been addressing county ordinances meant to restrict firearm acquisition and possession as much as a local government can get away with." *Teixeira*, 873 F.3d at 692 (Tallman, J., dissenting).

Furthermore, the ordinance is hardly what one would consider longstanding. The Alameda County ordinance at issue was adopted less than a decade ago and the first zoning regulations did not appear until 1916. Thus, "Alameda County's Conditional Use

Permit requirement is not heir to a longstanding class of historical prohibitions or regulations." *Id.* at 699 (Bea, J., dissenting) (citing *Teixeira v. County of Alameda*, 822 F.3d 1047, 1058 (9th Cir. 2016) ("*Teixeira I*"), *rev'd en banc*, 873 F.3d 670 (9th Cir. 2017)).

Finally, that portion of Alameda County Ordinance section 17.54.130-131 which creates a 500-foot buffer zone between firearms retailers and a "residentially zoned district" would seem suspect on its face, perhaps even prima facie evidence of the County's animus to the Second Amendment, particularly in light of *Heller*'s pronouncement that the "inherent right of self-defense" is in the home, "where the need for defense of self, family, and property, is most acute." *Heller*, 554 U.S. at 628.

The time is right for this Court to pick up where *Heller* left off and clarify whether "presumptively lawful" regulations include city and county zoning ordinances like the ones at issue here.

III. The Burden to Petitioners' Second Amendment Rights Need Not Be "Meaningful" to Require Some Form of Heightened Scrutiny.

In *Chovan*, the Ninth Circuit adopted its straightforward "two-step Second Amendment inquiry." 735 F.3d at 1136. The first step requires the Court to ask a very precise question: "[W]hether the challenged law burdens conduct protected by the Second Amendment." If so, the Court is then required "to apply an

appropriate level of scrutiny." *Id*. Here, the majority *en banc* panel casually acknowledges the appropriateness of its *Chovan* approach to Petitioners' Second Amendment claims (*Teixeira*, 873 F.3d at 679, n.10), but in the next breath refuses to apply it despite Petitioners' allegations that residents of unincorporated Alameda County are unable to obtain the products and services their business would provide because of Alameda County Ordinance section 17.54.131. *Id.* at 679–80.

Exhibiting an apparent anti-gun bias, as well as an ignorance of what actually transpires during the purchase of a firearm at a dealer's business, the Ninth Circuit *en banc* panel makes the utterly dismissive observation that Petitioners are claiming the Second Amendment "not only encompasses a right to acquire firearms but guarantees a certain type of retail experience." *Id.* at 680, n.13. Selecting an appropriate firearm for the defense of one's family and home is serious business; it is not about the sights, sounds and smells of the "retail experience," as if one were perusing the shelves of an Anthropologie or Bed Bath & Beyond. In its effort to trivialize Petitioners' suit, the Ninth Circuit majority *en banc* panel completely misses the nature of Petitioners' claims – that their excluded business would not only provide a wide range of firearms and a knowledgeable staff to aid in the selection of the best one to suit a customer's needs, but also the educational and training services required to obtain California's Firearm Safety Certificate, as well as the

skills needed to use a particular firearm proficiently and safely.[7]

Finally, the Ninth Circuit's majority opinion found the right to purchase firearms was not meaningfully or substantially burdened because customers could go to other firearms retailers nearby, including a Big 5 Sporting Goods.[8] But the presence of firearms/

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[7] The *en banc* panel also claims the ancillary right to services such as training and certification for firearms use will not be burdened in any way because the subject ordinance only refers to firearms sales. But "firearms sales" is not defined in the Alameda County Municipal Code. Thus, there is no way to know how the county will apply the ordinance. As a practical example, what about firearms training/certification which involves live rounds? Are firearms rentals considered a "sale" for purposes of the ordinance? Are the trainees expected to bring all ammunition they might need to the location of training/certification? Is the business prohibited from selling ammunition if it is located within 500 feet of the identified zones/structures?

Moreover, this claim is disingenuous in the sense it is highly unlikely a business providing training and certification in firearms will be viable if prohibited from selling the very firearms and ammunition for which it provides instruction. In the First Amendment context, it would be like upholding a zoning ban on businesses selling books but allowing retailers to still sell bookmarks, attractive book covers and reading glasses. Such a business would not last long.

[8] The fact Alameda County residents can go to Big 5 Sporting Goods to buy a firearm does not mean they can buy *the* firearm which best suits their individual circumstances and needs for self-defense, home protection, including handguns, or other lawful purchases like hunting and target shooting. The court below's ignorance about firearm sales is apparent in its suggestion that one or several existing gun shops should suffice for all potential firearm purchasers. The fact of the matter is that firearm dealers vary greatly in focus, inventory, expertise, pricing, and available related services. To suggest Big 5 Sporting Goods would or should

ammunition retailers in incorporated Alameda County does not mean there is no burden whatsoever. As *Ezell I* determined, the "availability of [firearms retailers] outside the city neither defeats the organizational plaintiffs' standing nor has anything to do with merits of the claim. The question is not whether or how easily Chicago residents can comply with the range-training requirement by traveling outside the city. . . . The pertinent question is whether the Second Amendment prevents the City Council from banning firing ranges everywhere in the city; that ranges are present in neighboring jurisdictions has no bearing on this question." *Ezell I*, 651 F.3d at 696–97.

Nor does the availability of certain types of firearms and ammunition in other areas operate to protect the right to *sell* firearms of all kinds. Moreover, Petitioners' First Amended Complaint (which must be accepted as true and construed in the light most favorable to Petitioners as the non-moving parties) alleges the distance limitations in Alameda County Ordinance section 17.54.131 operate to completely ban the sale (and therefore the purchase) of firearms and ammunition in unincorporated Alameda County because there are *no areas* within unincorporated Alameda County where a firearms retailer may establish a location. ER at p. 50; *see generally Ezell I*, 651 F.3d at 684.

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satisfy all customers misses the mark by a wide margin. And, notably, the Zoning Board found a public need for this retailer. *See* footnote 4, *infra*.

Had the lower appellate court here followed its own precedent in *Chovan*, it would have found Alameda County Ordinance section 17.54.131 burdens Second Amendment rights (either to purchase or to sell firearms/ammunition) and proceeded to the second inquiry – what level of scrutiny should apply. At that stage, Respondents would have been put to the task – as they should be – to come forward with evidence to justify how its seemingly arbitrary distance limitations serve an important or compelling governmental interest.

The ordinance at issue here burdens both the right to purchase and the right to sell firearms and ammunition. Because the Ninth Circuit applied the inquiry incorrectly, review by this Court is necessary to clarify the extent of the burden needed to implicate a heightened level of scrutiny.

CONCLUSION

As judges Tallman and Bea wryly observe in their respective dissents, those who engage in firearms commerce and their customers are part of a "politically unpopular" and highly regulated group in Alameda County and elsewhere in California. *Teixeira*, 873 F.3d at 694 (Tallman, J., dissenting) and at 697 (Bea, J., dissenting). Truer words have not been spoken. Yet, this group does not consist of second-class citizens exercising a second-class right. Indeed, had this case involved a First Amendment challenge brought by a bookstore

seeking to locate in Alameda County, the below court of appeal would have no doubt allowed the case to proceed to the merits. Rather, all members of the firearms industry seek – as Petitioners do here – to exercise a fundamental and enumerated right which protects their ability to purchase *and sell* firearms, ammunition and related services to law abiding Americans, many of whom are military and law enforcement personnel who use those firearms to keep our nation and our communities safe. Without the lawful commerce in firearms, the right to keep and to bear arms protected by the Second Amendment would be illusory. As is evident by this case, NSSF members engage in lawful and constitutionally protected commerce despite a growing number of counties, cities and towns wishing to use arbitrary and indefensible distance limitations to zone them out of existence. Courts like the *en banc* Ninth Circuit panel below serve as enablers to this growing encroachment of individual constitutional rights.

Once in a blue moon, a case comes along which provides this Court with the opportunity to further define the contours of the Second Amendment and rein-in those lower courts that have failed to follow the lessons *Heller* and *McDonald* taught about how Second Amendment challenges are properly analyzed. Far from being merely a "mundane zoning dispute dressed up as a Second Amendment challenge"

(*Teixeira I*, 822 F.3d at 1064 (Silverman, J., dissenting)), this is such a case and the Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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