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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' amended complaint failed to state a Second Amendment claim where it did not allege that the County's zoning ordinance impedes anyone from purchasing firearms in the County, and where the complaint revealed that ten gun stores already operate in the County, including one 607 feet from petitioners' proposed site.

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STATEMENT

1. As part of their police powers, California cities and counties may enact zoning and land use regulations for their jurisdictions. *See* Cal. Const. art. XI, § 7. The County of Alameda has enacted a comprehensive zoning ordinance that governs the noncontiguous, unincorporated regions of the County, which are home to about nine percent of the County's population. *See* Pet. App. 11a n.6; Alameda Cty., Cal., Code of Ordinances, tit. 17; *City of S. San Francisco v. Berry*, 120 Cal. App. 2d 252, 253 (1953) (land annexed by a city is no longer within the county's jurisdiction).

The zoning ordinance requires an applicant to obtain a "conditional use permit" before using a commercial property for several enumerated purposes, including "Animal hospital," "Drive-in theater," "Plant nursery," "Auto sales and service agency," "Tavern," "Tattoo studio," "Alcohol outlets," "Adult entertainment activity," and, as relevant here, "Firearms sales." Alameda Cty., Cal., Code of Ordinances §§ 17.40.030 & 17.40.035. To obtain a conditional use permit for selling firearms on a property, a retailer must demonstrate, among other things, that (1) it possesses the requisite state and federal licenses, (2) it will store firearms and ammunition lawfully, and (3) the proposed location of the business is not within 500 feet of a "[r]esidentially zoned district; elementary, middle or high school; pre-school or day care center; other firearms sales business; or liquor stores or establishments in which liquor is served." *Id.* §§ 17.54.130 & 17.54.131.

Under California law, counties may choose to create "board[s] of zoning adjustment" to hear and decide applications for permits and variances in the first instance. The County of Alameda has created two such boards, one for the west portion of the County and one for the east portion. A county's elected board of supervisors retains the ultimate authority to adjudicate zoning applications. *See* Cal. Gov't Code § 65900-65904; Alameda Cty., Cal., Code of Ordinances §§ 17.54.090, 17.54.140, 17.54.670; Alameda Cty., Cal., Admin. Code §§ 2.04.090(Q), 2.40.120.

2. The individual petitioners sought to open a gun store at a property in San Lorenzo, a community located within the unincorporated area of the County approximately five miles south of the City of Oakland. Pet. App. 4a-5a, 8a. Their proposed location was 607 feet from another gun store—one of the ten that already operated in the County, including three in the unincorporated areas. Pet. App. 19a, 146a-147a.

Petitioners applied for a conditional use permit under the zoning ordinance. Pet. App. 8a. A report prepared by the Alameda County Community Development Agency Planning Department recommended denying the permit application. The Planning Department found that the location identified by the individual petitioners did not comply with the ordinance's radius rule because it was less than 500 feet from residential properties in two different directions. Pet. App. 8a-10a.

The West County Board of Zoning Adjustments also recognized that petitioners' proposed site did not comply with the zoning ordinance, but voted to grant

petitioners a variance and issue the permit. Pet. App. 10a. On review, however, the Board of Supervisors reversed the decision to grant a variance and denied the conditional use permit, consistent with the Planning Department's initial recommendation. Pet. App. 10a.[1]

3. The individual petitioners, joined by various advocacy organizations, turned to federal court to claim that the zoning ordinance was unconstitutional on its face and as applied to the denial of their permit application. As relevant here, petitioners asserted that the ordinance violated both their prospective customers' Second Amendment right to purchase firearms and their own purported right to sell guns. Pet. App. 11a-12a, 15a-16a, 23a.[2]

The District Court granted the County's motion to dismiss for failure to state a claim, with leave to

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[1] Under California law, variances are not all-purpose exceptions to zoning rules for good cause. Rather, "[v]ariances from the terms of the zoning ordinances shall be granted *only* when, because of special circumstances applicable to the property" like an irregular lot or steep hillside, "the strict application of the zoning ordinance deprives such property of privileges *enjoyed by other property in the vicinity*." Cal. Gov't Code § 65906 (emphasis added); *see* Alameda Cty., Cal., Code of Ordinances § 17.54.080. The West County Board of Zoning Adjustments therefore erred in granting a variance on the theory that 446 feet was far enough away from residential districts in light of particular physical barriers in the neighborhood; nothing inherent to petitioners' proposed location left it on unequal footing with "other property in the vicinity."

[2] Petitioners also brought challenges under the Due Process and Equal Protection Clauses that were dismissed below. Pet. App. 11a-12a, 71a. They do not press those claims here.

amend. Pet. App. 12a; *see* Pet. App. 133a-148a. It subsequently dismissed petitioners' amended complaint with prejudice, again for failure to state a claim, after petitioners "waived [their] right to amend the complaint" further by expressly declining the opportunity to do so. Pet. App. 12a, 21a n.15; *see* Pet. App. 103a-132a. The District Court observed that "the ordinance is a presumptively lawful regulatory measure under *Heller*," in which this Court deemed "laws imposing conditions and qualifications on the commercial sale of arms" presumptively valid. Pet. App. 103a-104a, 119a-120a (citing *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008)). The court held that the ordinance would "pass any applicable level of scrutiny." Pet. App. 120a.

4. A divided three-judge panel of the Ninth Circuit reversed in relevant part. Pet. App. 65a-100a. The majority held that an ordinance "restricting the commercial sale of firearms" would burden core Second Amendment rights because it necessarily "inhibit[s]" firearms acquisition. Pet. App. 89a. The majority concluded that the ordinance is therefore subject to heightened scrutiny, and remanded for the District Court to take evidence on the need for and effects of the zoning restriction. Pet. App. 89a, 99a-100a.

Dissenting in relevant part, Judge Silverman would have affirmed. Pet. App. 100a-102a. He explained that this case involves nothing more than "a mundane zoning dispute dressed up as a Second Amendment challenge," because "[c]onspicuously missing from this lawsuit is any honest-to-God resident of Alameda County complaining that he or she cannot lawfully buy a gun nearby." Pet. App. 101a.

5. The Court of Appeals granted rehearing en banc and affirmed the dismissal of petitioners' amended complaint. Pet. App. 1a-43a.

First, the court held that petitioners' amended complaint failed to "adequately allege … that Alameda County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular." Pet. App. 16a-17a. The court emphasized that the attachments petitioners had incorporated into their amended complaint revealed that ten gun stores *were* operating in the County at the time, including one about 600 feet from petitioners' proposed location. Pet. App. 17a-18a. Accordingly, the court concluded that "[w]hatever the scope" of a Second Amendment right to acquire firearms, petitioners "failed to state a claim that the ordinance impedes Alameda County residents from acquiring firearms." Pet. App. 15a; *see id.* at 17a-19a.

Second, after a thorough textual, historical, and case-law analysis, the court rejected petitioners' allegation that the ordinance burdened their own purported right to *sell* firearms. Pet. App. 23a-43a. The court recognized that "firearms commerce plays an essential role … in the realization of the individual right to possess firearms." Pet. App. 36a. It explained, however, that there is no "freestanding right, wholly detached from any customer's ability to acquire firearms," of "a proprietor of a commercial establishment to sell firearms." Pet. App. 25a. Because the court found that the complaint did not sufficiently allege that the ordinance infringed any cognizable Second Amendment right, it affirmed the dismissal for failure to state a claim. Pet. App. 43a.

Judge Owens concurred in most of the majority opinion and in the result. He would have held simply that the ordinance is "presumptively lawful" under *Heller*. Pet. App. 43a-44a (quoting *Heller*, 554 U.S. at 626-27 & n.26).

Judge Tallman concurred in part and dissented from the dismissal of petitioners' as-applied challenge. Pet. App. 44a-53a. He agreed that petitioners' facial Second Amendment challenge must fail, because petitioners "did not allege that none of the existing gun stores in the county can comply with the ordinance." Pet. App. 45a. He would have allowed petitioners' as-applied challenge to proceed to discovery. Pet. App. 45a, 51a.

Judge Bea dissented. Pet. App. 53a-64a. He considered the ordinance insufficiently "longstanding" to be "presumptively lawful" under *Heller*. Pet. App. 63a (quoting 554 U.S. at 626-27 & n. 26). And he stated that petitioners had sufficiently alleged that the law burdened prospective customers' ability to "obtain training, repairs, and other gun-related services *at the same location* at which they buy their firearms." Pet. App. 55a.[3] He therefore would have remanded for the District Court to apply intermediate scrutiny. Pet. App. 57a, 61a.

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[3] In rejecting that argument, the Court of Appeals explained that the zoning ordinance regulates only the location of firearms sales, not other ancillary services. Pet. App. 22a-23a. And whether "existing firearm retail establishments in Alameda County do not meet 'customer needs and demands'" for other services is a function of those stores' business decisions, not county law. Pet. App. 22a.

REASONS TO DENY CERTIORARI

Petitioners argue that the Court of Appeals departed from decisions of this Court and other courts of appeals, and from its own precedent, by "apply[ing] rational-basis review" to "laws burdening the Second Amendment." Pet. 18-19. That contention is premised on a misreading of the decision below, which reaffirmed that "rational basis review is not appropriate" in evaluating laws that burden Second Amendment rights. Pet. App. 17a n.10. The Court of Appeals held instead that petitioners had failed to adequately allege that the zoning ordinance "burden[s] the Second Amendment" in the first place, because they did not claim that the zoning ordinance impairs any County resident's ability to acquire firearms. Rather, petitioners' amended complaint showed that ten gun stores already operate in the County, including one 607 feet away from their proposed site. That fact-bound, complaint-specific holding is correct and does not conflict with any decision of this Court or any other court of appeals. Nor has any court of appeals accepted petitioners' alternative theory (Pet. 27-29) that they have a freestanding Second Amendment right to sell guns, at a store of their own, that exists independent of local residents' ability to purchase guns. This Court's review is unwarranted.

1. Petitioners principally contend (Pet. 17-27) that the Court of Appeals broke from other circuits by not applying heightened constitutional scrutiny to their challenge. But every circuit petitioners describe follows essentially the same approach, applying heightened scrutiny *only if* a complaint actually alleges impairment of conduct protected by the Second

Amendment. Here, the Court of Appeals never reached any means-ends analysis because petitioners' amended complaint failed at the outset by not adequately alleging any burden on Second Amendment rights. Petitioners' assertion that "the lower courts are deeply divided" is meritless. Pet. 18.

a. As petitioners acknowledge (Pet. 17), the leading case is the Third Circuit's decision in *United States v. Marzzarella*, which established a "two-pronged approach to Second Amendment challenges." 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011). Courts first ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* If it does not, the "inquiry is complete," and the court never reaches heightened scrutiny. *Id.* But if the law does burden protected conduct, courts will proceed to "evaluate the law under some form of means-end scrutiny" at the second step. *Id.* That scrutiny will either be "intermediate" or "strict," depending on the nature of the restriction, but not "a rational basis test" because "*Heller* rejects that standard for laws burdening Second Amendment rights." *Id.* at 95-96.

The Ninth Circuit adopted the Third Circuit's approach in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014). The court then applied that well-settled test in this case: It undertook the "two-step inquiry" that asks "'whether the challenged law burdens conduct protected by the Second Amendment,' and, if so, … determine[s] the 'appropriate level of scrutiny.'" Pet. App. 24a (quoting *Chovan*, 735 F.3d at 1136). And it reiterated that when a regulation does "burden the

Second Amendment," then "'rational basis review is not appropriate'" at the second step. Pet. App. 17a n.10. But the court never reached the second step here, because the amended complaint did not adequately allege a violation of any Second Amendment right. *See infra* at 12-13.

Almost every circuit applies the same "two-pronged approach" adopted by the Third and Ninth Circuits, likewise finding the inquiry "complete" at step one if the challenged gun law does not burden protected conduct. *Marzzarella*, 614 F.3d at 89; *see Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194-95 (5th Cir. 2012), *cert denied*, 134 S. Ct. 1364 (2014); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 685-86 (6th Cir. 2016) (en banc) (plurality opinion); *id.* at 717 (Moore, J., dissenting); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010), *cert. denied*, 563 U.S. 990 (2011); *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017)[4]; *see also United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1538 (2012) (recognizing that if "laws burden[] the

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[4] Petitioners argue that the Eleventh Circuit's position is "unclear." Pet. 21 n.4. But that court explicitly adopted the same "two-step inquiry" employed by its sister circuits. 869 F.3d at 1285. It held that a "presumptively lawful" "condition[] … on the commercial sale of arms" did not impose any burden on Second Amendment rights at step one of the two-step analysis, just like the Court of Appeals held here. *Id.* at 1286-87.

Second Amendment," then a "rational basis alone would be insufficient to justify" them).

The Second Circuit similarly employs the two-step analysis, and it too resolves cases at step one when a law does not implicate any recognized Second Amendment right. *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 55 (2d Cir. 2018) ("First, we determine whether the challenged legislation impinges upon conduct protected by the Second Amendment.") (internal quotation marks omitted). Petitioners take issue with the particular way the Second Circuit has described its approach at step two—that a law must "substantially" burden Second Amendment rights to trigger heightened scrutiny. Pet. 20-21 (discussing *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013), and *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012)). But the Second Circuit recently applied heightened scrutiny at step two to a regulation that it assumed implicated core Second Amendment rights, even though the law did "*not* impose a substantial burden" on those rights. *New York State Rifle & Pistol Assoc., Inc.*, 883 F.3d at 61-62 (emphasis added). And regardless of how the Second Circuit proceeds at step two, it would likewise stop at step one whenever a complaint fails to state any impairment of a Second Amendment right, as here. *See id*.

In any event, whatever the Second Circuit's current rule is, the Court of Appeals here did not even cite, much less "adopt[]," any decision from that court. *Contra* Pet. 21. On the contrary, the Ninth Circuit has expressly clarified that there is no threshold substantial-burden test for applying heightened scrutiny

where, unlike here, a law *does* implicate a Second Amendment right, and the inquiry thus proceeds to step two. *Jackson v. City & Cty. of San Francisc*o, 746 F.3d 953, 965 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015) (applying intermediate scrutiny to law even though it did "not impose a substantial burden on conduct protected by the Second Amendment"); *see also Nordyke v. King*, 681 F.3d 1041, 1046 (9th Cir. 2012) (en banc) (Ikuta, J., concurring), *cert. denied*, 568 U.S. 1085 (2013) (observing that the en banc court declined to adopt "the substantial burden standard adopted by the original three-judge panel").

In sum, *no* court of appeals would apply heightened scrutiny where a challenge simply fails out of the gate to allege an infringement of any Second Amendment right. Rather, all courts applying heightened scrutiny to Second Amendment claims at step two of this analysis do so only *after* determining (or assuming arguendo) that the law actually burdens Second Amendment rights at step one. *See, e.g.*, *New York State Rifle & Pistol Assoc., Inc.*, 883 F.3d at 61-62; *Mance v. Sessions*, 880 F.3d 183, 188 (5th Cir. 2018) (assuming without deciding that laws prohibiting dealers from selling handguns to residents of other states were not "presumptively lawful regulatory measures" under *Heller* and thus subject to heightened scrutiny, but concluding that they would survive even strict scrutiny); *Silvester v. Harris*, 843 F.3d 816, 826-27, 829 (9th Cir. 2016), *cert. denied sub nom. Silvester v. Becerra*, 138 S. Ct. 945 (2018) (No. 17-342) (assuming without deciding that 10-day waiting period for lawful gun purchases was not presumptively lawful, and holding that it would survive intermediate scrutiny even as applied to those who already

owned firearms and cleared a background check in less than 10 days); *Jackson*, 746 F.3d at 963, 968 (applying heightened scrutiny to two San Francisco ordinances only after determining, at step one, that each indeed "regulates conduct within the scope of the Second Amendment").

b. The Court of Appeals here applied that prevailing two-step approach. It held—at step one—that petitioners failed to adequately allege an impairment of a Second Amendment right. And, as petitioners acknowledge, where a court determines at the "first" step that a regulation does not "implicate[] Second Amendment rights," then "the challenge fails." Pet. 17.

The court began by recognizing that the Second Amendment protects the right to purchase guns, because the "core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." Pet. App. 15a (quoting *Ezell*, 651 F.3d at 704). The court held, however, that the amended complaint simply "failed to state a claim that the ordinance impedes Alameda County residents from acquiring firearms." Pet. App. 15a. The court observed that the complaint showed just the opposite because it demonstrated that guns are readily available in the County. Pet. App. 17a-18a. Thus, the court concluded that "[w]hatever the standard governing the Second Amendment protection accorded the acquisition of firearms"—whether intermediate or strict scrutiny—petitioners had failed at the threshold to allege that the zoning ordinance impaired that right. Pet. App. 17a-19a & 17a n.10.

The court then turned from petitioners' "derivative" claim "on behalf of [their] potential customers," Pet. App. 16a, to their claim on behalf of themselves as gun sellers. That claim also failed to allege a Second Amendment violation. The court explained that "the Second Amendment does not confer a freestanding right, wholly detached from any customer's ability to acquire firearms, upon a proprietor of a commercial establishment to sell firearms." Pet. App. 25a.

Because neither of petitioners' theories adequately alleged any infringement upon protected Second Amendment conduct, petitioners' challenge failed at the first step of the analysis, and the court had no need to reach heightened Second Amendment scrutiny at step two. Pet. App. 21a-23a, 42a-43a. Faced with no plausible allegation that an ordinance impaired anyone's Second Amendment right, every other court of appeals would similarly end the inquiry there.

c. Notwithstanding that the Court of Appeals expressly endorsed and followed the *Marzzarella* two-step approach here, petitioners argue (Pet. 21) that the court implicitly "overruled circuit precedent" following that case. That contention is without merit.

Petitioners' argument stems from a misunderstanding of the court's statement that the amended complaint "fails to state a plausible claim … that the ordinance *meaningfully inhibits* residents from acquiring firearms." Pet. App. 21a (emphasis added). Petitioners read this to mean that the court held that prospective customers' Second Amendment rights *were* burdened, which should have gotten petitioners'

claim past step one to some form of heightened scrutiny at step two of the analysis. Pet. 21. They then assert that because the court found the burden not "meaningful," it applied only rational-basis review at step two. *Id.*

But that is not what the court held. Indeed, it recognized that "rational basis review is *not* appropriate" at step two. Pet. App. 17a n.10 (emphasis added). The court's holding here instead rested on the amended complaint's failure to allege *any* burden on Second Amendment rights in the first place, because there is no Second Amendment right to "have a gun store in a particular location." Pet. 17a, 19a-20a. Where guns are broadly available for purchase in the jurisdiction, including at another store 607 feet away, petitioners had no "plausible claim" that the zoning ordinance impaired anyone who wanted a gun from buying one—that is, petitioners had not plausibly alleged that the ordinance "actually or really" impaired any customer's Second Amendment right to purchase firearms *at all*. Pet. App. 20a n.14. The court thus never reached step two. And certainly the court never suggested it was overruling circuit precedent applying the standard two-step approach.

In so ruling, the court expressly disavowed the understanding of the word "meaningfully" that petitioners now attribute to it. *Id*. And its conclusion is consistent with the decisions of other courts of appeals that petitioners cite (Pet. 19-20). *See Heller II*, 670 F.3d at 1254-55, 1261 (regulation "does not impinge upon the right protected by the Second Amendment" when it imposes only "*de minimis*" requirements, or does not "*meaningfully* affect the

right to keep and bear arms") (emphasis added); *Marzzarella*, 614 F.3d at 94-95 (restriction does not "regulate[] protected conduct" in the first place, and thus does not trigger heightened scrutiny when any "burden on [plaintiff's] ability to defend himself is … *de minimis*").

Petitioners also insist (Pet. 22) that this case conflicts with *Ezell II*, in which the Seventh Circuit rejected Chicago's proposal that "only laws that substantially or 'unduly' burden Second Amendment rights should get any form of heightened judicial scrutiny." *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) ("*Ezell II*"). But that argument fails for the same reason: The Court of Appeals here held that the County's zoning ordinance did not burden Second Amendment rights *at all*. Pet. App. 17a-18a, 20a n.14, 42a-43a. And, as noted above (at 10-11), the Ninth Circuit *agrees* with the Seventh Circuit (and petitioners) that there is no substantial-burden test before courts will engage in heightened scrutiny where, unlike here, they reach step two. *See Ezell II*, 846 F.3d at 893 (citing *Jackson*, 746 F.3d at 961). The decision below also easily distinguished *Ezell II* on its facts, because while Chicago's zoning ordinance regulating the location of shooting ranges resulted in *no* publicly available ranges in the city, petitioners' amended complaint demonstrated that firearms stores operate extensively throughout the County. Pet. App. 18a-19a.

2. Precisely because petitioners failed to allege any impairment of a cognizable Second Amendment right at *step one* of the two-step analysis, this case

presents no opportunity to resolve the question petitioners present regarding what standard of scrutiny applies at *step two* to gun regulations in general, and to regulations on the commercial sale of firearms in particular. Whether a "presumption of constitutionality" can ever "shield laws squarely implicating Second Amendment rights," for example, is a question that arises only if the law "squarely implicate[s] Second Amendment rights" in the first place. Pet. 3. But here, the court determined that the County's zoning ordinance does *not* implicate Second Amendment rights because petitioners failed to allege that it impedes anyone's ability to purchase guns. Nor does the zoning ordinance have anything to say at all about where ancillary firearms services and classes may be offered. *See supra* at 6 n.3. This case is therefore an exceedingly poor vehicle to address the question petitioners present (Pet. i, 24-30) regarding the proper level of scrutiny at step two.

3. Petitioners also argue (Pet. 24-30) that the Court of Appeals erred in its assessment of the allegations in the amended complaint. But the court correctly determined that the factual allegations in petitioners' amended complaint did not adequately state a Second Amendment claim. Pet. App. 17a. That factbound holding does not merit this Court's review in any event.

a. First, the Court of Appeals properly recognized that the Second Amendment protects individuals' ability to acquire the very arms that they have the right to keep and bear for self-defense. Pet. App. 15a. But it had no cause to "define the precise scope" of

that right, nor to decide whether burdens on acquiring guns would be subject to intermediate or strict scrutiny, because the amended complaint here failed to plausibly allege "that the ordinance impedes" firearms acquisition. Pet. App. 15a. The court's ruling stands for no broader principle.

While petitioners asserted that it would be "virtually impossible to open" a *new* gun store in the County's unincorporated areas, Pet. App. 11a, their amended complaint demonstrated that several gun stores already operate in the County, including in unincorporated areas, and including one a block away from where they sought to open their store. C.A. E.R. 47, 121, 133. The Court of Appeals observed that the "closest [petitioners] come[] to stating a claim that [their] potential customers' Second Amendment rights have been, or will be, infringed," is the allegation in the amended complaint that the ordinance restricts "convenient access to a neighborhood gun store," forcing consumers to "travel to other, more remote locations." Pet. App. 19a. The court held that that allegation was inadequate and implausible because, under the facts supplied by the complaint, the more "remote" gun store is only about 600 feet from the proposed site, and there are "nine other gun stores in the County as a whole, including … three other gun stores in the unincorporated parts of the County." Pet. App. 18a-19a. Petitioners never explained how such a minute increase in distance could burden County residents' Second Amendment right to acquire firearms: They failed to "make any allegations about how far [their] potential customers currently travel to purchase firearms, or how much the proposed store would shorten travel distances, if at all, or for whom." Pet.

App. 21a. And while they describe the Planning Department and Board of Zoning Adjustments as citing a "public need" for the store, Pet. App. 8a, 10a, all that those entities found was that "[t]he necessary number of firearms sales establishments to serve the public need is left up to the market." C.A. E.R. 65, 179.

In short, petitioners never alleged that the absence of an eleventh gun store in the County, or a fourth in its unincorporated pockets, limited anyone's ability to buy a gun. And, if petitioners had additional facts to make out a plausible claim, it was incumbent on them to at least plead them. Instead, petitioners expressly "decline[d]" the opportunity to amend their complaint a second time to add allegations of any impairment. Pet. App. 21a n.15, 112a n.2, 132a.

Petitioners argue in passing (Pet. 24) that the Court of Appeals inappropriately considered the availability of guns in nearby jurisdictions in evaluating whether the law inhibited consumers' access to guns in the unincorporated areas of the County. But the court made a finding specific to those unincorporated areas: "Teixeira did not adequately allege in his complaint that Alameda County residents cannot purchase firearms within the County as a whole, *or within the unincorporated areas of the County in particular*." Pet. App. 16a (emphasis added). While the court noted that the proper scope of analysis "may not be limited to a particular jurisdiction," Pet. App. 17a n.9, the case presented no opportunity to resolve the question.

b. Second, the Court of Appeals properly rejected petitioners' assertion of a right to sell guns that is personal to them, independent of their prospective customers' right to purchase guns.

Petitioners assert that the Court of Appeals held broadly that there is "no right to sell guns," Pet. 27, but that is again incorrect. The court recognized that "firearms commerce plays an essential role today in the realization of the individual right to possess firearms recognized in *Heller*." Pet. App. 36a. Indeed, it is a "necessary prerequisite to keeping and possessing arms for self-defense." Pet. App. 25a. But the court clarified that the "Second Amendment does not confer a *freestanding* right, wholly detached from any customer's ability to acquire firearms, upon a proprietor of a commercial establishment to sell arms." *Id.* (emphasis added).

As the court explained, the text of the Second Amendment "confers a right on the 'people' who would keep and use arms, not those desiring to sell them." Pet. App. 27a. So long as the people are able to purchase firearms, a particular proprietor has no special right to open a store of its own, let alone in the location of its choosing. Gun dealers are thus unlike booksellers, whose distribution of "written materials is … *itself* expressive activity" that is protected by the First Amendment. Pet. App. 39a; *id.* at 39a-41a. "[G]un sellers are instead in an analogous position to medical providers in the Fourteenth Amendment context," who could not, for example, "assert an independent right to provide [abortion] service[s] for pay" at a clinic of their own in the absence of any "burden

on a woman's right to obtain an abortion." Pet. App. 41a-42a.

The Ninth Circuit's detailed historical analysis confirmed this view. The "British embargo and the colonists' reaction to it suggest … 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." Pet. App. 34a. But that does not mean 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." Pet. App. 34a.

The court's holding also followed from *Heller*'s admonition that "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful." 554 U.S. at 626-27 & n.26; *see McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (same); Pet. App. 25a-26a. A plaintiff can rebut this presumption by demonstrating that a law regulating commercial gun sales actually impedes individuals from keeping or bearing arms. *See Binderup v. Att'y Gen.*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc) (plurality opinion) ("the burden [is] on the challenger to rebut the presumptive lawfulness" of a measure fitting within *Heller*'s enumerated categories), *cert. denied*, 137 S. Ct. 2323 (2017); *id*. at 366 (Hardiman, J., concurring) (same); *Heller II*, 670 F.3d at 1253 (a "plaintiff may rebut th[e] presumption [of lawfulness] by showing the regulation does have more than a de minimis effect upon his right"). But petitioners alleged nothing to rebut the presumption here.

Consistent with this holding, no court of appeals has found a freestanding right to sell firearms, unconnected to the right of a citizen to acquire the arms that the Second Amendment entitles him to keep and bear. The Fourth Circuit, for example, in affirming a conviction for the sale of guns to an unlawful drug user, emphasized that the Second Amendment protects the individual's right to bear arms, not a wholly separate right to sell them. *United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011). Further, as in the decision below, courts evaluating Second Amendment challenges by (and on behalf of) proprietors typically focus on the burden on customers, rather than on the proprietors themselves. *See Ezell II*, 846 F.3d at 890 (focusing on burden of restrictions on shooting range locations on consumers, not range operators); *Nat'l Rifle Ass'n*, 700 F.3d at 199-204 (examining effect of ban on arms sales to minors on those consumers, not sellers).

Of course, as the Court of Appeals explained, "in many circumstances, there will be no need to disentangle an asserted right of retailers to sell firearms from the rights of potential firearm buyers and owners to acquire them, as the Second Amendment rights of potential customers and the interests of retailers seeking to sell them will be aligned." Pet. App. 35a-36a. But, based on the allegations in the amended complaint, this is the unusual case in which "restrictions on a commercial actor's ability to enter the firearms market … have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms" in light of the robust existing market in the County. Pet. App. 36a.

That case-specific holding was correct and does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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