No. 17-982

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

REPLY BRIEF FOR THE PETITIONERS

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SUMMARY OF ARGUMENT

Respondents employ three semantic sleights-of-hand to dismiss the plain circuit split presented here, and the lower court's latest acts of direct resistance to the Second Amendment as authoritatively interpreted in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

First, respondents gloss over the qualifying language that the Ninth Circuit below, and the Second Circuit, have inserted to alter the two-step Second

Amendment analysis employed by eight other circuits. There is a world of difference between applying heightened scrutiny to test a "burden," and applying heightened scrutiny to test *only* a "meaningful burden" or "substantial burden."

Second, respondents suggest no fewer than five times within sixteen pages—once every 3.2 pages in that span—that petitioners lack a "freestanding" right to operate a gun store. BIO 5, 7, 13, 19, 21. Repetition does not alter the fact that petitioners do not seek a "freestanding" right, in the sense of a right free of regulation. Petitioners do, however, believe that they enjoy a "fundamental" right, see *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), meaning, the prohibition of their right does not stand free of judicial review.

Third, respondents deny that the lower court rejected the existence of a right to sell guns. But on the very same page, they quote the opinion below holding precisely that. And they omit mention that *Heller*'s test for presumptive validity requires that such laws be "longstanding." *Heller*, 554 U.S. at 626.

There is no great mystery as to whether the Ninth Circuit recognizes a Second Amendment right to sell guns. The en banc majority plainly rejected that right, drawing a concurrence and two dissents addressing that point. Two significant amicus briefs urge the Court to overturn this holding. Given respondents' failure to properly acknowledge the holding below with respect to the right to sell firearms, it is unsurprising

that respondents also fail to refute that this is "an important question of federal law that has not been, but should be, settled by this Court," and that this "important federal question [was decided] in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

ARGUMENT

1. Respondents incorrectly claim that "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." BIO 7-8. Plainly that is not the case. As petitioners demonstrated, eight circuits mandate the application of heightened scrutiny wherever Second Amendment rights are burdened. Period, full stop. Two circuits, including the Ninth Circuit, impose a threshold test of substantiality, under which some burdens avoid heightened scrutiny. Pet. 19-24. That threshold test made the difference here.

Respondents correctly note, as did Judge Bea in dissent, that the Ninth Circuit previously employed the familiar two-step inquiry in *United States* v. *Chovan*, 735 F.3d 1127 (9th Cir. 2013), requiring that *any* burden on Second Amendment rights face heightened scrutiny. BIO 8; Pet. App. 57a. But respondents misstate the facts and the law in offering that "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." BIO 10-11 (citing *Jackson* v. *City & Cty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014)) (other citation omitted).

Banning a gun store—especially the only full-service gun store in a populated jurisdiction such as Alameda County—*obviously* implicates Second Amendment rights. Respondents may wish to dispute whether that impact is material, and they might even argue in the face of the Zoning Board's considered judgment that the store should be banned. Respondents may further argue that the store could be banned without violating the Second Amendment. But it is no use pretending that banning a full-service gun store is completely disconnected from the people's ability to access their Second Amendment rights, such that the Second Amendment is not even implicated here.

Even the majority below did not go that far. Instead, it discarded the circuit's earlier promises, in *Chovan*, *Jackson*, and elsewhere, to follow the prevailing two-step rule, and adopted a threshold test. Where eight other circuits still apply heightened scrutiny if Second Amendment rights are burdened, the Ninth Circuit now requires that people be "meaningfully" burdened in their exercise of Second Amendment rights. Pet. App. 21a.

These are not remotely the same thing.

The majority approach requires the government to justify restrictions on constitutional rights. The

minority approach, followed below, absolves the government of any burden when judges disfavor a right, or do not take its infringement seriously. This case starkly reveals the significance of the lower court's departure from the majority rule. The case is "factbound," BIO 7, 16, only in the sense that respondents were bound to lose on the facts—the Zoning Board's considered judgment that nothing justifies banning petitioners' store, ER179-80—under what remains the approach in eight other circuits. It would be difficult to imagine a better vehicle for demonstrating the practical difference between the majority and minority rules.

Any circuit split can be made to disappear by simply ignoring a dispositive word or two that a minority of courts add to an otherwise uniform test. Respondents do a fair job in recounting the prevailing approach to the Second Amendment. But they skip the inconvenient language added by the Ninth (and Second) Circuits to trigger rational basis review of Second Amendment claims. Respondents thus force themselves to claim, against all reason, that banning gun stores does not implicate Second Amendment rights.

In the First, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits, the prohibition of a gun store would trigger heightened scrutiny. Not all of these circuits are enthusiastic enforcers of the Second Amendment, but for the time being their precedent does not permit the dubious procedure employed below. This conflict should be resolved before the situation declines further.

2. Would any court reject a "theory" that people "have a freestanding [First] Amendment right to sell [books], at a store of their own, that exists independent of local residents' ability to purchase [books]?" BIO 7. How about a right to operate abortion clinics, notwithstanding the presence of other allegedly-adequate facilities? One would imagine that such claims would not be casually dismissed at the pleading stage, but rather tested through discovery, summary judgment, and perhaps trial.

Indeed, the outcome of such cases in the Ninth Circuit would be as predictable as that of any Second Amendment case, albeit in a different way. Four times, Ninth Circuit panels have opened the door to Second Amendment challenges. Four times, that court convened an en banc panel and slammed the door shut. Pet. 32-33. The Ninth Circuit has never seen—and unless corrected by this Court, probably never will see—a Second Amendment violation. Lower courts can continue singing paeans to the allegedly-fundamental right to keep and bear arms, and disclaim the use of rational basis review, but the performance is unconvincing. The regulation is relentless, and very little of it is seriously tested by the courts. Pet. 31.

Of course petitioners never claimed a "freestanding" Second Amendment right. They would settle for an ordinary fundamental right valid in their local federal courts.

Nor is it true that "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." BIO 18. Judges Tallman and Bea understood full-well that petitioners' full-service gun store differed markedly from existing stores. See Pet. App. 48a, 56a-57a. It is not a fair reading of the complaint, in the light most favorable to petitioners, to assume that their store is fungible and offers no value beyond that which already exists in the market. Indeed, the Zoning Board found that "[t]he necessary number of firearms sales establishments to serve the public need is left up to the market." ER179. That finding was attached as an exhibit to the complaint.

If respondents wished to dispute the impact that petitioners' store would have on firearms access, they should have welcomed discovery and trial. This is precisely the sort of question that eleven appellate judges, some of whom may have little or no knowledge of firearms or the firearms market, cannot presume to answer on the pleadings.

3. The following language appears on page 19 of respondents' Brief in Opposition:

> Petitioners assert that the Court of Appeals held broadly that there is "no right to sell guns," Pet. 27, but that is again incorrect.

Also on the same page:

> 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.

Respondents add that "a particular proprietor has no special right to open a store of its own, let alone in the location of its choosing." BIO 19. Query: do attorneys have a "freestanding" right to open a law firm of their own if their county deems the industry saturated, let alone to open an office in a location of their choosing? Lawyers and land uses are regulated, but it would be odd to claim that lawyers have "no special right" to open an office. Again, substituting almost any concept for "guns" exposes the unusually constrained way in which respondents envision this extremely-disfavored subject, notwithstanding the fact that it is imbued with constitutional protection.

The remainder of the Brief in Opposition defends the concept that there does not exist a right to sell firearms, largely by claiming that the County's zoning law is "presumptively lawful." BIO 20 (quoting *Heller*, 554 U.S. at 626-27 & n. 26). They forget to quote the other word that explains which laws may be "presumptively lawful": "longstanding." *Heller*, 554 U.S. at 626. The Framers knew nothing of zoning laws. Pet. App. 63a-64a.

More to the point, the Ninth Circuit rejected the existence of a right to sell arms merely because that right has historically been regulated, and because it has not been explicitly spelled out in constitutional text. Pet. 27-28. Were these the standards for securing constitutional rights, we would have almost no rights at all. Especially considering the weight of the evidence for the right to sell arms discussed by the panel

opinion, the dissents, the petition, and the two amicus briefs, this approach warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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