APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN TEIXEIRA; STEVE NOBRIGA; GARY GAMAZA; CALGUNS FOUNDATION, INC., (CGF); SECOND AMENDMENT FOUNDATION, INC., (SAF); CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, (CAL-FFL), *Plaintiffs-Appellants,* v. COUNTY OF ALAMEDA; ALAMEDA COUNTY BOARD OF SUPERVISORS, as a policy making body; WILMA CHAN, in her Official Capacity; NATE MILEY, in his official capacity; KEITH CARSON, in his official capacity, *Defendants-Appellees.*	No. 13-17132 D.C. No. 3:12-cv-03288-WHO OPINION

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted En Banc March 22, 2017
San Francisco, California

Filed October 10, 2017

Before: Sidney R. Thomas, Chief Judge, and
Stephen Reinhardt, M. Margaret McKeown,
Ronald M. Gould, Richard A. Paez,
Marsha S. Berzon, Richard C. Tallman,
Jay S. Bybee, Carlos T. Bea, Paul J. Watford
and John B. Owens, Circuit Judges.

Opinion by Judge Berzon:
Concurrence by Judge Owens;
Partial Concurrence and
Partial Dissent by Judge Tallman;
Dissent by Judge Bea

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OPINION

BERZON, Circuit Judge:

The County of Alameda seeks to preserve the health and safety of its residents by (1) requiring firearm retailers to obtain a conditional use permit before selling firearms in the County and (2) prohibiting firearm sales near residentially zoned districts, schools and day-care centers, other firearm retailers, and liquor stores. The individual plaintiffs in this case, John Teixeira, Steve Nobriga, and Gary Gamaza

(collectively, "Teixeira"), wished to open a gun shop but were denied a conditional use permit because the proposed location of their gun shop fell within a prohibited zone. Teixeira challenges the County's zoning ordinance, alleging that by restricting his ability to open a new, full-service gun store, the ordinance infringes on his Second Amendment rights, as well as those of his potential customers.

Teixeira has not, however, plausibly alleged that the County's ordinance impedes any resident of Alameda County who wishes to purchase a firearm from doing so. Accordingly, he has failed to state a claim for relief based on infringement of the Second Amendment rights of his potential customers. And, we are convinced, Teixeira cannot state a Second Amendment claim based solely on the ordinance's restriction on his ability to *sell* firearms. A textual and historical analysis of the Second Amendment demonstrates that the Constitution does not confer a freestanding right on commercial proprietors to sell firearms. Alameda County's zoning ordinance thus survives constitutional scrutiny.

I. Background

A.

In the fall of 2010, Teixeira, Nobriga, and Gamaza formed a partnership, Valley Guns and Ammo, with the intention of opening a gun store in Alameda County, California. After conducting local market research among gun enthusiasts, Teixeira concluded that there

was a demand for a full service gun store in an unincorporated area of Alameda County called San Lorenzo, near the incorporated city of San Leandro. In response to this demand, Teixeira intended to open a specialty shop that would sell new and used firearms and ammunition and would also provide gun repairs, gun smithing, appraisals, and training and certification in firearm safety.

Teixeira contacted the Alameda County Planning Department for information as to any land use or other permits necessary to open a gun store in unincorporated areas of the County.[1] The Planning Department informed Teixeira that because he intended to sell firearms, he would need to obtain a Conditional Use Permit pursuant to Alameda County Ordinance Sections 17.54.130 *et seq.* Conditional Use Permits are required for certain land uses and are granted after a special review in which the County determines whether or not the proposed business (1) is required by public need; (2) is properly related to other land uses and transportation and service facilities in the area; (3) if permitted, will materially and adversely affect the health or

[1] Regulations enacted by California counties are effective only in unincorporated areas, as city governments exercise regulatory authority within city boundaries. *See* Cal. Const. art. XI, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."); *City of S. San Francisco v. Berry*, 120 Cal. App. 2d 252, 253, 260 P.2d 1045 (Cal. Dist. Ct. App. 1953) (explaining that when unincorporated land is annexed by a city it leaves "the territorial jurisdiction of the county" and thus "cease[s] to be within [the county's] limits") (internal quotation marks omitted).

safety of persons residing or working in the vicinity; and (4) will be contrary to the specific performance standards established for the area. Alameda Cty., Cal., Code § 17.54.130.

The County informed Teixeira that to receive a Conditional Use Permit for his proposed gun store, he also had to comply with Alameda County Ordinance Section 17.54.131 (the "Zoning Ordinance"). That ordinance requires, among other things, that businesses selling firearms in unincorporated areas of the County be located at least five hundred feet away from any of the following: schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially zoned districts.[2]

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[2] The ordinance provides in relevant part that "no conditional use permit for firearms sales shall issue unless the following additional findings are made by the board of zoning adjustments based on sufficient evidence . . . (B) That the subject premises is not within five hundred (500) feet of any of the following: Residentially 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. . . ." Alameda Cty., Cal., Code § 17.54.131.

The ordinance additionally requires that: (1) the proposed district is appropriate for firearm sales activity, (2) the applicant possess all firearms dealer licenses required by federal and state law, (3) the applicant obtain a firearms dealer license from Alameda County before commencing sales, (4) the premises fully comply with applicable building, fire, and other technical codes, and (5) the applicant has provided sufficient detail regarding intended compliance with California penal code requirements for safe storage of firearms and ammunition at the premises. *Id.*

Based on this guidance, Teixeira identified a suitable rental property at 488 Lewelling Boulevard in unincorporated Alameda County.[3] Teixeira obtained a survey that showed, based on door-to-door measurements,[4] that the property was more than 500 feet from any disqualifying property under the Zoning Ordinance. Teixeira began arranging with the landlord to lease the Lewelling Boulevard property and to make the modifications necessary to transform the space into a gun store compliant with all state and federal regulations.

Teixeira then applied to the Alameda County Community Development Agency for a Conditional Use Permit for his planned store. Staff of the Alameda County Community Development Agency Planning Department ("Planning Department") prepared a report for the West County Board of Zoning Adjustments ("Zoning Board") on Teixeira's application. The staff report made the following findings: there was a public need for a licensed firearms dealer; the proposed use was compatible with other land uses and transportation in the area; and a gun shop at the proposed site

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[3] The parties and record variously locate 488 Lewelling Boulevard in San Lorenzo (an unincorporated area of the County), Ashland (another unincorporated area of the County), and San Leandro (an incorporated city in the County). The parties are agreed, however, that the property is located somewhere in unincorporated Alameda County.

[4] Teixeira maintains that the County informed him that, for purposes of compliance with the 500-foot rule, measurements should be taken from the closest door of the intended store to the front door of any disqualifying property.

would not adversely affect the health or safety of persons living and working in the vicinity. The staff report also found, however, that the site of the proposed gun shop did not satisfy the Zoning Ordinance's distance requirements, because it was approximately 446 feet from two residential properties in different directions. The staff report's distance calculation was based on measurement from the closest exterior wall of the proposed gun shop to the property lines of the disqualifying properties. The staff report thus recommended denying Teixeira's permit application.

The Zoning Board held a public hearing on Teixeira's Conditional Use Permit application. Teixeira appeared at the hearing and offered testimony in support of his application; neighborhood residents also appeared, some testifying in support of the application and others in opposition.

After the hearing, the Planning Department issued a revised staff report. That report acknowledged the ambiguity in the Zoning Ordinance regarding how the 500 feet should be measured for the purpose of determining compliance. The report nevertheless concluded that the proposed gun store location was less than 500 feet from the property line of the closest residentially zoned district, whether measured from the exterior wall, front door, or property line of the proposed gun shop.[5] The Planning Department staff

[5] The County rejected Teixeira's suggestion that the distance should be measured from the proposed site to the closest door of a dwelling in the residentially zoned district, rather than to the closest property line of a residential district. The ordinance states

therefore again recommended denying Teixeira a Conditional Use Permit and variance.

Notwithstanding this recommendation, the Zoning Board passed a resolution granting Teixeira a variance from the Zoning Ordinance and approving his application for a Conditional Use Permit. The Zoning Board concluded that a gun shop at the proposed location would not be detrimental to the public welfare and warranted a variance in light of the physical buffer created by a major highway between the proposed site and the nearest residential district. The Zoning Board also determined that there was a public need for a licensed firearms retailer in the neighborhood.

Shortly after the County granted Teixeira's permit application, the San Lorenzo Village Homes Association filed an appeal challenging the Zoning Board's resolution. Acting through three of its members, the Board of Supervisors voted to sustain the appeal, overturning the Zoning Board's decision and revoking the Conditional Use Permit.

After the permit was revoked, Teixeira alleges, he was unable to identify any property in unincorporated Alameda County that satisfied the ordinance's 500-foot rule and was otherwise suitable—in terms of location, accessibility, building security, and parking—for a

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that the property proposed for firearm sales shall not be within five hundred feet of a "[r]esidentially zoned district," foreclosing Teixeira's proposal that the measurement should be taken from the door of an actual dwelling. *See* Alameda Cty., Cal., Code § 17.54.131.

gun shop. Teixeira later commissioned a study to analyze the practical implications of the Zoning Ordinance for opening a gun store in unincorporated areas of the County. The study found it "virtually impossible to open a gun store in unincorporated Alameda County" that would comply with the 500-foot rule "due to the density of disqualifying properties."[6]

B.

Joined by institutional plaintiffs The Calguns Foundation, Inc., Second Amendment Foundation, and California Association of Federal Firearms Licensees, Inc., Teixeira filed a complaint in federal district court challenging the Board of Supervisors' decision to deny him a variance and Conditional Use Permit. The challenge was premised on due process, equal protection, and Second Amendment grounds, and alleged violations of Teixeira's own rights as well as those of his

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[6] As of 2009, the total population of unincorporated areas of Alameda County was 142,166, approximately 9% of the total County population of 1,556,657. *See* Alameda County Community Development Agency, *2009 Population and Housing Estimates for Alameda County and its Cities*, Pub. No. 09-10 (May 2009), http://www.co.alameda.ca.us/about/documents/AlaCtyPopHsng2009.pdf. We take judicial notice of these undisputed facts regarding the County's population. *See* Fed. R. Evid. 201(b); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (holding that a court may take judicial notice of "matters of public record" that are not subject to reasonable dispute) (internal quotation marks omitted). The unincorporated areas of Alameda County are non-contiguous. Teixeira's proposed gun store—at 488 Lewelling Boulevard—would lie in an unincorporated sliver of land between the incorporated cities of Hayward and San Leandro.

prospective customers. Alameda County filed a motion to dismiss the complaint for failure to state a claim, which the district court granted, with leave to amend; Teixeira also filed a motion for a preliminary injunction, which the district court denied. The plaintiffs thereupon filed an amended complaint, which the district court likewise dismissed for failure to state a claim, this time without leave to amend.

A three-judge panel of this court affirmed the district court's dismissal of Teixeira's Equal Protection Clause claims but reversed the district court's dismissal of Teixeira's Second Amendment Claims, remanding for further proceedings.[7] *See Teixeira v. County of Alameda*, 822 F.3d 1047 (9th Cir. 2016). Judge Silverman dissented from the Second Amendment holding. *See id.* at 1064 (Silverman, J., dissenting).

II.

A.

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 interpreted in recent years by the Supreme Court, the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570,

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[7] Teixeira did not seek rehearing of the panel's rejection of his Equal Protection claims. We affirm the district court on that claim for the reasons given in the panel opinion.

635 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) ("[O]ur central holding in *Heller* [was] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

After *Heller*, this court and other federal courts of appeals have held that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense. For example, we held in *Jackson v. City and County of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015), that a prohibition on the sale of certain types of ammunition burdened the core Second Amendment right and so was subject to heightened scrutiny. *Jackson* involved a challenge by handgun owners to a San Francisco ordinance that prohibited the sale of particularly lethal ammunition, including hollow-point ammunition, within the City and County of San Francisco. *Id.* at 958. We recognized in *Jackson* that, although the Second Amendment "does not explicitly protect ammunition . . . , without bullets, the right to bear arms would be meaningless." *Id.* at 967. *Jackson* thus held that " 'the right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them." *Id.* (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)).[8]

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[8] *Jackson* went on to hold that the prohibition on the sale of hollow-point ammunition "burden[ed] the core right of keeping firearms for self-defense only indirectly" and insubstantially, because San Francisco citizens were not precluded from using

Similarly, in *Ezell v. City of Chicago* ("*Ezell I*"), the Seventh Circuit held that an ordinance banning firearm ranges within the city of Chicago was not categorically unprotected by the Second Amendment and so demanded constitutional scrutiny. 651 F.3d at 704-06. *Ezell I* held that the Chicago ordinance, coupled with a law requiring range training as a prerequisite to obtaining a firearm permit, encroached on "the right to maintain proficiency in firearms use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at 708. This core right to possess firearms, *Ezell I* explained, "wouldn't mean much without the training and practice that make it effective." *Id.* at 704. *Ezell I* relied on *Heller*, which quoted an 1868 treatise on constitutional law observing that "to bear arms implies something more than the mere keeping; it implies the learning to

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hollow-point ammunition in San Francisco if obtained elsewhere, and because the ordinance applied only to certain types of ammunition. 746 F.3d at 968. Applying intermediate scrutiny, *Jackson* then held the ordinance did not violate the Second Amendment, as the regulation of lethal ammunition was justified by the legitimate and compelling government interest in reducing the fatality of shootings. *Id.* at 970.

Jackson also involved a challenge to a San Francisco ordinance that required that handguns be stored in locked containers or disabled with trigger locks when not carried on the person. *Jackson*, 746 F.3d at 958. *Jackson* upheld that ordinance, holding (1) that the ordinance regulated conduct falling within the scope of the Second Amendment, (2) but did not place a substantial burden on core Second Amendment conduct and therefore triggered only intermediate scrutiny, and (3) applying intermediate scrutiny, the ordinance passed constitutional muster. *Id.* at 963-66.

handle and use them." *Id.* (quoting *Heller*, 554 U.S. at 617-18).

As with purchasing ammunition and maintaining proficiency in firearms use, the core Second Amendment right to keep and bear arms for self-defense "wouldn't mean much" without the ability to acquire arms. *Id.*; *see Jackson*, 746 F.3d at 967. The Tennessee Supreme Court cogently observed in 1871, interpreting that state's constitution, that "[t]he right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." *Andrews v. State*, 50 Tenn. 165, 178 (1871); *see also Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014) (emphasis in original) ("[T]he right to keep and bear arms for self-defense under the Second Amendment . . . must also include the right to *acquire* a firearm, although that acquisition right is far from absolute. . . .").

We need not define the precise scope of any such acquisition right under the Second Amendment to resolve this case. Whatever the scope of that right, Teixeira has failed to state a claim that the ordinance impedes Alameda County residents from acquiring firearms.

B.

"[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting

their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195 (1976). Teixeira, as the would-be operator of a gun store, thus has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers. *See also Carey v. Population Servs., Int'l*, 431 U.S. 678, 683 (1977); *Ezell I*, 651 F.3d at 693, 696 (supplier of firing-range facilities had standing to challenge Chicago ordinance banning firing ranges on behalf of potential customers).

But 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. To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege in the complaint "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). We assume the factual allegations in Teixeira's complaint to be true. *See id*. But "[c]onclusory allegations and unreasonable inferences . . . are insufficient to defeat a motion to dismiss." *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).

The operative complaint does not meet this standard with regard to whether residents can purchase guns in the County—or in unincorporated areas of the

County—if they choose to do so.[9] Teixeira alleges in general terms that the gun store he plans to open is necessary to enable his potential customers to exercise their Second Amendment rights. The complaint also states that the zoning ordinance amounts to a complete ban on new gun stores in unincorporated Alameda County because, according to a study commissioned by Teixeira, "there are no parcels in the unincorporated areas of Alameda County which would be available for firearm retail sales."

Whatever the standard governing the Second Amendment protection accorded the acquisition of firearms,[10] these vague allegations cannot possibly state a claim for relief under the Second Amendment. The

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[9] We note that *Jackson* suggests that the proper inquiry regarding accessibility may not be limited to a particular jurisdiction. *Jackson* held that although San Francisco's prohibition on the sale of hollow-point ammunition burdens core Second Amendment rights, it does so only indirectly, because a local resident "is not precluded from using the hollow-point bullets in her home if she purchases such ammunition outside of San Francisco's jurisdiction." 746 F.3d at 968.

[10] "In *Heller*, the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment," although the Court did "indicate that rational basis review is not appropriate." *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014) (citing *Heller*, 554 U.S. at 628 n.27). In this Circuit, we have likewise not identified a uniform standard of scrutiny that applies to regulations that burden the Second Amendment, either generally or as to particular categories of regulations. We have instead held that "the level of scrutiny should depend on (1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.'" *Id.* at 1138 (quoting *Ezell I*, 651 F.3d at 703); *see also Jackson*, 746 F.3d at 960-61.

exhibits attached to and incorporated by reference into the complaint, which we may consider, *see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003), demonstrate that Alameda County residents may freely purchase firearms within the County.[11] As of December 2011, there were ten gun stores in Alameda County.[12] Several of those stores are in the non-contiguous, unincorporated portions of the County. In fact, Alameda County residents can purchase guns approximately 600 feet away from the proposed site of Teixeira's planned store, at a Big 5 Sporting Goods store.

Ezell v. City of Chicago ("*Ezell II*"), 846 F.3d 888 (7th Cir. 2017), involved an entirely different situation with regard to the availability of a gun-related service to county residents. Chicago's zoning regulations at issue in that case so "severely limit[ed] where shooting ranges may locate" that "*no* publicly accessible shooting range yet exist[ed] in Chicago." *Id.* at 894. (emphasis added). As a result, the zoning regulations, "though not on their face an outright prohibition of gun ranges, nonetheless severely restrict the right of Chicagoans to train in firearm use at a range." *Id.* No analogous restriction on the ability of Alameda County residents to

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[11] Throughout this opinion, when we refer to the complaint, we include the supporting attachments.

[12] As discussed, *supra* note 6, the unincorporated areas of Alameda County are noncontiguous, and the site Teixeira selected for his gun shop lies in a small unincorporated area adjacent to incorporated population centers. The site is relatively distant from the less urban, less populated parts of the County.

purchase firearms can be inferred from the complaint in this case.

The closest Teixeira comes to stating a claim that his potential customers' Second Amendment rights have been, or will be, infringed is his allegation that the ordinance places "a restriction on convenient access to a neighborhood gun store and the corollary burden of having to travel to other, more remote locations to exercise their rights to acquire firearms and ammunition in compliance with the state and federal laws." But potential gun buyers in Alameda County generally, and potential gun buyers in the unincorporated areas around San Lorenzo in particular, *do* have access to a local gun store just 600 feet from where Teixeira proposed to locate his store. And if the Big 5 Sporting Goods store does not meet their needs, they can visit any of the nine other gun stores in the County as a whole, including the three other gun stores in the unincorporated parts of the County.[13]

In any event, gun buyers have no right to have a gun store in a particular location, at least as long as

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[13] The complaint also alleges that current firearms retailers in the area do not "meet customer needs and demands" and do not provide "the level of personal service" that Teixeira's proposed store would provide. No case supports Teixeira's suggestion that the Second Amendment not only encompasses a right to acquire firearms but guarantees a certain type of retail experience.

In addition, counsel for Teixeira stated at oral argument that Big 5 Sporting Goods does not sell handguns. That allegation is not in the complaint. Moreover, counsel for Teixeira did not contend that handguns are not available for purchase at other stores in Alameda County.

their access is not meaningfully constrained. *See Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015) ("[A] slight diversion off the beaten path is no affront to . . . Second Amendment rights."); *cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016), *as revised* (June 27, 2016) ("[I]ncreased driving distances do not always constitute an 'undue burden.'"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (holding that a zoning ordinance that limited churches and synagogues to residential districts did not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA) because "walking a few extra blocks" is not a substantial burden).

We recognized a similar principle in *Jackson*. After recognizing that San Francisco's ban on the sale of certain particularly lethal ammunition *did* regulate conduct within the scope of the Second Amendment, we held that the regulation burdened the core right only indirectly, in part because handgun owners in San Francisco could freely obtain the banned ammunition in other jurisdictions and keep it for use within city limits. *Jackson*, 746 F.3d at 968. As *Jackson* illustrates, the Second Amendment does not elevate convenience and preference over all other considerations.[14]

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[14] Judge Bea's dissent argues, *post* at 52, that we misread *Chovan* by declining to apply constitutional scrutiny to the Ordinance unless it "meaningfully" burdens the Second Amendment rights of would-be gun buyers. Not so. There is no *meaningful* difference—that is, one that matters—between failing to plead that "the ordinance meaningfully inhibits residents from acquiring

Moreover, Teixeira does not make any allegations about how far his potential customers currently travel to purchase firearms, or how much the proposed store would shorten travel distances, if at all, or for whom. Nor does Teixeira make any argument as to what distance necessarily impairs Second Amendment rights.

In sum, based on the allegations in the complaint, 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.[15] As Judge Silverman observed in his dissent from the panel opinion, "[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." *Teixeira*, 822 F.3d at 1064 (Silverman, J., dissenting). Similarly missing is any allegation by Teixeira that any "honest-to-God resident of Alameda County . . . cannot lawfully buy a gun nearby." *Id.*

In short, because the allegations in the complaint, read in light of the attachments and judicially noticeable

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firearms within their jurisdiction," *infra*, and failing to plead that the ordinance actually or really burdens these residents' Second Amendment rights.

[15] Teixeira waived his right to amend the complaint. When the district court asked whether he would like an opportunity to amend the pleadings, counsel for Teixeira declined, noting "we have pled the sufficient facts." Moreover, the attachments to the complaint demonstrate that individuals in unincorporated Alameda County can purchase guns from several retail outlets, so any allegation that the ordinance poses a meaningful obstacle to acquiring firearms would be implausible.

information about the population and geography of Alameda County, do not plausibly raise a claim of entitlement to relief, the district court properly dismissed at the pleadings stage Teixeira's claim that the ordinance infringes the Second Amendment rights of his potential customers. *See Twombly*, 550 U.S. at 556-58.

C.

Teixeira also fails to state a claim for relief insofar as he alleges that the ordinance interferes with the provision of ancillary training and certification services in Alameda County. Teixeira maintains that existing firearm retail establishments in Alameda County do not meet "customer needs and demands" with respect to personalized training and instruction in firearms safety and operation, services Teixeira planned to provide.

The claim that the ordinance burdens his potential customers' Second Amendment rights to obtain necessary firearms instruction and training is belied by the ordinance itself. The Zoning Ordinance limits the location of premises conducting "firearm sales." Alameda Cty., Cal., Code § 17.54.131. It does not concern businesses providing firearms instruction and training services. Accordingly, the Zoning Ordinance would pose no obstacle if Teixeira wanted to open a business at the proposed site on Lewelling Boulevard to provide firearms instruction and training.

This case is therefore entirely unlike the *Ezell* cases. The ordinance in *Ezell I* expressly banned

publicly accessible firing ranges in the entire city of Chicago. 651 F.3d at 691. The zoning ordinance in *Ezell II*, although not an outright ban, so severely limited the potential locations for operating a range that less than three percent of the city's total acreage was even theoretically available to site a range, and no range yet existed in the city. 846 F.3d at 894. The ordinances in those cases thus directly, and meaningfully, interfered with the ability of city residents to maintain firearms proficiency, a right the Seventh Circuit found to be an "important corollary" to the core right to bear arms. *Ezell I*, 651 F.3d at 708.

No such interference can be shown in this case, as the ordinance restricts the location of firearm sales, not training. Teixeira thus fails to state a Second Amendment claim related to the provision of ancillary firearms training and certification services.

D.

Teixeira also suggests that, independent of the rights of his potential customers, the Second Amendment grants him a right to *sell* firearms. In other words, his contention is that even if there were a gun store on every square block in unincorporated Alameda County and therefore prospective gun purchasers could buy guns with exceeding ease, he would still have a right to establish his own gun store somewhere in the jurisdiction. He alleges that the Zoning Ordinance infringes on that right by making it virtually impossible

to open a new gun store in unincorporated Alameda County.[16]

We apply a two-step inquiry to examine Teixeira's claim. *See Chovan*, 735 F.3d at 1136. We first ask "whether the challenged law burdens conduct protected by the Second Amendment," and, if so, we then determine the "appropriate level of scrutiny." *Id.*

If we conclude that the ordinance imposes no "burden on conduct falling within the scope of the Second Amendment's guarantee . . . our inquiry is complete," *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), as a law that "burdens conduct that falls outside the Second Amendment's scope, . . . passes constitutional muster." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012). *See also Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995

[16] The complaint does not address whether Teixeira could open a gun store in an incorporated area in the vicinity of the proposed site, nor does it allege that Teixeira has any particular reason for wishing to locate a store in the unincorporated areas of the County (such as proximity to the residence of the owners). Although a number of Alameda County municipalities regulate the location of firearms sales, *see, e.g.*, Oakland, Cal., Mun. Code § 5.26.070(I), the complaint provides no information as to whether there are viable locations in those municipalities or any others in the County in which a new gun store could be located. Notably, 91% of the County's residents live in incorporated areas, *see supra* note 6. We need not determine, however, whether the complaint plausibly alleges meaningful interference with Teixeira's sale of firearms, as we conclude that the Second Amendment does not independently protect the ability to engage in gun sales.

(2017) ("Because the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry . . . is necessarily allowed by the Amendment.").

At the first step of the inquiry, "determining the scope of the Second Amendment's protections requires a textual and historical analysis of the amendment." *Chovan*, 735 F.3d at 1133; *see also Ezell I*, 651 F.3d at 701. Based on such an analysis, we conclude 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. Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense, but the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor to sell them.

The Supreme Court in *Heller* was careful so to caution, even while striking down a statute banning handgun possession in the home: "[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27. These types of regulations, *Heller* explained, are examples of "presumptively lawful regulatory measures." *Id.* at 627 n.26. Two years later, the Supreme Court repeated that *Heller* "did not cast doubt on such longstanding regulatory measures." *McDonald*, 561 U.S. at 786. The Supreme Court's assurance in this regard guided our analysis in *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012)

(en banc), in which we upheld an Alameda County ordinance that regulated the manner of displaying firearms at gun shows on County property.

Heller's assurance that laws imposing conditions and qualifications on the commercial sale of firearms are presumptively lawful makes us skeptical of Teixeira's claim that retail establishments can assert an independent, freestanding right to sell firearms under the Second Amendment. The language in *Heller* regarding the regulation of "the commercial sale of arms," however, is sufficiently opaque with regard to that issue that, rather than relying on it alone to dispose of Teixeira's claim, we conduct a full textual and historical review.

i. Text

We begin with text of the Second Amendment. *See Heller*, 554 U.S. at 576. Nothing in the specific language of the Amendment suggests that sellers fall within the scope of its protection.

After its introductory language,[17] the Second Amendment commands that "the right of the people to

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[17] The introductory clause of the Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State. . . ." U.S. Const. amend. II. *Heller* held that this clause "announces the purpose for which the right was codified: to prevent elimination of the militia." 554 U.S. at 599, 128 S.Ct. 2783. That purpose reflected the widely held belief at the time the Amendment was adopted that a "citizen militia . . . might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.*

keep and bear Arms, shall not be infringed." U.S. Const. amend. II. That language confers a right on the "people" who would keep and use arms, not those desiring to sell them.

The operative language—"keep" and "bear"—confirms that focus. As *Heller* observed, "the most natural reading of 'keep Arms' . . . is to 'have weapons.'" *Heller*, 554 U.S. at 582. And "bear arms" is naturally read to mean "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in case of conflict with another person." *Id.* at 584 (omissions in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). 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.

Second Amendment analogues in state constitutions adopted during the founding period likewise expressly refer to the right of the people to bear arms, nowhere suggesting in their text that the constitutional protection extends to those who would engage in firearms commerce. *See, e.g.*, Pa. Declaration of Rights, § XIII (1776) ("That the people have a right to bear arms for the defence of themselves and the state. . . ."); Mass. Const., Pt. First, art. XVII (1780) ("The people have a right to keep and to bear arms for the common defence."); Ky. Const., art. XII, § 23 (1792) ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned."); Ohio

Const., art. VIII, § 20 (1802) ("That the people have a right to bear arms for the defence of themselves and the State. . . .").

ii. The Right to Bear Arms in Britain and Colonial America

The historical record confirms that the right to sell firearms was not within the "historical understanding of the scope of the [Second Amendment] right." *Jackson*, 746 F.3d at 959 (alteration in original) (quoting *Heller*, 554 U.S. at 625). The Supreme Court held in *Heller* that the Second Amendment "codified a pre-existing right," 554 U.S. at 592 (emphasis omitted), a "right inherited from our English ancestors," *id.* at 599 (internal quotation marks omitted). *Heller* and later cases scrutinizing firearms restrictions thus examined the nature of the right to bear arms in England, colonial America, and during the Founding. *See id.* at 584-610; *McDonald*, 561 U.S. at 768-78; *Peruta*, 824 F.3d at 929-39. *Heller*, *McDonald*, *Peruta*, and other cases provide thorough historical accounts, so we do not repeat that full history of the Second Amendment here. Instead, we highlight the historical evidence that demonstrates that the right codified in the Second Amendment did not encompass a freestanding right to engage in firearms commerce divorced from the citizenry's ability to obtain and use guns.

We begin with a provision of the 1689 English Bill of Rights "long . . . understood to be the predecessor to our Second Amendment." *Heller*, 554 U.S. at 593. With

respect to the right to bear arms, the English Bill of Rights provided "[t]hat the subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. This right to "*have* arms for their [d]efence" was codified in reaction to the Stuart kings' systemic disarming of the English people in the period leading up to the Glorious Revolution. *See Heller*, 554 U.S. at 592-93. William Blackstone, "whose works . . . constituted the preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 593-94 (internal quotation marks and citations omitted), described the right announced in that declaration as an "auxilliary right" designed to protect the primary rights of "free enjoyment of personal security, of personal liberty, and of private property." 1 William Blackstone, *Commentaries on the Laws of England* 139-40 (1765). Should these primary rights be violated or attacked, Blackstone explained, "the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defence." *Id.* at 140.

St. George Tucker, in the "most important early American edition of Blackstone's Commentaries," *Heller*, 554 U.S. at 594, similarly described the English right to bear arms as a necessary means of protecting personal liberties. The English Bill of Rights, Tucker observed, granted Englishmen "the right of repelling

force by force; because that may be absolutely necessary for self-preservation, and the intervention of the society on his behalf, may be too late to prevent an injury." 1 William Blackstone & St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia* 145 (St. George Tucker ed., 1803).

Blackstone's and Tucker's commentaries indicate that both recognized the right to bear arms in England to have been held by individual British subjects as a means to provide for the preservation of personal liberties. Neither of these authoritative historic accounts states or implies that the English Bill of Rights encompassed an independent right to engage in firearms commerce.

As many historians and courts have observed, the right to bear arms remained important in colonial America. "By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 554 U.S. at 593. Arms were considered an important means of protecting vulnerable colonial settlements, especially from Indian tribes resisting colonial conquest, and from foreign forces. *See* Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 579 (2006); Joyce Lee Malcolm, *To Keep and Bear Arms* 139 (1994) ("Like the English militia, the colonial militia played a primarily defencive role. . . . The dangers all the colonies faced . . . were so great that not

only militia members but all householders were ordered to be armed."). At the same time, colonial governments substantially controlled the firearms trade. The government provided and stored guns, controlled the conditions of trade, and financially supported private firearms manufacturers. *See* Solomon K. Smith, *Firearms Manufacturing, Gun Use, and the Emergence of Gun Culture in Early North America*, 49th Parallel, Vol. 34, at 6-8, 18-19 (2014).

As scholars have noted, in light of the dangers the colonies faced, "[t]he emphasis of the colonial governments was on ensuring that the populace was well armed, not on restricting individual stocks of weapons." Malcolm, *supra*, at 140. Historian Saul Cornell has observed that "[i]t would be impossible to overstate the militia's centrality to the lives of American colonists. For Americans living on the edge of the British Empire, in an age without police forces, the militia was essential for the preservation of public order and also protected Americans against external threats." Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 13 (2006). 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. That purpose was later expressly recognized in the prefatory clause to the Second Amendment.

Notably, colonial government regulation included some restrictions on the commercial sale of firearms. In response to the threat posed by Indian tribes, the

colonies of Massachusetts, Connecticut, Maryland, and Virginia all passed laws in the first half of the seventeenth century making it a crime to sell, give, or otherwise deliver firearms or ammunition to Indians. *See Acts of Assembly, Mar. 1657-8*, *in* 1 William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 441 (1823); 1 J. Hammond Trumbull, *The Public Records of the Colony of Connecticut, Prior to the Union with New Haven Colony, May, 1665*, at 49, 182 (1850); *Assembly Proceedings, February-March 1638/9*, *in Proceedings and Acts of the General Assembly of Maryland, January 1637/8—September 1664*, at 103 (William Hand Browne, ed., 1883); *Records of the Governor and Company of the Massachusetts Bay in New England* 196 (Nathaniel B. Shurtleff, ed., 1853). At least two colonies also controlled more generally where colonial settlers could transport or sell guns. Connecticut banned the sale of firearms by its residents outside the colony. 1 Trumbull, *Public Records of the Colony of Connecticut*, 138-39, 145-46. And under Virginia law, any person found within an Indian town or more than three miles from an English plantation with arms or ammunition above and beyond what he would need for personal use would be guilty of the crime of selling arms to Indians, even if he was not actually bartering, selling, or otherwise engaging with the Indians. Acts of Assembly, Mar. 1675-76, 2 William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First*

Session of the Legislature, in the Year 1619, at 336-37 (1823).[18]

As *Heller* observed, during the 1760s and 1770s, in the face of growing rebellion, the British Crown sought to disarm the colonies. 554 U.S. at 594; *see* 5 *Acts of the Privy Council of England* § 305, at 401 (1774) (James Munro ed., 1912). Colonial Americans reacted to the embargo by gathering arms for their defense. The General Committee of South Carolina, for example, adopted a resolution in 1774 recommending that all persons immediately supply themselves with powder and bullets, observing that "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them." 1 John Drayton, *Memoirs of the American Revolution from its Commencement to the Year 1776, Inclusive; as Relating to the State of South-Carolina: and Occasionally Referring to the States of North-Carolina and Georgia* 166 (1821) (internal quotation marks omitted).

The panel majority suggested that the Founders adopted the Second Amendment in part because of the experience of the British arms embargo. *See Teixeira*,

[18] Virginia law also provided that all persons were at "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony." Laws of Va., Feb., 1676-77, Va. Stat. at Large, 2 Hening, *supra* at 403. The liberty to sell arms to Virginians did not, however, extend to sales to others, and so did not encompass a freestanding right to sell arms, independent of citizens' right to acquire them.

822 F.3d at 1054-55. We agree that "[o]ur forefathers recognized that the prohibition of commerce in firearms worked to undermine the right to keep and to bear arms." *Id.* at 1054. But the panel's conclusion that the Second Amendment therefore independently protects the sale of firearms does not follow. The British embargo 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.

Like the British right to bear arms, the right declared in the Second Amendment of the U.S. Constitution was thus "meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 298 (3d ed. 1898). Early American legislators and commentators understood the Second Amendment and its state predecessors as protecting Americans against tyranny and oppression. They recognized that the availability of arms was a necessary prerequisite to exercising the right to bear arms, as the British arms embargo had made clear. Yet no contemporary commentary suggests 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.

These historical materials demonstrate that the right to bear arms, under both earlier English law and American law at the time the Second Amendment was adopted, was understood to confer a right upon individuals to have and use weapons for the purpose of self-protection, at least in the home.[19] The colonies regulated the sale of weapons to some degree.

In short, no 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.[20]

We emphasize that 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

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[19] We have not decided the degree to which the Second Amendment protects the right to bear arms outside the home. *See Peruta*, 824 F.3d at 939 ("There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here.").

[20] The panel majority relied on a 1793 statement by Thomas Jefferson for its conclusion that the Second Amendment included the freedom to both purchase and sell arms: "[o]ur citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them." *Teixeira*, 822 F.3d at 1055 (alteration in original) (quoting Thomas Jefferson, 3 *Writings* 558 (H.A. Washington ed., 1853)). But that was a factual statement—albeit an imprecise one, as we have shown—not a prescriptive one. Jefferson's observation does not support the conclusion that the Founders understood the right to sell arms was to be independently protected by the Second Amendment.

interests of retailers seeking to sell to them will be aligned. As we have noted, firearms commerce plays an essential role today in the realization of the individual right to possess firearms recognized in *Heller*. But restrictions on a commercial actor's ability to enter the firearms market may also, as here, have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms. Teixeira alleges that Alameda County's zoning ordinance effectively bars him from opening a new gun store in an unincorporated area of the County. But he does not—and, given the number of gun stores in the County as a whole and in the unincorporated areas, as well as the geography of the County and the distribution of people within it, likely cannot[21]—allege that residents are meaningfully restricted in their ability to acquire firearms.

Our conclusion that the Second Amendment does not confer a freestanding right to sell firearms is fully consistent with *Heller*, which closely examined the historical record and concluded that, at its core, the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Later cases have also examined firearms restrictions with respect to the burden on a potential gun owner or user, even when the challenge is brought by a commercial actor engaged in supplying arms or related services. In *Ezell II*, for example, the Seventh Circuit held that Chicago's

[21] Again, Teixeira has waived any right to amend his complaint in this litigation, *see supra* note 15.

restrictions on shooting range locations caused a Second Amendment injury because it "severely limit[ed] Chicagoans' Second Amendment right to maintain proficiency in firearm use via target practice at a range," not because a range operator has any protected interest in operating a shooting range in the city. 846 F.3d at 890.

Similarly, in a suit brought by firearms dealers and residents challenging a Chicago ordinance that banned "virtually all sales and transfers of firearms inside the City's limits," the District Court for the Northern District of Illinois examined the burden imposed by the sales prohibition on "law-abiding residents who want to exercise their Second Amendment right," not on firearms dealers. *Ill. Ass'n of Firearms Retailers*, 961 F. Supp. 2d at 940, 942; *see also Nat'l Rifle Ass'n*, 700 F.3d at 199-204 (examining whether a ban on firearms sales to minors burdened conduct protected by the Second Amendment by examining the burden on minors' rights to acquire firearms, not the burden on sellers).

Our holding does not conflict with *United States v. Marzzarella*. *Marzzarella* cautioned that if there were a categorical exception from Second Amendment scrutiny for all laws imposing conditions on the commercial sale of firearms, "it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms." 614 F.3d at 92 n.8. *Marzzarella* rightly observed that in contemporary society, permitting an overall ban on gun sales "would be untenable under *Heller*," *id.*, because a total prohibition would

severely limit the ability of citizens to *acquire* firearms. *Marzzarella* did not consider a situation in which the right of citizens to acquire and keep arms was not significantly impaired, yet commercial retailers were claiming an independent right to engage in sales.

Finally, Teixeira invokes an analogy to First Amendment jurisprudence for his contention that the Second Amendment independently protects commercial sellers of firearms, suggesting that gun stores are in the same position as bookstores, print shops, and newspapers. The analogy fails. 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, and for reasons explained below, that changes the constitutional calculus.

First, the language of the Second Amendment is specific as to whose rights are protected and what those rights are, while the First Amendment is not. Compared to the Second Amendment's declaration, after an announcement of its purpose in the introductory clause, that a right of "the people" to "keep and bear Arms, shall not be infringed," the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press" is far more abstract. And, 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.

Second, the Supreme Court has long recognized that speech necessarily entails communication with other people—with *listeners*. *See Talley v. California*, 362 U.S. 60, 64 (1960) ("[S]uch [a] . . . requirement would tend to restrict freedom to distribute information and thereby freedom of expression."); *Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views. . . ."). Merely protecting one's right to speak without more—to lecture in vacant auditoriums or in remote forests, or to write pamphlets without being permitted to hand them out—would assuredly not satisfy the First Amendment.

Selling, publishing, and distributing books and other written materials is therefore *itself* expressive activity. Sellers, publishers, and distributors of such materials consequently have freestanding rights under the First Amendment to communicate with others through such protected activity. The Supreme Court so observed in *Smith v. California*, 361 U.S. 147, 150 (1959), stating that "the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of the[] constitutionally protected freedoms [of speech and of the press]." The right to express one's views, orally and in writing, that is protected by the First Amendment thus *necessarily* entails reaching an audience, including through the distribution of written material. *See id.* "Liberty of circulating is as essential to th[e] freedom [of the press] as liberty of publishing. . . ." *Lovell v. City*

of Griffin, 303 U.S. 444, 452 (1938) (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)).

The circulation and distribution of expression, in turn, often necessitates retail transactions by booksellers and other merchants, as free speech often isn't free in the monetary sense. As the Supreme Court has noted, "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). In light of this commercial reality, the fact that "the dissemination [of books and other forms of the printed word] takes place under commercial auspices" does not remove those forms of communication from First Amendment protection. *Smith*, 361 U.S. at 150.

In short, bookstores and similar retailers who sell and distribute various media, unlike gun sellers, are *themselves* engaged in conduct directly protected by the First Amendment. They are communicating ideas, thoughts, and other forms of expression to those willing to hear or read them. Unlike gun sellers, they are "not in the position of mere proxies arguing another's constitutional rights." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963).

So, for example, if Teixeira wanted to sell books and magazines rather than ammunition and magazines, the existence of ten other bookshops in Alameda County—or on a single street in Alameda County—that could sell his potential customers the same

material would be irrelevant to his claimed right to distribute and sell books. The First Amendment grants *him* the right to speak and disseminate ideas, not merely his customers the right to hear them.[22] But Teixeira sells guns instead of books, and the act of selling firearms is not part or parcel of the right to "keep and bear arms." Yet Teixeira is asserting the right to sell guns no matter how many other gun stores there are in the jurisdiction.

Here, the gun sellers are instead in an analogous position to medical providers in the Fourteenth Amendment context. When medical providers have challenged laws restricting the distribution of contraceptives and provision of abortions, courts consistently examine whether the challenged laws burden their patients' right to access reproductive health services, *not* whether the laws burden any putative right of the provider. *See Whole Woman's Health*, 136 S. Ct. at 2312-13, 2316 (in suit brought by abortion providers, examining whether admitting privileges and surgical center requirements imposed on health providers burdened a woman's choice to obtain a pre-viability abortion); *Carey*, 431 U.S. at 684-89 (striking down a statute forbidding the

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[22] *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means. . . ."). Though *Virginia State Board* dealt with the right of *listeners* to hear particular speech, the Court identified it as "reciprocal" to the right of the speaker. *Id.* at 757. It follows that the *speaker's* right is undiminished by the availability of other people merchandising the same ideas and messages.

distribution of certain contraceptives because the statute constrained a woman's choice of whether to have a child); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 886-87 (1992) (examining regulations on abortions with regard to the burden imposed on women seeking abortions).[23] Never has it been suggested, for example, that if there were no burden on a woman's right to obtain an abortion, medical providers could nonetheless assert an independent right to provide the service for pay.

As we have demonstrated, the Second Amendment does not independently protect a proprietor's right to

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[23] The same principle applies in the Sixth Amendment context. The Sixth Amendment provides a criminal defendant the right to an attorney in criminal proceedings, but does not confer upon any attorney a corresponding right to represent a defendant (much less to do so for a fee). *See Faretta v. California*, 422 U.S. 806, 819-20 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' . . . The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant. . . ."). Counsel do have their own right not to have their speech restricted when making legal arguments and giving clients advice, but that right derives from the First, not the Sixth, Amendment. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001).

sell firearms.[24] Alameda County's Zoning Ordinance, to the extent it simply limits a proprietor's ability to open a new gun store, therefore does not burden conduct falling within the Amendment's scope and is "necessarily allowed by the Amendment." *Peruta*, 824 F.3d at 939; *see also Marzzarella*, 614 F.3d at 89.

AFFIRMED.

OWENS, Circuit Judge, concurring:

I join all but Part II.D of the majority opinion. In my view, we need not decide whether the Second Amendment guarantees the right to sell firearms. It is enough that *Heller* left intact "laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures[.]"). The ordinance at issue here

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[24] Our conclusion is consistent with the Fourth Circuit's determination in its unpublished decision in *United States v. Chafin*, 423 Fed.Appx. 342, 344 (4th Cir. 2011), that no historical authority "suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to *sell* a firearm" (emphasis in original). *See also Mont. Shooting Sports Ass'n v. Holder*, No. CV-09-147-DWM-JCL, 2010 WL 3926029, at *21 (D. Mont. Aug. 31, 2010) ("*Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation by the federal government under existing federal firearms laws.").

falls within that category of "presumptively lawful regulatory measures," *Heller*, 554 U.S. at 627 n.26, and plaintiffs therefore "cannot state a viable Second Amendment claim." *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc). As the dissent to the original panel decision put it, all "we're dealing with here is a mundane zoning dispute dressed up as a Second Amendment challenge." *Teixeira v. County of Alameda*, 822 F.3d 1047, 1064 (9th Cir. 2016) (Silverman, J., dissenting).

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's decision to affirm the district court's dismissal of the Second Amendment facial challenge. Majority Op. II. A-C. However, I respectfully dissent from the dismissal of the constitutional challenge as applied to Teixeira. Majority Op. II. D. The majority's analysis of the Second Amendment challenge to locating a full-service gun shop in an unincorporated area of Alameda County, which I will call San Lorenzo, substantially interferes with the right of its customers to keep and bear arms. The impact of this county ordinance on the fundamental rights enshrined in the Second Amendment cannot be viewed in a vacuum without considering gun restrictions in California as a whole. I fear today's decision inflicts yet another wound on our precious constitutional right.

Teixeira's facial Second Amendment challenge fails because appellants cannot demonstrate that the zoning ordinance is unconstitutional in *all* of its applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Notably, Teixeira did not allege that none of the existing gun stores in the county can comply with the ordinance.[1] The district court properly dismissed the facial challenge to Alameda County's zoning ordinance.

Teixeira, however, has the better argument on the as-applied challenge. Teixeira alleges that the restrictive zoning rules in the ordinance make it virtually impossible to open a new, full-service gun store in unincorporated Alameda County, and that makes it very difficult for individuals who wish to exercise their Second Amendment rights to obtain, maintain, and comply with the burdensome California state and federal laws which govern acquisition, ownership, carrying, and possession of firearms protected by the Second Amendment. Teixeira should be permitted to engage in further fact-finding to test whether the ordinance meets at least intermediate scrutiny in establishing its challenge.

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[1] The complaint concedes and its attachments state that there is at least one such store that has complied with the Alameda County ordinance and sells firearms to county residents. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) ("We need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint.").

We have adopted a two-step inquiry: (1) "whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, . . . to apply an appropriate level of scrutiny." *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013). Step One asks whether the conduct falls outside the historical scope of the Second Amendment. If so, the claim fails. To make this determination we ask: (1) whether the regulation is one of the "presumptively lawful regulatory measures" identified in *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008), or (2) "whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). If neither of these are met, then the law falls within the historical scope of the Second Amendment and the analysis proceeds to Step Two.

Under Step Two the appropriate level of scrutiny is determined by examining how closely the law comes to the core of the burdened Second Amendment right and the severity of that burden. *Chovan*, 735 F.3d at 1138. First, we must determine if Alameda County's ordinance is a "presumptively lawful regulatory measure" as identified in *Heller.* 554 U.S. at 627 n. 26. The majority properly notes that the Supreme Court's language is "opaque," but declines to clarify this precedent for our circuit. Majority Op. at 26. In *Heller*, the Court declared "nothing in our opinion should be taken to cast doubt on longstanding . . . laws imposing conditions

and qualifications on the commercial sale of arms." 554 U.S. at 626-27. These are "presumptively lawful regulatory measures." *Id.* at 627 n.26.

As I read the footnote, "longstanding regulatory measures" refers to congressional measures that regulate the sale of firearms, such as the validity of the Federal Firearms Act, its implementing regulations, and the Bureau of Alcohol, Tobacco, Firearms and Explosives' historical enforcement of sales, exchanges, and prohibitions on dealing in certain types of firearms and with potential customers. *McDonald v. City of Chicago*, 561 U.S. 742, 777 (2010). 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. The record here establishes beyond cavil the animus of the Alameda County Board of Supervisors to Second Amendment rights. I agree with Judge Bea that the Alameda County ordinance does not fall within the *Heller* categories and does not earn its presumption of lawfulness. *See* Bea dissent at pp. 58-61.

Nevertheless, even if we found that the ordinance fell within the *Heller* categories and was "presumptively lawful," that presumption is subject to rebuttal. Teixeira should have been permitted to return to the district court to conduct discovery and "rebut this presumption by showing the regulation does have more than a de minimis effect upon his [claimed Second Amendment] right." *Heller v. District of Columbia*, 670 F.3d 1244, 1273 (D.C. Cir. 2011) (*Heller II*).

Second, if a law does not fit within the language of *Heller*, the court determines if a challenged regulation prohibits conduct that was traditionally protected by the Amendment. *Jackson*, 746 F.3d at 960. The majority concludes "the Second Amendment does not confer a free standing right, wholly detached from any customer's ability to acquire firearms, upon a proprietor of a commercial establishment to sell firearms." Majority Op. at 25. Maybe so.

But we need not find a freestanding right to sell firearms. Rather, the 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.[2] The majority properly notes that the "Second Amendment protects ancillary rights necessary to the realization of the core right to possess firearms for self-defense," but fails to apply that protection here to ensure the ordinance imposes no unreasonable restrictions on the right to lawfully acquire and maintain firearms for the defense of hearth and home. Majority Op. at 14.

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[2] I disagree with the majority's assumption that the existing federally licensed gun stores elsewhere in the county offer the full range of services Teixeira proposed to offer in San Lorenzo. The West County Board of Zoning Adjustments approved a variance for Teixeira's location and stated that "Unincorporated Alameda County currently has four (4) licensed firearms sales business [sic]." Merely possessing such a license tells us nothing about whether the licensee sells only long guns, handguns, or ammunition. Nor can we tell whether gunsmithing services, training/education classes, a target range, or anything else attends mere possession of the license at each location.

We found in *Jackson* that a regulation which "eliminate[ed] a person's ability to obtain or use ammunition" was subject to heightened scrutiny because it had the potential to make "it impossible to use firearms for their core purpose." 746 F.3d at 967. We face an analogous situation. The Alameda County zoning ordinance precludes Teixeira from opening a new gun store in San Lorenzo. The lawful sale of arms to qualified people who wish to acquire and keep them for employment (e.g., police officers and security guards), self-defense, hunting, target shooting, protection of commercial occupations—such as carrying valuables like diamonds, protection of business premises, or other such legal purposes—need freedom to purchase and maintain the very arms they have the right to bear. Without the ability to establish reasonable locations that sell and service these arms, the ordinance "make[s] it impossible to use firearms for their core purpose" of self-defense. *Id.* As applied here, the ordinance potentially renders the right to bear arms meaningless. When considered in combination with similar burdensome regulations by other San Francisco Bay Area cities and counties, local officials do not need to explicitly ban firearms to block gun owners from reasonable access to gun stores.[3] *Cf. Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928 (N.D.

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[3] And it is no answer, as my colleagues suggested in *Jackson*, that while San Francisco could ban the sale of hollow point ammunition (carried by many law enforcement officers), putative purchasers could simply buy their ammunition elsewhere and bring it back to San Francisco since it was not illegal to possess hollow point rounds. 746 F.3d at 968.

Ill. 2014) (striking down an ordinance seeking to prohibit all firearms sales).

The ability to acquire guns and ammunition, and to keep them in operable condition, is "indispensable to the enjoyment" of the fundamental right to bear arms as much as access to a shooting range. *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 (1980). Judge O'Scannlain's scholarly opinion for our panel in this case explains why this is true. *See* 822 F.3d 1047, 1053-56 (9th Cir. 2016).

All would agree that a complete ban on the sale of firearms and ammunition would be unconstitutional. History supports the view that the Second Amendment must contemplate the right to sell firearms if citizens are to enjoy the core, fundamental right to own and possess them in their homes. *Chovan*, 735 F.3d at 1133. The majority recounts that states historically imposed criminal sanctions for giving or selling arms to the Indians. Majority Op. at 31. They urge this is evidence that the right to sell arms was not implicated by the Second Amendment. However, this merely reiterates the longstanding prohibition on the sale of firearms to certain forbidden persons acknowledged in *Heller*. At the time such discriminatory laws were adopted, the fledgling Nation was treating our ancestral inhabitants as if they were convicted felons or illegal aliens, who today are still banned by law from possessing or acquiring firearms. 18 U.S.C. § 924; 27 C.F.R. § 478.32.

In light of the British embargo on the sale of arms in 1774 to prevent the Colonists from resisting the tyranny of King George III, it is understandable that the Framers would want to protect not only the right to bear arms, but correspondingly, the right to sell and acquire them. *See* David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 286 (2012). Throughout history and to this day the sale of arms is ancillary to the right to bear arms.[4]

Based upon the Second Amendment's text and history, the Alameda County ordinance imposes prohibitions that may indeed fall within the scope of Second Amendment protection. Therefore, we must reach Step Two and ask whether the ordinance unduly interferes with the right to acquire and possess firearms for self-defense. So long as the ordinance does not unduly impede that right, it will ultimately pass constitutional muster. But plaintiffs are entitled to try to establish evidence through discovery to support their plausible claim. Teixeira has stated sufficient grounds, which, if supported by such discovery, may well undermine the nexus between the means chosen and the ends sought when examined under the lens of at least intermediate scrutiny.

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[4] "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them." *Teixeira v. County of Alameda*, 822 F.3d 1047, 1055 (9th Cir. 2016) (quoting Thomas Jefferson, 3 *Writings* 558 (H.A. Washington ed., 1853)).

Today's decision perpetuates our continuing infringement on the fundamental right of gun owners enshrined in the Second Amendment. We cannot analyze constitutional rights in a vacuum; instead, we must analyze the totality of the impact of gun control regulations like these—local, state, and federal—in determining how severely the fundamental liberty protected by the Second Amendment is being burdened. In states like California, that burden is becoming substantial in light of continuing anti-gun legislation[5] and our decisions upholding such laws. *See Chovan*, 735 F.3d 1127 (9th Cir. 2013); *Jackson*, 746 F.3d 953 (9th Cir. 2014) (upholding an ordinance requiring handguns inside the home to be stored in locked containers or disabled with a trigger lock when not being carried on the person); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017) (holding the Second Amendment does not protect the right to carry a concealed weapon in public where the sheriff's policy required "good cause" to obtain permits to do so, and refused applicants who could offer no justification beyond claiming the need for self-defense); *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016) (upholding a 10-day waiting period for purchasers who already had a concealed-carry permit and already cleared a background check); *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (upholding an Alameda

[5] *Peruta v. Cty. of San Diego* outlines part of California's "multifaceted statutory scheme regulating firearms." 824 F.3d at 925-26; *see also* Cal. Penal Code Pt. 6, T. 4 (regulating firearms generally); *see also* Cal. Penal Code Pt. 6, T. 4, D. 5 (regulating the carrying of firearms in California).

County ordinance that regulates the sale of firearms at gun shows).

Our cases continue to slowly carve away the fundamental right to keep and bear arms. Today's decision further lacerates the Second Amendment, deepens the wound, and resembles the Death by a Thousand Cuts.

BEA, Circuit Judge, dissenting:

The Second Amendment right to "keep and bear arms" would not mean much unless one could lawfully purchase and use arms. Section 17.54.131 of the Alameda County Ordinance Code (the "Ordinance") targets firearm stores; it prohibits them within 500 feet of residences.

When a government regulation affects one's right to purchase and use a firearm, it may be challenged as impeding the exercise of the Second Amendment right. To determine the validity of such a regulation, we turn to Supreme Court and Ninth Circuit precedents for guidance.

Those precedents require we first determine whether the regulation—here, the Alameda ordinance—burdens the right granted by the Second Amendment. If it does, we next examine whether there is a specific governmental interest to be served to justify the burden. If there is, we then measure how severely the right is burdened, to see how much judicial scrutiny into the workings of the regulation is required.

The majority opinion short-circuits this process by making two errors. First, it holds that the Alameda ordinance does not "meaningfully" burden the right to purchase and use firearms because other gun stores are nearby Appellants' proposed location. Second, it holds that Appellants have no Second Amendment rights to sell firearms. I'll deal with these two errors in turn.

I.

In rejecting the panel opinion's conclusion that the Ordinance burdens the right to *buy* guns, today's majority does not deny that such a right exists. Rather, it concludes only that Appellants fail sufficiently to allege a violation of that right because there are other gun sellers near the location of their proposed gun store, including a Big 5 Sporting Goods store just 600 feet away.

For the majority, a challenge to the Alameda Ordinance requires that the Ordinance be not just a burden to the exercise of Second Amendment rights, but a "meaningful[ ]," Majority Op. 21 or "substantial," Majority Op. 22, burden before any type of judicial scrutiny, beyond the very permissive "rational review" standard, be applied. This requirement misreads our precedent in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) in two ways. First, *Chovan* did not require the burden to be "meaningful" or "substantial" to proceed to the second step in the analysis, the "severity" of the burden. It required only that the right be

burdened. Second, *Chovan* explicitly required the "severity" of the burden to be examined at its second step, as necessary to choose the level of judicial scrutiny to be applied. *Id.* at 1138.

Here, when read in the light most favorable to Appellants,[1] the first amended complaint *does* allege a burden on their prospective customers' Second Amendment rights:[2] It alleges a burden on the ability of those prospective customers to obtain training, repairs, and other gun-related services *at the same location* at which they buy their firearms. *Teixeira v. County of Alameda*, 822 F.3d 1047, 1056 (9th Cir. 2016); *see also Ezell v. City of Chicago*, 651 F.3d 684, 696-97 (7th Cir. 2011) (rejecting Chicago's argument that its ban on firearms ranges passed constitutional muster because residents could travel outside the city to satisfy their needs elsewhere, explaining that "[t]he 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"). Just as

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[1] *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) (on a motion to dismiss, "[w]e . . . construe the complaint in favor of the complaining party" (internal quotation marks and ellipses omitted)).

[2] The complaint alleges that "a full service gun store located in San Lorenzo," of the kind contemplated by Appellants, "would be a success, in part, because existing retail establishments . . . do not meet customer needs and demands." Specifically, the existing "general sporting good stores" do not provide "personalized training and instruction in firearm safety and operation" as well as "arms and ammunition."

Chicago could not outlaw target ranges in Chicago, Alameda County could not outlaw combined firearm sales, training, licensure, smithy and storage services in the unincorporated areas of Alameda County.

In rejecting this burden, the majority concludes that the Second Amendment does not guarantee a particular "retail experience" to a gun buyer. *See* Majority Op. 20 n.13. This characterization of the services to be offered by Appellants pooh-poohs the alleged needs and demands of the firearm buyers to meet those several needs and demands at a single gun store. The majority assumes there is no advantage gained, nor burden lessened, to firearm customers in the exercise of their Second Amendment rights in being able to receive training, establish licensure to possess firearms, obtain smithy and maintenance services, and deposit firearms all in one place. But combining the sales of products with services necessary for their use is not merely a "retail experience"; it is an essential form to meet the "needs and demands" of customers. *See* Venkatesh Shankar, Leonard L. Berry, and Thomas Dotzel, *A Practical Guide to Combining Products and Services*, Harvard Business Review (November 2009) ("These days, many firms are trying to mix products with services in an effort to boost revenue and balance cash flows. . . . Such offerings are commonplace—think Apple (the iPod product combined with the iTunes service) and Xerox (copiers and printers bundled with maintenance or customer support services)."). Would it be a burden for a burglary victim to be required to make an actionable crime report separately at City

Hall, the Hall of Justice and the local police station, rather than call "911?" Or would the majority simply tell the burgled homeowner that he wasn't burdened by having to visit three municipal offices because he wasn't entitled to a particular "citizen's experience?"

The burden exists and was sufficiently alleged. The proper analysis under *Chovan* is as to the *severity* of the burden. But of course, if one were to admit that a "burden" existed as to the customers' Second Amendment rights, one would have to consider the severity of such burden under an intermediate or strict scrutiny test, rather than the permissive "rational review" standard invoked by the majority opinion. And that judicial scrutiny the majority opinion avoids altogether by erroneously, in my view, finding that the customers' Second Amendment rights were not "meaningfully" burdened.

Were one to find that yes, the customers' Second Amendment rights were at least lightly burdened, under *Chovan* intermediate scrutiny would have to be employed to analyze the validity of Alameda County's actions. The first question would be whether the County has a "substantial"[3] governmental interest in prohibiting gun stores to be located within 500 feet of residences. What could that substantial interest be?

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[3] *See Jackson*, 746 F.3d at 965 (identifying "the first prong of intermediate scrutiny review" as an inquiry into "whether the government's stated objective is significant, *substantial*, or important" (emphasis added)).

The majority (albeit perhaps inadvertently) supplies the answer in its first sentence: "to preserve the health and safety of its residents." Majority Op. 7; *see also Teixeira*, 822 F.3d at 1060-61 (recognizing that one of the Ordinance's asserted purposes was "protecting public safety and preventing harm in populated, well-traveled, and sensitive areas"). There are two problems with invoking this "health and safety" claim as a "substantial governmental interest" to justify the red-lining of Appellants' gun store.

First, Appellants' complaint clearly alleges that even the County doesn't believe such purported justification; thus it is pretextual. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a regulation "lack[ed] a rational relationship to legitimate state interests" because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects"); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("[A] bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). The complaint recounts the "adoptive admissions and/or undisputed facts regarding the [Alameda County Community Development Agency] Planning Department's findings." Among those admissions and undisputed facts, we find:

> "Will the use [the proposed gun store], if permitted, under all circumstances and conditions of this particular case, 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?"

The County answers: "No." As is said in Spain, "Mas claro, ni el agua" (Not even water could be clearer). This admission by the County calls into question whether the Ordinance would pass even the "rational review" test, redolent as it is in deference to government regulation. It is much less likely that the health and safety of Alameda residents can be stated with a straight face as a "substantial" or "compelling" justification for the regulation as is required under the intermediate scrutiny test. No sociological study is needed to assert that gun buyers and gun sellers constitute a "politically unpopular group" in Alameda County within the meaning of *Moreno*. That the vote to deny Appellants' variance was purely political, and not based on an independent finding of danger to citizens, is confirmed by the record's utter lack of even the most minimal explanation for the Supervisors' vote.

Second, there is nothing in the record which intimates that locating a gun store within 500 feet of a residence creates any risk to the residents. The employees of a gun store are all background checked. The purchasers must prove proper backgrounds to buy. Our "intermediate scrutiny" jurisprudence requires some type of proof of risk of the harm the government seeks to prevent to justify its prohibitive regulation. Thus, in *Chovan* statistical studies of recidivism in domestic violence offenders provided the proof of a substantial governmental health and safety interest in prohibiting

domestic violence misdemeanants from possessing firearms. *Chovan*, 735 F.3d at 1140-41. Likewise, in *Jackson*, a legislative finding that "hollow-point bullets are designed to tear larger wounds in the body by flattening and increasing in diameter on impact" was sufficient to establish that a ban on the sale of such ammunition furthered San Francisco's asserted interest of "reducing the fatality of shootings." *Jackson*, 746 F.3d at 969 (internal quotation marks omitted); *see also Ezell*, 651 F.3d at 709 (rejecting Chicago's argument that "firing ranges create the risk of accidental death or injury and attract thieves wanting to steal firearms" because the city had "produced no empirical evidence whatsoever and rested its entire defense of [its] range ban on speculation about accidents and theft").

Here, as in *Ezell*, the majority merely speculates that the proximity of guns, in a gun store, threatens the County residents' health and safety. The County doesn't even speculate. Not only do the Planning Department of the County's Community Development Agency and the West County Board of Zoning Adjustments categorically deny that the threat exists, but ironically, it is just the other way around: As noted in the panel's now-vacated decision, it is precisely in residences where the core Second Amendment right to keep and bear arms is most pronounced and protected. *See Teixeira*, 822 F.3d at 1061. The closer the store to residences, the easier for residents to buy guns and the safer the residences.

In sum, this case does not present merely a "zoning dispute" dressed up in Second Amendment garb.

Id. at 1064, (Silverman, J., dissenting). If there were a zoning measure of general application to bar retail stores of any kind within 500 feet of residences to lower traffic or noise, we wouldn't be here. But when law-abiding citizens are burdened in the exercise of their Second Amendment rights to purchase firearms and train, license, and maintain them for their self-defense, the Government must justify its actions by proving the existence of a substantial governmental interest and that its regulation is reasonably tailored to achieve such interest—the intermediate scrutiny test. *See Jackson*, 746 F.3d at 965. That, it has not done.

II.

The panel opinion persuasively lays out the historical evidence demonstrating that the right to sell firearms is "part and parcel of the historically recognized right to keep and to bear arms." *See Teixeira*, 822 F.3d at 1054-56 (citing, *inter alia*, a law in colonial Virginia providing for the "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony"; Thomas Jefferson's observation in 1793 that "our citizens have always been free to make, vend, and export arms"; and an 1871 Tennessee Supreme Court decision which recognized that "the right to keep arms, necessarily involves the right to purchase them" (internal quotation marks, brackets, and citations omitted)). I will not rehash that historical evidence here.

Instead, I will address the majority's assertion that the language of *District of Columbia v. Heller*, 554 U.S. 570 (2008), is "opaque" regarding the Second Amendment's application to "conditions and qualifications on the commercial sale of firearms." Majority Op. 26. In my view, *Heller*'s language is perfectly clear: such regulations are "presumptively lawful" *only if* they are "longstanding." *Heller*, 554 U.S. at 626-27; *see also Teixeira*, 822 F.3d at 1056-58.

In *Heller*, the Supreme Court recognized for the first time that the Second Amendment protects "an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The Court then said the following about the scope of that right:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on *longstanding* prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or *laws imposing conditions and qualifications on the commercial sale of arms*.

Id. at 626-27 (emphasis added). Then, in a footnote, the Court added: "We identify these *presumptively lawful regulatory measures* only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26 (emphasis added).

In my view, the County cannot avail itself of the italicized limitations for "longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms," because it has failed to carry its burden of establishing that the Ordinance is "longstanding" or is in a class of longstanding prohibitions as to the location of firearms sales and services in particular. Indeed, the County has offered *no* evidence demonstrating that the Ordinance is the kind of regulation which Americans would have seen as permissible at the time of the adoption of the Second Amendment. *See Teixeira*, 822 F.3d at 1058. Though the majority has unearthed its own historical narrative to that effect, *see* Majority Op. 28-34, none of those materials were presented by the County to the district court or in the County's brief on appeal.

There can be no doubt 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." In the above-quoted passage from *Heller*, the object of the preposition "on" in the phrase "cast doubt on" is a disjunctive parallel construction: "longstanding prohibitions on the possession of firearms by felons and the mentally ill, *or* laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, *or* laws imposing conditions and qualifications on the commercial sale of arms." Thus, under the series-qualifier canon, the adjective "longstanding" applies to each phrase within the parallelism—including "laws imposing conditions and qualifications on the

commercial sale of arms." *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-151 (West 2012).

True, if the adjective "longstanding" *describes* "laws imposing conditions and qualifications on the commercial sale of arms," rather than *qualifying* that phrase, then historical evidence would not be necessary to claim the carve-out. But this reading is untenable, because then *any* law "imposing conditions and qualifications on the commercial sale of arms" would be "longstanding"—even if it were invented and enacted yesterday. "Longstanding" therefore tells us *which* "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful," and the County has failed to demonstrate that the Ordinance falls within this category. *See also Teixeira*, 822 F.3d at 1058 ("That the Nation's first comprehensive zoning law did not come into existence until 1916, while not dispositive, provides at least some evidence that Alameda County's Conditional Use Permit requirement is not heir to a longstanding class of historical prohibitions or regulations."). Thus, neither the historical evidence nor the language of *Heller* supports the majority's conclusion that the Second Amendment offers no protection against regulations on the sale of firearms.

I respectfully dissent.

[Attachments To Opinion Omitted]

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN TEIXEIRA; STEVE NOBRIGA; GARY GAMAZA; CALGUNS FOUNDATION, INC., (CGF); SECOND AMENDMENT FOUNDATION, INC., (SAF); CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, (CAL-FFL), *Plaintiffs-Appellants*, v. COUNTY OF ALAMEDA; ALAMEDA COUNTY BOARD OF SUPERVISORS, as a policy making body; WILMA CHAN, in her official capacity; NATE MILEY, in his official capacity; KEITH CARSON, in his official capacity, *Defendants-Appellees*.	No. 13-17132 D.C. No. 3:12-cv-03288-WHO OPINION

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick III, District Judge, Presiding

Argued and Submitted December 8, 2015
San Francisco, California

Filed May 16, 2016

Before: Diarmuid F. O'Scannlain, Barry G. Silverman, and Carlos T. Bea, Circuit Judges.

Opinion by Judge O'Scannlain;
Partial Concurrence and Partial Dissent by Judge Silverman

COUNSEL

Donald E. J. Kilmer, Jr., San Jose, California, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the opening brief was Charles W. Hokanson, Long Beach, California.

Scott J. Feudale, County Counsel, Alameda County, California, argued the cause for the defendants-appellees. Donna R. Ziegler, County Counsel, and Mary Ellyn Gormley, Assistant County Counsel, filed the brief.

Alan Gura, Gura & Possessky, PLLC, Alexandria, Virginia, filed a brief on behalf of amicus curiae Citizens Committee for the Right to Keep and Bear Arms in support of the plaintiffs-appellants. Imran A. Khaliq, Arent Fox LLP, filed a brief on behalf of amici curiae Law Center to Prevent Gun Violence and Youth Alive! in support of the defendants-appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the right to keep and to bear arms, as recognized by the Second Amendment,

necessarily includes the right of law-abiding Americans to purchase and to sell firearms. In other words, we must determine whether the Second Amendment places any limits on regulating the commercial sale of firearms.

I

A

In the fall of 2010, John Teixeira, Steve Nobriga, and Gary Gamaza decided to open a retail business that would offer firearm training, provide gun-smith services, and sell firearms, ammunition, and gun-related equipment. The three formed a partnership named "Valley Guns & Ammo" and set to work on making their plan a reality. The trio conducted an extensive survey of Alameda County, California residents and discovered that existing retail establishments failed to satisfy customer demand. The men believed that Alameda County residents were in need of a more personal experience, and were likely to embrace a business that could provide a broader range of services not offered by existing sporting goods retailers. The City of San Leandro appeared to be the ideal location for their gun store.

Teixeira had operated an Alameda County gun store previously and was thus well aware of the maze of federal, state, and local regulations that he and his partners would have to navigate before they could open shop. Teixeira and Nobriga qualified for federal firearm licenses; all three men were eligible for California

licenses. All that remained was to ensure that Valley Guns & Ammo would be in compliance with the Alameda County code.

In unincorporated Alameda County, two species of retailers must obtain "Conditional Use Permits" before they are authorized to conduct business: "superstore[s]" and "firearms sales business[es]." Alameda Cty., Cal., Code §§ 17.54.130-132 ("the Ordinance"). The County reviews applications to determine whether there is a "public need" for a proposed business, whether the business will "affect adversely the health or safety of persons residing or working in the vicinity," and whether the business would be detrimental to the public welfare or property. *Id.* § 17.54.130. The County will not issue a permit to a prospective gun retailer until the applicant proves, among other things, that it (1) possesses the requisite state and federal licenses, (2) will store firearms and ammunition lawfully, and (3) the proposed location of the business is not within five hundred 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.* §§ 17.54.130-131. Finally, firearms sellers must obtain a county firearms dealer license. *Id.* § 17.54.131.

The Alameda County Planning Department informed Teixeira, Nobriga, and Gamaza (collectively "Teixeira") that the 500-foot zoning requirement was to be measured from the closest door of the proposed business location to the front door of any disqualifying property. Relying on such guidance, Teixeira settled on

a suitable property on Lewelling Boulevard in San Leandro. The building he chose had only one door, which faced Lewelling Boulevard. Teixeira obtained a survey showing that the closest residential property (from door to door) was located 532 feet away, across Interstate 880 in San Lorenzo Village. The next closest disqualifying properties, similarly measured, were a residence located 534 feet away and another property located 560 feet away (the latter also on the far side of the Interstate). Teixeira met with the landlord of the chosen premises, agreed to a lease, and began conducting preparations to ensure that the property would comply with myriad state and federal regulations.

The West County Board of Zoning Adjustment scheduled a hearing and the Planning Department issued a "Staff Report." Aside from raising concerns regarding compliance with the "Eden Area General Plan,"[1] the report found that there was indeed a "public need" for Valley Guns & Ammo's services, that the proposed business would not affect adversely the health or safety of local residents, that it had obtained all required licenses, and that Teixeira had sufficient knowledge to operate a gun store. The report nevertheless concluded that a zoning variance would be required because the proposed site, contrary to the survey Teixeira had commissioned, was in fact within 500 feet of a residential property and therefore failed to

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[1] The Eden Area General Plan deals largely with aesthetics and has a stated goal of "[e]stablish[ing] a clearly defined urban form and structure to the Eden Area in order to enhance the area's identity and livability."

qualify for a permit. The report explained that the County had chosen to measure from the closest building exterior wall of the proposed site to the closest residential property line rather than from door to door. As a result, it determined that the nearest residential property was only 446 feet away—54 feet too close under the 500-foot rule. The report recommended against approving a variance.

Despite the report, at a public hearing on December 14, 2011, the West County Board of Zoning Adjustments voted to grant a variance and approved the issuance of a permit. Noting the violation of the 500-foot rule, the Board reasoned that the "situation [was] unique" and thus a variance was appropriate because Interstate 880, as well as other obstructions, prevented "direct traversable access at a distance less than 500 feet from the site to a residentially zoned district." The Board determined that Teixeira's proposal otherwise complied with the Conditional Use Permit requirements, and that it was not counter to the Eden Area General Plan. Teixeira was informed that the decision would be final unless an appeal were filed by December 26, 2011.

The San Lorenzo Village Homes Association, some of whose members "are opposed to guns and their ready availability and therefore believe that gun shops should not be located within [their] community," challenged the Board's decision. On February 28, 2012, the Alameda County Board of Supervisors voted to sustain the appeal, thus revoking Teixeira's Conditional Use Permit and variance.

B

Teixeira challenged the County's decision in the United States District Court for the Northern District of California, arguing that it violated his right to due process and denied him equal protection of the law, and that the Ordinance was impermissible under the Second Amendment both facially and as applied. In preparation for the suit, Teixeira commissioned a study, which determined that, as a result of the 500-foot rule, "there are no parcels in the unincorporated areas of Alameda County which would be available for firearm retail sales." He argued that the zoning ordinance "is not reasonably related to any possible public safety concerns" and effectively "red-lin[es] . . . gun stores out of existence."

Alameda County moved to dismiss the claims and Teixeira moved for a preliminary injunction (Teixeira would later stipulate to the dismissal of his due process claim). The district court denied Teixeira's motion and dismissed the equal protection and Second Amendment claims with leave to amend. Teixeira filed an amended complaint that asserted four claims: (1) in singling out gun stores, the Ordinance, as applied, violated the Fourteenth Amendment's Equal Protection Clause; (2) the Ordinance was facially invalid under the Equal Protection Clause because it targeted guns [sic] stores but did not apply to other similarly situated businesses; (3) the Ordinance was facially invalid under the Second Amendment; and (4) the Ordinance, as applied, violated the Second Amendment. Teixeira sought declaratory and injunctive relief; damages

including costs, expenses, and lost profits; and costs and attorney's fees. In response, the County moved to dismiss, arguing that the equal protection challenges failed to state sufficient facts to support a claim and that under the Second Amendment, regulations governing the sale of firearms are presumptively valid.

The district court granted the County's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss for failure to state a claim upon which relief could be granted. Teixeira timely appealed.

II

Teixeira first renews his Equal Protection Clause claims. Because "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," we will uphold a legislative classification so long as it "neither burdens a fundamental right nor targets a suspect class," and "bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

A

Because gun store owners have not been recognized as a "suspect class," *see Olympic Arms v. Buckles*, 301 F.3d 384, 388-89 (6th Cir. 2002), Teixeira instead asserts that he is "engaged in, or assisting others in exercising a core fundamental right" and that "the Government's actions infringe on" that right. Merely

infringing on a fundamental right, however, does not implicate the Equal Protection Clause; to succeed, Teixeira must allege that he is being denied a fundamental right while others are permitted to exercise such right, and that there is no valid justification for the distinction. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."); *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969), *overruled, in part, on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). Here, "other general retailers," whom Teixeira identifies as similarly situated businesses, are also forbidden from engaging in the commercial sale of firearms absent compliance with Alameda County Land Use Code § 17.54.131. This is not a situation where one group is being denied a right while another similar group is not. And because the right to keep and to bear arms for self-defense is not only a fundamental right, *McDonald v. City of Chicago*, 561 U.S. 742, 766-78 (2010), but an enumerated one, it is more appropriately analyzed under the Second Amendment than the Equal Protection Clause. *Cf. Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for

analyzing these claims.'" (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))). Because Teixeira's equal protection challenge is "no more than a [Second] Amendment claim dressed in equal protection clothing," it is "subsumed by, and coextensive with" the former, *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001), and therefore is not cognizable under the Equal Protection Clause.

B

Nor did Teixeira adequately plead a "class-of-one" Equal Protection Clause claim. A class-of-one claim is cognizable when a "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). But Teixeira himself acknowledges that gun stores are materially different from other retail businesses when he notes that "[b]usinesses offering gun smithing services and retail firearm sales are strictly licensed and regulated by state and federal law." In neglecting to identify a similarly situated business, Teixeira failed to plead a cognizable class-of-one claim. Teixeira's Equal Protection Clause claims accordingly fail.

III

Next Teixeira argues that he has sufficiently pled a claim that Alameda County's zoning ordinance violates the Second Amendment. Because the district

court disposed of the case on the pleadings, we must assume the veracity of the factual allegations contained in Teixeira's complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The Second Amendment states that "[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." In *District of Columbia v. Heller*, the Supreme Court held that the Amendment guarantees an individual right to possess firearms for traditionally lawful purposes, such as self-defense. *See* 554 U.S. 570, 574-626 (2008). The Court subsequently applied the right against the States via the Fourteenth Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *See also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016) (per curiam).[2] Though the Supreme Court has yet to "clarify the entire field" of Second Amendment jurisprudence, *Heller*, 554 U.S. at 635, it has established a broad framework for addressing challenges such as the one at hand. *See Jackson v. City & County of San Francisco*, 746 F.3d 953, 959 (9th Cir. 2014).[3] In reviewing Alameda County's ordinance, we

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[2] Teixeira brings his Second Amendment claims, in part, on behalf of his "actual and prospective customers." As vendors "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function," *Craig v. Boren*, 429 U.S. 190, 195 (1976), Teixeira has standing to challenge the Ordinance.

[3] Although the Supreme Court denied certiorari, at least two justices expressed concern with our analysis in *Jackson*. *See Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari).

employ a two-step inquiry, which begins by asking whether a challenged law burdens conduct protected by the Second Amendment; if the answer is in the affirmative, we apply the appropriate level of scrutiny. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)); *see also Jackson*, 746 F.3d at 959-60.

A

Turning to the inquiry's first step, we must determine whether the commercial sale of firearms implicates the Second Amendment right to keep and to bear arms by reviewing the "historical understanding of the scope of the right." *Heller*, 554 U.S. at 625.

1

Teixeira ultimately bases his Second Amendment challenge on a purported right to purchase firearms—that is, a right to *acquire* weapons for self-defense. Though *Heller* did not recognize explicitly a right to purchase or to sell weapons, the Court's opinion was not intended to serve as "an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Heller*, 554 U.S. at 626. Therefore it is incumbent upon us to take a fresh look at the historical record to determine whether the right to keep and to bear arms, as understood at the time it was enshrined in the

Constitution, embraced a right to acquire firearms. *See id.* at 634-35.

Our forefathers recognized that the prohibition of commerce in firearms worked to undermine the right to keep and to bear arms. *See generally* David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 Harv. L. Rev. F. 230 (2014). The English Bill of Rights of 1689 had guaranteed "[t]hat the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by law." 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. The right of citizens to possess firearms was a proposition that necessarily extended from the fundamental tenet of natural law that a man had a right to defend himself. As William Blackstone noted:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute I W. & M. st. 2. c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

1 William Blackstone, *Commentaries* 139 (1765).

As British subjects, colonial Americans believed that they shared equally in the enjoyment of this guarantee, and that the right necessarily extended to commerce in firearms. Colonial law reflected such an

understanding. For instance, in Virginia, all persons had "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony." Laws of Va., Feb., 1676-77, Va. Stat. at Large, 2 Hening 403. It came as a shock, therefore, when the Crown sought to embargo all imports of firearms and ammunition into the colonies. 5 Acts Privy Council 401, *reprinted in Connecticut Courant*, Dec. 19, 1774, at 3. The General Committee of South Carolina declared in response that "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them." 1 John Drayton, *Memoirs of the American Revolution As Relating to the State of South-Carolina* 166 (1821) (internal quotation marks omitted). Such suspicions were not unwarranted. As war raged in 1777, Colonial Undersecretary William Knox recommended that the Americans, once conquered, be subdued, in part, by prohibiting their means of producing arms: "the Arms of all the People should be taken away . . . nor should any Foundery or manufactuary of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence." Leland J. Bellot ed., *William Knox Asks What is Fit to Be Done with America?, in* 1 *Sources of American Independence* 140, 176 (Howard H. Peckham ed., 1978).

Knox never had the opportunity to put his plan into action. Having freed themselves from the rule of King George III, Americans turned their attention to

fashioning a constitutional order that would preserve the rights they had shed blood defending at Lexington and Concord, Trenton, and Yorktown.

In ratifying the Second Amendment, the States sought to codify the English right to keep and to bear arms. *See Heller*, 554 U.S. at 599. The historical record indicates that Americans continued to believe that such right included the freedom to purchase and to sell weapons. In 1793, Thomas Jefferson noted 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). Indeed, as one commentator of the early Republic pondered, "What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . . ?" *Heller*, 554 U.S. at 583 n.7 (quoting *Some Considerations on the Game Laws* 54 (1796)). At the time the Fourteenth Amendment was ratified, which *McDonald* held applied the Second Amendment against the States, at least some American jurists simply assumed that the "right to keep arms, necessarily involve[d] the right to purchase them." *Andrews v. State*, 50 Tenn. 165, 178 (1871).

As our predecessors recognized, logic compels such an inference. 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. Indeed, where a right depends on subsidiary activity, it would make little sense if the right did not extend, at least partly, to such activity as well. The

Supreme Court recognized this principle in very different contexts when it held that "[l]imiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives," *Carey v. Population Servs., Int'l*, 431 U.S. 678, 689 (1977), and when it held that a tax on paper and ink products used by newspapers violated the First Amendment because it impermissibly burdened freedom of the press, *see Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). "[F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined" because such "unarticulated rights are implicit in enumerated guarantees." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980). One cannot truly enjoy a constitutionally protected right when the State is permitted to snuff out the means by which he exercises it; one cannot keep arms when the State prevents him from purchasing them. *Cf. Jackson*, 746 F.3d at 967 ("[W]ithout bullets, the right to bear arms would be meaningless."); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("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."). Thus, the Second Amendment "right must also include the right to *acquire* a firearm." *Illinois Ass'n of Firearms Retailers v. City of Chicago*,

961 F. Supp. 2d 928, 930 (N.D. Ill. 2014).[4] As the District Court for the Northern District of Illinois noted in striking down a Chicago ordinance that abridged such right, a "ban on gun sales and transfers prevents [citizens] from fulfilling . . . the *most fundamental* prerequisite of legal gun ownership—that of simple acquisition." *Id.* at 938; *see also Mance v. Holder*, 74 F. Supp. 3d 795, 807 n.8 (N.D. Tex. 2015) ("[O]perating a business that provides Second Amendment services is generally protected by the Second Amendment, and prohibitions on firearms sales are subject to similar scrutiny."); *Radich v. Guerrero*, No. 1:14-CV-00020, 2016 WL 1212437, at *7 (D.N. Mar. I. Mar. 28, 2016) ("If the Second Amendment individual right to keep and bear a handgun for self-defense is to have any meaning, it must protect an eligible individual's right to purchase a handgun, as well as the complimentary right to sell handguns.").

Alameda County has offered nothing to undermine our conclusion that the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms.

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[4] History and logic aside, our Second Amendment jurisprudence compels such a conclusion. In *Jackson* we held that the Second Amendment protects the sale of ammunition. *See Jackson*, 746 F.3d at 968. It would be truly bizarre if the Second Amendment did not extend similarly to the sale of firearms.

In addition to selling firearms, Teixeira alleges in his First Amended Complaint that his proposed gun store would offer various services including "state-mandated Hunter Safety Classes, Handgun Safety Certificates" and "classes in gun safety, including safe storage of firearms in accordance with state law." Because the Second Amendment protects a "right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms," *Heller*, 554 U.S. at 617, it naturally follows that

> to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

Id. at 617-18 (quoting Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1868)).

Such logic led the Seventh Circuit to conclude that a regulation prohibiting most firearm ranges within the city limits of Chicago constituted a "serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Ezell*, 651 F.3d at 708. Just like the firearm range in *Ezell*, the services Teixeira hopes to offer implicate the right to keep and to bear arms. The

Ordinance's potential interference with such services was therefore a proper basis for Teixeira's Second Amendment challenge. *See Mance*, 74 F. Supp. 3d at 807 n.8.

B

Having determined that, contrary to the district court's ruling, the Alameda County ordinance burdens conduct protected by the Second Amendment, the next step in the inquiry is to identify the proper standard of review. *Jackson*, 746 F.3d at 960-61; *Chovan*, 735 F.3d at 1136.

1

Though we typically subject a regulation interfering with a constitutionally protected right to some form of heightened scrutiny and require the Government to justify the burden it has placed on such right, the *Heller* court made clear that certain regulations enjoy more deferential treatment:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-27. The Court went on to explain in a footnote that this list of "presumptively

lawful regulatory measures" was not intended to be exhaustive. *Id.* at 627 n.26. *McDonald v. City of Chicago*, which incorporated the Second Amendment against the States, made similar assurances regarding such "longstanding regulatory measures." 561 U.S. at 786.

Teixeira argues that the passage in *Heller* is merely a prediction by the Court that such regulations would likely survive if subjected to some form of heightened scrutiny—it did not exempt listed activities from the analysis altogether. A dismissal of the language as dicta, however, is something we have considered previously and rejected. *See United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). We instead treat *Heller*'s "presumptively lawful regulatory measures" as examples of prohibitions that simply "fall outside the historical scope of the Second Amendment." *Jackson*, 746 F.3d at 959-60. Given their longstanding acceptance, such measures are not subjected to the more exacting scrutiny normally applied when reviewing a regulation that burdens a fundamental right.

But an exemption for certain "laws imposing conditions and qualifications on the commercial sale of arms," *Heller*, 554 U.S. at 626-27, does not mean that there is a categorical exception from Second Amendment scrutiny for the regulation of gun stores. If such were the case, the County could enact a total prohibition on the commercial sale of firearms. There is no question that "[s]uch a result would be untenable under *Heller.*" *Marzzarella*, 614 F.3d at 92 n.8. Indeed, if all regulations relating to the commercial sale of

firearms were exempt from heightened scrutiny, there would have been no need to specify that certain "conditions and qualifications on the commercial sale of arms" were "presumptively lawful." *Heller*, 554 U.S. at 626-27 & n.26; *see* Kopel, *supra*, at 236 ("[T]he exception proves the rule. There is a right to the commercial sale of arms, but it is a right that may be regulated by 'conditions and qualifications.' "). As discussed, *supra*, we are satisfied that the historical right that the Second Amendment enshrined embraces the purchase and sale of firearms. The proper question, therefore, is whether Alameda County's ordinance is the type of longstanding "condition[ ]" or "qualification[ ] on the commercial sale of arms," *Heller*, 554 U.S. at 626-27, whose interference with the right to keep and to bear arms historically would have been tolerated.

In *United States v. Chovan*, we held that a federal statute prohibiting domestic violence misdemeanants from possessing firearms for life was not presumptively lawful under *Heller. See* 735 F.3d at 1137. First, we determined that the statute did not represent a "longstanding" prohibition, noting that the "first federal firearm restrictions regarding violent offenders were not passed until 1938." *Id.* Second, we concluded that the Government failed to prove "that domestic violence misdemeanants in particular have historically been restricted from bearing arms." *Id.* (emphasis omitted). Thus, a regulation that merely resembles something listed by the Court in *Heller* will not avoid heightened constitutional scrutiny. Instead, the type of law in question must be both longstanding and closely

match a listed prohibition, *see id.*, 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," *Jackson*, 746 F.3d at 960. The burden is on the Government to demonstrate that a prohibition has historically fallen outside the Second Amendment's scope before it can claim a presumption of validity. *See Chovan*, 735 F.3d at 1137.

Here, the County failed to demonstrate that the Ordinance "falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected." *Jackson*, 746 F.3d at 960 (internal quotation marks omitted). Although, as the district court observed, the Ordinance is a "law[] imposing conditions and qualifications on the commercial sale of arms," (quoting *Heller*, 554 U.S. at 626-27), there has been no showing that it is "longstanding." *See Chovan*, 735 F.3d at 1137. Of course, that is not to say that the Ordinance itself had to have been on the books at the time the Second Amendment "codified a right 'inherited from our English ancestors,'" *Heller*, 554 U.S. at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)), in order to be presumed lawful. But the County has failed to advance any argument that the zoning ordinance is a type of regulation that Americans at the time of the adoption of the Second Amendment or the Fourteenth Amendment (when the right was applied against the States) would have recognized as a permissible infringement of the traditional right. While founding-era laws may have regulated where firearms

could be discharged and where gunpowder could be stored, *id.* at 632, the County has not demonstrated that any historical regulation restricted where firearm sales could occur. That the Nation's first comprehensive zoning law did not come into existence until 1916, *see* Sonia A. Hirt, *Zoned in the USA: The Origins and Implications of American Land-Use Regulation* 35 (2014), while not dispositive, provides at least some evidence that Alameda County's Conditional Use Permit requirement is not heir to a longstanding class of historical prohibitions or regulations. *See also Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("Building zone laws are of modern origin. They began in this country about 25 years ago.").[5] In any event, the County has failed to demonstrate that the Ordinance is the type of longstanding regulation that our predecessors considered an acceptable intrusion into the Second Amendment right. *See Jackson*, 746 F.3d at 960. Such burden was the County's to carry. *See Chovan*, 735 F.3d at 1137.

But such reasoning does not signify that the Ordinance violates the Second Amendment. It does mean, however, that the Ordinance must be subjected to heightened scrutiny—something beyond mere rational basis review, for, as the *Heller* Court noted, "If all that was required to overcome the right to keep and bear

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[5] Of course, even if a zoning ordinance does not represent a longstanding prohibition or regulation, it may ultimately survive Second Amendment scrutiny as "sensible zoning and other appropriately tailored regulations" for gun-related activities are most certainly permissible. *See Ezell*, 651 F.3d at 709.

arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller*, 554 U.S. at 628-29 & n.27.

2

Though neither *Heller* nor *McDonald* dictates a specific standard of scrutiny for Second Amendment challenges, *see Heller*, 554 U.S. at 628-29, "[b]oth *Heller* and *McDonald* suggest that First Amendment analogues are more appropriate," *Ezell*, 651 F.3d at 706, as does our own jurisprudence, *see Jackson*, 746 F.3d at 960-61. "When ascertaining the appropriate level of scrutiny, 'just as in the First Amendment context,' we consider: '(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right.'" *Id.* (quoting *Chovan*, 735 F.3d at 1138); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, 56 UCLA L. Rev. 1443, 1461-73 (2009).

a

"[T]he Second Amendment has 'the core lawful purpose of self-defense,'" *Jackson*, 746 F.3d at 961 (quoting *Heller*, 554 U.S. at 630)—"'the right of a law-abiding, responsible citizen to possess and carry a weapon,'" *Chovan*, 735 F.3d at 1138 (quoting *Chester*, 628 F.3d at 682-83) (emphasis omitted). The first step in selecting an appropriate level of scrutiny is to

determine how close the Alameda County ordinance comes to burdening such right.

In *Chovan*, we determined that a federal statute forbidding domestic violence misdemeanants from possessing firearms did not implicate the core Second Amendment right because, by definition, misdemeanants were not "'law-abiding, responsible citizens.'" *Id.* at 1138 (quoting *Heller*, 554 U.S. at 635). In contrast, in *Jackson* we determined that a city ordinance requiring gun owners to store firearms in locked containers in their homes did strike close to the core of the Second Amendment right because it made accessing weapons for self-defense more difficult. *See Jackson*, 746 F.3d at 963-64. Finally, in *Ezell*, the Seventh Circuit held that a regulation prohibiting most firearm ranges within the city limits of Chicago constituted a "serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Ezell*, 651 F.3d at 708.

Here, there is no question that an ordinance restricting the commercial sale of firearms would burden "the right of a law-abiding, responsible citizen to possess and carry a weapon," *Chovan*, 735 F.3d at 1138 (internal quotation marks omitted) (emphasis omitted), because it would inhibit his ability to acquire weapons.[6] We are therefore satisfied that such a

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[6] As Teixeira observes, his future customers necessarily would be "law-abiding" because state and federal laws require that gun retailers perform background checks to confirm that customers are not criminals. Furthermore, as Teixeira argued in his

regulation comes close to the core of the Second Amendment right.

b

Having determined that a law such as Alameda County's ordinance burdens protected conduct, we must next determine the severity of such burden. *See Jackson*, 746 F.3d at 960-61.

The County argues that the Ordinance "simply restricts the location of gun stores." If such is the case, the Ordinance "does not impose the sort of severe burden imposed by the handgun ban at issue in *Heller* that rendered it unconstitutional" because the Ordinance "does not substantially prevent law-abiding citizens from using firearms to defend themselves in the home." *Jackson*, 746 F.3d at 964. If the district court's assumption is indeed correct—that the Ordinance merely regulates where gun stores can be located rather than banning them—it burdens only the "*manner* in which persons may exercise their Second Amendment rights." *Chovan*, 735 F.3d at 1138. It is thus analogous to "a content-neutral speech restriction that regulates only the time, place, or manner of speech." *Jackson*, 746 F.3d at 964. To put it another way, the Ordinance would be a regulation rather than a prohibition. Though the Ordinance might implicate "the core of the Second Amendment right, [if] it does not impose

First Amended Complaint, current law requires that gun owners receive training and certifications, which his business would provide.

a substantial burden on conduct protected by the Second Amendment," intermediate scrutiny would be appropriate. *Id.* at 965. *But see Mance*, 74 F. Supp. 3d 795, 807 ("Restricting the distribution channels of [firearms] to a small fraction of the total number of possible retail outlets requires a compelling interest that is narrowly tailored.").

Teixeira's First Amended Complaint, however, alleges that Alameda County has enacted something beyond a mere regulation—Teixeira alleges that the Conditional Use Permit's 500-foot rule, as applied, amounts to a complete ban on gun stores: "according to the plaintiffs' research, which is based primarily on government agency data, there are no parcels in the unincorporated areas of Alameda County which would be available for firearm retail sales." The district court disregarded such assertion, observing that other retail establishments selling guns exist in Alameda County and "plaintiffs [fail to] allege that the 'existing retail establishments' that sell guns are unable to comply with the Ordinance." Perhaps anticipating the district court's skepticism, Teixeira's complaint alleged that other Federal Firearm Licensees located within the County were either not in fact retailers, or for whatever reason were not required to comply with the restrictions mandated by the Ordinance. Though such an assertion may yet prove false, there is no way to tell that from the face of the complaint. *See New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). And if Teixeira had been given a chance to demonstrate that the Ordinance was "not

merely regulatory," but rather functioned as a total ban on all new gun retailers, "a more rigorous showing" than even intermediate scrutiny, "if not quite 'strict scrutiny,' " would have been warranted. *Ezell*, 651 F.3d at 708.

C

Having determined that the Second Amendment compels us to apply some form of heightened scrutiny to a regulation that would significantly burden the commercial sale of firearms, we must finally examine the district court's disposition of Teixeira's claims.

1

Because Teixeira alleges here that the Ordinance's 500-foot requirement is unconstitutional on its face, we assume that the Ordinance merely regulates the location of gun stores and thus intermediate scrutiny applies. "Although courts have used various terminology to describe the intermediate scrutiny standard, all forms of the standard require (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139.

The district court erroneously believed that the Ordinance fell outside the scope of the Second Amendment and thus warranted no more than rational basis review. The court nevertheless went through the

motions of applying heightened scrutiny, contending that "the Ordinance would pass any applicable level of scrutiny." In analyzing step one, the court listed the "important governmental objectives" identified by the County: (1) "an 'interest in protecting public safety and preventing harm in populated, well-traveled, and sensitive areas such as residentially-zoned districts,'" (2) "'protecting against the potential secondary effects of gun stores'" and (3) "'preserving the character of residential zones.'"

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. *See Heller*, 554 U.S. at 626-28. Of course, reducing violent crime is without question a substantial interest, *see Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015), assuming that the "secondary effects" to which the district court referred have something to do with crime.[7]

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[7] Before the district court, the County argued that it was "reasonable to keep gun stores away from residentially-zoned districts simply because gun stores are heavily regulated, their patrons are heavily regulated, their owners are heavily regulated, and exactly the type of person should not be in a gun store can be—can be attracted to that area so there is secondary effect. And it is public safety to keep them away from the (inaudible) but it is a part of the burden of (inaudible)." It is difficult to understand why the County relies on the "secondary effects" doctrine. In the First Amendment context, the Supreme Court explained that "a city may not regulate the secondary effects of speech by suppressing the speech itself," even if reducing speech would eliminate its

Preserving the appearance of a neighborhood may also be characterized fairly as a substantial interest; on a previous occasion we held that Honolulu had "a substantial interest in protecting the aesthetic appearance of [its] communities by avoiding visual clutter" caused by "unsightly vendor stands." *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996) (internal quotation marks omitted). The district court thus properly identified at least some interests that were "significant, substantial, or important." *Chovan*, 735 F.3d at 1139.

After identifying the County's purported interests, the district court then declared that there was a "reasonable fit between the Ordinance and its objectives." Here, the district court's analysis erred. It reasoned that "[w]hile 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." The problem is that the 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.

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undesired effects. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002). Following *Heller* and *McDonald*, it is doubtful that an ordinance whose true "purpose and effect," *id.*, was to eliminate access to firearms for law-abiding citizens could survive scrutiny.

Under heightened scrutiny, the County "bears the burden of justifying its action." *Ezell*, 651 F.3d at 706. The County failed to satisfy its burden because it never justified the assertion that gun stores act as magnets for crime. Indeed, Teixeira took pains to remind the court that "all employees working at a gun store, and all clients/customers are required to be law-abiding citizens."

In upholding other gun regulations, we have not simply accepted government assertions at face value. In *Chovan*, we reviewed evidence presented by the Government in support of a statute forbidding domestic violence misdemeanants from owning firearms—specifically, a series of studies relied upon previously by the Seventh Circuit supporting the Government's assertion that "a high rate of domestic violence recidivism exists." *See id.* at 1140-41 (citing *United States v. Skoien*, 614 F.3d 638, 643-44 (7th Cir. 2010)). Likewise in *Jackson*, we required that San Francisco provide evidence to demonstrate that requiring handguns to be stored in locked containers was reasonably related to the objective of reducing handgun-related deaths:

> The record contains ample evidence that storing handguns in a locked container reduces the risk of both accidental and intentional handgun-related deaths, including suicide. Based on the evidence that locking firearms increases safety in a number of different respects, San Francisco has drawn a reasonable inference that mandating that guns be kept locked when not being carried will increase public safety and reduce firearm casualties.

> This evidence supports San Francisco's position that section 4512 is substantially related to its objective to reduce the risk of firearm injury and death in the home.

746 F.3d at 966; *cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002) ("[T]he city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects."). And in *Fyock*, we affirmed a denial of a preliminary injunction against a city's ban on large-capacity magazines because we were satisfied with the district court's determination that "pages of credible evidence, from study data to expert testimony to the opinions of Sunnyvale public officials, indicat[ed] that the Sunnyvale ordinance is substantially related to the compelling government interest in public safety." 779 F.3d at 1000.

The district court should have followed our approach in *Jackson, Chovan*, and *Fyock* and 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. Although under intermediate scrutiny the district court was not required to "impose 'an unnecessarily rigid burden of proof,'" the court should have at least required the County to demonstrate that it "reasonably believed [the evidence upon which it relied was] relevant to the problem that the [Ordinance] addresses.'"

Jackson, 746 F.3d at 965 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986)).[8] The burden was on the County to demonstrate that there was "a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139. The County failed to carry such burden.

2

Teixeira also claims that the Ordinance, as applied, effects a complete ban on gun stores in unincorporated Alameda County.

In an attempt to further its conclusion that the 500-foot rule was reasonably tailored, the district court explained that the Ordinance "merely regulates the places where gun stores may be located . . . but it does

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[8] Certain facts alleged in the First Amended Complaint cast doubt on the County's contention that enforcement of the Ordinance was designed to satisfy the objectives it articulated in court. According to the complaint, the West County Board of Zoning Adjustments initially granted the Conditional Use Permit and variance after a staff report reached, among other findings, the conclusion that Valley Guns & Ammo would not "materially affect adversely the health or safety of persons residing or working in the vicinity." The variance and permit were denied instead because the San Lorenzo Village Homes Association, objecting to the proposed business, filed an appeal challenging the County's approval. In the First Amendment context, we condemned a "sensitive use veto" in *Young v. City of Simi Valley*, 216 F.3d 807, 814 & n.8 (9th Cir. 2000), because of the potential for third parties to invoke it arbitrarily. Of course, the residents who appealed the Zoning Board's approval may have done so for valid reasons other than "hostil[ity] to the civil rights of the plaintiffs as guaranteed by the Second and Fourteenth Amendments," as Teixeira alleges.

not ban them" and "reasonable locations to operate a gun store in Alameda County exist, as evidenced by the many stores that sell guns there." As discussed, *supra*, Teixeira's First Amendment Complaint contends otherwise: "there are no parcels in the unincorporated areas of Alameda County which would be available for firearm retail sales." Though such an assertion may yet prove false, the district court could not simply assume so on a motion to dismiss. *See Iqbal*, 556 U.S. at 679 ("When there are well-pleaded factual allegations, a court should assume their veracity."). If on remand evidence does confirm that the Ordinance, as applied, completely bans new gun stores (rather than merely regulates their locations), something more exacting than intermediate scrutiny will be warranted. *See Ezell*, 651 F.3d at 708.

IV

The dissent does not share our concern over Alameda County's attempt to restrict the ability of law-abiding Americans to participate in activity protected by the Second Amendment. According to the dissent, there is no constitutional infirmity so long as firearm sales are permitted somewhere in the County. We doubt the dissent would afford challenges invoking other fundamental rights such cursory review. Would a claim challenging an Alameda County ordinance that targeted bookstores be nothing more than "a mundane zoning dispute dressed up as a [First] Amendment challenge"? *See* Dissent at 1064. Surely the residents of Alameda County could acquire their literature at

other establishments that, for whatever reason, had not been shuttered by the law.

Such an ordinance, of course, would give us great pause. Our reaction ought to be no different when it comes to challenges invoking the Second Amendment. *See Ezell*, 651 F.3d at 697. The right of law-abiding citizens to keep and to bear arms is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald*, 561 U.S. at 780. Indeed, it is one "that the Framers and ratifiers of the Fourteenth Amendment counted . . . among those fundamental rights necessary to our system of ordered liberty." *Id.* at 778. Just as we have a duty to treat with suspicion governmental encroachments on the right of citizens to engage in political speech or to practice their religion, we must exert equal diligence in ensuring that the right of the people to keep and to bear arms is not undermined by hostile regulatory measures.

We reiterate *Heller* and *McDonald*'s assurances that government enjoys substantial leeway under the Second Amendment to regulate the commercial sale of firearms. *See id.* at 786; *Heller*, 554 U.S. at 626-27. Alameda County's Ordinance may very well be permissible. Thus far, however, the County has failed to justify the burden it has placed on the right of law-abiding citizens to purchase guns. The Second Amendment requires something more rigorous than the unsubstantiated assertions offered to the district court. Consequently, we reverse the dismissal of Teixeira's

well-pled Second Amendment claims and remand for the district court to subject Alameda County's 500-foot rule to the proper level of scrutiny.

V

For the forgoing reasons, the dismissal of the Equal Protection Clause claims is **AFFIRMED** and the dismissal of the Second Amendment claims is **REVERSED**. The case is **REMANDED** for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

SILVERMAN, Circuit Judge, concurring in part and dissenting in part:

The first thing you need to know about this case is who the plaintiffs are. They are *not* individuals who claim the right to keep and bear arms for self-defense or for other lawful purposes. Rather, they are entrepreneurs (and their supporters) who want to operate a gun shop in an area of Alameda County that is not zoned for that use.

The next thing you need to know is that there is no claim that, due to the zoning ordinance in question, individuals cannot lawfully buy guns in Alameda County. It is undisputed that they *can*. The record shows that there are at least ten gun stores already operating lawfully in Alameda County.

When you clear away all the smoke, what we're dealing with here is a mundane zoning dispute dressed up as a Second Amendment challenge.

The Supreme Court has held that the Second Amendment confers an individual right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Even assuming for the sake of discussion that merchants who want to sell guns commercially have standing to assert the personal, individual rights of wholly hypothetical would-be buyers—a dubious assumption, in my opinion—the first amended complaint does not explain *how* Alameda County's zoning ordinance, on its face or as applied, impairs any *actual* person's *individual* right to bear arms, no matter what level of scrutiny is applied. Instead, the first amended complaint alleges that would-be buyers are entitled to the enhanced customer service experience that plaintiffs could provide. Now, I like good customer service as much as the next guy, but it is not a constitutional right. What's more, the Supreme Court specifically held in *Heller* that "nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27.

Conspicuously missing from this lawsuit is any honest-to-God resident of Alameda County complaining that he or she cannot lawfully buy a gun nearby. The district court was right on target in dismissing the plaintiffs' zoning case for failure to state a Second Amendment claim, because the district court correctly ruled that the ordinance restricting the location of a

gun store is "quite literally a 'law[] imposing conditions and qualifications on the commercial sale of arms. . . .' " Therefore, I respectfully dissent from that portion of the majority's opinion.[1]

[1] I agree with my colleagues that the district court correctly dismissed the equal protection claim, and I concur in the opinion to that extent.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN TEIXEIRA, et al., Plaintiffs, v. COUNTY OF ALAMEDA, et al., Defendants.	Case No. 12-cv-03288-WHO **ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE** (Filed Sep. 9, 2013) Re: Dkt. No. 44

INTRODUCTION

When the Supreme Court decided in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment confers an individual right to possess handguns in the home for self-protection—a right which the Supreme Court later held, in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), was incorporated against states and municipalities through the Fourteenth Amendment—it took pains to assure that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Supreme Court identified these sorts of laws as "presumptively lawful regulatory measures"

and emphasized that "our list does not purport to be exhaustive." *Id.* at 627 n.26. That assurance was reiterated in *McDonald*. 130 S. Ct. at 3047.

In this case, plaintiffs John Teixeira, Steve Nobriga, and Gary Gamaza (collectively, the "individual plaintiffs"), as well as The Calguns Foundation, Inc., Second Amendment Foundation, Inc., and California Association of Federal Firearms Licensees, Inc., seek on Second Amendment and Equal Protection grounds in their First Amended Complaint ("FAC") to invalidate an Alameda County ordinance that prohibits a gun store from being located within 500 feet of any residential district, school, other gun store, or establishment that sells liquor. Because the ordinance is a presumptively lawful regulatory measure under *Heller*, and because there is a rational basis to treat gun stores differently than other commercial retailers, after consideration of the parties' briefs, argument of counsel, and for the reasons below, the Motion to Dismiss filed by defendants County of Alameda, Alameda Board of Supervisors (the "Board of Supervisors"), Supervisor Wilma Chan of the Alameda Board of Supervisors in her official capacity, Supervisor Nate Miley of the Alameda Board of Supervisors in his official capacity, and Supervisor Keith Carson of the Alameda Board of Supervisors in his official capacity is GRANTED WITH PREJUDICE.

FACTUAL BACKGROUND

The plaintiffs allege the following facts: In the fall of 2010, Teixeira, Nobriga, and Gamaza formed a

partnership called Valley Guns and Ammo ("VGA") to open a gun store in Alameda County. FAC ¶ 26. VGA conducted "market research" prior to opening its store and concluded that "a full service gun store located in San Lorenzo would be a success, in part, because existing retail establishments (e.g., general sporting good [sic] stores) do not meet customer needs and demands" based on feedback from approximately 1,400 "gun enthusiasts." FAC ¶ 27.

In November 2010, the individual plaintiffs were informed that any gun store could not be located within 500 feet of any residentially zoned district, school, other gun store, or establishment that sells liquor ("disqualifying property") as mandated by Alameda County Land Use Ordinance § 17.54.131 (the "Ordinance"). FAC ¶ 32. This "is a recent land use regulation." FAC ¶ 34. In addition, any applicant for a gun store license must obtain a conditional use permit from the County. FAC ¶ 33. Alameda County only requires conditional use permits for retail stores selling guns. FAC ¶ 35. On information and belief, the plaintiffs allege that as of February 2013, Alameda County had 29 Federal Firearm Licensees, many of whom "are not located in commercial buildings open for retail firearm sales." FAC ¶ 36. The plaintiffs also allege on information and belief that the Ordinance's requirements have not been imposed on "many" of the 29 licensees, who are either not complying or were never required to comply with the restrictions imposed against VGA. FAC ¶ 37.

The Alameda County Planning Department told VGA that the 500-foot measurement would be taken from the closest door in the proposed gun store to the front door of any disqualifying property. FAC ¶ 38. Based on this requirement, the individual plaintiffs leased property at 488 Lewelling Boulevard, San Leandro, California. FAC ¶ 39. The property only has one door facing Lewelling Boulevard. FAC ¶ 40. A survey the individual plaintiffs obtained showed that no disqualifying property is within a 500-foot radius of the front door of VGA's property. FAC ¶¶ 41-42.

On November 16, 2011, the West County Board of Zoning Adjustment (the "Zoning Board") was scheduled to hold a hearing to determine whether VGA should be issued a conditional use permit and a variance (although the hearing was ultimately rescheduled). FAC ¶ 44. A staff report based on information publicly available prior to the hearing concluded that VGA's property was less than 500 feet from a disqualifying property and recommended denying a variance. FAC ¶ 44. It concluded that "[t]he measurement taken from the closest exterior wall of the gun shop to the closest property line of a residentially zoned district is less than 500 feet in two directions." FAC Ex. A at 8. Specifically, the gun shop was measured to be 446 feet away from residences on Albion Avenue and 446 feet away from residentially zoned properties on Paseo del Rio in San Lorenzo Village, which is separated from the gun shop by Interstate 880. FAC Ex. A. at 8. The County "measured from the closest building exterior wall of the gun shop to the property line of the

residentially zoned district." FAC Ex. A at 3. The report reflects that there are no other disqualifying properties within 500 feet of the gun store. FAC Ex. A at 8.

The staff report tentatively found a "public need" to "provide the opportunity to the public to purchase firearms in a qualified, licensed environment." FAC Ex. A at 9. The report also tentatively found that the proposed use relates to other land uses and facilities in the vicinity, and 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 injurious to property or improvements in the neighborhood." FAC Ex. A at 9. However, the report found that the gun store would be "contrary to the specific intent clauses or performance standards for the District in which it is to be considered" based on the fact that the location does not meet the 500-foot rule. FAC Ex. A at 9. It noted that one of the residential sites is on the other side of a highway, "which cannot be traversed," but the other site "can be easily accessed." FAC Ex. A at 10. The plaintiffs allege that there is a fence between the gun store and the latter site, but the report does not reflect this. FAC ¶¶ 46(f)(ii)(2) and 46(g)(i). The report tentatively found that a variance for the gun store "will be detrimental to persons or property in the neighborhood or to the public welfare" because it is less than 500 feet away from the residentially zoned properties near Albion Avenue, but "there would be no detriment" to San Lorenzo Village due to the highway. FAC Ex. A at 11.

The Zoning Board held the hearing on December 24, 2011, after which it issued a revised staff report. The revised report acknowledged that different ways of defining the starting point for the measurement would alter the distance to the nearest residentially zoned property. FAC Ex. B at 5. Nonetheless, under all three ways it applied (starting from the gun shop's building wall, front door, or property line), the Zoning Board still found the gun shop to be less than 500 feet away from the closest residence. FAC Ex. B at 5. Based on these measurements, the staff recommended denying a conditional use permit and variance to VGA. FAC Ex. B at 2.

The plaintiffs used the front door of the gun shop as a starting point to measure distance, however, and submitted its own figure showing that the gun shop was at least 532 feet away from the closest residence. FAC ¶ 47(c). The plaintiffs claim that the Zoning Board's measurements are wrong because it measured "from the front doors of the disqualifying residential properties to the closest possible part" of VGA's building—"a brick wall with no door." FAC ¶ 45. By "moving the end-points," VGA did not qualify for a variance. FAC ¶ 45.

Despite the staff report's recommendation, the Zoning Board passed a resolution granting VGA a conditional use permit and variance. FAC Ex. C. In a December 16, 2011, letter, the individual plaintiffs were informed that the resolution would be effective on December 26, 2011, unless an appeal was filed with the Alameda County Planning Department. FAC ¶¶ 50,

52. On February 23, 2012, the individual plaintiffs were informed that the San Lorenzo Village Homes Association filed an appeal on or after December 29, 2011, challenging the Zoning Board's resolution. FAC ¶ 52. On February 28, 2012, the Board of Supervisors, "acting through Supervisors CHAN, MILEY and CARSON voted to sustain the late-filed appeal" and overturned the Zoning Board's decision, thereby revoking the conditional use permit and variance granted to VGA. FAC ¶ 54.

The plaintiffs allege that the Board of Supervisors "appeared to be acting with deliberate indifference to the rights of the Plaintiffs and overt hostility to the fact that it was a gun store." FAC ¶ 55. They argue that the report found no public safety concerns with granting the permit and variance, and that the 500-foot rule is "wholly arbitrary" and "erroneous and unreasonable." FAC ¶ 55. The individual plaintiffs tried to find other properties that they could use as a gun store; they also commissioned a study, which found that "there are no parcels in the unincorporated areas of Alameda County which would be available for firearm retail sales" due to the 500-foot rule. FAC ¶¶ 60-61.

PROCEDURAL BACKGROUND

On June 25, 2012, the plaintiffs filed their original complaint asserting four causes of action: (1) denial of Due Process; (2) denial of Equal Protection; (3) violation of the Second Amendment on its face; and (4) violation of the Second Amendment as applied. Dkt. No. 1

¶¶ 48, 50, 52, 54.[1] Following the defendants' motion to dismiss (Dkt. No. 13) and the plaintiffs motion for a preliminary injunction (Dkt. No. 21), on February 26, 2013, the Honorable Susan Illston dismissed with leave to amend the plaintiffs' Equal Protection and Second Amendment claims, and denied the plaintiffs' motion for a preliminary injunction (Dkt. No. 37).

The plaintiffs filed the FAC on April 1, 2013. Dkt. No. 40. In it, the plaintiffs assert that the 500-foot rule "is not reasonably related to any possible public safety concerns," and that Alameda County is unable to "articulate how the '500 Foot Rule' is narrowly tailored to achieve any legitimate government interest." FAC ¶ 63. The First Cause of Action alleges that the defendants "have intentionally discriminated against" the individual plaintiffs by "not requiring the [conditional use permit] of similar situated parties" and that they violated the Equal Protection Clause as applied to the individual plaintiffs. FAC ¶¶ 68-75. The Second Cause of Action challenges the requirements for getting a conditional use permit, in particular, the 500-foot rule, which allegedly gives gun stores "different treatment from similarly situated retail businesses," as unconstitutional on its face under the Equal Protection Clause. FAC ¶ 74. The Third Cause of Action challenges the Ordinance as "hav[ing] no proper basis" and being "constitutionally impermissible" on its face under the Second Amendment. FAC ¶ 78. The Fourth Cause of Action alleges that the 500-foot rule "is irrational as

[1] The parties later stipulated to dismissing the Due Process claim.

applied to the facts of this case" and thus violates the Second Amendment as applied to the individual plaintiffs. FAC ¶ 80. The plaintiffs seek declaratory and injunctive relief stating that the Board of Supervisor's grant of the San Lorenzo Village Homes Association's appeal was improper and that the 500-foot rule is unconstitutional facially and as-applied, and they also seek damages and attorney's fees.

The defendants then moved to dismiss the FAC. Dkt. No. 44.

LEGAL STANDARD

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party,"*Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008), drawing all "reasonable inferences" from those facts in the nonmoving party's favor, *Knievel v. ESPN*, 393 F.3d 1068, 1080 (9th Cir. 2005). However, a complaint may be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[T]he tenet that a court must

accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 678. Similarly, "a complaint [does not] suffice if it tenders naked assertions devoid of further factual enhancement," *id.* (quotation marks and brackets omitted), and the court need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations," *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

If a motion to dismiss is granted, a court should normally grant leave to amend unless it determines that the pleading could not possibly be cured by allegations of other facts. *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990).[2]

DISCUSSION

I. LAW OF THE CASE

The plaintiffs argue that the Court's "ruling on the prior motion to dismiss [Order Granting Defendants' Motion to Dismiss and Denying Plaintiffs' Motion for a Preliminary Injunction ("Order")] was clearly erroneous." Opp'n 1. They dispute the Court's conclusion that the Ordinance is "presumptively valid," and say that the Court was incorrect to "suggest[ ] that there was [no] Second Amendment right outside of one's home" (which the Court did not suggest). Opp'n 1. They assert that because the ruling was only an order of this Court

[2] At oral argument on the Motion to Dismiss the FAC, plaintiffs conceded that they had no additional facts to allege in support of their claims.

and not an appellate court, the Court "is absolutely free to, and should," revisit its earlier Order since the "law of the case" doctrine does not apply here. Opp'n 6.

While it is true, as the plaintiffs say, that the "law of the case" doctrine prohibits a trial court from revisiting a decision by an appellate court, Opp'n 1, it is not true that the doctrine does not caution a trial court against reconsidering its own prior decisions. *See United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) (stating that "reconsideration of legal questions previously decided should be avoided"). The Ninth Circuit has said that "[u]nder the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue *previously decided by the same court*, or a higher court, in the same case." *United States v. Smith*, 389 F.3d 944, 948 (9th Cir. 2004) (citing *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988)) (emphasis added). "Issues that a district court determines during pretrial motions become law of the case." *United States v. Phillips*, 367 F.3d 846, 856 (9th Cir. 2004). "The doctrine is a judicial invention designed to aid in the efficient operation of court affairs, and is founded upon the sound public policy that litigation must come to an end." *Smith*, 389 F.3d at 948 (citations and quotation marks omitted). At the same time, the "law of the case" doctrine is "not an inexorable command," *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988) (citation omitted), and is "discretionary." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

Asking the Court to wholly revise its interpretation of the law applied in an earlier motion to dismiss merely because a new motion to dismiss is pending, without providing the Court "strong and reasonable [grounds for deciding] that the earlier ruling was wrong," goes against the purpose and intent of the doctrine. *Smith*, 389 F.3d at 949. Here, the Court will exercise its discretion to follow the law as explained in its earlier Order.

II. PLAINTIFFS DO NOT STATE A CLAIM UNDER THE SECOND AMENDMENT.

A. Third Cause of Action: Facial Second Amendment Challenge

Plaintiffs facially challenge the Ordinance under the Second Amendment. "A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no* set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). Plaintiffs fail to sufficiently allege that the Ordinance is facially unconstitutional under the Second Amendment.

The Court noted in its earlier Order that "[n]either the Supreme Court nor the Ninth Circuit has articulated the precise methodology to be applied to Second Amendment claims." Order 7. Drawing from other authorities, however, the Court applied a two-step analysis that most other courts have applied in this context. As the Fifth Circuit explained it, "the first step is to

determine whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee; 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." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (Heller II); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese,*627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). *But see United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010).).

The first step of the analysis is dispositive in this case: under the Supreme Court's decisions in *Heller* and *McDonald*, the Ordinance is presumptively lawful. Critically, as previously noted, the Supreme Court has cautioned that *nothing* in the *Heller* opinion "should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. The Supreme Court explained that its list of "presumptively lawful regulatory measures" was "not [] exhaustive." *Id.* at 627 n.26. It reiterated these principles two years later in *McDonald*, 130

S. Ct. at 3047 ("We repeat those assurances here."), and the Ninth Circuit followed them in *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012).[3]

The Ordinance, which requires that gun stores obtain a permit to operate and be at least 500 feet away from sensitive locations are regulatory measures, is quite literally a "law[ ] imposing conditions and qualifications on the commercial sale of arms," which the Supreme Court identified as a type of regulatory measure that is presumptively lawful. *Heller*, 554 U.S. at 626-27. In addition, the Ordinance shares the same concerns as "laws forbidding the carrying of firearms in sensitive places" because it requires the selling of guns to occur at least 500 feet away from schools, residences, establishments that sell liquor, and other gun stores. *Id.* It is not a total ban on gun sales or

[3] The plaintiffs argue that *Heller*'s discussion of presumptively lawful regulatory measures is merely dicta and provides "no basis" to decide this case. Opp'n 10-12. The Ninth Circuit has explicitly rejected the contention that this portion of *Heller* is somehow not controlling. In *United States v. Vongxay*, the court said, "[The defendant] nevertheless contends that the Court's language about certain long-standing restrictions on gun possession is dicta, and therefore not binding. We disagree." 594 F.3d 1111, 1115 (9th Cir. 2010). Even if the Supreme Court's statements were dicta, as the Ninth Circuit has repeatedly said, courts "do not treat considered dicta from the Supreme Court lightly." *United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013). Given the importance of the issues of first impression addressed by *Heller*, and the fact that the Supreme Court reaffirmed its statements about presumptive lawfulness again in *McDonald*, 130 S. Ct. at 3047 ("We repeat those assurances here."), the plaintiffs cannot seriously argue that the Supreme Court's analysis was not "considered." This Court follows the Supreme Court's guidance.

purchases in Alameda County. On its face, the Ordinance is part of the Supreme Court's non-exhaustive list of regulatory measures that are constitutional under the Second Amendment. *Id.*

While both the Supreme Court and the Ninth Circuit left unanswered precisely how broad the scope of the Second Amendment is, *Nordyke*, 681 F.3d at 1044, they have not extended the protections of the Second Amendment to the sale or purchase of guns. Plaintiffs have failed to explain how the Ordinance unconstitutionally burdened their "core right to possess a gun in the home for self-defense articulated in *Heller*" or any right they have to sell or purchase guns—"a right which the U.S. Supreme Court has yet to recognize." Order 8. The Ninth Circuit observed that "[t]he Supreme Court has made it clear that the government can continue to regulate commercial gun dealing." *United States v. Castro*, No. 10-50160, 2011 WL 6157466, at *1 (9th Cir. Nov. 28, 2011), *cert. denied*, 132 S. Ct. 1816 (2012). In *Nordyke v. King*, the Ninth Circuit upheld an Alameda County ban on guns on County property due to such property's nature as a "sensitive" place. 681 F.3d at 1044. As another court in this circuit held, "*Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation. . . ." *Mont. Shooting Sports Ass'n v. Holder*, CV-09-147-DWM-JCL, 2010 WL 3926029, at *21 (D. Mont. Aug. 31, 2010), *adopted by* CV-09-147-DWM-JCL, 2010 WL 3909431, at *1 (D. Mont. Sept. 29, 2010).

Nor is the Court aware of any authority outside the Ninth Circuit that would support plaintiffs' claims. The Fourth Circuit has explicitly held that "although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding right to sell a firearm." *United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011). Analogizing from the First Amendment context, the Fourth Circuit in *Chafin* cited the Supreme Court's decision in *United States v. 12 200-Foot Reels of Super 8mm. Film* for the proposition that "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." 413 U.S. 123, 128 (1973). And the Third Circuit's understanding is persuasive that the "longstanding limitations" listed in *Heller*—such as laws regulating the sale of guns—are "exceptions to the right to bear arms." *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

The plaintiffs cite to two Seventh Circuit cases as support for deeming the Ordinance unconstitutional: *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Neither helps them. In *Ezell v. City of Chicago*, where the Seventh Circuit applied the same two-step approach detailed above to assess whether the lower court erred in denying a preliminary injunction against the law at issue, the circuit court found that the plaintiffs showed a strong likelihood of establishing that a ban on firing ranges in Chicago violated the Second Amendment. But *Ezell* is inapposite because, as the Seventh Circuit

noted, "[t]he City's firing-range ban is not merely regulatory; it *prohibits* the law-abiding, responsible citizens of Chicago from engaging in target practice." *Ezell*, 651 F.3d at 708. *Ezell* recognized the difference between a ban and "laws that merely regulate rather than restrict, and modest burdens . . . may be more easily justified." *Id.* Here, the Ordinance merely regulates how far a gun store must be from certain types of sensitive establishments—a requirement that gun stores be at least 500 feet from certain areas is far from the total ban on firing ranges in *Ezell*.

The plaintiffs' reliance on *Moore v. Madigan* is similarly misplaced because that case also involved a near-total ban, this time on carrying a gun in public. The Seventh Circuit found the law to be unconstitutional, but stated that "reasonable limitations, consistent with the public safety," could save the law. 702 F.3d at 942. *Moore* does not help the plaintiffs any more than *Ezell* does: the Ordinance is not a ban, and possessing a gun implicates a different interest than selling one. The Ordinance is a "reasonable limitation[ ], consistent with the public safety" that creates a "barrier" that is "*de minimis*." Order 9.

Given the *Heller* court's recognition that "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful," and the fact that the Ordinance falls squarely into that category by its terms, the plaintiffs fail to adequately allege that the Ordinance is facially unconstitutional. They are unable to show that there is "no set of circumstances [ ]

under which the Ordinance would be valid." *Salerno*, 481 U.S. at 745.

The Court's decision that the Ordinance is presumptively lawful makes unnecessary any analysis under the second step in the Second Amendment inquiry, i.e., applying the applicable level of constitutional scrutiny. Suffice it to say, the Ordinance would pass any applicable level of scrutiny.

First, the Ordinance is based on important governmental objectives. Alameda County has an "interest in protecting public safety and preventing harm in populated, well-traveled, and sensitive areas such as residentially-zoned districts." Reply 6. It "has an interest in protecting against the potential secondary effects of gun stores" and "a substantial interest in preserving the character of residential zones." *Id.* The Supreme Court has held that "[t]he State's interest in protecting the well-being [and] tranquility . . . of the home is certainly of the highest order." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). The Ninth Circuit also held that local governments "have a substantial interest in protecting the aesthetic appearance of their communities" and "in assuring safe [] circulation on their streets." *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998); *see also Schneider v. State of N.J., Town of Irvington*, 308 U.S. 147, 160 (1938) (holding that municipalities have an interest in "public safety, health, [and] welfare").

Second, there is a reasonable fit between the Ordinance and its objectives. Alameda County's

Ordinance only regulates *where* a gun store may be located, restricting them from being within 500 feet of sensitive places. 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. For these same reasons, another judge in this district has upheld a restriction against gun possession within 1,000 feet of a school—double the distance mandated by the Ordinance here—stating that such a regulation would be constitutional "[u]nder any of the potentially applicable levels of scrutiny." *Hall v. Garcia*, No. 10-cv-3799-RS, 2011 WL 995933, at *4 (N.D. Cal. March 17, 2011).

At oral argument, plaintiffs suggested for the first time that the appropriate analysis for regulations that impinge on Second Amendment rights is the three-part analysis used in First Amendment cases involving adult bookstores and movie theaters: whether the ordinance is a ban or a time, place and manner regulation; whether the ordinance is content neutral or content based; and, whether the ordinance is designed to serve a substantial government interest and reasonable alternative avenues of communication remain available. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46-47, 50 (1986) (holding that a municipal ordinance that prohibited any adult movie theater from being within 1,000 feet of any residential zone, family dwelling, church, park, or school is valid). The Court is unaware of (nor do the plaintiffs cite) any authority

that applied this analysis in the Second Amendment context, nor will it adopt this analytical framework because a gun store, by its nature, does not have the expressive characteristics that allow for this sort of content-based analysis. If it did, the Ordinance would pass muster anyway. First, as discussed above, the Ordinance merely regulates the places where gun stores may be located, i.e., away from sensitive locations, but it does not ban them. Second, the Ordinance is content-neutral because it is aimed at the secondary effects of gun stores on the surrounding neighborhood, not to suppress gun ownership. *City of Renton*, 475 U.S. at 48. Finally, as discussed above, the Ordinance was designed to serve a substantial government interest. Furthermore, reasonable locations to operate a gun store in Alameda County exist, as evidenced by the many stores that sell guns there. Thus even if this alternative analysis were applicable, it would not help the plaintiffs.

The crux of *Heller* and *McDonald* is that there is a "personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*, 130 S. Ct. at 3044. *See United States v. Morsette*, 622 F.3d 1200, 1202 (9th Cir. 2010) ("*Heller* and *McDonald* concern the right to possess a firearm in one's home for self-defense."). But that does not mean that there is a correlative right to sell firearms. As discussed above, the Ordinance is presumptively valid. It survives any applicable level of scrutiny or alternative analysis proposed by the plaintiffs. Because the plaintiffs fail to adequately allege that "no set of

circumstances exists under which the [Ordinance] would be valid," *Salerno*, 481 U.S. at 745, their facial challenge under the Second Amendment cannot succeed. *See United States v. Kaczynski*, 551 F.3d 1120, 1125 (9th Cir. 2009) ("a generally applicable statute is not facially invalid unless the statute can *never* be applied in a constitutional manner") (quotation marks omitted).

B. Fourth Cause of Action: As-Applied Second Amendment Challenge

The plaintiffs also make an as-applied challenge to the Ordinance. "An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular [ ] activity, even though the law may be capable of valid application to others." *Foti*, 146 F.3d at 635. But the plaintiffs plead no facts showing that the Ordinance is unconstitutional as applied to them, and for the reasons discussed with respect to their facial challenge they have failed to state a claim.

The FAC states that the Ordinance "is irrational as applied to the facts of this case and cannot withstand any form of constitutional scrutiny" and has "no proper basis and [is] constitutionally impermissible." FAC ¶¶ 80-81. These assertions are nothing more than "legal conclusions . . . cast in the form of factual allegations" and cannot support a cause of action. *W. Min. Council*, 643 F.2d at 624.

The plaintiffs also allege that "existing retail establishments (e.g., general sporting good [sic] stores)

do not meet customer needs and demands. In fact, gun stores that can provide the level of personal service contemplated by VGA are a central and important resource for individuals trying to exercise their Second Amendment rights" because "they also provide personalized training and instruction in firearm safety and operation." FAC ¶ 27. The plaintiffs also state that "[t]he burdens on the plaintiffs and their customers' Second Amendment rights include . . . a restriction on convenient access to a neighborhood gun store," resulting in customers' "having to travel to other, more remote locations." FAC ¶ 45.

Assuming the plaintiffs have standing to represent their prospective customers' interests, it is hard to understand how these facts would support an as-applied challenge. They are equally applicable to any prospective gun store owner or customer. Further, these allegations are insufficient to show that Alameda County residents' right to possess guns is impinged by the Ordinance. Although the plaintiffs allege that some customers may appreciate additional gun stores that provide a better level of "personal service" and "personalized training and instruction," the plaintiffs do not allege that customers cannot buy guns in Alameda County or cannot receive training and instruction. The FAC makes quite clear that there *are* existing retail establishments operating in Alameda County that provide guns. Indeed, the FAC admits that Teixeira himself "had previously owned a gun store in Castro Valley," located in Alameda County. FAC ¶ 29. Teixeira makes no allegation that the Ordinance hampered his

ability to operate a gun store before, nor do the plaintiffs allege that the "existing retail establishments" that sell guns are unable to comply with the Ordinance.

The Court is unaware of any authority stating or implying that the Second Amendment contemplates a right to "convenient access to a neighborhood gun store." FAC ¶ 45. The Second Amendment's core right of the individual to possess guns is not impinged by the Ordinance as applied to the plaintiffs since it merely regulates the distance that all gun stores must be from certain sensitive establishments. The Ordinance is presumptively lawful. The plaintiffs' Second Amendment as-applied challenge does not state facts sufficient to support a cause of action.

III. PLAINTIFFS DO NOT STATE A CLAIM UNDER THE EQUAL PROTECTION CLAUSE.

A. Second Cause of Action: Facial Equal Protection Challenge

The essence of the plaintiffs' Equal Protection claims is that gun shops "are being treated differently than other retailers because they are [] gun shop[s] and [] there is no justification for such disparate treatment." Opp'n 15. The plaintiffs point out that gun stores are required to obtain conditional use permits while other retailers are not—allegedly for no apparent reason—thus violating their right to Equal Protection. *Id*. at 15-16.

As with the facial challenge to the Ordinance under the Second Amendment, to succeed on a facial challenge under the Equal Protection Clause, the plaintiffs must show "that no set of circumstances exists under which the [a]ct would be valid." *Salerno*, 481 U.S. at 745. And as with the facial Second Amendment challenge, the plaintiffs fail to adequately plead that the Ordinance is facially unconstitutional under the Equal Protection Clause.

In *Freeman v. City of Santa Ana*, the Ninth Circuit explained that "[t]he first step in equal protection analysis is to identify the [ ] classification of groups." 68 F.3d 1180, 1187 (9th Cir. 1995) (citations omitted). "To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people." *Id.* Based on the class identified, the next step is to determine the appropriate level of scrutiny. *Id.* "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

The plaintiffs cite no authority that gun store owners are a protected class because they have an "inherently suspect characteristic," or, as discussed above, that there is a "fundamental right" to selling guns. Even assuming that gun shops constitute a cognizable class, Alameda County need only have a rational basis for passing the Ordinance.

Under the rational basis test, a "classification must be upheld against equal protection challenge if there is *any* reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (emphasis added). "A legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 320-21 (citations and quotation marks omitted).

The Ordinance passes the rational basis test. The plaintiffs have not "allege[d] facts sufficient to overcome the presumption of rationality that applies to government classifications." *See Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992) (applying the rational basis standard on a motion to dismiss). Under a section titled "Facts Relating to the '500 Foot Rule,'" the plaintiffs merely state in conclusory fashion that the Ordinance "is not reasonably related to any possible public safety concerns a retail gun store might raise . . . [n]or does Alameda County articulate how the '500 Foot Rule' is narrowly tailored to achieve any legitimate government interest." FAC ¶ 63. Without pleading facts to support these conclusions, the plaintiffs have not sufficiently pleaded a cause of action.

Nonetheless, the defendants explain that the 500-feet rule is intended to "protect[] public safety and prevent[] harm in populated, well-traveled, and sensitive areas such as residentially-zoned districts," as well as to "protect[] against the potential secondary effects of gun stores" and to "preserv[e] the character of residential zones." Reply 6. They also justify their classification of gun stores separate from other retail stores based on "the many state and federal laws that regulate retail firearm sales." Br. 7 (citing FAC ¶¶ 17, 19-25). As discussed above, these are legitimate aims and rationales for a local government to act upon. To establish the constitutionality of the Ordinance, the defendants do not have to demonstrate that treating gun stores differently from other retailers is the best way to achieve those goals. The Ordinance satisfies the rational basis test.[4]

[4] Even if the Ordinance had to satisfy a heightened level of scrutiny because it jeopardizes the exercise of a fundamental right, it would do so easily. Because gun stores are especially susceptible to issues of public safety, which the Ordinance is intended to address, the statutory classification is undoubtedly "substantially related" to Alameda County's "important governmental objective" of "protecting public safety and preventing harm." Reply 6; *see Clark*, 486 U.S. at 461 ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."). The plaintiffs allege no facts to show that this is not the case.

B. First Cause of Action: As-Applied Equal Protection Challenge

The plaintiffs fail to allege that the Ordinance as applied to them violates their Equal Protection rights. "In order to claim a violation of equal protection in a class of one case, the plaintiff must establish that the [government] intentionally, and without rational basis, treated the plaintiff differently from others similarly situated." *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008) (citation omitted). The plaintiff bears the burden of pleading what other entities are similarly situated with him and how they are so. *Scocca v. Smith*, No. 11-cv-1318-EMC, 2012 WL 2375203, at *5 (N.D. Cal. June 22, 2012). "A class of one plaintiff must show that the discriminatory treatment was intentionally directed just at him, as opposed to being an accident or a random act." *N. Pacifica*, 526 F.3d at 486 (ellipses and quotation marks omitted). Showing that the treatment was "intentional" does not require showing subjective ill will. *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011).

The plaintiffs fail to adequately allege that the defendants treated the individual plaintiffs differently from any other similarly situated party, or that the defendants did so intentionally and without a rational basis. The plaintiffs state, "Plaintiffs' position is that they are similarly situated with all other general retailers who are entitled to open shop in commercially zoned areas." Opp'n 16. They argue that their allegation that they "are being treated differently than other retailers because they are a gun shop and that there is

no justification for such disparate treatment," coupled with their assertion that "Defendants are using zoning laws to redline or ban retail gun stores from Unincorporated Alameda County," is sufficient to plead a violation of Equal Protection. Opp'n 15-16. The plaintiffs point to the fact that before the Board of Supervisors passed the Ordinance, gun stores were "not distinguished from other retail stores." RJN Ex. H at 4. Thus, they argue that the defendants should be estopped from claiming that gun stores are dissimilar to other retailers. Opp'n 16.

The plaintiffs meet none of the criteria to successfully plead that they are "a class of one." Their allegations appear equally applicable to any other prospective gun store owner covered by the Ordinance. There is a rational basis for the Ordinance. And there is no allegation with facts showing that the plaintiffs were treated differently than others similarly situated. The plaintiffs reiterated at oral argument, as they said in their papers, that they believe gun stores are similarly situated to other commercial retailers that do not sell weapons. This is simply wrong, as underscored by plaintiffs' recognition that gun stores are "strictly licensed and regulated by state and federal law." By those laws and regulations Congress and state legislatures have demonstrated their understanding that gun stores are different from, say, clothing or convenience stores. FAC ¶¶ 17-24.

Finally, the plaintiffs' argument that the defendants have no right to enact the Ordinance merely because gun stores were not regulated in this manner

before cannot be taken seriously otherwise, new legislation could never be passed.

Because the plaintiffs fail to adequately plead that the defendants intentionally treated the individual plaintiffs differently from others similarly situated with no rational basis, they fail to adequately allege a violation of Equal Protection as the Ordinance was applied to them.[5]

CONCLUSION

The plaintiffs fail to adequately plead that the Ordinance is facially unconstitutional under the Second Amendment and Equal Protection Clause. The plaintiffs also fail to adequately plead that the Ordinance

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[5] To the extent the plaintiffs plead that they are being treated differently than the other 29 Federal Firearm Licensees, their claim still fails. At oral argument, the plaintiffs made clear that this is not their claim, but the FAC is somewhat ambiguous on this point so the Court will address it in passing. The plaintiffs allege that many of those licensees "are not located in commercial buildings open for retail firearm sales," and that the Ordinance's requirements have not been imposed on "many" of the 29 licensees, who are either not complying or were never required to comply with the restrictions imposed against VGA. FAC ¶¶ 36-37. However, the plaintiffs do not explain or provide any facts to show how these licensees are similarly situated with the individual plaintiffs. *Scocca*, 2012 WL 2375203, at *5. Even assuming the 29 licensees are similarly situated, the plaintiffs do not allege any facts to *plausibly* show that the defendants *intentionally* treated the individual plaintiffs differently or that the defendants did so without a rational basis beyond the defendants' bare assertions, e.g., that the defendants sought to "trick" the individual plaintiffs or "red-lin[e] them out of existence." FAC ¶¶ 45, 63.

was unconstitutionally applied to them under the Second Amendment and Equal Protection Clause.

At oral argument, the Court inquired whether the plaintiffs could or wished to plead any additional facts in a further amendment to their complaint. The plaintiffs declined. Accordingly, the First Amended Complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: September 9, 2013

/s/ William H. Orrick
WILLIAM H. ORRICK
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN TEIXEIRA, *et al.*, Plaintiffs, v. COUNTY OF ALAMEDA, *et al.*, Defendants. _______________________/	No. C 12-03288 SI **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** (Filed Feb. 26, 2013)

Now before the Court are defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and plaintiffs' motion for a preliminary injunction. Plaintiffs have filed an opposition to the motion to dismiss, defendants have filed an opposition to the motion for a preliminary injunction, and both parties have filed replies. In addition, both parties have submitted supplemental briefing pursuant to the Court's December 18, 2012 Order. Docket No. 30. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument. The defendants' motion to dismiss is GRANTED and the plaintiffs' motion for a preliminary injunction is DENIED for the reasons set forth below.

BACKGROUND

In 2010, John Teixeira, Steven Nobriga, and Gary Gamaza formed a partnership called Valley Guns and Ammo ("VGA") in order to open a gun store in Alameda County. Compl. ¶ 17. In April of 2011, Teixeira, Nobriga, and Gamaza located a property in San Leandro where they planned to open the store. *Id.* ¶ 25.

Under Alameda County Land Use Ordinance § 17.54.131 ("Ordinance"), a gun store cannot be located within 500 feet of residentially zoned areas and certain kinds of schools and businesses. *Id.* ¶ 21. As part of their preliminary preparations, Teixeira, Nobriga, and Gamaza obtained a survey which measured from the front door of their property to the front door of the nearest residential properties and found that the distance was over 500 feet. *Id.* ¶ 26-27.

The West County Board of Zoning Adjustments ("WBZA") held a hearing on VGA's application for a conditional use permit on December 14, 2011. *Id.* ¶ 30. The staff reports submitted to WBZA found that the distance from the proposed location to the nearest residence was less than 500 feet; this measurement was from the front door of the closest house in the neighboring residential zone to the closest part of plaintiffs' building. *Id.* ¶ 31. Thus, WBZA found that the location did not meet the requirements of the Ordinance. However, WBZA granted VGA a variance and issued the conditional use permit in Resolution No. Z-11-70. *Id.* ¶ 32.

WBZA informed VGA that Resolution No. Z-11-70 would become effective on December 25, 2011 unless an appeal was filed with the Alameda County Planning Department. *Id.* ¶ 33. The San Leandro Village Home Association filed an appeal. *Id.* ¶ 34. The Alameda County Board of Supervisors ("Board") heard the appeal from the decision of the WBZA on February 28, 2012, and voted to overturn the decision of the WBZA. *Id.* ¶ 37. VGA did not appeal this decision to any state court.

On June 25, 2012, Teixeira, Nobriga, Gamaza and three non-profits—the CalGuns Foundation, Inc., Second Amendment Foundation, Inc., and California Association of Federal Firearms Licensees, Inc.—filed this suit alleging violations of due process and equal protection guarantees under the Fourteenth Amendment and alleging that the Ordinance on its face and as applied to the facts of this case violates the Second Amendment.

On September 27, 2012, defendants filed a motion to dismiss all four claims for failure to state a claim. On November 5, 2012, plaintiffs filed a motion for a preliminary injunction to enjoin defendants from prohibiting VGA from opening the proposed gun store. Plaintiffs subsequently stipulated to the dismissal of their claim alleging violation of due process of law. Pls.' Supplemental Br., Docket No. 30, at 2.

DISCUSSION

1. MOTION TO DISMISS

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although courts do not require "heightened fact pleading of specifics," *Twombly*, 550 U.S. at 544, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *id.* at 555. The plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Id.*

In deciding whether the plaintiff has stated a claim, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in his or her favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008). Moreover, "the tenet that a court must

accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

If the Court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted.

B. Collateral Estoppel

Defendants argue that both the legal and factual findings of WBZA and the Board must be given preclusive effect in this Court. In determining the preclusive effect of a state administrative decision, federal courts follow the state's rules of preclusion. *White v. City of Pasadena*, 617 F.3d 918, 926 (9th Cir. 2012). California has a two-part test to determine the preclusive effect of an administrative determination. *Eilrich v. Remas*, 839 F.2d 630, 633 (9th Cir. 1988). First, the proceeding must meet the fairness requirements set forth in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). *Id.* Under *Utah Construction*, collateral estoppel should be applied "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Id.* at 422. Second, the determination must satisfy

traditional criteria for issue preclusion. *Eilrich*, 839 F.2d at 633. Under traditional collateral estoppel criteria, an issue cannot be relitigated if the identical issue was actually litigated and necessarily decided at the previous proceeding; the previous proceeding must have also resulted in a final judgment on the merits and involved the same parties. *Lucido v. Superior Court*, 51 Cal. 3d 335, 341-43 (1990).

Here, WBZA and the Board decided that VGA's proposed gun store violates the Ordinance because its location is less than 500 feet from the closest residential zone. *See* Exs. A, B, & C, Request for Judicial Notice in Supp. of Def.'s Mot. to Dis.[1] Also, plaintiffs concede that the distance from the neighboring residential zone to the closest point of the proposed store is less than 500 feet and that the Court can give preclusive effect to this finding of fact. Pls.' Supplemental Br. at 2:26-28.

However, the parties dispute whether plaintiffs are precluded from arguing that WBZA violated the Fourteenth Amendment's equal protection guarantee in other ways. Defendants argue that VGA could have raised, but failed to raise, the core equal protection claim—that similarly situated businesses have been granted conditional use permits and variances, or were

[1] In considering a motion to dismiss, the court may take judicial notice of matters of public record outside the pleadings. *See MGIC Indemn. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Exhibits A, B, C & D attached to Defendants' Request for Judicial Notice are matters of public record. Docket No. 24. Therefore, the Court takes judicial notice of them.

subject to measurement for zoning purposes unlike the measurement methodology applied in VGA's case. Defendants argue that because plaintiffs failed to raise the equal protection claim in earlier proceedings, plaintiffs are estopped from raising it now. Defendants cite *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1034 (9th Cir. 1994), for this proposition.

However, *Miller* does not so hold. In *Miller*, the plaintiff was a former employee of the county sheriffs' department who had been terminated for misconduct. He challenged his termination before the county civil service commission and, after an evidentiary hearing, lost. The commission issued findings of fact and concluded that his termination was appropriate. He did not pursue an available appellate procedure, so the findings became final. Thereafter he filed a federal § 1983 claim, restating the core allegations in his previously unsuccessful wrongful termination claim. *Id.* at 1034-35. The Ninth Circuit agreed with the district court that the factual findings of the civil service commission must be given preclusive effect and were dispositive of plaintiff's claim. The opinion did not discuss, or decide, whether other constitutional claims, premised on factual assertions not presented to the administrative agency, were precluded.

In this case, the unchallenged factual findings of the WBZA—that the proposed location violates the Ordinance—are not dispositive as to plaintiffs' equal protection claim, because the question raised is how similarly situated businesses have been treated. A review of the minutes of the meeting of the WBZA, the

WBZA's subsequent resolution, and the brief summary of the decision of the Board shows no evidence that the parties litigated any of the facts at issue in the proposed equal protection claim. *See* Exs. A, B, & C, Request for Judicial Notice in Supp. of Def.'s Mot. to Dis. Nowhere does the record reflect any litigation regarding similarly situated businesses and whether they have been granted conditional use permits and variances, or were subject to measurement for zoning purposes unlike the measurement methodology applied in VGA's case. Accordingly, the Court finds that the factual issues underlying plaintiffs' equal protection claim are not precluded.

In addition, there is no indication that WBZA or the Board considered the constitutionality of Alameda's Ordinance under the Second Amendment or that the parties litigated that issue. Accordingly, the Court finds that plaintiffs' claims under the Second Amendment are not precluded.

C. Equal Protection Claim

A plaintiff can bring an equal protection claim as a "class of one." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). A "class of one" claim requires a showing that the government "(1) intentionally (2) treated [plaintiffs] differently than other similarly situated [businesses], (3) without a rational basis." *Gerhart v. Lake County, Montana*, 637 F.3d 1013, 1022 (9th Cir. 2011) (citing *Olech*, 528 U.S. at 564). In *Olech*, the Court held that the plaintiff's allegations that the

Village of Willowbrook intentionally demanded a thirty-three foot easement as a condition of connecting her property to the municipal water supply when the Village required only a fifteen-foot easement from other similarly situated property owners, that this demand was irrational and wholly arbitrary, and that the Village ultimately connected her property after receiving a fifteen-foot easement, were sufficient to state an equal protection claim. 528 U.S. at 565.

Here, the Court finds that plaintiffs have not alleged sufficient facts indicating that defendants intentionally treated plaintiffs differently from other similarly situated businesses without a rational basis. Plaintiffs' conclusory assertions that "the [d]efendants have not engaged in unreasonable measurements against similarly situated businesses and/or the [d]efendants have granted conditional use permits and variances to similarly situated businesses" are not enough. Compl. ¶ 50. Plaintiffs fail to allege facts sufficient to show that defendants intentionally granted conditional use permits and variances to other similarly situated businesses that fell within 500 feet of a disqualifying property under the Ordinance or that defendants intentionally measured the distance to the buildings of similarly situated businesses differently.

Plaintiffs respond that facts regarding the different treatment of similarly situated businesses are uniquely in control of the defendants. Pls.' Opp., Docket No. 22, ¶ 25. Rule 8 of the Federal Rules of Civil Procedure, however, requires the plaintiffs to allege facts sufficient to show they are entitled to relief. "Rule

8. . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at *1 (N.D. Cal. Sept. 14, 2009).

Accordingly, the Court GRANTS defendants' motion to dismiss plaintiffs' equal protection claim with leave to amend.

D. Second Amendment Claims

The Second Amendment confers an individual right to possess handguns in the home for self-protection. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). This is a fundamental right and is incorporated against states and municipalities under the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). However, the "right secured by the Second Amendment is not unlimited," and the Supreme Court has reaffirmed the longstanding presumptive lawfulness of regulatory measures forbidding the carrying of firearms in sensitive places such as schools or imposing conditions on the sale of arms. *Heller*, 554 U.S. at 626-27.

Neither the Supreme Court nor the Ninth Circuit has articulated the precise methodology to be to be [sic] applied to Second Amendment claims. *See Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 840 (2013) (noting "we leave for another day" the scope of the Second Amendment). However, *Heller* and courts applying it have provided some guidance. In *Heller*, the Court specifically reaffirmed that

"nothing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," calling them "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 626-27, 627 n.26. Presumptively lawful restrictions, according to the Third Circuit, are those that "regulate conduct outside the scope of the Second Amendment" and "these longstanding limitations" should be understood as "exceptions to the right to bear arms." *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010). Thus, the question of "what level of constitutional review the law must survive" only applies "[i]f a given regulation does not qualify as 'presumptively lawful.' " *Hall v. Garcia*, No. C 10-03799, 2011 WL 995933, *3 (N.D.Cal. Mar. 17, 2011). In other words, *Heller* envisioned a process where courts first examine whether the regulation is presumptively valid and therefore excepted from Second Amendment coverage—a presumption that may be overcome by a showing that the regulation nonetheless places a substantial burden [sic] the "core protection of the Second Amendment," which is the ability to defend "hearth and home." *Marzzarella*, 614 F.3d at 94.

The Ninth Circuit endorsed this approach in its first opinion in *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) (vacated and remanded, 611 F.3d 1015 (9th Cir. 2010)).[2] In *Nordyke*, plaintiffs challenged an

[2] The first *Nordyke* opinion was issued after the Supreme Court's *Heller* decision, but before *McDonald v. City of Chicago*,

Alameda County ordinance that generally banned guns on County property, with an exception for certain events that did not include plaintiffs' proposed gun show. The Ninth Circuit first analyzed whether the regulation at issue fit within the presumptively valid *Heller* exceptions, noting that open public spaces such as county fairground property are very similar to the "schools and government buildings" excepted in *Heller*. *Id.* at 460. In particular, the Court explained that all these places—schools, government buildings, and now open public spaces—are considered "sensitive places" by the Supreme Court because "possessing firearms in such places risks harm to great numbers of defenseless people (e.g., children)." *Id.* at 459. After rehearing in *Nordyke*, the Ninth Circuit eventually found that "[n]o matter how broad the scope of the Second Amendment . . . it is clear that, as applied to Plaintiffs' gun shows and as interpreted by the County, this regulation is permissible." *See Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 840 (2013) (citing *Heller*, 554 U.S. at 626-27); *see also United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (relying

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130 S. Ct. 3020 (2010). Prior to addressing the constitutionality of the county ordinance, the panel held that the Second Amendment was incorporated by the Due Process Clause of the Fourteenth Amendment. 563 F.3d at 457. The Ninth Circuit ordered that the case be reheard *en banc*, 575 F.3d 890 (9th Cir. 2009). After *McDonald*, the Ninth Circuit remanded the case back to the same panel. 611 F.3d 1015 (9th Cir. 2010). Although its original decision is vacated, the panel's analysis of laws regulating guns in sensitive places has been recognized by other courts. *See, e.g.*, *Brown v. United States*, 979 A.2d 630, 641 (D.C. 2009); *United States v. Masciandaro*, 648 F.Supp. 2d 779, 790-91 (E.D.Va.2009).

on the same passage in *Heller* to find that the prohibition of felons from possessing handguns was presumptively lawful).

Here, plaintiffs allege that Alameda's zoning Ordinance violates the Second Amendment, both facially and as applied to them. The zoning Ordinance places limited "qualifications on the commercial sale of arms" by restricting their sale within 500 feet of "sensitive places such as schools" and residences. The Ordinance is precisely the kind of presumptively valid restriction envisioned by *Heller*—it is a restriction on gun sales and purchases in or near sensitive places. The Ordinance is not a total ban on gun sales or purchases in Alameda County and therefore does not implicate the core right to possess a gun in the home for self-defense articulated in *Heller.* Moreover, there are no factual allegations in the complaint that this presumptively lawful Ordinance burdens, even slightly, plaintiffs' right to sell or purchase guns in Alameda County—a right which the U.S. Supreme Court has yet to recognize. At most, there are conclusory allegations that this particular gun store is "essential" to defendants' ability to exercise their Second Amendment rights and that it is "essential to [defendants] assisting their patrons and customers in exercising their Second Amendment rights." Compl. ¶¶ 43-44. Such conclusory allegations fail to demonstrate how the zoning prohibition as to *one* gun store substantially burdens the rights of defendants or their Alameda County patrons. Accordingly, the Court concludes that dismissal of defendants' Second Amendment claims is warranted.

The Court need not decide what level of constitutional scrutiny to apply to the (as yet unarticulated) right to sell or purchase guns because as a threshold matter, there are simply no allegations sufficient to rebut the presumption of validity established in *Heller.* Moreover, even applying the strictest scrutiny—which this Court explicitly does not decide—courts in this district have upheld similar regulations. *See Hall v. Garcia*, 2011 WL 995933, at *5 (N.D.Cal. Mar. 17, 2011) (upholding a regulation prohibiting gun possession within 1000 feet of a school under intermediate scrutiny, but noting that the regulation would survive "[u]nder any of the potentially applicable levels of scrutiny" because of the substantial government interest of protecting citizens from gun violence in sensitive spaces).

If the Court dismisses a cause of action, leave to amend may be appropriate unless the Court "determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted). In the ordinary course, where a motion to dismiss is decided on allegations in pleadings, without any relevant factual record, leave to amend may be appropriate. Here, however, while defendants' motion to dismiss was pending, plaintiffs filed a motion for preliminary injunction. In support of their motion, plaintiffs submitted evidence which itself suggests that leave to amend may be futile. In particular, plaintiffs provided evidence that there are ten other gun stores in Alameda County, including the "Big

5 Sporting Goods" store located only 607 feet from plaintiffs' proposed site. *See* Nobriga Decl., Ex. O, Docket No. 20-15 at 5, 6. According to defendants, these existing stores are in compliance with the Ordinance. Def's. Rep. at 12 (Docket No. 24 at 18). Moreover, plaintiffs Teixeira and Gamaza previously operated another gun store in Alameda County before attempting to open this new one. *See* Nobriga Decl. ¶ 5. This suggests that Alameda County residents seeking to purchase guns have no shortage of options; merchants looking to sell guns have managed to do so lawfully, in compliance with this Ordinance; and any barrier to gun sales, purchases, or ownership presented by this Ordinance is *de minimis.*

The Court is therefore skeptical that plaintiffs can amend their complaint to allege that the Ordinance is invalid, either facially or as applied, in light of *Heller.* However, leave to amend will be granted, should plaintiff [sic] choose to do so. Accordingly, defendants' motion to dismiss plaintiffs' Second Amendment claims is GRANTED with leave to amend.

2. PRELIMINARY INJUNCTION

Having granted defendants' motion to dismiss, plaintiffs' motion for a preliminary injunction is moot. Accordingly, plaintiffs' motion is DENIED.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS the defendants' motion to dismiss with leave to amend. If plaintiffs wish to amend the complaint, they must do so ***no later than March 15, 2013***. The plaintiffs' motion for preliminary injunction is DENIED as moot. This Order resolves Docket Nos. 13 and 21.

IT IS SO ORDERED.

Dated:
February 26, 2013

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX E

U.S. Const. amend. II

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. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alameda County, Cal., Municipal Code § 17.54.080 —Variances.

Upon application in proper form pursuant to Sections 17.54.590 and 17.54.610 and subject to the procedure governing variances set forth herein, the strict terms of Title 17 of this code, except as to regulations relating to principal uses, may be varied in specific cases upon affirmative findings of fact upon each of these three requirements:

A. That there are special circumstances including size, shape, topography, location or surroundings, applicable to the property which

deprive the property of privileges enjoyed by other property in the vicinity under the identical zoning classification;

B. That the granting of the application will not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone;

C. That the granting of the application will not be detrimental to persons or property in the neighborhood or to the public welfare.

Alameda County, Cal., Municipal Code § 17.54.081 —Variances—Firearms sales.

A conditional use permit for firearms sales issued pursuant to this title is subject to the variance provisions set forth in Chapter 17.54.

Alameda County, Cal., Municipal Code § 17.54.130 —Conditional uses.

Certain uses, referred to in this title as conditional uses, are hereby declared to possess characteristics which require special review and appraisal in each instance, in order to determine whether or not the use:

A. Is required by the public need;

B. Will be properly related to other land uses and transportation and service facilities in the vicinity;

C. If permitted, will under all the circumstances and conditions of the particular case, 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; and

D. Will be contrary to the specific intent clauses or performance standards established for the district, in which it is to be located.

A use in any district which is listed, explicitly or by reference, as a conditional use in the district's regulations, or in Section 17.52.580 shall be approved or disapproved as to zoning only upon filing an application in proper form and in accordance with the procedure governing such uses set forth hereinafter.

Alameda County, Cal., Municipal Code § 17.54.131 —Firearms sales.

In addition to the findings required of the board of zoning adjustments under Sections 17.54.130 and 17.54.140, no conditional use permit for firearms sales shall issue unless the following additional findings are made by the board of zoning adjustments based on sufficient evidence:

A. That the district in which the proposed sales activity is to occur is appropriate;

B. That the subject premises is not within five hundred (500) feet of any of the following: Residentially 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;

C. That the applicant possesses, in current form, all of the firearms dealer licenses required by federal and state law;

D. That the applicant has been informed that, in addition to a conditional use permit, applicant is required to obtain a firearms dealer license issued by the County of Alameda before sale activity can commence, and that information regarding how such license may be obtained has been provided to the applicant;

E. That the subject premises is in full compliance with the requirements of the applicable building codes, fire codes and other technical codes and regulations which govern the use, occupancy, maintenance, construction or design of the building or structure;

F. That the applicant has provided sufficient detail regarding the intended compliance with the Penal Code requirements for safe storage of firearms and ammunition to be kept at the subject place of business and building security.

Alameda County, Cal., Municipal Code § 17.54.140 —Conditional uses—Action.

Except as provided in Section 17.17.020 or Section 17.54.135, the board of zoning adjustments shall receive, hear and decide applications for a conditional use permit and after the conclusion of the hearing may

authorize approval as to zoning of the proposed use if the evidence contained in or accompanying the application or presented at the hearing is deemed sufficient to establish that, under all circumstances and conditions of the particular case, the use is properly located in all respects as specified in Section 17.54.130, and otherwise the board of zoning adjustments shall disapprove the same. In each case, notice of the hearing shall be given pursuant to Section 17.54.830.

Where for any reason a board of zoning adjustments is unable to take an action on an application, the planning director has the power to transfer the application to the planning commission, who shall then receive, hear, and decide such applications as specified in Section 17.54.130.

Alameda County, Cal., Municipal Code § 17.54.141 —Conditional uses—Action—Firearms sales.

In order for a conditional use permit for firearms sales to become effective and remain operable and in full force, the following are required of the applicant:

A. A final inspection from appropriate building officials demonstrating code compliance;

B. Within thirty (30) days of obtaining a conditional use permit, and prior to any sales activity, a firearms dealer license shall be secured from the appropriate county agency;

C. The county-issued firearms dealer's license be maintained in good standing;

D. The maintenance of accurate and detailed firearms and ammunition transaction records;

E. Transaction records shall be available for inspection as required by the California Penal Code;

F. Compliance with all other state and federal statutory requirements for the sale of firearms and ammunition and reporting of firearms transactions, including, but not limited to Section 12070 et seq. of the California Penal Code.