No. 13-17132

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN TEIXEIRA, et al.,

Plaintiffs-Appellants,

v.

COUNTY OF ALAMEDA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for Northern California,
No. 3:12-cv-03288-WHO

BRIEF OF *AMICI CURIAE* NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AND CALIFORNIA RIFLE & PISTOL ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

C.D. MICHEL
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd
Suite 200
Long Beach, CA 90802

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CHRISTOPHER G. MICHEL
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the National Rifle Association of America, Inc. certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock. The California Rifle & Pistol Association also certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Rifle Association of America, Inc. ("NRA") is America's oldest civil rights organization and foremost defender of the Second Amendment. Founded in 1871 by Union Army veterans, the NRA now has about five million members—and its education, training, and safety programs reach millions more. Among its other programs, the NRA is the Nation's leading provider of firearms marksmanship and safety training for both civilians and law enforcement officers.

Founded in 1875, the California Rifle & Pistol Association ("CRPA") is a nonprofit membership and donor supported organization with tens of thousands of members throughout California, including competitive and recreational shooters, firearm retailers, hunters, youth, women, police, firearm expert, trainers, and loving parents who choose to own a firearm to defend their families.

The NRA and CRPA regularly participate as parties or amici in firearms-related litigation. They have a strong interest in this case because it implicates the the rights of their members to purchase firearms for self-defense, hunting, and other lawful purposes. All parties have provided consent to the filing of this *amicus* brief, which is authorized by Ninth Circuit Rule 29-2(a).[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than amicus, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

In its present procedural posture, this is a straightforward case. Plaintiffs allege that an Alameda County ordinance that requires gun stores to be located at least 500 feet from various other properties violates the Second Amendment because it has the effect of making it unlawful to open a gun store *anywhere in the jurisdiction*. Those allegations, which control at the motion to dismiss stage, plainly state a valid Second Amendment claim.

Remarkably, the County's principal argument to dismiss this lawsuit at the threshold is not that plaintiffs are mistaken as to the impact of the ordinance or the extent to which it burdens the ability of law-abiding citizens to obtain firearms, but that a ban on opening gun stores does not even *implicate* the Second Amendment. The County's version of the Second Amendment protects only the right to possess a firearm, not to acquire one. *See, e.g.*, Appellee Br.18 (denying "that there is a Second Amendment right to *acquire* firearms"); En Banc Pet.10 (claiming that the right to "possess a gun" is "the only right recognized by *Heller*"). According to the County, it could ban firearms sales entirely, and the Second Amendment would have *nothing* to say about it. Even more remarkable still, the district court accepted that startling proposition, holding that "the protections of the Second Amendment" do not extend "to the sale or purchase of guns," period. ER19.

Fortunately, the Framers had a different vision of the Second Amendment, in which the People have a right to acquire arms, as well as to keep and bear them. A right to keep and bear arms would be meaningless, and both self-defense and formation of a well-regulated militia impossible, if the government could eliminate the businesses that supply firearms and ammunition to law-abiding individuals. Just as a right to publish books and newspapers and the public's right to read them are incompatible with a ban on bookstores or newspaper sales, the Second Amendment right to keep and bear arms is incompatible with a ban on the sale of guns and ammunition. Indeed, it is absurd to think that the Framers considered the right to keep and bear arms so essential as to warrant enshrinement in the Constitution, yet were utterly indifferent to whether individuals had any means to obtain the arms necessary to exercise it.

The Supreme Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), only reinforces that commonsense conclusion. The County suggests otherwise based on a single passage in which the Court described "conditions and qualifications on the commercial sale of arms" as "presumptively lawful." *Id.* at 626-27 & n.26. Whatever that language may imply about how regulations impacting firearms transactions should be *analyzed*, it cannot plausibly be understood to stand for the sweeping proposition that burdens on the ability to acquire firearms get no Second Amendment scrutiny at all. That is obvious from

the fact that the Court included the qualifier "presumptively" (as opposed to "categorically" or "conclusively")—not to mention the fact that any other conclusion is impossible to reconcile with *Heller*'s core holding. Simply put, the Court did not spend 56 pages recognizing an individual and fundamental right to keep and bear arms only to deprive individuals of any right to obtain those arms in a couple of (at best) ambiguous lines.

All of that is sufficiently self-evident that it should not necessitate any extended analysis of text, history, or precedent. Indeed, this Court has already held that the right to keep and bear arms necessarily implies the right to obtain ammunition, and the same reasoning applies *a fortiori* to the right to obtain the firearm itself. In all events, every interpretive tool unsurprisingly confirms that the right to keep and bear arms includes the right to acquire them. Accordingly, if, as plaintiffs allege, the County's ordinance does in fact have the purpose and effect of preventing gun stores from opening anywhere within the jurisdiction, then they have plainly stated a valid Second Amendment claim. This Court would certainly not dismiss for failure to state a claim a complaint challenging an ordinance as having the purpose and effect of preventing bookstores or abortion clinics from opening anywhere within the jurisdiction. The individual, fundamental, and enumerated right protected by the Second Amendment should not—and cannot—be treated any differently.

ARGUMENT

Under the "two-step inquiry" that this Court applies when considering Second Amendment claims, the Court asks "whether the challenged law burdens conduct protected by the Second Amendment" and, if so, whether the law withstands "an appropriate level of scrutiny." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). The relevant text, history, and precedent all make clear that a law that burdens the ability of law-abiding citizens to obtain firearms burdens conduct protected by the Second Amendment. And this Court's precedents likewise confirm that the kind of complete ban on gun stores alleged here demands, at a minimum, meaningful intermediate scrutiny after careful consideration of a full evidentiary record. Accordingly, this case must be remanded for the district court to allow plaintiffs to develop their claims.

I. Plaintiffs Have Adequately Alleged That The Gun Store Ordinance Burdens Second Amendment Conduct.

A. The Right To Keep and Bear Arms Necessarily Includes the Right To Obtain Arms.

The threshold question in this case is whether burdening the ability of law-abiding individuals to purchase firearms "burdens conduct protected by the Second Amendment"—that is, whether the right to bear arms encompasses "a right to acquire firearms." *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1053-54 (9th Cir. 2016), *reh'g en banc granted*, No. 13-17132, 2016 WL 7438631 (9th Cir. Dec. 27, 2016). The answer to that threshold question is clear. As this Court observed in

holding that the Second Amendment protects the right to "obtain or use ammunition," "without bullets, the right to bear arms would be meaningless." *Jackson*, 746 F.3d at 967; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) ("a regulation restricting possession of certain types of magazines burdens conduct falling within the scope of the Second Amendment"); *cf. 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 acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective."). That reasoning applies with all the more force to the firearm itself. Indeed, the textually enshrined "right of the people to keep and bear arms" would amount to little more than words on parchment if the people had no right to acquire arms in the first place. Thus, just as the First Amendment rights of free speech and free exercise necessarily include the rights to acquire books and Bibles, the Second Amendment right to keep and bear arms necessarily includes the right to acquire arms.

Indeed, history underscores the inextricable connection between the rights to buy and sell arms and the right to keep and bear arms. When King George III forbade exports of firearms and ammunition from England into the Colonies (and subsequently threatened to ban firearm manufacturing in America), the Founding generation "treated the embargo on firearms commerce as evidence of plain intent

to enslave America and … redoubled their efforts to engage in firearms commerce." David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 Harv. L. Rev. F. 230, 234-35 (2014). The people adopted the Second Amendment in direct response to that experience, which confirms that the right to "keep and bear arms" includes "a guarantee of the right to buy, sell, and manufacture arms." *Id.* at 235. So, too, do laws in place when the Second Amendment was ratified. For instance, Virginia law at the time of the Founding provided that all persons had "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony." *Teixeira*, 822 F.3d at 1054 (quoting Laws of Va., Feb., 1676-77, Va. Stat. at Large, 2 Hening 403). And in 1793, Thomas Jefferson was able to boast that American "citizens have always been free to make, vend, and export arms." *Id.* at 1055 (quoting Thomas Jefferson, 3 *Writings* 558 (H.A. Washington ed., 1853)).

Moreover, the Second Amendment was enshrined in the Constitution not only to protect the right to keep and bear arms for self-defense, but also to provide for a "well-regulated militia." U.S. Const. amend. II; *see Heller*, 554 U.S. at 599. The firearms carried by "the citizens' militia," however, did not come from the government; nor did they did fall from the sky. *Id.* The militiamen had to *buy* them, and the Second Amendment protected their right to do so. *See* Kopel, 127 Harv. L. Rev. F. at 236-37. Thus, as *Heller* noted in construing the meaning of

"keep and bear arms," citizens in the early Republic enjoyed the right not just to keep and bear arms, but to "purchase" them as well. 554 U.S. at 583 n.7. And by the time the Fourteenth Amendment was ratified, courts readily recognized that the "right to keep arms, necessarily involve[d] the right to purchase them." *Andrews v. State*, 50 Tenn. 165, 178 (1871).

Courts have reached the same commonsense conclusion after *Heller*. In *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)—a precedent this Court has cited repeatedly in its Second Amendment jurisprudence, *see, e.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 945 (9th Cir. 2016) (en banc); *Fyock*, 779 F.3d at 998; *Jackson*, 746 F.3d at 960; *United States v. Chovan*, 735 F.3d 1127, 1134 (9th Cir. 2013)—the Third Circuit held that "[c]ommercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment." 614 F.3d at 92 n.8. As the court explained, "[i]f there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*." *Id.* at 91-92 n.8. Likewise, a district court confronted with a Chicago law that banned "virtually all sales and transfers" of firearms within city limits struck down the ordinance on the ground that 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); *see also Teixeira*, 822 F.3d at 1056 (collecting cases).

The sole authority the County has identified that even hints at a contrary view is a two-page unpublished non-precedential per curiam decision in which the Fourth Circuit affirmed the denial of a Second Amendment challenge to a federal prosecution based on the sale of a gun by one unlawful drug user to another unlawful drug user in violation of 18 U.S.C. §922(d)(3). *United States v. Chafin*, 423 F. App'x 342 (4th Cir. 2011). In rejecting the defendant's contention that "his conduct—the sale of a firearm *to an unlawful user of drugs*—falls within the historical scope of the Second Amendment," the court noted 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." *Id.* at 344 (emphasis added). That equivocal statement, made in the context of rejecting a narrow argument regarding a firearm sale to someone barred by federal law from possessing a gun, 18 U.S.C. §922(g)(3), hardly establishes the sweeping proposition that the Second Amendment does not protect the right to acquire a firearm. Indeed, if the Fourth Circuit really intended to embrace such a startling proposition—and open up a split with the Third Circuit in the process—it is unlikely, to say the least, that it would have done so through a two-page per curiam unpublished decision.

In all events, whatever *Chafin* did or did not hold, that decision is not even precedential within the Fourth Circuit itself, *see id.* at 343 ("[u]npublished opinions are not binding precedent in this circuit"), and it should have no force in this Circuit either, especially when embracing its conclusion would open a split of precedential authority with the Third Circuit. *See Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) ("we decline to create a circuit split unless there is a compelling reason to do so"). Nor is the reasoning of *Chafin* persuasive. All it provided to support the proposition that the Second Amendment does not necessarily protect the right to sell arms is a "*cf.*" citation to *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123 (1973), in which the Supreme Court held 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." *Id.* at 128. Obscene material is, of course, "not protected by the First Amendment," *id.* at 126, which is why the decision recognizing a right to possess it inside, but not outside, the home was rooted in privacy considerations. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

Needless to say, a privacy-based right to possess something in the privacy of one's home does not necessarily extend to a right to commerce in the public bazaar. But a right to engage in First Amendment protected activity like publishing most

certainly does imply a correlative right to be able to purchase ink and paper, and no precedent—not even a *cf.*—is to the contrary. Moreover, notwithstanding the *Chafin* court's professed inability to locate any authority for the proposition that, "at the time of its ratification, the Second Amendment was understood to protect an individual's right to *sell* a firearm," 423 F. App'x at 344, as discussed, the historical record in fact confirms that protecting the right to sell and purchase arms was central to—indeed, an impetus for—the Second Amendment.

Consistent with that understanding, legal scholars of all stripes agree that the right to keep and bear arms necessarily includes the right to acquire them. *See, e.g.*, *Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Laurence H. Tribe) (*Heller* "recognized that the core individual liberty protected by the [Second A]mendment affords Americans the right to *purchase* and store operable firearms for self-defense in the home.") (emphasis added); Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97 (2009) ("Whatever such a right [to possess handguns for the purpose of self-defense] might mean, it must include the right to accomplish that core lawful purpose by acquiring the handgun."); Glenn H. Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S.

Cal. L. Rev. 247, 250 (2012) ("If citizens have the right to own guns, presumably they have the right to buy them."); Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 Tenn. L. Rev. 479, 481 (2014) ("[B]efore one can keep and bear arms … one has to obtain the gun from somewhere. Thus, any meaningful Second Amendment right encompasses the right to acquire arms.").

That consensus should come as little surprise, as the conclusion that the right to keep and bear arms necessarily encompasses the right to acquire them follows from the same reasoning courts—including this Court—apply when confronted with similar questions in other constitutional contexts. The panel opinion cited several examples, including the right of newspapers to obtain paper and ink, which is implicit in the First Amendment freedom of the press. *See Teixeira*, 822 F.3d at 1055; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). And the list does not end there. This Court has recognized, for example, that the First Amendment "right of association would be hollow without a corollary right of self-governance," which allows people "not only to form political associations but to organize and direct them in the way that will make them most effective." *San Francisco Cty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989). And the Supreme Court has recognized not just an implicit right to obtain an abortion, but also a right to be free

from state laws that place an "undue burden" or "substantial obstacle" on that right by limiting the number of accessible clinics in the state. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-18 (2016). Once the Court recognizes a substantive right, the availability of the means to exercise the right follows.

After *Heller*, the substance of the Second Amendment undeniably includes the individual right to bear arms for self-defense. And the right to bear arms undeniably necessitates the ability to acquire them. The right to acquire protected firearms is thus as "implicit in [the] enumerated guarantee[]" of the Second Amendment as the right to buy books is implicit in the First Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980); *see also Ezell*, 651 F.3d at 708 ("the right to maintain proficiency in firearm use … [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense"). And a local government may no more evade the right to bear arms by the simple expedient of banning their sale than it may evade the First Amendment by banning the sale of books or the right to free exercise by banning religious articles. To conclude otherwise would be to treat the Second Amendment "as a second-class right, subject to an entirely different body of rules" than other fundamental guarantees, which the Supreme Court has emphatically explained it is not. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion).

B. *Heller* Does Not Immunize Burdens on the Right To Acquire Arms from Second Amendment Scrutiny.

Notwithstanding the wealth of authority establishing a right to acquire arms, the County maintains (and the district court agreed) that *Heller* eliminated any need to scrutinize its ordinance for compatibility with the Second Amendment when the Court described "conditions and qualifications on the commercial sale of arms" as "presumptively lawful." *Heller*, 554 U.S. at 626-27 & n.26. *See* En Banc Pet.1, 6-11; ER18-19. That strained reading of *Heller* is flawed on multiple levels.

At the outset, to state the obvious, *Heller* described "conditions and qualifications on the commercial sale of arms" as "*presumptively* lawful," which necessarily refutes any suggestion that the Court intended to deem such laws constitutional per se, or immunize them from any Second Amendment scrutiny at all. *See, e.g.*, *Binderup v. Attorney General*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (*Heller II*); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). If that were what the Court intended, it would have omitted the qualifier "presumptively," in lieu of the modifier "categorically" or "conclusively," or would have simply said that such conditions and qualifications do not violate the Second Amendment, period. Surely that kind of sweeping immunity from constitutional scrutiny is not what the Court that had just taken the historic step of recognizing an individual right to keep

and bear arms had in mind when it observed that it decision was not meant to call into question the constitutionality of certain longstanding regulations.

Moreover, plaintiffs are not challenging a "condition[] [or] qualification[] on the commercial sale of arms." *Heller*, 554 U.S. at 626-27 & n.26. They are challenging an ordinance that they maintain "amounts to a complete ban on gun stores." *Teixeira*, 822 F.3d at 1060. Setting aside whether a zoning regulation even qualifies as a regulation of the terms of sales,[2] a total ban on opening a gun store anywhere in the jurisdiction is no mere "condition" or "qualification" on sales. One would not say, for example, that there is a condition or qualified right to purchase a handgun, the condition being that no one may ever purchase them and the qualification being that they are unavailable to anyone. *See Silvester*, 843 F.3d at 830 (Thomas, C.J., concurring) ("conditions" and "qualifications" take their

[2] At its core, a zoning regulation "exists to forbid the erection of a building of a particular kind or for a particular use." *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Such regulations thus set *conditions on land use*, not conditions on who may buy or sell the proprietor's products, or through what procedures, or for what price. *Cf. Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc) (regulation requiring that firearm for sale at a gun show be "secured to prevent unauthorized use" was condition or qualification on commercial sale); *Silvester v. Harris*, 843 F.3d 816, 830 (9th Cir. 2016) (Thomas, C.J., concurring) (contending that waiting period is a condition or qualification on commercial sale of firearms); *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016) ("prohibition against unlicensed firearm dealing is a longstanding condition or qualification"). Notably, neither the County nor the district court has identified any cases in which a zoning ordinance was considered a condition or qualification on the commercial sale of arms under *Heller*.

"common meaning"). Indeed, the relevant passage of *Heller* made a point of treating "prohibitions," such as the prohibition "on the possession of firearms by felons and the mentally ill," as distinct from "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. And *Heller* went on to note that a law "which, under the preten[s]e of regulating, amounts to a destruction of the right … would be clearly unconstitutional." *Id.* at 629. Thus, even the County has acknowledged (as it must) that, "[i]n Second Amendment law as in other areas, prohibitions are scrutinized more closely than mere regulations." En Banc Pet.8-9.

In all events, even if an effective ban constituted a "condition[]" or "qualification[] on the commercial sale of arms," the County's ordinance would still not be "presumptively lawful" under *Heller* because it is not "longstanding." *Heller*, 554 U.S. at 626-27 & n.26. The County appears to read *Heller* as creating special "safe harbors" for any and all conditions and qualifications on commercial sale, even if they have no historical basis at all. En Banc Pet.12. But the very sentence of *Heller* identifying the measures on which the "opinion should [not] be taken to cast doubt" describes such measure as "longstanding." *Heller*, 544 U.S. at 626-27. Likewise, *McDonald* reiterated that *Heller* "did not cast doubt on such *longstanding* regulatory measures as … laws imposing conditions and qualifications on the commercial sale of arms." *McDonald*, 561 U.S. at 786

(emphasis added). Indeed, the County itself apparently recognized this as recently as its opening brief in this appeal, when it explained that "presumptively lawful restrictions are *longstanding limitations*." Appellee Br.12 (emphasis added).

The County was right then, and it is wrong now. This Court's precedents leave no doubt that a condition or qualification *must be longstanding* to qualify as presumptively lawful under *Heller* and *McDonald*. As this Court has explained, the "first step" of the Second Amendment inquiry—that is, the step that asks whether a law burdens Second Amendment conduct—is based on a "historical understanding of the scope of the [Second Amendment] right." *Jackson*, 746 F.3d at 960 (quoting *Heller*, 554 U.S. at 625); *accord Fyock*, 779 F.3d at 997 (asking whether "large-capacity magazines have been the subject of *longstanding*, accepted regulation" (emphasis added)). Chief Judge Thomas's recent concurrence in *Silvester* likewise makes clear that "*Heller* specifically identified a non-exhaustive list of '*longstanding* prohibitions,' which can be considered 'presumptively lawful regulatory measures.'" *Silvester*, 843 F.3d at 830 (emphasis added). Thus, the relevant question is whether "a regulation qualifies as longstanding." *Id.*

Other courts have reached the same conclusion, explaining that *Heller*'s list of presumptively lawful measures is "derived from historical prohibitions." *Marzzarella*, 614 F.3d at 91; *see Ezell*, 651 F.3d at 701 (*Heller*'s enumerated measures suggest "a textual and historical inquiry"); *Heller II*, 670 F.3d at 1253

("*Heller* tells us '*longstanding*' regulations are 'presumptively lawful.'" (emphasis added)). Indeed, the D.C. Circuit in *Heller II* held that certain "conditions" and "qualifications" on the commercial sale of arms—namely, registration requirements—did not qualify as presumptively lawful precisely because they were "novel, not historic" or "longstanding." *Id.* at 1255.

All of this makes good sense, because the basis for treating a longstanding regulation as presumptively lawful would be that it "has long been accepted by the public" and thus "is not likely to burden a constitutional right." *Id.* at 1253; *see Jackson*, 746 F.3d at 960 (analogizing longstanding firearms regulations to historically unprotected categories of speech). The County's contrary position appears to be that *any* condition or qualification on the commercial sale of arms, no matter how novel, categorically counts as presumptively—indeed, necessarily—lawful under *Heller*. En Banc Pet.8. Thus, a million-dollar gun purchase fee or a 20-year waiting period would, in the County's view, have to be accepted as consistent with the Second Amendment, even though there is no basis in history for such draconian conditions or qualifications, and even though they would effectively eviscerate the right. Indeed, the County even appears to accept that, under its theory of the case, "a *total prohibition* on the commercial sale of firearms" would get no Second Amendment scrutiny at all. *Id.*

Simply put, that is not a plausible reading of *Heller*. The County's approach divorces the concept of presumptively lawful regulatory measures from the historical basis reflected in the relevant passage—and virtually every other passage—of the decision. To suggest that the Supreme Court went to such extraordinary lengths to interpret the Second Amendment according to its historical meaning, yet at the same time opened a loophole that would allow *any* condition or qualification on the commercial sale of firearms—even one that is completely novel and effectively eliminates the right—to escape Second Amendment review is absurd. That position is no more defensible than the suggestion that weapons that did not exist at the time of the founding merit no Second Amendment protection, a proposition that the Supreme Court summarily rejected. *See Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam).

Finally, as the County's persistent efforts to change the legal standard confirm, zoning laws requiring gun stores to be a certain distance away from other properties are not longstanding. The district court identified no similar historical restrictions, and the best the County can muster is a scattered set of laws regulating the kinds of firearms that can be sold and imposing licensing or reporting requirements on firearms dealers. En Banc Pet.18-19. As even a cursory review indicates, those regulations are not remotely comparable to the County's zoning ordinance, which prevents a gun shop from even opening if it is located within 500

feet of certain properties. The County strains even more by comparing its gun store ordinance to nuisance laws. *Id.* at 20. A gun store is not a garbage dump or a chemical plant; it is a place where law-abiding citizens exercise an enumerated and fundamental constitutional right. *See McDonald*, 561 U.S. at 769. Such stores accordingly have "a constitutional status different from" the objects of ordinary land use regulation. *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009); *see Ezell*, 651 F.3d at 707-08.

Indeed, just weeks ago, the Seventh Circuit reversed a district court decision that had rejected a Second Amendment challenge to a Chicago zoning ordinance prohibiting firing ranges from being located within 500 feet of residences and certain other properties. *Ezell v. City of Chicago*, No. 14-3312, 2017 WL 203542, at *1 (7th Cir. Jan. 18, 2017) (*Ezell II*). The district court viewed the law as "essentially immune from challenge under" *Heller*'s "enigmatic" passage describing "presumptively lawful" regulatory measures. *Id.* at *5. The Seventh Circuit rejected that reading, holding that the 500-foot restriction "severely restrict[s] the right of Chicagoans to train in firearm use at a range" and accordingly must be justified by the City under heightened scrutiny. *Id.* So too here. While the County is certainly entitled to try to adduce facts proving that its ordinance survives Second Amendment scrutiny, it cannot avoid Second Amendment scrutiny altogether.

II. The County's Ordinance Cannot Withstand Second Amendment Scrutiny At This Preliminary Stage.

The district court alternatively held that even if the County's ordinance burdens Second Amendment conduct, it "would pass any applicable level of scrutiny." ER21. That cursory conclusion, reached without even allowing the plaintiffs to develop evidence on disputed factual issues and based on little more than a single page of briefing from the County, cannot be sustained.

As noted, plaintiffs claim that the ordinance effectively prohibits the opening of a gun store anywhere in unincorporated Alameda County. And at the motion to dismiss stage of the case, that well-pleaded allegation, which is supported by a commissioned land study, ER50, must be "accepted as true," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester*, 843 F.3d at 821. A total ban on opening gun stores would clearly do both of those things, as it would deprive law-abiding citizens of places to purchase firearms that they have a right to keep and bear for the lawful purpose of self-defense. Thus, the County can defeat plaintiffs' claims at the motion to dismiss stage, if at all, only by identifying undisputed facts proving that its ordinance survives strict scrutiny. *See id.* at 820. At a minimum, the County must satisfy intermediate scrutiny—*i.e.*, it must prove that its 500-foot rule is designed to further a "significant, substantial, or important" objective, and that there is "a reasonable fit between the challenged regulation and

the asserted objective." *Jackson*, 746 F.3d at 965; *cf. Ezell*, 651 F.3d at 708 (subjecting total ban on firing ranges to "a more rigorous showing" than intermediate scrutiny, "if not quite 'strict scrutiny'").

According to the district court, the County obviated the need to conduct that analysis simply by pointing to a document indicating that a handful of gun shops already operate in the jurisdiction. ER23; Appellee Br.18. That reasoning cannot be reconciled with the Supreme Court's recent decision in *Whole Woman's Health*, in which the Court invalidated as an undue burden a law that had the effect of reducing the number of abortion clinics in the jurisdiction by half. *See* 136 S. Ct. at 2312. Just as the constitutionality of that law necessarily depended on the extent to which it limited access to abortions, the constitutionality of the County's ordinance necessarily depends on the resolution of as-yet-unresolved factual disputes about how many gun stores the county currently has, and how capable those stores are of meeting demand. And the limited information in the record here raises serious questions on that score, as it suggests that there are at most only four gun stores in unincorporated Alameda County, and that not all of them are even open to the public for commercial retail sales. ER40, 179. Nor is it at all clear, when it comes to commercial activity necessary for the exercise of a constitutional right, that a complete ban on new establishments passes muster. A complete ban on new bookstores or outlets for religious articles would raise serious First

Amendment issues even if a few stores pre-existed the ban. Constitutional rights are protected, not begrudgingly grandfathered.

Worse still, plaintiffs' complaint raises the troubling prospect that the County denied them a zoning permit out of a naked desire to discourage the exercise of Second Amendment rights. According to plaintiffs, the Alameda County Planning Department departed from its usual rule for measuring the 500-foot separation required by the rule (measuring from the front door of the business to the line of the disqualifying property) and instead chose a different method (measuring from the closest point on the business to the disqualifying property line) that caused plaintiffs to fall barely out of compliance. ER40-41. The zoning board overruled the staff report on the grounds that there was a need for the store, that plaintiffs had complied with all applicable safety requirements, and that two of the three disqualifying properties were located *on the opposite side of a 12-lane interstate highway* and thus not remotely affected by the gun store. ER42-47. Nevertheless, the county board of supervisors reversed the zoning board after an untimely appeal by a homeowners association and complaints that the store "is GOING TO ATTRACT what we DON'T want"—*i.e.*, people exercising their Second Amendment rights in Alameda County. ER48, 95.

Of course, whether plaintiffs can substantiate those allegations remains to be seen. But there should be no serious dispute that they are entitled to try. "Viewing

the complaint's factual allegations in the light most favorable to [*p*]*laintiffs*," *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016) (emphasis added), as this Court must do, those allegations readily support the conclusion that the ordinance violates the Second Amendment. Indeed, if the County really has manipulated the application of its zoning laws out of a bare desire to make it harder for people to exercise their Second Amendment rights, then that is a paradigmatic constitutional violation. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) ("a city may not regulate the secondary effects of speech by suppressing the speech itself"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("a law targeting religious beliefs as such is never permissible").

Moreover, even setting aside plaintiffs' well-pleaded allegations that the County acted out of animus toward Second Amendment rights, the County has not come close to showing that its ordinance furthers a sufficiently important interest in a sufficiently tailored manner. To support its professed safety rationale, the County offers the head-scratching assertion that "[g]un stores can be targets of the exact persons that should be excluded from purchasing and possessing weapons; therefore it is reasonable to regulate them such that they are located away from residential areas." Appellee Br.21. The County's only basis for this claim appears to be a letter from the county sheriff reporting "a large volume of calls for service

to retail stores in unincorporated Alameda County in the past year with a majority of the calls involving property crimes." ER167. That letter says nothing about criminals targeting gun stores in particular, and it merely recommends "additional security features," not the relocation or elimination of any particular retail stores. *Id.*

That is manifestly not the kind of "credible evidence" this Court and others have required to uphold Second Amendment restrictions under intermediate (let alone strict) scrutiny. *Fyock*, 779 F.3d at 1000; *see Ezell*, 651 F.3d at 709 ("the government must supply actual, reliable evidence to justify restricting" Second Amendment rights); *Heller II*, 670 F.3d at 1259 (government must provide "meaningful evidence, not mere assertions … to show a substantial relationship between" the regulation and the purported interest). Indeed, the Seventh Circuit expressly rejected generalized assertions and speculation that "firing ranges could attract gun thieves" as a valid basis for Chicago's 500-foot rule. *Ezell II*, 2017 WL 203542, at *6. Moreover, even assuming that Alameda County's paltry and untested evidence might support the imposition of *some* sort of additional safety measures for gun stores, it does not remotely justify "red-lining … gun stores out of existence." ER50. Indeed, the County has not even tried to demonstrate that its blunderbuss approach is tailored to "avoid unnecessary abridgement of" Second Amendment rights. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014).

Instead, the County just tries to shift the burden to plaintiffs, suggesting that their claims fail because they have not alleged that "individuals cannot lawfully buy guns in Alameda County." En Banc Pet.10 (citing ER23). Again, that argument cannot be reconciled with how courts approach burdens on any other fundamental right. Simply put, the question is not whether the County has *eliminated* the right to acquire arms; it is whether the county has unconstitutionally *burdened* that right. Just as with every other fundamental constitutional right, a law can do so without destroying the right entirely. *See, e.g.*, *Ezell II*, 2017 WL 203542, at *7 (invalidating zoning ordinance that left a small amount of property available for firing ranges). A plaintiff need not allege that the jurisdiction has no libraries in order to challenge a ban on bookstores, or that none of its hospitals perform abortions in order to challenge a ban on abortion clinics. *See Whole Woman's Health*, 136 S. Ct. at 2312. Nor need a plaintiff allege that it is impossible to purchase a firearm in order to challenge a law that makes it inordinately more difficult to do so.

Again, whether plaintiffs' allegations regarding the purpose and impact of the County's ordinance can be proven remains to be seen. But at this stage, the only question is whether plaintiffs are entitled to try. They are. The County's contrary position relies on a reading of Supreme Court precedent so drastic that it would allow a flat ban on gun stores to avoid any Second Amendment scrutiny at

all. This Court would never countenance such transparent circumvention of other constitutional rights, and the Second Amendment should be no different. Nor should the Court accept the County's conclusory statements attempting to justify its apparent effort to zone gun stores out of existence. Accordingly, the district court's decision should be reversed, and the case should be remanded to allow plaintiffs to develop their Second Amendment claims.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's decision to dismiss the complaint and should remand for further proceedings.

Respectfully submitted,

s/Paul D. Clement

C.D. MICHEL
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd
Suite 200
Long Beach, CA 90802

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CHRISTOPHER G. MICHEL
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(3) because this brief contains 6,558 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

Dated: January 31, 2017

s/Christopher G. Michel
Christopher G. Michel

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Paul D. Clement