No. 13-17132

IN THE

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.

On Appeal from the United States District Court for the Northern District of California

DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF IN RESPONSE TO AMICUS BRIEFS SUBMITTED AFTER GRANT OF REHEARING EN BANC

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INTRODUCTION

After this Court granted the County's petition for rehearing en banc, Amici Curiae filed four briefs in support of Plaintiffs.[1] The Amici, however, fundamentally misunderstand this case. They all argue from the same false premise that the challenged Ordinance completely bans gun stores in the County's jurisdiction, thus depriving individuals of access to gun stores in the County. But the Ordinance does no such thing, and Plaintiffs have not alleged otherwise. Rather, Plaintiffs' own amended complaint demonstrates that ten gun stores already operate within the County, including in the unincorporated communities governed by the Ordinance. So it is no accident that Plaintiffs have not alleged that denying them a zoning permit meaningfully reduced *any* County resident's ability to acquire firearms. And because of that unavoidable omission, Plaintiffs' amended complaint fails to state a claim under the Second Amendment.

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[1] Briefs were filed by Professor Randy Barnett et al. (Barnett Br.), the National Shooting Sports Foundation (NSSF Br.), the National Rifle Association et al. (NRA Br.), and Jews for the Preservation of Firearms Ownership et al. (JPFO Br.).

The County fully respects individuals' right to acquire the arms that the Second Amendment entitles them to keep and bear for self-defense. The question in this case, however, is whether a particular business seeking to sell firearms has a Second Amendment right of its own, *independent of* anyone's ability to acquire a gun, to open shop wherever it pleases. It does not. The only Second Amendment claim a gun store could assert would be derivative of the rights of its customers, so if there is no claim that individuals are meaningfully hindered from acquiring arms by the Ordinance, then the store has no claim either. Amici err in conflating these two distinct questions.

Moreover, any analysis of a law regulating gun *sales*, like the County's zoning ordinance, must begin from two Supreme Court decisions deeming "conditions and qualifications on the commercial sale of arms" to be "presumptively lawful." For that reason, Amici are simply wrong in insisting that the permit denial here must be evaluated as if it applied to a bookstore or church or abortion clinic. The Supreme Court has *not* specifically exempted conditions on providers in those contexts. Rather, with respect to bookstores and theaters and churches, the Court has recognized that providers have their *own* expressive and

religious rights under the First Amendment. It is not "to treat the Second Amendment 'as a second-class right'" to recognize that different constitutional rights are subject to different constitutional exceptions. NRA Br. 13. In any event, the cases Amici cite all involve demonstrated (or at least alleged) burdens on the relevant constitutionally protected right, which is precisely the element of Plaintiffs' claim that they did not and could not sufficiently plead.

At bottom, Amici just disagree with the Supreme Court's decision to treat rational regulations on gun sales as "presumptively lawful." The Supreme Court, however, properly recognized that such regulation of firearm dealers is far removed from individuals' right to keep and bear arms for self-defense—the only right the Amendment protects—and the Supreme Court's repeated emphasis of this point is binding on this Court.

Absent any allegation that the Ordinance meaningfully denies County residents access to gun stores in the County, the Supreme Court's presumption of validity cannot be rebutted here. The district court therefore properly dismissed Plaintiffs' amended complaint, and its judgment should be affirmed.

ARGUMENT

I. The Ordinance Is A Presumptively Lawful Regulation On The Commercial Sale Of Firearms, Not A "Complete Ban" On Sales That Infringes Anyone's Ability To Obtain Arms.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. The Court held, however, that the right to keep and bear arms is "not unlimited." *Id.* at 626. *Heller* went out of its way to make clear that "nothing in [its] 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. Such measures, the Court explained, are "presumptively lawful." *Id.* at 627 n.26. The Court then "repeat[ed] those assurances" two years later, reiterating that the Second Amendment right recognized in *Heller* does not undermine the validity of regulations on

the commercial sale of firearms. *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion).

As our answering brief and petition for rehearing en banc (PFREB) explain, the district court correctly upheld the Ordinance under *Heller* and *McDonald* because it "is quite literally a 'law[] imposing conditions and qualifications on the commercial sale of arms.'" Excerpts of Record (ER) 18; *see* County Br. 13-14; PFREB 7-10. The Ordinance requires that gun stores be operated by licensed firearms dealers, make sufficient provision "for safe storage of firearms and ammunition to be kept at the subject place of business and building security," meet all applicable building and fire codes, and not be located "within five hundred (500) feet of any … [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." Alameda County, Cal., Code § 17.54.131(B)-(F).

Amici's contrary arguments rest heavily on two misapprehensions about this case. First, Amici insist that the Ordinance works an outright ban on gun sales in the unincorporated portions of Alameda County that are governed by the Ordinance. But Plaintiffs' own

amended complaint contradicts that assertion. *Infra* § I.A. Second, Amici misunderstand the County to argue that individuals have no right to purchase firearms for personal use. That is not our argument, nor does the Ordinance's validity even remotely depend on that proposition. The Second Amendment protects an individual right to keep and bear arms for self-defense, and that necessitates a right to obtain arms for that purpose in the first place. But the Second Amendment does *not* establish a freestanding right of an individual business to sell arms. Any regulation on the commercial sale of firearms could therefore be challenged under the Second Amendment only upon a showing that it meaningfully inhibits local residents' ability to obtain from *any* seller the arms they are entitled to keep and bear. Plaintiffs have not even alleged as much here, nor could they. *Infra* § I.B.

A. Plaintiffs' amended complaint demonstrates that the Ordinance is not a complete ban on gun stores.

1. Amici premise their arguments on the repeated, incorrect assertion that the Ordinance imposes a "complete ban on gun stores," NRA Br. 5, and a total "prohibition of firearms commerce," JPFO Br. 31; *see also* NRA Br. 2, 15, 26; NSSF Br. 7 n.3, 11-13; Barnett Br. 3, 8, 11-

14. It is uncontested, however, that "firearms commerce" is active in unincorporated Alameda County: An exhibit to Plaintiffs' own amended complaint—which is properly considered on a Rule 12 motion to dismiss, *see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)—demonstrates that ten gun stores operated within the County as of 2011, including several in the unincorporated areas governed by the County's zoning laws. Excerpts of Record (ER) 121.[2] Indeed, guns are readily available at another store only 607 feet away from the site where Plaintiffs proposed opening their gun store. Supplemental Excerpts of Record (SER) 9; ER 120, 133 (map showing both locations).

Amici cite Plaintiffs' allegation that they "commissioned a study" that purported to find "no parcels in the unincorporated areas of

[2] The exhibit lists the addresses of all ten stores in the County. Three (not four, as previously stated, *see* County Br. 7, 18; PFREB 3) are in unincorporated San Lorenzo and Castro Valley. Other parts of the exhibits to the amended complaint (ER 126, 179) reference a fourth store in the unincorporated area of the County, but the correct number is actually three; 4514 Las Positas Road sits just outside the unincorporated portion of Livermore and inside the incorporated city limits. A map of the unincorporated portions of Alameda County is available at http://communitylocator.acgov.org. *See United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (this Court may "take judicial notice of a … map … 'whose accuracy cannot reasonably be questioned'") (quoting Fed. R. Evid. 201(b)).

Alameda County which would be available for firearm retail sales." ER 50. But, even assuming that allegation were plausible, nothing in Plaintiffs' amended complaint disputes that gun stores are open for business in the County under the Ordinance. Rather, the face of Plaintiffs' amended complaint appears to confirm as much: It notes that "there are 29 Federal Firearm Licensees (FFLs) in Alameda County," and alleges that "[m]any of these FFLs"—but not all—"are not located in commercial buildings open for retail firearm sales." ER 40. And in any event, this "court need not … accept as true allegations that contradict" an "exhibit" that is "attached to [a plaintiff's] complaint," such as the exhibit showing that three gun stores presently operate in unincorporated Alameda County. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).[3]

[3] To the extent Amici suggest that "grandfathered" gun stores may eventually be forced to close, their contention is both incorrect and premature. *See* NSSF Br. 15 n.7; *see also* Reply Br. 15-16. Locations operating as gun stores before the Ordinance was enacted may, as a general rule, continue to operate legally as gun stores without any required permit—including by new owners or proprietors—so long as the use of the building or land is "not … increased, enlarged or expanded." *See* Alameda County, Cal., Code §§ 17.52.610, 17.52.741. The possibility that locations that have housed gun stores under these provisions for nearly 20 years might not one day is entirely speculative,

Accordingly, this case presents no occasion to consider the constitutionality of a law that outright bans gun sales in a jurisdiction, whether expressly or in effect. *Compare Ezell v. City of Chicago* ("*Ezell II*"), 846 F.3d 888, 890 (7th Cir. 2017) (considering zoning restrictions on shooting ranges that left "only 2.2% of the city's total acreage … even theoretically available," such that "no shooting range yet exists"). Guns are lawfully bought and sold in unincorporated Alameda County every day.

2. Amici similarly misunderstand the County to argue here that it may ban sales entirely because "gun stores are available nearby, but outside the County's jurisdiction." Barnett Br. 11; *see also* NSSF Br. 7 n.3; JPFO Br. 31-35. Gun stores operate *within* the unincorporated parts of the County. Indeed, as noted above, one gun store is only a few hundred feet from where Plaintiffs want to open a new gun store. So, even assuming that the archipelago of unincorporated communities is the proper unit of analysis, rather than the County as a whole, Amici's argument is misplaced.

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and so any challenge premised on that possibility would be unripe. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39, 1141 (9th Cir. 2000) (en banc).

This is therefore not a case about depriving County residents of their ability to exercise their Second Amendment right to keep and bear arms. Nor does it concern an effort to keep gun stores out of the County. Once those false premises are swept away, it becomes clear that this case simply involves a "law[] imposing *conditions and qualifications* on the commercial sale of arms," which *Heller* deemed "presumptively lawful," 554 U.S. at 626-27 & n.26 (emphasis added), not a "complete ban" on the commercial sale of firearms, which would be subject to a different analysis.[4]

B. The Second Amendment establishes an individual right to keep and bear arms, not a freestanding right of a particular business to sell arms.

Amici posit that the "threshold question in this case is … whether the right to bear arms encompasses 'a right to acquire firearms.'" NRA Br. 5 (quoting Slip Op. 14); *see also id.* at 5-13; NSSF Br. 9-10. In Amici's view, the County's reading of *Heller* rests upon rejecting "the

[4] Although the Third Circuit failed to appreciate that distinction in a footnote of dicta (in a case having nothing to do with regulation of firearms sales), *see United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010), even Amici ultimately acknowledge that "conditions and qualifications" are constitutionally distinct from outright "prohibitions," NRA Br. 16.

wealth of authority establishing a right to acquire arms." NRA Br. 14. That is incorrect. Amici err in conflating a right of *individuals* to acquire firearms for personal use—which the County does not deny—with an asserted independent right of a given *commercial business* to sell firearms regardless of how available for purchase guns already are in a jurisdiction.

The Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Accordingly, as Dean Chemerinsky observes, "[t]he [three-judge] panel's conclusion that the Second Amendment encompasses an individual's 'right to acquire the very firearms they are entitled to keep and to bear,' is not controversial." Chemerinsky Br. 5-6 (quoting Slip Op. 16) (internal citation and emphasis omitted). The County does not dispute that "the Second Amendment right to keep and bear arms necessarily includes the right to acquire arms" for that purpose.[5] NRA Br. 6. But there is no *freestanding* right of commercial

[5] Acquiring arms for purposes other than keeping and bearing them for self-defense, however—such as gun trafficking—would raise other questions not presented here. Hence our answering brief's caution (at 18) about embracing an unqualified "right to acquire."

enterprises to sell guns that exists wholly apart from individuals' ability to buy guns. Only the individual right is protected, so regulation of gun stores could implicate the Second Amendment only indirectly, to the extent it actually burdens anyone's ability to purchase a gun.

Consider an extreme example: a city with a gun store on every block, except those with elementary schools. A decision not to allow yet another gun store in the city, this time next to an elementary school, could not plausibly be said to infringe anyone's ability to buy a gun for personal use. That is why "protect[ing] an individual's right to bear arms … does not necessarily give rise to a corresponding right to sell a firearm" on the part of gun store owners. *United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011); *see Montana Shooting Sports Ass'n v. Holder*, No. 09-147, 2010 WL 3926029, at *21 (D. Mont. Aug. 31, 2010) ("*Heller* said nothing about extending Second Amendment protection to firearm[s] … dealers."); Chemerinsky Br. 6-7. The numbers here are different, but the result is not: So long as residents have reasonable access to firearms, the Second Amendment is satisfied. Would-be proprietors have no Second Amendment right to open a store of their own.

To the extent Amici's analogies to First Amendment or abortion rights are instructive at all (*but see infra* § III), they only highlight the importance of distinguishing between buyers' and sellers' rights. When the Supreme Court invalidated a special tax on paper and ink products used in publishing newspapers, for example, it did so because the "[d]ifferential taxation of the press" threatened to restrain *newspapers*' free expression—not because of any independent concern for paper and ink sellers. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Likewise, a proposed abortion clinic could be disallowed in the absence of any indication that doing so would burden women's right to access abortion services, even if it meant that a particular physician would not be able to open a clinic in her preferred location. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846, 887 (1992).

The analysis is different, of course, when a supplier or seller is invoking its own constitutional rights, rights that are independently protected in addition to the buyer's rights. For example, the owner of a bookstore can *directly* assert that a restriction on bookstores violates the First Amendment because selling books is itself speech. *Infra* at 35.

But the only claims a prospective gun store operator—like abortion providers and ink and paper suppliers—can assert are those derived from their potential customers. So if the customers' rights would not be infringed, there can be no constitutional challenge.

Here, "there is no claim that, due to the zoning ordinance in question, individuals cannot lawfully buy guns in Alameda County." Slip Op. 35 (Silverman, J., dissenting). That is no inadvertent omission. Because guns are lawfully and readily available for sale in the County, Plaintiffs could not have alleged that necessary fact in good faith, as they tacitly acknowledged to the district court.[6]

The closest that Plaintiffs come is their allegation that the Ordinance is "a restriction on *convenient* access to a neighborhood gun store," which thus imposes a "burden of having to travel to other, more remote locations." ER 42 ¶ 45 (emphasis added). But "[r]equiring an individual to drive to one part of a city as opposed to another"—or here,

[6] At the hearing on the County's motion to dismiss, the district court asked whether "there [are] other facts … that you would want … to address the concerns that Judge Illston has expressed and that I've expressed here" or "whether there's something else that's there … that you would want to take another crack at the pleading." SER 14. Plaintiffs responded, "I really don't think so, Your Honor. I think that we have … pled the sufficient facts." *Id.*

607 feet—"in order to purchase a firearm does not, on its face, burden the core right to possess a firearm for protection.... [F]or those intent on purchasing a firearm (which is what the Second Amendment is concerned with), a slight diversion off the beaten path is no affront to their Second Amendment rights." *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015). The same is true in other contexts. *See infra* at 40.[7]

Plaintiffs also allege that "existing retail establishments (e.g., general sporting good stores) do not meet customer needs and demands" with respect to offerings like a high "level of personal service" as well as "personalized training and instruction in firearm safety and operation." ER 37-38 ¶ 27. That is not a cognizable burden on residents' ability to obtain arms for personal use; "good customer service … is not a constitutional right." Slip Op. 36 (Silverman, J., dissenting). And to

[7] *See also Torraco v. Port Auth. of New York & New Jersey*, 615 F.3d 129, 140-41 (2d Cir. 2010) ("travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel," including a one-day delay, "simply do not amount to the denial of a fundamental right") (internal quotation marks and citation omitted); *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 989 F. Supp. 2d 981, 992 (C.D. Cal. 2013) ("[T]he First Amendment does not guarantee a right to the cheapest and most convenient means of advertising."), *aff'd*, 827 F.3d 1192 (9th Cir. 2016).

the extent barring Plaintiffs' proposed store limits nearby options for firearms training, the *Ordinance* does not cause any injury. The Ordinance regulates only the location of "Firearms *sales*." § 17.54.131 (emphasis added). If the proposed store offered all of the services Plaintiffs intend to provide but did not trade in firearms, the Ordinance challenged here would have posed no obstacle.

In short, absent any allegation that there is any individual "resident of Alameda County complaining that he or she cannot lawfully buy a gun nearby"—or even is meaningfully *hindered* in doing so—Plaintiffs have simply failed to state a Second Amendment claim. Slip Op. 36 (Silverman, J., dissenting).

II. Amici's Position Would Render *Heller*'s "Commercial Sale Of Arms" Exemption Meaningless.

Amici's arguments ultimately reduce to the contention that the Supreme Court did not really mean what it said when it *twice* expressly deemed "conditions and qualifications on the commercial sale of arms" to be "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 626-27 & n.26; *see McDonald*, 561 U.S. at 786. The NRA, for example, dismisses this critical limitation as "a couple of (at best) ambiguous

lines" in an "'enigmatic' passage," and then advances an analysis that would strip it of all meaning. NRA Br. 4, 20.

That will not do. *Heller*'s express limitations are not meaningless dicta, as this Court has already recognized, but rather the "limitations" recognized by the Supreme Court were "integral" to its decisions. *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). Indeed, by repeating this caveat in *McDonald*, the Supreme Court "underscore[d] the importance of that language and … remove[d] any doubt about the care that went into it and its importance in understanding the holding in *Heller*." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1124 (10th Cir. 2015). That importance cannot be overstated: By affording a presumption of validity to broad categories of measures that protect the public from the particular risks gun pose, *Heller* spared many essential laws from protracted challenges. *See* PFREB 21-22; California Br. 1-4, 17-18.

A. *Heller*'s presumption of validity is incompatible with Amici's insistence on heightened scrutiny.

1. Amici first insist that *Heller*'s commercial-sale exemption "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," and so, "[a]t a minimum, the County must satisfy intermediate scrutiny" by "prov[ing]" that the Ordinance is necessary and appropriate. NRA Br. 3, 21; *see also* Barnett Br. 14-17; NSSF Br. 12-13. But imposing heightened scrutiny on gun store regulations is incompatible with *Heller*'s holding that such laws must be presumed *lawful*.

Under heightened scrutiny (whether intermediate or strict), it is the government's burden to prove the lawfulness of a regulation. *See United States v. Chovan*, 735 F.3d 1127, 1140-41 (9th Cir. 2013). That means that a regulation is presumptively *invalid* until the government demonstrates otherwise. So it cannot be that heightened scrutiny applies to the categories of measures *Heller* deemed presumptively *valid*. As Judge Gould has explained, "[g]iven the Supreme Court's admonition that certain arms restrictions are presumptively lawful, 'a heightened standard that presumes every regulation to be unconstitutional makes no sense.'" *Nordyke v. King*, 644 F.3d 776, 796 (9th Cir. 2011) (Gould, J., concurring) (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 708 (2007)), *vacated upon reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012).

Accordingly, when this Court has evaluated laws that fit within *Heller*'s enumerated exceptions, it has not engaged in the sort of means-ends analysis that heightened scrutiny would require. *See, e.g.*, *Vongxay*, 594 F.3d at 1115. Because the County's "ordinance restricting the location of a gun store is 'quite literally a "law[] imposing conditions and qualifications on the commercial sale of arms,"'" it is not subject to heightened scrutiny either. Slip Op. 36 (Silverman, J., dissenting) (quoting ER 18).

2. As Amici note, however, a law's *presumptive* validity does not mean it is *conclusively* valid. *See* NRA Br. 4, 14. We fully agree. A condition on sales that works a de facto prohibition on, or meaningfully impairs, County residents' "core … Second Amendment right … to use arms in defense of hearth and home" may well be subject to challenge. *Chovan*, 735 F.3d at 1133 (quoting *Heller*, 554 U.S. at 635). *Heller* itself makes this clear: "A statute which, under the preten[s]e of regulating, amounts to a destruction of the right … would be clearly unconstitutional." 554 U.S. at 629 (internal quotation marks omitted). Thus, to use Amici's fanciful examples, a plaintiff challenging "a million-dollar gun purchase fee or a 20-year waiting period" would

handily rebut the presumption of validity by showing that "such draconian conditions or qualifications … would effectively eviscerate the right." NRA Br. 18. And the measures would then be subject to heightened scrutiny.

The key point, though, is that *Heller* places the burden on the *challenger* to rebut a restriction's presumptive validity in the first instance. Only then is heightened scrutiny—and the government's resulting burden—triggered. Here, because Plaintiffs could not allege that the Ordinance infringes anyone's ability to purchase guns for personal use, their claims were properly dismissed. *See supra* at 6.

Other courts have adopted precisely this approach to *Heller*'s safe harbors. Sitting en banc, the Third Circuit recently concluded that "the *burden* [*is*] *on the challenger* to rebut the presumptive lawfulness" of a measure that fits within *Heller*'s enumerated categories. *Binderup v. Att'y Gen.*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc) (plurality opinion) (emphasis added); *see also id.* at 366 (Hardiman, J., concurring) (same). Thus "a challenger must prove … that a presumptively lawful regulation burdens his Second Amendment rights" in an "as-applied challenge." *Id.* at 346-47 (plurality opinion) (citing *United States v.*

Barton, 633 F.3d 168, 173-74 (3d Cir. 2011)); *accord United States v. Hosford*, 843 F.3d 161, 167 (4th Cir. 2016) ("Even if a statute is facially constitutional, the phrase 'presumptively lawful regulatory measures' suggests the possibility that one or more of these 'longstanding' regulations could be unconstitutional in the face of an as-applied challenge.") (some internal quotation marks and emphasis omitted).

With respect to the *Heller* category at issue in *Binderup*—bans on felons possessing firearms—the Third Circuit held that a challenger must "present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." 836 F.3d at 347 (plurality opinion). The Third Circuit concluded that because the challengers there had "carried their burden of showing that their misdemeanors were not serious offenses despite their maximum possible punishment [of over one year]," the burden should shift to "the Government to meet some form of heightened scrutiny." *Id.* at 353.

Similarly, the D.C. Circuit has held that a "plaintiff may rebut th[e] presumption [of lawfulness] by showing the regulation does have more than a de minimis effect upon his right." *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("*Heller II*"). The D.C.

Circuit then upheld certain presumptively lawful handgun registration requirements after finding that challengers had failed to demonstrate that they were "onerous," while striking down other more burdensome ones that were not presumptively lawful. *Id.* at 1255.

Under this approach, when *Heller*'s presumption of lawfulness is correctly applied to conditions on the sale of guns, "[t]he presumption … puts the initial burden on the plaintiff to … articulat[e] specific facts to create a plausible inference that the restrictions on the sale of firearms abridge the individual right to possess firearms for protection." *Second Amendment Arms*, 135 F. Supp. 3d at 753. Thus in *Second Amendment Arms*, the district court dismissed a complaint where challengers could not "allege some set of facts to create a plausible inference that the zoning restrictions in question impair (or completely ban) the right to acquire firearms." *Id.* at 754.

The district court here correctly reached the same result. *See* ER 20 (applying *Heller*'s presumption of validity and finding no allegation that the Ordinance "creates a 'barrier' that is" more than "'*de minimis*'"). Indeed, *Heller*'s presumption of validity would have no meaning at all if a plaintiff could rebut it by filing a complaint as silent

as this one is about how the challenged law actually infringes anyone's ability to obtain guns for personal use.

B. Amici's interpretation of "longstanding" would similarly strip the "commercial sale of arms" exemption of most meaning.

1. Amici further contend that *Heller* does not presume that all conditions and qualifications on the commercial sale of firearms are lawful, but only the subset of such regulations that have a "historical basis." NRA Br. 16. Amici point in particular to the word "longstanding" in *Heller*'s critical passage:

> "[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."

554 U.S. at 626-27. But Amici misread *Heller*'s statement. The Court was not establishing two distinct criteria for presumptively valid commercial measures—(1) "conditions and qualifications" on sales, plus (2) "longstanding." Rather, it was "identify[ing]" a few broad categories of restrictions *as* sufficiently "longstanding" to be "presumptively lawful," so as to emphasize just how limited the Court's holding was. *Id.* at 626-27 & n.26.

The Court made this much clear two years later in *McDonald*, when it summarized *Heller* as exempting "*such* longstanding regulatory measures *as* … 'laws imposing conditions and qualifications on the commercial sale of arms.'" 561 U.S. at 786 (emphasis added). That is, the Court equated "longstanding regulatory measures" with the safe-harbor categories; it did not limit the presumption of lawfulness to only the subset of those measures with an ancient pedigree.

Accordingly, this Court has never held that a regulation described by one of *Heller*'s enumerated carve-outs must *separately* be found to be "longstanding." On the contrary, to identify "presumptively valid" measures, this Court "ask[s] whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, *or* 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 & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (emphasis added, internal citation omitted). In other words, *either* fitting within one of *Heller*'s enumerated safe harbors, *or* historical evidence demonstrating that the type of regulation similarly falls outside the Second

Amendment's scope, suffices for a regulation to avoid heightened Second Amendment scrutiny.

Thus in *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), for example, this Court relied primarily on *Heller*'s commercial-sale exception to uphold an Alameda County regulation of gun shows, without engaging in any historical analysis. *See id.* at 1044 (quoting *Heller* as providing simply that "nothing in our opinion should be taken to cast doubt on ... laws imposing conditions and qualifications on the commercial sale of arms") (ellipsis in original). And a panel of this Court upheld a restriction on unlicensed firearm dealing, without any historical analysis, merely because "[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); *see also Vongxay*, 594 F.3d at 1118 (upholding prohibition on possession of firearms by felons even though "the historical question has not been definitively resolved"); *Petramala v. U.S. Dep't of Justice*, 481 F. App'x 395, 396 (9th Cir. 2012) (upholding prohibition on possession of firearms by mentally ill, relying on *Heller* without historical analysis).

Meantime, *no* Court of Appeals has held that a specific type of commercial-sale regulation must itself have deep historical roots before it will be entitled to *Heller*'s presumption of validity.[8] Amici point to *Heller II* as a counterexample, asserting that the D.C. Circuit "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.'" NRA Br. 18 (quoting 670 F.3d at 1255). But that is not an accurate description of the case. *Heller II* did not consider the exception for "conditions and qualifications on the commercial sale of arms" *at all*; the registration requirements at issue had nothing to do with commercial sales or any other enumerated *Heller* exemption. Therefore, consistent with this Court's approach in *Jackson*, *Heller II* considered historical evidence to determine whether a law that did *not* fit within an express exemption should nevertheless be presumed valid.

[8] The Fourth Circuit recently noted that "[t]here may be debate as to whether the Supreme Court called presumptively lawful all 'laws imposing conditions and qualifications on the commercial sale of arms,' or only 'longstanding ... laws imposing conditions and qualifications on the commercial sale of arms,'" but it ultimately left that question open. *Hosford*, 843 F.3d at 166-67.

2. This Court is correct not to engage in a separate historical inquiry as to every sub-aspect of a regulation of firearm sales. This Court's approach properly respects the Supreme Court's decisions specifying (twice) as a categorical matter that conditions and qualifications on gun sales should be presumed valid. And this Court's approach comports with the point *Heller* was making when it offered reassurance that the regulation of sales would remain lawful: Recognizing an individual right to use and possess guns for self-defense should not prompt worry about jeopardizing the *types of* traditional public-safety restrictions that are peripheral to that right, regardless of the vintage of any particular restriction.

Indeed, Amici's alternative interpretation would effectively nullify *Heller*'s commercial-sale exception. Amici observe that "when the Second Amendment was ratified," Virginia law protected people's "liberty to sell armes and ammunition," and Americans more generally were "free to make, vend, and export arms." NRA Br. 7; *see also* JPFO Br. 32 ("Regulations on the commercial sale of firearms did not exist at the time of the passage of the Second Amendment."). But if *that* historical reference point defined the right, then *Heller*'s commercial-

sale exemption would be a null set. None of the commonplace regulations that exist today, including requirements that gun dealers be licensed and follow safe handling and storage rules, *see* California Br. 3-4, would be protected. This Court should not negate an important limitation on the Supreme Court's holding.

Other courts have adopted a less extreme position than Amici's, reasoning that "*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue." *Nat'l Rifle Ass'n of Am., Inc. v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012). This even includes regulations "of mid-20th century vintage." *Id.* Thus in *Hosford*, the Fourth Circuit concluded that even if a separate "longstanding" showing were required, "the federal progenitor of the [licensing requirement for gun dealers] at issue" was sufficiently "longstanding" because it was enacted in 1938. 843 F.3d at 167. Under that view, the Ordinance is sufficiently "longstanding" because it stems from the authority local governments have had to regulate gun sales for decades. *See* PFREB 18-21.[9]

[9] Moreover, as the petition for rehearing explains, zoning ordinances are just modern-day successors of traditional nuisance law. PFREB 20-21.

Although the Ordinance would survive under that approach, it simply highlights the folly of treating *Heller*'s "longstanding" term as an independent requirement in the first place. As the Seventh Circuit put it: "It would be weird to say that [the federal ban on possession by domestic violence misdemeanants] is unconstitutional in 2010 but will become constitutional by 2043, when it will be as 'longstanding' as [the federal ban on possession by felons] was when the Court decided *Heller*." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010). It cannot "be that the relative age of a regulation is the key to its constitutionality." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011). Instead, the inquiry is whether a given *category* of regulation is sufficiently established, and tangential enough to anyone's ability to keep and bear guns for personal use, that it should be deemed not to implicate Second Amendment rights in most cases. *Heller* and *McDonald* confirm that, as a general rule, conditions and qualifications

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Amici scoff at this this suggestion ("A gun store is not a garbage dump or a chemical plant," NRA Br. 20), but they do not dispute that nuisance law has long been used to regulate Second Amendment-protected goods like gunpowder. Besides, "nuisance" is not a value judgment; rather, a "nuisance may be merely a right thing in the wrong place." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 446 (2002) (Kennedy, J., concurring) (internal quotation marks omitted).

on the commercial sale of guns fit the bill. The Ordinance's regulation of where the commercial sale of guns may occur should therefore be treated as presumptively valid.

III. Amici's Analogies To Other Constitutional Contexts Are Misplaced.

Amici also build their argument extensively around hypothetical zoning laws regulating bookstores or abortion clinics. They argue, for example, that this Court should treat the Ordinance like a law "preventing bookstores or abortion clinics from opening anywhere within the jurisdiction." NRA Br. 4, 22-23, 26; *see also* Barnett Br. 9-10; Plaintiffs' Response to the PFREB (Resp.) 8. Many of those analogies are improper, however, because they deal with sellers or suppliers asserting their own rights.

More broadly, the constitutional concerns that attend restrictions on the location of those businesses and services are each different, reflecting the very different contours of the constitutional right in each context. That is why courts do not cross-pollenate the *content* of each constitutional doctrine (as opposed to modes of analysis like heightened scrutiny). Most significantly, unlike here, there is no Supreme Court decision in any of those contexts deeming restrictions on the relevant

commercial activity "presumptively lawful." *Infra* § III.A. In any event, a complaint like Plaintiffs' that fails to allege any meaningful burden on the protected right would fail in any of these other contexts as well. *Infra* § III.B.

A. First, Second, and Fourteenth Amendment rights differ in critical ways, rendering Amici's analogies inapposite.

First Amendment. First and Second Amendment rights bear critical differences that make it impossible "to import *substantive* First Amendment principles wholesale into Second Amendment jurisprudence." *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012). Thus, "no court has done so." *Id.* Courts have, of course, adopted the *structure* of First Amendment analysis in their Second Amendment jurisprudence, endorsing an "inquiry [that] bears strong analogies to the Supreme Court's free-speech caselaw" by pegging the "appropriate level of scrutiny" to the nature of the conduct being regulated and the degree to which the challenged law burdens the right. *Jackson*, 746 F.3d at 960-61; *see Chovan*, 735 F.3d at 1138; *Ezell v. City of Chicago* ("*Ezell I*"), 651 F.3d 684, 708 (7th Cir. 2011) ("distill[ing]" First Amendment doctrine to "extrapolate a few general principles to

the Second Amendment context"). But courts have never suggested that the *substance* and *scope* of First Amendment protections could be imported into the Second Amendment. So it is unremarkable that a regulation may be lawful as applied to guns but not books (or vice versa).

Consider the different exceptions the Supreme Court has carved out of each right, based on the unique social harms that each could pose. In the First Amendment context, the Court has declined to protect speech "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Thus the "freedom of speech … does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002). Those exempted categories are perfectly sound as applied to speech, but they would be nonsensical as applied to guns. Any suggestion, for example, that an individual could not carry a gun at home for self-defense because the

sight of the gun might "incite violence" would be flatly inconsistent with *Heller*.

The categories exempted from the Second Amendment make no more sense when analogized to restrictions on speech. For example, *Heller* approved of prohibitions on the possession of firearms by felons, 554 U.S. at 626, as this Court recognized in *Vongxay*, 594 F.3d at 1115. But a prohibition on the possession of *books* by felons would plainly be unconstitutional. *See Ashker v. California Dep't of Corrections*, 350 F.3d 917 (9th Cir. 2003) (protecting First Amendment right of convicts to obtain books even while in prison). That is because the Supreme Court has shaped its Second Amendment jurisprudence with full awareness that "[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights." *Bonidy*, 790 F.3d at 1126.

This is not to say that cross-doctrine analogies are never appropriate. In *Jackson*, for example, a law requiring guns to be stored in locked containers or disabled with trigger locks was a regulation of the manner in which gun owners could exercise their core Second Amendment right to keep guns for self-defense in the home. 746 F.3d

at 964. Similarly, an outright ban on the sale of specific types of ammunition within the jurisdiction regulated the manner in which firearms could be used for self-defense. *Id.* at 968. In the absence of a Second Amendment-specific reason to take a different approach (like the unique presumption that conditions and qualifications on gun sales are lawful), this Court analogized the laws to First Amendment time, place, or manner restrictions. *Id.* at 964, 968.[10]

But, on the whole, substantive comparisons between restrictions on guns and restrictions on other "constitutionally protected goods and services," Barnett Br. 7, will rarely be illuminating. The Seventh Circuit put the point well when plaintiffs tried to compare a permit requirement for carrying concealed weapons to a prior restraint on speech: "The problem with this argument is that everyone is entitled to speak and write, but not everyone is entitled to carry a concealed firearm in public." *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016).

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[10] Even if the First Amendment analogy were apt, despite the Second Amendment-specific presumption applicable here, the Ordinance does not restrict the "time, place, or manner" of *keeping and bearing guns for personal use*—the protected right—at all.

Amici's First Amendment analogies ignore these critical differences between First and Second Amendment rights, seizing instead on superficial similarities. They thus compare direct burdens on speech and religion in the First Amendment context—which are always subject to heightened scrutiny under Supreme Court case law—with regulations on sales in the very different Second Amendment context—which the Supreme Court deemed "presumptively lawful." Barnett Br. 14, NRA Br. 13, 22-23; *see also* Resp. 8.

Most significantly, as noted above, both buyers and sellers have rights protected by the First Amendment, whereas sellers do not under the Second Amendment. First Amendment cases analyzing zoning restrictions on adult bookstores and theaters evaluate the laws as time, place, and manner restrictions on *the proprietors'* expressive activity itself, and apply intermediate scrutiny in that context. *See Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring)[11] (addressing the expressive rights of "adult speech businesses"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986); *Schad v. Borough of*

[11] Justice Kennedy's concurrence is the controlling opinion in *Alameda Books*. *See Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003).

Mount Ephraim, 452 U.S. 61, 65 (1981); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 64 (1976); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) ("[A]ppellants [book publishers] are not in the position of mere proxies arguing another's constitutional rights.").[12]

Similarly, in the free exercise context, courts evaluate laws regulating the location of churches as direct burdens on the *institutions'* exercise of religion. *See Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (denying church's challenge to zoning decision where burdens on its religious practice were "of convenience and expense" and therefore "minimal"). That is because "for a religious institution, having a place of worship ... is at the very core of the free exercise of religion." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011) (applying the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*) (internal quotation marks omitted).

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[12] Restrictions on where religious literature may be distributed and sold is likewise treated as a time, place, or manner restriction on the *religious organization's* speech. *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

In contrast, regulating and zoning where guns are to be sold is "presumptively lawful" under Second Amendment doctrine, and the constitutional inquiry whether that presumption has been rebutted focuses exclusively on the customers' access to firearms. *Heller*, 554 U.S. at 627; *see supra* at 10. "At a minimum, this presumption distinguishes restrictions on the sale of firearms under the Second Amendment from similar restrictions on speech in the First Amendment." *Second Amendment Arms*, 135 F. Supp. 3d at 752-53.

Reproductive Rights. Amici's analogies to reproductive rights cases are equally off-point. *All* barriers to accessing pre-viability abortion services are subject to a means-ends examination of whether the "burden" on a woman's right to choose is "undue" in view of a state's interests in "protecting the health of the woman and the life of the fetus." *Casey*, 505 U.S. at 846; *see Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016). *None* is presumed valid. Thus, courts evaluating the constitutionality of laws regulating abortion providers in these circumstances must scrutinize "the asserted benefits" in order to "weigh[] [them] against the burdens." *Id.* at 2310.

In the context of *Heller*'s "presumptively lawful" regulatory measures, in contrast, the Supreme Court has already determined that the state's interest in regulation predominates, at least absent a showing that it meaningfully inhibits the right to keep and bear arms. Accordingly, comparing the interest-balancing approach in abortion cases with the presumption of lawfulness established by Second Amendment cases improperly ignores important differences in the two bodies of law.

Similarly flawed is Amici's suggestion that the rationale from *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977), applies here. Barnett Br. 7. In *Carey*, the Supreme Court struck down a state law "[l]imiting the distribution of nonprescription contraceptives to licensed pharmacists" because it imposed a "significant burden on the right of the individuals to use contraceptives if they choose to do so." 431 U.S. at 689. The Court explained that "the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition." *Id.* *Carey*, however,

emphasized that the law reduced access to contraceptives without any real safety rationale, *id.* at 690-91, while *Heller* established the presumptive *validity* of certain measures that reflect the particular safety concerns that guns present. *Supra* at 33.

Moreover, even if Plaintiffs had alleged any comparable reduction in access or increase in cost here, the burdens invoked in *Carey* would be wholly insufficient outside of the context of contraception, where low cost and easy availability are critical to protect meaningful access to a regularly purchased commodity item. Courts have declined to find that increased prices raise constitutional concerns in this and other, more comparable contexts. *See United States v. Decastro*, 682 F.3d 160, 168 n.6 (2d Cir. 2012) (if firearms law indirectly increased cost of acquiring guns, "within limits, that would not be a constitutional defect"); *see also Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (upholding a city ordinance prohibiting the use of sound trucks even though it may increase the cost of advertising).

B. In any event, Plaintiffs' allegations would not suffice in any constitutional context.

1. The burdens alleged in Plaintiffs' amended complaint would not trigger heightened scrutiny even if this Court were to treat Second

Amendment rights as substantively identical to the other rights Amici and Plaintiffs discuss. As noted above, Plaintiffs have not alleged any meaningful burden on the protected right at issue here—an individual's constitutional right to keep and bear arms for personal use.

Rather, the only alleged burden on consumers is that they may have to drive farther within the County to purchase a gun. *See supra* at 14. Even in the abortion context, though, that argument would likely fail. In *Whole Woman's Health*, for example, the Supreme Court declined to rely exclusively on driving distances of "more than 150 miles" to abortion clinics in its undue-burden analysis, recognizing that "increased driving distances do not always constitute an 'undue burden.'" 136 S. Ct. at 2313; *see also id.* at 2349-50 & n.32 (Alito, J., dissenting) (observing that, under *Casey*, "the need to travel up to 150 miles is not an undue burden" on a woman's right to seek an abortion, even when coupled with a 24-hour waiting period).

If such daunting driving distances—coupled with waiting periods—are not an undue burden on women seeking time-sensitive abortions, then surely much *smaller* distances (like the 607 feet to the nearest gun store, SER 9) cannot be *more* problematic for gun

purchases. For as jealously guarded as a woman's right to choose to terminate a pregnancy is, a physician's challenge to a zoning law that prevented her from opening a new abortion clinic would likely be dismissed where three clinics already operate within the unincorporated portion of a county, seven more are open within its incorporated portions, and no one asserts that any patient is burdened by the denial.

So too with places of worship. A cognizable burden on the free exercise of religion must be "more than an inconvenience" on religious exercise. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994) (internal quotation marks omitted). Thus in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), for example, the Eleventh Circuit rejected a congregation's challenge under RLUIPA's substantial-burden provision to a zoning ordinance that excluded churches and synagogues from a business district. The court reasoned that "walking a few extra blocks" to a site in a differently zoned district was not a cognizable burden, even in the "Floridian heat and humidity." *Id.* at 1228.

2. Amici nevertheless argue that *any* reduced ability to buy a gun is presumptively unconstitutional. Barnett Br. 7 (citing *Carey*, 431 U.S. at 689 and *Doe v. Bolton*, 410 U.S. 179, 194-95 (1973)). But because Plaintiffs have failed to allege any such reduced access here, *Carey* is not comparable on this score either. And in *Doe*, a case predating *Casey's* "undue burden" standard, the Court relied on equal protection grounds to hold unconstitutional a requirement that abortions (but not other surgical procedures) be performed in accredited hospitals. 410 U.S. at 194-95 (citing *Morey v. Doud*, 354 U.S. 457, 465 (1957) (Equal Protection Clause case)). Any analogous claim here would fail for the same reasons that Plaintiffs' equal protection challenge was rejected by the panel. Slip Op. 10-11.

In the end, Plaintiffs have alleged nothing more than the most minor of inconveniences to potential gun buyers. Where that inconvenience is insufficient to raise constitutional concerns with respect to zoning regulations applicable to churches, or laws governing abortion clinics, it certainly does not trigger heightened scrutiny of *presumptively lawful* conditions and qualifications on the commercial sale of arms.

IV. The Ordinance Survives Heightened Scrutiny.

Finally, Amici argue that this Court should apply strict scrutiny to Alameda County's zoning ordinance because it "severely burdens" core Second Amendment rights by "depriv[ing] law-abiding citizens of places to purchase firearms." NRA Br. 21. As noted above, most of the underpinnings of that argument are badly flawed. But even if this Court were to apply heightened scrutiny, intermediate scrutiny is the most that would be appropriate, and the Ordinance readily passes that test.

To determine the appropriate level of scrutiny, this Court asks whether the law implicates conduct "close to the core of the Second Amendment" and evaluates the severity of the burden. *Jackson*, 746 F.3d at 963. Laws strike at the core of protected Second Amendment rights when they burden "the right of law-abiding responsible citizens to use arms in defense of hearth and home." *Id.* (citing *Heller*, 554 U.S. at 635). A burden is not severe if a law "does not effectively disarm individuals or substantially affect their ability to defend themselves." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (quoting *Heller II*, 670 F.3d at 1262).

A zoning regulation governing the location of guns stores—leaving three gun stores operating in the unincorporated portions of Alameda County alone—does not affect residents' ability to exercise that core right at all, let alone severely burden it. Intermediate scrutiny is therefore the most that could apply, and would be consistent with this Court's precedent declining to apply strict scrutiny to substantially more restrictive laws. *See Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016) (law requiring applicant to wait ten days before taking possession of firearm); *Jackson*, 746 F.3d at 964-65, 969 (city ordinance requiring handguns to be stored in locked container or disabled with trigger lock, and barring sale of hollow-point bullets); *Chovan*, 735 F.3d 1127, 1129-30 (law prohibiting domestic violence misdemeanants from possessing firearms for life).

Intermediate scrutiny requires "(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. As the panel recognized, the County asserted a number of substantial interests in defending the Ordinance. Slip Op. 28-29. They include protecting public safety and

"reducing violent crime," *Fyock*, 779 F.3d at 1000, and preserving the character of neighborhoods, *see One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996).

Amici assert that Alameda County has not presented evidence to support its safety rationale. NRA Br. 24; Barnett Br. 16. But this Court has not questioned that "the objective of promoting safety and reducing gun violence" is always an important objective. *Silvester*, 843 F.3d at 827; *see also Fyock*, 779 F.3d at 1000 ("It is self-evident that Sunnyvale's interests in promoting public safety and reducing violent crime are substantial and important government interests.") (internal quotation marks omitted). And in any event, the Alameda County Sheriff expressed specific concern that a new gun store "would significantly increase the likelihood of calls for service including thefts, burglaries, and robberies." ER 167.

That concern was reasonable: "[D]ealerships can be the targets of persons who are or should be excluded from possessing weapons." *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1132 (1997); *see also* Brady Ctr. Br. 7-8. In 2015, for example, a total of 470 firearms were reported lost or stolen by federally-licensed firearms dealers in California

alone.[13] Gun thefts are also on the rise nationwide. Gun store burglaries "spiked 28 percent between 2013 and 2015," when "[m]ore than 12,000 [firearms] … were stolen."[14]

More generally, the connection between gun stores and their negative secondary effects is well-established. Although Amici posit that the "overwhelming majority of people who buy guns at gun stores are law-abiding," Barnett Br. 5, they ignore the fact that gun dealers attract illegal straw purchasers who can pass background checks. For example, a recent survey of handgun dealers in California revealed that 20.1% agreed to assist a potential handgun buyer with a transaction that had many attributes of a straw purchase.[15]

And, most alarming, one recent study demonstrated a correlation between the density of firearms dealers in major cities and the homicide

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[13] U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, *FFL Thefts/Losses, United States* (2016), http://tinyurl.com/FFLThefts.

[14] Pierre Thomas et al., *More Than 500 Gun Store Burglaries Expected This Year, Says ATF*, ABC News (Nov. 30, 2016), http://tinyurl.com/ABCNews20161130.

[15] Garen Wintemute, *Firearm Retailers' Willingness to Participate in an Illegal Gun Purchase*, 87 J. Urb. Health 865, 867, 872 (2010), http://tinyurl.com/GWintemute.

rates in those cities, concluding that "having a disproportionately high number of [federal firearms licensees] was associated with significantly higher rates of firearm homicide in major cities."[16] The County is "entitled to rely on the experiences of" these other major cities and California communities in identifying the risks of secondary effects. *City of Renton*, 475 U.S. at 51-52.

Amici contend that the Ordinance is nevertheless not "tailored" to the County's needs. NRA Br. 24-26. But intermediate scrutiny does not require that a law be "the least restrictive means of achieving [the government's] interest." *Fyock*, 779 F.3d at 1000; *see also Peruta v. County of San Diego*, 824 F.3d 919, 945 (9th Cir. 2016) (en banc) (Graber, J., concurring) (a regulation's "fit" must "be reasonable, not perfect"). Rather, the court looks only to whether the law "promotes a 'substantial government interest that would be achieved less effectively absent the regulation.'" *Fyock*, 779 F.3d at 1000. This "test is not a strict one." *Silvester*, 843 F.3d at 827.

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[16] Douglas J. Wiebe et al., *Homicide and Geographic Access to Gun Dealers in the United States*, BMC Public Health (2009), http://tinyurl.com/WiebeHomicideGeo.

Thus in *Silvester*, imposing a 10-day waiting period on gun purchases was sufficiently tailored to California's interest in allowing time for both a background check and a "cooling-off period" to "prevent or reduce impulsive acts of gun violence or self harm"—even though the rule affected those whose background checks could be completed more quickly and who already owned guns (and thus would not be prevented from impulsive firearms violence regardless). *Id.* at 828. Similarly, in *Fyock*, it was enough that Sunnyvale's ban on large-capacity magazines related to its "interests in reducing the harm and lethality of gun injuries"; that such ammunition could also legitimately be used "for self-defense purposes" did not mean that Sunnyvale lacked authority to reach its reasonable policy judgment. 779 F.3d at 1000-01.

Here, where the interest is protecting the safety of sensitive places and the character of residential neighborhoods, drawing a radius around those very places and neighborhoods is entirely reasonable. Indeed, applying intermediate scrutiny in the First Amendment context, the Supreme Court has twice upheld zoning ordinances involving much larger radiuses. *See City of Renton*, 475 U.S. at 41 (upholding ordinance barring adult theaters from locating within 1,000

feet of a residential zone or other specified areas); *Young*, 427 U.S. at 71-72 (upholding ordinance barring adult theaters from locating within 1,000 feet of one another or other places like bars, hotels, and secondhand stores).

Requiring additional evidence that a given approach will succeed would deprive local governments of the "reasonable opportunity to experiment with solutions to admittedly serious problems" via their zoning laws. *Jackson*, 746 F.3d at 969-70 (quoting *City of Renton*, 475 U.S. at 52). Localities considering an "innovative solution" to reduce crime "may not have data" to directly prove "the efficacy of [their] proposal[s] because the solution would, by definition, not have been implemented previously." *Alameda Books*, 535 U.S. at 439-40 (plurality opinion).

Accordingly, should intermediate scrutiny apply here, the County may make arguments rooted in "common sense," *id.* at 439, to support the zoning law. Because the County has "fairly support[ed] its conclusion," *Jackson*, 746 F.3d at 969 (internal quotation marks omitted), the Ordinance survives intermediate scrutiny even if it applies. No remand for factual development is necessary. *See, e.g.*,

Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016) (affirming the dismissal of a complaint raising Second Amendment challenge reviewed under intermediate scrutiny).

CONCLUSION

For the foregoing reasons, and those stated in the County's answering brief and petition for rehearing, this Court should affirm the judgment below.

Respectfully submitted,

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February 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that 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 appellate CM/ECF system on February 28, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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