No. 13-17132

In the United States Court of Appeals for the Ninth Circuit

JOHN TEIXEIRA, et al.,

Plaintiffs-Appellants,

v.

COUNTY OF ALAMEDA, et al.,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Northern District of California
Hon. William H. Orrick
(CV-99-04389-MJJ)

BRIEF *AMICUS CURIAE* OF CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS IN SUPPORT OF APPELLANTS SEEKING REVERSAL

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March 21, 2014

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CORPORATE DISCLOSURE STATEMENT

The Citizens Committee for the Right to Keep and Bear Arms has no parent corporations. No publicly traded company owns 10% or more of *amicus* corporation's stock.

Dated: March 21, 2014

Respectfully submitted,

Citizens Committee for the
Right to Keep and Bear Arms
Amicus Curiae

By: /s/ Alan Gura
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STATEMENT OF *AMICUS CURIAE*

The Citizens Committee for the Right to Keep and Bear Arms is a non-profit corporation organized under Section 501(c)(4) of the Internal Revenue Code, dedicated to promoting the benefits of the right to bear arms. The Court's interpretation of the Second Amendment directly impacts the Committee's organizational interests, as well as the Committee's members and supporters, who enjoy exercising their Second Amendment rights. The Committee's substantial expertise in the field of Second Amendment rights would aid the Court.

No counsel for a party in this case authored the brief in whole or in part. No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person, other than amicus curiae and its members contributed money intended to fund preparing or submitting this brief.

CONSENT TO FILE

All parties have consented to the filing of this brief.

INTRODUCTION

Every constitutional right is unpopular among some segments of society. Some would prefer that their neighbors not practice a particular faith, adhere to different political views, or make different family planning decisions. And some will always view the private possession of firearms as a social evil holding no utility for decent people. Local political majorities may wish to expel such purportedly indecent people, and their guns, from the community.

When prejudice against a constitutional right finds legislative expression, the courts' role is clear: to strike down the offending law. Here, unfortunately, the lower court did not take the Second Amendment seriously, nor did the court take seriously its obligation to safeguard that right against Alameda County's ahistorical requirement that gun stores be located 500 feet apart from residential areas, schools, liquor stores, and each other. The challenged provision would flunk even the rational basis test. It cannot survive in a legal system that holds the right to keep and bear arms fundamental. The decision below should be reversed.

SUMMARY OF ARGUMENT

Guns do not grow on trees. Because there is a right to keep and bear arms, there is, necessarily, a right to buy and sell those arms. While "longstanding" firearm regulations inform the scope of Second Amendment rights, "longstanding" regulations, in this context, are those that the Framers would have recognized. The Framers had no zoning laws, and certainly nothing like Alameda County's ordinance.

Because the challenged provision burdens the right of responsible, law-abiding Americans to keep and bear arms for self-defense, it is subject to heightened scrutiny—in this case, strict scrutiny. But the level of scrutiny is, in the final analysis, irrelevant. Alameda County has absolutely no legitimate interest in enforcing this law.

The court below parroted the County's vague incantations regarding "secondary effects," "protecting public safety," and "sensitive places," but it must be asked—seriously—what "secondary effects" are unique to gun stores? Setting aside generalized objections to the private possession of firearms, a matter constitutionally resolved in 1791, and again in 1868, how do gun stores threaten public safety? How do gun stores enable, other than in the most generalized sense, the carrying of

guns in "sensitive places?" And considering that Americans enjoy a right to keep guns (to say nothing of the right to bear them in the interest of self-defense), how might residential districts (!) ever be defined as "sensitive places" from which firearms may be excluded?

Amicus understands the public safety rationale behind barring guns to dangerous people, or barring the possession of particular weapons, even where legitimate disagreement may exist regarding which people or which arms are unaccountably dangerous. And *amicus* does not challenge the concept of zoning. Gun stores are retail businesses, and as such, would not always be compatible with neighboring land uses for all the usual reasons that a retail business might not suit some particular property parcel. But Alameda County must have at least a rational basis to zone business uses generally—and much more to restrictively zone the use of land in the exercise of fundamental rights.

Indeed, the application of means-ends scrutiny may not even be appropriate if, as Plaintiffs alleged—and as the Court was required to assume on the County's motion to dismiss—the challenged provision, and its enablement of an ideological veto, made it impossible to open a gun store.

Worse still, even under the context of its unconstitutional law, *the County* determined that Plaintiffs' use:

- "will not be detrimental to persons or property in the neighborhood or to the public welfare," BZA Res. No. Z-11-70, D.C. Dkt. 40-3, at 3;
- is "required by the public need as there is a need to provide the opportunity to the public to purchase firearm sales [sic] in a qualified licensed establishment," *id.*;
- "will be properly related to other land uses and transportation and service facilities in the vicinity," *id.*, and
- "will not materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injuries [sic] to property or improvements in the neighborhood . . . ." *Id.* at 4.

Nonetheless, the County succumbed to local prejudice in barring Plaintiffs' exercise of a fundamental constitutional right.

Unconstitutional laws, not gun stores, must be "zoned out" from Alameda County. The judgment below should be reversed.

ARGUMENT

> [T]he zoning power is not infinite and unchallengeable; "it must be exercised within constitutional limits." Accordingly, it is subject to judicial review; and as is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.

Schad v. *Mt. Ephraim*, 452 U.S. 61, 68 (1981) (quotation and citation omitted). "[A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* (footnote omitted).

The right threatened and violated in this case is the Second Amendment right to keep and bear arms. "The two-step Second Amendment inquiry we adopt (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *United States* v. *Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). But the second step is not reached if the regulation amounts to a complete destruction of the right. *Peruta* v. *County of San Diego*, No. 10-56971, 2014 U.S. App. LEXIS 2786, at *66 (9th Cir. Feb. 13, 2014).

I. THE SECOND AMENDMENT SECURES THE RIGHT TO BUY AND SELL FIREARMS.

No court would struggle with the question of whether the First Amendment secures a right to buy and sell books, or whether the right to make family planning decisions implicates commercial access to contraceptives. The lower court seriously erred in holding that the Second Amendment fails to secure an interest in buying and selling the firearms whose possession and carrying it guarantees.

"[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579-80 (1980). Obviously, if there is a right to "keep and bear" arms, there must be some right to acquire arms, not just manufacture them at home. "[R]estricting the ability to purchase an item is tantamount to restricting that item's use." *Reliable Consultants, Inc.* v. *Earle*, 517 F.3d 738, 743 (5th Cir. 2008) (footnote omitted); accord *Carey* v. *Population Serv., Int'l*, 431 U.S. 678, 687-88 (1977) ("A total prohibition against the sale of contraceptives . . . would

intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use."). As the Seventh Circuit acknowledged, adopting tort doctrines "which would in practice drive [handgun] manufacturers out of business, would produce a handgun ban by judicial fiat in the face of" a constitutional right to handgun possession. *Martin* v. *Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984).

Accordingly, the Second Amendment "must also include the right to *acquire* a firearm . . . ." *Ill. Ass'n of Firearms Retailers* v. *City of Chicago*, No. 10-C-04184, 2014 U.S. Dist. LEXIS 782, at *2 (N.D. Ill. Jan. 6, 2014). That the right to arms includes this necessary corollary has long been understood. See, *e.g.*, *Andrews* v. *State*, 50 Tenn. 165, 178 (1871) ("[t]he right to keep arms, necessarily involves the right to purchase them"). "What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . .?" *District of Columbia* v. *Heller*, 554 U.S. 570, 583 n.7 (2008) (quoting SOME CONSIDERATIONS ON THE GAME LAWS 54 (1796)). "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them."

Thomas Jefferson, 6 Writings 252-53 (P. Ford ed. 1895); Laws of Virginia, February, 1676-77, Va. Stat. At Large, 2 Hening 403 (1823) ("It is ordered that all persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony . . . .").[1]

Contrary to logic, history, and precedent, the district court asserted that the Second Amendment does not secure the right to sell arms, because restrictions on the sale of arms are "longstanding." ER 7, 17. While *Heller* allowed that "the full scope of the Second Amendment" should be understood in light of "longstanding prohibitions," including "laws imposing conditions and qualifications on the commercial sale of arms," *Heller*, 554 U.S. at 626-27, it would be silly to infer from this language that *all* hypothetical commercial restrictions on the sale of arms—guns may only be paid for in pennies, or be sold during a full

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[1]Even were the Court to adopt the incongruent position that there is a right to acquire but not sell to guns, "vendors and those in like positions . . . have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function." *Carey*, 431 U.S. at 684 (quoting *Craig* v. *Boren*, 429 U.S. 190, 195 (1976)). Moreover, Plaintiffs include two membership organizations that plainly have standing to assert the Second Amendment rights of their individual members. *Ezell* v. *City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011).

moon—are therefore presumptively constitutional.

> In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If 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*.

United States v. *Marzzarella*, 614 F.3d 85, 91 n.8 (3d Cir. 2010). Indeed, *Heller* explained that its reference to "longstanding" restrictions referred to restrictions *known to the Framers*: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35. "[T]he relevant time period for the first-step historical analysis is 1791." *Firearms Retailers*, 2014 U.S. Dist. LEXIS 782, at *18. Arguably, the relevant time period may be 1868, the time of the Fourteenth Amendment's ratification and its application of the Second Amendment as against the States. *Ezell* v. *City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

But in any event, critically, it is the *government*'s burden to prove, with specific evidence, the "longstanding" nature of a regulation

impacting the right to bear arms. *Id.* at 703-04; *Chovan*, 735 F.3d at 1137. Neither Alameda County nor the court below could point to any Framing Era laws restrictively zoning gun stores, as New York's first-in-the-nation municipal zoning ordinance dates only to 1916.[2] And while Framing Era gun stores might have been subjected to gunpowder storage laws, *Heller*, 554 U.S. at 632, modern ammunition is stable, and gun stores are not generally regarded as extreme fire hazards. Indeed, a century before Mrs. O'Leary's cow could be blamed for burning down Chicago, gunpowder storage laws "required only that excess gunpowder be kept in a special container or on the top floor of the home." *Id.* at 632.

The district court justified its incredible assertion that ordinances such as Alameda County's are "longstanding" by relying on the Fourth Circuit's somewhat skimpy, unpublished decision in *United States* v. *Chafin*, 423 Fed. Appx. 342 (4th Cir. 2011). In that case, the defendant asserted that the Second Amendment protects "the sale of a firearm to

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[2]Amanda Erickson, *The Birth of Zoning Codes: A History*, The Atlantic (June 19, 2012), available at http://www.theatlanticcities.com/politics/2012/06/birth-zoning-codes-history/2275/ (last visited March 20, 2014).

an unlawful user of drugs,"—very far from the issues here—and he did "not point[] this court to any authority" for the proposition that there exists a right to sell firearms. *Id*. at 344. To the extent the Fourth Circuit did not locate such authority itself, *id.*, respectfully, that court missed a few sources, see *supra*, as did the district court.

The Second Amendment plainly secures the rights to buy and sell guns. The would-be vendors have standing to assert their own rights, as well as those of their customers, and the organizational plaintiffs may just as obviously represent the interests of their respective memberships, whose right to purchase firearms is adversely impacted by Alameda County's ordinance. The Court must proceed to the second step of the analysis, and measure the constitutional right against the regulatory interest.

II. ALAMEDA COUNTY'S ORDINANCE FAILS ANY LEVEL OF SCRUTINY.

Rational basis review is unavailable in Second Amendment cases. "[S]ome sort of heightened scrutiny must apply." *Chovan*, 735 F.3d at 1137.

> [T]he level of scrutiny in the Second Amendment context should depend on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. More specifically, the

> level of scrutiny should depend on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right.

Id. at 1138 (quotations omitted).

The challenged ordinance implicates the entirety of the Second Amendment right, at its core and beyond, as one cannot do anything with a firearm if one cannot, in the first instance, acquire a firearm. "[T]he *most fundamental* prerequisite of legal gun ownership [is] that of simple acquisition." *Firearms Retailers*, 2014 U.S. Dist. LEXIS 782, at *27. Effectively prohibiting the operation of new gun retailers is quite obviously a severe burden.

The correct test would therefore be strict scrutiny, or something very close to it. The Seventh Circuit, for example, enjoined Chicago's gun range prohibition, applying "a more rigorous showing than [intermediate scrutiny], if not quite strict scrutiny." *Ezell*, 651 F.3d at 708. This test burdened the government with "establishing a strong public-interest justification for its [ordinance]." *Id.*

> The City must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights. Stated differently, the City must demonstrate that civilian target practice at a firing range

> creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified.

Id. at 708-09.

Ezell plaintiffs, like the Plaintiffs here, "*are* the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right," because "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 the City "condition[ed] gun possession on range training . . . ." *Id.* at 708. Applying *Ezell*'s scrutiny level, the Northern District of Illinois recently struck down Chicago's gun store ban. *Firearms Retailers*, 2014 U.S. Dist. LEXIS 782, at *30-*31.

The lower court's attempt to distinguish *Ezell* on grounds that Alameda County had not explicitly prohibited gun stores (presumably, it would have taken the same approach to *Firearm Retailers*) is unpersuasive. On the County's motion to dismiss, a fair reading of the complaint would have indicated that Plaintiffs claimed the law functioned as an effective prohibition. Fed. R. Civ. P. 8. More to the

point, had Alameda County banned new bookstores or abortion clinics, the court below would not have held that those laws imposed only insubstantial burdens on fundamental rights because others already (allegedly) served those markets. Of course, *the County* had found that a gun store is "required by the public need." D.C. Dkt. 40-3, at 3.

But under any level of scrutiny, the law must serve some valid purpose. Even the most forgiving test, unavailable here, would require a *rational* basis for the law. It must be asked here, because the district court did not ask and the County did not answer: what harms, *exactly*, does Alameda County's ordinance address? Do gun stores emit pollution, noise, or radiation incompatible with the specified land uses? What ills might befall society simply because two gun retailers are located in close proximity?

Might children on their way to school stop at a store and purchase a gun? Might a drunk not drive 501 feet from a liquor store to a gun store, and therefore not drink alcohol while armed? Might residential burglars, and crazy people who would harm school children—not the sort of people that could be expected to successfully purchase guns at licensed dealers—be so inconvenienced by the absence of gun stores

near their targets as to be deterred? And any sort of criminal plan initiated upon a lawful firearm purchase would likely involve over 500 feet of travel, considering California law imposes a ten-day waiting period for gun purchases. Cal. Penal Code § 26815(a).

It is well within judicial notice that historically, throughout the United States, guns have been sold not only at gun stores, but also at sporting goods stores, hardware stores, and general retailers of every description wherever commerce is permitted. Walmart is often reputed to be the nation's largest gun retailer.[3] Per the company, "guns are sold at between 1,700 and 1,800 of [its] 4,000 outlets across the U.S. . . . ."[4] But under the ordinance, an Alameda County Walmart would have to choose between selling firearms and wine. Why? Firearms and alcohol do not mix, but many millions of Americans responsibly purchase both.

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[3]David Gura, *Guns and dog food: Walmart sells a lot*, Marketplace (Jan. 10, 2013), available at http://www.marketplace.org/topics/business/guns-and-dollars/guns-and-dog-food-walmart-sells-lot (last visited March 20, 2014).

[4]Josh Sanburn, *Walmart's On-Again, Off-Again Relationship with Guns*, Time (Jan. 11, 2013), available at http://business.time.com/2013/01/11/walmarts-on-again-off-again-relationship-with-guns/ (last visited March 20, 2014).

Alameda County would not combat drunk driving by restrictively zoning car dealerships away from liquor stores.

Indeed, singling out gun stores for restrictive zoning is odd, considering that while any criminal or lunatic may conduct business at a gas station, bookstore, or grocery, shopping at (and operating) gun stores requires passing background checks. Gun stores simply have no unique adverse secondary effects owing to their nature as gun stores, let alone any that would appear related to other gun stores, residential districts, schools, or establishments that sell liquor.

And even if gun stores *did* nefariously impact society when located within 500 feet of the specified uses, there would still exist the significant point that the County determined that Plaintiffs' store would not "materially affect adversely the health or safety the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injuries [sic] to property or improvements in the neighborhood." D.C. Dkt. 40-3, at 4.

All the same, the court below sought to justify Alameda County's ordinance on the grounds that gun stores should not be placed near "sensitive" places. ER 15, 17-19, 21. Again, without spelling out exactly

what sort of harm a gun store qua gun store poses, it is impossible to evaluate the specified places' sensitivity to gun stores. *Amicus* notes, however, that in discussing "sensitive places," the Supreme Court referenced places from which the *carrying* of firearms could be excluded, describing as presumptively constitutional "laws forbidding *the carrying of firearms* in sensitive places such as schools and government buildings . . . ." *Heller*, 554 U.S. at 626 (emphasis added).

Turning to Alameda County's list of allegedly sensitive places, schools qualify as "sensitive places" because the Supreme Court declared as much, although in failing to explain its reasoning the Court left little guidance as to how other such sensitive places might be discerned. As a general matter, no one can disagree that guns should be kept out of particular places. And one might suppose that a place becomes "sensitive" because the misuse of a gun in that environment would carry an abnormally high adverse impact on society, and concomitantly the government affords additional security measures in such places—airplanes and airports, for example.

But how are residential districts and liquor stores "sensitive places?" And how do gun stores, wherever they are located, promote or

encourage in an immediate sense the carrying of loaded firearms? Gun stores may only deliver firearms that are "unloaded and securely wrapped or unloaded and in a locked container." Cal. Penal Code § 26815(b).

Indeed, assuming one complies with California's regulatory system for the carrying of defensive handguns—not an issue here—neither state nor federal law prohibit the carrying of guns in any of the locations in which Alameda County forbids gun stores. Not only are gun stores throughout America located within 500 feet of each other, residential neighborhoods, schools, and liquor stores, but millions of Americans walk through these areas every day, safely and in full compliance with the law, while carrying loaded firearms for self-defense—and the location of gun stores has no theoretical impact on their ability to responsibly do so.

Of course, even if the County could identify some specific, actual harm flowing from the location of gun stores within 500 feet of each other, schools, liquor stores, and residential districts (discomfort with the idea of guns and gun owners does not suffice), there would remain the issue of tailoring. Why 500 feet, and not 250—or 1,000. Or perhaps

some other laws of the sort that already govern gun sales: no delivery of uncased, loaded firearms; no selling guns to school children, etc.

To be sure, guns are misused in residences, schools, and liquor stores. But Alameda County's ordinance is not even rational.

III. THE DISTRICT COURT ERRED IN NOT TAKING SERIOUSLY PLAINTIFFS' CLAIM THAT ALAMEDA COUNTY'S ORDINANCE DESTROYS THE RIGHT TO SELL ARMS.

A fair reading of the complaint indicates that Plaintiffs are aggrieved by the fact that the ordinance renders it impossible to locate a new gun store within the county. Whether this is, in fact, true, would be a factual issue that could not be resolved against Plaintiffs on the County's motion to dismiss. The court below could not, as it did, take the ordinance at face value and hold that it did no more than impose a "de minimis" burden on the location of gun stores. ER 17.

In *Heller*, the Supreme Court applied no level of means-ends scrutiny before striking down Washington, D.C.'s handgun and functional firearms bans. Those laws were simply incompatible with the constitutional text. Accordingly,

> *Heller* stands for the rather unremarkable proposition that where a state regulation is entirely inconsistent with the protections afforded by an enumerated right—as understood through that right's text,

> history, and tradition—it is an exercise in futility to apply means-end scrutiny.

Kachalsky v. *Cnty. of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012); *Peruta*, 2014 U.S. App. LEXIS 2786, at *66. Even where a municipality may zone the exercise of fundamental rights on the basis of *proven* secondary effects, it must "refrain from denying [individuals] a reasonable opportunity to own and operate [their business] within the city . . . ." *Renton* v. *Playtime Theatres*, 475 U.S. 41, 54 (1986).

"[T]he Court in *Renton* did not expressly limit its 'reasonableness' inquiry to the number of available sites within a city." *Young* v. *City of Simi Valley*, 216 F.3d 807, 817 (9th Cir. 2000) (citation omitted). In *Young*, this Court held unconstitutional a zoning scheme "under which private third parties may effectively nullify, for any reason, the few areas in the City set aside for potential [First Amendment protected] adult uses . . . ." *Id.* at 818. Under what this Court condemned as a "sensitive use veto," *id.* at 814 & n.8, private parties opposed to the exercise of protected expression could "obtain an over-the-counter zoning permit that effectively blocks an adult use, at *any* time during the lengthy permitting process" for the use at issue. *Id.* at 814.

In this case, Plaintiffs might well dispute whether the Alameda County's ordinance leaves any room for new gun stores, but Plaintiffs obtained both a variance and a conditional use permit, D.C. Dkt. 40-3, only to be blocked from opening their Second Amendment-protected business because of local prejudice against the exercise of Second Amendment rights. See, *e.g.*, ER 112-13 (Complaint, ¶¶ 53, 55). Some members of the San Lorenzo Village Homes Association declared that they "are opposed to guns and their ready availability and therefore believe that gun shops should not be located within our community." D.C. Dkt. 40-1, p. 29; D.C. Dkt. 40-2, p. 32. The Cherryland Community Association expressed "strong feelings in opposition," including that the store is "not the kind of business we want here," "we don't have many Sheriff's [sic] living our [sic] area, so they should be [sic] guns in their own neighborhood," and "IT IS GOING TO ATTRACT what we DON'T want." D.C. Dkt. 40-1, pp. 38-39; D.C. Dkt. 40-2, pp. 41-42.

Unlike *Young*, the protestors here did not need to go through the formality of a "sensitive use veto." They were, if the Complaint is to be credited (again, Fed. R. Civ. P. 8), simply able to express a veto, and override the zoning board's initial, considered determination that

Plaintiffs' business would safely serve the community. Even were the 500 foot setoffs constitutional, enabling anti-gun activists to veto a gun store is not.

IV. OVERBREADTH IS A SECOND AMENDMENT DOCTRINE.

To the extent the district court rejected Plaintiffs' facial challenge for failing to establish "that *no* set of circumstances exists under which the [a]ct would be valid," ER 14 (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)), it seriously erred. Plaintiffs made precisely that showing in arguing that no gun store should be subjected to the 500 foot zoning requirements, and that the ordinance did not, as a general matter, allow the opening of any new gun stores.

But the court below erred in applying *Salerno* at all. While some courts have declined to apply overbreadth doctrine in Second Amendment cases, *e.g.*, *United States* v. *Barton*, 633 F.3d 168, 172 n.3 (3d Cir. 2011), others have been properly more skeptical.

"[T]he *Salerno* principle has been controversial and does not apply to all facial challenges." *Ezell*, 651 F.3d at 698 n.8 (quotation omitted). Abortion laws are deemed facially invalid where they impose undue burdens on abortion access, not in *all* cases, but "in a large fraction of

the cases." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 895 (1992). The Supreme Court has occasionally allowed a more permissive overbreadth test that upholds statutes only if they have a "plainly legitimate sweep." *United States* v. *Stevens*, 130 S. Ct. 1577, 1587 (2010); *Wash. State Grange* v. *Wash. State Repub. Party*, 552 U.S. 442, 450 (2008); *Washington* v. *Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments).

As recently as 2004, the Supreme Court listed "free speech, right to travel, abortion [and] legislation under § 5 of the Fourteenth Amendment" as rights "weighty enough" to be secured by overbreadth doctrine. *Sabri* v. *United* States, 541 U.S. 600, 609-10 (2004) (citations omited). There is no reason to suppose the Second Amendment would not be as weighty.

Indeed, *Heller* itself would have been wrongly decided had *Salerno*'s standard governed all Second Amendment claims. The Supreme Court sustained a facial challenge to three generally-applicable gun laws, while acknowledging that some individuals could be denied firearms, *Heller*, 554 U.S. at 626, and even cautioning that Mr. Heller might not be entitled to relief: "*Assuming that Heller is not disqualified from the*

exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Heller*, 554 U.S. at 635 (emphasis added). Of course the District of Columbia is not required to register handguns for the many violent felons and mentally ill people roaming its streets, but the fact that there are circumstances where individuals would be properly disarmed cannot sustain a city-wide handgun ban.

CONCLUSION

Nimbyism is not a proper basis for zoning away fundamental rights. The decision below should be reversed.

Dated: March 21, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 4,846 words, excluding the parts of the brief excluded 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 this brief has been prepared in proportionately spaced typeface using WordPerfect X4 in 14 point Century Schoolbook font.

/s/ Alan Gura
Alan Gura
Counsel for Amicus Curiae
Dated: March 21, 2014

CERTIFICATE OF SERVICE

On this, the 21st day of March, 2014, I served the foregoing Amicus Curiae Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 21st day of March, 2014.

/s/ Alan Gura
Alan Gura