No. 13-17132
(Decision: May 16, 2016; Panel: O'Scannlain, Bea, Silverman)

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 the United States District Court for the
Northern District of California, No. 3:12-cv-03288-WHO
(Hon. William Horsley Orrick III, District Judge)

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION; GOLDEN STATE SECOND AMENDMENT COUNCIL; MADISON SOCIETY FOUNDATION; COMMONWEALTH SECOND AMENDMENT, INC.; GUN OWNERS OF CALIFORNIA; AND SAN DIEGO COUNTY GUN OWNERS POLITICAL ACTION COMMITTEE OPPOSING REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus* certifies that it has no parent corporation or subsidiaries, and no publicly held corporation holds 10% of more of its stock. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Firearms Policy Coalition, Inc. (FPC) is a non-profit organization that serves its members and the public through direct and grassroots advocacy, legal efforts, and education. The purposes of FPC include defending the United States Constitution and the People's rights, privileges and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms.

Golden State Second Amendment Council is an open membership association based in the San Francisco Bay Area of California. The purpose

of the association is to educate the general public and influence public policy regarding the right to keep and bear arms; including but not limited to the right of self-defense, the rights of hunters, and the hobbies of collecting and sport shooting of firearms.

The Madison Society Foundation is a non-profit organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. The organization spends time and resources on outreach, education and training related to assisting its members—and the law-abiding public in general—in obtaining and maintaining licenses to carry firearms for self-defense and for other Second Amendment purposes.

Commonwealth Second Amendment, Inc. ("Comm2A") is a nonprofit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in Massachusetts and New England. Comm2A works locally and with national organizations to promote a better understanding of the rights that the Second Amendment guarantees. Comm2A has previously submitted *amicus curiae* briefs to the United States Supreme Court and to state supreme courts, and it has also sponsored litigation to vindicate the rights of lawful Massachusetts gun owners.

Gun Owners of California ("GOC") is a non-profit corporation that was organized in 1974. It has an office in Sacramento. GOC is a leading voice in California, supporting the right to self-defense and to keep and bear arms guaranteed by the Second Amendment to the United States Constitution. It monitors government activities at the national, state and local levels that may affect the rights of the American public to choose to own firearms.

San Diego County Gun Owners is a political action committee focused on advancing Second Amendment civil rights primarily at the local government level through research, education, grassroots activism, direct lobbying, political activities, strategic legal action, and other lawful activities.

Amici organizations seek to protect the rights of responsible, law-abiding citizens to keep and bear arms through direct advocacy, conducting research on state and federal firearms laws, and expending funds on firearms-related litigation. Many of their members are subject to California's firearms laws, and therefore have a particular interest in their ability to exercise rights secured by the Second Amendment, including the aspect of that right at issue in this case: the ability of law-abiding, responsible citizens to purchase firearms.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel majority correctly stated the fundamental issue here: "If 'the right of the people to keep and bear arms' is to have any force, the people must have a right to acquire the very firearms they are entitled to keep and to bear. . . ." *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1055 (9th Cir. 2016). The First Amended Complaint alleged, as a matter of fact, that the "500-foot rule" in Alameda County's zoning ordinance (the "Ordinance") made it impossible for gun stores to comply with the restrictions on opening—and continuing to operate—a retail business that sells firearms: the dispersal of residences, liquor stores, and the like made it literally impossible to find a parcel that qualified.

If this claim can be proven, presumably through experts and other witnesses testifying about competing interpretations of parcel maps, the right of Alameda County's 1.6 million residents to acquire a firearm would unquestionably be infringed under *Heller v. District of Columbia*, 554 U.S. 570 (2008), as "'the right to possess firearms for protection implies a corresponding right' to obtain" firearms. *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)).

It should not be controversial, then, to conclude that litigation is necessary to test plaintiffs' factual allegations and apply some level of constitutional scrutiny to the facts as they are developed in the district court. Yet the district court ignored these core allegations—and, in the process, fundamental rules of procedure governing motions to dismiss—in the course of rejecting plaintiffs' constitutional arguments.

The County and the panel dissent have compounded this error by not just avoiding the allegation that no gun store can operate under the Ordinance, but asserting that there are now many gun stores "operating lawfully" in Alameda County, so what's the big deal here? It turns out the big deal is that there is zero basis in the record to support this central premise of the Petition—a premise that flatly contradicts the core allegations of the First Amended Complaint.

Finally, the Petition mistakenly claims to have a new legal insight into the amount of historical analysis required for the government to qualify a firearms regulation as a "condition or qualification on the commercial sale of arms"—namely, none. This supposed revelation is based on an incomplete quotation from the *Jackson* opinion and a plain misreading of *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

This case, on this record, is not a worthy vehicle for en banc review.

I. Plaintiffs Allege That No Retail Firearms Establishment Can Comply With The Zoning Requirements, And That Allegation Stands Uncontradicted In The Record.

It is worth starting with fundamental rules of practice in the federal courts to demonstrate why the panel opinion here is unremarkable and unworthy of en banc review. Plaintiffs make specific factual allegations in their First Amended Complaint ("FAC"):

> Subsequent to filing this lawsuit, plaintiffs commissioned a study to determine if any prospective gun store could satisfy the CUP based solely on having to comply with the "500 Foot Rule." Their conclusion is that it is virtually impossible to open a gun store in unincorporated Alameda County while complying with this rule due to the density of disqualifying properties. Specifically, the study indicates that there is only one parcel in the entire unincorporated county that is greater than 500 feet from a residentially zoned property, and that parcel is also unavailable as it lies within 500 feet of an establishment that sells alcohol. Thus, according to the plaintiff's research, which is based primarily on government agency data, ***there are no parcels in the unincorporated areas of Alameda County which would be available for firearm retail sales***.

EOR 114 (emphasis added). Plaintiffs allege that "[t]his 500 foot zoning rule is a recent land use regulation" and that it is a "pretext" that is "exclusively designed to limit gun stores by red-lining (or zoning) them out of existence." EOR at 103, 115.

This case arrives to the Ninth Circuit after the granting of a motion to dismiss, where those allegations were supposed to have been assumed true. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) ("When there

are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

Instead of accepting these allegations as true, the district court's dismissal order simply ignored them. The district court stated that "plaintiffs do not allege that customers cannot buy guns in Alameda County" and that the "FAC makes quite clear that there *are* existing retail establishments operating in Alameda County that provide guns." EOR 20 (emphasis in original). Yes indeed, the FAC acknowledges these "other" locations: consistent with its allegation that the new zoning rules make it impossible to lawfully operate a firearms store, the FAC alleges that the rules "have not been imposed" against the other retailers and that such retailers are either "not currently in compliance" or "were never required to comply." EOR at 104. In other words, these other stores have no reason to be sanguine that they may *continue* to operate. *See* Alameda Cnty. Mun. Code § 17.58.050 ("Any building or structure set up, erected, constructed, altered, enlarged, converted, moved or *maintained* contrary to [the Alameda County zoning ordinance] is unlawful and is hereby declared to be a public nuisance and may be abated . . . as set forth herein.") (emphasis added). Thus, whereas the dissent treats allegations about the existence of other gun retailers as a savior

for the Ordinance, the actual allegations that the Ordinance is a "pretext" meant to suppress all opportunities to sell constitutionally protected products—if proven—are their death knell. *Cf. Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 84, 96 (1976) (Powell, J., concurring) ("[C]ourts must be alert . . . to the possibility of using the power to zone as a pretext for suppressing expression").

The dissent at the panel pushed this theme even farther, however. It stated, without citation, that "the record shows that there are at least ten gun stores already *operating lawfully* in Alameda County"—a point the Petition highlights prominently. 822 F.3d at 1064 (Silverman, J., concurring in part and dissenting in part). This is simply not correct. The record shows the opposite is true.

In an appeal following the granting of a motion to dismiss, support in "the record" for an assertion that "there are at least ten gun stores already operating lawfully" would have to appear in the complaint or matters for which the district court took judicial notice. *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899–900 (9th Cir. 2007). As shown above, the FAC provides no record basis for this assertion. To the contrary, the FAC states that, while an undetermined number of stores are operating, none

of them are operating "lawfully" since they cannot comply with the zoning restriction.

Even if the "operating lawfully" statement were considered a conclusion on a mixed question of law and fact, the County never argued, and the district court never found, that these other retail operations were operating in compliance with the Ordinance. Needless to say, rehearing en banc is not the venue for hashing out the details of whether, contrary to the allegations in the FAC, multiple existing gun locations really are satisfying the 500-foot rule. En banc review is "not favored," Fed. R. App. P. 35, and is justified "only when extraordinary circumstances exist," *United States v. American–Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). *See* Fed. R. App. P. 35(a) (en banc review is generally reserved to "maintain uniformity of the court's decisions" or where "the proceeding involves a question of exceptional importance"). That is what the remand for trial is for.

Nor did the district court take judicial notice of facts that would support the dissent's premise. The County asked the district court to take judicial notice of a list of stores compiled on a spreadsheet by the California Department of Justice, [Docket No. 13–3, Ex. I], and nowhere does the record reflect that this request was granted. Nor could it have been. No citation is necessary to show that a newly created spreadsheet listing stores

operating in a county is not the proper subject of judicial notice under Rule 201. In short, contrary to the central pillar of the dissent, "the record" does *not* "show[] that there are at least ten gun stores already operating lawfully in Alameda County."

In any event, even if there were a basis for concluding in the record that citizens currently have other opportunities to purchase firearms in the County, and even if there were a basis for assuming that those opportunities will not be snuffed out with more aggressive code enforcement if this appeal is resolved in the County's favor, the Petition and the dissent conspicuously gloss over another important factual allegation in the record: the Alameda County Planning Department actually found that there was a "public need" for the store firearms operation that plaintiffs want to provide. EOR 65.

In sum, the Rules of Civil Procedure should apply equally to all plaintiffs, including plaintiffs asserting unpopular constitutional rights. *See Iqbal*, 556 U.S. at 696 (at the motion to dismiss stage, a "court must take the [factual] allegations as true, no matter how skeptical the court may be"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable"); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's

disbelief of a complaint's factual allegations."). The core allegations of the FAC had to be assumed true, but they were not. This fatal defect alone demonstrates that the Petition is unworthy of en banc review.

II. The Petition's Claim That The Ordinance Is A "Presumptively Lawful" Regulation Is Flawed On Multiple Levels.

Building on the flawed premise that "the record" shows a proliferation of gun stores "operating lawfully," the Petition argues that the zoning law is compatible with *Heller* because it is merely a ho-hum "law[] imposing conditions and qualifications on the commercial sale of arms." Pet. at 8–10. We focus here on two of the many problems with this theory.

A. Substantive Rights Requiring A Product Or Service For Their Exercise Are Meaningless Without Access To Such Goods Or Services.

Heller's reference to "longstanding . . . laws imposing conditions and qualifications on the commercial sale of firearms" is not a magical exception that swallows the rule that *Heller* was simultaneously announcing. *See Heller*, 554 U.S. at 627. As shown above, the FAC alleges that no gun store can satisfy the 500-foot rule, and therefore the rule is a "pretext" designed to zone gun stores out of existence in Alameda County. The panel opinion correctly observed that "[o]ne cannot truly enjoy a constitutionally protected right when the State is permitted to snuff out the means by which he exercises it." 822 F.3d at 1055.

This is entirely consistent with the Ninth Circuit's determination, in *Jackson*, that the right to possess firearms recognized in *Heller* included a "corresponding right" to acquire firearms:

> [W]ithout bullets, the right to bear arms would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose. *Cf. Heller*, 554 U.S. at 630 (holding that "the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional"). Thus "the right to possess firearms for protection implies a corresponding right" to obtain the bullets necessary to use them. *Cf. Ezell*, 651 F.3d at 704 (holding that the right to possess firearms implied a corresponding right to have access to firing ranges in order to train to be proficient with such firearms).[1]

746 F.3d at 967.

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[1] *Ezell*, of course, is the decision on which the panel majority most strongly relied. 651 F.3d 684. In striking down a Chicago ordinance that prohibited all firing ranges within the city, the Seventh Circuit explained that "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Id.* at 704. Building from that foundation, the court drew on the Supreme Court's First Amendment jurisprudence to put the city to the burden of producing evidence to establish that its ordinance was constitutional, rather than a pretextual attempt to chill conduct protected by the Second Amendment. *See id.* at 709 (observing that "[i]n the First Amendment context, the government must supply actual, reliable evidence to justify restricting protected expression based on secondary public-safety effects."); *id.* at 707 (to justify a adult business zoning restriction, a municipality must "present 'evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech.'").

Jackson's conclusion was simply a restatement of the principle, reiterated in the panel opinion here, that "where a [constitutionally protected] right depends on subsidiary activity, it would make little sense if the right did not extend, at least partly, to such activity as well." *Teixeira*, 822 F.3d at 1055. This is consistent with Supreme Court precedent holding that the government cannot restrict constitutional rights indirectly by controlling the means necessary to exercise those rights. *See id.* (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down restriction on distributing contraceptives because it "impose[d] a significant burden on the right to use contraceptives"); and *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (holding unconstitutional a differential tax on paper and ink products consumed by publishers because it burdened rights protected by the First Amendment)).

The simple insight offered by these cases reveals the folly of the County's theory that *Heller*'s "presumptively lawful commercial regulation" passage is actually an invitation for local governments to eliminate access to firearms under the guise of regulation. Set aside that it makes no sense whatsoever for the *Heller* majority to include a "poison pill" by which its core holding could be undermined at will by local governments. The Court

has written in too many other areas that fundamental rights cannot be blocked in this manner.

B. The Petition Wrongly Argues That "Conditions And Qualifications On The Commercial Sale Of Arms" Are "Presumptively Lawful" Regardless Of Their Historical Pedigree.

The Petition posits a new and mistaken interpretation of *Jackson* in arguing the Ordinance is "presumptively lawful" under *Heller*: It claims that *Jackson* established an "either/or" test whereby a regulation can avoid heightened scrutiny by "*either* fitting within one of Heller's enumerated safe harbors, *or* historical evidence demonstrating that the type of regulation should also fall outside the Second Amendment's scope." Pet. 12 (emphasis in original). As support, the Petition quotes *Jackson* at length, but it omits critical language. The actual text of *Jackson*, with the omitted language italicized, undermines the County's argument and confirms that the constitutionality of a restriction depends on historical analysis:

> *To determine whether a challenged law falls outside the historical scope of the Second Amendment*, we ask whether the regulation is one of the "presumptively lawful regulatory measures" identified in *Heller*, 554 U.S. at 627 n.26, 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, 746 F.3d at 960 (italics and underline added).

Indeed, *Jackson* could not be susceptible to the interpretation proffered in the Petition because *Heller* did not create a constitutional "safe harbor" for "presumptively lawful" regulatory measures unmoored to searching historical analysis.[2] Rather, it stated that all such measures had to be "longstanding"—that modifier precedes the list. *Heller*, 554 U.S. at 626–27. Two years later, *McDonald* confirmed the point:

> We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "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."

McDonald, 561 U.S. at 742. *See also Peruta v. Cnty. of San Diego*, 824 F.3d 919, 948 (9th Cir. 2016) (en banc) ("while the Court enumerated four presumptively lawful 'longstanding prohibitions,' it did not list prohibitions of concealed weapons as one of them"). In short, the Petition's supposed insight is fatally flawed.

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[2] In response to Justice Breyer's criticism that the Court failed to provide "extensive historical justification for those regulations of the right that we [the majority] describe as permissible," 554 U.S. at 721 (Breyer, J., dissenting), the *Heller* majority explained: "[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . . [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. at 635.

The County argues nevertheless that zoning regulations restricting firearms dealers should "count" as longstanding, but this is plainly wrong. First, the County can cite no history of local land use laws that restrict firearms dealers for any length of time. As the majority notes, zoning laws of any sort, let alone zoning laws restricting the location of firearms dealers, did not even *exist* in America before 1900. 822 F.3d at 1058 (citing the Supreme Court's statement in *Village of Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365, 387 (1926), that zoning laws "began in this country about 25 years ago"). The Petition states that "[f]irearms dealers have been closely regulated for over a century," but offers only examples of *state* laws (not local zoning or land use laws) limiting the types of guns that could be sold and requiring licensure. Pet. 18.

This is nowhere close to the type of historical analysis that *Heller* requires. Each firearms regulation (even "presumptively lawful" ones) must be judged based on its "historical justifications" to determine whether it falls within the scope of the Second Amendment right. As explained in *Jackson*, this inquiry looks for "persuasive historical evidence" as to "whether the challenged law falls within a 'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected.'" 746 F.3d at 960 (quoting *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011)).

Indeed, *Jackson* rejected the County's argument that a modern handgun storage requirement fell outside the scope of the Second Amendment in light of the various gunpowder storage laws around the time of the founding. *Id*. at 963. If the "fact that the states historically imposed modest restrictions on the storage of gunpowder" in the founding era was an insufficient analogy to a modern handgun storage law, *id.*, it should be apparent that the County cannot point to the fact that local governments have, in general, imposed zoning restrictions on businesses since 1900 as an historical analogy to a modern zoning law that, according to the allegations of the FAC, prevents gun stores from operating legally in a county.[3]

In sum, the County must produce, but has not produced, historical evidence that zoning laws like the one challenged here fall outside of the scope of the Second Amendment as historically understood.

[3] *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), likewise forecloses the County's attempt to rely on 20th-century gun regulation to determine the historical scope of the Second Amendment. There, this Court observed that federal restrictions on possession of firearms by violent offenders traceable to 1938 were not "so longstanding" that they fall outside the scope of the Second Amendment. *Id.* at 1137.

CONCLUSION

For the reasons stated above, the Court should not rehear this case en banc.

Respectfully submitted,

Dated: September 30, 2016

Benbrook Law Group, PC

By: *__/s/ Bradley A. Benbrook_____*
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Ninth Circuit R. 29-2(c)(2) because it contains 3,380 words.

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 a proportionally spaced typeface using Microsoft Word 2010 and Times New Roman size 14 font.

Dated: September 30, 2016 Benbrook Law Group, PC

By: */s/ Bradley A. Benbrook*
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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 September 30, 2016.

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.

Dated: September 30, 2016 Benbrook Law Group, PC

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