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Too Little Space: Does a Zoning Regulation Violate the Second Amendment?

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TOO LITTLE SPACE: DOES A ZONING REGULATION VIOLATE THE SECOND AMENDMENT?

Abstract: On May 16, 2016, in *Teixeira v. County of Alameda*, the U.S. Court of Appeals for the Ninth Circuit held that a zoning ordinance was not presumptively lawful under the Second Amendment. The court utilized the two-step analysis derived from the U.S. Supreme Court’s 2008 decision in *District of Columbia v. Heller* to examine the constitutionality of the ordinance. The court remanded the case and recommended that the district court apply a heightened level of scrutiny—potentially even strict scrutiny. On December 27, 2016, the Ninth Circuit ordered an en banc rehearing. This Comment argues that on rehearing, the Ninth Circuit should analyze, or recommend that the district court analyze, the zoning ordinance at an intermediate scrutiny level. Intermediate scrutiny has been utilized by a majority of courts in Second Amendment challenges, and should be used on rehearing because the ordinance does not present a substantial burden to the core of the Second Amendment right.

INTRODUCTION

Throughout the past century, counties across California have enacted a multitude of zoning laws that restrict the locations where the sale of guns may occur.¹ In May 2016, in *Teixeira v. County of Alameda*, the U.S. Court of Appeals for the Ninth Circuit held that the right to keep and bear arms includes the right to purchase and sell firearms.² At issue in *Teixeira* was the constitutionality of a California county’s zoning ordinance that prevented a retail gun shop from opening within five hundred feet of any residentially-zoned districts, schools, other firearms sales businesses, or establishments where liquor was sold.³ The Ninth Circuit determined that, despite the county’s argument that the ordinance only regulated where gun stores were located, the zoning ordinance was not presumptively lawful and it remanded the case to the lower court.⁴ The Ninth Circuit held

¹ See, e.g., CATHEDRAL CITY, CAL., CODE § 5.32.040(A) (2017) (“[A] firearms dealer establishment may . . . not be located within one thousand feet from a church or other religious institution, day-care center, game arcade, halfway house, residence, residential zoned area, private or public park, group home, or other firearm dealer establishment.”); EL CERRITO, CAL., CODE § 6.70.100 (2016) (regulating that no permit for firearm sales will be given for any location which is within a residential zoning district, or within one thousand feet of the exterior limits of a dealer in firearms, or within two hundred and fifty feet of a public or private day care center or school).

² *Teixeira v. Cty. of Alameda (Teixeira II)*, 822 F.3d 1047, 1056 (9th Cir. 2016), *reh’g en banc granted*, No. 13-17132, 2016 WL 7438631 (9th Cir. Dec. 27, 2016).

³ *Id.* at 1058, 1064.

⁴ *Id.* at 1052, 1059–60.

that the ordinance would need to withstand a heightened form of scrutiny on remand in order to be considered constitutional.⁵ Although the court provided guidance as to what level of scrutiny would be appropriate, it refrained from mandating what level the lower court should apply.⁶ On December 27, 2016, the Ninth Circuit ordered a rehearing en banc.⁷

This Comment argues that the appropriate level of scrutiny should be intermediate, which the county's ordinance would likely survive.⁸ This Comment further contends that the Ninth Circuit's holding in *Teixeira* could affect a multitude of future copycat litigation cases, particularly in California, challenging other zoning laws.⁹ Part I provides a background discussion of the pertinent Second Amendment jurisprudence, followed by the underlying facts and procedural history of *Teixeira*.¹⁰ Part II discusses the Ninth's Circuit analysis of the zoning ordinance in relation to the Second Amendment.¹¹ Part III argues that the Ninth Circuit should apply intermediate scrutiny during the en banc rehearing, or instruct the district court to do so on remand, because the zoning ordinance does not severely burden individuals' Second Amendment rights.¹²

I. UNDER THE GUN: THE SECOND AMENDMENT AND THE NINTH CIRCUIT'S HOLDING IN *TEIXEIRA V. COUNTY OF ALAMEDA*

Since the U.S. Supreme Court's 2008 decision in *District of Columbia v. Heller*, lower courts have employed a two-part analysis in Second Amendment challenges.¹³ Section A of this Part summarizes Second Amendment jurisprudence, including the two-prong test taken from *Heller*.¹⁴ Section B outlines the facts and procedural history of *Teixeira v. County of Alameda*.¹⁵

⁵ See *id.* at 1058–64 (indicating that the ordinance may be constitutional but that the county did not provide any justification beyond claims without support).

⁶ See *id.* at 1060, 1064 (explaining that, on remand, if evidence does confirm that the ordinance completely bans new gun stores then there should be something more exacting than intermediate scrutiny, but if it merely regulates store locations, intermediate scrutiny would be appropriate).

⁷ *Teixeira v. Cty. of Alameda (Teixeira III)*, No. 13-17132, 2016 WL 7438631, at *1 (9th Cir. Dec. 27, 2016).

⁸ See *infra* notes 64–79 and accompanying text.

⁹ See *infra* notes 80–83 and accompanying text.

¹⁰ See *infra* notes 13–46 and accompanying text.

¹¹ See *infra* notes 47–63 and accompanying text.

¹² See *infra* notes 64–83 and accompanying text.

¹³ See *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008); see also, e.g., *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (“Like the majority of our sister circuits, we have discerned from *Heller*'s approach a two-step Second Amendment inquiry.”).

¹⁴ See *infra* notes 16–35 and accompanying text.

¹⁵ See *infra* notes 36–46 and accompanying text.

A. A Brief Historical Analysis of Second Amendment Jurisprudence

The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”¹⁶ In 2008, in *Heller*, the Supreme Court considered whether a regulation that banned handguns inside and outside the home and required other firearms to be kept unloaded and disassembled or bound by a trigger lock, violated the Second Amendment.¹⁷ The Court undertook a lengthy analysis of the historical understanding of the scope of the Second Amendment, including whether the handgun regulation could be considered a longstanding prohibition or a presumptively lawful regulatory measure.¹⁸ After the Court determined that the regulation fell within the scope of the Second Amendment, the Court held that the regulation could not pass muster under any level of scrutiny because it was a severe impediment on a person’s right to possess a firearm in the home for use in self-defense.¹⁹ After the *Heller* decision, the Supreme Court in 2010, in *McDonald v. City of Chicago*, held that the Second Amendment applies to the states by way of the Fourteenth Amendment.²⁰

Lower courts have interpreted *Heller* to suggest that a two-step analysis is necessary in order to determine the constitutionality of a law or regulation that allegedly infringes on the Second Amendment.²¹ If the challenged law does in

¹⁶ U.S. CONST. amend. II.

¹⁷ *Heller*, 554 U.S. at 574–76.

¹⁸ *See id.* at 576–627 (interpreting the lengthy historical record to determine the scope of the Second Amendment, and further implying that longstanding prohibitions or presumptively lawful regulatory measures can be considered limitations that exist on the right to bear arms).

¹⁹ *See id.* at 628–29. The Court considered the regulation to be such a severe restriction because the regulation was preventing the “inherent right of self-defense [that] has been central to the Second Amendment” and therefore it could not pass under any level of scrutiny. *Id.*

²⁰ *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010); *see* Reed Harasimowicz, Comment, *The Comfort of Home: Why Peruta v. Cty. of San Diego’s Extension of Second Amendment Rights Goes Beyond the Scope Envisioned by the Supreme Court*, 56 B.C. L. REV. E. SUPP. 51, 53 (2015), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3436&context=bclr> [<https://perma.cc/Q2JC-J9RS>] (describing *McDonald’s* holding that the Second Amendment applies to the states). In the *McDonald* case, the petitioner, a Chicago resident, wanted to keep a handgun in his home, but was prevented from doing so by a Chicago ordinance. *McDonald*, 561 U.S. at 750. Part of petitioner’s argument was that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment right to bear arms. *Id.* at 753. The Supreme Court agreed, deciding that the Second Amendment rights, as the Court recognized them in *Heller*, were applicable to the States. *Id.* at 748, 791.

²¹ *See, e.g., Jackson*, 746 F.3d at 960 (“[T]he two-step inquiry we have adopted ‘(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.’”) (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)); *Chovan*, 735 F.3d at 1136 (adopting the two-step Second Amendment inquiry, reflecting the holding in *Heller*); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (concluding that the two-step approach from *Heller* is appropriate for Second Amendment inquiries); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (adopting *Heller’s* two-step inquiry); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011) (applying *Heller’s* two-step inquiry); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d

fact burden conduct that falls within the purview of the Second Amendment, the court then performs the second step of the *Heller* test by applying an appropriate level of scrutiny to determine whether that burden is constitutional.²²

1. Application of the First Prong of the *Heller* Analysis

In applying the first step of the test derived from *Heller*, courts review the historical context of the Second Amendment in order to determine whether the right affected by a law is within the scope of the Second Amendment.²³ The essential question therein is whether the law does or does not interfere with the right to bear arms as it was understood at the time of the Amendment's adoption.²⁴ Within this assessment, courts have recognized that certain laws or regulations are lawful if they can be considered part of "longstanding restrictions or prohibitions" that have been historically accepted.²⁵ Some examples cited by

Cir. 2010) (interpreting a two-step inquiry from *Heller*'s holding); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (applying *Heller*'s two-step inquiry); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (holding that the two-step inquiry is appropriate for Second Amendment inquiries).

²² *See Chovan*, 735 F.3d at 1136 (implying that the rationale behind the first step reflects *Heller*'s holding that the scope of the Second Amendment is not unlimited, but that certain regulations can permissibly burden the protections afforded by the Second Amendment); *see also Jackson*, 746 F.3d at 960 (providing the two-step Second Amendment analysis and its analog to the First Amendment context); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 439 (2011) (discussing the lower courts' struggles in determining the appropriate level of scrutiny in the wake of the *Heller* decision).

²³ *See, e.g., Jackson*, 746 F.3d at 963 (holding that the ammunition and firearm regulations did fall within the scope of the Second Amendment based on historical evidence); *Chovan*, 735 F.3d at 1137 (holding that a regulation restricting the right to possess firearms of persons convicted of a domestic violence offense fell within the scope of the Second Amendment based on the lack of historical evidence to suggest otherwise).

²⁴ *Compare Peruta v. Cty. of San Diego*, 824 F.3d 919, 929–33, 939 (9th Cir. 2016), *petition for cert. docketed*, *Peruta, et al. v. California, et al.*, No. 16-894 (U.S. Jan. 12, 2017) (concluding that the historical analysis of the Second Amendment right does not include the right of a member of the general public to carry a concealed firearm because based upon a historical analysis of the laws of both England and the United States, governments have long been able to prohibit the use of concealed carry), *with Chovan*, 735 F.3d at 1137 (concluding that there was a lack of historical evidence indicating that persons convicted of domestic violence misdemeanors had their rights limited, and therefore those persons are assumed to still have Second Amendment rights).

²⁵ *See, e.g., Heller*, 554 U.S. at 626–27 (explaining that the Court's opinion should not raise doubts about the constitutionality of certain longstanding prohibitions that limit the Second Amendment); *Marzzarella*, 614 F.3d at 91 (explaining that "presumptively lawful" could mean that the challenged regulations are outside the scope of the Second Amendment analysis, or that they would "pass muster" under any standard of scrutiny); *see also* Matthew Gamsin, Note, *The New York Safe Act: A Thoughtful Approach to Gun Control, or a Politically Expedient Response to the Public's Fear of the Mentally Ill?*, 88 S. CAL. L. REV. POSTSCRIPT 16, 28 n.62 (2015), <http://lawreview.usc.edu/postscript/view/download/?id=1000037> [<https://perma.cc/8DTD-4EVA>] ("The prevailing view is that a 'longstanding prohibition' is presumptively lawful because the conduct regulated 'is not within the scope of the Second Amendment' and a challenge therefore fails the first step of a constitutional analysis because

courts include preventing felons from possessing firearms and the prohibition on carrying firearms in governmental buildings.²⁶ If the court finds that the law conflicts with the historical understanding of the Second Amendment, the court then performs the second part of the test, which is to determine the appropriate level of scrutiny.²⁷

2. Application of the Second Prong of the *Heller* Analysis

In constitutional jurisprudence, various levels of scrutiny are applied by courts in different contexts to determine whether a law or regulation passes constitutional muster—the most prevalent being rational basis, intermediate scrutiny, and strict scrutiny.²⁸ For a regulation to survive rational basis review, all that needs to be shown is a rational relationship between a permissible state goal and the means by which the regulations seeks to achieve that goal.²⁹ When a regula-

the prohibition does not burden rights protected by the Second Amendment.”) (quoting *Drake v. Filko*, 724 F.3d 426, 431–34 (3d Cir. 2013)).

²⁶ See *Heller*, 554 U.S. at 626–27 (indicating that although not an exhaustive list, there are longstanding regulations relating to the Second Amendment, including forbidding the possession of firearms from felons or the mentally ill, preventing firearms in schools or governmental buildings, and conditions and qualifications on the sale of firearms); see also *Chovan*, 735 F.3d at 1137 (concluding that prohibiting domestic violence misdemeanants from possessing firearms is not part of the long-lasting presumptively lawful regulations that have prohibited other offenders from possessing firearms, such as those convicted of murder, manslaughter, rape, and other violent crimes); *Hightower v. City of Boston*, 693 F.3d 61, 73–74 (1st Cir. 2012) (providing that the licensure of carrying concealed firearms is a presumptively lawful regulation).

²⁷ See, e.g., *Jackson*, 746 F.3d at 961–65 (applying intermediate scrutiny); *Chovan*, 735 F.3d at 1136–38 (applying intermediate scrutiny); *Chester*, 628 F.3d at 680–83 (applying intermediate scrutiny).

²⁸ See Stephen Kiehl, Note, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1145–49 (2011) (examining the various levels of scrutiny). Rational basis, which is the lowest basis of scrutiny, seldom results in a finding of unconstitutionality because it is an extremely deferential standard. Andrew Peace, Comment, *A Snowball’s Chance in Heller: Why Decastro’s Substantial Burden Standard Is Unlikely to Survive*, 54 B.C. L. REV. E. SUPP. 175, 178 (2013), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3304&context=bclr> [<https://perma.cc/W3H7-8RLY>]. Strict scrutiny, which is the highest standard of scrutiny, requires that a regulation be “narrowly tailored to promote a compelling governmental interest.” See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (defining strict scrutiny). Intermediate scrutiny falls somewhere between rational basis and strict scrutiny and requires that there is a “reasonable fit between the challenged regulation and a substantial governmental objective.” *Chester*, 628 F.3d at 682–83 (defining intermediate scrutiny); see *Marzzarella*, 614 F.3d at 98 (“[Intermediate scrutiny] standards differ in precise terminology, [but] they essentially share the same substantive requirements. They all require the asserted governmental end to be more than just legitimate, either ‘significant,’ ‘substantial,’ or ‘important.’”).

²⁹ See, e.g., *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (defining rational basis and indicating that in general commercial transactions, rational basis is more appropriate, but it is not appropriate in cases involving fundamental rights); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (holding that restrictions on sexual conduct are analyzed under a rational basis review); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (reviewing a ban on assisted suicide under rational basis scrutiny); *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 307 (1993) (holding that in areas of social or

tion or law allegedly restricts gun use or gun ownership, thereby implicating the Second Amendment, a majority of circuit courts have applied a heightened level of review akin to intermediate scrutiny.³⁰ Intermediate scrutiny has generally been the favorite among circuit and lower courts because it creates a balance between a constitutionally enumerated right and *Heller*'s presumption toward lawful regulation.³¹

When determining the specific standard of scrutiny in Second Amendment challenges, the Ninth Circuit, and several sister circuits, apply a two-part analysis.³² First, the circuits analyze the law or regulation's proximity to the core of the Second Amendment right and second, how severely the law burdens that right.³³ In examining the law's proximity to the core of the Second Amendment, many courts use *Heller*'s holding that the "core" of the Second Amendment is the right of law-abiding citizens to use firearms in self-defense of their home.³⁴

economic policy, statutes are analyzed under rational basis review if they do not infringe on fundamental constitutional rights or suspect lines).

³⁰ See *Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."); *Jackson*, 746 F.3d at 961 (concluding that a heightened scrutiny level should apply when a law implicates the Second Amendment); *Chovan*, 735 F.3d at 1137 (rejecting rational basis and indicating that some form of heightened scrutiny is necessary); *Ezell*, 651 F.3d at 703 (concluding that some form of heightened scrutiny is required); *Reese*, 627 F.3d at 801 (concluding that laws that implicate the Second Amendment require something greater than rational basis); *Chester*, 628 F.3d at 680 (concluding that a heightened level of scrutiny is required); see also Kiehl, *supra* note 28, at 1145 (stating that a "clear favorite" among lower courts is to apply intermediate scrutiny).

³¹ See Kiehl, *supra* note 28, at 1145 (explaining that one of the reasons courts have generally applied intermediate scrutiny rather than strict scrutiny is because under *Heller*, strict scrutiny would not fit within the list of presumptively lawful regulatory measures). Courts have indicated that strict scrutiny, which requires a regulation to be "narrowly tailored to promote a compelling governmental interest," does not square with the presumed longstanding presumptively lawful regulatory measures listed in *Heller*. *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010), *aff'd in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011); see also *Heller*, 554 U.S. 570, 688 (2008) (Breyer, J. dissenting) (arguing that the majority implicitly rejected the strict scrutiny test by approving the presumptive constitutionality of longstanding regulations, because such a premise may not be able to survive if strict scrutiny were applied); *United States v. Marzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009), *aff'd*, 614 F.3d 85 (3d Cir. 2010) ("Moreover, the Court's willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review.").

³² See *Jackson*, 746 F.3d at 960–61 (concluding that when determining the appropriate level of scrutiny, the test should be how close the law comes to the core of the Second Amendment right and how severe of a burden the law is on that right); *Chovan*, 735 F.3d at 1138 ("[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.'" (quoting *Chester*, 628 F.3d at 682)).

³³ See *Jackson*, 746 F.3d at 960–61; *Chovan*, 735 F.3d at 1138.

³⁴ See, e.g., *Jackson*, 746 F.3d at 964 (concluding that a statute that regulated how handguns should be stored in the home implicated the core of the Second Amendment); *Chovan*, 735 F.3d at 1138 (concluding that prohibiting a person convicted of domestic violence from purchasing a gun does not strike at the core of the Second Amendment because such persons are not *law abiding* citi-

In the second part of the analysis, the courts determine how severely the law burdens this core right.³⁵

B. Facts and Procedural History of Teixeira v. County of Alameda

In 2010, John Teixeira, Steve Nobriga, and Gary Gamaza (collectively “Teixeira”) formed a partnership called “Valley Guns & Ammo,” and attempted to open a retail gun business in Alameda County, California.³⁶ The partnership planned to sell firearms, ammunition, and gun-related equipment, as well as offer firearms training and gunsmith services.³⁷ The three men decided the best location for their business would be in the City of San Leandro, part of unincorporated Alameda County.³⁸ In order to build on the unincorporated section of land, Alameda County required both “superstore[s]” and “firearms sales business[es]” to obtain conditional use permits before beginning operations.³⁹ Among other requirements, the County would not issue a permit to a prospective gun retailer until the applicant showed that “the proposed location of the business [was] not within five hundred feet of a residentially-zoned district; elementary, middle or high school; pre-school or day care center; other firearms sales business; or liquor stores or establishments in which liquor is served.”⁴⁰ The West County Board of Zoning Adjustment (the “Board”), issued a report finding that the proposed location for the partnership’s business was 446 feet away from the nearest residential property, which was too close under the County regulations, and recommended against approving a variance.⁴¹ Despite that report and

zens); *Ezell*, 651 F.3d at 711 (concluding that a ban on firing ranges struck at the core of the Second Amendment).

³⁵ *Jackson*, 746 F.3d at 960–61; *Chovan*, 735 F.3d at 1138.

³⁶ *Teixeira II*, 822 F.3d at 1049–50.

³⁷ *Id.*

³⁸ *Id.* at 1050.

³⁹ *Id.* (internal quotation marks omitted) (quoting ALAMEDA COUNTY, CAL., CODE §§ 17.54.130–.132 (2016)). A conditional use permit allows the permit holder to use the land in a way that is otherwise prohibited under the zoning ordinance. *Guide: Applying for an Administrative Conditional Use Permit*, ALAMEDA COUNTY GOV’T, <https://www.acgov.org/cda/planning/ordinance/documents/CUP.pdf> [<https://perma.cc/2UP6-WE2Y>] (last visited on Jan. 31, 2017). Alameda County is divided into various zoning districts and zoning ordinances provide the types of uses permissible within each district. *Id.* Certain uses are prohibited under the ordinances unless a conditional use permit is obtained, and the permit process enables the county to review certain uses on a case-by-case basis. *Id.* John Teixeira and his group satisfied all federal and state regulations in order to operate a retail gun business, only needing as a final step to comply with the local Alameda County Zoning Code to start their business. *Teixeira II*, 822 F.3d at 1050.

⁴⁰ *Teixeira II*, 822 F.3d at 1050 (internal quotation marks omitted) (quoting ALAMEDA COUNTY, CAL., CODE §§ 17.54.130–31). The five hundred foot radius is measured “from the closest door of the proposed business location to the front door of any disqualifying property.” *Id.*

⁴¹ *Id.* at 1051. A variance is a special request for an exception from a strict application of the zoning ordinance based on some special circumstances that are specific to the applicant. *Guide: Applying for a Variance*, ALAMEDA COUNTY GOV’T, <https://www.acgov.org/cda/planning/ordinance/documents/Variance.pdf> [<https://perma.cc/ZW56-3FEK>] (last visited Jan. 31, 2017). John Teixeira

recommendation, the Board later voted to grant a variance and issue the conditional use permit on December 14, 2011.⁴² The Board's decision was subsequently appealed by a local homeowner's association to the Alameda County Board of Supervisors, which voted to sustain the appeal, and Teixeira's permit and variance were therefore revoked.⁴³

On June 25, 2012, Teixeira challenged that decision in the U.S. District Court for the Northern District of California, arguing that the county's ordinance was in violation of the Fourteenth Amendment's equal protection clause, and was impermissible under the Second Amendment, both facially and as-applied.⁴⁴ Teixeira argued that the ordinance "effectively red-lin[ed] gun stores out of existence," and was not reasonably related to any public policy concerns.⁴⁵ The court dismissed the challenges for failure to state a claim, and Teixeira appealed the decision to the Ninth Circuit Court of Appeals.⁴⁶

II. THE NINTH CIRCUIT'S ANALYSIS OF WHETHER THE ZONING ORDINANCE VIOLATED THE SECOND AMENDMENT

In 2016, in *Teixeira v. County of Alameda*, the U.S. Court of Appeals for the Ninth Circuit was tasked with determining whether the Second Amendment right to keep and bear arms includes the right to acquire and sell firearms.⁴⁷ In its review of Teixeira's appeal, the Ninth Circuit framed the issue as whether the "Second Amendment places any limits on regulating the commercial sale of firearms."⁴⁸ Specifically, the court addressed whether the case implicated the Second Amendment, and if so, which level of scrutiny to apply in assessing the constitutional validity of the county's zoning ordinance.⁴⁹

needed a variance in addition to the conditional use permit because their proposed location was 446 feet from a residential area, and therefore in violation of the conditional use permit requirements. *See Teixeira II*, 822 F.3d at 1051. Both requests were heard together at a public hearing. *Id.*

⁴² *Teixeira II*, 822 F.3d at 1051. The West County Board of Zoning Adjustment reasoned that Teixeira's proposed location was unique because an interstate highway and other obstacles made it impossible for the store to be accessible by road and not be within five hundred feet of a residential zone. *Id.*

⁴³ *Id.*

⁴⁴ *Id.* The equal protection claim was based on the argument that the zoning ordinance targeted gun stores but did not apply to other similarly situated businesses. *Id.*

⁴⁵ *Id.* To support this claim, Teixeira referred to a self-commissioned study that found that, due to the five-hundred-foot rule, there were no parcels in the unincorporated areas of Alameda County that would allow for a retail firearm business. *Id.* at 1051–52.

⁴⁶ *Id.* at 1052.

⁴⁷ *Teixeira v. Cty. of Alameda (Teixeira II)*, 822 F.3d 1047, 1049 (9th Cir. 2016), *reh'g en banc granted*, No. 13-17132, 2016 WL 7438631 (9th Cir. Dec. 27, 2016). In *Teixeira II*, the court specifically addressed whether a zoning ordinance that limited where guns could be sold was a permissible limit to the Second Amendment. *Id.*

⁴⁸ *Id.* The court affirmed the district court's dismissal of Teixeira's equal protection claims, agreeing with the lower court's finding that it had failed to plead a cognizable claim. *Id.* at 1053.

⁴⁹ *Id.* at 1056.

The court's first step was analyzing the historical understanding of the Second Amendment, pursuant to the framework provided in the U.S. Supreme Court's 2008 decision in *District of Columbia v. Heller*, to determine whether or not the zoning ordinance burdened the right to keep and bear arms.⁵⁰ Accordingly, the court concluded that the right to keep and bear arms also includes the right to acquire arms.⁵¹ The court reasoned that the right to keep and bear arms would be rendered meaningless without the right to acquire arms.⁵² In so doing, the court relied on analogous cases in which other courts have determined that when a right is dependent on a secondary pursuit, such as a means by which one can retain that right, eliminating the ability to achieve that secondary pursuit would render the right at issue meaningless.⁵³ Accordingly, the court concluded that the ordinance necessarily burdened the right to keep and bear arms through its hindrance on the ability to acquire guns.⁵⁴

⁵⁰ *Id.* at 1053–54 (citing *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008)) (providing that the decision in *Heller* established the “broad framework” for Second Amendment challenges, and the first step, which is to determine whether a law burdens the Second Amendment, is to undertake an assessment through the view the historical record). Thus, under *Heller*'s framework, the essential question was whether the Second Amendment, as understood at the time it was enacted, included the right to acquire guns. *See id.* at 1054.

⁵¹ *Id.* at 1056. To support that conclusion, the court looked to the English law and the views of Thomas Jefferson as evidence that such a right has been contemplated within the Anglo-American tradition. *Id.* 1055–56.

⁵² *Id.* at 1055. For example, in support of its reasoning, the court cited *Ezell v. City of Chicago*, where the U.S. Court of Appeals for the Seventh Circuit in 2011 concluded that a city ordinance banning shooting ranges within city limits necessarily burdened the right to keep and bear arms. *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (“The right to possess firearms for protection implies a corresponding right to . . . maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.”)). The court in *Teixeira II* analogized the issue before it to the holding in *Ezell* and other recent Second Amendment cases, implying that without the means necessary to fully exercise the right to possess a firearm—to own bullets, or to practice shooting at gun ranges—the underlying right is rendered pointless. *See id.* 1055–56 (citing *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“[W]ithout bullets, the right to bear arms would be meaningless.”); *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014) (concluding that a ban on gun sales within city limits would infringe upon the “most fundamental prerequisite of legal gun ownership—that of simple acquisition”)).

⁵³ *Teixeira II*, 822 F.3d at 1055 (“One cannot truly enjoy a constitutionally protected right when the State is permitted to snuff out the means by which he exercises it; one cannot keep arms when the State prevents him from purchasing them.”). For example, the Ninth Circuit cited to the 1983 U.S. Supreme Court decision in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue* where the Court held that a tax on paper and ink products violated the First Amendment because it necessarily burdened the right of freedom of the press. *Id.* (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983)). Similarly, the court noted that laws limiting the distribution of contraceptives have been held to be burdensome on an individual's right to reproduce. *See id.* (citing *Carey v. Population Servs., Int'l*, 431 U.S. 678, 689 (1977) (concluding that although limiting the distribution of contraceptives to pharmacists is not a total ban, it did put a substantial burden on a person's right to use contraceptives)).

⁵⁴ *Id.*

The Ninth Circuit also concluded that the zoning ordinance was not presumptively valid because it was not the type that would be considered a longstanding regulation and therefore was not outside the scope of the Second Amendment.⁵⁵ The court based this conclusion on its determination that there is no history of prohibitions on where firearms could be sold and that zoning ordinances did not come into existence until 1916.⁵⁶ The court noted, however, that although the ordinance did not fall under one of the longstanding or presumptively lawful regulation exceptions to a heightened form of scrutiny, this did not mean that it necessarily violated the Second Amendment; it merely meant that the ordinance would be subjected to the second part of the test.⁵⁷ Thus, the court held that Alameda County would have to justify the ordinance under some form of a heightened level of scrutiny.⁵⁸

Having found that the zoning ordinance implicated the Second Amendment, the Ninth Circuit continued onto the second prong of the *Heller* framework to determine what level of scrutiny should be applied.⁵⁹ To determine the level of scrutiny to apply, the court considered the separate two-part analysis.⁶⁰ Accordingly, the court first determined that the ordinance at issue struck at the core of the Second Amendment because an ordinance that restricts the commercial sale of firearms necessarily constrains the ability of law-abiding citizens to acquire firearms.⁶¹ The court, however, did not address the severity of the zoning

⁵⁵ *Id.* at 1058.

⁵⁶ *Id.* The court concluded that there was no showing that the zoning ordinance was of a type that would have been acceptable at the time the Second Amendment was enacted because the county did not show any historical laws that regulated where firearm sales could occur. *Id.* The only closely related laws involved locations where firearms could be fired or locations where gunpowder could be stored. *Id.*

⁵⁷ *Id.* (concluding that although the ordinance burdens conduct afforded by the Second Amendment, it is not necessarily unconstitutional, but rather it is subjected to some form of scrutiny higher than rational scrutiny). The court indicated that although the ordinance may have fallen under one *Heller* exception—laws that impose conditions and qualifications on the sale of firearms—the ordinance could not be considered a longstanding prohibition, and was therefore still outside of the exceptions. *Id.*

⁵⁸ *See id.* (implying that the zoning ordinance may survive Second Amendment scrutiny with an adequate justification based on an appropriate level of scrutiny).

⁵⁹ *See id.* 1058–59.

⁶⁰ *Id.* at 1059 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 766–68 (2010); *Heller*, 554 U.S. at 635) (interpreting both *Heller* and the Supreme Court’s 2010 decision in *McDonald v. City of Chicago* and stating that when assessing the appropriate level of scrutiny “we consider: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law’s burden on the right”) (internal quotations omitted) (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)).

⁶¹ *Id.* (concluding that there is “no question” that the zoning ordinance burdens the right of a law-abiding citizen to possess firearms because the ordinance would prevent that citizen from acquiring weapons). Compare *Chovan*, 735 F.3d at 1138 (concluding that a federal statute that prohibited persons with domestic violence misdemeanors from possessing firearms did not strike at the core of the Second Amendment because those with misdemeanors are not law abiding citizens), with *Jackson*, 746 F.3d at 964 (concluding that a law requiring gun owners to store firearms in locked containers in

ordinance's burden on this core right, holding only that some unspecified level of heightened scrutiny should apply.⁶² The Ninth Circuit left the district court to make its own determination as to the level of scrutiny on remand; however, during the en banc rehearing, the Ninth Circuit panel may decide the appropriate level of scrutiny.⁶³

III. REMAINING PRAGMATIC: THE EN BANC PANEL'S FUTURE DECISION

During the en banc rehearing of its 2016 decision in *Teixeira v. County of Alameda*, the U.S. Court of Appeals for the Ninth Circuit should analyze the County of Alameda's zoning ordinance using intermediate scrutiny, which would require the government to establish an important objective that reasonably fits with the ordinance.⁶⁴ In the Second Amendment context, intermediate, rather than strict, scrutiny is appropriate either when the regulation does not strike at the core of the Second Amendment or when the regulation does not severely burden conduct protected by the Second Amendment.⁶⁵ As the Ninth Circuit acknowledged, there can be little doubt that the ordinance strikes close to the

their homes did come close to the core of the Second Amendment because the ability to access weapons for self-defense is a core right protected by the Second Amendment).

⁶² See *Teixeira II*, 822 F.3d at 1060 (concluding that the level of scrutiny would depend on the accuracy of the factual assertions). Consequently, the court refrained from specifying the exact level of scrutiny to apply; however, the court did state that if the ordinance only regulates the permissible location of gun stores, rather than banning them, intermediate scrutiny would be sufficient. *Id.* If, however, the ordinance results in a complete ban on new gun stores, the court stated something higher than intermediate scrutiny is required. *Id.*

⁶³ *Teixeira v. Cty. of Alameda (Teixeira III)*, No. 13-17132, 2016 WL 7438631, at *1 (9th Cir. Dec. 27, 2016) (ordering the case to be reheard en banc); *Teixeira II*, 822 F.3d at 1064. The dissent in *Teixeira II* noted that the ordinance did not eliminate the opportunity to purchase a gun, because there are at least ten gun stores operating within Alameda County. *Teixeira II*, 822 F.3d at 1064 (Silverman, J., concurring in part, dissenting in part). The dissent also implied that the zoning ordinance should not fall under the Second Amendment analysis because of *Heller's* suggestion that nothing should cast doubt on laws "imposing conditions and qualifications on the commercial sale of arms." *Id.*

⁶⁴ See *Teixeira v. Cty. of Alameda (Teixeira III)*, No. 13-17132, 2016 WL 7438631, at *1 (9th Cir. Dec. 27, 2016) (ordering the case to be reheard en banc); see also *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (concluding intermediate scrutiny is appropriate in Second Amendment cases). 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." *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013); see also *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 207 (5th Cir. 2012) (applying intermediate scrutiny to a law that prohibited retail firearms dealers from selling handguns to individuals under the age of 21); *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (applying intermediate scrutiny in the Second Amendment context); *United States v. Marzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to a law that prohibited possession of a handgun with an obliterated serial number).

⁶⁵ See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) ("[I]f a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny."); *Chovan*, 735 F.3d at 1138 (concluding that because the law did place a substantial burden on the Second Amendment right, but did not strike the core of the Second Amendment, intermediate scrutiny was appropriate).

core of the Second Amendment because the right to bear arms inherently includes the right to legally procure arms.⁶⁶ Intermediate scrutiny, however, is appropriate because the ordinance does not impose a substantial burden on the right to acquire firearms.⁶⁷ The zoning ordinance at issue in *Teixeira* does not effectuate a complete ban on gun stores because there are multiple retail stores located in Alameda County; therefore, residents of the county still have reasonable opportunity buy firearms.⁶⁸ Intermediate scrutiny is appropriate because although the regulation strikes to the core of the Second Amendment, it does not severely limit the possession of firearms and consequently does not severely burden the Second Amendment right.⁶⁹

The Ninth Circuit's guidance to the district court on the appropriate level of scrutiny rested on an improper stretching of case law analysis.⁷⁰ The court, citing the Seventh Circuit Court of Appeals' 2011 holding in *Ezell v. City of Chicago*, stated that if Alameda County ordinance resulted in a complete ban on new gun stores in the unincorporated area, a higher standard than intermediate scrutiny would be required.⁷¹ Although the two cases broadly pose analogous situations, the court in *Ezell* concluded that a scrutiny level higher than intermediate was necessary because the law at issue in that case prohibited all firing ranges in a

⁶⁶ See *Teixeira II*, 822 F.3d at 1059 (concluding that the ordinance restricting where gun shops may be located clearly strikes at the core of the Second Amendment because it would hinder a law-abiding citizen's ability to acquire a gun).

⁶⁷ See *Masciandaro*, 638 F.3d at 470 (stating that regulations that implicate the Second Amendment can result in different levels of scrutiny, and laws that regulate Second Amendment rights rather than restrict them have a lower level of scrutiny to overcome); *Marzzarella*, 614 F.3d at 97 (holding that the statute that prohibited possession of a handgun with an obliterated serial number does not severely burden the core right of the Second Amendment because it does not severely limit the possession of firearms).

⁶⁸ See *Teixeira II*, 822 F.3d at 1059 (implying that more facts were required to make a determination on whether the ordinance resulted in a ban for *Teixeira* because of the availability of other gun stores operating in the county).

⁶⁹ See *Heller v. District of Columbia*, 670 F.3d 1244, 1257–58 (D.C. Cir. 2011) (concluding that intermediate scrutiny was appropriate because the registration laws at issue did not prevent an individual from possessing a firearm); *Marzzarella*, 614 F.3d at 97 (holding that the statute at issue did not severely burden the core of the Second Amendment because it did not severely limit the possession of firearms, and therefore applying intermediate scrutiny). Compare *Chovan*, 735 F.3d at 1138 (concluding that although a complete ban on firearm possession for domestic violence misdemeanants severely burdens conduct protected by the Second Amendment, intermediate scrutiny was appropriate because the ban did not strike at the core of the Second Amendment), with *Jackson* 746 F.3d at 964–65 (concluding that intermediate scrutiny was appropriate because although the regulation struck at the core of the Second Amendment, it did not severely burden the conduct protected by the Second Amendment).

⁷⁰ See *Teixeira II*, 822 F.3d at 1060 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (holding that if the ordinance resulted in a complete ban on all new gun retailers, something higher than intermediate scrutiny would be required)).

⁷¹ *Id.* (citing *Ezell*, 651 F.3d at 708).

city.⁷² As the dissent in *Teixeira* noted, the zoning ordinance at issue in Alameda does not prevent any person from buying guns in the county since there are already several other guns shops in the County.⁷³ Unlike in *Ezell*, where a law-abiding citizen was unable to use a firing range anywhere in the city, the zoning ordinance at issue in *Teixeira* does not prevent any law abiding citizen in the County of Alameda from possessing a gun and does not result in an outright ban on gun stores.⁷⁴ Further, several Second Amendment cases in which courts have required a scrutiny level higher than intermediate involved regulations with blanket bans on Second Amendment rights, which is unlike the regulation at issue in *Teixeira*.⁷⁵ While the ordinance does strike at the core of the Second Amendment, the severity of the burden on an individual's Second Amendment right is not substantial; therefore, the scrutiny level should be intermediate rather than strict.⁷⁶

On remand, to survive intermediate scrutiny, the County of Alameda will have to justify the ordinance by showing a the ordinance is substantially related to an important governmental interest and the zoning restrictions created by the ordinance.⁷⁷ The County of Alameda has an important governmental interest in preventing harm to children and decreasing crime in residential neighborhoods.⁷⁸

⁷² See *Ezell*, 651 F.3d at 708 (explaining that because the statute prohibited “law-abiding citizens” from “engaging in target practice,” it severely burdens the “corollary to the meaningful exercise of the core right to possess firearms for self-defense”); see also *supra* note 52 (describing the facts and holding of *Ezell*).

⁷³ *Teixeira II*, 822 F.3d at 1064 (Silverman, J., concurring in part and dissenting in part) (“[T]he first amended complaint does not explain how Alameda County’s zoning ordinance, on its face or as applied, impairs any actual person’s individual right to bear arms, no matter what level of scrutiny is applied.”).

⁷⁴ See *Ezell*, 651 F.3d at 708; *Heller v. D.C.*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (concluding that intermediate scrutiny would be appropriate because none of the registration requirements at issue prevented a law-abiding citizen from possessing a firearm); *Marzarella*, 614 F.3d at 97 (concluding that intermediate scrutiny was appropriate because the statute at issue was “more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights” because it did not have “the effect of prohibiting the possession of any class of firearms”).

⁷⁵ See *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (applying a higher level of scrutiny because the regulation was a blanket prohibition on carrying a gun in public); *Ezell*, 651 F.3d at 708 (applying a higher level of scrutiny than intermediate because the ordinance at issue completely banned individuals from practicing at the firing range).

⁷⁶ See *Jackson*, 746 F.3d at 964 (concluding that in the analysis of the severity of the burden, an important consideration is whether the ordinance burdens the “manner in which persons may exercise” the right, which would likely result in intermediate scrutiny, or whether it effectuates a blanket ban, which would result in a higher level of scrutiny). In *Teixeira*, the ordinance regulates rather than prohibits an individual’s ability to acquire a gun and therefore intermediate scrutiny is appropriate. See *Ezell*, 651 F.3d at 708 (contrasting mere regulation from outright prohibition).

⁷⁷ See, e.g., *Marzarella*, 614 F.3d at 98 (concluding that intermediate scrutiny requires the government objective to be significant, substantial, or important and be reasonable); *Chester*, 628 F.3d at 683 (concluding that, under intermediate scrutiny, the government must show that there is a reasonable fit between a significant governmental objective and the regulation challenged).

⁷⁸ See *Schall v. Martin*, 467 U.S. 253, 264 (1984) (concluding that protecting the community from crime is a “legitimate and compelling state interest”); *New York v. Ferber*, 458 U.S. 747, 757

The County should be able to justify their zoning ordinance, but it will need to show supporting evidence that prohibiting a gun store within five hundred feet of any residential area, school, or other specified establishment is reasonably related to their governmental objective.⁷⁹

The outcome of this case could produce similar litigation both in California and in other states where local zoning ordinances prevent commercial gun stores from operating within certain distinguished buffer zones.⁸⁰ For example, there are at least twenty California cities and counties that have enacted similar zoning ordinances that restrict the commercial sale of firearms.⁸¹ *Teixeira*, therefore, could have a substantial impact on zoning laws across the nation if on rehearing the Ninth Circuit finds that any zoning ordinance that prevents a commercial gun store from opening in a certain part of town is unconstitutional.⁸² The court should be cognizant of the vast implications of distance-based zoning ordinances, and if it does in fact strike down the County of Alameda's ordinance, it should do so in a way that provides guidance to legislatures for writing similar regulations.⁸³

(1982) (“Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”); *Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir. 2013) (concluding that the protection of public safety and preventing crime were substantial government interests).

⁷⁹ See *Jackson*, 746 F.3d at 969 (stating that while determining whether the government interest was substantial that a municipality may rely on any evidence “reasonably believed to be relevant”); cf. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (stating, in a case involving adult movie theaters, that the “essence of zoning” is “preserving the quality of life in the community at large” by preventing what the government feels is a harm to the community).

⁸⁰ See Matthew Henderson, *In the Crosshairs of the Second Amendment—Ninth Circuit Finds County Zoning Regime Was Overly Restrictive on the Sale of Firearms*, ARGENT COMMS. GROUP., (July 15, 2016), <https://argentco.com/post/crosshairs-second-amendment-ninth-circuit-finds-county-zoning-regime-overly-restrictive-sale-firearms> [<https://perma.cc/MLW6-VG9K>] (explaining that the ruling in *Teixeira* could produce copycat litigation throughout California).

⁸¹ See Brief of Amici Curiae Law Center to Prevent Gun Violence & Youth Alive! in Support of Defendants Appellees and Affirmance at 4, n.7, *Teixeira v. Cty. of Alameda*, 822 F.3d 1047 (9th Cir. 2016) (No. 13-17132), 2014 WL 4198123, at *4, 4 n.7 (listing twenty different local ordinances regulating where firearms stores may be located). There is therefore no shortage of local laws regulating the location of gun retailers in California for potential copycat litigators to direct their constitutional challenges. See, e.g., CATHEDRAL CITY, CAL., CODE § 5.32.040(A) (2017); ALBANY, CAL., CODE § 8-19.6(I)(3) (2016); BURBANK, CAL., MUNICIPAL CODE § 10-1-673.1(A)(2) (2016); EL CERRITO, CAL., CODE § 6.70.100 (2016); HERCULES, CAL., CODE § 4-14-06(I)(3) (2016); OAKLAND, CAL., CODE § 5.26.070(I)(3) (2010); PACIFICA, CAL., CODE § 9-4.2316(d) (2005); PALO ALTO, CAL., MUNICIPAL CODE § 4.57.050(a)(9)(C) (1996).

⁸² See Brief of Amici Curiae Law Center to Prevent Gun Violence & Youth Alive! in Support of Defendants Appellees and Affirmance, *supra* note 81, at 4 (indicating the prevalence of local zoning regulations involving gun retailers across California); Henderson, *supra* note 80 (suggesting that the outcome of *Teixeira* could encourage an increase in litigation attacking the constitutionality of zoning ordinances regulating the location of gun retailers).

⁸³ See Brief of Amici Curiae Law Center to Prevent Gun Violence & Youth Alive! in Support of Defendants Appellees and Affirmance, *supra* note 81, at 4 (highlighting the prevalence of distance-based zoning ordinances); Henderson, *supra* note 80 (discussing the potential implications of *Teixeira*

CONCLUSION

In 2016, the U.S. Court of Appeals for the Ninth Circuit in *Teixeira v. County of Alameda* was required to decide whether a zoning ordinance, which prohibited a commercial gun shop from opening within five hundred feet of any residential district, school, other gun store, or establishment that sold liquor, was unconstitutional under the Second Amendment. The Ninth Circuit correctly engaged in a two-step analysis to determine whether the zoning ordinance violated the Second Amendment. Under the first step, the zoning ordinance does burden conduct under the Second Amendment because it does have some form of restriction on the right to sell guns, which is a complementary Second Amendment right of individuals to acquire guns. However, under the second step, the zoning ordinance should only face intermediate scrutiny because although the ordinance strikes to the core of the Second Amendment, it does not severely burden the right to keep and bear arms for individuals in the community. No law-abiding citizens in the community were less able to buy a gun than they were before the ordinance. Therefore, on rehearing, if the Ninth Circuit rules in favor of *Teixeira* and strikes down the ordinance, the effect could be a potentially large increase in the number of constitutional challenges to zoning laws throughout the United States.

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Id.; see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (striking down a town's ordinance as unconstitutional, but making sure to provide guidance to governments on how to write an ordinance that would have survived the Court's constitutional scrutiny).