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Legal Sidebar

A Second Amendment Right to Sell Firearms? The Ninth Circuit, Sitting En Banc, Weighs In.

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On October 10, 2017, in a 9-2 ruling, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) sitting en banc reversed a decision by a three-judge Ninth Circuit panel that held that the Second Amendment protects the commercial sale of firearms. The case, *Teixeira v. County of Alameda,* involves a Second Amendment challenge to a zoning regulation applicable to firearms stores in Alameda County, California. *Teixeira* provides Congress with the most substantive guidance on the Second Amendment's applicability to the commercial sale of arms since the Supreme Court commented in *District of Columbia v. Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws imposing conditions and qualifications on the commercial sale of firearms," among other "presumptively lawful" regulations. The en banc ruling coincidentally was handed down as Congress is poised to consider legislation designed to limit the manufacture, sale, and possession of "bump stock" devices, a firearm accessory that allows a semi-automatic firearm to mimic the firing rate of a fully automatic machine gun.

At issue in *Teixeira* is an ordinance in Alameda County requiring businesses seeking to sell firearms to obtain a permit. A permit cannot be granted if, as relevant here, the planned firearms store will be within 500 feet of a residentially zoned district. The partners behind Valley Guns & Ammo sought a permit to open a retail store in the County, but local authorities denied the permit request because the proposed store site fell within 500 feet of a residential property. The partners, joined by several institutional plaintiffs, then challenged the zoning ordinance on Second Amendment grounds, among other things. The district court dismissed the complaint for failing to state a claim for relief.

On appeal, a three-judge panel of the Ninth Circuit—over one judge's dissent—reversed, concluding that the partners' Second Amendment claim must be allowed to proceed. That ruling is discussed in detail in an earlier Sidebar. In short, the Ninth Circuit panel reviewed the zoning ordinance under intermediate scrutiny and concluded that the ordinance did not pass muster under that standard. In particular, the panel concluded that the government had not met its burden of demonstrating that the ordinance befits its stated objective—protecting against crime and other purported secondary effects of gun stores—because the County did not put forth any evidence to "justif[y] the assertion that gun stores act as magnets for crime." Conversely, Judge Silverman, in a short dissent, framed the litigation as merely "a mundane zoning dispute dressed up as a Second Amendment challenge" and would have upheld the ordinance.

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An en banc panel of 11 judges reconsidered the three-judge panel ruling, and a majority of those judges concluded that the Second Amendment does not protect an independent right to *sell* firearms separate and apart from the right to *acquire* firearms. The court reasoned that regulations directed at firearms sales likely fall into the category of firearm laws described in *Heller* as "presumptively lawful" regulations "imposing conditions and qualifications on the commercial sale of arms." Still, the court viewed *Heller*'s language as "sufficiently opaque" to warrant a full textual and historical review of the Second Amendment's applicability to the commercial sale of arms. This review led the court to the same conclusion: The Second Amendment, as written, "did not encompass a freestanding right to engage in firearms commerce divorced from the citizenry's ability to obtain and use guns."

But the right to *acquire* firearms, the Ninth Circuit clarified, *is* protected. The court reasoned that "the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms." And though firearms dealers may assert that right on behalf of their potential customers, in this case, the court explained, the partners had not alleged that the inability to open a new firearms store interfered with the ability of Alameda County residents to acquire firearms. Notably, the court recounted that evidence established that, without the new gun store, "Alameda County residents may freely purchase firearms within the County," given that the County was already home to 10 gun stores, including one that stood 600 feet away from the proposed site of the new store. Because the partners could not show that the zoning ordinance had burdened County residents' right to acquire firearms, the court declined to determine the precise scope of the right to acquire firearms and the appropriate level of review to analyze claims of a deprivation of that right.

Furthermore, in explaining its ruling, the en banc majority distinguished the Alameda County ordinance from the law at issue in *Ezell v. City of Chicago,* in which the Seventh Circuit concluded that a Chicago ordinance effectively barring firing ranges likely burdened the Second Amendment's core right to possess a firearm for self-defense. These cases differed because, the Ninth Circuit said, the Chicago ordinance effectively precluded nearly any shooting range from operating within the city's boundaries, and thus severely limited the city's residents' Second Amendment right to maintain firearm proficiency. Whereas in *Teixeira,* the court reasoned, Alameda County residents had many available, local options to exercise their right to acquire firearms without the new store.

In dissent, Judge Tallman contended that more fact finding was needed to determine whether the Alameda County ordinance "imposes no unreasonable restrictions on the right to lawfully acquire and maintain firearms for the defense of hearth and home." Although the en banc majority did not opine on the level of scrutiny applicable to Second Amendment claims, in Judge Tallman's view, the court should have remanded the case to allow the district court to analyze the Second Amendment claim "under the lens of at least intermediate scrutiny." (In another dissenting opinion, Judge Bea echoed Judge Tallman's conviction that intermediate scrutiny should be applied.) Further, Judge Tallman asserted that constitutional rights cannot be analyzed "in a vacuum," and, when evaluating one firearms regulation, courts must additionally assess "the totality of the impact of gun control regulations" at the local, state, and federal level, to "determin[e] how severely the fundamental liberty protected by the Second Amendment is being burdened."

Accordingly, the en banc *Teixeira* ruling walks back the Ninth Circuit panel's conclusion that the Second Amendment independently protects the commercial sale of arms. Instead, the en banc court concluded that the Second Amendment protects only the right of the people to *acquire* firearms, and so restrictions on the commercial sale of arms must be analyzed under a framework that assesses any attendant restrictions on firearm acquisition. The en banc opinion seems to comport with a suggestion in an unpublished Fourth Circuit opinion that "although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding right to sell a firearm." Nor does the *Teixeira* opinion necessarily conflict with a comment made by the Third Circuit in dicta that the "[c]ommercial regulations on the sale of firearms do not fall outside the scope of the Second

Amendment." The Ninth Circuit did not foreclose Second Amendment claims against all commercial firearm regulations, but, rather, only those claims based on an alleged constitutional right to sell firearms independent of a constitutional right to acquire firearms.

Accordingly, post-*Heller*, the Ninth Circuit is the only circuit to have engaged in an in-depth analysis of whether the Second Amendment protects the commercial sale of arms. Of course, federal courts outside of the Ninth Circuit's jurisdiction are not bound by its ruling and will be free to decide in the first instance (1) how to evaluate claims alleging interference with the Second Amendment right *to acquire* firearms, and (2) whether the Second Amendment protects the commercial sale of arms independently. Still, *Teixeira* provides useful guidance, at least for now, as to how Congress potentially could regulate the commercial sale of arms. For instance, the en banc majority opined that "gun buyers have no right to have a gun store in a particular location . . . as long as their access is not meaningfully constrained," because "the Second Amendment does not elevate convenience and preference over all other considerations." This language potentially could inform policymakers' assessment of whether legislation comports with the Second Amendment if it restricts where, when, and how firearm sales are conducted.

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