

**IN THE
SUPREME COURT
OF THE UNITED STATES**

No. C18-0111-1

OCTOBER TERM 2018

COUNTY OF MOJAVE, Petitioner

v.

BROTHERHOOD OF STEEL, LLC AND ROGER MAXSON, Respondents

ORDER GRANTING WRIT OF CERTIORARI

PER CURIAM:

The petition for a writ of certiorari from the United States Court of Appeals for the Fourteenth Circuit is hereby granted.

IT IS ORDERED that the above-captioned matter be set down for argument in the 2019 term of this Court, said argument to be limited to the following issues:

- I. When Second Amendment claims are suitable for means-ends scrutiny, must courts apply some form of heightened scrutiny or might rational-basis review suffice?
- II. Does the Second Amendment secure a right to sell firearms?

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

BROTHERHOOD OF STEEL, INC.

And

ROGER MAXSON

Petitioners

v.

COUNTY OF MOJAVE

Respondent

Case No. 18-0013-1

Decided October 1, 2018

Before Judges Mossberg, Watan, and Hulbert.

Mossberg, Circuit Judge, for the Court.

We must decide whether the right to keep and to bear arms, as recognized by the Second Amendment, necessarily includes the right to sell and purchase arms and what, if any, limits can be placed on that right.

I. BACKGROUND FACTS

A. Maxson's Initial Interactions with the County.

On June 17, 2011, Maxson formed a limited liability company, Brotherhood of Steel, Inc., with the intention of opening a gun store and shooting range in Mjoave County, New Tejas.¹ Additionally, Brotherhood of Steel planned to offer training, certification courses, and gunsmithing services at the store. Maxson honorably retired from the United States Army after

¹ Mojave County has a population of 482,478 people. It is the 10th most populous county in the state. Half of the population lives in unincorporated parts of the County; however, the unincorporated parts of the county are not contiguous and are separated by three towns.

ten years of service. During his service, he completed the Military Occupation Specialization of 91F—Small Arms / Artillery Repairer and retired with the rank of E-6, Staff Sergeant. Before retirement, Maxson frequently worked with defense contractors to develop new pistol technology. Following his retirement, he worked for multiple weapons companies until he decided to open Brotherhood of Steel.

Maxson conducted internet and local market research among gun enthusiasts and concluded that demand existed for a full-service firearms center in an unincorporated area of Mojave County colloquially known as “Hidden Valley” near the incorporated city of Sloan. In response to this demand, Maxson contacted the Mojave County Planning Department for information as to any land use or other permits necessary to open a gun store in unincorporated areas of the County.

Mr. Gunther, the Chief Clerk of the Planning Department, informed Maxson that because he intended to sell firearms he would need to obtain a Conditional Use Permit pursuant to Mojave County Ordinance Sections 17.54.130 and 17.54.131. Section 17.54.130 states that Conditional Use Permits are required for certain land uses and are only granted after a special review in which the County determines whether or not the proposed business: (1) is required by public need; (2) is properly related to other land uses and transportation and service facilities in the area; (3) if permitted, will materially and adversely affect the health or safety of persons residing or working in the vicinity; and (4) will be contrary to the specific performance standards established for the area. Mojave Cty., NTX., Code § 17.54.130. Section 17.54.131 (the “Zoning Ordinance”). That ordinance requires, among other things, that businesses selling firearms in unincorporated areas of the County be located at least 800 feet away from any of the following: schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and

residentially zoned districts. Based on documentation provided by the County to Mr. Maxson, the 800-foot zoning requirement was to be measured from the closest door of the proposed business location to the front door of any disqualifying property.

Based on this information, Maxson identified a suitable rental property at 2274 Helios Lane in unincorporated Mojave County. The structure on 2274 Helios Lane is 28,743 square feet with 3,800 square feet dedicated to retail space and another 1,000 square feet dedicated to gunsmithing and repairs. To avoid violating the ordinances, Maxson obtained a survey that showed, based on door-to-door measurements, the property was more than 800 feet away from any disqualifying property. The closest residential property was 981 feet away, and the nearest gun store was approximately 10 miles away.

B. Maxson’s Planning Department and Zoning Board Interactions.

Maxson arranged to lease the Helios property on August 13, 2011, and to make necessary improvements to transform the space into a gun store compliant with all state and federal regulations. Maxson then applied to the Mojave County Community Development Agency for a Conditional Use Permit for his planned store.

The Staff of the Mojave County Community Development Agency Planning Department (“Planning Department”) reviewed Maxson’s application and prepared a November 1, 2011 initial report for the West County Board of Zoning Adjustments (“Zoning Board”) finding:

1. there was a public need for a licensed firearms dealer;
2. the proposed use was compatible with other land uses and transportation in the area; and
3. a gun shop at the proposed site would not adversely affect the health or safety of persons living or working in the vicinity.

The initial report also found that the site of the proposed gun shop did not satisfy the Zoning Ordinance's distance requirements because the shop was approximately 736 feet from an inactive church² located behind the property and across Interstate 76. The initial report's distance calculation was based on measurements from the closest exterior wall of the proposed gun shop to the property lines of the disqualifying property, the church. The initial report thus recommended denying Maxson's permit application.

The Zoning Board held a public hearing on Maxson's Conditional Use Permit application. Maxson appeared at the hearing and offered testimony in support of his application; neighborhood residents also appeared, some testifying in support of the application and others in opposition. Based on evidence in the record, 15 people spoke in favor of Maxson and eight spoke against the gun store.³

After the hearing, the Planning Department issued a revised report on November 10, 2011. The revised report acknowledged the ambiguity in the Zoning Ordinance regarding how the 800 feet should be measured for the purposes of determining compliance. The revised report concluded that the proposed gun store location was less than 800 feet from the property line of the closest disqualifying property, whether measured from the exterior wall, front door, or property line of the proposed gun shop.

The Planning Department once more recommended denying Maxson a Conditional Use Permit and variance.

² The church property shows the current ownership to be The Children of the Cathedral, a religious organization founded by Richard Moreau. However, Mr. Moreau took his life in 2009, after being arrested for tax evasion. Religious activities no longer occur on the property, but it is still labeled as tax exempt on a religious basis. Neither party contests the categorization of the property. Churches may be located in either residential or commercial zones in Mojave County.

³ It is unclear from the record if all of the speakers were residents of Mojave County.

On December 29, 2011, the Zoning Board passed a resolution granting Maxson a variance from the Zoning Ordinance and approving his application for a Conditional Use Permit. The Zoning Board ultimately concluded that a gun shop at the proposed location would not be detrimental to the public welfare and warranted a variance in light of the physical buffer created by a major highway between the proposed site and the nearest disqualifying property. The Zoning Board also determined that a public need existed for a licensed firearms retailer in the Hidden Valley area. The nearest existing shooting range is located over 20 miles away⁴ and the nearest store is located 10 miles away. Maxson was also a certified Red 888 Guns⁵ armorer and gunsmith. The record indicates there is not another Red 888 Guns armorer and gunsmith in the Mojave area.

C. Shady Sands Home Owners Association's Administrative Appeal.

Following County approval of Maxson's permit application, the Shady Sands Home Owners Association filed an appeal on January 6, 2016, with the County Commissioners' Court challenging the Zoning Board's resolution. The Shady Sands Home Owners Association is comprised of five members, Mrs. Tandi, Mr. Aradesh, Dr. Razlo, Ms. Alya, and Mr. Seth. All of the board members are members of the New Tejas Citizens Against the Second Amendment non-profit organization.

Acting through three of its members,⁶ the County Commissioners' Court voted to sustain the appeal, overturning the Zoning Board's decision and revoking the Conditional Use Permit.

⁴ New Tejas requires that an individual must complete at least one hour of firearms training course time on a shooting range to obtain a concealed carry permit.

⁵ Red 888 Guns is the fourth largest manufacturer of personal firearms in the world.

⁶ The three commissioners were Mr. Horrigan, Mr. Richardson, and Dr. Curling. All three were up for election in 2012. The other two members were not up for election and did not attend the meeting. Neither party challenges the validity of the ruling.

After the permit was revoked, Maxson alleges he was unable to identify any property in unincorporated Mojave County that satisfied the Zoning Ordinance’s 800-foot rule and was otherwise suitable—in terms of location, accessibility, building security, and parking—for a gun shop. Maxson commissioned a study to analyze the practical effects of the Zoning Ordinance for opening a gun store in unincorporated areas of the County.

Maxson filed a complaint in federal district court challenging the County Commissioners’ Court’s decision to deny him a variance and Conditional Use Permit.

D. Proceedings at the District Court.

In the United States District Court for the Central District of New Texas, Maxson argued that the Commissioners’ Court violated his right to due process and denied him equal protection under the law, and that the Zoning Ordinance was impermissible under the Second Amendment both facially and as applied. Maxson’s commissioned study determined that, as a result of the 800-foot rule, “there are no parcels in the unincorporated areas of Mojave County which would be available and suitable for firearm retail sales.”⁷ He argued that the Zoning Ordinance “is not reasonably related to any possible public safety concerns” and effectively “red-lines gun stores out of existence in unincorporated Mojave County.”

Mojave County moved to dismiss the claims, and Maxson moved for a preliminary injunction (Maxson stipulated to the dismissal of his due process claims). The District Court denied Maxson’s motion and dismissed the equal protection and Second Amendment claims with leave to amend. Maxson filed an Amended Complaint that asserted four claims: (1) in singling out gun stores, the Zoning Ordinance as applied violated the Fourteenth

⁷ Another study provided by Mojave County found that approximately 15% of the total unincorporated Mojave County acreage could comply with the 800-foot rule due to the density of disqualifying properties, however this study was silent as to whether any of the acreage was suitable for a firearm retail center.

Amendment's Equal Protection Clause; (2) the Zoning Ordinance was facially invalid under the Equal Protection Clause because it targeted guns stores but did not apply to other similarly situated businesses; (3) the Zoning Ordinance was facially invalid under the Second Amendment; and (4) the Zoning Ordinance as applied violated the Second Amendment. Maxson sought declaratory and injunctive relief, damages including expenses, lost profits, court costs and attorneys' fees. In response, the County moved to dismiss, arguing that the equal protection challenges failed to state sufficient facts to support a claim and that, under the Second Amendment, regulations governing the sale of firearms are presumptively valid.

The District Court granted the County's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss for failure to state a claim upon which relief could be granted. Maxson timely appealed.

II. DISCUSSION

A. Maxson Failed to State an Equal Protection Claim.

Maxson's equal protection challenge is nothing more than a Second Amendment claim dressed in equal protection clothing, it is "subsumed by, and coextensive with" the former, *Orin v. Barclay*, 272 F.3d 1207, 1213 n. 3 (9th Cir. 2001), and therefore is not cognizable under the Equal Protection Clause. Further, Maxson failed to adequately plead a "class-of-one" Equal Protection Clause claim. A class-of-one claim is cognizable when a "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, (2000). But Maxson himself acknowledges that gun stores are materially different from other retail businesses when he notes that "[b]usinesses offering gunsmithing services and retail firearm sales are strictly licensed and regulated by state and federal law." In neglecting to

identify a similarly situated business, Maxson failed to plead a cognizable class-of-one claim. Maxson's Equal Protection Clause claims accordingly fail.

B. Does the Ordinance of Mojave County Burden the Second Amendment?

Maxson asserts that Mojave County's Zoning Ordinance violates the Second Amendment. The Second Amendment states that:

“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.” U. S. Const. amend. II.

In District of Columbia v. Heller, 554 U.S. 570, 574-626 (2008), the United States Supreme Court held that the Amendment guarantees an individual's right to possess firearms for traditionally lawful purposes, such as self-defense. The Court subsequently applied the right against the States via the Fourteenth Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Though the Supreme Court has yet to “clarify the entire field” of Second Amendment jurisprudence, it has established a broad framework for addressing challenges such as the one at hand. In reviewing Mojave County's Zoning Ordinance, we employ a two-step inquiry, which begins by asking whether a challenged law burdens conduct protected by the Second Amendment; if the answer is in the affirmative, we apply the appropriate level of scrutiny. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

Turning to the inquiry's first step, we must determine whether the commercial sale of firearms implicates the Second Amendment right to keep and to bear arms by reviewing the “historical understanding of the scope of the right.” *Heller*, 554 U.S. at 625. Ultimately, this case hinges on a Second Amendment challenge on a purported right to purchase firearms or, put another way, the right to acquire weapons for self-defense. While *Heller* did not explicitly recognize a right to purchase or to sell weapons, the Court's opinion was not intended to serve as

“an exhaustive historical analysis ... of the full scope of the Second Amendment.” *Heller*, 554 U.S. at 626.

In looking through the history of the United States, we see that Americans have always believed—and shall continue to believe—that the right to bear arms must include the freedom to purchase and to sell weapons. At the time the Fourteenth Amendment was ratified, American jurists simply assumed that the “right to keep arms, necessarily involve[d] the right to purchase them.” *Andrews v. State*, 50 Tenn. 165, 178 (1871). It does not make sense that one has the right to possess firearms but does not have the right to also purchase firearms.

In addition to selling firearms, Maxson alleges in his First Amended Complaint that his proposed gun store would offer various services including “state-mandated Hunter Safety Classes, Handgun Safety Certificates,” and “classes in gun safety, including safe storage of firearms in accordance with state law.” Because the Second Amendment protects a “right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms,” it also follows that one must have the right to be trained on such firearms. *Heller*, 554 U.S. at 617. This has led the Seventh Circuit to conclude that a regulation prohibiting most firearm ranges within the city limits of Chicago constituted a “serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.” *Ezell v. City of Chicago* (“*Ezell I*”), 651 F.3d 684, 708 (7th Cir. 2011).

Just like the firearm range in *Ezell I*, the services Maxson is planning to offer are fundamental to the right to keep and to bear arms. The Zoning Ordinance’s potential interference with such services was therefore a proper basis for Maxson’s Second Amendment challenge.

Mojave County has offered nothing to undermine our conclusion that the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms.

C. The Proper Standard of Review of Interference with the Second Amendment.

Having determined that, contrary to the District Court's ruling, the Mojave County Zoning Ordinance burdens conduct protected by the Second Amendment, the next step in the inquiry is to identify the proper standard of review. *Chovan*, 735 F.3d at 1136.

We choose to adopt the 9th Circuit's reasoning in *United States v. Chovan*, that unless a statute or ordinance represented a longstanding prohibition understood to be prohibited by the Second Amendment, then the statute or ordinance will not avoid heightened constitutional scrutiny. Instead, the type of law in question must be both longstanding and closely match a listed prohibition in *Heller*. Alternatively, there must be "persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). The burden is on the Government to demonstrate that a prohibition has historically fallen outside the Second Amendment's scope before it can claim a presumption of validity. *See Chovan*, 735 F.3d at 1137.

Here, the County failed to demonstrate that the Zoning Ordinance "falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected." *Jackson*, 746 F.3d at 960. The County has not demonstrated that any historical regulation restricted where firearm sales could occur. In fact, the Nation's first comprehensive zoning law did not come into existence until the early 20th century; therefore, it was impossible for the founding fathers to have incorporated zoning into their rationale for the Second Amendment. Of

course, even if a zoning ordinance does not represent a longstanding prohibition or regulation, it may ultimately survive Second Amendment scrutiny because “sensible zoning and other appropriately tailored regulations” for gun-related activities are most certainly permissible. *See Ezell I*, 651 F.3d at 709.

Such reasoning, however, does not show on its face that the Zoning Ordinance violates the Second Amendment, but it does mean that the Zoning Ordinance must be subjected to heightened scrutiny, something that is beyond a rational basis review. “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.” *Heller*, 554 U.S. at 628-29 & n. 27.

While *Heller* does not dictate a test for the heightened scrutiny applied to the Second Amendment, it does suggest that the Second Amendment should be analogized to the longstanding First Amendment jurisprudence. *Ezell*, 651 F.3d at 706.

We will continue to follow the 9th Circuit by adopting the same test when ascertaining the appropriate level of scrutiny. First, we must look at how close the law comes to the core of the Second Amendment right and, second, determine the severity of the law’s burden on that right. *See Jackson*, 746 F.3d at 960-61 (quoting *Chovan*, 735 F.3d at 1138). There is no question that an ordinance completely restricting the commercial sale of firearms would burden the right of law-abiding citizens to possess and carry firearms.

The County argues that the Zoning Ordinance “simply restricts the location of gun stores.” If such is the case, the Zoning Ordinance does not impose the sort of severe burden imposed by the handgun ban at issue in *Heller*. If the Zoning Ordinance merely regulates where gun stores can be located rather than outright banning them, then it burdens only the “*manner* in

which persons may exercise their Second Amendment rights.” *Chovan*, 735 F.3d at 1138 (emphasis added).

It is thus analogous to “a content-neutral speech restriction that regulates only the time, place, or manner of speech.” *Jackson*, 746 F.3d at 964. To put it another way, the Zoning Ordinance would be a regulation rather than a prohibition.

However, the allegation is that Mojave County has enacted something beyond a mere regulation. Maxson alleges that the Conditional Use Permit’s 800-foot rule, as applied, amounts to a complete ban on gun stores: “according to the plaintiff’s research, which is based primarily on government agency data, there are no parcels in the unincorporated areas of Mojave County which would be available for firearm retail sales.” The District Court disregarded such assertions, observing that other retail establishments selling guns exist in Mojave County and “plaintiff [failed to] allege that the ‘existing retail establishments’ that sell guns are unable to comply with the Ordinance.” Perhaps anticipating the District Court’s skepticism, Maxson’s First Amended Complaint alleged that other federal firearm licensees located within the County were either not in fact retailers or, for whatever reason, were not required to comply with the restrictions mandated by the Zoning Ordinance. Though such an assertion may yet prove false, if Maxson had been given a chance to demonstrate that the Zoning Ordinance was “not merely regulatory” but rather functioned as a total ban on all new gun retailers, “a more rigorous showing” than even intermediate scrutiny, “if not quite ‘strict scrutiny,’” would have been warranted. *Ezell I*, 651 F.3d at 708.

The County’s stated interests are: first, an interest in protecting public safety and preventing harm in populated, well-traveled, and sensitive areas such as residentially-zoned

districts; second, protecting against the potential secondary effects of gun stores, such as crime; and, third, preserving the character of residential zones.

Having identified the interests, we must find if there is a reasonable fit between the Zoning Ordinance and its objectives. Here, the District Court's analysis erred. It reasoned that "[w]hile keeping a gun store 800 feet away from a residential area does not guarantee that gun-related violence or crimes will not occur, the law does not require a perfect match between the Ordinance's means and objectives, nor does the law require the Ordinance to be foolproof." The problem is that the District Court failed to explain how a gun store would increase crime in its vicinity. The Court instead simply accepted the County's assertion without exacting it to any scrutiny, in a fashion that more closely resembled rational basis review.

Under heightened scrutiny, the County "bears the burden of justifying its action." *Ezell I*, 651 F.3d at 706. The County failed to satisfy its burden because it never justified the assertion that gun stores act as magnets for crime. As Maxson stated, "all employees working at a gun store, and all clients/customers are required to be law-abiding citizens."

III. CONCLUSION

For the forgoing reasons, the dismissal of the Equal Protection Clause claims is AFFIRMED and the dismissal of the Second Amendment claims is REVERSED. The case is REMANDED for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

Watan, Circuit Judge, concurring in part and dissenting in part:

For the reasons discussed below, I respectfully concur in part and dissent in part.

I. DISCUSSION

A. Additional Factual Background.

The first thing you need to know about this case is something about the Petitioners. The Petitioners are not individuals who claim the right to keep and bear arms for self-defense or for other lawful purposes. Rather, they are entrepreneurs who want to operate a gun shop in an area of Mojave County that is not zoned for that use.

The next thing you need to know is that there is no claim that, due to the Zoning Ordinance in question, individuals cannot lawfully buy guns in Mojave County. It is undisputed that they can. The record shows that there are at least three gun stores and two shooting ranges already operating lawfully in Mojave County.⁸ While it may be true that there is not an official Red 888 Guns dealer in Mojave County, the citizens of Mojave County can still purchase Red 888 Guns during gun conventions that travel through the state.

B. Maxson Failed to State an Equal Protection Claim.

The majority did get this part of the decision correct. There is no Equal Protection Claim in this case. Much like there is no Second Amendment Claim in this case.

C. Maxson Failed to State a Claim for How the Ordinance Burdened the Second Amendment.

After *Heller*, federal courts of appeals have held that the Second Amendment protects ancillary rights necessary for the core right to possess a firearm for self-defense. While purchasing ammunition and access to gun ranges have been shown to be such ancillary rights,

⁸ While it is true that none of the stores opened after the Zoning Ordinance was passed, that fact is immaterial to the legal analysis.

Maxson does not adequately allege in his complaint that Mojave County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular. To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege in the complaint “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The closest Maxson comes to stating a claim that his potential customers’ Second Amendment rights have been or will be infringed is his allegation that the Zoning Ordinance places a restriction on convenient access to a neighborhood gun store and the corollary burden that those customers might need to travel to other, more remote locations to exercise their rights to acquire firearms, ammunition, gunsmithing, and access to shooting ranges in compliance with the state and federal laws. Further, Maxson’s argument that if the existing stores close no new stores will be allowed to open is unpersuasive because it is at best a theoretical harm.

Increased driving distances do not automatically constitute an undue burden on a constitutional right. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (holding that a zoning ordinance that limited churches and synagogues to residential districts did not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA)). Just making the allegation alone is not sufficient. In order to receive heightened scrutiny, Maxson must first allege a claim that a meaningful burden exists on the Second Amendment.

While the majority is correct that there should be a two-step process in analyzing Second Amendment claims, they are wrong to imply that once you move past step one, you must then analyze the statute under a heightened scrutiny test.

The Seventh Circuit provides sage advice to its fellow Appellate Courts by cautioning us that, during step two of the analysis, we should avoid digging into the “levels of scrutiny” quagmire. *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (*en banc*). Rather, we should view the interplay between the strength of the government’s justification and whether or not the restriction implicates a core Second Amendment right. Therefore, during step two, the further you get away from a core Second Amendment right, the stronger the government’s justification and the less strict the scrutiny.

In this case we are dealing with a Zoning Ordinance dressed up as a Second Amendment claim. Mojave County is at best inconveniencing its residents through the adoption of zoning regulations. One of the most sacred rights in this Country is the ability to pursue one’s economic destiny. No other maxim is more closely held in this Country, and yet we allow local governments to regulate where businesses are located, often resulting in jobs being unavailable to all of its citizens. We allow this to happen under a rational basis scrutiny. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). Just because a zoning regulation can be made to look like a Second Amendment claim does not actually make it into one. Therefore, in looking at the state of the law following *Heller*, it seems keeping all three levels of scrutiny available makes the most sense.

Which leads to Maxson failure to state a plausible claim on behalf of his potential customers that the Zoning Ordinance meaningfully inhibits residents from acquiring firearms within the County. With the dangers inherent in firearms, mere inconvenience is not enough.

The claim that the Zoning Ordinance burdens his potential customers’ Second Amendment rights to obtain necessary firearms instruction and training is belied by the Zoning Ordinance itself. It merely limits the location of premises conducting “firearm sales.” Mojave

Cty., Cal., Code § 17.54.131. It does not concern businesses providing firearms instruction and training services.

Therefore, the Zoning Ordinance imposes no burden on Maxson if he simply wanted to open a business at the proposed site that would provide firearms instruction and training and a shooting range but not the separate firearms storefront. Whether or not that makes economic sense is immaterial. The law has historically contemplated limitations on which types of firearms can be sold; it is therefore disingenuous to say there is a blanket right to sell firearms.

This case is entirely unlike the *Ezell* cases. The ordinance in *Ezell I* expressly banned publicly accessible firing ranges in the entire city of Chicago. 651 F.3d at 691. The zoning ordinance in *Ezell v. City of Chicago* (“*Ezell II*”), although not an outright ban, so severely limited the potential locations for operating a range that less than three percent of the city’s total acreage was even theoretically available as a site for a gun range, and there was no range in the city. 846 F.3d 888, 894 (7th Cir. 2017).

No such interference can be shown in this case, as the Zoning Ordinance restricts the location of firearm sales but not training. Maxson thus fails to state a Second Amendment claim related to the provision of the ancillary right of firearms training and certification services.

Given the uniquely dangerous nature of firearms and the extraordinary risk they pose to public safety, it is not hard to understand the County’s desire to enact whatever control measures it can.

II. CONCLUSION

In conclusion, I would affirm the lower court’s ruling.

MOJAVE COUNTY STATUTES

17.54.130 - Conditional uses.

Certain uses, referred to in this title as conditional uses, are hereby declared to possess characteristics which require special review and appraisal in each instance, in order to determine whether or not the use:

- A. Is required by the public need;
- B. Will be properly related to other land uses and transportation and service facilities in the vicinity;
- C. If permitted, will under all the circumstances and conditions of the particular case, materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood; and
- D. Will be contrary to the specific intent clauses or performance standards established for the district, in which it is to be located.

A use in any district which is listed, explicitly or by reference, as a conditional use in the district's regulations, shall be approved or disapproved as to zoning only upon filing an application in proper form and in accordance with the procedure governing such uses set forth hereinafter.

17.54.131 - Conditional uses—Firearms sales.

In addition to the findings required of the board of zoning adjustments under Sections 17.54.130 and 17.54.140, no conditional use permit for firearms sales shall issue unless the following additional findings are made by the board of zoning adjustments based on sufficient evidence:

- A. That the district in which the proposed sales activity is to occur is appropriate;
- B. That the subject premises is not within five hundred (800) feet of any of the following: Residentially zoned district; elementary, middle or high school; pre-school

or day care center; other firearms sales business; religious center; or liquor stores or establishments in which liquor is served;

- C. That the applicant possesses, in current form, all of the firearms dealer licenses required by federal and state law;
- D. That the applicant has been informed that, in addition to a conditional use permit, applicant is required to obtain a firearms dealer license issued by the County of Mojave before sale activity can commence, and that information regarding how such license may be obtained has been provided to the applicant;
- E. That the subject premises is in full compliance with the requirements of the applicable building codes, fire codes and other technical codes and regulations which govern the use, occupancy, maintenance, construction or design of the building or structure;
- F. That the applicant has provided sufficient detail regarding the intended compliance with the Penal Code requirements for safe storage of firearms and ammunition to be kept at the subject place of business and building security.

17.54.140 - Conditional uses—Action.

The board of zoning adjustments shall receive, hear and decide applications for a conditional use permit and after the conclusion of the hearing may authorize approval as to zoning of the proposed use if the evidence contained in or accompanying the application or presented at the hearing is deemed sufficient to establish that, under all circumstances and conditions of the particular case, the use is properly located in all respects as specified in Section 17.54.130, and otherwise the board of zoning adjustments shall disapprove the same. In each case, notice of the hearing shall be given.

Where for any reason a board of zoning adjustments is unable to take an action on an application, the planning director has the power to transfer the application to the planning commission, who shall then receive, hear, and decide such applications as specified in Section 17.54.130.

17.54.141 - Conditional uses—Action—Firearms sales.

In order for a conditional use permit for firearms sales to become effective and remain operable and in full force, the following are required of the applicant:

- A. A final inspection from appropriate building officials demonstrating code compliance;
- B. Within thirty (30) days of obtaining a conditional use permit, and prior to any sales activity, a firearms dealer license shall be secured from the appropriate county agency;
- C. The county-issued firearms dealer's license be maintained in good standing;
- D. The maintenance of accurate and detailed firearms and ammunition transaction records;
- E. Transaction records shall be available for inspection.
- E. Compliance with all other state and federal statutory requirements for the sale of firearms and ammunition and reporting of firearms transactions.

17.54.670 - Appeals.

An appeal may be taken to the County Commissioners' Court within ten days after the date of any order made by the planning commission, the planning director, or the board of zoning adjustments pursuant to Section 17.54.140.

The appeal may be taken by any property owner or other person aggrieved or by an officer, department, board, or commission affected by the order within said ten-day period, by filing with the clerk of the board of supervisors or the planning department a notice of appeal specifying the grounds for such appeal. Filing such notice shall stay all proceedings in furtherance of the order appealed from. The planning department is designated as an agent of the clerk of the board for purposes of receiving a notice of appeal.