No. C18-0111-1

IN THE

Supreme Court of the United States

OCTOBER TERM 2018

COUNTY OF MOJAVE,
Petitioner,

v.

BROTHERHOOD OF STEEL, LLC AND ROGER MAXSON,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

TEAM NUMBER 63
COUNSEL FOR RESPONDENTS

NOVEMBER 19, 2018

QUESTIONS PRESENTED

I. As fundamental constitutional protections, are Second Amendment claims entitled to heightened scrutiny when suitable for means-end review?

II. Are firearms sales, as the primary mechanism of acquiring arms, protected by the Second Amendment's guarantee of the right to keep and bear arms?

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PARTIES TO THE PROCEEDING

Petitioner County of Mojave is a county in the State of New Tejas.

Respondent Brotherhood of Steel, Inc. is a small New Tejas corporation owned by Respondent Roger Maxson, an individual and citizen of New Tejas.

CORPORATE DISCLOSURE STATEMENT

Respondent Brotherhood of Steel, Inc. is a New Tejas corporation wholly owned by Roger Maxson. It has no parent companies, and no entity or other person has any ownership interest in it.

DECISIONS BELOW

The Fourteenth Circuit Court of Appeals' decision is not reported, but is available at No. 18-0013-1 and reprinted at R. 2. The district court's decision is not reported and is unavailable.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 1, 2018. The petition was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents brought this action under the Second and Fourteenth Amendments, claiming their rights to sell firearms were violated by Petitioners' denial of a Conditional Use Permit under the Zoning Ordinance. The relevant Mojave County Statutes are set forth at R. 19-21 and reprinted in the Appendix.

The Second Amendment provides:

> 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.

INTRODUCTION

The Second Amendment to the United States Constitution provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Since its inception, the Second Amendment has secured one of the foundational rights that American citizens enjoy. The Zoning Ordinance that the County of Mojave used to deny Mr. Roger Maxson and Brotherhood of Steel's conditional use permit to establish a firearms retail establishment impinges on these foundational rights. This Court recognized in *Heller v. District of Columbia* that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. 570, 635 (2008). That time is now. This Court should affirm the decision of the Fourteenth Circuit Court of Appeals and recognize both that Second Amendment claims are subject to heightened constitutional scrutiny and that the Second Amendment inherently protects the right to sell firearms.

STATEMENT OF THE CASE

A. Maxson plans to bring his firearms experience to Hidden Valley.

In 2011, Roger Maxson formed Brotherhood of Steel, Inc., intending to open a gun store and shooting range in Mojave County, New Tejas. R. at 2. Maxson also planned to offer firearms training, certification courses, and gunsmithing services at his store. R. at 2. Maxson honorably retired as a Staff Sergeant after ten years of United States Army service, during which he completed the Military Occupation Specialization of 91F – Small Arms/Artillery Repairer. R. at 2-3. Maxson worked with defense contractors and multiple weapons companies before and after

retirement to develop new pistol technology before he decided to open Brotherhood of Steel. R. at 3. He is also a certified Red 888 Guns armorer and gunsmith. R. at 6.

In addition to forming a limited liability company, Maxson conducted market research and concluded that "Hidden Valley" had demand for a full-service firearms center that would showcase Maxson's expertise in firearms. R. at 3. When Maxson began researching the permits necessary to open his store in Hidden Valley, Mojave County Planning Department's Chief Clerk Gunther informed Maxson he would need to obtain a Conditional Use Permit pursuant to Mojave County Ordinance Sections 17.54.130 and 17.54.131. R. at 3. Conditional Use Permits 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. The Zoning Ordinance requires 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, religious centers, other gun stores, and residentially zoned districts. *Id.* § 17.54.131. The County provided documentation to Maxson indicating the 800-foot measurement was to be made from the closest door of the proposed business location to the front door of any disqualifying property. R. at 4.

B. Maxson selects a site in compliance with Mojave County ordinances.

Based on the information provided by the Planning Department, Maxson selected a rental property in unincorporated Mojave County and obtained a survey showing the property's front door was more than 800 feet away from any disqualifying property's front door. R. at 4. The site was 981 feet from the closest residential property, 10 miles from the nearest gun store, and over 20 miles from the nearest shooting range. R. at 4. There were also no certified Red 888 Guns armorers or gunsmiths in the Mojave area. R. at 6. The structure Maxson planned to transform into a store and range is 28,743 square feet with 3,800 square feet of retail space and another 1,000 square feet for gunsmithing and repairs. R. at 4. There is no other property in unincorporated Mojave County that satisfies the Zoning Ordinance's 800-foot rule and has the proper accessibility, location, building security, and parking for a gun shop.[1] R. at 7. Maxson arranged to lease the property and to make necessary improvements to comply with all state and federal regulations. R. at 4.

C. Maxson applies for and is granted a Conditional Use Permit.

After ensuring his property would comply with all federal, state, and local regulations – including the Zoning Ordinance – Maxson applied to the County Community Development Agency Planning Department for a Conditional Use Permit. R. at 4. Planning Department staff reviewed Maxson's application and prepared an initial report for the Zoning Board, finding (1) there was a public need

[1] A study conducted by Mojave County concluded approximately 15% of unincorporated Mojave County acreage could comply with the 800-foot rule, but the study did not consider whether such properties would be otherwise suitable for a firearms retail center. R. at 7, n. 7.

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. R. at 4. However, the initial report also found that Maxson's proposed site did not satisfy the Zoning Ordinance's 800-foot rule because the distance from the exterior wall of the gun shop to the property lines of an inactive church behind the property and across Interstate 76 measured 736 feet. R. at 5. Thus, the initial report recommended denial of Maxson's application. R. at 5.

At the Zoning Board's public hearing on Maxson's Conditional Use Permit application, Maxson appeared and offered testimony in support of his application. R. at 5. A majority of neighborhood residents in attendance also spoke in support of the application. R. at 5. After this hearing, Planning Department staff issued a revised report acknowledging that their measurement technique diverged from the one that the Chief Clerk conveyed to Maxson. R. at 5. Nonetheless, the Department again recommended that Maxson's application be denied because the front door of the gun shop was less than 800 feet from the property line of the inactive church. R. at 5. However, the Zoning Board concluded Maxson was entitled to a variance from the Zoning Ordinance and approved his application for a Conditional Use Permit. R. at 6. The Board concluded that Maxson's proposed gun shop "would not be detrimental to the public welfare" because Interstate 76 created a physical buffer between the site and the inactive church, warranting the variance from the 800-foot rule, and that a public need existed for a licensed firearms retailer in Hidden Valley. R. at 6.

D. The County Commissioners' Court revokes the Permit on appeal.

After Maxson was granted a Conditional Use Permit, the Shady Sands Home Owners Association filed an appeal with the County Commissioners' Court. R. at 6. The Association is comprised of five members, all of whom are members of the New Tejas Citizens Against the Second Amendment non-profit organization. R. at 6. The County Commissioners' Court – sitting with only three of its six members – voted to overturn the Zoning Board's decision and revoke Maxson's Conditional Use Permit. R. at 6. Maxson then commissioned an independent study to find a new location for his store, but the study was unable to identify an alternative property suitable for firearms retail that complied with the Zoning Ordinance. R. at 6, 7.

E. Maxson sues to protect his Second Amendment rights.

Maxson sued the County Commissioners' Court in the United States District Court for the Central District of New Tejas. R. at 7. He argued the Commissioners' Court violated his right to due process and denied him equal protection of the laws, and that the Zoning Ordinance was impermissible both facially and as-applied under the Second Amendment. R. at 7-8. After Maxson filed an amended complaint, the District Court granted the County's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. R. at 8.

Maxson appealed the dismissal to the Unites States Court of Appeals for the Fourteenth Circuit, challenging the dismissal of each count of his complaint. R. at 8. The Fourteenth Circuit held (1) Maxson's Equal Protection claims were subsumed by his Second Amendment claims, R. at 8-9; (2) the right to purchase and sell firearms

is "part and parcel" of the rights protected by the Second Amendment, R. at 9-10; (3) the Zoning Ordinance would be subject to a more rigorous showing than intermediate scrutiny if Maxson demonstrated and fully developed the allegations of his complaint, R. at 13; and (4) the District Court erred in accepting the County's assertion that gun stores increase crime without subjecting that assertion to scrutiny, R. at 14. The County appealed, and this Court granted certiorari.

SUMMARY OF ARGUMENT

The Second Amendment is an advantage "which the Americans possess over the people of almost every other nation." *The Federalist No. 46*, at 148 (James Madison) (Black & White Publications ed., 2015). The rights the Second Amendment protects are fundamental to liberty, and as such have received broad protection from the outset of American history. Recent cases from this Court illustrate the proper method for protecting these fundamental rights: applying heightened scrutiny to regulations which burden Second Amendment rights. While a narrow category of "longstanding" regulations are presumed lawful, they do not evade review under heightened scrutiny. Maxson's Complaint pled facts demonstrating the Zoning Ordinance burdened core Second Amendment rights, subjecting the Ordinance to strict scrutiny. The Zoning Ordinance cannot withstand that scrutiny. Even if, however, this Court were to determine that the Zoning Ordinance should receive only some level of intermediate scrutiny, Maxson's Complaint pled facts showing the Zoning Ordinance violated even this diminished protection.

The Second Amendment requires this rigorous scrutiny because it protects Maxson's right to sell firearms – both as an independent right and as an extension of the rights to keep and bear arms. This Court has focused on the drafters' understanding, as presented in founding-era documents and early court decisions, in determining the scope of the Second Amendment's protection. These sources document the founders' antipathy for restrictions on the sale of firearms and early courts' belief that the Second Amendment's broad protections extended to commerce in arms. Firearms retailers are also entitled to independent protection of their sales in the same way that bookstores are protected from restrictions on their sales and physicians are protected in their performance of abortions.

Beyond an independent protection of firearms sales, the Second Amendment also necessarily encompasses the right to sell arms in order to effectuate the primary rights to keep and bear arms. *Heller* recognized a right to acquire arms as fundamental to the Second Amendment. Because individuals must be able to purchase arms, the Second Amendment must protect the other side of the transaction – the sale of arms – unless the rights to keep and bear are to be extended only to those also able to manufacture. The Zoning Ordinance burdens both the independent and subsidiary right to sell firearms and fails any level of heightened scrutiny. Thus, Maxson and Brotherhood of Steel must be permitted to proceed on their Complaint against Petitioners.

ARGUMENT

I. The Fourteenth Circuit correctly held that heightened scrutiny applied to Respondents' Second Amendment claims, and that Respondents plausibly alleged that the Mojave County Zoning Ordinance unconstitutionally burdened those rights.

Respondent properly stated a claim, as a matter of law, that the Mojave ordinance improperly burdens conduct central to the exercise of Second Amendment rights. Constitutional claims receive *de novo* review. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991). In *Heller v. District of Columbia*, this Court held that the Second Amendment protects the right to bear arms for self-defense. 554 U.S. 570, 630 (2008). Noting that the Second Amendment right "is not unlimited," this Court went on to point out that its opinion should not cast doubt on certain longstanding, "presumptively lawful regulatory measures." *Id.* at 626-27 & n.26. At the same time, this Court expressly rejected the idea that rational basis review may be appropriate in evaluating Second Amendment claims. *Id.* at 628 & n.27. Some form of heightened scrutiny, whether it be termed "strict scrutiny" or "intermediate scrutiny," must be utilized. *See id.; see also, e.g.*, *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 701 (7th Cir. 2011) *rev'd in part* at 846 F.3d 888, 898 (7th Cir. 2017).

Accordingly, the circuits have developed a two-step analysis for determining whether a challenged law unconstitutionally burdens one's Second Amendment rights. First, a reviewing court must determine whether the conduct at issue falls within the Second Amendment's ambit. *E.g.*, *United States v. Chester*, 628 F.3d 673, 679-80 (4th Cir. 2010). If it does, a secondary question considered is whether the regulation is one of those presumptively lawful measures mentioned in *Heller*; if the

law is one of those measures, it is presumed constitutional. *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1253 (D.C. Cir. 2011). Whether the presumption applies or not, the court then proceeds to look at the nature of the Second Amendment right at issue and the burden on that right the challenged law presents, and determines the appropriate level of heightened scrutiny. *See id.*; *Chester*, 628 F.3d at 679-80.[2]

The Mojave County Zoning Ordinance unconstitutionally burdens Respondent's Second Amendment rights. Zoning ordinances do not fall within those "longstanding prohibitions" on gun ownership that are presumed lawful. Further, since rational basis review is not an appropriate means for adjudicating Second Amendment claims, this court must apply some form of heightened scrutiny, regardless of whether the Ordinances is presumptively lawful. Because the right to sell firearms is a core Second Amendment right, strict scrutiny is applicable, and Respondent's Complaint sufficiently pleads facts demonstrating that the law fails strict scrutiny. But even if this Court finds that the right to sell firearms is only tangentially related to a core Second Amendment right, Respondent's Complaint demonstrates that the law does not satisfy intermediate scrutiny.

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[2] The traditional analysis for Second Amendment claims is to first determine whether the conduct being burdened is constitutionally protected and then determine the proper level of scrutiny. *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013). However, because many courts have chosen to address the scrutiny question first and avoid defining the scope of Second Amendment constitutional protections, *see Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018), and because this Court granted the certified questions accordingly, Respondents will address the question of scrutiny and then address the proper scope of Second Amendment protections.

A. There is no avenue for rational basis review of Second Amendment claims after *Heller*.

Heightened scrutiny is the only appropriate mode of analyzing Respondent's claims. This Court noted in *Heller* that applying rational basis review to Second Amendment claims would render the right to bear arms meaningless, given the significant deference courts give to a legislature's judgment. 554 U.S. at 628 n.27. That principle must be reaffirmed here. The only way Petitioner can plausibly argue against heightened scrutiny is by demonstrating that zoning ordinances, as tools of restricting gun store locations, are "presumptively lawful regulatory measures" of Second Amendment rights, and that that presumption bars *any* constitutional scrutiny. *Id.* at 626-27 & n.26; *see, e.g.*, *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013); *Ezell I*, 651 F.3d at 702-03. Petitioner cannot make either showing.

i. Heller *generally precludes rational basis review for Second Amendment claims*.

Rational basis review is not appropriate for Second Amendment claims. This Court expressly rejected the idea of applying rational basis review to Second Amendment claims in *Heller*: 554 U.S. at 628 n.27. Rational basis review, this Court noted, applies only in those cases in which "the very substance of the constitutional guarantee" is a "prohibition[] on irrational laws." *Id.* (citing *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008)). Were Second Amendment claims subject to rational basis review, "the Second Amendment would be redundant . . . and would have no effect," for nearly any law scrutinized for a rational basis would pass constitutional muster. *Id.*

Lower courts have unanimously adopted this rationale, finding that only some level of *heightened* scrutiny is appropriate. *See, e.g.*, *Chovan*, 735 F.3d at 1137; *Heller II*, 670 F.3d at 1256-57; *Ezell I*, 651 F.3d at 701; *Chester*, 628 F.3d at 682; *United States v. Marzzarella*, 614 F.3d 85, 95-96 (3d Cir. 2010). To protect the continued viability of the Second Amendment's guarantees, this Court must reaffirm that rational basis review is not an appropriate mechanism for reviewing burdens upon conduct the Second Amendment protects. *See Heller*, 554 U.S. at 628 n.27.

ii. Heller*'s pronouncement of "presumptively lawful regulatory measures" does not preclude applying heightened review to zoning ordinances infringing upon Second Amendment rights.*

Petitioners cannot avoid *Heller*'s preclusion of rational basis review for Second Amendment claims by demonstrating that its Ordinance is one of those "presumptively lawful regulatory measures" *Heller* refused to "cast doubt on." 554 U.S. at 626-27 & n.26. The Second Amendment is not an "unlimited" right, as its history demonstrates that the Framers considered some limits upon that right. *Id.* at 626-27. For instance, a historical tradition of prohibiting "dangerous and unusual weapons" existed at the time the Framers ratified the Second Amendment. *Id.* While not purporting to describe the full extent of Second Amendment rights, this Court noted that its opinion "should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms," for those laws are part of a non-exhaustive list of "presumptively lawful regulatory measures." *Id.* at 626-67 & n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010) (plurality opinion)

(confirming that each measure *Heller* considered "presumptively lawful" must be "longstanding") (quoting *Heller*, 554 U.S. at 626-27).

This portion of *Heller* is of no avail to Petitioners. First, Petitioners cannot meet their burden to establish that zoning ordinances are one of those "presumptively lawful regulatory measures" that *Heller* considered. 554 U.S. at 626-27 n.26. Second, even if zoning ordinances did fall under one of those enumerated categories or constitute their own category, they are not "longstanding" ones. *Id.* But if Petitioners meet this burden, they still do not "get a free pass;" Petitioners must still demonstrate the law passes heightened scrutiny, "a mandate that flows from *Heller* itself." *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *see United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*).

1. Zoning ordinances are not within one of *Heller*'s categories of "presumptively lawful" measures.

Zoning ordinances are not "presumptively lawful regulatory measures" on Second Amendment rights. Despite noting that those enumerated categories were not exhaustive, this Court did not provide guidance for determining categories of other "presumptively lawful" regulations and prohibitions. *See Heller*, 554 U.S. at 626-27 & n.26; *see also, e.g.*, *Marzzarella*, 614 F.3d at 92-93 ("[T]he approach for identifying these additional restrictions is also unsettled."). Petitioner holds the burden to demonstrate that zoning ordinances are a longstanding, presumptively lawful regulation on Second Amendment rights. *Chovan*, 735 F.3d at 1137; *Ezell I*, 651 F.3d at 702-03.

First, Petitioners cannot show that zoning ordinances fall within the plain meaning of any of *Heller*'s enumerated categories of presumptively lawful measures. The Ordinance at issue does not prohibit possession by felons or the mentally ill, *see* Mojave Cty., NTX., Code § 17.54.131, nor does it forbid the carrying of weapons in sensitive places, *see Ezell v. City of Chicago* (*Ezell II*), 846 F.3d 888, 895 (7th Cir. 2017) (rejecting outright the notion that zoning ordinances fall under *Heller*'s "sensitive places" category).

Nor is the Ordinance a "condition" or "qualification" on firearms sales. A "condition" is typically defined as "[a] situation that must exist before something else is possible or permitted." *Condition*, ENGLISH OXFORD LIVING DICTIONARY, https://en.oxforddictionaries.com/definition/condition (last visited Nov. 17, 2018). A "qualification" is similarly defined as "[a] condition that must be fulfilled before a right can be acquired; an official requirement." *Qualification*, ENGLISH OXFORD LIVING DICTIONARY, https://en.oxforddictionaries.com/definition/ qualification (last visited Nov. 17, 2018).

The Ordinance here is not a mere "condition that must be fulfilled" before one can open a gun store. *See id.* Rather, the Ordinance is a *restriction* on that right; it places a "limiting condition or measure" on where one may open his gun store in Mojave County. *Restriction*, ENGLISH OXFORD LIVING DICTIONARY, https://en.oxforddictionaries.com/definition/ restriction (last visited Nov. 17, 2018). If Mr. Maxson cannot demonstrate that his proposed location is at least 800 feet from a disqualifying location, then he is restricted from opening his gun shop there, just as

the County Commissioners have done. *See id.*; Mojave Cty., NTX., Code § 17.54.131(B); R. at 6.

This reading is further bolstered by the text of the statute itself. Every other subsection of the statute sets out the necessary *qualifications*, or "official requirement[s]," for obtaining a Conditional Use Permit. *Qualification*, ENGLISH OXFORD LIVING DICTIONARY, *supra*; *see* Mojave Cty., NTX., Code § 17.54.131(C) (possession of all firearms dealer licenses "*required* by federal and state law (emphasis added)); *id.* § 17.54.131(D) (applicant must be informed that he is "*required* to obtain a firearms dealer license issued by the County of Mojave" (emphasis added)); *id.* § 17.54.131(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 . . . ." (emphasis added)); *id.* § 17.54.131(F) (applicant must provide detail regarding "the intended compliance with the Penal Code *requirements* for safe storage of firearms and ammunition" (emphasis added)). The text of Mojave County Code section 17.54.131(B), as compared with its corresponding subsections, demonstrates that the 800-foot rule is a qualitatively different kind of regulatory measure. It is a restriction on a gun store's location, not a condition on its approval. It therefore cannot be considered a presumptively lawful regulation "imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27 & n.26.

2. Zoning ordinances are not "longstanding" regulations upon Second Amendment rights.

Even assuming that a zoning ordinance is a condition or qualification on firearm sales, or that a zoning ordinance is one of those unenumerated categories of presumptively lawful measures, Mojave County cannot demonstrate that zoning ordinances, *as applied to gun shops*, are longstanding measures. *Heller* also did not provide guidance in determining which laws falling under a "presumptively lawful" category are "longstanding." *See* 554 U.S. at 626-27; *Skoien*, 614 F.3d at 640-41. Lower courts disagree on how to determine whether a measure is longstanding. Some courts find that the relevant inquiry is whether the challenged law burdens conduct outside the scope of the Second Amendment at the time of ratification (or, if analyzing a state law, the Fourteenth Amendment's ratification). *Ezell I*, 651 F.3d at 702-03. Other courts find that the "longstanding" inquiry "need not mirror limits that were on the books in 1791." *Skoien*, 614 F.3d at 641; *see also Nat'l Rifle Ass'n of Am. v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012).

First, the Seventh Circuit's reading of "longstanding" as measured according to how the ratifiers of the Fourteenth Amendment would have read the text is the proper interpretation. *Ezell I*, 651 F.3d at 702-03. This reading is the most faithful to the manner in which this Court, in both *Heller* and *McDonald*, determined the scope of the Second Amendment's core protections. *See McDonald*, 561 U.S. at 770-78; *Heller*, 554 U.S. at 580-85, 592-94, 605-19. While *Heller* focused on the understanding of the right to bear arms when the Second Amendment was ratified, *e.g.*, 554 U.S. at 580-85, *McDonald* instructs courts to shift that focus to when the

Fourteenth Amendment was adopted when considering a state or local law, 561 U.S. at 770-78.

Considering those laws that "cannot boast a precise founding-era analogue," *Nat'l Rifle Ass'n*, 700 F.3d at 196, as "longstanding" prohibitions improperly expands the analysis beyond what *Heller* and *McDonald* intended. First, it is important to consider the context in which the "longstanding prohibition" discussion occurred. That "longstanding prohibition" language is embedded in a discussion of historical limitations on the Second Amendment that existed "[f]rom Blackstone through the 19th-century." *Heller*, 554 U.S. at 626. As a demonstrative example, the Court positively cited a number of state court decisions from the nineteenth century upholding restrictions upon carrying concealed weapons. *Id.* And while those decisions came after the Second Amendment's ratification, they both rely on an understanding of the Second Amendment at the time it was ratified. *See State v. Chandler*, 5 La. Ann. 489, 490 (1850) (finding that the right to bear arms provided only the right "to a manly and noble defence of themselves, if necessary, and of their country," but not for concealing weapons for committing murder); *Nunn v. State*, 1 Ga. 243, 249-51 (1846) (upholding Georgia's concealed carry ban, in part, based on the existence of laws prohibiting the concealed carry of swords and guns in Britain prior to this country's founding).

Indeed, the discussion immediately following *Heller*'s carve-out for longstanding prohibitions focuses on the Second Amendment's scope at the time of ratification, specifically in the context of military grade rifles. *Heller*, 554 U.S. at

627. The Court, citing both pre- and post-ratification sources, found that the Second Amendment considered a limitation on the carrying of "dangerous and unusual weapons," such as "M-16 rifles and the like." *Id.* Though the weapons necessary for a militia in the eighteenth century would not be nearly sufficient for those same purposes today, the Court nonetheless emphasized that "the fact that modern developments have limited the degree of fit between [the Second Amendment's] prefatory clause and the protected right cannot change our interpretation of the right." *Id.* at 627-28.

Judge Easterbrook, writing for an *en banc* Seventh Circuit in *Skoien*, chastised this approach. 614 F.3d at 640-41. Judge Easterbrook focused on the fact that the types of "longstanding" prohibitions this Court mentioned in *Heller* – such as bans on felons' possession of firearms – did not exist until 1938, demonstrating that a prohibition "need not mirror limits that were on the books in 1791" to be "longstanding" under *Heller*. *Skoien*, 614 F.3d at 640-41.

This reasoning mischaracterizes the framework of analysis for whether a prohibition is longstanding. *Heller* demonstrates that a law is not "longstanding" merely because it was enacted a long time ago. *See* 554 U.S. at 626-28. Rather, a law is "longstanding" because it is a type of regulation upon the right to bear arms that the Framers envisioned. *See id.*; *see also* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 273 (2008) (finding that the Framers did not envision the

Second Amendment encompassing a convicted felon's right to bear arms).[3] Indeed, unmooring the definition of "longstanding" from these historical considerations, and instead focusing on what year the prohibition came into being, results in the precise types of inconsistencies Judge Easterbrook found "weird" – perhaps a law enacted in 1938 is "longstanding" and a law enacted in 1968 is not, but there is no workable standard for determining why that is. *See Skoien*, 614 F.3d at 640-41.

Accordingly, the most reasonable reading of *Heller* and *McDonald* together, is exactly that which the Fourteenth Circuit employed below: whether a state law falling under one of *Heller*'s categories of "presumptively lawful" prohibitions is "longstanding" must be considered with regard to the scope of the Second Amendment when the Fourteenth Amendment was ratified. *See McDonald*, 561 U.S. at 754, 786, 791; *Heller*, 554 U.S. at 626-28; R. at 11.

Mojave County cannot demonstrate that zoning ordinances, as applied to gun stores, are longstanding conditions on firearms sales. The framers of the Fourteenth Amendment, the Fourteenth Circuit correctly recognized, could not have envisioned zoning ordinances as limiting the scope of Second Amendment rights. R. at 11. As this Court noted in the seminal case *Village of Euclid v. Ambler Realty Co.*, zoning ordinances did not appear until the early 1900s. 272 U.S. 365, 386 (1926). They

[3] Some courts cast doubt on the historical evidence regarding whether the Second Amendment protected convicted felons' right to bear arms. *See, e.g.*, *Chester*, 628 F.3d at 679. However, this question is not presently before the Court. As this Court recognized in *Heller*, future cases will provide the opportunity to expand on its enumerated exceptions, but this case is not the vehicle for that discussion. 554 U.S. at 635. It is enough here to recognize that *Heller* looked to whether the Framers considered the Second Amendment to protect a felon's right to bear arms.

resulted from the rapidly changing nature of urban society; cities and towns needed to place some limits and restrictions on the use of private land in cities, given the vast rise in population and the advent of new modes of transportation, such as the railcar and automobile. *Id.* at 386-87. Because the framers of the Fourteenth Amendment could not have considered zoning laws and their potential impact on Second Amendment rights, zoning laws cannot be considered a "longstanding prohibition[]" on Second Amendment rights that is presumptively valid under *Heller*. *See McDonald*, 561 U.S. at 770-78, 786, 791; *Heller*, 554 U.S. at 626-28.

Even if this Court rejects a historical interpretation of "longstanding," Mojave County still fails to demonstrate that its zoning law is a longstanding condition on firearms sales. Courts analyzing the overall historical record to determine if a law limiting Second Amendment rights is longstanding make clear that the *specific* type of regulation or prohibition at issue must be longstanding. *See Chovan*, 735 F.3d at 1137; *Chester*, 628 F.3d at 681-82.

For instance, in *Chovan*, a criminal defendant brought a Second Amendment challenge to a federal law restricting those convicted of domestic violence misdemeanor offenses from -owning firearms. 735 F.3d at 1130-31. In considering whether the law at issue was a presumptively valid measure, the Ninth Circuit emphasized that while federal law prevented violent offenders from owning guns since 1938, "the government [did] not prove[] that *domestic violence misdemeanants* in particular have historically been restricted from bearing arms." *Id.* at 1137. Thus,

the Ninth Circuit held that the law was not presumptively valid, and proceeded to apply heightened scrutiny. *Id.*; *accord Chester*, 628 F.3d at 681-82.

The same reasoning applies here. While zoning laws themselves may be longstanding, *see Ambler Realty*, 272 U.S. at 386-87, zoning laws for the *specific* purpose of restricting where one may sell guns are not longstanding, *see Chovan*, 735 F.3d at 1137. Cities first implementing zoning laws did not seek sequester gun stores into segregated sectors of communities; instead, zoning ordinances' longstanding purpose has been, and continues to be, for addressing the issues arising from urbanization. *See Ambler Realty*, 272 U.S. at 386-87. Indeed, zoning ordinances regulating the location of gun stores appear to be a new phenomenon. One of the first, if not the first, challenge to a zoning ordinance restricting where a gun store may conduct business did not come until 2014, when Chicago passed such a zoning ordinance after this Court's ruling in *McDonald* invalidated its city ordinance banning handgun possession within city limits. *See Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 746-47 (N.D. Ill. 2015).

Thus, because Mojave County has provided no evidence demonstrating that zoning ordinances specifically restricting where a gun store may reside are longstanding, Mojave County's Zoning Ordinance cannot be considered "presumptively valid" and must therefore be subject to heightened scrutiny.

3. *Heller*'s "presumptively lawful" measures are not per se constitutional.

Finally, even if this Court does find that the Mojave County Zoning Ordinance is a "presumptively valid" law under *Heller*, the law must nonetheless pass some sort

of heightened scrutiny. At least one lower court has considered *Heller*'s list of "presumptively valid" laws as "exceptions to the Second Amendment guarantee," thus requiring no constitutional scrutiny. *Marzzarella*, 614 F.3d at 91-92. However, the majority of courts treat *Heller*'s list of presumptively valid laws as establishing a *presumption* that the measure, on its face, does not offend the Second Amendment, but could face heightened scrutiny if shown to burden conduct protected by the Second Amendment in an as-applied challenge. *See Tyler v. Hillsdale County Sheriff's Dep't*, 837 F.3d 678, 686-88 (6th Cir. 2016) (*en banc*); *Heller II*, 670 F.3d at 1253; *Chester*, 628 F.3d at 679-80; *Williams*, 616 F.3d at 692; *Skoien*, 614 F.3d at 641-42.

Importantly, *Heller* did not say that longstanding measures such as conditions and qualifications on firearms sales are valid; rather, those measures are "*presumptively* valid." 554 U.S. at 626-27 & n.26 (emphasis added). The qualifier "presumptively" has meaning – it "means that there must exist the possibility that the ban could be unconstitutional in the face of an as applied challenge." *Williams*, 616 F.3d at 692; *accord Tyler*, 837 F.3d at 687; *Chester*, 628 F.3d at 679. "The mere fact that [the legislature] created a categorical ban does not give the government a free pass; it must still be shown that the presumption applies in the instant case." *Tyler*, 837 F.3d at 687 (citing *Williams*, 616 F.3d at 692); *see also Skoien*, 614 F.3d at 641-42.

The Third Circuit disagrees. *See Marzzarella*, 614 F.3d at 91. According to the court, because *Heller*'s discussion of dangerous weapons falling outside the

Second Amendment came immediately after the list of presumptively lawful regulations, *Heller* "intended to treat them equivalently – as exceptions to the Second Amendment guarantee." *Marzzarella*, 614 F.3d at 91. As such, all presumptively lawful regulations would receive no constitutional scrutiny. *Id.* The court, however, immediately restricted this holding in a footnote, stating that commercial regulations on the sale of firearms "do not fall outside the scope of the Second Amendment." *Id.* at 91-92 & n.8. The Third Circuit found that such a result would be "untenable under *Heller*," despite this Court considering those types of measures presumptively lawful. *Marzzarella*, 614 F.3d at 91-92 & n.8; *see Heller*, 554 U.S. at 626-27 & n.26.

The Third Circuit's line of reasoning is flawed. Construing *Heller*'s list of presumptively valid measures as being subject to no constitutional scrutiny flies in the face of *Heller* itself. *See, e.g.*, *Chester*, 628 F.3d at 679; *Skoien*, 614 F.3d at 641-42. While the Framers may have envisioned those types of regulations on Second Amendment rights at the time of ratification, *Heller*, 554 U.S. at 626-27 & n.26, *Heller* made equally clear that rational basis review of laws infringing on conduct protected by the Second Amendment was wholly improper, *id.* at 628, n.27. As long a challenger alleges that the regulation has "more than a de minimis effect" upon his Second Amendment rights, the law must be subject to heightened scrutiny. *Heller II*, 670 F.3d at 1253.

Respondent has made such an allegation here. Respondent alleges that the Mojave County Zoning Ordinance's 800-foot rule, "as applied, amounts to a complete ban on gun stores." R. at 13. Respondent further alleges that other federal firearm

licenses in Mojave County did not have to comply with the Ordinance. *Id.* Even if the Ordinance is presumptively valid, these allegations "call[] into question the applicability of *Heller*'s presumption of lawfulness to [Respondents'] Second Amendment claim." *Tyler*, 837 F.3d at 688 (finding the presumption of lawfulness vitiated in claim that a federal law's lifetime ban on gun ownership for one prior involuntary commitment for mental health reasons violated the petitioner's Second Amendment rights). Accordingly, Petitioners cannot demonstrate any plausible means for this Court to perform a rational basis review of the Mojave County Zoning Ordinance.

B. Respondents' Complaint sufficiently alleges that the Mojave Zoning Ordinance fails heightened scrutiny.

Respondent's Complaint adequately pleads a claim that the Mojave County Zoning Ordinance is unconstitutional under heightened scrutiny. Complaints filed in federal court must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a plaintiff's complaint for failure to properly state a claim. Fed. R. Civ. P. 12(b)(6). Every federal court places upon the moving party – here, the Petitioner – the burden to demonstrate that the plaintiff's complaint fails to state a claim for relief. *Cohen v. Bd. of Trs. of the Univ. of D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016) (quoting 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2015)). Whether a complaint pleads facts sufficient to satisfy Rule 8 is an abstract question of law that this Court reviews *de novo*. *See Ashcroft v. Iqbal*, 556 U.S. 662, 674-75 (2009).

This Court employs a two-step process in analyzing whether a complaint sufficiently pleads a cause of action. First, this Court reviews the complaint for, and disregards, conclusory allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Iqbal*, 556 U.S. at 679. Next, this Court looks to the remaining factual allegations and assumes that all of them are true, "even if doubtful in fact." *Twombly*, 550 U.S. at 555-56. Those factual allegations must provide sufficient facts to "nudg[e]" a plaintiff's claims "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 570).

Courts across the country apply a framework analogous to the First Amendment context to determine the proper level of scrutiny to apply to a claimed Second Amendment violation. *See, e.g.*, *Ezell I*, 651 F.3d at 706-09; *Chester*, 628 F.3d at 682; *Marzzarella*, 614 F.3d at 89 n.4. This is because this Court in *Heller* "repeatedly invoke[d] the First Amendment in establishing principles governing the Second Amendment." *Marzzarella*, 614 F.3d at 89 n.4 (citing *Heller*, 554 U.S. at 582, 595, 635); *accord Ezell I*, 651 F.3d at 706-07.

In applying that framework, first, courts look to "the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *E.g.*, *Heller II*, 670 F.3d at 1257 (quoting *Chester*, 628 F.3d at 682). If the law burdens a core Second Amendment right, the law is subject to strict scrutiny review." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2012) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)). Laws that implicate, but do not substantially burden, a core Second Amendment right, receive intermediate scrutiny.

E.g., *Jackson v. City & County of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014). However, laws that impose a "severe burden" on a core Second Amendment right receive a more stringent version of intermediate scrutiny. *Ezell I*, 651 F.3d at 708; *see also Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

Respondents properly state a claim that the Mojave County Zoning Ordinance is unconstitutional. First, because the Ordinance burdens a core Second Amendment right – the right to sell firearms – it fails strict scrutiny review. But even if the Ordinance burdens only a corollary right to one's Second Amendment right to bear arms, that burden is significant, and the law accordingly fails intermediate scrutiny.

i. The Complaint demonstrates that the Mojave County Ordinance, properly analyzed under strict scrutiny, burdens the core Second Amendment right to sell firearms.

The Mojave County Zoning Ordinance is subject to strict scrutiny review. As this Court's ruling in *Heller* suggests, First Amendment jurisprudence offers a helpful analogue in determining how to analyze Second Amendment claims. *See Marzzarella*, 614 F.3d at 89 n.4 (citing *Heller*, 554 U.S. at 582, 595, 635). In the First Amendment context, the "core" protection is the content of speech; as such, content-based speech regulations are "presumptively invalid," and justifiable only if they satisfy strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Analogously, laws that burden "fundamental" conduct central to the Second Amendment's guarantees receive strict scrutiny. *Masciandaro*, 638 F.3d at 470 (citing *Playboy*, 529 U.S. at 813).

Here, Respondents' Complaint contains well-pleaded facts demonstrating that the Mojave County Zoning Ordinance significantly burdens a core right of the Second

Amendment – the right to sell firearms. *See infra* part II. The law does not merely burden the "manner in which persons may exercise their Second Amendment right[]" to sell firearms. *Chovan*, 735 F.3d at 1138; *see also Jackson*, 746 F.3d at 964 (finding that a law requiring that handguns be stored in either a locked safe or with a trigger lock burdened the "manner" that one exercises the Second Amendment right to bear arms for self-defense). Instead, Respondents allege facts demonstrating that the Ordinance's 800-foot rule functions as a categorical ban on firearms sales, for it leaves no suitable parcel of land for opening a gun shop "in terms of location, accessibility, building security, and parking." R. at 7. Further, though there are other gun stores operating in Mojave County, Respondents allege that those stores did not have to comply with the Ordinance's 800-foot rule. R. at 13, 15. Respondents have therefore adequately alleged that the Ordinance functions as a categorical ban on the core Second Amendment right to sell firearms, requiring that this Court apply strict scrutiny.

Applying strict scrutiny, Mojave County cannot satisfy its burden to demonstrate that Respondents have failed to state a claim for relief. *See Reed*, 135 S. Ct. at 2231. Even assuming that the interests Mojave County purports are compelling – which Respondents do not concede – the County cannot demonstrate that the law is narrowly tailored to achieve those interests. As the Zoning Board found, Respondents' proposed gun store location "would not be detrimental to the public welfare," despite the fact that it failed to comply with the 800-foot rule. R. at 6. That rule, however, was the only requirement Maxson's proposal could not meet,

as the proposed location was approximately 736 feet from a (now defunct) church. R. at 4-5 & n.2. Because Respondents allege facts demonstrating that the 800-foot rule is unconstitutionally over inclusive by burdening Second Amendment conduct that does not trigger the state's purported interests, the Ordinance plausibly fails strict scrutiny. *See Reed*, 135 S. Ct. at 2231.

ii. Even if the Ordinance only receives intermediate scrutiny review, the Complaint demonstrates that the law is unconstitutional both on its face and in its application to Respondents.

Even if this Court finds that strict scrutiny is inappropriate, Respondents have stated a claim that the Ordinance fails intermediate scrutiny. While the formulation of the standard varies slightly by court, most courts "require (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." *Id.* (quoting *Chovan*, 735 F.3d at 1139). However, laws that impose a "severe burden" on a core Second Amendment right receive a more stringent version of intermediate scrutiny, which "require[s] an extremely strong public-interest justification and a close fit between the government's means and its end." *Ezell I*, 651 F.3d at 708; *see also Moore*, 702 F.3d at 940.

1. <u>The facts of this case warrant a more stringent version of intermediate scrutiny.</u>

This Court should utilize a more stringent form of intermediate scrutiny in reviewing the Mojave County Zoning Ordinance. For this inquiry, the Seventh Circuit's decision in *Ezell II* is particularly on point. There, the Seventh Circuit reviewed cross-appeals from a district court judge's mixed rulings on cross-motions

for summary judgment. *Ezell II*, 846 F.3d at 891. The plaintiffs challenged, *inter alia*, Chicago's newly passed zoning ordinances, which barred shooting ranges within 100 feet of another range, or within 500 feet of any district zoned for a wide variety of purposes, including (but not limited to) land for "residential use or planned residential use, [a] preexisting school, [a] day-care facility, [or a] place of worship." *Id.* After reaffirming that the core right to bear arms for self-defense included a right to acquire firearms training and maintain proficiency in their use, the Seventh Circuit held in *Ezell II* that zoning ordinance at issue constituted a "sever[e]" restriction on that corresponding right. 846 F.3d at 892-94 (citing *Ezell I*, 651 F.3d at 704). Though the ordinance was "not an outright ban on shooting ranges throughout [Chicago]," the court found that the effect of the ordinance left "only about 2.2% of the city's total acreage even theoretically available to site a shooting range (10.6% of the total acreage currently zoned for business, commercial, and manufacturing use)." *Id.* The court made these conclusions at the summary judgment stage, despite it being "unclear how many of these parcels [were] commercially suitable" for shooting ranges. *Id.* at 894.

Whether this Court terms the right to sell firearms as a core Second Amendment right, *see infra* part II(A), or a corollary to the right to bear arms, *see infra* part II(B), the Complaint demonstrates that the burden on either right is severe. Mojave County's study found that the Ordinance left only fifteen percent of unincorporated Mojave County's acreage compliant with the 800 foot rule, and was further "silent as to whether any of the acreage was suitable for a firearm retail

center." R. at 7 n.7. The Complaint alleges, pursuant to a study Respondents launched prior to filing, that the Ordinance's 800 foot requirement leaves no property within unincorporated Mojave County suitable for opening a gun store. R. at 7. Though there are at least three gun stores in Mojave County, the closest to Respondents' proposed location is ten miles away, and "none of these stores opened after the Zoning Ordinance was passed." R. at 6, 15 & n.8. Indeed, the Complaint alleges that other federal firearm licensees currently operating in the county either are not retailers or were otherwise "not required" to comply with the Ordinance. R. at 13. While those numbers may vary slightly from those in *Ezell II*, *see* 846 F.3d at 893-94, their significant similarities – combined with all of the other well-pleaded facts – further indicate that Respondents' claims plausibly allege that the Ordinance severely burdens conduct protected by the Second Amendment. *See Iqbal*, 556 U.S. at 680.

2. The Ordinance is facially invalid under any intermediate scrutiny formulation.

Even under a general intermediate scrutiny analysis, Respondents have stated a claim that the Ordinance is facially unconstitutional. While the linguistic forms of intermediate scrutiny appear to vary, the majority of courts applying the two agree on the substance of the analysis: in considering both the importance of the government's stated objective and the fit between the regulation and the objective, the government must put forth some empirical evidence or legislative history to support both prongs of the analysis. *See, e.g.*, *Ezell II*, 846 F.3d at 894-96; *Chovan*,

735 F.3d at 1139-42; *Moore*, 702 F.3d at 940-41; *Nat'l Rifle Ass'n*, 700 F.3d at 207-10; *Heller II*, 670 F.3d at 1258-59; *Chester*, 628 F.3d at 683.

For instance, when considering the importance of the government's stated objective under intermediate scrutiny, the Seventh Circuit consistently requires the government make a "strong showing" that the law is essential, supported by both "logic and data." *Skoien*, 614 F.3d at 641-42; *see also Ezell I*, 651 F.3d at 708-09. The government must provide evidence, and cannot rely on "shoddy data or reasoning." *Ezell II*, 846 F.3d at 896 (quoting *Ezell I*, 651 F.3d at 709). Thus, in both *Ezell I* and *Ezell II*, the Seventh Circuit struck down Chicago laws burdening Second Amendment rights because the city failed to provide any empirical evidence justifying those laws. *Ezell II*, 846 F.3d at 895-96; *Ezell I*, 651 F.3d at 709-11. The city "continue[d] to assume" that it could invoke the public interest to prevent crime "as a general matter and call it a day," with no evidence to support those claims. *Ezell II*, 846 F.3d at 895; *see Ezell I*, 651 F.3d at 709. Conversely, where the federal government could point to specific findings in the legislative history and to empirical studies regarding the need for a law banning gun ownership for those convicted of domestic violence, the Seventh Circuit found that the government satisfied its burden to justify its interest in promulgating the ban. *Skoien*, 614 F.3d at 641-44.

Other circuits concur in this approach. In *Chovan*, the Ninth Circuit similarly found that the government met its burden to show an important government interest in promulgating a ban on gun ownership by those convicted of domestic violence by citing findings in the legislative history. 735 F.3d at 1139-40. The Fifth Circuit

similarly held that the government met its burden to justify a law banning the sale of handguns to 18-to-20-year-olds by pointing to extensive findings in the legislative record demonstrating, for example, "a causal relationship between the easy availability of firearms to young people under 21 and the rise in crime." *Nat'l Rifle Ass'n*, 700 F.3d at 207-08.

Here, Mojave County asserts that its zoning ordinance furthers three interests. R. at 13-14. Certainly, one can argue that the amount of evidence needed under the two different formulations of intermediate scrutiny may differ. *Compare Ezell I*, 651 F.3d at 708-09, *with Jackson*, 746 F.3d at 965-66. Yet the common thread, under either analysis, is that the government must produce *some* evidence so that the court may "evaluate the seriousness of [the government's] claimed public-safety concerns. *Ezell I*, 651 F.3d at 709; *see, e.g.*, *Chovan*, 735 F.3d at 1139-40.

Mojave County provides no evidence – by way of empirical studies, legislative history, or other means – demonstrating that zoning gun stores within 800 feet of the various uses listed in Zoning Ordinance contributes to the harms Mojave County purports to address. *See Ezell II*, 846 F.3d at 895; *Chovan*, 735 F.3d at 1139-40; *Ezell I*, 651 F.3d at 708-09; *see also* Mojave Cty., NTX., Code § 17.54.131(B); R. at 13-14. The County instead "rest[s] its entire defense of the [ordinance] on speculation." *Ezell I*, 651 F.3d at 709. This Court cannot condone the County's pointing to interests such as crime control and preserving the character of residential zones "as a general matter and call it a day." *Ezell II*, 846 F.3d at 895; *see* R. at 13-14.

For similar reasons, Mojave County also fails to show that the Ordinance is sufficiently tailored to further the asserted interests. Under the second intermediate scrutiny prong, the County must again provide some evidence demonstrating a tight "fit" between its Ordinance and its asserted substantial government interests. *See Heller II*, 670 F.3d at 1258-59; *see also, e.g.*, *Chester*, 628 F.3d at 683 ("The government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between [the law] and an important governmental goal.").

Here even assuming that Mojave County's asserted interests are all substantial, the County provides no "meaningful evidence . . . to justify its predictive judgments." *Heller II*, 670 F.3d at 1259. Even under a less-stringent intermediate scrutiny analysis, there must be some sort of legislative history or studies in the record, or even studies in relevant case law, to support the County's assertion that its Ordinance is sufficiently tailored to address its asserted interests. *See Jackson*, 746 F.3d at 966. No such legislative history or studies exist in the record, *see* R. at 3-5, 13-15, 19-21, nor can the County point to any case law citing studies that demonstrate that gun shops zoned close to residential districts increases crime or otherwise jeopardizes "the character of residential zones," R. at 13-14.

Finally, the Fourteenth Circuit correctly noted that the District Court erred in its means-end analysis. R. at 14. Under intermediate scrutiny – no matter how it is

termed – the onus remains on the government to show that its chosen means of regulation fits the ends it aims to achieve. *See United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Heller II*, 670 F.3d at 1259. While it is true that the government does receive some deference in reaching a conclusion based on conflicting legislative evidence, *see Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018), the government must first demonstrate to this Court that it even considered evidence in the first place before receiving that deference, *see Nat'l Rifle Ass'n*, 700 F.3d at 207-11; *Heller II*, 670 F.3d at 1259.

Approving the County's chosen means because it need not be a "perfect match" to its chosen ends without requiring the County to provide any corroborating evidence, as the District Court ruled here, "more closely resemble[s] rational basis review." R. at 14; *see, e.g.*, *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (noting that under rational basis review, this Court "must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred"); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (stating that in analyzing the chosen means in rational basis review, "[p]erfection . . . is neither possible nor necessary"). Any review of Second Amendment claims even resembling rational basis review disobeys this Court's proclamation against rational basis review of those claims. *See Heller*, 554 U.S. at 628, n.27. Because Mojave County fails to provide any evidence justifying the need for its Ordinance, the Respondents' Complaint properly alleges that the Ordinance is facially invalid. *See, e.g.*, *Ezell I*, 651 F.3d at 706; *see also Cohen* 819 F.3d at 481.

3. Alternatively, the Complaint sufficiently alleges that the Ordinance is invalid as applied to Respondents.

Even if this Court finds that the Mojave County Ordinance is constitutional on its face, Respondents have properly alleged that the County Commissioners Court's application of the ordinance to Respondents' gun store application is unconstitutional. In moving to dismiss an as-applied challenge, the County must demonstrate a substantial relation between its application of the Ordinance to Respondents and its stated interests in promulgating the Ordinance. *See Tyler*, 837 F.3d at 693-94.

Here, the facts set forth in Respondents' Complaint overwhelmingly demonstrate a plausible Second Amendment violation. Perhaps the most telling evidence comes from the Planning Department's initial November 2011 report to the Zoning Board regarding Respondents' application for a Conditional Use Permit. *See* R. at 4. According to that report, not only did the Planning Department find that "there was a public need for a licensed firearms dealer," it found that "a gun shop at the proposed site would not adversely affect the health or safety of persons living or working in the vicinity." R. at 4. Further, the Planning Department found the proposed use compatible with other land uses and transportation in the area. These findings alone are enough to raise a plausible inference each of the County's purported interests in denying Respondents' application, and also enough to suggest pretext. *See* R. at 13-14; *see also Ezell I*, 651 F.3d at 710.

Further, even though the proposed gun store location did not comply with the Zoning Ordinance's location requirement, the Zoning Board nonetheless granted

Respondent Maxson a variance from the Ordinance. R. at 6. The Board concluded that Respondent Maxson's proposed gun shop "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." R. at 6. These facts give rise to a plausible inference that the Board "did not believe" that all gun shops located within 800 feet of a disqualifying zone "[were] sufficiently dangerous as a class to permanently deprive all" persons wishing to open a gun shop of their Second Amendment right to sell firearms. *Tyler*, 837 F.3d at 697.

Nonetheless, the County Commissioners' Court – acting only through three of its six members – overturned the Board's decision at the behest of members of the New Tejas Citizens Against the Second Amendment. R. at 6. The record, however, provides no insight as to why the Commissioners' Court made its ruling. *See* R. at 6, 13-14. As such, Mojave County cannot demonstrate, at the motion to dismiss stage, that its decision to deny Maxson's application for a Conditional Use Permit was substantially related to any important governmental interest. *See Tyler*, 837 F.3d at 693-99. Therefore, Mojave County cannot meet its burden to show that Respondents' well-pleaded facts fail to state a claim for relief. *See* Fed. R. Civ. P. 12(b)(6); *Cohen*, 819 F.3d at 481. For these reasons, Respondents urge this Court to affirm the Fourteenth Circuit and remand this case to the District Court for proceedings on the merits.

II. The Second Amendment protects a right to sell firearms both independently from and as an extension of the rights to keep and bear arms.

The right of the people to keep and bear arms has justly been considered the true palladium of a republic's liberties. 1 BLACKSTONE'S COMMENTARIES APP. 300 (1803); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890, at 746 (1833). In 2010, this Court secured that right against the states. *McDonald*, 561 U.S. at 748. But that opinion did not directly address whether the Second Amendment secures a right to sell firearms. This Court has explicitly upheld the right to obtain, register, and keep firearms. *See Heller*, 554 U.S. at 628. That right fundamentally encompasses two distinct guarantees: the independent right to sell firearms, and the ability to sell firearms as a basis for the right to bear arms at all.

A. The Second Amendment secures an independent right to sell firearms.

To determine whether the Second Amendment protects a certain activity from government regulation, this Court relies on the text of the amendment itself, as understood by its drafters. *Heller*, 554 U.S. at 614; *see also Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (holding the Constitution clearly "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition"). Evidence from the founding era through Reconstruction can shed light on the amendment's original meaning as applied to the states. *Heller*, 554 U.S. at 614-19 (surveying evidence from 1791 to 1868); *Ezell I,* 651 F.3d at 701-02 (finding the Second Amendment's scope depends on how the amendment was understood when the Fourteenth Amendment was ratified); *see* David B. Kopel, *The*

Federal Circuits' Second Amendment Doctrines, 61 ST. LOUIS U. L.J. 193, 203 (2017) (arguing the Court can find evidence of the Second Amendment's original meaning "in the Early Republic, the Age of Jackson, and all the way through Reconstruction").

i. The Second Amendment's original context included an independent right to sell firearms.

The roots of the Second Amendment extend far before our republic. While the Second Amendment "confer[red] no new rights on the people which did not belong to them before," *Nunn*, 1 Ga. at 249, it did have an ancestor in Magna Carta. The narrower protection for English citizens provided "the subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by law." *Magna Carta*, 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. This English antecedent eventually grew into the far broader protection the Second Amendment affords. *See* U.S. CONST. amend. II.

The Founders expanded the protections of the Second Amendment in part because of their own experience with English colonial government. Just before the Revolution, and in a failed attempt to prevent such an action by its ever more-independent colonists, England banned the export of arms or ammunition from England to any of its colonies. 5 *Acts of the Privy Council of England* § 305, at 401 (1774). Colonists saw this as a direct attack on their natural and constitutional right to self-defense "in order the more speedily to dragoon and enslave them," and it was met with cries to procure firearms by any means necessary. 1 JOHN DRAYTON, MEMOIRS OF THE AMERICAN REVOLUTION FROM ITS COMMENCEMENT TO THE YEAR 1776, INCLUSIVE; AS RELATING TO THE STATE OF SOUTH-CAROLINA: AND OCCASIONALLY

REFERRING TO THE STATES OF NORTH-CAROLINA AND GEORGIA 166 (1821). Fifteen years later, with the experience of a hostile British government seeking to eliminate firearms sales in the colonies scorched in their minds, the Founders drafted and proposed the Second Amendment.

The Founders considered the protection of commerce in arms to be central to the liberty of the new Republic. *See Bliss v. Commonwealth*, 2 Litt. 90, 91-92 (Ky. 1822). In advocating the Constitution's ratification, Madison assumed a vast distribution of firearms resulting in one in four Americans – essentially every adult male – possessing firearms. *The Federalist No. 46*, (James Madison), at 148. Jefferson took special pride in Americans' freedom in manufacturing and selling firearms, saying "our citizens have always been free to make, vend, and export arms," and extolled that firearms sales, "[are] the constant occupation and livelihood of some" – like Roger Maxson today. THOMAS JEFFERSON, 3 WRITINGS 558 (H.A. Washington ed., 1853).

It is no surprise, then, that early cases addressing the Second Amendment and parallel state protections recognized the centrality of commerce in arms to the Second Amendment right to self-defense. The Alabama Supreme Court found that a state constitutional provision parallel to the Second Amendment would be violated whenever a statute would prohibit an action "indispensable to the right of defence." *State v. Reid*, 1 Ala. 612, 618-20 (1840). Importantly, the court did not view the right to "keep and bear arms" as solely an affirmative endorsement of the possession and display on the person of arms. Instead, it read the protection as one restraining

government from intrusion on the natural right of defense, much as the Founders viewed the English arms embargo as an intrusion on their liberty.

The Georgia Supreme Court made an even stronger application of the Second Amendment itself when it invalidated a ban on the sale of certain knives and pistols. *Nunn*, 1 Ga. 243. While the court tacitly approved a ban on the concealed carry of weapons in dicta, it found the ban on the sale of arms to violate both the natural law and the Second Amendment, which it found applied to the states in principle if not in actuality. *Id.* Thus, the Georgia Supreme Court was willing to approve a regulation of the manner of *bearing* arms, but it could not reconcile a regulation of the *sale* of arms with the principles or protections of the Second Amendment. Put more simply by the Tennessee Supreme Court, the Second Amendment "necessarily involves" a protection of commerce in arms. *Andrews v. State*, 50 Tenn. 165, 178 (1871).

These early interpretations of the Second Amendment's protections, by both the drafters themselves and courts, evidence an understanding that the right to "keep and bear arms" was a broad protection against government intrusion. Part of this restraint on government tyranny naturally included the people's ability to buy and sell firearms for their defense. The Founders viewed both possession of, and commerce in, arms as essential to preserving the Constitution's other guaranteed liberties and the Republic itself. In fact, Madison viewed the "the advantage of being armed" as setting apart America from every other nation, ensuring that a government hostile to freedom would never overwhelm the citizenry. *The Federalist No. 46*, (James Madison), at 148.

More modern cases have yet to reiterate this historic right to sell firearms as firmly rooted in the drafters' understanding of the Second Amendment, but the question has not been squarely presented. This Court has assumed in dicta that its recent decisions have not cast doubt on "longstanding [. . .] laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27; *see McDonald*, 561 U.S. at 786 (restating dicta from *Heller*). But those opinions were not intended to serve as "an exhaustive historical analysis" of all the rights protected by the Second Amendment and instead should be limited to their more narrow inquiries. *Heller*, 554 U.S. at 626. Neither does the historical protection of commerce in arms lack modern support. *See, e.g.,* Josh Blackmun, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 498 (2014) ("[. . .] a right to make arms, however defined, is firmly grounded in the Second Amendment").

The most appropriate evidence in determining whether the Second Amendment protects an independent right to sell firearms is that which conveys the drafters' understanding of its meaning. A broad but detailed examination of the record demonstrates that the Founders understood the dangers of a hostile government prohibiting the sale of firearms and drafted a broad Second Amendment to prevent such an overreach. Jefferson and Madison stated explicitly their understanding of a relatively free trade in arms as essential to liberty. And potential threats to the right to sell firearms were struck down in cases interpreting the Second Amendment and parallel state provisions. Nothing in this Court's previous decisions

forecloses the conclusion, consistent with the historical record, that the sale of firearms is an activity fully and independently protected by the Second Amendment.

ii. The Second Amendment includes an independent right to sell firearms in the same way that other Constitutional rights may be asserted by their providers.

Firearms retailers have an independent right under the Second Amendment to sell firearms in the same way that bookstores possess independent rights under the First Amendment and doctors possess a right to provide the constitutional right to obtain an abortion. *See, e.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976) (holding that women have the right, *with a physician*, to obtain an abortion) (emphasis added); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) *aff'd by Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986). In *Danforth*, the doctors who provided abortion services were able to assert rights independently from the rights of their patients. *Danforth*, 428 U.S. at 62. Likewise, the bookstore in *Hudnut* was able to assert First Amendment protections over their right to sell pornography. *Hudnut*, 771 F.2d at 325.

In the context of the Second Amendment, firearms retailers also possess independent Second Amendment rights. Under the precedent set in *Danforth* and *Hudnut*, providers of services necessary to effectuate constitutional rights are also entitled to independent constitutional protections. *See Danforth*, 428 U.S. at 62; *Hudnut*, 771 F.2d at 325. Mr. Maxson and Brotherhood of Steel hold an independent Second Amendment protection to sell firearms, subject to only those restrictions that can be upheld under the appropriate standard of scrutiny.

B. The Second Amendment's protections necessarily encompass the right to sell arms in order to effectuate the primary right to keep and bear arms.

Maxson and the Brotherhood of Steel are entitled to Second Amendment protection because their right to sell firearms form the fundamental basis on which others may exercise their right to keep and bear arms. History and modern jurisprudence also firmly establish that the Second Amendment's right to keep and bear arms must, by necessity, also encompass the right to sell arms. This Court has recognized that no state may completely remove citizens' ability to lawfully acquire, license, and keep firearms. *Heller*, 554 U.S. at 628-36. This holding was premised on the fact that certain abilities must be protected in order to give effect to the Second Amendment's fundamental protection. *Id.* The right to keep and bear arms means nothing if a person cannot meaningfully obtain, and then use, those arms in a lawful exercise of their constitutional rights. *Id.* at 628-29. In order for any person to effectuate their right to keep and bear arms, others must also be able to sell those arms. The Second Amendment therefore must also encompass several auxiliary protections, including the right to sell firearms.

i. The Second Amendment encompasses a right to acquire arms.

The Mojave County zoning ordinance attempts to regulate away the ability of citizens to exercise their Second Amendment rights and lawfully acquire firearms. In *Heller*, this Court held that the Second Amendment protects a right to acquire arms. *Id.* at 628-36. Justice Scalia, writing for the Court, noted that government restrictions on the commercial availability of firearms should not be called into question, per se. *Id.* at 626. Specifically, this Court held that its decision "should

[not] be taken to cast doubt on . . . laws imposing *conditions and qualifications* on the commercial sale of arms." *Id.* Justice Scalia's carefully chosen phrasing illustrates that such a restriction could be unlawful, thereby indicating that arms sellers do have Second Amendment rights. *See id.*

Judge O'Scannlain reasoned similarly on behalf of the Ninth Circuit in the original decision in *Teixeira v. County of Alameda*, arguing that "[i]f 'the right of the people to keep and bear arms' is to have any force, the people must have a right to acquire the very firearms they are entitled to keep and to bear." 822 F.3d 1047, 1055 (9th Cir. 2016) *rev'd en banc*, 873 F.3d 670 (9th Cir. 2017). Enumerated rights must necessarily include protections of the subsidiary activity necessary to exercise those rights. *See id.* The Ninth Circuit implied this in its *en banc* rehearing of *Teixeira* as well, finding that certain rights must be implicit in the Second Amendment's core protection. *Teixeira v. County of Alameda*, 873 F.3d 670, 693 (9th Cir. 2017) (*en banc*) ("[A]lthough the Second Amendment 'does not explicitly protect ammunition . . . , without bullets, the right to bear arms would be meaningless.'" (quoting *Jackson*, 746 F.3d at 967)).

The Third Circuit further applied the *Heller* premise in recognizing that courts must consider the conditions of restrictions on firearms commerce when analyzing the constitutionality of those restrictions. *Marzzarella*, 614 F.3d at 92, n. 8. "If there were somehow a categorical exception for these restrictions, . . . there would be no constitutional defect in prohibiting the commercial sale of firearms [entirely]. Such a result would be untenable under *Heller*." *Id.*; *see also* David B. Kopel, *Does the*

Second Amendment Protect Firearms Commerce?, 127 HARV. L. REV. F. 230, 232-33 (2014).

The right to acquire firearms is not absolute, but it must be one of the fundamental protections under the Second Amendment. *See Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014). That right is implicated here because the County of Mojave is substantially interfering with the ability of individuals to acquire firearms through commercial firearms sales. *See id.*

ii. In order to acquire arms, some parties must have the subsidiary right to sell arms.

Because individuals must be able to acquire arms, it would be untenable to conclude that Mr. Maxson and the Brotherhood of Steel cannot assert a right to sell firearms. In order to effectuate the rights of Mojave residents to acquire arms, the Brotherhood of Steel and Mr. Maxson also have the right to sell arms, and the County Zoning Ordinance impermissibly threatens those rights.

Many courts have chosen to avoid the constitutional inquiry of whether commercial firearms sales are protected by the Second Amendment and have chosen to assume that commercial arms sales are protected conduct. *See, e.g., Pena*, 898 F.3d at 976 (noting that it is judicious for courts to assume that commercial sales are protected by the Second Amendment in some manner, because regulations on commercial sales are so often upheld under the appropriate level of scrutiny); *Silvester v. Harris*, 843 F.3d 816, 827-29 (9th Cir. 2016) (assuming that a mandatory waiting period for firearms sales burdened protected Second Amendment conduct); *Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016) (holding that a regulation

preventing those with medical marijuana cards from purchasing arms was protected conduct, but upholding that regulation under intermediate scrutiny). Even without this assumption, however, *Heller* and subsequent cases demonstrate that the right to acquire firearms must be afforded at least some Second Amendment protection in order to give meaningful effect to any Second Amendment rights at all. *See supra Part II(B)(i).* This Court affirmed that sentiment in *McDonald*, noting that the right to keep a handgun in the home was necessary to effectuate the primary protection of the Second Amendment—using arms in one's home for self-defense. 561 U.S. at 767.

The federal courts of appeals are split on the question of whether the activity of selling firearms is protected under the Second Amendment as a subsidiary right. This Court in *Heller* noted that some restrictions on firearms are "presumptively lawful", such as "conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27 & n.26. Some circuits interpret this language to imply that the sale of firearms is not protected by the Second Amendment. *See United States v. Chafin*, 423 F. App'x 342, 343-44 (4th Cir. 2011); *Teixeira*, 873 F.3d at 673; *United States v. Conrad*, 923 F. Supp. 2d 843 (W.D. Va. 2013). Other circuits recognize that this language implies a right to sell firearms, subject to reasonable conditions and qualifications. *See Ezell I*, 651 F.3d at 710-11.

The Fourth Circuit asserted in *Chafin* that there is no right to sell arms under the original intent of the Constitution. *Chafin*, 423 F. App'x at 343-44. The court upheld a regulation prohibiting the sale of firearms to a known drug user based on the premise that there is no right to sell weapons. *Id.* The Ninth Circuit followed the

Chafin reasoning when it held in the en banc rehearing of *Teixeira* 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." *Teixeira*, 873 F.3d at 680. Even this holding affirms that the Second Amendment does offer some protection to those who sell firearms as a subsidiary to the right of individuals to acquire arms. *See id.* The *Chafin* theory is improper as applied beyond its own and similar contexts because it fails to recognize that firearms sales are necessary to effectuate the right to keep and bear arms, and that meaningful constraints on those sales burdens lawful exercise of the Second Amendment. *See Chafin*, 423 F. App'x at 343-44.

Other circuits disagree with the Fourth and Ninth circuits and have upheld the right to sell firearms. *See Ezell I*, 651 F.3d at 710-11; *see also Kerr v. Hickenlooper*, 744 F.3d 1156, 1163 (10th Cir. 2014) *vacated & remanded* at 135 S. Ct. 2927 (2015). The Seventh Circuit considered an analogous situation to the instant case in *Ezell v. City of Chicago* when it struck down an ordinance that barred gun ranges within the Chicago city limits. *Ezell I*, 651 F.3d at 710-11. The court held that, in order to effectively use a firearm in the home for self-defense, individuals must be able to learn how to use that firearm, and that banning gun ranges in the city effectively prevented citizens from acquiring that proficiency. *Id.* Likewise, under the *Ezell* theory, a ban of all gun stores within a Chicago suburb necessarily burdened Second Amendment activity because it prevented individuals from

acquiring arms in a lawful way, for lawful purposes. *Kole v. Village of Norridge*, 941 F. Supp. 2d 933, 942-46 (N.D. Ill. 2013).

These two theories of the right to sell arms can be reconciled through a clarification of the *Heller* dicta. In establishing that some limits on the sale of firearms are presumptively lawful, this Court recognized that there can be a wide variety of valid regulations pertaining to the sale of firearms. *Heller*, 554 U.S. at 635. For example, the regulation in *Chafin* concerned one's ability to sell firearms to a known drug criminal. 423 F. App'x at 343-44. A regulation on this activity does not necessarily implicate conduct that would be otherwise protected by the Second Amendment—regulations on whether criminals may own a firearm are presumptively lawful and have been upheld across the country. *Id.*; *see Heller*, 554 U.S. at 635. Likewise, a regulation that prevented individuals from owning unlawfully altered firearms – like sawed-off shotguns – would not implicate activity otherwise protected by the Second Amendment. *See Chester*, 628 F.3d at 679.

Here, by contrast, the right to acquire weapons necessarily requires that Mr. Maxson and the Brotherhood of Steel be permitted to sell firearms to those wishing to lawfully exercise their rights—not those with criminal histories or those who wish to obtain unlawfully altered weapons. The Mojave Zoning Ordinance goes far beyond regulations that merely limit those to whom dealers may sell weapons or prohibit selling certain types of weapons. The ordinance eliminates the ability of American citizens to engage in their constitutionally protected rights subsidiary to the primary protections of the Second Amendment.

Respondents do not contest that states are never able to enact statutes limiting the exercise of Second Amendment rights. It is well established that the Second Amendment's protections are not absolute. *Heller*, 554 U.S. at 626. States may prohibit transfer of weapons without serial numbers. *Marzzarella*, 614 F.3d at 95. States may place restrictions on how individuals may carry firearms in public. *See Moore*, 702 F.3d at 942. Fees associated with firearms purchase also do not unduly implicate Second Amendment rights because there is no right to sell firearms free from the imposition of fees. *Bauer v. Harris*, 94 F. Supp. 3d 1149, 1155 (E.D. Cal. 2015). States may even place reasonable restrictions on the existence and location of firearms retailers. *Teixeira*, 873 F.3d at 673. But the validity of these measures does not imply that the conduct being burdened is unprotected by the Second Amendment. Rather, they affirm that the Second Amendment applies to this conduct, but qualify those protections based on the reasonable interests of the state.

Mr. Maxson and the Brotherhood of Steel are attempting to engage in conduct that is fundamentally protected by the Second Amendment. Without the right to sell arms, the right to acquire arms and ultimately to keep and bear arms is meaningless. Because the County utilized the zoning ordinance to limit and ultimately eliminate Mr. Maxson's and the Brotherhood's right to sell arms, it burdened conduct protected by the Second Amendment as a subsidiary right to the Amendment's core protection.

iii. Unless retailers are permitted to sell arms, the Second Amendment could only be effectuated by manufacturing arms.

It is vital that Mr. Maxson and the Brotherhood of Steel be permitted, like other lawful firearms dealers, to sell arms. If retailers cannot sell arms, individuals

wishing to lawfully exercise their right to keep and bear arms would have to manufacture their own firearms. *See* Blackmun, *supra,* at 496-98. The right to manufacture firearms is also a subsidiary protection under the Second Amendment. *Id.* However, the state should not attempt to force all individuals to exercise their Second Amendment rights solely through manufacturing firearms. To do so would substantially impair the ability of the state to effectively regulate firearm safety, licensing, ownership, and production. *Cf. Heller*, 554 U.S. at 626 n.26.

The advent of three-dimensional printing could pose serious threats to public safety, particularly if manufacturing firearms becomes the only method of effectuating individual Second Amendment rights. *See* Blackmun, *supra*, at 508-11. Three-dimensional printed weapons are often undetectable to metal detectors and are very difficult to regulate for safety. *Id.* Eliminating the right to sell firearms would not further the interests of the state in public safety, it would fundamentally compromise those interests. *See id.*

Here, Mojave County practically eliminates the right to sell firearms and may incur these public safety risks. The ordinance under which Mr. Maxson and the Brotherhood of Steel sought their conditional use permit allowed for many conditions on the sale of firearms, including where those arms could be sold, licensing requirements for dealers, and a balancing test that allows the county to take in all of the circumstances surrounding a particular firearms retailer. The Court of Appeals below properly found that Mojave County has utilized its lawful ability to institute zoning restrictions that effectively eliminate the right to sell firearms. The policy

rationale that the County asserts, ensuring the safety of its residents, is actually compromised, not furthered, by this action.

C. The Mojave County Ordinance impermissibly burdens the ability of citizens to exercise either their primary or subsidiary rights to sell firearms under the Second Amendment.

Regulation of firearms sales must not prohibitively burden individuals who wish to exercise their Second Amendment rights. *See Bauer*, 94 F. Supp. 3d at 1155 (citing *Peruta v. County of San Diego*, 742 F.3d 1144, 1181 (9th Cir. 2014)). The appropriate inquiry is whether the Mojave County regulation deprives any individual of his ability to exercise his Second Amendment rights. *See Peruta*, 742 F.3d at 1191. The regulation at issue here deprives at least some residents of Mojave County the ability to meaningfully and lawfully exercise their Second Amendment rights to acquire and sell firearms.

The record reflects, and the Court of Appeals below properly found, that the Mojave County Ordinance burdens conduct protected by the Second Amendment. History supports the contention that the Second Amendment includes an independent right to sell firearms. *See Andrews*, 50 Tenn. at 178. In the alternative, the Second Amendment protects the right to sell firearms as a fundamental pre-requisite to Amendment's core protection. *See McDonald*, 561 U.S. at 767. Further, as Respondents alleged in the District Court, the Brotherhood of Steel and Mr. Maxson would provide services not otherwise available to Mojave County residents, which deepens the fundamental character of the Second Amendment protection here. These services, such as the ability to train with a firearm and become proficient in

using that weapon for self-defense, are also fundamental to the primary protection of the Second Amendment. *See Ezell I*, 651 F.3d at 708.

Here, the Mojave County Ordinance and the application of that ordinance in this case do not allow Mr. Maxson and the Brotherhood of Steel to freely exercise their Second Amendment rights. Under the pleadings standards, Mr. Maxson and the Brotherhood of Steel needed to allege facts that plausibly support a claim for relief in order to survive the County's motion to dismiss. *See Iqbal*, 556 U.S. at 677-80; *Twombly*, 550 U.S. at 564-70. Respondents did so in this case because the Second Amendment protects a right to sell firearms both as an independent right and as a subsidiary right that is necessary to effectuate the fundamental protection of keeping and bearing arms, and the facts as alleged before the District Court indicate that Mojave County violated that right by using its zoning ordinance to prevent Mr. Maxson and the Brotherhood of Steel from selling firearms.

CONCLUSION

Mr. Maxson and the Brotherhood of Steel have the right to sell firearms, both as a subsidiary right to that of every American to keep and bear arms, and as an independent right protected by the Second Amendment. Mojave County, by enacting this zoning ordinance, has substantially burdened Mr. Maxson's and the Brotherhood's ability to exercise those rights. Because of this burden, the regulation should be subject only to heightened scrutiny, and it would summarily fail to fulfill that standard. This Court should affirm the decision of the Fourteenth Circuit Court of Appeals, reverse the District Court's grant of Petitioners' motion to dismiss, and remand for further proceedings.

Respectfully submitted,
/s/ *Team #63*
Team #63
Counsel for Respondents
November 19, 2018

CERTIFICATE OF SERVICE

By our signature, we certify that a true and correct copy of Respondents' brief on the merits was forwarded to Petitioner, Mojave County, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 19th day of November, 2018.

/s/ *Team #63*
Team #63
Counsel for Respondents
November 19, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Respondents, Roger Maxson and Brotherhood of Steel, contains 13,980 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

/s/ *Team #63*
Team #63
Counsel for Respondents
November 19, 2018

Appendix

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 eight 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.

F. 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.