Docket 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 PETITIONER

Team 25
*Attorneys for the Petitioner*
November 19, 2018

## QUESTIONS PRESENTED

I. When Second Amendment claims are suitable for means-ends scrutiny, must courts apply heightened scrutiny regardless of the level of burden imposed, or can rational-basis review ever suffice?

II. Does the Second Amendment secure a right to engage in the commercial sale of arms?

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## STATEMENT OF JURISDICTION

The United States District Court for the Central District of New Tejas granted Mojave County's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). R. at 8. The district court had jurisdiction under 28 U.S.C. § 1331. Respondents gave timely notice of appeal. The United States Court of Appeals for the Fourteenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Court of Appeals reversed the judgment of the district court and remanded for further proceedings. R. at 14. This Court granted Petitioner's petition for writ of certiorari. This Court has appellate jurisdiction under 28 U.S.C. § 1254(1). This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

## STATEMENT OF THE CASE

### *I. Statement of Facts*

After multiple hearings and several failed applications, Respondents were denied a conditional use permit for their proposed gun store. They seek special treatment based solely on the fact that they want to sell guns.

**The Zoning Ordinances.** In the County of Mojave, a resident may apply with the board of zoning adjustments for a conditional use permit. R. at 19. Factors relevant to the grant of any conditional uses are whether the use "[i]s required by the public need," whether it is "properly related to other land uses . . . in the vicinity," whether it will "materially affect adversely the health or safety" of persons in the vicinity or will "be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood," and whether the use is contrary to

any "specific intent clauses or performance standards" for the relevant district. Mojave County Statute (M.C.S.) § 17.54.130.

When a resident applies for a conditional use permit, the board of zoning adjustments reviews the application and conducts a hearing to determine whether the evidence "is deemed sufficient to establish that, under all circumstances and conditions of the particular case, the use is properly located in all respects." M.C.S. § 17.54.140. The planning director can transfer an application to the planning commission for its decision if the board "is unable to take action on an application." *Id.* If the board of zoning commissioners denies the application, "any property owner or other person aggrieved," or "an officer, department, board, or commission affected by the order" may appeal to the County Commissioners' Court "within ten days after the date of any order" under § 17.54.140, made by the board, director, or commission.

Those applicants who seek a conditional use permit for firearms sales must produce evidence to support additional findings by the board, including that the district is "appropriate" for firearm sale and that the premises is at least eight hundred (800) feet away from any residential zone, schools or day care center, other business that sell firearms, "religious center," or establishment selling or serving liquor.[1] M.C.S. § 17.54.131 (the "Zoning Ordinance"). Once a conditional use permit

[1] An applicant for a conditional use permit for firearms sales is also required to show that the applicant has proper state and federal licenses and has been informed about the necessary County license, that the premises is up to code, and that the applicant has provided the board with "sufficient detail regarding the intended compliance with the Penal Code requirements" for building security and the storage of firearms and ammunition. M.C.S. § 17.54.131.

for firearms sales is granted, the applicant must satisfy several other requirements, including inspection. M.C.S. § 17.54.141.

**Respondents' Proposed Gun Store.** In 2011, Respondent Maxson formed Brotherhood of Steel, Inc., a limited liability company and also a Respondent in this case, to open a gun store and shooting range in Mojave County, New Tejas. R. at 2. Maxson planned to also offer gun training, certification, and gunsmithing. R. at 2. Maxson planned to open the store in an unincorporated part of the County, near the incorporated city of Sloan. R. at 3.

Pursuant to M.C.S. §§ 17.54.130 and 17.54.131, Maxson applied for a conditional use permit and proposed that 2274 Helios Lane would meet the zoning requirements. R. at 4. Maxson proposed that 2274 Helios Lane would meet the zoning requirements. R. at 4. The property is 28,743 square feet, including 3,800 square feet of retail space and 1,000 square feet for gunsmithing and repairs. R. at 4. Maxson provided a survey that indicated that the closest residential property to 2274 Helios Lane was 981 feet away, and the closest gun store was about 10 miles away. R. at 4.

**Respondents' Application for a Conditional Use Permit.** Maxson made arrangements to lease and improve the property on August 13, 2011. R. at 4. Maxson then applied for a conditional use permit for his gun store. R. at 4. After reviewing Maxson's application, the Staff of the Mojave County Community Development Agency Planning Department ("Planning Department") prepared a report on November 1, 2011, for the West County Board of Zoning Adjustments ("Zoning Board"). R. at 4. The report found that (1) "there was a public need for a licensed

firearms dealer;" (2) "the proposed use was compatible with other land uses and transportation in the area;" and (3) "a gun shop at the proposed site would not adversely affect the health or safety of persons living or working in the vicinity." R. at 4.

However, the report also found that the proposed site failed the 800-foot zoning requirement, because it was approximately 736 feet from a church, which was behind the property and across Interstate 76. R. at 5. The measurement was calculated from the rear wall of the gun property to the lines of the church property. R. at 5. The report recommended that the board deny the conditional use permit application. R. at 5.

The zoning board then held a hearing on Respondents' application, at which Maxson testified. R. at 5. The record indicates that, at the hearing, 15 people spoke in favor of Maxson, and eight people spoke in favor of the gun store. R. at 5. The record does not indicate which speakers, if any, were residents of Mojave County. R. at 5, n.3.

After the public hearing, the Planning Department revisited the issue of the 800-foot zoning rule. R. at 5. It issued a revised report on November 10, 2011, acknowledging that there was an ambiguity regarding how to measure the distance for compliance with the 800-foot rule. R. at 5. The revised report stated that whether the distance was measured from the front door, property line, or exterior wall of the proposed gun store, the proposed gun store would still be "less than 800 feet from the

property line of the closest disqualifying property." R. at 5. Therefore, the Planning Department again recommended denying Maxson's application. R. at 5.

Despite the Planning Department's findings and recommendations, the board passed a resolution on December 29, 2011, granting a variance and approving Maxson's conditional use permit. R. at 6. The board concluded that a gun shop at that location "would not be detrimental to the public welfare and warranted a variance in light of the physical barrier" created by Interstate 76. R. at 6. In the resolution, the Department noted that the closest existing gun store was ten miles away, and the existing shooting range was about 20 miles away. R. at 6. However, "[t]he record shows that there are at least three gun stores and two shooting ranges already operating lawfully in Mojave." R. at 15.

**Community Members Oppose the Permit.** On January 6, 2016, the Shady Sands Home Owners Association filed an appeal with the County Commissioners' Court, challenging the board's resolution that granted Maxson a variance and a conditional use permit. R. at 6. The County Commissioners' Court sustained the appeal, overturned the board's decision, and revoked the permit. R. at 6.

Maxson then commissioned a study and alleged that he could not find any property in any unincorporated part of the county that would not only satisfy the 800-foot rule but would also be satisfactory "in terms of location, accessibility, building security, and parking." R. at 7. However, a study commissioned by Mojave County revealed that at least 15% of unincorporated Mojave County complied with the 800-foot rule. R. at 7.

## *II. Procedural History*

**Proceedings at the District Court.** Respondents filed a complaint in the United States District Court for the Central District of New Tejas, alleging that the Commissioners Courts' decision to deny a variance and conditional use permit violated the Fourteenth Amendment guarantees to due process and equal protection. R. at 7. Respondents also challenged the zoning ordinance facially and as applied, arguing that it violated the Second Amendment. R. at 7.

Maxson's study concluded that because of the 800-foot rule, "there are no parcels in the unincorporated parts of Mojave County which would be available and suitable for firearm retail sales." R. at 7. Arguing that the zoning ordinance "is not reasonably related to any possible public safety concerns," Respondents argued that the ordinance "effectively 'red-lines gun stores out of existence in unincorporated Mojave County.'" R. at 7.

Mojave County moved to dismiss and succeeded with respect to both the Equal Protection and Second Amendment Claims. R. at 7. Respondents filed an Amended Complaint that asserted that the zoning ordinance (1) as applied violated the Fourteenth Amendment's Equal Protection Clause; (2) facially violated the Equal Protection Clause "because it targeted gun stores but did not apply to other similarly situated businesses;" (3) facially violated the Second Amendment; and (4) as applied violated the Second Amendment. Respondents sought declaratory and injunctive relief, damages, court costs, and attorneys' fees. R. at 7-8.

Mojave County moved to dismiss again, arguing that Respondents failed to state a claim on Equal Protection grounds and that the zoning ordinance is presumptively valid under the Second Amendment. R. at 8. The district court granted the county's motion. R. at 8.

**Proceedings at the Fourteenth Circuit**. Respondents appealed to the United States Court of Appeals for the Fourteenth Circuit. R. at 8. The court affirmed the District Court's dismissal of Respondents' Equal Protection claims. R. at 9. However, the court reversed on Respondents' Second Amendment claims. R. at 14. Applying a two-step framework for Second Amendment claims, the court determined that Respondents planned to offer services that "are fundamental to the right to keep and bear arms," namely the "freedom to purchase and to sell weapons," and "the right to be trained" in firearm use. R. at 10.

The court held that Mojave County had failed to prove that zoning ordinances had historically restricted the place of firearm sales, and that the County could not "claim a presumption of validity." R. at 11. The court then applied heightened scrutiny to strike down the zoning ordinance.

Though the ordinance did not pass heightened scrutiny, the court still found that Mojave County had legitimate interests in "protecting public safety and preventing harm in populated, well-traveled, and sensitive areas such as residentially-zoned districts," in "protecting against the potential secondary effects of gun stores, such as crime," and "preserving the character of residential zones." R. at 13-14.

For these reasons, the Fourteenth Circuit reversed the dismissal of the Second Amendment claims and remanded for further proceedings consistent with its opinion. R. at 14.

## SUMMARY OF THE ARGUMENT

*Means-ends Scrutiny*

**This Court's holding in *Heller* did not foreclose rational basis review for all Second Amendment claims.** In *Heller,* this Court focused on the purpose of the Second Amendment. Because the District law was a severe restriction on the Second Amendment right to keep and bear arms in the home for self-defense, this Court struck it down without articulating a standard of review for all Second Amendment challenges. This Court analogized to First Amendment caselaw, in which courts routinely examines the burden on conduct before choosing a level of scrutiny.

**Presumptively lawful regulations are those which are outside of the scope of the Second Amendment.** Any question on the degree of burden imposed on conduct relates solely to the level of scrutiny, not to whether the conduct is within the scope of the Amendment at all. Therefore, when a regulation is not presumptively lawful, it is appropriate for courts to then examine the level of burden placed on the protected conduct. In this inquiry, too, the purpose of the Second Amendment is paramount.

**Minimal scrutiny is appropriate for Mojave County's zoning ordinance.** When a regulation imposes neither a substantial burden on non-core conduct nor a burden on core conduct, heightened scrutiny is inappropriate. The zoning ordinance does not regulate Second Amendment rights within the home, and any burden it places on the right to acquire firearms is insubstantial. Mojave County has legitimate interests in

public safety, preventing secondary effects, and preserving neighborhood tranquility that are rationally related to the zoning ordinance. Furthermore, the application of minimal scrutiny for minimally-burdensome firearms regulations is consistent with this Court's other fundamental rights jurisprudence, including marriage, contraceptives, abortion, voting, and speech.

*Commercial Sale of Arms*

**Mojave County's zoning ordinance constitutes a condition or qualification on the commercial sale of arms and is therefore presumptively lawful under *Heller*.** In *Heller*, this Court created a list of "presumptively lawful" regulatory measures that serve as exceptions to Second Amendment protection. Included on the list were "conditions or qualification on the commercial sale of arms." Therefore, such conduct falls outside the scope of the Second Amendment.

**A textual and historical inquiry into the Second Amendment reveals that there is no standalone right to commercially sell firearms.** Legal history shows that commercial arms dealing has been heavily regulated for over a century and at least somewhat restricted since before the adoption of the Second Amendment. Therefore, commercial sales of arms has not historically been constitutionally protected.

**The zoning ordinance is a mere regulation, not prohibition, on the sale of arms in Mojave county and therefore does not implicate the core right of the people to keep and bear arms.** Because the ordinance does not effectively ban the sale of arms in the county, and there are adequate alternatives for individuals to purchase arms within county limits, the ordinance represents only *de minimis* burden on conduct that is

ancillary to the core Second Amendment right. Therefore, the core right is not implicated or burdened.

## ARGUMENT

### I. Rational Basis Review Is Appropriate When the Challenged Regulation Imposes Only an Insubstantial Burden on Non-Core Conduct.

Ten years ago, this Court stated that self-defense is the "core lawful purpose" of the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008). Despite this holding, Second Amendment jurisprudence is far from uniform in the circuit courts. The circuits have offered different interpretations not only of this Court's assertion that certain regulatory measures are "presumptively lawful," *Heller*, 554 at 626, n.27, but also—and particularly at issue, here—of the level of scrutiny that should be applied in any given Second Amendment challenge.

Second Amendment claims are properly analyzed under rational basis review when the challenged regulation poses neither a burden on core conduct nor a substantial burden on non-core conduct. Drawing from a footnote in *Heller*, many circuits have applied a rule that heightened scrutiny is always appropriate when a regulation touches conduct protected by the Second Amendment. However, the holding in *Heller* does not foreclose rational basis review. Applying minimal scrutiny to regulations that pose no more than an insubstantial burden on non-core Second Amendment conduct is consistent not only with *Heller* but also with the greater line of this Court's fundamental rights jurisprudence, which typically requires a threshold showing of a substantial burden on protected conduct to trigger heightened scrutiny.

### A. The Application of Minimal Scrutiny to Certain Firearms Regulations is Consistent with both *Heller* and the Two-Step Framework Adopted by Most Circuits.

Applying rational basis review to regulations that do not burden core conduct and do not substantially burden non-core conduct comports with the framework set out in *Heller* and developed by the circuit courts. In *Heller*, this Court emphasized the severe burden placed on Second Amendment conduct by the District handgun ban. *Heller*, 554 at 630. Reading this Court's opinion to foreclose minimal scrutiny for all Second Amendment claims—regardless of the context and burden imposed—unnecessarily overextends the holding and ignores the purpose of the Second Amendment. This Court deemed certain regulations "presumptively lawful" because they fall outside of the historical purpose of the Amendment. The purpose of the Second Amendment should be a primary concern, therefore, not only in which conduct is protected but also in the extent to which the government can regulate.

#### 1. *Heller* Did Not Foreclose Rational Basis Review.

This Court's holding in *Heller* did not foreclose rational basis review for all Second Amendment claims. The Court determined that the Second Amendment individual right of self-defense "was the *central component* of the right itself." *Heller*, 554 U.S. at 599; *see also id.* at 634 (stating that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). With this understanding of the scope of the right, the Court discussed the constitutionality of the law that "totally ban[ned] handgun possession in the home." *Id.* at 628.

In *Heller*, the extreme burden imposed on core Second Amendment conduct ensured the law's unconstitutionality. Because the law "ma[de] it impossible for citizens to use [handguns] for the core lawful purpose of self-defense," it was clearly impermissible. *Id.* at 630. This outcome would have been certain under any level of scrutiny—except for rational-basis. *Id.* at 629, 628, n.27. Characterizing the "absolute ban on handguns" as a "severe restriction," *id.* at 632, this Court declined to compare it with a Rhode Island law from 18th Century that "simply levied a 5-shilling fine on those who fired guns in *streets* and *taverns*." *Id.* at 633. The older and more modest restriction was "obviously inapplicable" to the District law at issue. *Id.* at 633. This Court did not engage in comparative analysis in *Heller* because the constitutional infirmity of the District law was so evident.

The comment about levels of scrutiny must be read in the context of the Court's holding, which was two-fold: defining the Second Amendment right and applying that right to the challenged law. *See Heller*, 554 U.S. at 635 (holding "finally" that the District law was unconstitutional). This Court expressly "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions." *Id.* at 634. Indeed, this Court did not "clarify the entire field" but left "many applications of the right to keep and bear arms in doubt." *Id.* at 635.

The footnote that purportedly rejects rational basis review is persuasive, then, only as it relates to cases that place the same sort of onerous burden on Second

Amendment conduct. The *Heller* Court engaged in a two-step inquiry of its own.[2] First, this Court first determined the scope of the Second Amendment right and decided—easily—that the right was burdened by the District law. Second, this Court declared the law unconstitutional without ever adopting a level of scrutiny. In cases similar to this one, where the core Second Amendment right is so severely circumscribed, the footnote is on target—more than a rational basis would be "required to *overcome* the right to keep and bear arms." *Id.* at 628, n.27 (emphasis added). But where the Second Amendment right is not being "overcome," or where the core right is not being burdened, there is little reason to apply the same stringent rule against a challenged regulatory measure. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (restating that dicta can be "sufficiently persuasive but which are not controlling." (quoting *Humphrey's Ex'r v. U.S.*, 295 U.S. 602, 627-28 (1935)).

In addition, applying minimal scrutiny to certain Second Amendment claims is consistent with First Amendment precedent, on which this Court relied heavily in *Heller*. *See* 554 U.S. at 595 (stating that the Second Amendment right "was not unlimited, *just as* the First Amendment's right of free speech was not," and "we do not read the Second Amendment [to protect the rights of citizens for all confrontations] . . . *just as* we do not read the First Amendment [to protect speech for all purposes]"). Circuit courts continue to do the same. *See United States v. Decastro*,

[2] The two-step inquiry used by most Circuit Courts is discussed in Section I.A.2., *infra*.

682 F.3d 160, 167 (2d Cir. 2012) (deciding it was "appropriate to consult principles from other areas of constitutional law, including the First Amendment" when determining whether Second Amendment rights were substantially burdened); and *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 702 (7th Cir. 2011) (stating that "free-speech jurisprudence contains a parallel" for inquiry into the scope of the Second Amendment right).

Examining the degree of burden on protected conduct before determining constitutionality is not foreign to this Court's free speech jurisprudence. *See Ellis v. Bhd. of Ry.*, 466 U.S. 435, 456 (1984) (finding that the "communicative conduct" of paying union dues for social activities was "not inherent in the act," and that while payment of dues for "publications and conventions [was] more serious," there was "little additional infringement of First Amendment rights . . . ."); and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (requiring that time, place, and manner restrictions on protected speech be content-neutral, reasonable, "narrowly tailored to serve a significant government interest," and "leave open ample alternative channels for communication.")

This case affords the Court an opportunity to limit and define the broad language in *Heller*, and to correct the errors made by federal circuit courts in this area of the law. *See Davis v. United States*, 564 U.S. 229, 258-59 (2011) (Breyer, J., dissenting) (warning that the Court's previous "broad dicta" might "lead[] lower courts" in an undesirable direction). Except for the Second Circuit, almost all federal circuit courts have applied a rule that rational basis review is categorically

inappropriate for a claim that implicates Second Amendment rights.[3] For reasons discussed below, this approach affords unwarranted, unfavorable treatment to firearms regulations. This Court can also clarify that—consistent with the purpose-driven discussion in *Heller*—the degree of burden on the core Second Amendment right must affect the appropriate level of scrutiny. Last, this Court can clarify the appropriate test by conclusively placing the list of presumptively lawful regulations in the first step of the analysis.

### 2. The List of "Presumptively Lawful" Regulations Falls in the First Step of a Second Amendment Claim and is Rebuttable by the Challenger Showing that the Challenger's Circumstances are Distinguishable from Those of the Historically Unprotected Class.

Following this Court's seminal decision in *Heller*, most federal circuit courts have adopted a two-step analytical approach to challenges that are based on the Second Amendment.[4] This approach originates in the Third Circuit's opinion in

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[3] Indeed, courts have used the footnote in *Heller* to justify nothing more than a cursory analysis on the type of scrutiny required for any given regulation impacting firearms. For example, the First Circuit said that this Court "made plain in *Heller* that a rational basis alone would be insufficient to justify laws burdening the Second Amendment." *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011). The Fourth Circuit similarly stated, "The Court did not say which form of scrutiny should apply, but it did rule out rational basis scrutiny . . . ." *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012). The Ninth Circuit did the same: "the ordinance must be subjected to heightened scrutiny—something beyond mere rational basis review." *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1058 (9th Cir. 2016). *Accord United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); and *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015). The Eighth Circuit has not stated a rule excluding rational basis review for Second Amendment claims.

*United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011). Drawing from *Heller* and from First Amendment principles, the court asked first whether the challenged law "regulates conduct that falls within the scope of the Second Amendment." *Id.* at 89. If the conduct were within the purview of the Second Amendment, then the court would, as a second step, "evaluate the law under some form of means-ends scrutiny." *Id.*

To delineate the scope of the Amendment, the *Marzzarella* court referred back to *Heller* and noted: "At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." *Id.* at 92. Even though the challenged law only involved the use of unmarked firearms, the regulated conduct fell within the Second Amendment because it "implicated [the plaintiff's] interest in the defense of hearth and home—the *core protection* of the Second Amendment." *Id.* at 94. The purpose of the right to keep and bear arms, therefore, is tantamount to determining if regulated conduct is within the scope of the Amendment.

**i. The Presumptively Lawful Laws Listed in *Heller* Regulate Conduct Outside the Second Amendment's Scope.**

[4] Again, the exception is the Eighth Circuit. Refraining from adopting any specific analytical approach, the court has considered historical tradition and the government's interest in public safety. *See United States v. Bena*, 664 F.3d 1180, 1182-85 (8th Cir. 2011).

This Court's list of "presumptively lawful" regulations in *Heller* belongs in the first step of the analysis.[5] *See Heller*, 554 U.S. at 627, n.26. Referencing the historical tradition that formed the basis for its opinion, this Court stated that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Indeed, "the right secured by the Second Amendment is not unlimited." *Id.* at 626. While the list is not exhaustive—that point is clear[6]—this Court listed several measures as "presumptively lawful[:] . . . longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27.

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[5] Not all circuits agree with this conclusion. The Fourth Circuit, without choosing which interpretation was correct, suggested that the language "may not be a limitation *on the scope* of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right." *United States v. Masciandaro*, 638 F.3d 458, 472 (4th Cir. 2011). The Seventh Circuit appears to have placed the language in the first step of the analysis—whether the conduct is within the scope of the Amendment—but has not explicitly done so. *See Ezell I*, 651 F.3d at 703 (stating that "if the historical evidence [produced by the government] is inconclusive or suggests the regulated activity is not categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.). Judge Tymkovich, disagreeing with the Tenth Circuit's conclusion that the Second Amendment right does not extend to government buildings, suggested that "*Heller's* dicta . . . could just as easily (or perhaps more easily) mean the right extends to those locations but that the regulations in those locations presumptively survive scrutiny at step two of our two-prong Second Amendment analysis." *Bonidy*, 790 F.3d at 1136, n.7 (Tymkovich, J., concurring in part and dissenting in part).

[6] "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Heller*, 554 U.S. at 627, n.26.

By disclaiming any "exhaustive historical analysis of *the full scope* of the Second Amendment" but listing certain measures upon which the opinion was not meant to "cast doubt," this Court placed those measures outside the scope of the Amendment. *Id.* at 626 (emphasis added). The list precedes the section where this Court determined the constitutionality of the District law. *See id.* at 627 ("We turn finally to the law at issue here."). To make matters even more certain, "another important limitation *on the right to keep and bear arms*" immediately follows the list: "the sorts of weapons protected were those 'in common use at the time,'" not those weapons which would be suitable today "against modern-day bombers and tanks." *Id.* at 627 (emphasis added) (quoting *U.S. v. Miller*, 307 U.S. 174, 179 (1939)). Therefore, certain regulations are presumed lawful not because they impose only a small burden but because they regulate conduct historically understood to be outside the scope of the Amendment's protection.

**ii. The Presumption is Rebuttable if the Challenger Presents Evidence to Show that the Particular Circumstances at Issue are Distinguishable from the Traditional Justifications for the Regulation.**

If a challenged regulation is the type that this Court has declared presumptively lawful, the burden is on the challenger to rebut that presumption. Because the presumption of lawfulness derives from the fact that certain measures are "longstanding," the presumption is rebutted if "the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson v. City & Cty. San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014); *see Marzzarella*, 614 F.3d at 92, n.8

("If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms."). The history and purpose of the Second Amendment is paramount.

Some circuits have erroneously suggested that a plaintiff can also rebut the presumption by showing that a regulation "does have more than a *de minimis* effect upon his right." *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011); *accord Peterson v. Martinez*, 707 F.3d 1197, 1218 n.1 (10th Cir. 2013). To rebut the presumption of lawfulness in the first step by showing that the conduct is not being burdened *too much* is to misconstrue the analysis. Certain regulations are presumed lawful not because they hardly affect the Second Amendment right but because the conduct at issue is not within the right at all. First, the fact that this Court identified presumptively lawful measures while discussing that the Second Amendment is limited demonstrates that those measures are limits on the right, "not cases where the right is not burdened at all." *Bonidy*, 790 F.3d at 1136, n.7 (Tymkovich, J., concurring in part and dissenting in part).

Second, this construct would produce inconsistent results among Second Amendment claimants. For example, if the presumption were rebuttable by showing that the burden were more than *de minimis*, then a felon prohibited from carrying a firearm would have a difficult argument to make: at once, he has no Second Amendment right because he is not a "law-abiding citizen." *Heller*, 554 U.S. at 625. But at the same time, a felon is told that he can rebut the presumption by showing that his Second Amendment right has been burdened in more than a *de minimis*

fashion. This cannot be the intended result. Instead, the presumption should be rebutted by showing that the burdened conduct was historically protected—thus passing to step two, where courts analyze the regulation under the appropriate level of scrutiny.

As explained above, the presumption of lawfulness derives from the scope and history of the Second Amendment right, not from the degree to which the government can burden that right. Therefore, the question whether the conduct is protected in the first place must be both asked and answered before inquiring into the degree of the burden imposed. The purpose of the Second Amendment—which is to protect the right of responsible and law-abiding citizens to keep and bear arms for self-defense—is foremost in any challenge. The purpose affects not only which conduct is protected by the Amendment but also which level of scrutiny is applicable for any given regulation.

### B. This Court Should Apply Minimal Scrutiny to the Zoning Ordinance Here Because It Imposes Neither a Substantial Burden on Non-Core Conduct Nor a Burden on Core Conduct.

Minimal scrutiny should be applied to the zoning ordinance here because it imposes an insubstantial burden on conduct outside the core of the Second Amendment. Most circuits have concluded that minimal scrutiny is inappropriate for Second Amendment claims. But applying minimal scrutiny to minimally-burdensome regulations not only affords due protection to Second Amendment conduct but also is consistent with this Court's fundamental rights jurisprudence. Unless there is a threshold showing that the challenged law at least burdens core conduct or substantially burdens non-core conduct, heightened scrutiny is inappropriate. This

rule sustains this Court's promise in *McDonald v. City of Chicago* that "incorporation does not imperil every law regulating firearms." 561 U.S. at 786.

### 1. Minimal Scrutiny is Appropriate for Regulations that Neither Burden Core Conduct, Nor Impose a Substantial Burden on Non-Core Conduct.

This Court should adopt the test used by the Second Circuit, which requires a threshold showing of a burden on core Second Amendment conduct or a substantial burden on non-core conduct, before heightened scrutiny is triggered. In *United States v. Decastro*, the Second Circuit considered the constitutionality of New York's firearm licensing scheme—which prohibited transportation of firearms bought out-of-state into the state of the plaintiff's residence, as-applied to the plaintiff.[7] 682 F.3d 160 (2d Cir. 2012). Before determining the constitutionality of the licensing scheme, the court emphasized two points from *Heller.* First, that this Court "declined to announce the precise standard of review applicable to laws that infringe the Second Amendment right . . . " because the law would have failed under any standard. *Id.* at 165. Second,

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[7] Under Respondents' facial challenge, Respondents must "establish that no set of circumstances exists under which the [Ordinance] would be valid." *United States v. Salermo*, 481 U.S. 739, 745 (1987). As discussed in Section II.B.2.ii, *supra*, the facial claim here fails because the statute falls within the presumptively lawful measures listed by this Court in *Heller*. "[A] facial challenge must fail where the statute has a 'plainly legitimate sweep.' . . . In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008).

To trigger intermediate scrutiny on their as-applied claim, Respondents must show a substantial burden on *their* Second Amendment rights. *See Jimenez v. Lee*, 895 F.3d 228, 236 (2d Cir. 2018) (finding a substantial burden on the plaintiff's Second Amendment rights when the statute prohibited possession of firearms or ammunition by individuals who were dishonorably discharged, and when the plaintiff had been dishonorably discharged.)

that "[t]hroughout, *Heller* identifies the constitutional infirmity in the District of Columbia laws in terms of the burden on the ability of D.C. residents to possess firearms for self-defense." *Id.*

Because the holding in *Heller* can be circumscribed to account for the particular burden imposed by the District law, the Second Circuit concluded, "we do not read the case to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny." The Second Circuit has since clarified that heightened scrutiny is inappropriate when a law places merely an insubstantial burden on "non-core conduct." *Jimenez v. Lee*, 895 F.3d 228, 234 (2d Cir. 2018).[8] This rule finds support in "other constitutional contexts," including "takings, abortion, and free speech." *Decastro*, 682 F.3d 160, 167.

**2. The Zoning Ordinance Neither Implicates Core Second Amendment Rights and Nor Imposes a Substantial Burden on Non-Core Rights.**

A law "implicate[s] the core of the Second Amendment's protections [when it] extend[s] into the home, 'where the need for defense of self, family and property is most acute.'" *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 258 (2d. Cir. 2015) [hereinafter "*NYSRP v. Cuomo*"] (quoting *Heller*, 554 U.S. at 628). The core right, for example, can be implicated by a "*residential* handgun licensing fee." *See*

[8] The Second Circuit in *Jimenez* distilled this rule from several other cases. *See N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 883 F.3d 45 (2d. Cir. 2018) [hereinafter "*NYRSP v. City*"] (analyzing a non-substantial burden on core conduct with intermediate scrutiny); and *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d. Cir. 2012) (analyzing a substantial burden on non-core conduct with intermediate scrutiny).

*Kwong v. Bloomberg*, 723 F.3d 160, 167-68 (2nd Cir. 2013) (emphasis added). In *Heller*, the District law prohibited residents from storing "a loaded handgun in [their] home[s]," *Heller*, 554 U.S. at 719 (Ginsburg, J., dissenting), thus implicating the core right of self-defense in the home.[9]

As opposed to a licensing scheme that directly affects whether a plaintiff may possess any particular firearm in the home, here, the zoning ordinance does not implicate the core right. An ordinance regulating the place of sale does not "extend[] into the home." *See NYRSP v. Cuomo*, 804 F.3d at 258. In *Decastro*, the prohibition on interstate transportation of firearms would not have implicated the core right. *See* 682 F.3d at 162. While the Second Circuit never explicitly stated whether the core right was implicated, the court acknowledged that the statute "[did] nothing to keep someone from purchasing a firearm in her home state . . . ." *Id.* at 168. Here, the ordinance has no direct bearing on the ability of individuals in Mojave County to keep firearms in the home. Far from "extending into the home," *NYRSP v. Cuomo*, 804 F.3d at 258, the zoning ordinance and its 800-foot rule simply extends to property lines. The ordinance is a far cry from the District's ban.

Mere inconvenience in the ability to purchase a firearm does not constitute a substantial burden. Rather, the burden on Second Amendment conduct is substantial if the legislation has an overly broad sweep or leaves no "adequate alternatives . . .

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[9] The Fifth Circuit noted that the District law accomplished a "rare feat" when it "squarely struck the core of the Second Amendment . . . ." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 193 (5th Cir. 2012).

for law-abiding citizens to acquire a firearm for self-defense." *Decastro*, 682 F.3d at 168. For example, there is a substantial burden on protected conduct when "laws impose an outright ban statewide." *NYRSP v. Cuomo*, 804 F.3d at 259. But in *Decastro*, the fact that citizens of New York were able to purchase guns in-state, in compliance with state law, demonstrated that there were "ample alternative means of acquiring firearms for self-defense purposes." 682 F.3d at 168. Justice Ginsburg made a similar point in her dissent in *Heller*: "I cannot say that a subway ticket and a short subway ride (and storage costs) create more than a minimal burden." *Heller*, 554 U.S. at 709 (Ginsburg, J., dissenting).

As noted in Section II.B.2, below, the ordinance here does not pose a substantial burden on non-core conduct. The zoning ordinance does not forbid all gun stores in the Mojave County. There are "at least three gun stores" already operating in Mojave County. R. at 15. Indeed, one of those gun stores is located only ten miles from Respondents' proposed gun store. R. at 4. The ordinance does not have an overly broad sweep, and these other stores provide "ample alternative means of acquiring firearms for self-defense purposes." *Decastro*, 682 F.3d at 168. An increased travel distance within the same county is not a substantial burden.

3. **The Zoning Ordinance Survives Rational Basis Review**

Because the ordinance does not regulate core conduct and does not pose a substantial burden on non-core conduct, it should be reviewed with rational basis scrutiny. On rational-basis review, a statute will be upheld if there is any conceivable rational basis for the classification. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).. The ordinance requires gun stores to be at least 800 feet away from

residential zones, schools or day care centers, other firearm stores, churches, or establishments selling or serving liquor. M.C.S. § 17.54.131. The Fourteenth Circuit noted that Mojave County had interests in public safety, preventing negative secondary effects, and "preserving the character of residential zones." R. at 13-14. In segregating stores that sell deadly weapons from these types of establishments, Mojave County certainly pursues these legitimate goals. Respondents' inconvenience does not prove otherwise.

#### 4. Requiring a Burden on Core Conduct or a Substantial Burden on Non-Core Conduct Before Applying Heightened Scrutiny is Consistent with this Court's Fundamental Rights Jurisprudence.

This Court assured in *McDonald v. City of Chicago* that "[d]espite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms." 561 U.S. at 786. But applying heightened scrutiny to every law implicating firearm use, including those that are minimally burdensome, does precisely that. Amidst laments that "the Second Amendment is a disfavored right in this Court," *Silvester v. Becerra*, 138 S.Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari), the right does not receive disfavored treatment in the circuit courts when compared to other fundamental rights. As a broad principle. this Court has held, "[w]hen a statutory classification *significantly interferes* with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (emphasis added). To require either a substantial burden on non-core conduct or a burden on core conduct, before

applying heightened scrutiny, brings Second Amendment jurisprudence in line with the scrutiny applied for other fundamental rights.

A "reasonable regulation[] that do[es] not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki*, 434 U.S. at 386. In *Zablocki*, this Court reaffirmed that the right to marry is fundamental. *Id.* When this Court determined that the Wisconsin statute "interfere[d] directly and substantially with the right to marriage," *id.* at 387, it applied the same kind of analytical framework advocated here. The statute directly regulated the ability of some Wisconsin residents to marry, *id.* at 374, implicating the core of the right. It prohibited marriage without a court order, and it left some Wisconsin residents entirely stripped of their right to marry and others practically incapable of exercising it. *Id.* at 388. In other words, the statute was overly broad and left no reasonable alternatives available; in Second Amendment terms, it imposed a "substantial burden" on the protected right. Because the statute was a significant interference on the right to marry, this Court applied heightened scrutiny. *Id.*

This Court has applied similar principles to the right to obtain contraception. *Carey v. Population Serv.*, 431 U.S. 678, 685-86 (2010). This Court noted in *Carey* that, just like with commercial firearms regulations, the state can regulate the manufacture and sale of contraceptives "in ways that do not infringe protected individual choices." 431 U.S. at 686. This Court applied heightened scrutiny *after* determining that the distribution limitation "clearly imposes a significant burden" on the fundamental right to obtain contraceptives. *Id.* at 686-981.

The State's ability to regulate abortion is also circumscribed by the burden imposed on the woman's right. A law "which imposes an undue burden" on a woman's right to have an abortion before fetal viability is unconstitutional. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992). "An 'undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of the woman seeking an abortion of an nonviable fetus." *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (quoting *Casey*, 505 U.S. at 877).

Similarly, the degree of burden imposed on the fundamental right to vote determines "the rigorousness of [this Court's] inquiry into the propriety of a state election law." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Strict scrutiny is applied to "'severe' restrictions." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992). However, "important regulatory interests are generally sufficient" to support "'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

The burden imposed on speech in a public forum must be a "reasonable restriction on the time, place, or manner of protected speech" that "leave[s] open ample alternative channels for communication for information," and which are content-neutral and narrowly tailored to a significant government interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This principle also finds a parallel in

Takings jurisprudence, where a regulation is categorized as a Taking if it "goes too far." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (citation omitted).

Requiring a showing of a burden on core Second Amendment rights or a substantial burden on non-core rights is far from a novel concept in this Court's jurisprudence. The limitation advocated here still prevents undue encroachment on Second Amendment rights because any infringement on the core Second Amendment right would still receive heightened scrutiny. To exempt all challengers under the Second Amendment from this sort of threshold showing and to categorically excluding rational basis review is to treat the right to keep and bear arms as more deserving of protection than the fundamental rights to marry, obtain contraceptives, and obtain an abortion.

Restrictions that do not infringe on core rights, and that pose no substantial burden on non-core rights, are deserving of rational basis review. To require these minimally-burdensome restrictions to be evaluated under heightened scrutiny is to, as Justice Blackmun said, "launch[] a missile to kill a mouse." *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

**II. The Second Amendment Does Not Secure a Core Right to Sell Firearms.**

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." U.S. Const. Amend. II. Though this provision has been in place since 1791, litigation surrounding the Amendment is relatively new. *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 700 (7th Cir. 2011). In *District of Columbia v. Heller*, this Court laid the foundation for a two-part inquiry that lower courts have adopted

to determine the constitutionality of laws or regulations that touch upon the Second Amendment. *See, e.g.*, *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) ("We apply a two-step inquiry . . . ."); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) ("Thus, a two-part approach to Second Amendment claims seems appropriate under *Heller* . . . ."); *United States v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010) ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges.").

Although this Court declined to conduct an "exhaustive historical analysis of the full scope of the Second Amendment" in *Heller*, 554 U.S. at 626, it has been sufficiently decided that if a law relates to conduct outside that scope, the inquiry ends. *Teixeira*, 873 F.3d at 682 (quoting *Marzzarella*, 614 F.3d at 89). Stated another way, if, under step one of the *Heller* analysis, a court concludes that a law does not implicate conduct protected by the Second Amendment, there is no need to continue on to step two.

Despite this Court expressly stating in *Heller* that it did not mean to define the ends of the Second Amendment, lower courts have been wary to define new "core rights." Instead, courts have chosen to apply the first step in one of two ways. Some courts forego a complete step one analysis, choosing instead to assume that the conduct in question is within the scope of the Second Amendment. *See, NYRSP v. City*, 883 F.3d 45, 55 (2nd Cir. 2018) (quoting *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 86 F. Supp. 3d 249, 257 (N.Y.S.D. 2015)) ("Thus . . . we 'proceed on the assumption that [the Rule restricts activity] protected by the Second Amendment.'");

*Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017) ("If a law burdens conduct protected by the Second Amendment, as we assume, but do not decide that this one does . . ."). Meanwhile, other courts dive fully into step one, seeking to determine whether the conduct in question represents a core right or otherwise implicates a core right. *See, e.g.*, *Teixeira*, 873 F.3d at 682-83 ("we conduct a full textual and historical review."); *Ezell I*, 651 F.3d at 704 ("our first question is whether range training is categorically unprotected by the Second Amendment.").

Here, unlike in other cases where constitutional coverage was assumed, it is important to conduct a full inquiry into whether the Second Amendment secures a right for a commercial retailer to sell firearms. Because the zoning ordinance in Mojave County represents a "condition[] or qualification[] on the commercial sale of arms," it is "presumptively lawful" under *Heller*. 554 U.S. at 626-27 n. 26. However, even if the zoning ordinance here does not qualify as presumptively lawful under *Heller*, it is still not subject to further analysis because the commercial sale of arms has never been recognized as a right under the Second Amendment. A historical and textual analysis shows that there can be no freestanding right to commercially sell arms. Last, the zoning ordinance here represents a mere regulation on the sale of arms, not a prohibition that may implicate the core right to keep and bear arms.

### A. Neither the Plain Language of the Second Amendment Nor Caselaw Recognizes a Standalone Right to Sell Firearms.

It is a well-established principle of statutory interpretation that in order to determine the meaning of a statute or constitutional provision, courts should begin with the plain meaning of the text. *Heller*, 554 U.S. at 576-77. In *Heller*, this Court

conducted an in-depth, yet non-exhaustive, review of the meaning behind the language of the Second Amendment. *See generally id.* Ultimately, this Court held—and other courts have agreed—that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" *Id.* at 582.

Continuing this analysis, the Ninth Circuit in *Teixeira v. Cty. of Alameda* found that "[n]othing in the specific language of the Amendment suggests that *sellers* fall within the scope of its protection." 873 F.3d at 683 (emphasis added). In fact, the court found that the language secures a right of the "'people' who would keep and use arms, not those desiring to sell them." *Id.* Because the text of the Amendment itself did not answer the question of whether there is a right to sell firearms, the Ninth Circuit opted to conduct a full textual and historical analysis. *Id.* at 683-87. Ultimately, the court found that the Second Amendment does not protect a standalone right to sell arms. *Id.* at 686-87.

Other courts, too, have found no evidence of the Second Amendment conferring a right to sell arms. In *Bauer v. Harris*, the California Eastern District Court found that no Second Amendment right was implicated where the State of California imposed a fee on firearms dealers for each sale they made. 94 F. Supp. 3d 1149, 1150 (E.D. Cal. 2015), *aff'd sub nom. Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017). The court found that the fee "falls outside the historical scope of the Second Amendment." *Id.* at 1155 (quoting *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014)).

Similarly, in *United States v. Chafin*, the Fourth Circuit found that no authority

> remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to sell a firearm. Indeed, although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding right to sell a firearm.

423 Fed. Appx. 342, 344 (4th Cir. 2011) (unpublished opinion). In *Chafin*, the court had to decide whether a law that criminalized the sale of a firearm to an individual whom the seller "[knew] or [had] reasonable cause to believe" was a drug user, was a violation of the Second Amendment. *Id.* at 343. The seller claimed that the law violated his right to sell firearms; however, the Fourth Circuit rejected this argument, concluding that no such freestanding right existed. *Id.* at 344.

Several courts have also found it important to identify the proper beneficiary of the right to *keep and bear* arms, seeking to interpret to whom "the people" refers. U.S. Const. Amend. II. Notably, this Court in *Heller* found that the Second Amendment "elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home." 554 U.S. at 635 (emphasis added). Following this Court's lead, the Fourth Circuit was careful to identify when a law regulated only "those who engage in the commercial sale of firearms . . . ." *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016). Specifically, the court in *Hosford* found that the law in question only affected "those who regularly sell firearms, not owned for personal use, in the course of trade or business for the principal purpose of profit." *Id.* Because the law imposed conditions and qualifications on only commercial retailers, and because these kinds of restrictions were found to

be longstanding, the Fourth Circuit concluded that the law in question was presumptively lawful. *Id.* at 167.

Here, the Mojave County zoning ordinance specifically governs "firearms sales" by licensed "firearms dealer[s]." R. at 20. This is not a case where an individual's right to alienate his or her own property has been infringed. Instead, the zoning ordinance here merely sets certain conditions on those who wish to engage in *commercial* firearms sales. According to the plain language of the Second Amendment and case precedent on the issue, this ordinance does not implicate any Second Amendment right held by Respondents, let alone a core right. In fact, the "closest [Respondents] come[] to stating a claim" that *any* Second Amendment right is burdened by the zoning ordinance is that "his potential customers' . . . rights have been or will be infringed . . . ." R. at 16.

Furthermore, while it is true that courts have recognized individuals' corresponding rights to train and become proficient in firearm use and to acquire firearms, these rights are not burdened by the County's zoning ordinance. *See Heller*, 554 U.S. at 597-98; *Ezell I*, 651 F.3d at 704. As noted in Judge Watan's dissent to the Fourteenth Circuit's opinion, "[t]he record shows that there are at least three gun stores and two shooting ranges already operating lawfully in Mojave." R. at 15. Therefore, the only cognizable way Respondents' customers may be affected is by some impact on their "convenient access to a neighborhood gun store." R. at 16.

Accordingly, under the plain language of the Second Amendment, and under pertinent caselaw, the zoning ordinance here does not relate to conduct falling within

the scope of the Second Amendment or burden the true beneficiary of the Second Amendment rights. However, as in *Heller* and other cases, the analysis cannot end here. Although the plain meaning of a text may not suggest one answer or another, "[n]ormal meaning[s] may of course include an idiomatic meaning[s]." *Heller*, 554 U.S. at 576-77. Therefore, because the zoning ordinance is a presumptively lawful regulation, and because textually and historically commercial sales of arms has not been protected under the Second Amendment, *Heller's* two-part inquiry ends at step one.

### B. Step One of The *Heller's* Two-Part Test Reveals That the Commercial Sale of Firearms Is Not Conduct Protected by the Second Amendment.

The first step of the *Heller* inquiry asks "whether the challenged law burdens conduct protected by the Second Amendment . . . ." *Teixeira*, 873 F.3d at 682 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)). According to *Heller*, with the exception of presumptively lawful regulatory measures, this first step requires a detailed analysis of the textual and historical meaning of the Second Amendment as it pertains to the specific conduct in question. 554 U.S. at 592.

The question to be answered under the first step of the *Heller* analysis is "what is the scope of the Second Amendment"—or more pointedly, "does the conduct in question fall within the scope of the Second Amendment." To answer this question in *Heller*, this Court looked to several revealing sources and ultimately identified a right that would come to be known as *the* "core" right by nearly every court to conduct a Second Amendment inquiry: the right for "law-abiding, reasonable citizens to use

arms in defense of hearth and home." *Id.* at 635; *see also McDonald v. City of Chicago*, 561.S. 742, 780 (2010).

After *Heller,* no rights have been identified that stand alone, wholly detached from the fundamental right to have arms to use for defense. *Teixeira*, 873 F.3d at 676-77 ("After Heller, this court and other federal courts of appeals have held that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense."); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) ("Because restrictions on ammunition may burden the core Second Amendment right of self-defense . . . [the law here] regulates conduct within the scope of the Second Amendment."); *Ezell I*, 651 F.3d at 704 ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").

This Court in *Heller* claimed not to "clarify the entire field" of Second Amendment protection. *Heller*, 554 U.S. at 635. While most courts have interpreted this language to mean that *Heller* did not foreclose the possibility of their being more than one "core" right, these same courts have refused to find Second Amendment protection of any conduct unless that conduct is attached to the core right identified in *Heller*.

Conducting a full analysis of the right to sell firearms under the first step of the *Heller* test will yield consistent results here. To find that there is an independent right to commercially sell firearms would be to find that such is a core right, a

conclusion that cannot be justified by any source. Alternatively, analyzing the right to sell as attached to individual's right to acquire, keep, and bear arms will result in the conclusion that even this ancillary right, being two degrees removed from the Second Amendment's core right, is not implicated here.

**1. There is no standalone right to commercially sell firearms.**

Courts have identified two ways to analyze whether conduct falls within the scope of the Second Amendment, pursuant to the first step of the *Heller* test.

> To determine whether a challenged law falls outside the historical scope of the Second Amendment, we ask whether the regulation is one of the "presumptively lawful regulatory measures" identified in *Heller* . . . or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment . . . .

*Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citing *Heller*, 554 U.S. at 627 n. 26; *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013)). Here, because the zoning ordinance is a "presumptively lawful regulatory measure" that merely sets "conditions or qualifications on the commercial sale of arms," it falls outside the scope of Second Amendment protection. *Heller*, 554 U.S. at 627 n. 26. Furthermore, looking to the history of laws restricting the commercial sale of arms, it is clear that the zoning ordinance "imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson*, 746 F.3d at 960.

**i. Mojave's Zoning Ordinance Constitutes a Condition or Qualification on the Commercial Sale of Arms and Is Therefore a Presumptively Lawful Regulatory Measure of Conduct Falling Outside the Scope of the Second Amendment.**

Although many cases will require a full two-step inquiry, this Court in *Heller* provided an instructive list of "presumptively lawful" measures that could serve to shorten a Second Amendment analysis. Here, the zoning ordinance is eligible for this truncated analysis because it constitutes a "condition or qualification on the commercial sale of arms," which is a "presumptively lawful" measure. 554 U.S. 626-27 n.26.

There is some contention as to where *Heller's* "presumptively lawful" language fits in a Second Amendment inquiry.[10] However, due to this Court's use of the language in *Heller*, it most appropriately belongs in the first step of the Second Amendment inquiry. Additionally, regardless of whether the presumptively lawful nature of a restriction ends the *Heller* analysis, the presumption can be used to defeat a facial challenge.

In *Marzzarella*, the Third Circuit evaluated whether a federal statute that criminalized the possession of a handgun with an obliterated serial number violated the Second Amendment. 614 F.3d at 87. When considering whether the statute constituted a "presumptively lawful" restriction, the court concluded that the language fit in the first step of the analysis, which determines whether the restricted conduct was "outside the scope of the Second Amendment. *Id.* at 91. The court

[10] In *United States v. Marzzarella*, the Third Circuit found that "this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny." 614 F.3d 85, 91 (3rd Cir. 2010).

explained that the presumptively lawful restrictions listed are exceptions to Second Amendment protection. *Id.* (citing *Heller*, 554 U.S. at 627).

Because this presumption arises in the first step of the *Heller* test, it can only be rebutted by a showing that the listed conduct was *not* historically restricted. Therefore, while the burden to show that the restricted conduct falls outside the scope of the Second Amendment initially rests with the government, the burden then shifts to the challenger to rebut the presumption. *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 962-63 (9th Cir. 2014); *United States v. Chester*, 628 F.3d 673, 680-82 (4th Cir. 2010); *Hosford*, 843 F.3d at 165-67 (4th Cir. 2016).

Ultimately, if a restriction is found on the list of presumptively lawful measures, and the challenger does not rebut the presumption, the analysis may end there. *Peña v. Lindley* (*Peña I*), No. 2:09-CV-01185-KJM-CKD, 2015 U.S. Dist. LEXIS 23575, 39-40 (E.D. Cal. Feb. 25, 2015), *aff'd* 898 F.3d 969 (9th Cir. 2018) (citing *Jackson*, 746 F.3d at 960). In *Peña*, the court determined whether a California statute that restricted the "manufacture, sale, gifting, or lending of any handgun . . . that does not meet certain requirements" was constitutional. *Id.* at 3. The statute required, among other things, that manufacturers list all models of handguns on a roster (a $200.00 per-model fee), conduct safety tests, and comply with mechanical qualifications. *Id.* at 3-12. The court found that the restrictions qualified as "conditions and qualifications on the commercial sale of arms" and were therefore "presumptively lawful." *Id.* at 39-40. This conclusion ended the two-step inquiry. *Id.*

In holding this way, the court in *Peña* carefully evaluated whether the California statute was merely a condition or qualification on the commercial sale of handguns or whether it served as a prohibition. *Id.* at 32-34. The court concluded that the law did not prohibit the sale of handguns—a measure that would have impermissibly encroached on purchasers' right to acquire and bear arms—but instead only conditioned their sale. *Compare id.*, *with Ezell I*, 651 F.3d 684 (where a combination of regulations, which not only banned all firing ranges in the city but also conditioned possession of firearms on the completion of a range safety course, worked in tandem to effectively ban possession of firearms in Chicago).

Here, Mojave's zoning ordinance serves as a condition or qualification on the commercial sale of arms and is presumptively lawful. Like the statute in *Peña*, the zoning ordinance here does not prohibit the sale of firearms. Instead, the zoning ordinance is merely an example of "local government[] . . . regulat[ing] where businesses are located" for public health and safety purposes. R. at 17. Respondents cannot argue that the mere existence of a requirement that certain businesses acquire a conditional use permit, serves as a functional prohibition of that business. Indeed, the zoning ordinance here is arguably an even less restrictive measure than the requirement for a commercial firearms dealer to be licensed—a requirement that Respondent does not assert is unconstitutional. The licensure requirement dictates whether a business may *ever* engage in the commercial sale of arms, whereas the zoning ordinance merely conditions where such sales may take place. R. at 17.

Respondents' argument is, essentially, that there is not enough space left in Mojave County. However, even if this were true, that fact alone could not prove that the zoning ordinance serves as a ban or prohibition of gun sales within the county. The record indicates that there are "at least three gun stores" already operating in Mojave County. R. at 15. Additionally, a study conducted by the county showed that 15% of unincorporated Mojave County met the 800-foot requirement. R. at 7 n.7. Therefore, because the zoning ordinance does not serve as a prohibition on gun sales, but merely places conditions or qualifications on the commercial sale of guns in Mojave County, it serves as a presumptively lawful regulatory measure.

**ii. Because Mojave County's Zoning Ordinance Is Presumptively Lawful, Respondents' Facial Challenge Fails.**

If a restriction is found to be a presumptively lawful regulatory measure, step one of the *Heller* test is satisfied and the Second Amendment inquiry may end. *Jackson*, 746 F.3d at 960. However, even if this Court chooses not to end the inquiry based on this finding, it may use it to defeat Respondents' facial challenge. *See, e.g.*, *Hosford II*, 843 F.3d 161.

In *Hosford*, the plaintiff asserted that a federal statute that forbid the unlicensed "importing, manufacturing, or dealing [of] firearms" was unconstitutional both facially and as applied to the facts of his case. *Id.* at 163. The court found that the statute was presumptively lawful and therefore was not facially invalid. *Id.* at 167. In making this determination, the court noted that the statute "cover[ed] only the commercial sale of firearms," fitting it squarely into *Heller's* list of presumptively lawful measures. *Id.* at 166. Additionally, the regulation imposed a "mere condition

or qualification" and was not "so prohibitive as to turn this condition or qualification into a functional prohibition." *Id.* Lastly, the court confirmed that the "prohibition against unlicensed firearm dealing is longstanding."[11] *Id.* Because the statute fit perfectly into *Heller's* list of presumptively lawful regulatory measures, the Fourth Circuit concluded that the regulation could not be facially invalid.

Here, Respondents' facial challenge fails because the zoning ordinance is a presumptively lawful regulatory measure. Like the regulation in *Hosford*, the zoning ordinance covers only the commercial sale of arms. It does not enter the home or directly restrict any conduct of private individuals. Additionally, the zoning ordinance constitutes a condition or qualification on the commercial sale of firearms, not a prohibition or ban. The record shows that other gun stores remain in Mojave County and there are other locations within the county that comport with the ordinance for the purpose of opening a firearm retailer. R. at 7 n.7, 15. Last, restrictions on commercial arms dealing are longstanding. Scholars have noted that some states have given "localities the power to license, regulate, or even bar the commercial sale of firearms" since at least 1905. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law and Contemporary Problems 55, 75 (2017).

[11] Because the regulation fit into a category of presumptively lawful regulatory measures listed in *Heller*, the Fourth Circuit found that "longstanding" need not be evidenced by a historical analysis dating back to 1791. Instead, the court found that evidence of restrictions on the commercial sale of arms dating back to the early twentieth century was sufficiently "longstanding." *Hosford II*, 843 F.3d at 166-67.

The Mojave County zoning ordinance is a presumptively lawful condition or qualification on the commercial sale of arms. Therefore, Respondents' Second Amendment challenge wholly fails unless, under its as-applied challenge, it can rebut the presumption of validity by showing that commercial sales of arms has not historically been restricted.

### iii. A Full Historical Analysis Reveals That There Is No Right to Commercially Sell Firearms Secured by The Second Amendment.

Following this Court's decision in *Heller*, most courts that are faced with an alleged Second Amendment violation conduct at least a partial historical analysis under step one of the *Heller* test. Even where the restricted conduct falls into *Heller's* list of presumptively lawful regulatory measures, the confusion surrounding that language has led some courts to find that it is "sufficiently opaque" and a full "textual and historical review" is needed. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 683 (9th Cir. 2017).

When conducting a historical review of conduct that may be covered by the Second Amendment, *Heller* suggests that the review need not go as far back as 1791. In *Hosford*, the Fourth Circuit found that for the purposes of presumptively lawful restrictions, "longstanding" could refer to restrictions only coming into existence in the 20th century. 843 F.3d at 166-67. Specifically, the *Hosford* court looked to where the D.C. Circuit "found prohibitions on the possession of firearms by felons[12] to be

[12] Prohibitions on felons possessing firearms are notably included on this Court's list of presumptively lawful restrictions in *Heller*. 554 U.S. at 626-27 n.26.

longstanding 'although states did not start to enact th[ose prohibitions] until the early 20th century.'" *Id.* (citing *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011)). Additionally, the court looked to the Third Circuit, which found New Jersey's permit requirement for the possession of handguns to be "longstanding," though the first permit requirements were enacted 1924. *Id.* (citing *Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013)).

Scholars, too, have taken note of longstanding restrictions on the commercial sale of firearms. Robert Spitzer notes that "[a]t least eight states regulated, barred, or licensed firearm sales" throughout history. Spitzer, *supra*, at 75. Florida, Georgia, and North Carolina granted localities the power to "license, regulate, or even bar the commercial sale of firearms" in 1927, 1902, and 1905, respectively. *Id.* New Hampshire, New Jersey, and New York established restrictions on the commercial sale of arms as early as 1911 that imposed requirements like keeping detailed sale logs or instituted prohibitions like preventing pawn brokers from selling guns. *Id.* In West Virginia, the legislature passed a law in 1925 that banned the public display of firearms by dealers and required retailers to create sale records that were to be reported to the "local department of public safety." *Id.*

Restrictions on the commercial sale of firearms are longstanding. This shortened historical inquiry, together with the fact that conditions and qualifications on the commercial sale of guns are presumptively lawful regulatory measures, should lead this Court to conclude that there is no freestanding right to sell firearms found in the Second Amendment. Regardless of whether the right to sell was contemplated

by the framers in 1791, engaging in commercial retail of firearms has become one of the most regulated gun-related activities, since at least the turn of the twentieth century. Consequently, Mojave County's zoning ordinance does not burden a standalone or core right under the Second Amendment. The ordinance places reasonable restrictions on conduct that has been, understandably, regulated for over a century.

Despite this Court categorizing conditions and qualifications on commercial sale of firearms as presumptively lawful, at least one court has found it prudent to conduct a full historical review, dating back to the adoption of the Second Amendment. Following in the footsteps of such cases as *Heller* and *Ezell I*, the Ninth Circuit in *Teixeira* surveyed the depths of American regulatory law to determine whether a right to sell firearms has ever been recognized. 873 F.3d 670 (9th Cir. 2017).

The *Teixeira* court began by reiterating what this Court had identified as the "core" Second Amendment right in *Heller*: the right of law-abiding citizens to keep and bear arms for self-defense. *Id.* at 683-85. The court highlighted the contrast between the core right of the Second Amendment and the "right" to sell arms. *Id.* The core right was tied to "personal liberties" as well as preservation of one's person and property. *Id.* at 684. Conversely, the court could find no support that commercial entities held such personal rights, apart from the core right of individuals. *Id.* Notably, the court could not even find historical evidence of a *personal* right to sell arms "unconnected to the rights of citizens to 'keep and bear' arms." *Id.* at 685-87.

Though the court found no evidence of a right to sell arms, it did find evidence of restrictions on such conduct. As far back as the mid-1600s, colonies restricted certain commercial sales of guns. *Id.* at 687. "[T]he colonies of Massachusetts, Connecticut, Maryland, and Virginia all passed laws in the first half of the seventeenth century making it a crime to sell, give, or otherwise deliver firearms or ammunition to Indians." *Id.* Additionally, "[a]t least two colonies also controlled more generally where colonial settlors could transport or sell guns." *Id.* Ultimately, based on a historical review of which rights were contemplated at the time the Second Amendment was adopted, the Ninth Circuit concluded that "the Second Amendment does not confer a freestanding right to sell firearms . . . ." *Id.* at 687.

Under both a truncated and full historical review, there is no evidence of a standalone right to sell firearms. In fact, history shows that quite the opposite is true. Centuries of restrictions on the commercial sale of arms proves that such conduct, on its own, was not considered a right at the time the Second Amendment was adopted. Furthermore, due to the longstanding nature of such restrictions, and the public need for regulation of commercial arms dealers, this Court has considered "conditions and qualifications on the commercial sale of arms" to be "presumptively lawful." *Heller*, 554 U.S. 626-27 n. 26. Here, because the Mojave County zoning ordinance constitutes a condition or qualification on the commercial sale of arms, it is presumptively lawful. Additionally, because the sale of arms has historically not been considered a right secured by the Second Amendment, the zoning ordinance here governs only activity

that falls outside the scope of the Second Amendment. Therefore, the zoning ordinance here escapes step one of the *Heller* test and the inquiry ends.

### 2. The Zoning Ordinance Here Serves as Only a Regulation Not a Prohibition of Sales and Therefore Does Not Implicate Citizens' Core Right to Acquire and Bear Arms.

Courts have identified two general ways the Second Amendment can be violated. First, there are cases where a law directly burdens a standalone right. For instance, in *Heller*, this Court evaluated a D.C. statutory scheme that "generally prohibit[e] the possession of handguns." 554 U.S. at 574. This Court concluded that the city had directly violated the core right of the Second Amendment and therefore affirmed the circuit court's striking of the law. *Id.* at 635-36.

The second way courts have found that the government may violate the Second Amendment is through prohibiting conduct that is so closely related to a core right that the prohibition amounts to a substantial burden on the core right itself. In *Ezell I*, the Seventh Circuit analyzed a set of laws that worked in tandem to effectively ban firearm training and possession. 651 F.3d at 691. Though the laws did not touch upon the core right identified in *Heller*, the court still found that they were so prohibitive of conduct that is related to that right, that they violated the Second Amendment. *Id.* at 711.

The fact that certain conduct is related to the core right does not mean that the conduct itself constitutes a Second Amendment right. The Second Circuit rejected an argument that there is a freestanding Second Amendment right to "firearms practice." *NYRSP v. City*, 883 F.3d at 58. The court found that "regulations amounting to a ban" burdened the core right to keep and bear arms. *Id.* In that case,

only "regulations that sharply restrict[ed]" the ability to firearms practice implicated the core Second Amendment right because they constituted a "substantial burden" on the right. *Id.* There was no standalone right to firearms practice, and "minimal regulation" of such conduct would not implicate the Second Amendment because the core right would not be burdened. *Id.*

Similarly, in *Jackson*, the Ninth Circuit found that a total ban on the sale of hollow-point ammunition burdened individuals' core right to keep and bear arms for self-defense. 746 F.3d 953, 967-68. In making this determination, the court pointed to *Heller* where this Court discussed the difference between the lesser burden of gunpowder storage laws with the greater burden of a total handgun ban. *Id.* The court reasoned that because the sale of ammunition was *prohibited*, it encroached on the core second amendment right. *Id.* at 968.

Cases like *NYRSP v. City* and *Jackson* highlight an important difference between *prohibition* and *regulation*. "Whereas the 'imposi[tion] of conditions and qualifications on the commercial sale of arms' is 'presumptively lawful,' the prohibition of commercial sale 'would be untenable,' because it would "effect[] a 'destruction of the [Second Amendment] right . . . .'" *Peña*, 2015 U.S. Dist. LEXIS 23575 at *32-33 (E.D. Cal. Feb. 25, 2015) (quoting *Heller*, 554 U.S. at 627 n.26; *Marzzarella*, 614 F.3d at 92 n.8; and *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1168 (9th Cir. 2014)).

The Fourth Circuit also recognizes the prohibition/regulation distinction. In *Hosford*, the circuit court found that "[t]hough framed as a prohibition against

unlicensed firearm dealing, the law is in fact a requirement that those who engage in the commercial sale of firearms obtain a license" and that "[n]either the application procedure nor the fee are so prohibitive as to turn this *condition* or *qualification* into a functional *prohibition*." 843 F.3d at 166 (emphasis added). There, the court found that the law burdening the sale of arms was not prohibitive enough to burden the core right to keep and bear for self-defense. *Id.* at 168.

Though certain conduct may not, standing alone, receive protection under the Second Amendment, some laws might be so prohibitive that they, in effect, burden the core right identified in *Heller*. Here, Mojave County's zoning ordinance is not "so prohibitive as to turn [a] condition or qualification into a functional prohibition." *Id.* at 166. Unlike the laws in *Ezell I* or the ammunition ban in *Jackson*, the county's ordinance does not effectively ban the sale of firearms. In fact, one of at least three gun stores in Mojave is located only ten miles from the location Respondents wished to open their store. R. at 4. Instead, like the "Unsafe Handgun Act" in *Peña* and the licensure requirement in *Hosford*, the zoning ordinance here represents only a regulation on the sale of arms, not a prohibition.

Furthermore, Respondents' assertion that the ordinance "effectively 'red-lines gun stores out of existence in unincorporated Mojave County'" is inaccurate. R. at 7. While Respondents argue that its study found that there were no locations in the county that would be "available and suitable for firearm retail sales," the county's own study revealed that there is at least 15% of unincorporated Mojave County that "could comply with the 800-foot rule." R. at 7 n. 7. Therefore, it is only the *suitability*,

not the *availability*, of space in the county that is in question. The record is unclear as to whether any of the 15% of unincorporated Mojave County would be *practically* suitable for a retail gun shop. R. at 7. However, it is clear that it was solely the 800-foot requirement that prevented Respondents from opening their location in this instance. Indeed, twice Mojave County found that "there was a public need for a licensed firearms dealer." R. at 4, 6. Additionally, Respondents' store met all other requirements of the zoning ordinance. R. at 4. Therefore, the record indicates that, barring any practical limitations, Respondents would likely succeed in opening their retail location if they did so in part of the 15% of unincorporated Mojave that complies with the 800-foot rule.

The zoning ordinance here constitutes a condition or qualification on the commercial sale of arms. As such, it is presumptively lawful under *Heller*. Furthermore, a historical inquiry reveals that the commercial sale of firearms has never been recognized as a standalone Second Amendment right. Last, because the zoning ordinance does not constitute a functional ban on the sale of arms in Mojave County, the core Second Amendment right is not implicated and Respondents' conduct is not protected.

## CONCLUSION

For these reasons, the Petitioner respectfully requests that this Court reverse the decision of the Fourteenth Circuit Court of Appeals and reinstate the decision of the District Court for the Central District of New Tejas.