NO. C18-0111-1

IN THE

Supreme Court of the United States

OCTOBER TERM 2018

COUNTY OF MOJAVE,
Petitioner,

—v.—

BROTHERHOOD OF STEEL, INC., AND ROGER MAXSON,
Respondents.

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

BRIEF FOR PETITIONER

TEAM # 38
Counsel of Record

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QUESTIONS PRESENTED

I. When Second Amendment claims are suitable for means-ends scrutiny, must courts apply some form of heightened scrutiny or might rational-basis review suffice?

II. Does the Second Amendment secure a right to sell firearms?

PARTIES TO THE PROCEEDINGS

Petitioner, Mojave County, is a municipality located in the state of New Tejas, with a population of 482,478 people.

Respondent, Roger Maxson, is a retired E-6, Staff Sergeant for the United States Army, and a certified Red 888 Guns armorer and gunsmith. Respondent Brotherhood of Steel, Inc., is a limited liability company formed by Maxson in June 2011.

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The opinion of the United States District Court for the Central District of New Tejas is unreported. The unreported opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 2–18.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 1, 2018. Petitioner timely filed a petition for writ of certiorari, which this Court granted. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable portions of The United States Constitution and The Mojave County Statutes appear in the Appendix at 39.

STATEMENT OF THE CASE

The Tenth Amendment grants police powers—the rights and powers "not delegated to the United States"—to every state to establish and enforce laws protecting the welfare, safety, and health of its citizens. U.S. Const. amend. X. In an effort to protect public safety, prevent crime and other secondary effects of gun stores, and preserve the character of residential zones, Mojave County, New Tejas[1] passed multiple ordinances to *regulate* and permit certain land use involving the sale of firearms. R. at 3, 13–14. These ordinances require, among other things, (1) a special review of the proposed business prior to granting a Conditional Use Permit, and (2) that any businesses selling firearms in unincorporated areas of the County be at least 800 feet away from "schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially zoned districts," (hereinafter "Zoning Ordinance"). R. at 3–4; Mojave Cty., NTX., Code § 17.54.131.

A. Respondent's Initial Interactions with Planning Department and Zoning Board

Respondent, Roger Maxson, formed Brotherhood of Steel, Inc. in June 2017 with the intention of opening a gun store and shooting range in Mojave County. R. at 2. Pursuant to the ordinance requirements in the city, Respondent applied for a Conditional Use Permit from the Mojave County Community Development Agency. R. at 4. Initially, and upon review of Respondent's application, the Staff of Mojave County Community Development Agency Planning Department (the "Planning

[1] Mojave County, New Tejas has a population of just under 500,000 people. R. at 2 n.1.

Department") found: (1) there was a public need for a licensed firearms dealer, (2) the proposed use was compatible with other land use, and (3) the gun shop would not adversely affect the health or safety of the residents of Mojave in the area. R. at 4. Nevertheless, this initial report also found Respondent's proposed location did not comply with the Zoning Ordinance distance requirements, because the shop location was within 800 feet of an inactive church. R. at 5. As a result, the Planning Department recommended that the West County Board of Zoning Adjustments (the "Zoning Board") deny Respondent's permit application. R. at 5.

Following this initial recommendation, the Zoning Board held a public hearing on Respondent's Conditional Use Permit Application. R. at 5. After providing Respondent an opportunity to offer testimony in support of his application, the Planning Department filed a revised report—again noting Respondent's proposed store location violated the ordinance. R. at 5. Nevertheless, on December 29, 2011 the Zoning Board passed a resolution granting Respondent a variance from the zoning ordinance and approving Respondent's application for a Conditional Use Permit despite the Planning Department's recommendation. R. at 6.

B. Shady Sands Home Owners Association Appeals

Following the Zoning Board's approval, the Shady Sands Home Owners Association (the "HOA") filed an appeal in the County Commissioners' Court. R. at 6. The County Commissioners' Court—acting through a majority of its members—sustained the HOA's appeal effectively revoking Respondent's Conditional Use Permit. R. at 6.

As a result, Respondent claims he is unable to find any property in the unincorporated area of Mojave County that both satisfies the 800-foot rule and is suitable for his business. R. at 7. This is despite the fact that Respondent refuses to consider any of the 15% of the total Mojave County acreage that would comply with the 800-foot rule. R. at 7 n.7. In the end, Respondent filed a complaint in Federal District Court challenging the County Commissioners' Court's decision denying the variance and Conditional Use Permit. R. at 7.

C. Procedural Posture

Initially, Respondent filed suit in the United States District Court for the Central District of New Tejas, alleging violations of due process and equal protection. R. at 7. Moreover, Respondent argued the Zoning Ordinance was impermissible under the Second Amendment. R. at 7. Ultimately, the District Court denied Respondent's motion and dismissed the equal protection and Second Amendment claims with leave to amend.[2] R. at 7.

In his amended complaint, Respondent challenged the Zoning Ordinance through four separate claims arising under the Equal Protection Clause and Second Amendment. R. at 7–8. This time, the District Court Granted Mojave County's 12(b)(6) motion and dismissed all of Respondent's claims. R. at 8.

Respondent appealed, and a divided Court of Appeals for the Fourteenth Circuit affirmed the District Court's dismissal of Respondent's Equal Protection claims. R. at 8, 14. Nevertheless—applying a heightened scrutiny analysis—the

[2] Respondent stipulated to the dismissal of his due process claims. R. at 7.

court reversed the dismissal of Respondent's Second Amendment claims. R. at 14. As a result, the case was remanded for further litigation on Respondent's Second Amendment claims. R. at 14. This Court granted certiorari and should now reverse the decision of the Fourteenth Circuit to reverse the District Court's dismissal of Respondent's Second Amendment claims. R. at 1.

SUMMARY OF THE ARGUMENT

I.

The accepted framework for evaluating a Second Amendment claim dictates that the reviewing court must determine which level of scrutiny is appropriate to apply to the challenged regulation only if the court first determines that the challenged regulation burdens conduct protected by the Second Amendment. This Court recognized that the core protection of the Second Amendment is the right to keep and bear firearms for the purpose of self-defense. Following that declaration, circuit courts have concluded that the Second Amendment must also protect ancillary rights, necessary to carry out the conduct of possessing arms for self-defense.

The Mojave County Zoning Ordinance does not burden the core or ancillary protections of the Second Amendment. Respondent fails to show how the Zoning Ordinance's regulation of firearms sales locations implicates Mojave County residents' right to possess firearms for self-defense.

Because the Zoning Ordinance does not implicate the core or ancillary rights of the Second Amendment, Respondent's alleged Second Amendment claim is actually a mere zoning ordinance dispute. A zoning ordinance that does not implicate a fundamental right is a valid exercise of the County's police power unless Respondent can show that the ordinance bears no rational relation to public health, safety, morals or general welfare. Respondent has not shown that the Ordinance does not rationally relate to public safety, the legitimate government interest offered by the County.

Because the Zoning Ordinance does not burden conduct protected by the Second Amendment, and further does not present a viable Second Amendment claim, this Court need not decide whether heightened scrutiny must be applied to a Second Amendment claim suitable for means-end scrutiny.

Nevertheless, even if the Court decides Respondent's Second Amendment claim is appropriate for means-end scrutiny, the sliding scale approach dictates that, because the Zoning Ordinance merely regulates conduct peripheral to the core of the Second Amendment, ration-basis review will suffice. The Zoning Ordinance passes muster under rational-basis because it is rationally related to Mojave County's legitimate interests in public safety, crime prevention, and preservation of residential character.

Nevertheless, were the Court to mandate a heightened level of scrutiny, the Zoning Ordinance would still pass constitutional muster. Given the fact that the ordinance merely regulates conduct peripheral to Second Amendment core, intermediate scrutiny would be the appropriate level of review. As the Zoning Ordinance qualifies as a presumptively lawful regulatory measure, as recognized by this Court, the ordinance is substantially related to Mojave County's important interests.

II.

Respondent alleges that the Zoning Ordinance violates his Second Amendment right to sell firearms. To determine whether the challenged regulation burdens conduct protected by the Second Amendment, the Court must engage in a textual and

historical analysis of the Second Amendment to determine whether the conduct was understood to be protected by the Second Amendment at the time of ratification.

Looking to the text of the Second Amendment, the focus of the protected right is "people" who would keep and bear arms. The Amendment makes no mention of any right or ability to sell or engage in firearms commerce. Starting from the English Bill of Rights, the predecessor to the Second Amendment, and analyzing the history of the right to keep and bear arms up to the time of ratification, no authority suggests that the right to sell arms was ever conduct considered to be protected.

In fact, there is historical evidence that the commercial sale of firearms has been regulated since early colonial America. The history is consistent with this Court's recognition of laws that impose conditions and qualifications on the commercial sale of firearms, such as the Zoning Ordinance, as longstanding and presumptively lawful regulatory measures. The circuit courts have concluded the "presumptively lawful regulatory measures" identified by this Court are lawful because they burden conduct that has been historically considered to be outside the scope of the Second Amendment, such as the sale of firearms.

Looking again to the history of the Second Amendment, it is evident that the founders recognized the right to access or acquire firearms is necessary to the right to possess firearms for self-defense. In some instances, this right to acquire firearms might align with a dealer's ability to sell firearms, but this does not mean there is a freestanding right—independent of the right to acquire—to engage in the sale of firearms.

STANDARD OF REVIEW

Under a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a plaintiff's complaint pleading obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege sufficient facts, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the standard for plausibility does not require probability, it does require "more than a sheer possibility that the defendant has acted unlawfully." *Id.* Determining plausibility of a claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. In making its determination, the Court must consider the factual allegations in the complaint as true, however, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). This Court reviews questions of law de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

ARGUMENT AND AUTHORITIES

I. This Case Does Not Present a Second Amendment Claim Suitable for Means-Ends Scrutiny and Therefore the Court Need Not Determine Which Level of Scrutiny to Apply.

The Second Amendment provides that "a well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. This Court has twice considered the scope of rights codified in the Second Amendment and has held the Second Amendment indisputably protects a fundamental, individual right to possess a firearm for self-defense. *See generally District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago,* 561 U.S. 742 (2010). This right is fully applicable to the states through the Fourteenth Amendment. *See McDonald,* 561 U.S. at 750. In both instances, this Court overturned laws that were, in effect, near-total bans on the possession of handguns—laws deemed categorically unconstitutional under any level of scrutiny. *See Heller,* 554 U.S. at 635 (holding a general ban on handguns violates the Second Amendment); *McDonald,* 561 U.S. at 748 (applying *Heller's* holding to the states through the Fourteenth Amendment). Thus, this Court has yet to explicitly articulate a test for evaluating less restrictive regulations challenged under the Second Amendment. *See Heller*, 554 U.S. at 635 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

Filling the gap, the circuit courts adopted a two-step inquiry for evaluating laws and regulations challenged under the Second Amendment.[3] *See United States*

[3] The Third Circuit first established the two-step test for evaluating Second Amendment challenges in *Marzzarella*. 614 F.3d 85, 89 (3d Cir. 2010). Reading *Heller* to suggest guidance from First Amendment principles, the Third Circuit analogized the two-step process for analyzing whether regulations encroach on free speech to fit in the context of the Second Amendment. *Id.* at 89 n.4. Since

v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (reading *Heller* to suggest a two-step approach to Second Amendment challenges). At the first step, courts evaluate whether the challenged regulation burdens conduct protected by the Second Amendment. *Id*. If the court concludes that it does, the court then determines which level of means-end scrutiny to apply. *Id.* Conversely, if the court determines the challenged regulation does not burden conduct protected by the Second Amendment, the claim is not suitable for means-end scrutiny and the inquiry is complete. *See id.* This is particularly important in the instant case, as regulations burdening conduct falling outside the scope of the Second Amendment pass constitutional muster under any level. *See id.*

With this in mind, the only scenario where this Court would need to address the appropriate level of means-end scrutiny for suitable Second Amendment claims is if the Court determines: (1) Respondent presents a viable Second Amendment claim regarding the Zoning Ordinance; and (2) the Zoning Ordinance burdens conduct protected by the Second Amendment. *See id.* This is not that case. Nevertheless, if this were that case, the Zoning Ordinance's relation to its stated

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Marzzarella, every circuit has accepted the two-step test as the framework for evaluating Second Amendment claims. *See generally Powell v. Tompkins*, 783 F.3d 332 (1st Cir. 2015); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013); *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol*, 700 F.3d 185 (5th Cir. 2012); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016); *Ezell v. City of Chicago ("Ezell II")*, 846 F.3d 888 (7th Cir. 2017); *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011); *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244 (D.C. Cir. 2011).

purposes would pass constitutional muster under the heightened level of intermediate scrutiny, much less rational-basis review.

A. Respondent's Claim is Not Suitable for Means-End Scrutiny Because the Challenged Zoning Ordinance Does Not Burden Conduct Protected by the Second Amendment.

This Court limited its recognition of the Second Amendment's scope to its core protection—an individual's right to keep and bear arms for self-defense. *See generally Heller*, 554 U.S. 570. Since first articulated in *Heller*, circuit courts have held ancillary rights necessary to the exercise of this core right also fall under Second Amendment protection. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); *Ezell v. City of Chicago ("Ezell I")*, 651 F.3d 684, 708 (7th Cir. 2011). Recognized ancillary rights include: (1) the right to obtain bullets necessary to use firearms, (2) the right to maintain proficiency in firearms use, and (3) the right to acquire firearms. *See Jackson*, 746 F.3d at 967 (right to obtain bullets); *Ezell I*, 651 F.3d at 708 (right to maintain proficiency in firearm use); *Teixeira*, 873 F.3d at 677 (right to acquire firearms). Respondent alleges the Zoning Ordinance's limitation on the sale of firearms burdens the Second Amendment rights of his potential customers—the residents of Mojave County. R. at 10, 16. Specifically, Respondent alleges the Zoning Ordinance forces residents to travel to less convenient locations to exercise their rights to acquire firearms and ammunition and to access shooting ranges—acts amounting to an unconstitutional infringement of their Second Amendment right. R. at 16. Nevertheless, Respondent fails to show how the Mojave

County Zoning Ordinance burdens any citizen's individual right to keep and bear arms or the rights ancillary thereto—facially or as applied. In other words, Respondent fails to state a claim in which the appropriate level of means-end scrutiny would even need to be considered. *See* Fed. R. Civ. P. 12(b)(6).

1. Respondent's Inability to Sell Firearms at a Specific Location Does Not Violate Mojave County Citizens' Right to Legally Acquire Firearms.

In *Teixeira v. Cty. of Alameda*, the Ninth Circuit considered a case similar to our own. 873 F.3d 670 (9th Cir. 2017) (en banc). John Teixeira sought to open a shop in an unincorporated area of Alameda County that would sell firearms and accessories, provide repairs, and offer training and certification. *Id.* at 673–74. The county required firearms sellers to obtain a permit pursuant to the county's zoning ordinance. *Id.* at 674. The ordinance requires businesses selling firearms be located at least five hundred feet away from various specified types of establishments. *Id.* The county's board of supervisors denied Teixeira's permit application, because Teixeira's proposed location violated the ordinance's distance requirement. *Id.* at 675–76. Teixeira alleged that the zoning ordinance made it "virtually impossible" to open a gun shop in the unincorporated area of the county, and that he was unable to identify any property that would both satisfy the ordinance and suit his purposes.[4] *Id.* at 676.

[4] The court notes,

> [a]lthough a number of Alameda County municipalities regulate the location of firearms sales, *see, e.g.*, Oakland, Cal., Mun. Code § 5.26.070(I), the complaint provides no information as to whether there are viable locations in those municipalities or any others in the County in which a new gun store could

In response, Teixeira sued the county, challenging the constitutionality of the zoning ordinance. *Id.* One of his many allegations was that the zoning ordinance violated his customers' Second Amendment rights—specifically the rights to acquire firearms and access training. *Id.* Ultimately, the district court dismissed Teixeira's amended complaint for failure to state a claim, and the Ninth Circuit affirmed. *Id.* at 690. The Ninth Circuit held, Teixeira failed to state a claim that the challenged ordinance meaningfully inhibited county residents from being able to acquire firearms within their county. *Id.* at 680. Noting Teixeira's allusion to the ordinance as a restriction on "convenient" access to a local gun shop, the court clarified that there is no right to have a gun shop in a particular location, as long as citizens' access to firearms is not meaningfully constrained.[5] *Id.* at 679–80. The court was satisfied with citizens' ability to acquire firearms when the facts showed that county residents,

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> be located. . . . We need not determine, however, whether the complaint plausibly alleges meaningful interference with Teixeira's sale of firearms, as we conclude that the Second Amendment does not independently protect the ability to engage in gun sales.

Teixeira, 873 F.3d at 682 n.16.

[5] *See also Nordyke v. King*, 644 F.3d 776, 788 (9th Cir. 2011) ("regulations of gun sales do not substantially burden Second Amendment rights merely because they make it more difficult to obtain a gun."); *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015) ("Requiring an individual to drive to one part of a city as opposed to another in order to purchase a firearm does not, on its face, burden the core right to possess a firearm for protection."); Michael Hiltzik, *An Appeals Court Upholds a Gun Store Ban, Despite the 2nd Amendment*, LA Times (Oct. 12, 2017, 10:25 AM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-9th-circuit-guns-20171012-story.html ("[H]owever one interprets the Constitution's guarantee of a right to "keep and bear arms," it doesn't mean that gun shops have an absolute right to locate themselves anywhere they wish.").

a total population of 1,556,657 people, could freely purchase firearms from any of the other ten gun shops located throughout the county. *Id.* at 679.

Like Teixeira, Respondent's allegations fail to establish that: (1) the Zoning Ordinance inhibits Mojave County residents' ability to acquire firearms within the county, and (2) the allegations of inconvenience are insufficient to establish a meaningful constraint on access to firearms. The record indicates there are at least three gun shops located in Mojave County, the closest being just ten miles from Respondent's proposed location. R. at 4, 15. Moreover, Mojave County residents can access and purchase firearms at various gun conventions that travel throughout the state. *Id.* Although the Zoning Ordinance prohibits Respondent from opening a gun shop at a restricted location, Mojave County residents remain free to acquire firearms from any of the other shops located in their county.[6] R. at 2. As in *Teixeira*, aside from Respondent's bare allegations on behalf of prospective customers, "conspicuously missing from this lawsuit is any honest-to-God resident of [the county] complaining that he or she cannot lawfully buy a gun nearby." *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1064 (9th Cir. 2016) (Silverman, J., dissenting), *vacated and reh'g en banc granted*, 873 F.3d 670 (9th Cir. 2017).

[6] To better illustrate the analogy, the Ninth Circuit in *Teixeira* was satisfied that county residents were not constrained in their ability to acquire firearms when there were at least ten gun stores throughout the county. *Teixeira*, 873 F.3d at 679. With a population of 1,556,657 people, the ratio between residents and gun stores is approximately 155,566 to 1. *Id.* In the case before us, the record indicates there are at least three gun stores operating in Mojave County. R. at 15. With a population of 482,478 people, the ratio between residents and gun stores in Mojave County is approximately 160,826 to 1. R. at 2 n.1. This difference in ratios is marginal.

2. The Challenged Zoning Ordinance Only Applies to the Sale of Firearms and Has No Effect on Respondent's Ability to Provide Training and Certification Services.

The lower court likens this case to *Ezell v. City of Chicago ("Ezell I")* by emphasizing the fact that Respondent's proposed gun shop would also provide firearm training services, including safety classes and certification. R. at 10. In *Ezell I*, the Seventh Circuit evaluated a regulation prohibiting all publicly accessible firearm ranges within the city limits of Chicago. 651 F.3d at 708. There, the Seventh Circuit concluded that the regulation was a "serious encroachment" on the ancillary Second Amendment right to maintain proficiency in firearm use. *Id.* ("The City's firing-range ban in not merely regulatory; it *prohibits* the 'law-abiding, responsible citizens' of Chicago from engaging in target practice in the controlled environment of a firing range. This is a serious encroachment in the right to maintain proficiency in firearm use.").

In this case, the lower court unconvincingly stated that Respondent properly challenged the Zoning Ordinance under the Second Amendment for its potential interference with Respondent's proposed training services. R. at 10. The lower court's reasoning fails because the Zoning Ordinance challenged in this case presents no potential interference with Respondent's training services. The Zoning Ordinance only applies to businesses engaged in the sale of firearms and has no independent application to firearm training or certification. This means that if Respondent sought only to open a firearm training and certification business at his proposed property, the Zoning Ordinance poses no obstacle. *See* R. at 19; Mojave Cty., NTX., Code

§ 17.54.131 ("no conditional use permit for firearms *sales* shall issue unless . . . the subject premises us not within eight hundred (800) feet of any of the following . . . .") (emphasis added). By expressly banning publicly accessible firearm ranges in the city, the regulation in *Ezell I* directly and substantially interfered with citizens' right to maintain firearm proficiency. *See Ezell I*, 651 F.3d at 708. No interference with such a right can be shown in this case, because the challenged ordinance only applies to firearms sales.

Here, Respondent does not allege that the Zoning Ordinance burdens his, or his potential customers', individual right to keep and bear arms for self-defense. Additionally, Respondent fails to show how the challenged Zoning Ordinance burdens residents' right to acquire firearms. Finally, Respondent cannot even show that the ordinance interferes with the right to maintain firearm proficiency or any other ancillary rights protected by the Second Amendment. As a result, Respondent's Second Amendment challenge should be resolved at the first step of the inquiry. Because the Zoning Ordinance does not burden conduct protected by the Second Amendment, the ordinance is constitutional and scrutiny considerations are unnecessary. *See Marzzarella*, 614 F.3d at 89 ("If it does not [burden conduct falling within the scope of the Second Amendment], our inquiry is complete.").

B. Respondent's Claim Presents a Mere Zoning Dispute in Which the Appropriate Level of Review is Rational-Basis.

The above analysis supports the district court's conclusion that Respondent does not present a viable Second Amendment claim. R. at 8. Respondent alleges that, in effect, the Zoning Ordinance "red-lines gun stores out of existence in

unincorporated Mojave County" because no parcels of land suitable for firearm retail comply with the 800-foot rule. R. at 7. What Respondent alleges is a mere zoning dispute—a weak due process claim disguised as a Second Amendment violation.[7] *See Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood*, 699 F.2d 303 (6th Cir. 1983) (evaluating a regulation under due process after concluding that it did not burden plaintiff's First Amendment right to religious freedom as alleged); *see also* Elie Mystal, *How Long Before the Second Amendment is Perverted to Include the Right to "Sell" Arms*, Above L. (Oct. 12, 2017, 7:00 PM), https://abovethelaw.com/2017/10/how-long-before-the-second-amendment-is-perverted-to-include-the-right-to-sell-arms/ ("[T]hat doesn't sound to me like a fusillade attack on the Second Amendment, it sounds like the most basic of zoning regulations."). Respondent is not fighting for his right to keep and bear arms, but rather for the right to use his property for his desired purpose.

Similarly, in *Koscielski v. City of Minneapolis*, the city enacted a zoning ordinance requiring firearms retailers to be located within particular zones sufficiently distant from daycares and churches. 435 F.3d 898, 900 (8th Cir. 2006). A firearms dealer challenged the constitutionality of the ordinance, arguing that it impermissibly prohibited firearms dealers from locating within the city. *See id.* After concluding that the argument did not touch on a fundamental right, the Eighth

[7] We recognize that Respondent originally pled a due process claim which was dismissed with stipulation, a decision with which we agree. R. at 7. Nevertheless, we present this argument to highlight the fact that although Respondent failed to present a viable due process claim, he has also failed to present a viable Second Amendment claim.

Circuit held that, to prove a due process violation, the dealer had to prove the ordinance failed rational-basis review. *See id* at 902. The Eight Circuit upheld the zoning ordinance, because the ordinance's purpose—protecting public safety—was legitimate, and the dealer failed to establish his substantive due process violation. *See id.* at 902–03. Like *Koscielski*, Respondent challenges a zoning ordinance that regulates the location of firearms sales within a municipality. R. at 3, 7. Respondent's argument does not touch on a fundamental right, and thus should be evaluated under rational-basis review.

In the context of county zoning ordinances, an individual's substantive due process right to property is weighed against the deference given to local governments in exercising their police powers. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). In *Village of Euclid v. Ambler Realty Co.*, this Court established that zoning ordinances are legitimate exercises of a local government's police power, so long as the ordinances are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* at 395. The scope of a local government's police power is vast and is entitled to substantial deference from the courts. *See Powell v. Pennsylvania,* 127 U.S. 678, 685 (1888) ("The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large."). Zoning ordinances passed in the exercise of police powers are presumptively valid, and only deemed unconstitutional

when they bear no rational relation to the health, morals, safety, and general welfare of the community.[8] *See Thomas Cusack Co. v. Chicago,* 242 U.S. 526, 531 (1917).

Although a due process claim is not presently before this Court, and the constitutional validity of Mojave County's exercise of police powers need not be decided, evaluating the Zoning Ordinance in this context accentuates Respondent's failure to present a viable Second Amendment claim. The Zoning Ordinance's rational relation to safety and general welfare is evidence of the County's stated interests in its enactment. R. at 13. The County declares an interest in protecting public safety and preventing harm, specifically, protecting against potential secondary effects of gun stores and preserving the character of residential zones. R. at 13–14. Given the deference afforded to local governments such as Mojave County in exercising police powers, and the minimal burden on the County to prove a rational relation, it is clear that the Zoning Ordinance would be constitutional even if Respondent properly pled a due process claim.[9] *See generally Koscielski*, 435 F.3d 898.

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[8] *See also Lydo Enter., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("Zoning ordinances are presumptively valid and local governments have broad power to zone and control land use."); *Kuzinich v. Santa Clara Cty.,* 689 F.2d 1345, 1347 (9th Cir. 1982) ("zoning is a valid exercise of the police power"); *Am. Tower Corp. v. City of San Diego,* 763 F.3d 1035,1059 (9th Cir. 2014) ("Municipal decisions like those at issue here [regarding zoning] 'are presumptively constitutional'" (quoting *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir.1990))).

[9] Because zoning ordinances are a presumptively lawful exercise of police power, the burden would actually fall on Respondent to rebut the Zoning Ordinance's presumption of validity. *See* Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption"); *see also*

C. If the Court Determines the Zoning Ordinance is Suitable for Means-End Scrutiny, Rational-Basis Review Would Still be the Appropriate Standard to Apply.

If this Court concludes the challenged Zoning Ordinance in some way implicates a Second Amendment right, the second step of the *Marzzarella* inquiry requires determining which level of scrutiny is appropriate for evaluating the ordinance's constitutionality. *See Marzzarella*, 614 F.3d at 89. While the circuit courts agree to the framework for evaluating Second Amendment claims, they are split as to whether rational-basis is an appropriate level of review at the second step. *See generally United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 686 (6th Cir. 2016); *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). This case presents a scenario in which rational-basis is the appropriate level.

Although some circuit courts interpret *Heller* as mandating a heightened level of scrutiny for reviewing Second Amendment challenges, other circuits support a "sliding scale approach" to determining the applicable level. *See United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). The Second Circuit has explicitly denied the necessity for heightened scrutiny in saying, "[g]iven *Heller*'s emphasis on the weight of the burden imposed by the D.C. gun laws, we do not read the case to mandate that any marginal, incremental or even appreciable restraint on the right

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Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1352 (9th Cir. 1985) ("where a plaintiff makes a prima facie showing of infringement of First Amendment rights, the presumption of validity of a zoning ordinance disappears"). Respondent has failed to show the Zoning Ordinance is a violation of the Second Amendment and has failed to rebut the Zoning Ordinance's presumption of validity.

to keep and bear arms be subject to heightened scrutiny." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). Rather, the Second Circuit indicates heightened scrutiny is saved for instances, like *Heller*, where the restriction operates as a substantial burden on the core right to possess firearms for self-defense. *See id.* The sliding scale approach dictates that the level of scrutiny depends on two variables at play in Second Amendment challenges: (1) how close the burdened conduct is to the core of the Second Amendment protection, and (2) how severity of the challenged law's burden on the conduct. *See United States v. Skoien,* 587 F.3d 803, 809 (7th Cir. 2009).

If the law severely or "substantially" burdens the core Second Amendment right to possess firearms for self-defense, the sliding scale approach indicates strict scrutiny would be appropriate. *See Ezell I*, 651 F.3d at 708 ("a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end . . . ."). If the law's burden is less severe, or only burdens ancillary Second Amendment rights, intermediate scrutiny is more appropriate. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny because the law in question did not burden the core right of the Second Amendment). If the law merely regulates conduct that, if anything, is at the periphery of the Second Amendment, rational-basis would suffice. *See United States v. Decastro*, 682 F.3d 160, 168–69 (2d Cir. 2012) (holding the regulation did not burden the plaintiff's Second Amendment rights in a way substantial enough to justify a heightened level of scrutiny).

This approach finds support by analogy to other fundamental constitutional rights.[10] *See generally Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–16 (1992) (indicating a sliding scale approach to assessing alleged takings violations); *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978) (indicating a similar sliding scale approach for evaluating alleged violations of the right to marry). In *Heller*, this Court analogized between the First and Second Amendment throughout its opinion. *See Heller*, 554 U.S. at 582, 595, 635. Looking to the evaluation of First Amendment challenges, this Court holds reasonable time, place, or manner regulations on speech are subject to a lesser level of scrutiny as long as they are content-neutral and leave individuals with "ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). In general terms, *Ward* tells us laws that merely regulate conduct peripheral to protected rights, and still leave alternatives for exercising the right, will not be subject to heightened scrutiny. *See id.* In the context of the fundamental right to vote, this Court has held the level of scrutiny applied in evaluating a state election law "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In *Burdick*, this Court reasoned that when state election laws imposes "reasonable, nondiscriminatory restrictions" upon the right to

[10] *See also* Michael J. Habib, *The Second Amendment Standard of Review: The Quintessential Clean-Slate for Sliding-Scale Scrutiny*, 37 Admin. & Reg. L. News 13, 14 (2012) ("Sliding-scale scrutiny is not a new invention. Rather, it has been utilized by the Court with regard to freedom of speech and the right to vote.").

vote, the State's "regulatory interests are generally sufficient to justify" those restrictions. *Id.* (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). This is an articulation of the presumptively lawful nature of rational-basis review.

Applying these principles to the Zoning Ordinance at issue, it is clear that rational-basis is the appropriate level of review. The ordinance only regulates the sale of firearms—an act not independently protected by the Second Amendment. *See* Mojave Cty., NTX., Code § 17.54.131; R. at 19. If anything, such conduct is at the periphery of Second Amendment considerations, far from the core right to possess firearms for self-defense. Additionally, the ordinance, by its language, merely regulates the locations where firearms sales are permissible, an insubstantial burden on the ability to actually sell firearms. *See* R. at 19; Mojave Cty., NTX., Code § 17.54.131 ("[N]o conditional use permit for firearms sales shall issue unless . . . the subject premises us not within eight hundred (800) feet of any of the following . . . .). Borrowing this Court's language from *Ward*, the Zoning Ordinance leaves "ample alternative channels" for selling firearms, and for acquiring and possessing firearms generally. *Ward*, 491 U.S. at 791. In this case, Mojave County's legitimate regulatory interests should be sufficient to justify its Zoning Ordinance—rational-basis review is sufficient.

Under rational-basis review, the Zoning Ordinance is presumed constitutional and will only be overturned if Respondent can prove that it is not rationally related to Mojave County's legitimate governmental interests. *See Lyng v. Int'l Union,* 485 U.S. 360, 370 (1988); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) ("This

inquiry employs a relatively relaxed standard . . . [s]uch action by a legislature is presumed to be valid."). This Court has held that a "broad range of governmental purposes and regulations satisfies" the requirements of rational-basis review. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987). Mojave County's stated interests in enacting the Zoning Ordinance are: (1) "protecting public safety and preventing harm in populated, well-traveled, and sensitive areas[;]" (2) protecting against the potential secondary effects of gun stores, such as crime;" and (3) preserving the character of residential zones." R. at 13–14; *see also Koscielski*, 435 F.3d at 902 ("It is undisputed the purpose of the City's zoning ordinance, to protect public safety, is legitimate."). Because Respondent has not alleged anything to rebut the presumption that the Zoning Ordinance is rationally related to the County's stated interests, the ordinance should be found constitutional under a rational-basis standard of review.

D. If the Court Determines Heightened Scrutiny Must Apply, the Zoning Ordinance Would Only Trigger Intermediate Scrutiny, and Would Still Pass Constitutional Muster.

Were the Court to hold heightened scrutiny is required for evaluating a Second Amendment challenged, the Zoning Ordinance at issue would still only trigger intermediate scrutiny. The circuit courts are in agreement that strict scrutiny, the highest level of scrutiny, is reserved for regulations substantially burdening the core right of the Second Amendment.[11] The Zoning Ordinance is merely regulatory and

[11] *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol*, 700 F.3d 185, 195 (5th Cir. 2012) ("A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family . . . triggers strict scrutiny." (citing *Heller*, 554 U.S. at 635)); *United States v. Skoien*, 587 F.3d 803, 805 (7th Cir. 2009)

does not affect the core right to possess firearms for self-defense. If the Zoning Ordinance burdens any conduct protected by the Second Amendment, it is the right of Mojave County residents to acquire firearms, a right ancillary to the core of the Second Amendment. The Zoning Ordinance only affects the right to acquire firearms in the sense that it limits the ability of gun shops to open anywhere they please, indirectly affecting the ability of residents to acquire guns anywhere dealers may want to locate. This regulation is far from a substantial burden on the right to possess firearms for self-defense, and would thus trigger intermediate scrutiny, if any.

For the Zoning Ordinance to pass constitutional muster under intermediate scrutiny, Mojave County must show that it is substantially related to an important governmental interest. *See Clark v. Jeter,* 486 U.S. 456, 461 (1988). Intermediate scrutiny requires that the regulation be narrowly tailored to fit the important interest, but not necessarily the least restrictive means possible. *See Heller v. District of Columbia ("Heller II"),* 670 F.3d 1244, 1258 (D.C. Cir. 2011). Stated another way, intermediate scrutiny requires that the challenged law not burden more conduct than is reasonably necessary. *See Drake v. Filko,* 724 F.3d 426, 436 (3d Cir. 2013) (citing *Marzzarella*, 614 F.3d at 98). In making these determinations, courts have granted substantial deference to the state legislatures, recognizing, "[i]n the context of

("[T]he government's application of § 922(g)(9) in this case requires less rigorous justification than strict scrutiny because the core right of self-defense identified in Heller is not implicated."); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("[W]e assume that any law that would burden the "fundamental," core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny."); *Marzzarella*, 614 F.3d at 97 (implying strict scrutiny is only triggered when a law substantially burdens the core right of the Second Amendment).

firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015).

As discussed, Mojave County's stated interests in enacting the Zoning Ordinance are: (1) "protecting public safety and preventing harm in populated, well-traveled, and sensitive areas[;] (2) protecting against the potential secondary effects of gun stores, such as crime; and (3) preserving the character of residential zones." R. at 13–14. This Court and several circuit courts have recognized public safety and crime prevention as inherently "important" interests.[12] As for preserving the character of the residential zone, the Ninth Circuit has held, "Cities have a

[12] *See, e.g.*, *Schall v. Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."); *Schneider v. State of N.J., Town of Irvington*, 308 U.S. 147, 160 (1938) (holding that municipalities have an interest in "public safety, health, [and] welfare"); *Heller II,* 670 F.3d 1244, 1267 (D.C. Cir. 2011) (holding that preventing crime is undoubtedly an important governmental interest); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (holding the state has a substantial, indeed compelling, governmental interests in public safety and crime prevention); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) ("It is 'self-evident' that [the city]'s interests in promoting public safety and reducing violent crime are substantial and important government interests. (citing *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013))); *Nat'l Rifle Ass'n of Am. v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (recognizing the state's important governmental interest in public safety through crime prevention); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012) ("The bottom line is that crime control and public safety are indisputably 'important' interests."); *see also United States v. Jimenez,* 895 F.3d 228, 236 (2d Cir. 2018) (recognizing an interest in public safety is always a compelling governmental interest); *Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013) ("The regulation of firearms is a paramount issue of public safety . . . .");

substantial interest in protecting the aesthetic appearance of their communities[.]" *One World One Family Now v. City of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996).

The question becomes—under the intermediate scrutiny standard—whether the Zoning Ordinance at issue is substantially related to achieving the important interests offered by Mojave County. The substantial relationship between the Zoning Ordinance and public safety is supported by at least one recent study showing that the location of firearm dealers may be a risk factor for gun homicide.[13] Moreover, the Zoning Ordinance is narrowly tailored to achieving its goal as it only restricts gun dealers within 800 feet of specific locations—even allowing the granting of variances from this already modest requirement where there is a good reason for doing so. *See*

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[13] *See generally* Douglas J. Weibe et al., *Homicide and Geographic Access to Gun Dealers in the United States*, 9 BMC Pub. Health 199 (2009). The authors of the study introduced their findings by saying:

> Although the federal government is responsible for regulating which individuals or businesses are issued a [federal license to sell firearms], the decision about where an [federally-licensed firearm dealer ("FFL")] can operate is a local matter. Therefore, it is helpful to adopt an urban planning perspective when considering the possibility that FFLs could be impacting local homicide rates. Like other businesses, FFLs are subject to regulations including zoning laws which dictate how land parcels can be used. . . . Therefore, if FFLs do act as a spigot through which firearms flow into a community and thereby contribute to homicide, it is possible that regulating the locations and activities of stores where firearms are sold is a way to curb homicide.

Id. Comparing annual county-level data (from the years 1993–1999) on gun homicide rates and rates of FFLs per capita, using negative binomial regression controlling for socio-demographic characteristics, the researchers found that there was an association between the per capita rate of licensed firearm dealers in a county and its rate of firearm homicide. After analyzing and discussing the gathered evidence, the researchers concluded that modification of FFLs through federal, state, and local regulation, such as the Zoning Ordinance, may be a feasible intervention to reduce gun homicide in major cities. *See id.*

R. at 6, 19–20. Additionally, as discussed in detail below, *Heller* recognized regulations, like the Zoning Ordinance, that impose conditions and qualifications on the sale of firearms are presumptively lawful regulatory measures. *See Heller*, 554 U.S. at 626–27 ("[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms."). Such regulations pass constitutional muster under any level of scrutiny. *See Marzzarella*, 614 F.3d at 91 ("[I]t may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny."). Accordingly, the Zoning Ordinance's regulation on the permissible locations for firearms sales is substantially related to Mojave County's proffered interests and passes constitutional muster under intermediate scrutiny—although, as discussed, rational-basis review is sufficient for evaluation.

II. The Second Amendment Does Not Secure an Independent Right to Sell Firearms, Unattached from the Ancillary Second Amendment Right to Acquire Firearms for Self-Defense.

Respondent's alternative claim alleges that the Zoning Ordinance unconstitutionally infringes his right to sell firearms—a right he suggests is protected by the Second Amendment. R. at 7–9. As discussed, circuit courts recognize the right to acquire firearms as an ancillary right and necessary pre-requisite to the possession of firearms for self-defense. *See Teixeira*, 873 F.3d at 677. Nevertheless, the right of citizens to acquire firearms is not coextensive with the right to sell firearms. *Id.* at 682. The intent of the Founders and this Court's precedent dictate that the Second Amendment does not confer an independent right upon

proprietors to sell firearms, detached from the consumer's ability to legally acquire firearms.

A. The Second Amendment's History and Text Confirm That the Founders Did Not Intend to Codify a Right to Sell Firearms.

To determine whether the Zoning Ordinance burdens conduct protected by the Second Amendment, we must first determine the scope of the Second Amendment's protection through a textual and historical analysis of the amendment. *See United States v. Chovan*, 735 F.3d 1127, 1133 (9th Cir. 2012) (citing *Marzzarella*, 614 F.3d at 89).

1. The Second Amendment Text Only Addresses an Individuals' Right to Possess Firearms—Making No Mention of a Right to Sell Firearms.

Looking first to the text of the Second Amendment, the subject of the codified right is the "people" who keep and bear arms. *Teixeira*, 873 F.3d at 683. Using *Heller*'s authoritative interpretation of the amendment, "keep arms" is most naturally read as to "have weapons," while "bear arms" is most naturally read as to mean "to wear, bear, or carry" upon the person in case of confrontation. *Heller*, 554 U.S. at 582–84. This language clarifies the Founders' intent—protecting a person's ability to possess firearms. Nothing in the amendment's text indicates the founders were concerned with protecting the right of retailers to sell firearms—if such a right exists at all. Invoking *Heller*'s method of analogizing the Second Amendment to the First Amendment, reveals key distinctions in the language of the two amendments that result in rights of differing scopes. The First Amendment provides, "Congress shall make no law. . . abridging the freedom of speech, or of the press . . . ."

U.S. Const. amend. I. This language is far more abstract than that of the Second Amendment, and notably (the First Amendment) does not identify a subject to enjoy the right expressed. *See Teixeira*, 873 F.3d at 688. The First Amendment's vagueness results in a right vast in scope—individual citizens enjoy this right, as do retailers and distributers such as newspaper publishers and bookstores. *See id.* The Second Amendment does not employ the same abstractness, and expressly identifies the holder of the right as the "people" who "keep and bear arms," meaning those who acquire and possess the firearms, not extending to those who give or sell them. *See* U.S. Const. amend. II.

2. The Second Amendment's History Suggests the Founders Intended to Protect Citizens' Access to Firearms, Not an Independent Right of Retailers to Sell Firearms.

Historical evidence confirms that the right to sell firearms, independent from citizens' ability to obtain firearms, was not within the historical understanding and scope of the Second Amendment. This historical evidence was examined by the Court in both *Heller* and *McDonald*, and by the circuit courts in cases that followed. *See Heller*, 554 U.S. at 584–610; *McDonald*, 561 U.S. at 768–78; *Teixeira*, 873 F.3d at 683–87; *Peruta v. Cty. of San Diego*, 824 F.3d 919, 929–39 (2016). In *Heller*, this Court held the Second Amendment did not create a new right, but rather codified a pre-existing right inherited from our English ancestors. *Heller*, 554 U.S. at 592, 599. Thus, *Heller*'s historical analysis began with the 1689 English Bill of Rights—the predecessor to our own Bill of Rights and Second Amendment. *Id.* at 593. The English Bill of Rights declared citizens "may have Arms for the Defen[s]e suitable to

their Conditions, and as allowed by Law." *Id.* at 593 (quoting 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441). William Blackstone's commentary—considered the leading authority on English law for the founding generation—interpreted this text as a protecting "public allowance, under due restrictions, of the natural right of resistance, and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." William C. Sprague, *Blackstone's Commentaries, Abridged* 33 (9th ed. 1915).

In early colonial America, English Colonists regarded the right to keep and bear arms for self-defense as fundamental. *Id.* at 593. The threat of attack from Native American tribes made bearing arms necessary for self-defense. *See Teixeira*, 873 F.3d at 684. At the same time, the firearms trade was already being controlled by colonial governments, and several colonies passed laws regulating where and to whom firearms could be sold. *Id.* at 685. Throughout the 1760s and 1770s, as the threat of colonial rebellion grew, the British crown attempted to disarm the American colonies by prohibiting the exportation of firearms and ammunition from Britain. *Heller*, 554 U.S. at 594; *Teixeira*, 873 F.3d at 686. Colonists reacted by "invoking their rights as Englishmen to keep arms," holding tight to their firearms, and gathering arms and ammunition for their defense. *Heller*, 554 U.S. at 594.

Fear of usurpation by the government lingered at the time of our nation's founding. *See Teixeira*, 873 F.3d at 686. The Founders recognized the importance of codifying a right to possess firearms as a way to protect oneself from potential tyranny and oppression. *See id.* This is evident from the language of the resulting Second

Amendment. *See id.* It is also clear that, following the British embargo, the Founders recognized access to firearms was a necessary pre-requisite to exercising the right of possession. *Id.* Nevertheless, and despite the lower court's contentions, the right to access or acquire firearms does not presume an independent right to sell firearms. No historical evidence or contemporary commentary suggests "that the right codified in the Second Amendment independently created a commercial entitlement to sell guns if the right of the people to obtain and bear arms was not compromised." *Id.* at 686; *see also United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011) ("[W]e have found [no authority], that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to sell a firearm.").

B. Respondent's Inability to Sell Firearms Does Not Affect Mojave County Citizens' Ability to Keep and Bear Firearms.

Under different circumstances, a firearm retailer's interest in the ability to sell and a prospective customer's interest in being able to acquire a firearm may align and eliminate the need to distinguish between the protected ancillary right to acquire and the unprotected freestanding right to sell. *See Teixeira*, 873 F.3d at 687. This is not that case. Such would be the case if the Zoning Ordinance completely prohibited the sale of firearms anywhere in Mojave County. *See, e.g.*, *Ill. Ass'n of Firearms Retailers v. City of Chicago,* 961 F. Supp. 2d 928 (N.D. Ill. 2014) (evaluating firearms retailers' and city residents' challenge of a city ordinance that effectively banned all firearms sales within city limits). Generally, retailers have no independent right to sell firearms—nevertheless, if the law in question would, as applied, compromise

residents' right to acquire firearms, and consequently their right to keep and bear arms for self-defense, the law may violate the Second Amendment. *See id.* at 939. Respondent presents no such claim. Rather, here, the Zoning Ordinance's restrictions on Respondent's ability to sell firearms at a particular location within Mojave County have little to no impact on the ability of Mojave County residents to acquire firearms from one of the other gun stores in the county and exercise the right to possess arms for self-defense.

The conclusion that the Second Amendment does not protect a freestanding right to sell firearms is supported by the circuit courts' examinations of cases brought by firearms retailers. *See, e.g.*, *Teixeira*, 873 F.3d 670; *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol*, 700 F.3d 185 (5th Cir. 2012); *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928 (N.D. Ill. 2014). Despite such cases being brought by the seller, alleging a violation of his or her own right, the courts examine challenged restrictions with respect to their burden on potential gun owners or buyers. *See Teixeira*, 873 F.3d at 687. For example, in *National Rifle Association of America v. Bureau of Alcohol*, the NRA—along with a group of minors—filed suit against several federal agencies on behalf of eighteen-to-twenty-year-old NRA members, and on behalf of licensed dealers. 700 F.3d 185 (5th Cir. 2012). There, the NRA challenged regulations prohibiting licensed dealers from selling handguns to persons under twenty-one alleging that they violated the Second Amendment. *Id.* at 188. The Fifth Circuit, in determining whether the provisions implicated the Second Amendment,

examined the burden on the minors' right to acquire firearms for possession—not the burden on the licensed dealers' right to sell. *Id.* at 200.

Again, in *Illinois Association of Firearms Retailers v. City of Chicago*, firearms retailers and city residents challenged a city ordinance that effectively banned all firearms sales within city limits. 961 F. Supp. 2d 928 (N.D. Ill. 2014). In evaluating the Second Amendment claim, the District Court for the Northern District of Illinois examined the burden in the context of the city residents' right to acquire and possess firearms for self-defense—not the firearms retailers' right to sell. *Id.* at 938–39. In *Teixeira*, the Ninth Circuit evaluated the firearms sellers' challenge against a zoning ordinances' restriction on gun shops in the context of the burden on county residents' ability to acquire firearms—expressly rejecting a freestanding right to sell. *See Teixeira*, 873 F.3d at 679–687. The fact that the courts in these cases evaluate the alleged violation from the point of view of the consumers' rights, rather than the sellers, is evidence that courts do not consider sellers to have a freestanding right to sell firearms, protected by the Second Amendment. If the courts acknowledged such a right, they would examine the alleged violation as it impacts the seller, as well as the buyer.

Respondent may argue the Second Amendment right of firearms retailers to sell firearms is analogous to the First Amendment rights of newspaper publishers and bookstores. This analogy fails. *See Teixeira*, 873 F.3d at 688–89. The language of the First Amendment is much more abstract than that of the Second—namely, the First Amendment does not identify a holder of the right codified while the Second

Amendment expressly identifies the holder of the right as the "people" who "keep and bear arms." *Compare* U.S. Const. amend. I, *with* U.S. Const. amend. II. The result of this difference in language is that the First Amendment right of free speech applies to individuals and consumers, as well as sellers whereas the Second Amendment only applies to those who acquire and possess firearms, potential consumers. *See Teixeira*, 873 F.3d 688–89. This is because in the context of the First Amendment, book sellers and distributors are themselves directly engaged in the conduct protected by the Amendment—the right to free expression. *See id.* at 689 ("The First Amendment grants [the seller] the right to speak and disseminate ideas, not merely his customers the right to hear them."). In the context of the Second Amendment, firearms sellers and distributors are not themselves directly engaged in the exercise of the right to possess firearms for self-defense. *See id.*

In this sense, the Second Amendment is more closely analogous with medical providers lack of a right to provide abortions, or other reproductive health services, in the context of the Fourteenth Amendment. *See id.* When medical providers challenge restrictions on abortions or contraceptives, courts evaluate Fourteenth Amendment violations in terms of the patients' right to access reproductive health care, not the right of the medical provider to provide the care. *Id.* (citing *Whole Woman's Health*, 136 S. Ct. 2292, 2312–13 (2016); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992)). Medical providers have no right to provide abortions for pay, unattached from potential patients' right to have obtain the procedure. *Id.* at 690. Similarly, firearms retailers have no right to sell firearms for pay, unattached from

potential customers' right to acquire firearms for self-defense. *See id.* ("As we have demonstrated, the Second Amendment does not independently protect a proprietor's right to sell firearms.").

C. The Zoning Ordinance's Regulation of Firearm Sales is a Longstanding and Presumptively Lawful Regulation Recognized by This Court.

After recognizing the core right of the Second Amendment to keep and bear arms for self-defense, *Heller* clarified that "nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms," and in a corresponding footnote indicated that these are presumptively lawful regulatory measures. *Heller*, 554 U.S. at 626–27. This notion was repeated reaffirmed in *McDonald*. 561 U.S. at 786. In outlining the Second Amendment framework, *Marzzarella*, along with most other circuits, recognized *Heller*'s "presumptively lawful" language to mean such longstanding restrictions are exceptions to the right to bear arms—meaning they do not burden conduct falling within the scope of the Second Amendment.[14] *See Marzzarella*, 614 F.3d at 91.

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[14] *See also Binderup v. Att'y Gen.*, 836 F.3d 336, 343 (3d Cir. 2016) ("These [presumptively lawful regulatory] measures comport with the Second Amendment because they affect individuals or conduct unprotected by the right to keep and bear arms."); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) ("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* . . . ."); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("*Heller* tells us 'longstanding' regulations are 'presumptively lawful,' that is, they are presumed not to burden conduct within the scope of the Second Amendment."); *United States v. Barton*, 633 F.3d 168, 172 ("A 'lawful' prohibition regulates conduct 'fall[ing outside] the scope of the Second Amendment's guarantee.' (quoting Marzzarella, 614 F.3d at 91) (alteration in original)).

By its plain language, the challenged Zoning Ordinance regulates locations in which business may permissibly engage in firearms sales. *See* Mojave Cty., NTX., Code § 17.54.131. The terms of the ordinance set out the conditions and qualifications the permit applicant must satisfy before engaging in firearms sales. *See id.* Under *Heller*, the Zoning Ordinance's regulation of firearms sales based on express conditions and qualifications is a longstanding regulation and is presumptively lawful. *See, e.g.*, *Heller*, 554 U.S. at 626–27. Accordingly, the Zoning Ordinance is presumptively lawful under the Second Amendment framework because it does not burden conduct protected by the amendment—namely, the ability to sell firearms.

The lawfulness presumption is rebutted only by demonstrating the law regulating the commercial sale of firearms actually impedes individuals from keeping and bearing arms. *See Binderup*, 836 F.3d at 347; *Heller II*, 670 F.3d at 1253. Nevertheless, as we have repeatedly shown, Respondent fails to allege the Zoning Ordinance actually burdens Mojave County residents' right to keep and bear arms for self-defense.

CONCLUSION AND PRAYER

For the forgoing reasons, Respondent respectfully requests this Court reverse the judgment of the Fourteenth Circuit Court of Appeals.

Respectfully submitted this 19th day of November 2018.

/s/ Team 38

Team 38
Counsel for Petitioner

APPENDIX

The Second Amendment of the United States Constitution, codified at U.S.C. Const. Amend. II, provides in relevant part:

> 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.

* * * *

The Mojave County Statutes ("Zoning Ordinance"), Mojave Cty., NTX., Code § 17.54.131, provides in relevant part:

> **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:
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> * * *
>
> 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;
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