No. C18-0111-1

IN THE

Supreme Court of the United States

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 PETITIONER

Team: 39
Counsel for Petitioner

QUESTIONS PRESENTED

1. Must courts apply heightened scrutiny to Second Amendment cases where the challenged law is presumptively lawful, or alternatively, where the challenged law imposes only a minimal burden on Second Amendment rights?
2. When a challenged law does not burden any individuals' enumerated rights to acquire firearms, can a gun seller assert an independent right to sell firearms under the Second Amendment?

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The panel opinion of the United States Circuit Court of Appeals for the Fourteenth Circuit, ruling that Mojave County's Zoning Ordinance burdened Respondents' Second Amendment right to sell firearms and that Mojave County failed to justify its burden under some form of heightened scrutiny, is unreported but reprinted in Record at 2-21. The Central District Court ruling is unreported but is discussed in the Fourteenth Circuit Court ruling.

JURISDICTIONAL STATEMENT

On October 1, 2018, the United States Circuit Court of Appeals for the Fourteenth Circuit issued its decision finding that Mojave County's Zoning Ordinance burdened Respondents' Second Amendment right to sell firearms, and that Mojave County failed to justify its burden under some form of heightened scrutiny. Mojave County filed a Petition for a Writ of Certiorari, which the Supreme Court granted. This Court has jurisdiction pursuant to 28 U.S.C § 1254(1).

CONSTUTIONAL PROVISIONS & STATUTES INVOLVED

This case involves the Second Amendment. The Second Amendment to the United States Constitution 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 case also involves Mojave County's Zoning Ordinance. Mojave cty., NTX., Code § 17.54.130-.131. The relevant provisions of the Mojave County Zoning Ordinance are sections 17.54.130 and 17.54.131.

STATEMENT OF THE CASE

The Gun Store: Brotherhood of Steel, Inc.

On June 17, 2011, Roger Maxson, a retired U.S. Army Staff Sergeant, formed a limited liability company called Brotherhood of Steel, Inc. R. at 2. Maxson intended for Brotherhood of Steel to be a full-service firearms center, where residents could take firearms training courses, obtain gunsmithing services, and purchase guns. R. at 2. In order to find an opportune location for Brotherhood of Steel, Maxson conducted internet and local market research among gun enthusiasts to determine where there was demand for a full-service firearms center like this. R. at 3. Ultimately, Maxson landed on an unincorporated area of Mojave County known as "Hidden Valley." R. at 3.

The Mojave County Zoning Ordinance

In preparation for identifying a specific property in "Hidden Valley," Maxson reached out to the Mojave County Community Development Agency Planning Department ("Planning Department") to ensure whichever property he chose would comply with all state and federal regulations. R. at 3-4. The Chief Clerk of the Planning Department instructed Maxson that the proposed gun store needs to comply with Mojave Cty., NTX., Code § 17.54.130-17.54.131 (the "Zoning Ordinance"). R. at 3.

The first section of the Zoning ordinance, Section 17.54.130, regulates conditional use permits for certain land uses. R. at 3; 19. Section 17.54.130 states, in relevant part, that the County will only grant a Conditional Use Permit after determining whether the proposed business: (1) is required by public need; (2) is

properly related to other land uses and transportation and service facilities in the area; (3) if permitted, will materially and adversely affect the health or safety of persons residing or working in the vicinity; and (4) will be contrary to the specific performance standards established for the area. R. at 3; 19.

The second section of the Zoning Ordinance, Section 17.54.131, regulates specifically business that sell firearms. R. at 3; 19. Section 17.54.131 outlines six requirements, one being that businesses selling firearms in unincorporated areas of the County must be located at least 800 feet away from any of the following: schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially zoned districts. R. at 3-4; 19-20.

The Planning Department's Report

Maxson identified a property in "Hidden Valley" located at 2274 Helios Lane ("Helios property") that he believed complied with the Zoning Ordinance. R. at 4. In preparation for leasing the Helios property and transforming it into a gun store, Maxson applied to the Mojave County Community Development Agency Planning Department for a Conditional Use Permit. R. at 4. After reviewing Maxson's application, the Planning Department prepared a report finding that the Helios property violated the distance requirement of the Zoning Ordinance. R. at 5. The report revealed that the closest exterior wall of the Helios property was 736 feet from the property lines of an inactive church. R. at 5. As a result, the Planning Department recommended the Zoning Board deny Maxson's permit application. R. at 5.

The Zoning Board Grants Maxson's Permit

In light of the Planning Department's report, the Zoning Board held a public hearing on Maxson's Conditional Use Permit application. R. at 5. Twenty-three people total attended the hearing to express their views about the prospective location for Maxson's gun store, 15 people expressing support for the gun store and eight expressing opposition. R. at 5.

Following the Zoning Board's public hearing, the Planning Department issued a revised report that clarified how the county should measure the 800 feet distance requirement. R. at 5. The revised report concluded that even if the county measured the distance from the exterior wall, front door, or property line of the proposed gun shop, the Helios property still did not meet the distance requirement of the Zoning Ordinance. R. at 5. Once again, the Planning Department recommended denying Maxson's conditional use permit. R. at 5.

Despite the Planning Department's revised report, the Zoning Board granted Maxson a variance from the Zoning Ordinance and approved his application for a Conditional Use Permit. R. at 6. The Zoning Board reasoned that the major highway existing between the proposed site and the inactive church created a physical buffer; therefore, a variance in this particular scenario was warranted. R. at 6. The Zoning Board concluded that there was a public need for a gun store in this location, despite the next closest gun store being 10 miles away and shooting range 20 miles away. R. at 6.

The Subsequent Administrative Appeal

In response to the Zoning Board granting Maxson's permit, the Shady Sands Home Owners Association, a nonprofit organization, filed an appeal with the County Commissioners' Court. R. at 6. The County Commissioners' Court voted to overturn the Zoning Board's decision and revoked Maxson's Conditional Use Permit. R. at 6. After the County Commissioners' Court revoked Maxson's permit, Maxson claims that there is not one property in the "Hidden Valley" area that complies with the Zoning Ordinance's distance requirement and is also suitable as far as location, accessibility, building security, and parking for a gun store. R. at 7.

Procedural History

Maxson filed a lawsuit in the District Court alleging: (1) the Zoning Ordinance violated the due process and equal protection clause of the Fourteenth Amendment; and (2) the Zoning Ordinance, both facially and as applied, violated the Second Amendment. R. at 7. Based on these allegations, Maxson moved for a preliminary injunction against Mojave County. R. at 7. The District Court granted Mojave County's motion to dismiss on both the equal protection and Second Amendment claims with leave to amend. R. at 7. Maxson stipulated to the dismissal of the due process claim. R. at 7.

In Maxson's Amended Complaint, he asserted four claims: (1) the Zoning Ordinance, as applied, violated the Fourteenth Amendment's equal protection clause; (2) the Zoning Ordinance, on its face, violated the Equal Protection clause; (3) the Zoning Ordinance, on its face, violated the Second Amendment; (4) the Zoning Ordinance, as applied, violated the Second Amendment. R. at 8. Mojave County

moved to dismiss all four of Maxson's claims. R. at 8. The District Court once again granted Mojave County's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a clam upon which relief could be granted. R. at 8.

Maxson appealed to the Fourteenth Circuit. R. at 8. The Fourteenth Circuit (1) affirmed the District Court's dismissal of Maxson's equal protection claim; and (2) reversed the District Court's dismissal of Maxson's Second Amendment claims. R. at 8; 11; 14. First, the Fourteenth Circuit disagreed with the lower court's dismissal of Maxson's Second Amendment claims, finding that the Zoning Ordinance burdened Maxson's Second Amendment right to sell firearms and that the Mojave County did not justify its burden that the Zoning Ordinance is constitutional under some form of heightened scrutiny. R. at 11; 14.

Mojave County filed a Petition for Writ of Certiorari, which the Supreme Court granted.

SUMMARY OF THE ARGUMENT

This Court need not even reach the question of which level of judicial scrutiny should be applied to the challenged Mojave County Zoning Ordinance because the Zoning Ordinance falls outside the scope of the Second Amendment.

When assessing challenged laws under the Second Amendments a uniform two-step test has been applied. Under the first step, the courts assess whether the challenged law burdens conduct protected by the Second Amendment. The court's analysis is complete if, like here, the challenged law is presumptively lawful. In *District of Columbia v. Heller*, this Court specifically excluded "longstanding laws imposing conditions and qualifications on the commercial sale of arms" from being

within the scope of the Second Amendment. These laws are simply "presumptively lawful."

Regulations on the commercial sale of arms find their origins in the founding era of America. Early colonial governments regulated all manner of Second Amendment rights. States specifically regulated where firearms may be sold and to whom they may be sold. Also, a law need not be identical to one "on the books" in 1971 to be longstanding and thereby presumptively lawful. This would frustrate all manner of modern laws. The Zoning Ordinance here joins a long lineage of laws imposing conditions on the commercial sale of arms; it merely regulates the location and licensing requirements of commercial arms sellers. Conversely, the Zoning Ordinance specifically avoids restricting the use of firearms by law-abiding individuals for self-defense.

If this Court finds that the Zoning Ordinance is not presumptively lawful, instead answering "yes" to the first step of Second Amendment analysis, heightened scrutiny is still improper. Under step two of the test, the courts determine what level of scrutiny should be applied to the challenged law. Under step two, courts look at (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right.

Post-*Heller*, lower courts universally accept that the core of the Second Amendment is the right of self-defense. That right is most acute in one's home, meaning it is inherently less protected outside the home. The Zoning Ordinance does not come close to the core of the Second Amendment because it does not seek to

restrict the Second Amendment rights of individuals. Residents of Mojave County maintained access to three gun stores and two shooting ranges both before and after Mojave County passed the Zoning Ordinance. There is no diminished access to self-defense in the home as a result of the Zoning Ordinance.

In any event, even if the Zoning Ordinance implicates the core of the Second Amendment, the burden imposed by the Zoning Ordinance is exceedingly minimal. As explained above, the residents of Mojave Court have not experienced a diminished access to firearms. Respondents offer no evidence showing that the Zoning Ordinance has had any quantifiable negative impact at all. Given that any burden imposed is minuscule, this Court should hold that the Zoning ordinance is reasonable and constitutional.

Finally, if heightened scrutiny is considered by this Court despite the preceding arguments, intermediate scrutiny is appropriate. Strict scrutiny, or something like it, has not been applied by the courts to anything less than complete prohibitions on Second Amendment rights. In *Heller*, this Court assessed an outright ban on firearm possession in the District of Columbia. Applying the same scrutiny to the Zoning Ordinance here as this Court did to the complete prohibition in *Heller*, would negate the purpose of Second Amendment analysis.

In any case, the Zoning Ordinance is constitutional under any level of scrutiny. Public safety and preservation of residential areas represent the panicle of governmental objectives. Further, no standard of scrutiny requires that the government apply the least restrictive means of pursuing its objectives.

The Zoning Ordinance is minimally burdensome if it is burdensome at all. This court should find that Mojave County's Zoning Ordinance is constitutional as a permissible regulation on the commercial sale of firearms.

This Court should reverse the Fourteenth Circuit's decision below and hold there is no freestanding right to sell firearms. Circuit courts generally employ a two-step inquiry when determining whether a challenged law violates the Second Amendment. The first question asks whether the challenged law burdens conduct protected by the Second Amendment, and if it does, only then does the court determine which level of scrutiny to apply.

This Court need not move on to the second step because the inquiry is complete at step one. The Zoning Ordinance does not burden any conduct protected by the Second Amendment because the Second Amendment does not confer a freestanding right to sell firearms. Rather, to state an adequate Second Amendment claim, Respondents must show that the Zoning Ordinance impedes Mojave County residents ability to acquire firearms. But Respondents fail to even show that the Zoning Ordinance impedes on the right to acquire firearms.

There are three reasons why the Second Amendment does not confer a freestanding right to sell firearms: (1) interpreting the Second Amendment to protect a freestanding right to sell firearms conflicts with this Court's language in *Heller*; (2) nothing in the Second Amendment's text demonstrates the Second Amendment protects a freestanding right to sell firearms; and (3) the Second Amendment's historical record does not suggest that selling firearms falls within

the Second Amendment's scope. Because of these reasons, Respondents fail to state an adequate Second Amendment claim.

First, interpreting the Second Amendment to protect the right to sell firearms—unconnected to a citizen's right to acquire firearms—conflicts with this Court's language in *Heller*. The *Heller* Court made clear that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on…laws imposing conditions and qualifications on the commercial sale of firearms." The Court later said that these "longstanding prohibitions" are "presumptively lawful regulatory measures." This language demonstrates that selling firearms falls "outside the scope of protected Second Amendment conduct." It makes little sense to interpret selling firearms to be an independent right while regulations on this purported right are "presumptively lawful regulatory measures." If this Court were to interpret the Second Amendment to protect selling firearms as a freestanding right, it would dramatically extend the scope of Second Amendment protection.

Second, in the plain text of the Second Amendment explicitly states, or even implicitly suggests, that the amendment confers an independent right to sell firearms. This Court explained in *Heller* that the Second Amendment's text should not be interpreted to go beyond the "normal and ordinary" meaning of its plain language. Interpreting the phrase "to keep and bear arms" as inclusive of an additional right to sell firearms does just that: goes beyond the "normal and ordinary" meaning of the language. Analyzing the plain language of the state

constitutions adopted during the founding era confirm the notion that the Second Amendment does not protect a freestanding right to sell firearms.

Third, nothing in the Second Amendment's historical record suggests the Second Amendment protects a freestanding right to sell firearms. *Heller* walks through the right to keep and bear arms as it was understood in England, colonial America, and during the Founding era. Throughout each of these periods, the right to keep and bear arms consistently served the purpose of "preserving citizen *access* to firearms in light of the risk that a strong government would use its power to disarm people."

Even if Respondents allege a Second Amendment claim on behalf of Mojave County residents, Respondents still fail to state an adequate claim. Maxson, as a would-be owner of a gun store, can assert derivative standing on behalf of potential customers. This Second Amendment claim not only extends to potential customers' rights to acquire firearms, but also their rights to access firearms ancillary services. No matter how Respondents frame the Second Amendment claim, Respondents' claim fails.

The record reveals that there is already an existing gun store in the Mojave County area, and Respondents do not allege how this gun store is insufficient in providing Mojave County residents the opportunity to purchase guns. Further, the Zoning Ordinance only regulates the locations of gun stores—the Zoning Ordinance is silent on firearm ancillary services. The Fourteenth Circuit thus incorrectly decided that the Zoning Ordinance interfered with Mojave County resident's ability

to access firearm ancillary services. Ultimately, to find that Respondents adequately state a Second Amendment claim on these facts would stretch the Second Amendment's protections far beyond this Court's holding in *Heller*.

ARGUMENT

I. Applying Heightened Scrutiny to Second Amendment Claims is Improper Where the Challenged Law is Presumptively Lawful or Alternatively Where the Law Imposes Only a Minimal Burden on Second Amendment Rights.

In 2008, this Court undertook its "first in-depth examination of the Second Amendment." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). The District of Columbia had enacted a general prohibition on the possession of handguns. Id. at 2788. Ultimately, this Court decided that a blanket prohibition on the possession of handguns was unconstitutional under any level of scrutiny. *Id.* at 2817. In reaching its decision this Court established precedent important to this matter.

First, this Court prefaced its decision in *Heller* by stating that nothing in the opinion "should be taken to cast doubt on longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2786. Simply put, such laws constitute "presumptively lawful regulatory measures." *Id.* at 2817 n.26. Second, this Court defined the core of the Second Amendment as the right of self-defense. *Id.* at 2818. However, this Court qualified the right to self-defense as most acute in an individual's home. *Id.* at 2817. This qualification necessarily means that when we move outside the home Second Amendment rights are less protected.

With these two important points from *Heller*, lower courts have used a two-step test to evaluate Second Amendment claims. First, the courts ask "whether the challenged law burdens conduct protected by the Second Amendment." *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (*quoting United States v. Chovan*, 735 F.3d 1127, 1136-67 (9th Cir. 2013)). Under this first step, the courts look to (1) the "historical understanding of the scope of the [Second Amendment] right" or (2) "whether the challenged law falls within a . . . category of prohibitions that have historically been unprotected." *Id.* at 960 (alteration in original) (quoting *Chovan*, 735 F.3d at 1137). A law falls outside the historical scope of the Second Amendment if the court finds it is one of the presumptively lawful regulatory measures identified in *Heller*. *Id.* at 960.

If a challenged law does "fall within the historical scope of the Second Amendment" the court moves to the second step of this test, determining "the appropriate level of scrutiny." *Id.* (citing *Chovan*, 735 F.3d at 1136). To determine the appropriate level of scrutiny the courts look at "(1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.'" *Id.* at 960-61 (quoting *Chovan*, 735 F.3d at 1138). In assessing how close the law comes to the core of the Second Amendment courts refer to the "core lawful purpose of self-defense" that this Court recognized in *Heller*. *Id.* at 961 (quoting *Heller*, 128 S. Ct. at 2818). In assessing the severity of the law's burden on the Second Amendment courts consider whether the regulation "leave[s] open alternative channels for self-defense." *Id.*

The Mojave County Zoning Ordinance does not burden Second Amendment rights. This is true because the regulations on the commercial sale of firearms are part of this Court's non-exhaustive list of presumptively lawful regulations. *See Heller*, 128 S. Ct. at 2816-17. The Zoning Ordinance is presumptively lawful because it constitutes a longstanding law "imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2817. There is no burden on Second Amendment rights, and this Court's analysis is complete under the first step of the analysis.

Even so, if this Court finds that the Zoning Ordinance does burden the Second Amendment, the regulation is still lawful. In determining the appropriate level of scrutiny, this Court should find that Mojave County's Zoning Ordinance (1) does not come close to the Second Amendment's core of self-defense as it merely regulates where firearm stores may be located; and (2) the severity of any burden is minimal as the regulation "leave[s] open alternative channels for self-defense." *Jackson*, 746 F.3d at 961.

A. The *Zoning Ordinance does not burden Second Amendment rights because it is a longstanding presumptively lawful regulatory measure.*

The Zoning Ordinance deals exclusively with the commercial sale of firearms, making it presumptively lawful under *Heller*. Thus, this Court need not reach the second step of Second Amendment analysis, determination of the level of scrutiny, because the Zoning Ordinance is outside the scope of the Second Amendment.

Courts considering laws challenged under the Second Amendment use a two-step test. The Courts look at (1) whether the law burdens Second Amendment rights

and, if they do, (2) what level of scrutiny should be applied. *Jackson*, 746 F.3d at 960. Courts need not reach the second step of this test where the challenged law is presumptively lawful. This Court specifically said that these regulations are 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." *Heller*, 128 S. Ct. at 2816-17.

Conditions on the commercial sale of arms find their roots in colonial America. At the time of the founding of America, "colonial governments substantially controlled the firearms trade." *Teixeira v. County of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017). The government controlled all aspects of commercial firearm sales. Relevant here, "[t]he government provided and stored guns, controlled the conditions of trade, and financially supported private firearms manufacturers." *Id*. There is additional evidence of conditions on the commercial sale of firearms during this period. For example, "the 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, multiple "colonies also controlled more generally where colonial settlers could transport or sell guns." *Id*. An example of this comes where "Connecticut banned the sale of firearms by its residents outside the colony." *Id*.

Further, lower courts have not interpreted *Heller* to mean that regulations must "mirror limits that were on the books in 1791." *United States v. Skoien*, 614

F.3d 638, 641 (7th Cir. 2010). For example, this Court included excluding felons from possessing firearms as longstanding, yet "[t]he first federal statute disqualifying felons from possessing firearms was not enacted until 1938." *Id*. at 640. Similarly, this Court reaffirmed restrictions on the possession of firearms by the mentally ill, however, such laws "were not enacted until 1968." *Id*. at 641. In *Drake v. Filko*, the Third Circuit found that requiring applicants to show a "justifiable need" to carry a firearm in public was longstanding and thereby presumptively lawful. 724 F.3d 426, 427 (3rd Cir. 2013). This was true even though the justifiable need standard only existed "in New Jersey in some form for . . . 90 years." *Id*. at 432. Regulation of the commercial sale of arms has existed in some form since the founding era. That a zoning ordinance identical to the Mojave County Zoning Ordinance was not on the books in 1791 is unimportant.

The Zoning Ordinance deals only with the commercial sale of arms. There is no language in the Zoning Ordinance limiting how many firearms an individual may possess, or how an individual must store their firearms. Much like its historical predecessors, the Zoning Ordinance merely regulates where firearm stores may be located and how they may operate. For example, section 17.54.131(B) of the Zoning Ordinance requires 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." R. at 19-20. Subsection

(C) of section 17.54.131 simply requires "[t]hat the applicant possesses, in current form, all of the firearms dealer licenses required by federal and state law." R. at 20.

Mojave County's Zoning Ordinance is firmly rooted in historical regulations on the commercial sale of arms dating to the founding of America. This court should find that the Zoning Ordinance are presumptively lawful and thereby do not burden Second Amendment rights. Thus, this Court's analysis should end here. The Zoning Ordinance is constitutional.

B. *This Court need not apply any form of heightened scrutiny.*

Even if this Court finds that the Zoning Ordinance is not presumptively lawful under the preceding analysis it need not apply heightened scrutiny. Step one of the Second Amendment analysis simply asks whether the challenged law burdens Second Amendment rights. *Jackson*, 746 F.3d at 960. As discussed above, a law is either presumptively lawful by historically being outside the scope of the Second Amendment or it does burden the Second Amendment. Proceeding to the second step of this test does not require this Court to apply heightened scrutiny. Despite burdening the Second Amendment, a challenged law's burden may be so negligible or minuscule that it would not make sense to subject it to a higher level of scrutiny. *See United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). That is the case here. The Zoning Ordinance does not come close to the core of the Second Amendment and does not burden the Second Amendment in any meaningful way.

1. The regulated conduct under the Zoning Ordinance is not close to the core of the Second Amendment.

The Zoning Ordinance does not come close to the core of the Second Amendment because it only marginally impacts commercial sellers of firearms and does not impact individual law-abiding citizens' use of firearms in their homes for self-defense.

A law comes close to the core of the Second Amendment when it imposes "restrictions on the use of handguns within the home." *Jackson*, 746 F.3d at 963. For example, in Jackson, a San Francisco regulation required that within the home individuals must store handguns "in a locked container or disabled with a trigger lock" or an "individual over the age of 18" must carry the handgun on his or her person. *Id*. at 958. There, the law was close to the core of the Second Amendment as it specifically regulated access to firearms for self-defense within the home.

Mojave County's Zoning Ordinance is incomparable to the law at issue in Jackson. The Zoning Ordinance does not seek to regulate the use of firearms by law-abiding individuals in their homes. In fact, it does not regulate the use of firearms by these individuals outside the home either. The Zoning Ordinance simply regulates where commercial retailers of firearms may be located in Mojave County. *See* R. at 19. This regulation has no relevant relation to firearm use for self-defense in the home. Individuals may still purchase firearms at three gun stores and may still use the two existing shooting ranges already operating in Mojave County. R. at 15.

The Zoning Ordinance regulates the location of prospective firearm stores in Mojave County. It does not impact firearm stores and shooting ranges already established in Mojave County. Nor have Respondents provided any evidence that existing gun stores and shooting ranges would be unable to comply with the Zoning Ordinance. *See* R. at 13. Therefore, there is no relation between the Zoning Ordinance and the core of the Second Amendment, the individual right to self-defense.

2. The Zoning Ordinance's *de minimis* burden on Second Amendment rights does not necessitate heightened scrutiny.

The Zoning Ordinance is minimal and thereby requires something less than heightened scrutiny. Heightened scrutiny is not automatically applied where a law may burden the Second Amendment. The courts do not read *Heller*, "to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny." *Decastro*, 682 F.3d at 166.

In *Decastro*, the challenged law prohibited "anyone other than a licensed importer, manufacturer, dealer or collector from transporting into his state of residence a firearm purchased or obtained outside that state." *Id.* at 162. The court held that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller* operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Id.* at 166. The court supported this conclusion by (1) drawing support from other circuits and (2) looking to the level of scrutiny determinations with other fundamental rights.

First, the *Decastro* court provided various examples from other circuits supporting its decision to not apply heightened scrutiny. The court noted the Ninth Circuit's decision in *Nordyke v. King*, which held "[o]nly regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Decastro*, 682 F.3d at 166 (quoting *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011), *reh'g en banc granted*, 664 F.3d 774 (9th Cir. 2011)). The court also quoted the D.C. Circuit in *Heller v. District of Columbia*, finding that "laws that have only a de minimis effect on the right to bear arms or that do not meaningfully affect individual self-defense do not impinge on the Second Amendment right and therefore do not warrant heightened scrutiny." *Id*. at 166 (internal quotation marks omitted) (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1253, 1260 (D.C.Cir.2011)).

Second, the *Decastro* court drew comparisons between the Second Amendment and other fundamental rights analyses. It noted that "[t]he right to marry is fundamental, but reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship are not subject to the rigorous scrutiny that is applied to laws that interfere directly and substantially with the right to marry." *Id*. at 167 (internal quotation marks omitted) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978)). Similarly, in the First Amendment context, "reasonable time, place or manner restrictions are subject to lesser scrutiny as long as they are content-neutral and preserve ample alternative channels for

communication of the information." *Id*. at 167 (internal quotation marks omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Finally, Respondents essentially argue that the Zoning Ordinance restricts convenient access to a neighborhood gun store imposing the burden of travel on Mojave County residents seeking to purchase firearms. R. at 4 ("the nearest gun store was approximately 10 miles away"). *See Teixeira*, 873 F.3d at 679. This claim fails as "the Second Amendment does not elevate convenience and preference over all other considerations." *Teixeira*, 873 F.3d at 680. Simply put, "gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained." *Id*. This Court held the same when considering access to abortion finding that "increased driving distances do not always constitute an undue burden." *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016).

The Zoning Ordinance imposes only a de minimis restriction on Second Amendment rights. To borrow from First Amendment analysis, the Zoning Ordinance does not regulate "content" by restricting the type of firearm, or the number of firearms an individual may possess. Rather, it regulates only where firearms may be commercially sold. This resembles a time, place, or manner restriction rather than a restriction on the content of speech. The distance to available firearm stores and shooting ranges in Mojave County does not impose a significant burden. In *Whole Women's Health*, a Texas statute rendered 400,000 reproductive age women over 150 miles from the nearest abortion-providing facility

and left 290,000 women over 200 miles away. *Id*. at 2314. Here, Respondents complain that the nearest gun store from their proposed firearm store property is a mere 10 miles away. R. at 4.

Any burden here is minimal and purely related to the reasonable distance of only 10 miles to the nearest gun store. This court should not apply heightened scrutiny but should find that the Zoning Ordinance is constitutional as it imposes only a minimal burden.

C. *Even under heightened scrutiny, the Zoning Ordinance is constitutional.*

If this Court finds that heightened scrutiny is necessary, intermediate scrutiny is the proper standard of review. It is irrefutable that "[s]trict scrutiny does not apply automatically any time an enumerated right is involved." *United States v. Marzzarella*, 614 F.3d 85, 96 (3rd Cir. 2010). When "the burden imposed by the law does not severely limit the possession of firearms" it "should merit a less stringent standard than the one that would have applied to the District of Columbia's handgun ban" in *Heller*. *Id*. at 97. In *Marzzarella*, the court held this to mean intermediate scrutiny should be applied. *Id.*

Almost every circuit, has applied intermediate scrutiny to Second Amendment claims where heightened scrutiny is required.[1] In *Marzzarella*, the court considered a law prohibiting the possession of "a handgun with an obliterated

[1] *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *National Rifle Ass'n of America, Inc.* v. McCraw, (5th Cir. 2013); *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010)

serial number." *Id*. at 95. The court compared determining the level of scrutiny in Second Amendment claims to determining the level of scrutiny in First Amendment claims. With First Amendment claims, "[s]trict scrutiny is triggered by content-based restrictions on speech in a public forum." *Id*. at 96. In contrast, "content-neutral time, place, and manner restrictions in a public forum trigger a form of intermediate scrutiny." *Id*. The law complained of in *Marzzarella* acted as a regulation like First Amendment time, place, and manner restrictions, rather than as a blanket prohibition like this Court dealt with in *Heller*. Because of the minimal impact of the Zoning Ordinance, far from an outright prohibition or ban, intermediate scrutiny should be applied.

1. The Zoning Ordinance is lawful under intermediate scrutiny.

Under the appropriate level of heightened review, intermediate scrutiny, the Zoning Ordinances of the County of Mojave are constitutional. Intermediate scrutiny requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Jackson*, 746 F.3d at 965. The "fit between the challenged regulation and the asserted objective [must] be reasonable, not perfect." *Marzzarella*, 614 F.3d at 98. In assessing the Zoning Ordinances under intermediate scrutiny, it is crucial to remember that they "need not be the least restrictive means of serving the interest." *Id*.

The Ninth Circuit's decision in Jackson is relevant here. 746 F.3d 953. As noted above, the challenged law in *Jackson* required that handguns in one's home be "stored in a locked container or disabled with a trigger lock" or that "[t]he

handgun is carried on the person of an individual over the age of 18." *Id.* at 958. The stated governmental objective in passing the law "was to reduce the number of gun-related injuries and deaths from having an unlocked handgun in the home." *Id.* at 965. San Francisco simply noted that "having unlocked firearms in the home increases the risk of gun-related injury, especially to children." *Id.* San Francisco reasoned "that storing handguns in a locked container reduces the risk of both accidental and intentional handgun-related deaths." *Id.* The court found that "[i]t is self-evident . . . that public safety is an important government interest." *Id.* (quoting *Chovan*, 735 F.3d at 1139). The law was "substantially related to [San Francisco's] objective to reduce the risk of firearm injury and death in the home." *Id.* at 966. The law passed intermediate scrutiny.

First, the stated objectives of Mojave County satisfy the first prong of intermediate scrutiny. As noted above, these objectives specifically touch on the safety and security of the residents of Mojave County as well as the preservation of residential areas. R. at 13-14. As in *Jackson*, "[i]t is self-evident. . . that public safety is an important government interest." 746 F.3d 956.

Second, there is a reasonable fit between the County of Mojave's stated objectives and the Zoning Ordinances. The District Court below correctly found "that [w]hile keeping a gun store 800 feet away from a residential area does not guarantee that gun-related violence or crimes will not occur, the law does not require a perfect match between the Ordinance's means and objectives, nor does the law require the Ordinance to be foolproof." R. at 14 (internal quotation marks

omitted). The Zoning ordinances are not overbroad, they simply distance firearm stores from sensitive areas. Sensitive areas are outside the scope of the Second Amendment. *See Heller*, 128 S. Ct. at 2786 (reaffirming prohibitions on carrying firearms "in sensitive places such as schools and government buildings").

The Zoning Ordinance here is substantially related to the important interests asserted by the County of Mojave. This court should find that the Zoning Ordinance passes intermediate scrutiny and is thereby constitutional.

2. Application of Strict Scrutiny is improper and regardless the Zoning Ordinance is constitutional under all levels of scrutiny.

Even under the highest level of judicial review, strict scrutiny, the Mojave County Zoning Ordinance is constitutional as it imposes only a minimal burden while serving compelling government interests.

Strict scrutiny requires that a challenged law be "narrowly tailored to serve a compelling governmental interest." *Ezell v. City of Chicago*, 651 F.3d 684, 707 (7th Cir. 2011). Use of strict scrutiny by the courts is rare and even more so in the context of the Second Amendment. It is extremely uncommon that a court will apply strict scrutiny to a law challenged under the Second Amendment. In *Heller*, this Court held the challenged law was unconstitutional "[u]nder any of the standards of scrutiny." 128 S. Ct. at 2817. The challenged law in *Heller* instituted an outright prohibition on the possession of firearms. *Id*. at 2788. Similarly, the court in *Ezell* applied something like strict scrutiny where it dealt with several city ordinances that essentially banned handgun possession. 651 F.3d at 689.

Comparing these cases to the *Jackson* case shows again how rare it is that courts will apply strict scrutiny. 746 F.3d 953. In that case, the challenged law specifically regulated the storage of all firearms in an individual's home. *Id*. at 958. Yet, the court there did not apply strict scrutiny because it found that the law did "not impose the sort of severe burden imposed by the handgun ban at issue in *Heller*." *Id*. at 964.

The Zoning Ordinance here bears no resemblance to the cases in which strict scrutiny or at least something more than intermediate scrutiny has been applied. Regardless, under strict scrutiny, the Zoning Ordinance is narrowly tailored to serve Mojave County's stated objectives of ensuring public safety and preserving residentially zoned areas. R. at 13-14. The Zoning Ordinance does not prohibit firearm stores or shooting ranges from operating within the County limits. The Zoning Ordinance does not impact the existing gun stores and shooting ranges in Mojave County. And the ordinance imposes only an eight-hundred-foot distance requirement from sensitive areas. This means that the nearest gun store from Respondents' proposed retail property was only 10 miles away. R. at 4. This represents a mere 15-minute drive at 40 miles per hour. Respondent has produced no evidence that the Zoning Ordinance has in any way meaningfully diminished access to firearms for law-abiding citizens in Mojave Court.

The Zoning Ordinance is narrowly tailored to further the compelling interests asserted by Mojave County. This Court should find that the Zoning Ordinance is constitutional under any level of scrutiny.

II. This Court Should Reverse the Fourteenth Circuit's Decision Below and Hold There Is No Freestanding Right to Sell Firearms Under the Second Amendment.

Regardless of which level of scrutiny this Court finds appropriate for Second Amendment claims, this Court need not apply any form of scrutiny to a law that fails to burden a Second Amendment right in the first place. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 61-62 (2d Cir. 2018). As mentioned above, Circuit Courts generally follow a two-step inquiry when determining whether a challenged law is unconstitutional under the Second Amendment. *See e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) *cert. denied*, 562 U.S. 1158 (2011). The first step asks whether the law burdens conduct protected by the Second Amendment. *Id*. The Second Amendment protects conduct that falls within the "historical understanding of the scope of the right." *Heller*, 128 S. Ct. at 2816. If the answer to the first step is "yes," only then does the court proceed to the next step, applying the appropriate level of scrutiny. *Marzzarella*, 614 F.3d at 88.

Here, the inquiry is complete at step one, so this Court need not engage in step two to determine a scrutiny level. Maxson asserts that the Zoning Ordinance burdens his right to sell firearms—a right that this Court, nor any other court, has ever recognized. R. at 10; *See, e.g., Teixeira*, 873 F.3d at 677-78. What this Court has recognized, rather, is that the Second Amendment protects the right to possess firearms. *Jackson*, 746 F.3d at 968. Selling guns and acquiring guns are two types of conduct that are analytically distinct under the Second Amendment. For a gun seller to state an adequate Second Amendment claim, the gun seller must show that

a challenged law burdens prospective customers' ability to acquire firearms—not that the challenged law burdens the gun seller's purported independent right to sell firearms. *Teixeira,* 873 F.3d at 682. (clarifying that the "Second Amendment does not confer a *freestanding* right, wholly detached from any customer's ability to acquire firearms, upon a proprietor of a commercial establishment to sell arms.") (emphasis added). [2]

This critical distinction between a gun seller's purported right to sell guns versus a prospective gun owner's right to purchase guns is analogous to a medical provider and a patient in the context of the Fourteenth Amendment. *Id*. at 689. Consider a woman's Fourteenth Amendment right to access reproductive health services. In *Roe v. Wade*, this Court held a woman's right to privacy under the Fourteenth Amendment protects the ability to obtain an abortion. 410 U.S. 113 (1973). Following that decision, this Court has examined laws regulating that right according to the burden it may impose on a woman's right to obtain an abortion, not on any burden it may impose on a medical provider's ability to provide an abortion. *See, e.g., Teixeira*, 873 F.3d at 689. This is precisely the same logic that extends to analyzing whether a challenged law imposes a burden on a citizen's right to acquire firearms. *Id*. (stating that "[n]ever has it been suggested, for example, that if there were no burden on a woman's right to obtain an abortion, medical providers could nonetheless assert an independent right to provide the service for pay.")

[2] The Ninth Circuit emphasized in *Teixeira* that "in many circumstances, there will be no need to disentangle an asserted right of retailers to sell firearms from the rights of potential firearm buyers and owners to acquire them, as the Second Amendment rights of potential customers and the interests of retailers seeking to sell to them will be aligned." 873 F.3d at 687.

The Fourteenth Circuit incorrectly decided at step one of the two-step inquiry that the Zoning Ordinance burdened conduct protected by the Second Amendment. The Fourteenth Circuit conflates a citizen's right to acquire guns with a gun seller's purported right to sell guns. R. at 11 (explaining that "Mojave County has offered nothing to undermine our conclusion that the right to purchase and sell firearms is part and parcel of the historically recognized right to keep and bear arms.") In deciding this, the Fourteenth Circuit inadvertently creates a new enumerated right under the Second Amendment with no basis to do so.

Accordingly, this Court should reverse the Fourteenth Circuit's decision below and find that there is no freestanding right to sell firearms because: (1) *Heller* held that regulations on the commercial sale of firearms are "presumptively lawful; (2) the Second Amendment's text confirms that there is no freestanding right to sell firearms; and (3) the Second Amendment's historical record confirms that there is no freestanding right to sell firearms.

A. *Interpreting the Second Amendment to confer a freestanding right to sell firearms is irreconcilable with this Court's language in Heller.*

Interpreting the Second Amendment to protect the right to sell firearms—unconnected to a citizen's right to acquire firearms—is irreconcilable with this Court's language in *Heller*. While *Heller* does not "clarify the entire field" of Second Amendment jurisprudence, it certainly makes one thing clear: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 128

S.Ct. at 2816-17. These "longstanding prohibitions" are "presumptively lawful regulatory measures." *Id*. at 2817, n. 26.

The significance of the *Heller* Court labeling regulations on selling firearms as "longstanding prohibitions" that are "presumptively lawful" is that it demonstrates that selling firearms falls "outside the scope of protected Second Amendment conduct." *Marzzarella*, 614 F.3d at 91. A plaintiff can only rebut the presumption of "lawfulness" by demonstrating that a law regulating gun sales interferes with a citizen's ability to exercise the right to possess a firearm. *See Binderup v. Att'y Gen*., 836 F.3d 336, 347 (3d Cir. 2016) (en banc) (plurality opinion) (explaining that "the burden [is] on the challenger to rebut the presumptive lawfulness" of a measure fitting within *Heller*'s enumerated categories), cert. denied, 137 S. Ct. 2323 (2017); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (explaining that a "plaintiff may rebut th[e] presumption [of lawfulness] by showing the regulation does have more than a de minimis effect upon his right").

It makes little sense for selling firearms to be an independent Second Amendment right while regulations on that purported right are "longstanding prohibitions" that are "presumptively lawful." *Heller*, 128 S.Ct. at 2816-17. The Ninth Circuit, like the Fourteenth Circuit below, addressed this notion in *Teixeira*. 873 F.3d at 682. There, a prospective gun store owner alleged precisely the same Second Amendment claim that Respondents assert here: a county's local zoning ordinance effectively barred him from opening a gun store and thus burdened his Second Amendment right to sell firearms. *Id*. at 673. The Ninth Circuit affirmed the

dismissal of the gun seller's Second Amendment claim, explaining that "*Heller*'s assurance that laws imposing conditions and qualifications on the commercial sale of firearms are presumptively lawful makes us skeptical of Teixeira's claim that retail establishments can assert an independent, freestanding right to sell firearms under the Second Amendment." *Id*. at 682; *See also United States v. Chafin*, 423 F. App'x, 342, 344 (4th Cir. 2011) (affirming a conviction for the sale of guns to an unlawful drug user, emphasizing that the Second Amendment protects the individual's right to bear arms, not a wholly separate right to sell them).

If this Court were to adopt the Fourteenth Circuit's holding that the Second Amendment confers a freestanding right to sell firearms, this would dramatically extend the reach of the Second Amendment's scope. For instance, "even if there were a gun store on every square block" in unincorporated Mojave County, Maxson contends that he would still have a right to open a gun store in that area. *Teixeira*, 873 F.3d at 681. The *Heller* Court did not intend for the Second Amendment to sweep this broadly. As acknowledged by the Ninth Circuit, it's correct that "firearms commerce plays an essential role today in the realization of the individual right to possess firearms as recognized in *Heller*." *Id*. But the Second Amendment "confers a right on the 'the people' who would keep and bear arms, not those desiring to sell them." *Id*. at 683.

B. *The text of the Second Amendment demonstrates that there is no freestanding right to sell firearms.*

Nothing in the plain text of the Second Amendment explicitly states, or even implicitly suggests, that the amendment confers an independent right to sell

firearms. This Court explained in *Heller* that "[i]n interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" 128 S.Ct. at 2788 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). With this principle guiding the analysis, the *Heller* Court dissected the plain text of both the prefatory and operative clause of the Second Amendment to determine that the Second Amendment protects an individual's right to possess a firearm, even outside service in a militia. 128 S.Ct. at. 2789.

Interpreting the phrase "to keep and bear arms" as inclusive of an additional right to sell firearms goes beyond the "normal and ordinary" meaning of the Second Amendment—contravening this Court's explicit textual analysis instruction in *Heller*. 128 S.Ct. at 2788. Even though the question in *Heller* focused on an individual's right to possess firearms in connection to the militia, this Court's textual analysis of the phrase "to keep and bear arms" also informs whether the Second Amendment confers an individual right to sell firearms. The *Heller* Court focused in large part on the Second Amendment's operative clause, "the right of the people to keep and bear arms, shall not be infringed," by explaining that "the most natural reading of 'keep arms' in the Second Amendment is to 'have weapons'" and the phrase "bear arms" meant no more than to "wear, bear, or carry…pon the person or in the clothing or in a pocket." U.S. Const. amend. II; *Heller*, S.Ct. at 2792.

A plain textual analysis of the state constitutions adopted during the founding era confirm that the Second Amendment does not include the right to sell firearms. *See, e.g.*, *Teixeira*, 873 F.3d at 683; Pa. Declaration of Rights, § XIII (1776) ("That the people have a right to bear arms for the defense of themselves and the state"); Mass. Const., Pt. First, art. XVII (1780) ("The people have a right to keep and bear arms for the common defence."); Ky. Const., art. XII, § 23 (1792) ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned."); Ohio Const., art. VIII, § 20 (1802) ("That the people have a right to bear arms for the defence of themselves and the State"). These state constitutional provisions, which *Heller* observed as "Second Amendment analogues," all demonstrate that the Second Amendment's gaurentee to firearms only extends to an individual's right to possess firearms. 128 S.Ct. at 2803.

Respondents contend, however, that this Court's textual analysis does not paint a complete picture of the Second Amendment because the Framers of the Constitution need not define in explicit terms every possible protected right that the amendment protects. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980) (explaining that "Fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.") While this Court has recognized implicit rights not expressly set forth in other amendments, Respondents nonetheless need to point to a valid basis, either rooted in the text or history, that demonstrates the Second Amendment protects an independent right to sell firearms. *Heller*, 128 S.Ct. at 2799 (conducting

a full textual and historical analysis to determine whether the Second Amendment conferred an individual right to keep and bear arms.) Respondents fail to do so.

C. *A historical analysis of the Second Amendment confirms that there is no freestanding right to sell firearms.*

Nothing in the Second Amendment's historical record shows that an independent right to sell firearms falls under the blanket of Second Amendment protection. Along with analyzing the plain text, the *Heller* Court also undertook an in-depth historical analysis of the Second Amendment to determine whether an individual's right to possess firearms must be connected to service in the militia. *Id.* at 2799. *Heller* specifically focused on the right to bear arms as it was historically understood in "England, colonial America, and during the Founding." *Id.* at 2791.

First, *Heller*'s Second Amendment historical analysis began by scrutinizing the 1689 English Bill of Rights, as it has "long [been] understood to be the predecessor to our Second Amendment." *Id.* at 2786. Between the Restoration and Glorious Revolution, Englishmen long feared that Stuart Kings Charles II and James II planned to "suppress political dissidents, in part by disarming their opponents." *Id.* at 2798. As a product of this concern, the English Bill of Rights provided "[t]hat subjects which are Protestants, may have arms for their Defence suitable to their Conditions, and as allowed by law." *Id.* St. George Tucker, a "preeminent authority on English law for the founding generation," described the right to bear arms in England as this time as a "preservation of personal liberty." *Id.*

Second, the right to bear arms served the same purpose in colonial America as it did in England; it was "a means of protecting personal liberties." *See, e.g.,*

Teixeira, 873 F.3d at 684 ("Arms were considered an important means of protecting vulnerable colonial settlements, especially from Indian tribes resisting colonial conquest, and from foreign forces."). "Like the English militia, the colonial militia played a primarily defencive role…The dangers all the colonies faced …were so great that not only militia members but all householders were ordered to be armed." Joyce Lee Malcom, *To Keep and Bear Arms* 139 (1994).

Because of this threat the colonies faced, the colonial government was primarily concerned with "'ensuring that the populace was well armed, not on restricting individual stocks of weapons.'" *See, e.g.*, *Teixeira*, 873 F.3d at 685. Most importantly, the government was in control of regulating the trade and sale of firearms. *Id*. Some colonies passed laws that prohibited Americans from selling firearms to Indian tribes; other colonies passed more general laws regulating where "colonial settlers could transport or sell guns. *Id*.

In the 1760s and 1770s, Americans began to invoke their right to keep arms in response to the British Crown seeking to disarm the colonies, much like the English under Charles II and James II. *Heller*, 128 S.Ct. at 2799. "The General committee of South Carolina, for example, adopted a resolution in 1774 recommending that all person immediately supply themselves with powder and bullets." *See, e.g.*, *Teixeira*, 873 F.3d at 686. Thus, the central reason the Founders adopted the Second Amendment was to "preserve citizen *access* to firearms," not to preserve a citizen's ability to sell firearms. *Id*. (emphasis original).

Nothing in the historical accounts demonstrates that the commercial sale of firearms was of any concern when ratifying the Second Amendment into the Bill of Rights. Starting from early English law through colonial America and the founding, the underpinnings of the Second Amendment's ratification was the understanding that an individual's right to keep and bear arms was no more than "a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 298 (3d ed. 1898).

D. *Even if Respondents allege a Second Amendment claim on behalf of Mojave County residents, Respondents still fail to state an adequate Second Amendment claim.*

Even if Respondents allege a Second Amendment claim on behalf of Mojave County residents, Respondents still fail to state an adequate Second Amendment claim. Maxson, as a would-be owner of a gun store, has derivative standing to assert a Second Amendment claim on behalf of his potential customers. *Craig v. Boren,* 429 U.S. 190, 195 (1976) ("[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function."); *see also Carey v. Population Servs., Int'l*, 431 U.S. 678, 683 (1977). This Second Amendment claim not only extends to potential customers' rights to acquire firearms, but also their rights to access firearm ancillary services. *Jackson*, 746 F.3d at 968 (holding that the right to possess firearms implies a corresponding right to obtain certain ammunition); *Ezell*, 651 F.3d at 704 (holding that the right to possess firearms

implies a corresponding right to "maintain proficiency in firearms use"). But no matter how Respondents frame the Second Amendment claim, Respondents' allegation fails.

1. The Zoning Ordinance does not interfere with Mojave County residents' rights to acquire firearms.

Respondents fail to state a claim that the Zoning Ordinance interferes with Mojave County residents' rights to acquire firearms. Respondents argued that the Zoning Ordinance "effectively 'red-lines gun stores out of existence in unincorporated Mojave County'" and that "a public need existed" for a gun store in this area. R. at 6-7. Yet, the record does not reflect this allegation. In fact, the record points to that a gun store already exists in the Mojave County area just 10 miles away from the location in which Respondents wanted to operate his own gun store. R. at 6. Respondents fail to show how this already existing gun store does not sufficiently provide Mojave County's residents the opportunity to purchase guns. Judge Watan highlights this point in his dissent: "there is no claim that, due to the Zoning Ordinance in question, individuals cannot lawfully buy guns in Mojave County. It is undisputed that they can." R. at 15. Respondent's unsupported allegation cannot possibly state an adequate Second Amendment claim.

2. The Zoning Ordinance does not interfere with Mojave County residents' rights to access firearms ancillary services.

Respondents fail to state a claim that the Zoning Ordinance interferes with Mojave County residents' protected ancillary rights under the Second Amendment. Following *Heller*, some circuits held that the Second Amendment also protects "ancillary rights necessary to the realization of the core right to possess a firearm

for self-defense." *See, e.g.*, *Teixeira*, 873 F.3d at 677. Purchasing ammunition and access to gun ranges are two such ancillary rights. *Jackson*, 746 F.3d at 968; *Ezell*, 651 F.3d at 708. Based on the Seventh Circuit's decision in *Ezell*, the Fourteenth Circuit concluded that, "the Zoning Ordinance's potential interference with such services was [. . .] a proper basis for [Respondent's] Second Amendment challenge." R. at 10.

However, the Fourteenth Circuit incorrectly analogized the facts in *Ezell* to the facts here. R. at 10. In *Ezell*, half of the named plaintiffs in were firearm organizations seeking to build a firearm range in Chicago. 651 F.3d at 692. The "organizational" plaintiffs were challenging a Chicago ordinance that explicitly banned all firing ranges in the city. *Id*. at 690. Plaintiffs argued that this ordinance, along with another Chicago ordinance mandating one hour of range training as a prerequisite to lawful gun ownership, burdened Chicago residents' core Second Amendment right to possess firearms for self-defense. *Id*. The Seventh Circuit agreed with plaintiffs, holding that the organizational plaintiffs had standing on behalf of "third parties who seek access to' its services" and that the ordinance unconstitutionally infringed on Chicago residents' core Second Amendment rights to possess firearms. *Id*. at 696.

The Fourteenth Circuit failed to recognize that, unlike the ordinance in *Ezell*, Mojave County's Zoning Ordinance is silent on regulations on firearms instruction and training services. R. at 19-20. Despite any mention of firearm instruction or training in the ordinance, the Fourteenth Circuit held that the ordinance burdened

Mojave County residents' ability to maintain proficiency in firearms use. R. at 10. Judge Watan correctly observed the majority's flawed analogy to *Ezell* in his dissent: "The Zoning Ordinance imposes no burden on Maxson if he simply wanted to open a business at the proposed site that would provide firearms instruction and training and a shooting range but not the separate firearms storefront." R. at 18.

To find that Respondents adequately state a Second Amendment claim on these facts would undoubtedly stretch the Second Amendment's protections far beyond this Court's holding in *Heller*. Given that the Zoning Ordinance imposes no burden on a citizen's ability to acquire firearms—the only enumerated right under the Second Amendment—there is no possibility for Respondents to state a Second Amendment claim.

CONCLUSION

For these reasons, this Court should reverse the judgment of the Fourteenth Circuit and find that rational basis review is the suitable level of scrutiny to apply to Second Amendment claims and that the Second Amendment does not confer a freestanding right to sell firearms.

Respectfully Submitted,

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