No. C180-0111-1

In the

SUPREME COURT OF THE
UNITED STATES OF AMERICA

County of Mojave,
Petitioner,

v.

Brotherhood of Steel, LLC and Roger Maxson,
Respondent.

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

BRIEF FOR PETITIONER

Team 82
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether rational-basis review is a sufficient test for those Second Amendment claims which are suitable for means-end scrutiny.
2. Whether the sale of arms falls outside the scope of the individual right to "keep and bear Arms" at the core of the Second Amendment, and thus is not afforded constitutional protection.

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The Memorandum and Order of the United States District Court for the Central District of New Tejas is unreported and is not set out in the record. The Opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but is set out in the record. R. at 2–18.

STATEMENT OF JURISDICTION

The judgment of the United State Court of Appeals for the Fourteenth Circuit was entered on October 1, 2018. This court granted petition for writ of certiorari. R. at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2016).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, the Second Amendment and Mojave County Ordinances, are reprinted in Appendices A and B, respectively. The First Amendment, from which some of the relevant jurisprudence is drawn, is reprinted in Appendix C.

STATEMENT OF THE CASE

On June 17, 2011, Respondent Roger Maxson formed a limited liability company, Brotherhood of Steel, Inc., with the intention of opening a gun store and shooting range in Mojave County, New Tejas. R. at 2. In response to a perceived demand for a full-service firearms center in an unincorporated area of Mojave County, Mr. Maxson contacted the Mojave County Planning Department for information about required permits and permissible land uses. R. at 3. The Chief Clerk of the Planning Department informed Mr. Maxson that he would need to obtain a Conditional Use Permit pursuant to Mojave County Ordinance Sections 17.54.130

and 17.54.131 (the "Ordinance") because he wanted to sell firearms. R. at 3. The ordinance mandates that businesses selling firearms in unincorporated areas of the County be located at least 800 feet from any one of the following: schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially zoned districts. R. at 3–4. Mr. Maxson identified what he believed was a suitable rental property. To avoid violating the ordinance, he obtained a survey that showed, based on door-to-door measurements, that the property was more than 800 feet away from any disqualifying property. R. at 4.

Mr. Maxson's Interactions with the Planning Department and Zoning Board

Mr. Maxson applied for a Conditional Use Permit for the planned store. R. at 4. The Mojave County Community Development Agency Planning Department ("Planning Department") reviewed the application and prepared an initial report for the West County Board of Zoning Adjustments ("Zoning Board") on November 1, 2011. R. at 4. The initial report found that there was a public need for a licensed firearms dealer, the proposed use was compatible with other land uses and transportation in the area, and a gun shop at the proposed site would not adversely affect the health or safety of persons living or working in the vicinity. R. at 4. However, the initial report recommended *denying* Mr. Maxson's permit application because the Zoning Board thought the shop was approximately 736 feet from a church, a disqualifying property. R. at 5.

On November 10, 2011, the Planning Department affirmed its earlier decision denying Mr. Maxson's permit. R. at 5. However, on December 29, 2011, the Zoning

Board passed a resolution granting Mr. Maxson a variance from the Ordinance and approving his application for the Conditional Use Permit. R. at 6. The Zoning Board found that a major highway created a physical buffer between the proposed site and the nearest disqualifying property. R. at 6.

Shady Sands Home Owners Association's Administrative Appeal

About four years later, on January 6, 2016, the Shady Sands Home Owners Association filed an appeal with the County Commissioners' Court challenging the Zoning Board's resolution granting Mr. Maxson a variance. R. at 6. The County Commissioners' Court sustained the appeal, overturned the Zoning Board's decision, and revoked Mr. Maxson's Conditional Use Permit. R. at 6. After his permit was revoked Mr. Maxson alleged that there was no property in unincorporated Mojave County territory that satisfied the Ordinance's 800-foot rule and was otherwise suitable for a gun shop. R. at 7.

Procedural History

Mr. Maxson filed a complaint in the United States District Court for the Central District of New Tejas challenging the County Commissioners' Court's decision to deny the variance and Conditional Use Permit. R. at 7. Mr. Maxson claimed that the Commissioners' Court violated his due process rights and denied him equal protection under law. He also claimed that the Ordinance was impermissible under the Second Amendment both facially and as applied. R. at 7. Mr. Maxson's commissioned study found that there are no parcels in the unincorporated areas of Mojave County which would be available and suitable for

firearm retail sales. R. at 7. However, another study that Mojave County provided found that approximately fifteen percent of the total unincorporated Mojave County acreage could comply with the 800-foot rule. R. at 7.

Mojave County moved to dismiss the claims, and Mr. Maxson moved for a preliminary injunction.[1] R. at 7–8. The District Court denied Mr. Maxson's motion and dismissed the equal protection and Second Amendment claims with leave to amend. Mr. Maxson filed an Amended Complaint that asserted four claims: (1) in singling out gun stores, the Ordinance as applied violated the Fourteenth Amendment's Equal Protection Clause; (2) the Ordinance was facially invalid under the Equal Protection Clause because it targeted guns stores but did not apply to other similarly situated businesses; (3) the Ordinance was facially invalid under the Second Amendment; and (4) the Ordinance as applied violated the Second Amendment. R. at 7–8. In response, the County moved to dismiss, arguing that the equal protection challenges failed to state sufficient facts to support a claim and that, under the Second Amendment, regulations governing the sale of firearms are presumptively valid. R. at 8. The District Court granted the County's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss for failure to state a claim upon which relief could be granted. Mr. Maxson timely appealed. R. at 8.

Upon reviewing Mr. Maxson's appeal, the Fourteenth Circuit affirmed the dismissal of the Equal Protection Clause claims but reversed the dismissal of the Second Amendment claims, remanding the case for further proceedings consistent

[1] Mr. Maxson stipulated to the dismissal of his due process claims.

with its opinion. R. at 14. The Fourteenth Circuit held that the services Mr. Maxson planned to offer were fundamental to the right to keep and bear arms and that the Ordinance's interference with those services was a proper basis for a Second Amendment challenge. R. at 10. The Fourteenth Circuit also found that the Ordinance was not a presumptively lawful regulation and that it did not pass heightened scrutiny because the County failed to meet its burden of proving that the Ordinance was substantially related to the stated interest of public safety. R. at 13–14.

Judge Watan concurred in part and dissented in part. R. at 15. Judge Watan found that Mr. Maxson failed to state a claim for how the Ordinance burdened the Second Amendment because he did not adequately allege in his complaint that Mojave County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular. R. at 15–16. Judge Watan also found Mr. Maxson's claim about burdening people's ability to obtain necessary firearms instruction and training to be unfounded. R. at 17. The judge pointed to the Ordinance itself, which does not concern business providing firearms instruction and training services. R. at 17–18. Judge Watan wrote, "With the dangers inherent in firearms, mere inconvenience is not enough." R. at 17.

The Supreme Court granted certiorari from the United States Court of Appeals for the Fourteenth Circuit on two questions related to the Second Amendment issues arising out of the dispute.

SUMMARY OF ARGUMENT

Rational Basis Review May Apply

The Supreme Court declared that there is an individual right to carry weapons in *District of Columbia v. Heller*, 554 U.S. 570 (2008). However, the Court left open how to decide a vast number of cases beyond of the facts of *Heller*, where the regulation denied the core right inherent in the Second Amendment to individuals entitled to it. While *Heller* did recognize that there are limits to the Second Amendment right, it found that the regulation in that case would fail under any level of scrutiny. The regulation would have failed any constitutional scrutiny because it essentially eliminated the Second Amendment right of an individual to keep and bear arms, without a sufficient corresponding government interest. The facts of *Heller* do not speak to the situation at hand in the instant case, necessitating a look at lower court practice.

In response to *Heller*, lower courts have developed a two-prong test to evaluate Second Amendment claims. The test calibrates the level of scrutiny a court uses to the seriousness of the intrusion on the Second Amendment right. This approach reflects *Heller*'s understanding of the scope of Second Amendment rights: there is a "core" right, and there are rights at the periphery which may impact the core but will still be constitutionally valid. Core rights receive heightened review, non-core rights receive less stringent review, and some related regulations may fall outside of the constitutional right altogether. This approach is consistent with how other enumerated constitutional rights are evaluated. Using the two-prong test, the regulation at question does not threaten the core of the Second Amendment right and

should be reviewed either under rational-basis review, or outside of the *Carolene Products* tiered framework as it may be outside of the Second Amendment right altogether.

The Sale of Arms Falls Outside the Scope of the Second Amendment

To determine whether or not a right falls within the scope of the Second Amendment, the Court should look to both the amendment's text and history as it did in *Heller*, 554 U.S. at 595. The text of the Second Amendment explicitly protects the right "to keep and bear Arms" but does not list any other rights, including the right to sell arms asserted by Respondent below. U.S. CONST. amend. II. The amendment's history illustrates that the right to bear arms was fundamental for early Americans and preexisted the bill of rights. *Heller*, 554 U.S. at 593. Nothing in the history indicates that those same Americans understood there to be a right to sell firearms. To the contrary, colonial governments substantially controlled the firearms trade and restricted where and to whom colonialists could sell firearms. *See Teixeira v. County of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (citing 1 J. Hammond Trumbull, *The Public Records of the Colony of Connecticut, Prior to the Union with New Haven Colony, May, 1665*, 138–39, 145–46 (1850)).

The Mojave County Ordinance Sections 17.54.130 and 17.54.131 is a presumptively lawful regulatory measure and is therefore constitutional. Mojave Cty., NTX., Code §§ 17.54.130–31. The *Heller* Court listed a "law imposing conditions and qualifications on the commercial sale of arms" as an example of a presumptively lawful regulatory measure. *Heller*, 554 U.S. at 626–27. Even though there is no free-

standing right to sell firearms in the Second Amendment, firearms commerce might affect the protected right to "keep and bear Arms." Only if a regulation of firearms commerce meaningfully constrains the right to "keep and bear Arms" does it infringe on the Second Amendment. The Ordinance does not meaningfully constrain people's rights to "keep and bear Arms" because citizens can still purchase and use firearms, so it receives no level of constitutional scrutiny. Therefore, the Ordinance is constitutional both facially and as applied.

STANDARD OF REVIEW

This Court should review the decision of the Fourteenth Circuit Court of Appeals *de novo*. *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009); *Aruanno v. Cape May Cty. Jail*, No. 02-1395, 2007 U.S. App. LEXIS 5641, at *7 (3d Cir. Mar. 8, 2007); *McLaughlin v. Bos. Harbor Cruise Lines, Inc.*, 419 F.3d 47, 50 (1st Cir. 2005). The Court of Appeals' reversed the District Court's decision to dismiss the Respondent's Second Amendment claim. The Court should accept as true all of the factual allegations in the complaint and draw reasonable inferences on behalf of the plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 118 (1990). 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) (citations omitted).

ARGUMENT

I. WHEN SECOND AMENDMENT CLAIMS ARE SUITABLE FOR MEANS-ENDS SCRUTINY, COURTS MAY APPLY RATIONAL-BASIS REVIEW.

A. Supreme Court Precedent Does Not Require the Application of Heightened Scrutiny.

i. The Second Amendment right is subject to limitations.

In *District of Columbia v. Heller*, the Supreme Court considered a question that would redefine the parameters of the national discussion around the Second Amendment: is there an individual right to carry weapons? 554 U.S. 570, 592 (2008). Both the text of the amendment and historical practice informed the Court's view that there is an individual right to carry weapons. *Id.* at 636. Despite the recognition of an individual right, the Court noted that this right is inherently limited. *Id.* at 626–27 ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

Having recognized there was an individualized Second Amendment right, the Court considered what restrictions upon that right would be permissible. Rather than articulate a specific standard to apply, the Court declared that the District of Columbia's ban on keeping handguns in the home infringed upon that right regardless of the standard of scrutiny applied. *Id.* at 628–29. ("Under *any* of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster.") (internal citations omitted) (emphasis added).

ii. The Court's opinion in Heller does not address the entire Second Amendment landscape.

Contrary to the assertions of certain courts and commentators,[2] the Court in *Heller* did not declare that Second Amendment cases must be considered using heightened scrutiny. The Court began with the original articulation of our modern tiers of scrutiny in *Carolene Products*.[3] *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). It focused on language indicating that the presumption of constitutionality might not apply if a law touched upon a specific Constitutional provision, such as one of the first ten amendments. *Heller*, 554 U.S. at 628 n.27. The Court, in responding to Justice Breyer's critique that the Court left lower courts in doubt about which standard to apply, wrote, "If all that was required to overcome the right to keep and bear arms was a rational-basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* This statement should not be read as a limitation on using rational-basis for cases that touch upon the Second Amendment for two reasons.

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[2] *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) ("In *Heller,* the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment. The *Heller* Court did, however, indicate that rational-basis review is not appropriate."); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 259 (S.D.N.Y. 2011); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852, 864 (2013).

[3] In *Carolene Products*, a salesman of "Milnut," a product made of skimmed milk and coconut oil, challenged a regulation which prohibits the sale of such a product. The Court affirmed the regulation, explaining that the appellee's Fifth Amendment due process right was not violated. In footnote four of the case, the Court introduced factors which may require courts to scrutinize government regulations. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Subsequently, the Court has developed three different tiers of scrutiny: rational, intermediate, and heightened. Ernest A. Young, *The Supreme Court and the Constitution* 353 (2017) ("*Rational Basis Review:* The law will be upheld if it is rationally related to a legitimate state interest. *Intermediate Scrutiny:* The law will be upheld if it is closely related to an important state interest. *Strict Scrutiny:* The law will be upheld only if it is narrowly tailored to a compelling state interest.").

First, both this Court in *Heller* and lower courts after *Heller* have recognized that there remain many unanswered questions about the Second Amendment. *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010). ("But *Heller* did not purport to fully define all the contours of the Second Amendment…and accordingly, much of the scope of the right remains unsettled.") (international citations omitted).[4] In *Heller*, the Court did not consider a regulation that could plausibly pass rational-basis review. The Court announced that the right to self-defense was "central to the Second Amendment Right"; moreover, the ban affected the home "where the need for defense of self, family, and property is most acute." *District of Columbia v. Heller*, 554 U.S. at 628. Once the Court declared there was an individual right to carry arms, deciding that the D.C. regulation harmed the right was a *fait accompli*. The Court did not have the opportunity to consider a colorable claim of a regulation that could pass rational-basis review; therefore, *Heller*'s statement about the need for heightened scrutiny should only be read to apply to cases involving rights that are central to the Second Amendment.

Second, this approach is consistent with earlier language in the opinion which embraces exceptions to the Second Amendment. The Court in *Heller* was clear that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the

[4] Joseph Blocher & Darrell A.H. Miller, *The Positive Second Amendment* 110 (2018) ("*Heller* did not need to fully elaborate Second Amendment doctrine to resolve the case before it. But lower courts do not have that luxury. They face questions that could come out differently depending on the Amendment's breadth of coverage or the level of protection it affords. The constitutionality of banning guns near post offices might depend on whether a post office is a "sensitive place. A ban on "assault weapons" might survive intermediate scrutiny but fail strict scrutiny.").

carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27. Whether they are called exceptions or seen as being outside of the "central" rights of the Second Amendment, this list provides a roadmap for types of cases that could be considered using rational-basis review or which could be outside the purview of the Second Amendment altogether. The Court sets up a dichotomy between rights that are "central" to the amendment, such as the right to self-defense, and exceptions, such as the right to have a gun in a "sensitive place" like a school. This is consistent with the way the Court talks about the First Amendment as well. The First Amendment guarantees freedom of speech, but contains "exceptions for obscenity, libel, and disclosure of state secrets…" illustrating that even enumerated rights have exceptions outside of their broad promises. *Id.* at 635.

Heller tells courts what they should do with rights that are "central" to the amendment: consider them with heightened scrutiny. *Heller* left open, however, what standard of review should be used for questions on the periphery. *Heller* should not be read to apply more broadly than to the circumstances presented in that case, where the court faced a regulation that implicated the core of the Second Amendment right. As the Second Circuit Court of Appeals explained in *United States v. Decastro*, "In *Heller,* the Court was faced with restrictions that undoubtedly did impose a significant burden on core Second Amendment rights. It had no occasion to consider the appropriate standard of review for laws that only minimally impact such rights." 682 F.3d 160, 167 (2d Cir. 2012) (refusing to apply heightened scrutiny to a gun

licensing scheme in New York because it did not significantly affect the ability to obtain a firearm). Courts were left with the responsibility of deciding what standard of scrutiny to apply to Second Amendment cases.

B. Courts Should Apply Rational-Basis Review to Cases Involving Claims Outside of the Core of the Second Amendment.

i. The two-part test faithfully applies Heller's recognition of a scope of rights within the Second Amendment.

In response to the "vast terra incognita"[5] that *Heller* created, federal courts have adopted a two-part test to review challenges to the Second Amendment. Blocher & Miller, *supra* note 4, at 110 ("In the decade since *Heller*, the federal courts of appeals have widely adopted the two-part approach used in *Masciandaro*."). The two-part approach first took shape in the Fourth Circuit Court of Appeals in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011). That court considered a federal statute that forbids "carrying or possessing a loaded weapon in a motor vehicle within national park areas." *Id.* at 475 (internal quotations omitted). The court considered how the statute affected the core right of self-defense in the home. It assumed that if a law encroached on that core, it would receive strict scrutiny. *Id.* at 470. Beyond the core-right of the Second Amendment, "firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *Id.* Believing that the statute at hand was outside of the core Second Amendment right to self-defense, the court applied intermediate scrutiny and upheld the statute.

[5] Blocher & Miller, *The Positive Second Amendment* 102 (2018)

Multiple other courts have since adopted a similar version of the two-part test. The Fifth Circuit described the test in *NRA of Am. v. Bureau of Alcohol*:

> A two-step inquiry has emerged as the prevailing approach: the first step is to determine whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee; the second step is to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny.

700 F.3d 185, 194 (5th Cir. 2012) (applying intermediate scrutiny to uphold a regulation preventing federally licensed firearm dealers from selling to individuals under age 21). The Second Circuit surveyed other courts of appeal and found that the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted this approach as well. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015).[6]

This test is appropriate because it recognizes that not all conduct that falls under the Second Amendment should be protected equally. Moreover, because the right is not absolute, governments should not always have to rigorously justify related laws. *Heller* recognized the prerogative of governments to regulate who may have a firearm, what types of firearms one may have, and where one may possess firearms. *District of Columbia v. Heller*, 554 U.S. at 626–27. If a government wanted to bar weapons from public schools, but faced strict scrutiny in the courts, even the most

[6] *See GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *United States v. Chovan*, 735 F.3d at 1136; *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia* (*Heller* II), 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 702–703 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–801 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d at 89.

well-intentioned, historically grounded rule might be struck down under the heightened standard of review. It is possible that strict scrutiny would "foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to 'prevent[ ] armed mayhem' in public places… and depriving them of 'a variety of tools for combating that problem.'" *United States v. Masciandaro*, 638 F.3d at 471 (internal citations omitted).

Moreover, applying strict scrutiny to all gun regulations would drastically increase the burden on the judiciary. The Ninth Circuit imagined how this would impact courts:

> Whenever a law is challenged under the Second Amendment, the government is likely to claim that the law serves its interest in reducing crime. Because the Supreme Court has already held that "the Government's general interest in preventing crime" is "compelling," the question, under strict scrutiny, would be whether the regulation is narrowly tailored to that interest. But courts cannot determine whether a gun-control regulation is narrowly tailored to the prevention of crime without deciding whether the regulation is *likely to be effective* (or, at least, whether less burdensome regulations would be as effective).

Nordyke v. King, 644 F.3d 776, 785 (9th Cir. 2011) *rev'd en banc on other grounds*, 681 F.3d 1041 (9th Cir. 2012) (internal citations omitted). Not only would requiring strict scrutiny impose a burden on the judiciary, but the task may set up regulations to fail. The Court has said that "The purpose of the narrow tailoring requirement is to ensure that the means chosen 'fit' . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). Expanded beyond the equal protection context, analysis of fit requires courts to consider

whether a law is "over-inclusive" or "under-inclusive." Drawing a law too broadly or too narrowly could be fatal. In the context of guns, this type of analysis would result in too many "false positives": laws being struck because they fail this indicator despite legitimate purposes that do not overly infringe on the Second Amendment Right. This analysis is ill-suited to the gun context because data will be difficult to obtain, either because of resource constraints or because the law has been challenged before it has had time to take effect. Because of these inherent difficulties, "Sorting gun-control regulations based on their likely effectiveness is a task better fit for the legislature," as the Ninth Circuit noted. *Nordyke v. King*, 644 F.3d at 780. Thus, even if the judiciary can obtain the information it needs to analyze the effectiveness of a law, institutionally it is poorly suited for the task.

Recognizing the constraints of both governments and courts, the better approach would be to calibrate the level of scrutiny based on the importance of the right at hand. The two-step test that a majority of circuits have adopted embodies that approach while remaining faithful to both the letter and the spirit of *Heller*.

ii. This approach is consistent with how courts evaluate challenges to regulations on speech.

The two-step approach is not a novel invention of lower courts attempting to justify the application of rational-basis review. Rather, this approach mirrors the existing practice of courts in considering First Amendment claims: applying different standards of review depending on the conduct at hand. Courts in the Second, Third, and Ninth Circuits link their Second Amendment jurisprudence to the already established approach to the First Amendment. *N.Y. State Rifle & Pistol Ass'n v.*

Cuomo, 804 F.3d at 258–59 ("The practice of applying heightened scrutiny only to laws that 'burden the Second Amendment right *substantially* is, as we noted in *Decastro,* broadly consistent with our approach to other fundamental constitutional rights, including those protected by the First and Fourteenth Amendments."); *United States v. Marzzarella*, 614 F.3d at 96–97; *Nordyke v. King*, 644 F.3d at 795 ("Drawing from First Amendment doctrine, I would subject to heightened scrutiny only arms regulations falling within the core purposes of the Second Amendment.").

In the context of the First Amendment, courts alter the level of scrutiny based on the nature of the speech or expression in question. After incorporating the freedom of speech and press through the Fourteenth Amendment, the Supreme Court began using a common law approach to determine the boundaries of the protection that the First Amendment offered. *See* David M. O'Brien, *Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the U.S. Supreme Court* 11 (2010). The Court has developed a "two-level theory" in which it classifies certain categories of speech as either "protected or unprotected per se." *Id.* at 17. Fighting words, obscenity, and defamatory speech are examples of the types of speech that do not receive constitutional protection. *Id.*[7] In addition to these categorically unprotected types of speech, the Court has also refused to protect "perjury, plagiarism, contempt

[7] *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("Allowing the broads scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

of court, fraud and false advertising, insider trading and price fixing, trademark infringements, antitrust, and copyright, or for harassment in the workplace." *Id.* at 17–18.

In a case where the speech falls outside the categorically barred examples, heightened scrutiny is not automatically applied. Speech is subject to "reasonable" time, place, and manner limitations. These restrictions are considered acceptable so long as they are made without regard to content, are narrowly tailored, and allow other channels of communication. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding a restriction on camping in the National Memorial core-parks was an acceptable time, place, and manner restriction). Restrictions of speech receive heightened scrutiny only when the "government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (internal citations omitted).

First Amendment jurisprudence provides a roadmap for the Second Amendment. Not only are these rights enumerated: they were also both born of the same historical moment. The development of First Amendment law provides instructive guidance for analysis within the comparatively underdeveloped Second Amendment jurisprudence. Two principles can be drawn from the treatment of speech. First, the First Amendment does not protect all types of speech. Second, the type of speech dictates the level of scrutiny with which a regulation is reviewed. These two principles mirror the two-part test that circuits have developed in the area of Second Amendment law.

As with the First Amendment, there are activities which implicate the Second Amendment, but do not implicate the "core" of the right. The Ninth Circuit used this analysis when considering whether a county ordinance banning guns from county property effectively barred a couple from using the county fair for an annual gun show. *Nordyke v. King*, 644 F.3d at 780. The majority held that "The Supreme Court's reasoning in *Heller* and *McDonald* suggests that heightened scrutiny does not apply unless a regulation substantially burdens the right to keep and to bear arms for self-defense." *Id.* at 783. A concurring opinion elaborated more on what this substantial burden might look like: "I would be deferential to a legislature's reasonable regulations unless they specifically restrict defense of the home, resistance of tyrannous government, or protection of country." *Id.* at 797. This opinion illustrates that similar to First Amendment practice, courts recognize that not all practices involving guns encroach upon the Second Amendment equally.

Returning to First Amendment law, the evaluation of free speech claims is filled with examples of categorizing conduct and then applying varying levels of scrutiny. As explained earlier, some forms of speech receive no protection, such as defamation. Other forms of speech implicate the right, but do not burden the core of the right. Consider *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* in which the Court reviewed the disclosure requirements for commercial speech using a rational-basis test. The Court recognized that the disclosure requirements did touch on the First Amendment. 471 U.S. 626, 651 (1985) ("We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at

all."). However, the Court did not use heightened scrutiny, instead it asked whether the requirements bore a "reasonable relationship" to the State's interest. *Id.* That reasonable relationship test is akin to classic rational-basis review. This case illustrates the way the Supreme Court has altered the level of scrutiny based on how significantly the regulation infringes on the right. The Third Circuit Court of Appeals drew upon this framework in *Marzzarella*, explaining that "the right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue." 614 F.3d at 96–97.

iii. Other constitutional rights are reviewed without heightened scrutiny.

Heightened scrutiny is not often applied to constitutional rights, despite a common misperception to the contrary. Adam Winkler, *Fundamentally Wrong About Fundamental Rights,* 23 Const. Commentary 227, 239 (2006) ("But the old adage about laws infringing fundamental rights being subject to strict scrutiny remains a favorite of scholars, judges, and law students. And it is flatly wrong."). Beginning with the Bill of Rights, strict scrutiny is not used to evaluate claims encompassed in these rights. In the past, strict scrutiny has been used only when evaluating First Amendment and Fifth Amendment claims. *Id.* at 229. By comparison, claims implicating the core of the rights in the Third Amendment, Fourth Amendment, Sixth Amendment, Seventh Amendment, Eight Amendment, Ninth Amendment, and Tenth Amendment do not trigger strict scrutiny. *Id.*

While some of these amendments have received relatively little judicial attention, an examination of the others quickly rebuts that concern. *Id.* The lack of jurisprudence with respect to, for example, the Third Amendment, might cause some to suspect that if quartering of soldiers were to occur, claims regarding that right would be reviewed with heightened scrutiny, shifting the burden to the government. Examining the Fourth Amendment, which has been the subject of "voluminous case law," repudiates the view that all rights in the first ten amendments are protected by heightened scrutiny, addressing that suspicion. *Id.* The Court has taken from the language of the amendment and assessed searches based on a standard of "reasonableness." *Id.* While reasonableness could become a form of strict scrutiny, the Court has rejected such an approach. *Id.* at 230. ("In *Vernonia School District v. Acton*, the Court insisted, 'We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment.' Searches and seizures are thus not strictly scrutinized.") There is ample evidence that Courts have considered what tiers of scrutiny to apply and have not found a need to use strict scrutiny to protect the Bill of Rights.

The areas of law where strict and intermediate scrutiny are usually applied are dissimilar from the Second Amendment. In *Heller v. District of Columbia* (*Heller II*) then-Judge Kavanaugh wrote in dissent that strict and intermediate scrutiny are usually applied in substantive due process and equal protection cases. 670 F.3d 1244, 1283. Individual rights do not often receive intermediate or strict review per his assessment, listing many of the rights enumerated in the Bill of Rights: "Jury Trial

Clause, the Establishment Clause, the Self-Incrimination Clause, the Confrontation Clause, the Cruel and Unusual Punishments Clause, or the Habeas Corpus Clause, to name a few." *Id.*

Generally, the determination of whether a right will receive heightened scrutiny is dependent on a showing of "the weight of the burden." *Decastro*, 682 F.3d at 167. In addition to the First Amendment, constitutional issues such as takings and abortion are some of the only constitutional cases reviewed under heightened scrutiny, and only under specific circumstances. In the takings context, states are believed to have certain police powers, but if a state goes "too far" in regulating a court may find a "taking." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–16 (1992). With regard to abortion, regulations that place an "undue burden" on the decision to terminate a pregnancy before viability violate the Due Process Clause. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992). Claims that assert violations of constitutional rights do not receive heightened review automatically. Rather, plaintiffs often must show that the threat to the right is sufficiently serious to merit that review.

C. Courts Should Vary the Standard of Review They Use to Evaluate Second Amendment Cases Based on the Claim.

i. Claims that do not implicate the core of the Second Amendment right should be reviewed with rational-basis review.

As discussed earlier, the Court in *Heller* found that there is an individual right to possess and carry weapons for self-defense. 554 U.S. at 592. Certain behaviors are simply outside of the scope of the Second Amendment. For example, in *Heller* the Court listed traditional prohibitions, including: "[Possession of] firearms by felons

and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27. Additionally, the court recognized limitations on the *type* of arms that one may possess. *Heller* says that the only protected right is to arms that were "in common use at the time." *Id.* at 627. These types of traditional prohibitions do not receive the protection of the Second Amendment.

Cases challenging regulations of these types should not receive heightened scrutiny. These traditional prohibitions are similar to the First Amendment's prohibitions on certain types of speech, categorically, such as a prohibition on defamation or hate speech. In the context of the Second Amendment, traditional prohibitions, such as prohibitions of felons possessing weapons would be treated as categorically unprotected, thus receiving rational-basis review.[8] The Ninth Circuit applied rational-basis review when a petitioner, who was a felon, challenged a conviction for carrying a firearm in violation of federal law. *United States v. Vongxay*, 594 F.3d 1111, 1113–14 (9th Cir. 2010). First, the court affirmed that *Heller* explicitly denied the Second Amendment right to felons. The court then relied upon an earlier case in the circuit which applied rational-basis review to determine if a similar regulation violated the equal protection clause. Finding that the "distinction between felons and non-felons [are] grounded in both historical and modern understandings

[8] Traditional prohibitions are presumptively lawful and, thus, may receive no means-ends scrutiny. If challenged in such a way that they would be reviewed under means-ends scrutiny—i.e., under the Equal Protection Clause or after the presumption of legality is successfully rebutted—they would receive at most rational-basis review.

of the purpose of the Second Amendment. Therefore, we hold that § 922(g)(1) does not violate the equal protection guarantee of the Fifth Amendment." *Id.* at 1119. This analysis illustrates that the Second Amendment does not protect certain groups and behaviors and their claims should not receive heightened scrutiny.

Beyond these explicitly imagined restrictions, there are other regulations which may affect the Second Amendment right but that do not infringe upon the core right. For example, zoning regulations and fees may affect the Second Amendment, but are outside of the core of the right. In *Kwong v. Bloomberg*, the Second Circuit Court of Appeals considered a New York state regulation that allowed jurisdictions to choose how much to charge for residential handgun license. New York City charged $340 for a three-year license. 723 F.3d 160, 162 (2d Cir. 2013). The court considered each of these regulations in turn. It found that New York City's fee was not a "'marginal, incremental or even appreciable restraint' on one's Second Amendment rights—especially considering that plaintiffs have put forth *no evidence* to support their position that the fee is prohibitively expensive." *Id.* at 167. The court did not decide what standard of review should apply, explaining that it would pass even intermediate scrutiny. It did, however, apply rational-basis review to the claim that the penal law allowing different jurisdictions to charge different licensing amounts violated the Equal Protection Clause. *Id.* at 169. Despite the fact that the court did not feel the need to choose a standard, it could have applied rational-basis review for the same reasons it did when considering the equal protection claim. Reasoning that "geographical restrictions" were not a suspect category subject to heightened review,

the court applied rational-basis review and affirmed the validity of the law. *Id.* at 169 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (identifying statutes that classify based on race, alienage, or national origin as "suspect.")). Similarly, if a regulation does not affect the core right of the Second Amendment, it should not be considered "suspect." *See also Decastro*, 682 F.3d at 164. ("We hold that heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment.").

ii. The regulation at hand is lawful if reviewed using rational-basis review.

Rational-basis review should be applied to the zoning regulation at hand.[9] Rational-basis review presumes that a regulation is valid if it is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 440. Petitioner challenges Mojave County Ordinance Sections 17.54.130 as a violation of his Second Amendment right. The Ordinance requires that a "business selling firearms in unincorporated areas of the County be located at least 800 feet away from any of the following: schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially zoned districts." R. at 3-4. According to the Petitioner, this 800-foot rule "is not reasonably related to any possible public safety concerns" and makes it impossible to find a suitable space for a gun store in unincorporated Mojave County. R. at 7. If the Petitioner's argument was true, that

[9] *See* section II.B *infra*. Alternatively, this regulation could be approved without review because the Second Amendment does not protect the sale of weapons at all.

there was not *any* reason for the law, then it would fail rational-basis review. The County has several reasons for the regulations.

The County has explicitly stated three distinct interests in the regulation. First, keeping gun sales at a distance of 800 feet from "populated, well-traveled, and sensitive areas" maintains public safety. R. at 13. The stores are prevented from encroaching upon the space of places with children, such as schools and day care centers. In addition, the regulation imposes a distance between locations where alcohol is sold and where guns are sold, a combination which could lead to gun violence. These measures are reasonably related to improving public safety. Second, these regulations "protect against the potentially secondary effects of gun stores, such as crime." R. at 14. Third, it protects the county's interest in shaping residential zones. R. at 14.

These justifications are rationally related to the regulation and support a legitimate state interest. It may be hard to define the exact boundaries of a state's legitimate interests. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 181–82 (1972) ("Nowhere in the text of the Constitution, or in its plain implications, is there any guide for determining what is a 'legitimate' state interest…"). Despite the ambiguities of those boundaries, preserving the health and safety of residents in addition to regulating communities falls well within them and are encompassed within the traditional state "police powers." *Id.* ("The traditional police power of the States has been deemed to embrace any measure thought to further the well-being of the State in question, subject only to the specific prohibitions contained in the Federal

Constitution."). Because these regulations fall squarely within the traditional police powers and promote legitimate state interests, the regulation passes rational-basis review.

II. THE SECOND AMENDMENT DOES NOT SECURE A RIGHT TO SELL FIREARMS

A. The Law is Facially Constitutional Because the Second Amendment Does Not Secure a Right to Sell Firearms

In addressing Second Amendment claims, we look to what this Court articulated in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). *Heller* stands for the broad proposition that there is an individual right to bear arms articulated in the Second Amendment. The opinion in *Heller* directs those evaluating a given Second Amendment claim to look to "both text and history" when interpreting the Second Amendment, bearing in mind that "constitutional rights are enshrined with the scope that they were understood to have when the people adopted them." *Id.*

Mr. Maxson's Second Amendment claim begs the threshold question of whether the Second Amendment protects a right to sell firearms. To answer the question of facial constitutionality in the instant case, we examine the text and history of the Second Amendment with respect to that right. As discussed below, the regulation of gun sales is constitutionally valid, as neither the text nor the history of the Second Amendment provides otherwise.

i. The text of the Second Amendment does not demonstrate that there is a right to sell firearms.

The text of the Second Amendment protects the right of the people "to keep and bear Arms." U.S. CONST. amend. II.[10] This Court held in *Heller* that at the time of the founding, as now, the word "bear" means "carry." *Heller*, 554 U.S. at 583. Justice Ginsburg articulated a more elaborate definition of "bear" in her dissent in *Muscarello v. United States*: to "wear, bear, or carry. . .upon the person or in the clothing or in a pocket, for the purpose…of being armed and ready for offensive or defensive action in a case of conflict with another person." 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (quoting BLACK'S LAW DICTIONARY 214 (6th ed. 1998)). Notably, this dissent was joined by Justice Scalia, who authored the *Heller* opinion. Nothing in either the concise or expanded definition of "bear" includes the word "sale" or the right "to sell." The Oxford English Dictionary defines "keep" as "have or retain possession of" or "retain or reserve for future use." *OED Online*, Oxford University Press, July 2018. http://en.oxforddictionaries.com/definition/keep (last visited Nov. 14 2018). In fact, "keep" is the opposite of "sell," which the Oxford English Dictionary defines as "give or hand over (something) in exchange for money." *Id.* http://en.oxforddictionaries.com/definition/sell (last visited Nov. 14, 2018). The language of the Amendment does not include any mention of selling, trading, or conveying arms in any way.

[10] Justice Kagan has emphasized the Court's preference for analyzing claims starting with the text of the statute or the Constitution: "We are all textualists now." Jonathan R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy*, SCOTUSblog. (Nov. 14, 2017, 10:48 AM), http://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/.

In comparison with other constitutional amendments, the language of the Second Amendment is far narrower. For example, compared to the First Amendment, the Second Amendment includes fewer rights. *Teixeira*, 873 F.3d at 688. The Second Amendment specifies only the right to "keep and bear Arms," while the First Amendment specifies the right to free exercise of religion, free speech, free press, freedom of peaceable assembly, and the freedom to petition the Government for a redress of grievances. U.S. CONST. amend. I, II. The First Amendment's list of rights indicates that the drafters of the Bill of Rights listed rights explicitly when they wanted an amendment to protect them. The drafters could have easily only listed the freedom of speech and assumed that courts would discern other related rights, such as freedom of the press, stemming from the right to free speech. But, instead, the drafters listed the rights included in the First Amendment, indicating that the Second Amendment only includes the right to "keep and bear Arms." Nothing in the text of the Amendment suggests the Second Amendment confers an independent right to sell or trade weapons. *See Teixeira*, 873 F.3d at 683.

ii. The history of the Second Amendment does not demonstrate that there is a right to sell firearms

Because the Second Amendment codifies a preexisting right, the scope of the protection afforded by the amendment is a matter of historical inquiry. *United States v. Chester*, 628 F.3d 673, 678 (4th Cir. 2010) ("It has been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *preexisting right*, determining the limits on the scope of the right is necessarily a matter of historical inquiry."). The historical inquiry seeks to determine whether the conduct

at issue was understood to be within the scope of the right at the time of ratification. *Id.* at 680. If the conduct is not within such scope, then the challenged law is valid. *Id.* The historical record of the Second Amendment confirms that a right to sell firearms was not understood to be within the scope of the right at the time of ratification.

According to the *Heller* Court, we can discern the scope of the right as it was understood when it was ratified by looking directly to its predecessor, a provision of the 1689 English Bill of Rights. *Heller*, 554 U.S. at 593. The English Bill of Rights stated "[t]hat the subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441. This right was codified in reaction to the Stuart kings' systemic disarming of the English people. *See Heller*, 554 U.S. at 592–93. William Blackstone described that right as an "auxiliary right" designed to protect the primary rights of "free enjoyment of personal security, of personal liberty, and of private property." 1 William Blackstone, *Commentaries on the Laws of England* 139–40 (1765). Blackstone explained that if these primary rights are violated then the people must first turn to the courts of law, next to the king and parliament, and lastly to the right of having and using arms for self-preservation and defense. *Id.* at 140. St. George Tucker similarly described the English right to bear arms as a necessary means of protecting personal liberties. *Heller*, 554 U.S. at 594. Both Blackstone's and Tucker's description of the right to bear arms indicate that the right was a means to provide protection of personal liberties. *Teixeira*, 873 F.3d at 684. Neither of them state or

imply that the English Bill of Rights encompassed an independent right to engage in firearms commerce. *Id.*

Across the pond in colonial America, the right to bear arms was fundamental for English subjects. *Heller*, 554 U.S. at 593. Arms were an important way to protect vulnerable colonial settlements from Native American tribes and foreign forces. *See* Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 579 (2006); Joyce Lee Malcolm, *To Keep and Bear Arms* 139 (1994). The importance of bearing arms during the colonial period was rooted in the necessity of the militia: "It would be impossible to overstate the militia's centrality to the lives of American colonists. For Americans living on the edge of the British Empire, in an age without police forces, the militia was essential for the preservation of public order and also protected Americans against external threats." Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 13 (2006).

While using arms was essential to daily life, colonial governments substantially controlled the firearms trade. *Teixeira*, 873 F.3d at 685 (citing Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 579 (2006); Joyce Lee Malcom, *To Keep and Bear Arms* 139 (1994)). The government provided and stored guns, controlled the conditions of trade, and financially supported private firearms manufacturers. *See* Solomon K. Smith,

Firearms Manufacturing, *Gun Use, and the Emergence of Gun Culture in Early North America*, 49th Parallel, Vol. 4, at 6–8, 18–19 (2014). Colonial government regulation included some restrictions on the commercial sale of firearms. Under Virginia law, any person found within a Native American town or more than three miles from an English plantation with arms or ammunition above and beyond what he would need for personal use would be guilty of the crime of selling arms to Indians. Acts of Assembly, Mar. 1675–76, 2 William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 336–37 (1823). Connecticut banned the sale of firearms by its residents outside the colony. 1 J. Hammond Trumbull, *The Public Records of the Colony of Connecticut, Prior to the Union with New Haven Colony, May, 1665*, 138–39, 145–46 (1850).

The only historical evidence which could be used to find otherwise is the behavior of the colonists during the gun embargo against the colonies enacted by the British Crown. While there was an embargo placed on guns during the 1760s and 1770s that the colonists did not obey, nothing in the historical documents from that period indicates that the colonists then therefore assumed there was a right to sell arms imbued by the Second Amendment in response. Their failure to follow the embargo was an act of disobedience and rebellion in anticipation of conflict with the British, not an assertion of a right to convey arms through commerce. The British Crown sought to disarm the colonies through the embargo. *Heller*, 554 U.S. at 594. Colonial Americans reacted to the embargo by gathering arms for their defense as

the prohibition of commerce in firearms worked to undermine their right to keep and bear arms for their defense. *Teixeira*, 873 F.3d at 686.

Usefully, the embargo is a perfect example of a regulation on sales that would swallow the right to bear arms in the first place. The embargo implicated the core of the right, as opposed to valid regulations on arms sales which do not necessarily implicate that core. The right declared in the Second Amendment was "meant to be 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). Independent of and disconnected from the right to bear arms, the Second Amendment does not confer a free-standing right to sell arms because none of the historical materials indicate that the colonists or early Americans believed that such a right to sell arms existed.

B. The Law is Facially Constitutional Because Laws Imposing Conditions on the Commercial Sale of Arms are Examples of Presumptively Lawful Regulatory Measures

The Supreme Court has held that nothing in the *Heller* opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. The Supreme Court explained that its list of "presumptively lawful regulatory measures" was "not exhaustive." *Id.* at 627 n.26. Two years later in *McDonald v. City of Chicago*, 561 U.S.

742, 786 (2010), the Supreme Court reemphasized the existence of presumptively lawful regulatory measures.

> We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' '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.' We repeat those assurances here.

Id.

The Ordinance is a "law imposing conditions and qualifications on the commercial sale of arms," which the Supreme Court identified as a type of regulatory measure that is presumptively lawful. *Heller*, 554 U.S. at 626–27. The Court did not define what the phrase "presumptively lawful" means. "Presumptively lawful" could be read to suggest that the regulations are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010). Or, the restrictions could be "presumptively lawful" because they pass any standard of scrutiny. *Id.* The first reading, that the regulated conduct is outside the scope of the Second Amendment, better flows from the text and structure of *Heller*. *See id.*

Before discussing presumptively lawful regulations, the *Heller* Court discussed restrictions on the type of weapons people may possess. The Court held that restrictions on the possession of dangerous and unusual weapons are not unconstitutional because those weapons are outside the ambit of the amendment: "The Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes. . . " *Heller,* 554 U.S. at 625. The Court could

have analyzed restrictions on the possession of dangerous and unusual weapons through tiers of scrutiny. Instead, the Court found that dangerous and unusual weapons do not fall within the Second Amendment. *Id.* Thus, equating laws restricting the commercial sale of arms to laws restricting the possession of dangerous and unusual weapons, the Ordinance is a presumptively lawful regulation because its regulated conduct, selling guns, does not fall within the Second Amendment.

The Fourteenth Circuit reasoned below that to be a "presumptively lawful regulation," there must be persuasive historical evidence establishing that the regulation at issue imposes prohibitions that do not fall outside of the historical scope of the Second Amendment. R. at 11. They write that the burden is on the Government to demonstrate that a prohibition has historically fallen outside the Second Amendment's scope before it can claim a presumption of validity. R. at 11. The Fourteenth Circuit then concluded that the government has not demonstrated that any historical regulation restricted where firearms sales would occur; that the government has not demonstrated that there were zoning regulations similar to the one in this case. R. at 11. Even if the Nation's first comprehensive zoning law did not come into existence until the early 20th century,[11] historical documents show that Colonial government regulation included restrictions on the commercial sale of firearms. These restrictions were broader and more restrictive than the ordinance in this case. The Connecticut restriction banned the sale of firearms by its residents anywhere outside the colony. Trumbull at 138–39, 145–46. By contrast, the

[11] *See* section II.A.ii, *supra*.

Ordinance in question in this case has very specific requirements. While the County may not be able to point to a specific zoning requirement from the founding period that exactly mirrors the Ordinance in this case, colonial governments made even more restrictive regulations than the zoning Ordinance.

Regulations that are even more restrictive than the Ordinance would be presumptively lawful regulations for two reasons. First, these regulations existed during the founding period. Second, the Court in *Heller* specifically mentioned laws imposing conditions and qualifications on the commercial sale of arms in the category of presumptively lawful regulations. Therefore, regulations that are less restrictive but in the same vein, such as the zoning Ordinance, are also presumptively lawful regulations. The Fourteenth Circuit's reasoning that the County needs to find zoning restrictions that are akin to the zoning Ordinance when even more restrictions existed is flawed and has no basis in *Heller* or the Second Amendment. The Ordinance is a presumptively lawful regulation under *Heller* and is therefore constitutional unless that presumption is rebutted. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011). Mr. Maxson has not met that burden.

Some courts have held that to rebut the presumption of legality, a challenger must prove that the presumptively lawful regulation burdens his Second Amendment right by (1) identifying the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member and (2) present facts about himself and his background that distinguish his circumstances. *Binderup v. AG of United States*, 836 F.3d 336, 347 (3d. Cir. 2016); *see also Hamilton v. Palozzi*,

848 F.3d 614, 623 (4th Cir. 2017). Not only is the burden on Mr. Maxson to rebut the presumptive lawfulness of the regulation, but his showing must also be strong. *Binderup*, 836 F.3d at 347. ("[I]n cases where a statute by its terms only burdens matters (*e.g.*, individuals, conduct, or weapons) outside the scope of the right to arms, [the burden] is an impossible one."). Mr. Maxson has not provided any reasons that distinguish him from the class of persons regulated by this presumptively lawful regulation: sellers of guns.

Other courts have held that to rebut the presumption of legality, a challenger must show that the regulation has more than a *de minimis* effect upon his or her right. *Heller II*, 670 F.3d at 1253; *see also Pena v. Lindley*, 898 F.3d 969, 1006 (9th Cir. 2018) (Bybee, J., dissenting); *Peterson v. Martinez*, 707 F.3d 1197, 1218 n.1 (10th Cir. 2013) (Lucero, J., concurring). Mr. Maxson has not shown that the regulation has more than a *de minimis* effect upon his right to "keep and bear Arms" or residents' rights to "keep and bear Arms."[12]

C. As Applied, the Law is Constitutional Because it Does Not Meaningfully Constrain People's Rights to Keep and Bear Arms

Although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding free-standing right to sell a firearm given that there is not a Second Amendment right to keep and bear Arms in public. To analogize to the First Amendment, the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone

[12] *See* section II.C, *supra*.

sell or give it to others. *Cf. United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973).

However, even if there is no free-standing right to sell firearms in the Second Amendment, firearms commerce does play a vital role in individuals exercising their right to "keep and bear Arms," as recognized in *Heller. See Teixeira*, 873 F.3d at 687. It is certainly the case that allowing an outright, comprehensive ban on gun sales would violate the Second Amendment because a total prohibition on the sale of guns would nearly eliminate the ability of people to acquire and therefore, "keep and bear Arms." *Marzzarella*, 614 F.3d at 92 n.8. Indeed, the Court in *Heller* held that any law that essentially extinguishes the right to "keep and bear Arms" is unconstitutional *per se*. There have been cases where courts have found that any restriction that severely limits the ability of people to "keep and bear Arms," is unconstitutional under the Second Amendment. For example, in *Wrenn v. District of Columbia*, the D.C. Circuit analyzed a law that allowed D.C.'s police chief to only give people licenses for the concealed carry of handguns if they showed a "good reason to fear injury to [their] person or "any other proper reason for carrying a pistol." *Wrenn v. District of Columbia*, 864 F.3d 650, 656 (D.C. Cir. 2017). The D.C. Circuit found this regulation to be a total ban, unconstitutional *per se*, because as an effect of the regulation, guns were not available to each responsible citizen. *Id.* at 665–66. There were citizens in the District of Columbia who would not be able to possess a gun, essentially extinguishing the right.

If a gun-related regulation is not a total ban, the current framework courts use to determine if the infringes upon the right to "keep and bear Arms" is what we term the "meaningful constraint" framework. If a law meaningfully constrains people's rights to "keep and bear Arms," then—even if it facially regulates a right not included in the Second Amendment—it essentially violates a right that is included in the Second Amendment. Therefore, it should be analyzed under the tier of scrutiny that courts apply to Second Amendment rights.[13]

The Third Circuit ruled on a case in which a statute prohibited the use of handguns with "removed, obliterated, or altered" serial numbers. *Marzzarella*, 614 F.3d at 85. The Third Circuit found that such a statute does not infringe on people's rights to "keep and bear Arms." *Id.* The Third Circuit reasoned that the burden on the respondent's ability to use a gun in self-defense was *de minimis* because the statute did not bar the respondent from possessing any otherwise lawful, properly marked firearm for the purpose of self-defense. *Id.* at 94. Additionally, the court reasoned, a person is just as capable of defending himself or herself with a marked firearm as with an unmarked firearm. *Id.* Because of the *de minimis* burden on a people's ability to possess guns for self-defense, the statute was not a total ban on people's rights to "keep and bear Arms" and was therefore, constitutional.

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[13] The meaningful constraint framework is similar to the undue burden framework that the Court has used to analyze whether or not laws regulating abortions are unconstitutional. The Court wrote in *Casey*, "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992). While the frameworks are different, the spirit behind the undue burden framework is similar: that the extent to which a facially permissible regulation burdens a right—the extent to which someone has access to guns or someone has access to get an abortion—determines whether the regulation is unconstitutional.

The Ninth Circuit ruled on a case regarding a county's zoning ordinance that effectively banned the appellant from opening a new gun store in an unincorporated area of the county. *Teixeira*, 873 F.3d at 687. The Ninth Circuit reasoned that residents were not meaningfully restricted in their ability to acquire firearms. *Id.* The court made the conclusion that residents could still acquire firearms given the following factors: the number of gun stores in the county as a whole, the number of gun stores in the unincorporated areas, the geography of the county, and the distribution of the people in it. *Id.* Because, like this case, the ordinance in question was a zoning ordinance and only regulated where a gun store could be, Judge Berzon of the Ninth Circuit concluded, "[G]un 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.* at 680.

The factors that the Ninth Circuit used in *Teixeira v. County of Alameda* are instructive as to how courts analyze if a regulation meaningfully constrains people's rights to "keep and bear Arms." *See Teixeira*, 873 F.3d at 687. To determine whether the Ordinance in this case meaningfully constrains people's rights to "keep and bear Arms" we start with the first factor: the number of gun stores in the county as a whole. There are at least three gun stores and two shooting ranges already operating lawfully in Mojave County. R. at 15. The next factor, the number of gun stores in the unincorporated areas, can be joined with the geography of the county in this case. There is a shooting range located within driving distance from Mr. Maxson's proposed store and the nearest gun store is located 10 miles away from Mr. Maxson's proposed

store. R. at 6. Finally, the Ordinance does not burden potential customers' rights to obtain necessary firearms instruction and training. Instead, the Ordinance limits the location of premises conducting firearm sales and does not restrict or even discuss firearms instruction and training services. R. at 17–18. To receive a concealed carry permit in New Tejas, residents must complete at least one hour of firearms training course time on a shooting range. R. at 6. This Ordinance does not prevent residents from doing so.

Respondent may argue that there is not another Red 888 Guns armorer or gunsmith in the Mojave area. R. at 6. However, even if there are not any Red 888 guns sold in the area, it does not meaningfully constrain people's rights to "keep and bear Arms"; the Second Amendment does not protect anyone's rights to carry a specific brand of gun, even if that would be a person's preference. Moreover, should a given gun be an individual's preference, there is certainly not a right to purchase that preferred gun within a given area or in the way that is most convenient to them. As Judge Watan wrote in an opinion below concurring in part and dissenting in part, "With the dangers inherent in firearms, mere inconvenience is not enough." R. at 17. As applied, the Ordinance does not meaningfully constrain people's rights to "keep and bear Arms" and therefore, it is constitutional under the Second Amendment because it does not regulate any rights protected by the Second Amendment.

CONCLUSION

For the foregoing reasons, the judgement of the Fourteenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

s/s
Team 82
Counsel for Petitioner

APPENDIX A

U.S. CONST. amend. II

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.

APPENDIX B

17.54.130 - Conditional uses.

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

A. Is required by the public need;

B. Will be properly related to other land uses and transportation and service facilities in the vicinity;

C. If permitted, will under all the circumstances and conditions of the particular case, materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood; and

D. Will be contrary to the specific intent clauses or performance standards established for the district, in which it is to be located.

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

17.54.131 - Conditional uses—Firearms sales.

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

A. That the district in which the proposed sales activity is to occur is appropriate;

B. That the subject premises is not within eight hundred (800) feet of any of the following: Residentially zoned district; elementary, middle or high school;

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

C. That the applicant possesses, in current form, all of the firearms dealer licenses required by federal and state law;

D. That the applicant has been informed that, in addition to a conditional use permit, applicant is required to obtain a firearms dealer license issued by the County of Mojave before sale activity can commence, and that information regarding how such license may be obtained has been provided to the applicant;

E. That the subject premises is in full compliance with the requirements of the applicable building codes, fire codes and other technical codes and regulations which govern the use, occupancy, maintenance, construction or design of the building or structure;

F. That the applicant has provided sufficient detail regarding the intended compliance with the Penal Code requirements for safe storage of firearms and ammunition to be kept at the subject place of business and building security.

17.54.140 - Conditional uses—Action.

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

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

17.54.141 - Conditional uses—Action—Firearms sales.

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

A. A final inspection from appropriate building officials demonstrating code compliance;

B. Within thirty (30) days of obtaining a conditional use permit, and prior to any sales activity, a firearms dealer license shall be secured from the appropriate county agency;

C. The county-issued firearms dealer's license be maintained in good standing;

D. The maintenance of accurate and detailed firearms and ammunition transaction records;

E. Transaction records shall be available for inspection.

F. Compliance with all other state and federal statutory requirements for the sale of firearms and ammunition and reporting of firearms transactions.

17.54.670 - Appeals.

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

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

APPENDIX C

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.