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 the Petitioner

Team # 89

QUESTIONS PRESENTED

I. Whether a zoning ordinance regulating the locations where the commercial sale of firearms occur, under the Supreme Court's holding in *District of Columbia v. Heller* striking down a law that banned firearms in the home because it violated the core Second Amendment right of self-defense, is subject to a heightened level of scrutiny or will rational basis suffice?

II. Whether a gun purveyor has a fundamental right to sell firearms under the Second Amendment's historical guarantee of the right to bear and use arms?

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JURISDICTIONAL STATEMENT

The Fourteenth Circuit Court of Appeals entered its judgment on October 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Mojave Cty., NTX., Code §§ 17.54.130, 17.54.131, 17.54.140, 17.54.141, 17.54.670 are reproduced in Appendix 1.

STATEMENT OF FACTS

In January 2016, Mr. Maxson ("Maxson") was denied a Conditional Use Permit ("Permit") to open a gun store at a specific location in Mojave County. R. at 6. Mojave County, New Tejas requires that before an individual opens a gun shop they first obtain a Permit from the Board of Zoning Adjustments ("Zoning Board). R. at 19. The Permit requirement was implemented to ensure the health and safety of persons residing or working in the vicinity of the gun store, prevent any material detriment to public welfare, and avoid injury to property. Id. Maxson sought to operate a gun store,[1] provide a shooting range, and offer training certification courses. There are three gun stores as well as two shooting ranges located in Mojave County. R. at 2. One of those gun stores is ten miles from Maxson's proposed location. R. at 4. Maxson argued that his store was special because he is a certified Red 888 gunsmith and planned to sell Red 888's in his store.[2] R. at 6. Upon Maxson's independent survey of the County, he found that under Mojave Cty, NTX. Code § 17.54.131 no new gun stores could open in the County. R. at 7. However, the County's survey indicated that approximately 15% of the total unincorporated Mojave County could comply with § 17.54.131. Id. at n. 7.

The Mojave County Community Development Agency Planning Department ("Planning Department") recommended denying Maxson's permit application in its

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[1] Maxson formed a Limited Liability Company, Brotherhood Steel, LLC for the purpose of operating the gun store, shooting range and certification business. R. at 1.

[2] There are no other licensed sellers of Red 888's in Mojave County; however, residents can still purchase Red 888's from gun conventions that travel through the state. R. at 6, 15.

initial report because the proposed gun shop location did not satisfy § 17.54.131's distance requirements. R. at 5. The gun store's location was within 736 feet of a church. Id. After a hearing conducted by the Zoning Board, the Planning Department recommended denying Maxson the Permit and variance. Id. However, the Zoning Board granted Maxson a variance and approved his permit application. R. at 6.

On January 6, 2016 the Shady Sands Home Owners Association filed an appeal with the County Commissioners' Court, challenging the Zoning Board's decision. Id. The court voted to sustain the appeal and revoked the Permit. R. at 6–7. Maxson later filed a complaint in the United States District Court for the Central District of New Tejas, arguing first, that both his due process and equal protection rights were violated and second, that § 17.54.131 was impermissible under the Second Amendment both facially and as applied. R. at 7. Maxson moved for a preliminary injunction and Mojave County moved to dismiss Maxson's claims. R. at 7. The District Court dismissed all claims, finding that Maxson did not properly assert a class of one Equal Protection Clause claim and § 17.54.131 did not burden conduct protected by the Second Amendment. R. at 8.

Maxson appealed the District Court's ruling to the Fourteenth Circuit Court of Appeals. R. at 8. The court affirmed the lower court's dismissal of Maxson's Equal Protection Clause claim. R. at 8–9. The Fourteenth Circuit reversed the dismissal of the Second Amendment claim finding that the history of the right to bear arms must include the right to purchase and sell arms. R. at 11. Because the court found that the right to sell arms was a core right guaranteed by the Second Amendment, the

court applied heightened scrutiny. R. at 11. Ultimately, it decided that the County failed to justify its reasoning that gun stores are magnets for crime, and reversed the district court and remanded the case for further proceedings. R. at 12, 14.

One judge concurred in the equal protection holding and dissented from the Second Amendment holding. R. at 15. That judge found that § 17.54.131 did not burden a core Second Amendment right. R. at 15-16. The Second Amendment did not create a fundamental right to sell firearms. Therefore, § 17.54.131 did not call for a heightened level of scrutiny and the lower court's decision should be affirmed. R. at 16.

Mojave County filed a petition for certiorari to the United States Supreme Court. R. at 1. The Supreme Court granted writ of certiorari and the case is set for argument in 2019. Id.

SUMMARY OF ARGUMENT

This Court should reverse the Fourteenth Circuit's decision for two reasons. First, the Fourteenth Circuit erred in finding that *District of Columbia v. Heller* requires heightened scrutiny. Second, it erred in ruling that the Second Amendment includes a right to sell firearms.

In analyzing a Second Amendment challenge, the court first asks whether the challenged law burdens conduct protected by the Second Amendment. If the conduct falls outside the scope of the Second Amendment, there is no violation. However, if the law does burden conduct protected by the Second Amendment, the court determines the appropriate level of scrutiny to apply.

Under *Heller*, conditions and qualifications on the commercial sale of arms are presumptively lawful. Mojave County ordinance §17.54.131 falls into this category. But even if this Court does apply means-ends scrutiny, rational basis review should be applied because § 17.54.131 does not substantially burden conduct protected by the Second Amendment.

If the Court does not apply rational basis review, it should follow the lead of all other circuit courts and apply intermediate scrutiny—rather than strict scrutiny—when evaluating laws that minimally burden the Second Amendment. The Second Amendment's core right of self-defense is not burdened by § 17.54.131 because it only limits the locations where an individual can purchase a firearm. Following First Amendment jurisprudence, § 17.54.131 is a time, place and manner restriction and intermediate scrutiny should be applied.

This Court should not apply strict scrutiny to gun regulations, particularly those that have a *de minimis* impact on the core fundamental right of self-defense. *Heller's* list of presumptively lawful firearm regulations is inconsistent with strict scrutiny. And no lower court has applied strict scrutiny to laws falling under *Heller's* list of presumptively lawful regulations.

The Fourteenth Circuit also erred in concluding that the Second Amendment includes a commercial right to *sell* firearms. Neither the text nor the history of the Second Amendment indicates that any such right exists. The Second Amendment only states that citizens have the right to "keep and bear arms." An analysis of the amendment's history shows that it was not meant to enshrine any sort of commercial

right. As this Court concluded in *Heller*, the purpose of the Second Amendment is to ensure that citizens have the ability to defend themselves.

While the right to "keep and bear arms" must also include the right to *purchase* weapons, this does not mean that it also includes a commercial right to sell firearms. If an ordinance prohibited the sale of firearms altogether, such an ordinance would be unconstitutional only because it prevented citizens from *purchasing* weapons. However, that is not the case here. There are already three gun stores and two shooting ranges currently operating in Mojave County. No Mojave citizens are alleging that their rights to purchase weapons are being burdened. Maxson simply believes he has a constitutional right to sell firearms wherever he pleases. This cannot be what the Framers intended when they enumerated the right to "keep and bear arms." Moreover, this Court has already stated that conditions and qualifications on the commercial sale of firearms are presumptive lawful. This implies that such regulations do not burden conduct protected by the Second Amendment. Therefore, Maxson has not stated a Second Amendment claim and this Court does not need to engage in a means-end scrutiny analysis.

ARGUMENT

I. Mojave County's Zoning Ordinance Should Be Subject to Rational Basis Review, and Even if Heightened Scrutiny Applies, Intermediate Scrutiny is Appropriate.

The Second Amendment protects the right to keep and bear arms, but the scope of the right is not unlimited. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). After this Court's decision in *Heller*, lower courts adopted a two-step inquiry to assess

whether laws burdening the Second Amendment are constitutional. *United States v. Chovan*, 735 F.3d 1127, 1135 (9th Cir. 2013).

The first step is for the court to determine whether the challenged law impinges upon a right that falls within the scope of the Second Amendment's guarantee. *United States v. Marzzarella*, 614 F.3d. 85, 89 (3d Cir. 2010). If the law does not burden the Second Amendment, the inquiry is complete. *Id.* However, if the law does burden the Second Amendment the court then determines which level of scrutiny to apply. *Id.*

When applying the first step of the inquiry, courts look to the history associated with the Second Amendment to determine whether the right affected by the law is within the scope of the Second Amendment. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014). To determine whether a challenged ordinance falls outside the historical scope of the Second Amendment, courts asks (1) if the regulation is a presumptively lawful or (2) if there is historical evidence establishing that the ordinance falls outside the scope of the Second Amendment. *Chovan*, 735 F.3d at 1137. Once the court decides that a law burdens a Second Amendment right, the court moves to the second step.

During the second step of the inquiry, courts use a two-prong analysis to determine the appropriate level of scrutiny to apply. *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). The level of scrutiny depends on (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.* In regard to the first prong, the Second Amendment has the core purpose of protecting "the right of law-abiding, responsible citizens to use arms in defense of hearth

and home." *Heller*, 554 U.S. at 635. Courts have found that laws regulating only the "manner in which persons may exercise their Second Amendment rights" are less burdensome than those banning firearm possession completely. *Chovan*, 651 F.3d at 1138. Whereas a regulation that imposes a substantial burden upon the core right of self-defense must have a strong justification. *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (*Heller II*). Because § 17.54.131 only regulates the location where firearms are sold—at most a *manner* of exercising the Second Amendment—the Second Amendment does not require a strong justification.

A. Rational Basis Review Should Be Applied to the Ordinance Because It Does Not Substantially Burden Mojave County Citizens' Second Amendment Right.

The core of the Second Amendment protects the right of law-abiding, responsible citizens to use firearms in defense of hearth and home. *Chovan*, 735 F.3d at 1133. In order for § 17.54.131 to receive heightened scrutiny, Maxson would have to allege enough facts in his complaint to show that § 17.54.131 imposes a meaningful burden on Mojave County citizens' ability to acquire firearms within the County. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (holding that a plaintiff must allege in his complaint "enough facts to state a claim of relief that is plausible on its face" to withstand a motion to dismiss). Maxson has failed to plead any such facts; thus, the Fourteenth Circuit erred holding that the district court was required to apply heightened scrutiny before granting Mojave County's motion to dismiss.

Heightened scrutiny should be reserved for Second Amendment challenges where a law substantially overlaps with the core Second Amendment right—"namely the right to use arms for the purpose of self-defense in the home." *Kachalsky v.*

Cacace, 817 F. Supp. 2d 235, 264 (S.D.N.Y. 2011). In *Heller*, the District of Columbia's statute effectively prohibited the use of firearms in the home for the purpose of self-defense. *Heller*, 554 U.S. at 635. The statute in *Heller* directly and substantially burdened the core of the Second Amendment and accordingly was subject to heightened scrutiny. *Id.* at 636. The Northern District of Illinois also properly applied heightened scrutiny to a Chicago regulation banning virtually all sales and transfers of firearms within the city. *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 939–40 (N.D. Ill. 2014). Likewise, heightened scrutiny was appropriate for a regulation that prohibited all firing ranges in the city, while simultaneously requiring firing-range training as a prerequisite to lawful gun ownership. *Ezell v. Chicago*, 651 F.3d 684, 695 (7th Cir. 2011). Unlike these regulations, which imposed wholesale restrictions on firearm usage, § 17.54.131 does not impose such broad prohibitions. It does not implicate an individual's ability to safely use a firearm for self-defense. Therefore, rational basis review is proper.

While rational basis review is the minority approach, it is the proper approach for the regulations carved out in *Heller*. In the broader Second Amendment context, many courts have refused to apply rational basis. This is because *Heller's* majority—in a footnote—stated, "if all that was required to overcome the right to keep and bear arms was rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* at 628 n. 27. However, that language should only be applied to those regulations that "operate as a substantial burden on the ability of law-abiding citizens to possess and

use a firearm for self-defense." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). Namely, those regulations that undoubtedly impose a significant burden on core Second Amendment rights. *Id.* at 170 n.5.

Lower courts' continued reliance on this footnote in *Heller* to reject rational basis review is misplaced. The Fourteenth Circuit wrongly concluded that it had to apply a heightened form of scrutiny simply because § 17.54.131 implicates the Second Amendment at all.[3] *Heller* did not define the outer limits of the Second Amendment nor did it address the level of scrutiny that should be applied to laws that only burden the outer limits of the Second Amendment. *United States v. Masciandaro*, 638 F.3d 458, 466–67 (4th Cir. 2011). Therefore, *Heller* did not foreclose the use of rational basis review on regulations that at best reach that outer limit.

A severe burden on the core Second Amendment right of armed self-defense requires strong justification (i.e. it must withstand heightened scrutiny). But less severe burdens on the right—those that regulate rather than restrict acquisition of a firearm—do not implicate the central self-defense concern of the Second Amendment and may be more easily justified. *See Ezell*, 651 F.3d at 708. In *Decastro*, the Second Circuit decided that rational basis review of a law prohibiting the transfer of firearms acquired from one state into another state was consistent with *Heller*. *Decastro*, 682 F.3d at 170 n.5. The court held that the law did not substantially burden anyone's

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[3] As discussed in Section II, regulations on the commercial sale of firearms do not implicate the Second Amendment. However, even if this Court concludes that they do, the burden is not substantial because it does not infringe on the core right of self-defense in the home.

right to obtain a firearm for self-defense, and therefore, it did not infringe on the Second Amendment right to keep and bear arms. *Id.* at 168–69.

Additionally, in *Nordyke v. King*, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012), the Ninth Circuit applied rational basis to an ordinance regulating the sale of firearms at gun shows.[4] The ordinance required that a firearm at gun shows be secured when not in actual possession of the authorized participant. *Id.* The court upheld the ordinance under rational basis review, stating that "the ordinance regulates the sale of firearms at Plaintiff's gun shows only minimally, and only on County property." *Id.* This Court should follow the Ninth Circuit's *Nordyke* decision because both laws were regulating the commercial sale of firearms and only minimally impacted the Second Amendment.

§ 17.54.131 does not prohibit the citizens of Mojave County from acquiring firearms and it certainly does not affect their ability to use arms for self-defense in their homes. Nor does the ordinance prohibit them from acquiring or selling firearms within the County. Additionally, there are already two shooting ranges operating within Mojave County. Although § 17.54.131 could make it more difficult for citizens of Mojave County to purchase a gun, that alone does not constitute a substantial burden. *See Nordyke*, 644 F.3d at 787–89 (stating "a law does not substantially burden a constitutional right simply because it makes it the right more expensive or

[4] In *Nordyke* the court applied rational basis based on its conclusion that "the ordinance does not violate either the First or Second Amendments." 681 F.3d at 1043 n.2.

difficult to exercise."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) ("Not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement on that right.").

Under rational basis review, § 17.54.131 is valid because it is rationally related to a legitimate government interest. *Romer v. Evans*, 517 U.S. 620, 635 (1996). Mojave County enacted §17.54.131 in the interests of protecting public safety and preventing harm in populated, well-traveled, and sensitive areas such as a residentially-zoned districts; second, protecting against the potential secondary effects of gun stores, such as crime; and third, preserving the character of residentially zoned areas. *See* Mojave Cty., NTX., Code § 17.54.130. The ordinance's requirements that gun stores be located at least eight-hundred feet from these liquor stores, schools, other gun stores, and residential areas. These restrictions are at least rationally related to serve the interest of protecting the health and safety of the community. *See also Nichols v. Harris*, 17 F. Supp. 3d 989, 1005 (C.D. Cal. 2014) (reasoning that government's restriction on open carry of firearms was more than rationally related to its objective of increasing public safety and reducing public shootings). Applying anything more than rational basis review would severely limit the ability of local and state governments to protect public safety by imposing reasonable conditions on the sale of firearms within their communities.

Mojave's § 17.54.131 is rationally related to those goals and does not substantially burden its citizens' Second Amendment rights. Without Maxson's gun store, the citizens are still able to purchase firearms at any of the other three gun

stores located in the county. § 17.54.131 does burden Maxson's ability to provide firearm training or offer certification at his desired location. While the Red 888 gun is not sold at another location in Mojave County, the citizens of Mojave are not prevented from purchasing Red 888 guns from other stores in the surrounding area or when gun conventions are hosted in the County. Simply because access to a particular weapon is restricted, that does not constitute a substantial burden on the core Second Amendment right. *See Heller*, 554 U.S. at 626 (stating that "the Second Amendment does not guarantee the right to keep and carry *any* weapon.") (emphasis added). Therefore, § 17.54.131 is valid and the district court's finding should be reinstated.

B. If Rational Basis Is Not the Proper Level of Review, the Court Should Apply Intermediate Scrutiny.

If this Court finds that all regulations affecting the Second Amendment are subject to heightened scrutiny, it should apply intermediate scrutiny. Intermediate scrutiny requires that the government prove that the statute is aimed at "a substantial government interest and that its regulation is reasonably tailored to achieve such interest." *United States v. Teixeira*, at 873 F.3d 670, 698 (9th Cir. 2017) (citing *Jackson*, 746 F.3d at 965). First, the majority of circuit courts apply intermediate scrutiny when evaluating regulations that have a *de minimis* effect on the Second Amendment. Second, applying intermediate scrutiny is consistent with First Amendment jurisprudence, as this Court emphasized in *Heller*.

1. When heightened scrutiny is required, intermediate scrutiny is appropriate for *de minimis* regulations of the Second Amendment.

This Court should follow the lead of all of the circuit courts and apply either intermediate scrutiny or rational basis review when evaluating laws that do not burden the core Second Amendment right. After this Court's decision in *Heller*, the Third Circuit in *Marzzarella* created the two-prong analysis for determining whether a firearm regulation is constitutional. The second prong of that test is determining the appropriate level of scrutiny that the Court should apply after concluding that a given regulation burdens the Second Amendment. *Marzzarella*, 614 F.3d at 89.

The majority of the circuit courts that have heard cases concerning firearm statutes have applied intermediate scrutiny. *See id.*; *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012); *Nat'l Rifle Ass'n of America, Inc.*, 700 F.3d at 196; *Skoien*, 614 F.3d at 651; *Chovan*, 735 F.3d at 1138; *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010). The only circuit that did not apply intermediate scrutiny applied rational basis review. *See Decastro*, 682 F.3d at 168 (holding that heightened scrutiny is reserved for regulations substantially burdening fundamental rights guaranteed by the Second Amendment.) The Second Circuit found that a federal statute prohibiting the transfer of firearms across state lines did not substantially burden the Second Amendment's guarantee of self-defense. *Id.* And it upheld the law under rational basis review. *Id.* Therefore, this Court should apply either rational basis review or intermediate scrutiny.

When evaluating the appropriate level of scrutiny, the Seventh Circuit employs a two-prong test. *Ezell*, 651 F.3d at 684. Adopting principles from the First

Amendment, the Seventh Circuit held that "the rigor of judicial review will depend on" (1) "how close the law comes to the core of the Second Amendment right and" (2) "the severity of the burden on the right." *Id.* at 703. Under this analysis, the lower courts should have used either rational basis or intermediate scrutiny.

First, the Seventh Circuit, analyzing both *Heller and McDonald*, found that prohibitions are close to the core Second Amendment rights when the law "prohibited handgun possession even in the home." *Id.* However, laws that do not implicate the core right to self-defense are not automatically subject to strict scrutiny. In *Ezell*, Chicago passed a law banning firing ranges in the city. *Id.* Applying a historical analysis on firing ranges. Relying on *Heller*, the Seventh Circuit found that the law was "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at 708. The court held that the shooting range ban was close to the core of the Second Amendment, but it hesitated to apply traditional strict scrutiny. "[A] more rigorous showing than [intermediate scrutiny] should be required, if not quite 'strict scrutiny.'" *Id.* The Seventh Circuit found that even when a regulation implicates the safe use of firearms—a core right stemming from the time when the Second Amendment was ratified—strict scrutiny still may be too rigorous a standard. *Id.*

Mojave's § 17.54.131 does not come close to a core Second Amendment right. It only applies to the locations where a gun store can be located and does not regulate the possession or use of firearms by an individual like the statutes in *Heller* and

McDonald. Unlike the statute in *Ezell*, § 17.54.131 also does not implicate the training or skills necessary to use a firearm in self-defense. Therefore, the defense of hearth and home is not implicated and the law is not close to the core of the Second Amendment.

Second, the statute does not severely burden the Second Amendment. Respondent failed to plead that the statute violates any individual gun owner's rights, as is required by *Twombly*. At most, § 17.54.131 may result in an individual having to drive farther to purchase a firearm. However, as the dissenting opinion below pointed out "[i]ncreased driving distances do not automatically constitute an undue burden on a constitutional right." R. at 16 (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004)). Because § 17.54.131's burden on Mojave County residents would be an increase in driving distances to purchase firearms, the Second Amendment is not substantially burdened.[5] Therefore, intermediate scrutiny is appropriate.

The Third Circuit, when evaluating 18 U.S.C. § 992(k), held that criminalizing the possession of a firearm with an obliterated serial number did not substantially burden the defendant's Second Amendment rights. *Marzzarella*, 614 F.3d at 97. There the court said that the statute passed intermediate scrutiny and is constitutional. *Id.* at 101. The court reasoned that the statute was not subject to strict scrutiny in part because *Heller* did not stipulate that laws burdening the Second

[5] Maxson's proposed store is only ten miles from an already existing gun store.

Amendment required strict scrutiny. *Id.* at 97. Additionally, when a law does not severely limit the possession of firearms, like the handgun ban in *Heller*, intermediate scrutiny is the appropriate standard of review. *Id.* When a law does not limit an individual's ability to possess a firearm, the core Second Amendment protection of self-defense or defense of hearth and home is not substantially burdened. *Id.* (citing *Heller*, 554 US at 635).

The Mojave County regulation does not implicate a core right as found in *Heller, McDonald* or *Ezell*. In all of those cases, an individual's ability to possess or safely use a firearm was restricted. In Mojave County, no resident's ability to own a gun was impaired. As the dissent stated "there are at least three gun stores and two shooting ranges already operating lawfully in Mojave County." R. at 15. Additionally, § 17.54.131 does not limit Maxson's ability to operate a shooting range or provide safety training to prospective or current gun owners. R. at 21. Rather, the only restriction is on Maxson's ability to open a store to sell guns. This kind of regulation is not of the same kind as the cases above because it does not significantly impair an individual's ability to bear arms. As such, § 17.54.131 does not call for strict scrutiny.

2. Zoning regulations are like First Amendment time, place and manner restrictions, which only receive intermediate scrutiny.

The circuit courts, following this Court's directive in *Heller*, use First Amendment jurisprudence as a guidepost for determining the proper level of scrutiny in Second Amendment cases. This Court in *Heller* cited the First Amendment ten times when developing its Second Amendment rights analysis. It stated:

> The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people... it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Heller, 554 U.S. at 635. Although, *Heller* did not specify the standard of review for the Second Amendment, it signaled to the circuit courts that they should look to the First Amendment for guidance when evaluating firearms regulations. *See id.*

The Third Circuit noted that it looks to the First Amendment for guidance because "*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment. *See, e.g.*, 128 S. Ct. at 2791–92 ("Of course the right [to bear arms] was not unlimited just as the First Amendment's right of free speech was not." (citation omitted)); *id.* at 2821. *Marzzarella*, 614 F.3d at 90, n.4. The Third Circuit applied intermediate scrutiny to a gun regulation because "[t]he burden imposed by the law does not severely limit the possession of firearms." *Id.* at 98.

This Court applies either intermediate or strict scrutiny to regulations burdening the First Amendment. The Court applies strict scrutiny where a regulation discriminates based on the content of speech. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.") However, when a statute regulates the time, place and manner of speech, it receives intermediate scrutiny. "[I]ntermediate scrutiny is

reserved for . . . straightforward restriction going only to the time, place, or manner of speech or other expression." *City of Los Angeles v. Alameda Books, Inc.*, 533 U.S. 45, *455* (2002) (Scalia, J., concurring). Generally, in First Amendment cases the Court applies heightened intermediate scrutiny. The regulation needs to be "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

However, in certain First Amendment contexts this Court applies the Equal Protection Clause's intermediate scrutiny formulation: regulation must be "substantially related to an important governmental interest." *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (holding campaign finance statutes must be "substantially related to important governmental interests"); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 586 (1980) (holding commercial speech statutes cannot be more burdensome than necessary to achieve a substantial government interest). Time, place, and manner restrictions on speech that is ancillary to the core First Amendment protections receive a less protective form of intermediate scrutiny. Time, place, and manner restrictions on an individual's ability to sell a firearm is an ancillary right protected by the Second Amendment. *See Teixeira*, 873 F.3d at 687 ("[R]estrictions on a commercial actor's ability to enter the firearms market . . . have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms.") Therefore, § 17.54.131 and other zoning regulations on gun stores are subject to the Equal Protection Clause's formulation of intermediate scrutiny.

Additionally, the majority of cases applying intermediate scrutiny require the statute be "substantially related to an important governmental interest." *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (statutes distinguishing on the basis of gender must be substantially related to achieve an important governmental interest); *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 60 (2001) (statutes regarding legitimization of children must be substantially related to an important governmental objective).

Every circuit court that has applied intermediate scrutiny to regulations on the Second Amendment have used the Equal Protection Clause's formulation of intermediate scrutiny. *See Marzzarella*, 614 F.3d at 96; *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *Chovan*, 732 F.3d at 1127. In the event that this Court rejects rational basis review, it should affirm all of the lower courts, and hold that when a firearms regulation is a time, place and manner restriction, the regulation must be substantially related to an important governmental interest.

Mojave's § 17.54.131 passes intermediate scrutiny. First, Mojave County has an important interest in "protecting public safety and preventing harm in populated, well-traveled, and sensitive areas such as residentially-zoned districts; second, protecting against the potential secondary effects of gun stores, such as crime; and, third, preserving the character of residential zones." R. at 13–14. This Court has acknowledged that public safety is an important government interest. *See Reed v. Town of Gilbert Arizona*, 135 S. Ct. 2218, 2232 (2015). Because § 17.54.131 is a time, place and manner restriction, the government need only show that § 17.54.131 is

substantially related to public safety. § 17.54.131 keeps gun stores away from highly populated areas, schools and residences. Keeping guns out of those areas is substantially related to protecting public safety; therefore, the regulation should be upheld under intermediate scrutiny. Furthermore, gun regulations that inhibited an individual's access to types of weapons have been upheld under intermediate scrutiny. *See Marzzarella*, 614 F.3d at 96 (upholding a law that criminalized the possession of a firearm with an obliterated serial number), If regulations like the one in Marzzarella are upheld under intermediate scrutiny, § 17.54.131 should also be upheld. This Court should adopt the District Court's finding that § 17.54.131 attempts to decrease violence and crime in residential areas.

This Court should reverse the Fourteenth Circuit's decision and uphold the district court's motion to dismiss. § 17.54.131 only regulates where a new gun store can be located. Because Mojave County already has three gun stores, the citizens of Mojave County can still purchase firearms. Therefore, this is a *de minimis* restriction on the Second Amendment and deserves either rational basis review or intermediate scrutiny. Second, this regulation is a time, place and manner restriction. Under this Court's First Amendment jurisprudence, time, place and manner restrictions are only subject to intermediate scrutiny. Finally, when intermediate scrutiny is applied, § 17.54.131 must be upheld. § 17.54.131 was enacted to protect public safety, which this Court acknowledged is an important if not compelling government interest. Public safety is advanced by ensuring that guns are not sold in sensitive areas, such as residential areas, schools or as in this case near a church. Because § 17.54.131 is

substantially related to an important governmental interest, this Court must reverse the Fourteenth Circuit.

C. This Court has already foreclosed applying strict scrutiny when evaluating regulations on the commercial sale of firearms.

This Court should not apply strict scrutiny in Second Amendment cases, particularly those where the statute has a *de minimis* impact on the right of self-defense. "[T]he most exacting scrutiny" is applied "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Simon & Schuster*, 502 U.S. 105, 115 (1991)). If this Court were to apply strict scrutiny to all regulations concerning firearms, it would be forced to strike down a significant amount of longstanding federal and state laws. "Adoption of a true 'strict scrutiny' standard for evaluating gun regulations would be impossible." *Heller*, 554 U.S. at 689 (Breyer, J. dissenting). Most lower courts applying *Heller* have applied intermediate scrutiny and those courts that say they are applying strict scrutiny are actually applying a heightened version of intermediate scrutiny. Therefore, this Court should affirm those decisions and apply intermediate rather than strict scrutiny.

Heller's list of presumptively lawful firearms regulations is inconsistent with applying strict scrutiny to the Second Amendment. The *Heller* majority stated: "nothing in our opinion should cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . or on laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–627. Because this Court took the time to explain that some firearms regulations

are presumptively lawful under the Second Amendment, it could not have intended for lower courts to subject firearms regulations to strict scrutiny. *See Heller*, 554 U.S. at 688 (Breyer, J. dissenting) (stating the majority implicitly rejects strict scrutiny review when it laid out constitutionally permissible regulations because "under a strict-scrutiny standard [those regulations] would be far from clear.") *See also Skoien*, 614 F.3d at 651 n. 12 (holding strict scrutiny is "difficult to reconcile with *Heller's* reference to presumptively lawful firearms regulations"); *United States v. Marzzarella*, 595 F. Supp. 596, 604 (W.D. Pa. 2009) ("the Court's willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of the strict scrutiny standard"); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L. J. 1371, 1379 (2009) ("it is doctrinally impossible to conclude that strict scrutiny governs the Second Amendment claims, while also upholding [*Heller's* list of gun regulations]"). Therefore, *Heller* foreclosed the use of strict scrutiny.

When Justice Scalia created his list of permissible gun-regulations he implicitly closed the door for strict scrutiny review of regulations concerning the commercial sale of firearms. *Heller*, 554 U.S. at 627. Mojave County did just that, regulate the commercial sale of firearms. § 17.54.131 simply regulates the locations where individuals can sell commercial firearms. Because, this Court stated that this was a presumptively lawful regulation, it is not subject to strict scrutiny. Further, the regulation must be upheld because this Court has already granted states and local governments the ability to regulate the commercial sale of firearms.

The lower courts that state that they are applying strict scrutiny are truly applying a more exacting form of intermediate scrutiny. This Court has held that laws subject to strict scrutiny are presumptively invalid. *See Ysura v. Pocatello Educ. Ass'n*, 55 U.S. 353, 358 (2009) (holding that content based speech regulations are presumptively invalid and subject to strict scrutiny); *Plyler v. Doe*, 457 U.S. 202, 232 (1982) (Blackmun, J., concurring) (holding that under the Equal Protection Clause, regulations classifying individuals based on alienage are subject to strict scrutiny and are presumptively invalid); *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 502 n.4 (1981) (holding that racial classifications are subject to strict scrutiny and are presumptively invalid). When applying strict scrutiny, most laws are invalid. However, in the gun-regulation cases all the lower courts that applied strict scrutiny have upheld the gun-regulations. *See United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 U.S. Dist. LEXIS 78148, at *5-6 (N.D.N.Y. Oct. 6, 2008); *United States v. Montalvo*, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009) (both holding that a statute banning possession of a firearm by individual's subject to a protective order was narrowly tailored to the compelling government interest in reducing domestic violence).

In 2016, the Fourth Circuit became the only circuit court to apply strict scrutiny to a gun regulation. The Fourth Circuit held that "'any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside of the home, firearm rights have always been more limited.'" *Kolbe v. Hogan*, 813 F.3d 160, 181–

182 (4th Cir. 2016), *rev'd en banc Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (*Kolbe II*) (citing *Masciandaro*, 638 F.3d at 470). The Fourth Circuit found that Maryland's Firearm Safety Act's (FSA) ban on semiautomatic rifles and magazines holding more than 10 rounds burdened the core fundamental right of protecting hearth and home; therefore, the regulation was subject to strict scrutiny. *Id.* at 182. The Fourth Circuit required the district court to reconsider the regulation using strict scrutiny. *Id.*

On rehearing, the Fourth Circuit reversed itself and held that intermediate scrutiny is the appropriate standard for evaluating the FSA. *Kolbe II*, 849 F.3d at 138. "Heightened scrutiny need not . . . be akin to strict scrutiny when law burdens the Second Amendment—particularly when the burden does not constrain the Amendment's core area of protection." *Id.* (citing *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015)). The Fourth Circuit reasoned that FSA's ban only concerned certain military weapons but did not restrict an individual's ability to own any other kind of firearm for self-defense. *Kolbe II*, 894 F.3d at 138. The only circuit court to even entertain strict scrutiny review of a gun regulation—before expressly rejecting it—did not apply it to a regulation on the types of guns individuals can own. Under every circuit court's analysis, strict scrutiny would not be appropriate for a zoning regulation limiting, not prohibiting, available locations for the commercial sale of firearms.

This Court foreclosed the use of strict scrutiny in Second Amendment cases. In particular, *Heller* stated that laws concerning the sale of commercial firearms are presumptively lawful. Because strict scrutiny is often fatal in fact, the *Heller* carve

out makes strict scrutiny impractical if not impossible. This Court should also adopt the methods of all of the circuit courts of appeals and use either rational basis review or intermediate to evaluate regulations burdening the Second Amendment.

II. The Second Amendment Does not Secure an Independent Right to Sell Firearms

Neither the Second Amendment's text, nor its history, secures a right to the commercial sale of firearms. The Second Amendment provides: "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. The purpose of the amendment is to protect an individual's right to self-defense. A gun store's ability to sell firearms is largely detached from this core purpose of self-defense. Moreover, this Court has stated that "laws imposing conditions and qualifications on the commercial sale of fire arms" are "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 626–27 (2007). This case is about a "qualification on the commercial sale of fire arms." The Court's decision in *Heller* implies that the "commercial sale of fire arms" is not a constitutionally protected right, because if it were, laws burdening the sale of fire arms would not be "presumptively lawful."

A. Neither the Text Nor the History of the Second Amendment Indicates a Right to Sell Firearms.

The text of the Second Amendment only secures the right to "keep" and the right to "bear" arms. Nothing in the text of the Amendment indicates a right that is commercial in nature. The prefatory clause, which states that "[a] well regulated Militia, being necessary to the security of a free State . . . " indicates that the

Amendment addresses a state's ability to defend itself against a tyrannical federal government. The operative clause, which states that "the right of the people to keep and bear Arms, shall not be infringed," relates to an individual's right to possess and carry weapons. *Heller*, 554 U.S. at 582–84 (2007).

Practically speaking, the right to "keep and bear arms" would be meaningless if the government could simply outlaw the manufacture or sale of firearms. But such regulation would violate the Second Amendment only because it would destroy the people's right to keep and bear arms. If such a regulation were enacted, gun retailers such as Maxson could challenge the law on behalf of their customers. However, that is not what is happening here. Maxson is not asserting the rights of any potential gun buyers under the doctrine of third-party standing. Instead, Maxson is asserting that he has a constitutionally enshrined right to sell guns from a specific location in Mojave County.

Maxson's argument is completely detached from the text of the Second Amendment. No Mojave County citizens are challenging § 17.54.131 on the grounds that they cannot buy or carry firearms. This is likely explained by the fact that there are already three gun stores and two shooting ranges operating in Mojave County. Further, there is nothing preventing Maxson (or any other firearm retailer) from opening a gun store at another location in the County, assuming that the store's location meets the zoning requirements. Thus, Maxson has to argue that there is some implied right to sell firearms that is independent from the people's right to keep

and bear arms. There is no support for such a right in the text of the Second Amendment.

Moreover, a historical analysis of the Second Amendment confirms that there is no right to the commercial sale of firearms. The Second Amendment's primary purpose is to protect an individual's right to self-defense. The amendment is rooted in English law; it codifies a right "inherited from our English ancestors." *Id.* at 599. According to William Blackstone, the most influential English jurist in the Eighteenth Century, the right to keep and bear arms meant the "natural right" of "having and using arms for self-preservation and defense." Michael Waldman, *The Second Amendment: A Biography* (2014). The laws of the American Colonies reflected this "natural right," and some colonies went "another step beyond English law and required colonists to carry weapons." Joyce L. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 139 (1994).

But while colonies encouraged their citizens to arm themselves, restrictions on selling firearms were quite common place in colonial times. For example, the colonies of Virginia and Massachusetts both outlawed citizens from selling guns or gun-powder to American Indians. *Id.* at 140 (1994). The colony of Connecticut went even further and banned its citizens from selling guns to *anyone* outside the colony. 1 Trumbull, *Public Records of the Colony of Connecticut*, 138–39. So, while colonists

had a near absolute right to arm themselves, their ability to engage in the commercial sale of firearms was considerably more limited.

Following the ratification of the United States Constitution, nine of the earliest state constitutions (all written before 1820) protected their citizens' right to "bear arms in the defense of himself [or themselves] and the state." *Heller*, 554 U.S. at 584–85 (emphasis added). These states recognized that in order to defend one's self, the "right to keep and bear arms" undoubtedly must also include the right to purchase weapons. *See Andrews v. State*, 50 Tenn. 165, 178 (1871) ("[t]he right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.").

But nothing in the history of the Second Amendment suggests that it also secured an individual right to the commercial sale of firearms. Although early American legislators "recognized that the availability of arms was a necessary prerequisite to exercising the right to bear arms . . . no contemporary commentary suggests that the right codified in the Second Amendment independently created commercial entitlement to sell guns if the right of the people to obtain and bear arms was not compromised." *Teixeira*, 873 F.3d at 686.

In other words, regulating the commercial sale of firearms only implicates the Second Amendment if it prevents citizens from acquiring weapons. For example, if an ordinance prevented a county's citizens from acquiring guns altogether, this would likely be unconstitutional. But Maxson is not arguing that anyone's right to purchase

weapons is being infringed. As previously stated, there are currently three gun stores already open in Mojave County, including a gun store only ten miles from where Maxson wished to open a store. Mojave County citizens have ample opportunity to purchase firearms, regardless of whether Maxson ever opens a gun store at his proposed location.

This case is also categorically different than *Ezell*, which involved an ordinance that banned the opening of any shooting range in Chicago. *Ezell*, 651 F.3d at 684. The Seventh Circuit struck down the ordinance on the grounds that it prevented citizens from training with weapons and thus burdened their right to self-defense. *Id.* The court did not base its decision on any hypothetical right to operate a shooting range. Unlike Chicago in *Ezell*, there are already two shooting ranges currently operating in Mojave County. Mojave citizens have ample access to shooting ranges, can train with their firearms, and defend themselves.

The circuit courts faced with this question have largely concluded that the Second Amendment does not secure a right to sell firearms. *See Teixeira*, 873 F.3d at 673 ("A textual and historical analysis of the Second Amendment demonstrates that the Constitution does not confer a freestanding right on commercial proprietors to sell firearms."); *see also Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 196 (stating that the regulation of the commercial sale of firearms likely falls "outside the ambit of the Second Amendment."); see also *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) ("It seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second

Amendment right."). While these circuits have all recognized that there must be an individual right to purchase firearms, they have concluded that such a right does not also give rise to a commercial right to sell firearms. *See United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011) ("Indeed, although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding right to sell a firearm."). These rulings are consistent with both the history of the Second Amendment and this Court's interpretation that the core purpose of the Second Amendment is self-defense.

Mojave's § 17.54.131 does not implicate the Second Amendment because it does not affect its citizens' right to purchase firearms. Maxson's position is not only incorrect, it is also impractical. If firearm retailers had a constitutional right to sell weapons anywhere they pleased, zoning ordinances would be subjected to the strictest scrutiny. This means that counties and cities would largely lose their ability to regulate gun shops and protect their citizens. This simply cannot be what the Framers meant or intended when they gave citizens the right to keep and bear arms.

B. Zoning Ordinances Regulating the Sale of Firearms Are Presumptively Lawful under *Heller* and Are Therefore outside the Ambit of the Second Amendment.

The Second Amendment is not unlimited; it does not secure the right of individuals to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Moreover, this Court has stated that despite "doomsday proclamations, incorporation does not imperil every law regulating firearms." *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). This

Court has defined the core of the Second Amendment very specifically as the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. Whether a challenged law burdens conduct protected by the Second Amendment depends on the "historical understanding of the scope of the right," including "whether the challenged law falls within well-defined and narrowly limited category of prohibitions that have been historically unprotected." *Jackson*, 746 F.3d at 960. Mojave's § 17.54.131 falls within the limited category of prohibitions regulating conduct outside the scope of the Second Amendment.

A law that burdens conduct falling outside the scope of the Second Amendment is presumptively lawful. *Nat'l Rifle Ass'n. Am., Inc.*, 700 F.3d at 195. In *Heller*, the Court laid out a non-exhaustive list of presumptively lawful regulatory measures that are presumed to be consistent with the historical scope of the Second Amendment. 554 U.S. at 626–27. In other words, there are certain firearm regulations that do not govern conduct within the Second Amendment. *Id.* The Court stated:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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 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. This language should be read "to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment." *Masciandaro*, 638 F.3d at 473.

When a law implicates one of the presumptively lawful categories outlined in *Heller*, that law is outside of the Second Amendment. *United States v. Vongxay*, 594

F.3d 1111, 1115 (9th Cir. 2010). In *Vongxay*, the Ninth Circuit addressed a challenge to a federal statute prohibiting felons from possessing firearms. *Id.* at 1113. The court relied on *Heller*'s list of presumptively lawful regulations and concluded that the law was constitutional because it was a prohibition on the "possession of firearms by felons." *Id.* Therefore, the court did not apply means-end scrutiny because the conduct was not protected by the Second Amendment. *Id.* at 1115.

Similarly, other circuit courts have upheld regulations that fall into the presumptively lawful categories listed in *Heller* are not protected by the Second Amendment. In *United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013), the Second Circuit held that a federal statute criminalizing convicted felons for possessing firearms did not burden the Second Amendment. *Id.* Additionally, even categories that were not listed in *Heller's* list have been deemed to fall into the category of presumptively lawful regulations. *See United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (holding that statute prohibiting possession of firearms by persons convicted of domestic violence misdemeanors is included in the longstanding prohibitions deemed constitutional under *Heller*).

In *Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013), the Third Circuit held that a New Jersey law requiring applicants to demonstrate a justifiable need in order to obtain a permit to publicly carry a handgun fell into one of the presumptively lawful categories in *Heller*—"laws forbidding carrying of firearms in sensitive places." Because the law was presumptively lawful, the Court held that it regulated conduct falling outside the scope of the Second Amendment. *Id.* at 434.

The logic of all of these courts should be extended to zoning ordinances that impose conditions on the commercial sale of firearms. In fact, the Ninth Circuit has already done this. In *Teixeira*, the Ninth Circuit evaluated a statute that mirrors the one in Mojave County. Both regulations require that a gun shop obtain a conditional permit before opening. In both cases, the shop owner was unable to obtain a conditional permit because the there was no non-disqualifying location available for the store. Both Alameda County and Mojave County also have other operational gun stores. The Ninth Circuit in *Teixeira* held that in that case "restrictions on a commercial actor's ability to enter the firearms market . . . have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms." *Teixeria*, 873 F.3d at 687. In other words, the Second Amendment did not confer a right to open a gun shop in a particular location.

In the case at bar, the Fourteenth Circuit based its decision on the County's failure to show that its zoning ordinance fell within a "well-defined and narrowly limited category of prohibitions that have been historically unprotected" by the Second Amendment. *Jackson*, 746 F.3d at 960. The Fourteenth Circuit erroneously held that zoning ordinance do not qualify as longstanding prohibitions because noted they did not enter sphere until the early 20th century. However, the court erred in relying on the origin of zoning ordinances specifically, because *Heller* deemed regulations on the commercial sale of firearms to be "longstanding" prohibitions. *Heller*, 554 U.S. at 626.

Further, although zoning ordinances originated in the early 20th century, regulations do not have to perfectly mirror regulations that existed in 1791 in order to be deemed longstanding. *Skoien*, 614 F.3d at 640–41 (7th Cir. 2010). For instance, possession bans for felons have been deemed longstanding even though these bans did not arise until the mid-20th century. *See United States v. Booker*, 644 F.3d 12, 24–25 (1st Cir. 2011) (reasoning that despite the fact that the felony firearm possession ban in question enacted in 1938 did not resemble laws in effect at the time the Second Amendment was ratified, the ban fit comfortably within the presumptively lawful category of *Heller*). Likewise, bans prohibiting the mentally ill from possessing firearms have been upheld as falling outside the Second Amendment even though the first federal ban did not occur until 1968. *See Jeffries v. Sessions*, 278 F. Supp. 3d 831, 840–44 (E.D. Pa. 2017) (holding that the there was no need to determine whether a federal statue prohibiting individuals who had been committed to a mental institution from possessing firearms survived intermediate scrutiny because it was presumptively lawful under *Heller*). Therefore, there is no need to inquire further into the history of zoning ordinances.

Longstanding prohibitions on the possession of firearms named in *Heller* fail to burden conduct protected by the Second Amendment. Therefore, this Court does not even have to engage in means-end scrutiny. If there is no burden on protected Second Amendment rights, then the statute should be upheld. "A longstanding, presumptively lawful regulatory measure—whether or not it is specified in *Heller's* illustrative list—would likely fall outside of the ambit of the Second Amendment; that

is, such a measure would likely be upheld at step one of our framework." *Nat'l Rifle Ass'n.*, 700 F.3d at 196; *see also Heller II*, 670 F.3d at 1253 (stating "a regulation that is longstanding, which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right."). Because §17.54.131 only places conditions and qualifications on the commercial sale of firearms and does not prohibit individuals from acquiring firearms, it falls outside of Second Amendment protections.

CONCLUSION

This Court must uphold the Mojave County regulation. In Mojave County, there is no evidence that any residents were denied access to a gun shop. Maxson failed to plead that any individual's right to self-defense was negatively impacted by the regulation. Because no right to self-defense was implicated, the law is presumptively lawful. This Court in *Heller* did not confer a freestanding right to sell guns and this Court explicitly carved out the commercial sale of firearms from the Second Amendment. Thus, Maxson has not alleged a violation of his Second Amendment rights.

But even if this Court concludes that Maxson has a constitutional right to sell arms, § 17.54.131 survives both rational basis and intermediate scrutiny. When *Heller* created a list of presumptively lawful regulations, including the commercial sale of firearms, it suggested that rational basis was the appropriate form of review for these kinds of regulations. However, even if this Court decides to apply

intermediate scrutiny, § 17.54.131 is still constitutional because it is substantially related to the County's important interest in promoting public safety.

Therefore, this Court should reverse the Fourteenth Circuit and dismiss Maxson's claim for the failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b) (6).

Appendix 1 - Mojave County Statutes

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—Firearm 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—Actions.

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—Actions—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.