

No. C18-0111-1

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

COUNTY OF MOJAVE,

Petitioner,

v.

BROTHERHOOD OF STEEL, LLC AND ROGER MAXSON,

Respondents.

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

BRIEF FOR PETITIONER

TEAM No. 96

QUESTIONS PRESENTED

- I. When Second Amendment claims are suitable for means-end scrutiny, is rational-basis review sufficient when the challenged legislation only affects a business's right to sell firearms?
- II. Under the Second Amendment, do citizens have the right to sell firearms near residential and other sensitive areas when citizens have access to other firearms stores within the county?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Procedural Background.....	5
SUMMARY OF THE ARGUMENT	7
I. This Court should reverse because Mojave’s Zoning Ordinance must be analyzed under rational-basis scrutiny.	7
II. The Second Amendment does not secure a freestanding right to sell firearms, and any ancillary rights to sell firearms are subject to restrictions.	8
ARGUMENT	10
I. This Court should reverse because Mojave’s Zoning Ordinance must be analyzed under rational-basis scrutiny.	12
A. Rational-basis review is proper for Second Amendment claims when the challenged law merely places conditions on permits for the commercial sale of firearms.	13
i. The level of scrutiny applied must be proportionate to the severity of the burden imposed on the core right.	14
ii. The Zoning Ordinance does not significantly burden the fundamental right to keep and bear arms.....	16
iii. The Zoning Ordinance is more similar to cases in which the Court has used a rational-basis review.....	19
B. Mojave’s Zoning Ordinance is constitutional under rational-basis review.....	23
i. The Zoning Ordinance advances the legitimate governmental objectives of protecting public safety and preventing crime.....	24
ii. The Zoning Ordinance has a conceivable rational relation to Mojave’s objective.	25
C. The Zoning Ordinance is constitutional under a heightened scrutiny analysis.	25
II. The Second Amendment does not secure a freestanding right to sell firearms, and any ancillary rights to sell firearms are subject to restrictions.	30

A. The Second Amendment protects only an individual right to possess firearms, not an individual right to sell firearms.....	31
i. The right to sell firearms is not closely related to the core rights in the text of the Second Amendment.	32
ii. The historical context of the Second Amendment does not support a freestanding right to sell firearms.	34
B. The Second Amendment only protects a right to sell arms when failure to do so would infringe upon the right to bear arms.	36
i. Brotherhood’s right to sell arms is not protected because it does not meaningfully impact the right of county residents to bear arms.	37
ii. Even if Brotherhood’s right to sell arms was constitutionally protected, it is subject to presumptively constitutional limitations.	39
CONCLUSION	41

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004).....	29
<i>Bernal v. Fainter</i> , 467 U.S. 216 (1984)	17, 28
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979).....	23
<i>City of Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432 (1985)	20
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	17, 26, 27
<i>Davis v. Mich. Dep’t of Treasury</i> , 489 U.S. 803 (1989)	21
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	<i>passim</i>
<i>FCC v. Beach Commc’ns, Inc.</i> , 508 U.S. 307 (1993).....	21
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968).....	22
<i>Good News Club v. Milford Central School</i> , 533 U.S. 98 (2001)	12
<i>John Doe No. 1 v. Reed</i> , 561 U.S. 186 (2010)	18
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	<i>passim</i>
<i>Miss. Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982)	26
<i>Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	28
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	21
<i>Schall v. Martin</i> , 467 U.S. 253 (1984)	27, 28
<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994)	14, 15, 16, 22
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000)	24
<i>Whole Woman’s Health v. Hellerstedt</i> , 136 S.Ct. 2292 (2016)	19, 38
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955).....	24
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978)	16, 17

United States Courts of Appeals Cases

<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011)	<i>passim</i>
<i>Ezell v. City of Chicago</i> , 846 F.3d 888 (7th Cir. 2017)	<i>passim</i>
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011).....	11, 12, 15, 26
<i>Jackson v. City and County of San Francisco</i> , 746 F.3d 953 (9th Cir. 2014).23, 32, 38	
<i>Kolbe v. Hagan</i> , 849 F.3d 114 (4th Cir. 2017)	27
<i>Midrash Sephardi, Inc. v. Town of Surfside</i> , 366 F.3d 1214 (11th Cir. 2004).....	28, 28
<i>New York State Rifle & Pistol Ass’n, Inc. v. Cuomo</i> , 801 F.3d 242 (2d Cir. 2015)	27
<i>NRA v. ATF</i> , 700 F.3d 185 (5th Cir. 2012)	15
<i>Teixeira v. County of Alameda</i> , 873 F.3d 670 (9th Cir. 2017)	<i>passim</i>
<i>United States v. Chafin</i> , 423 Fed. Appx. 342 (4th Cir. 2011)	32
<i>United States v. Chester</i> , 628 F.3d 673 (4th Cir. 2010).....	11, 15, 16, 20

<i>United States v. Hosford</i> , 843 F.3d 161 (4th Cir. 2016).....	19, 20
<i>United States v. Marzzarella</i> , 614 F.3d 85 (3d Cir. 2010)	<i>passim</i>
<i>United States v. Reese</i> , 627 F.3d 792 (10th Cir. 2010)	11, 15
<i>United States v. Rozier</i> , 598 F.3d 768 (11th Cir. 2010)	19
<i>United States v. Scroggins</i> , 599 F.3d 433 (5th Cir. 2010).....	19
<i>Witt v. Dept. of the Air Force</i> , 527 F.3d 806 (9th Cir. 2008)	26

United States District Court Cases

<i>Second Amendment Arms v. City of Chicago</i> , 135 F.Supp.3d 743 (N.D. Ill. 2015) ...	39
--	----

State Court Cases

<i>Andrews v. State</i> , 50 Tenn. 165 (1871)	17
<i>State v. Reid</i> , 1 Ala. 612 (1840)	37

Constitutional Provisions

Amendment II, United States Constitution

Statutes

Mojave County, NTX., Code § 17.54.130	1, 3
Mojave County, NTX., Code § 17.54.131	1, 3
Mojave County, NTX., Code § 17.54.670	2, 3

Other Authorities

John Woodrow Cox & Steven Rich, <i>Scarred by school shootings</i> , THE WASHINGTON POST (March 25, 2018).....	24, 29
EVERYTOWN FOR GUN SAFETY, <i>Gun Violence in America</i> , (Aug. 8, 2018)	28
FEDERAL BUREAU OF INVESTIGATION, <i>Active Shooter Incidents in the United States in 2016 and 2017</i> , (2017)	3
John Adams, <i>Thoughts on Government</i> (1776).....	41
<i>Presumption</i> , <i>Black’s Law Dictionary</i> (9th ed. 2009)	21
<i>Purchase</i> , <i>Merriam-Webster Dictionary</i> (11th ed. 2003)	17

Sarah Mervosh, <i>Mass Shootings at Houses of Worship: Pittsburg Attack Was Among the Deadliest</i> , THE NEW YORK TIMES (Oct. 27, 2018)	25
<i>Sell</i> , Merriam-Webster Dictionary (11th ed. 2003)	17
Trent Steidley, David M. Ramey & Emily A. Shrider, <i>Gun Shops as Local Institutions: Federal Firearms Licensees, Social Disorganization, and Neighborhood Violent Crime</i> , 96 Social Forces 1, 265 (Sept. 1, 2017)	28, 29

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered judgment on October 1, 2018. This Court granted Petitioner's timely petition for writ of certiorari in October 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment II, United States Constitution

"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."

Mojave County, NTX., Code § 17.54.130

"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."

Mojave County, NTX., Code § 17.54.131

"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:

- I. That the district in which the proposed sales activity is to occur is appropriate;
- II. 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;
- III. That the applicant possesses, in current form, all of the firearms dealer licenses required by federal and state law;
- IV. 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;
- V. 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;
- VI. 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.”

Mojave County, NTX., Code § 17.54.670

“An appeal may be taken to the County Commissioner’s 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 notice of appeal.”

STATEMENT OF THE CASE

A. Factual Background

This case is about protecting the public from the dangers inherent to firearms, especially near areas such as schools and places of worship that are particularly vulnerable to gun violence.¹ This case presents the Court with the opportunity to support local governments in carrying out their responsibilities to provide for the common good of the communities they oversee.

The petitioner, the County of Mojave (“Mojave”), is the tenth most populous county in the state of New Texas. R. at 2, n.1. In an attempt to protect public safety, prevent harm in protected areas like schools and churches, and keep crime away from the community, Mojave enacted an ordinance (the “Zoning Ordinance”) that places certain conditions on the sale of firearms. R. at 3, 13-14. Any businesses intending to sell guns must first apply for a Conditional Use Permit pursuant to the Zoning Ordinance.² R. at 3. In order to receive a Conditional Use Permit, firearm stores must not be “within eight hundred (800) feet of any...[r]esidentially zoned district; elementary, middle or high school; pre-school or day care center; other firearms sales

¹ Nine recorded mass shooter incidents occurred in schools or places of worship in 2016 and 2017, resulting in 32 people killed and 46 wounded. FEDERAL BUREAU OF INVESTIGATION, Active Shooter Incidents in the United States in 2016 and 2017, (2017), <https://www.fbi.gov/file-repository/active-shooter-incidents-us-2016-2017.pdf/view>.

² Apart from the distance requirements under Section 17.54.131, Mojave will consider the following factors in determining an application for a gun store or shooting range: “(A) [i]s required by the public need; (B) [w]ill be properly related to other land uses and transportation and service facilities in the vicinity; (C) [i]f 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) [w]ill be contrary to the specific intent clauses or performance standards established for the district, in which it is to be located.” Mojave County, NTX., Code § 17.54.130; R. at 3, 19.

business; religious center; or liquor stores or establishments in which liquor is served....” R. at 19-20.

In June 2011, the respondent, Roger Maxson, formed Brotherhood of Steel, Inc. (collectively “Brotherhood”) to open a gun store and shooting range within the limits of Mojave. R. at 2. At the time Brotherhood applied for a Conditional Use Permit, at least three gun stores and two shooting ranges were, and still are, lawfully operating within Mojave. R. at 15. Brotherhood, however, preferred to open the gun store in an unincorporated area of Mojave known as “Hidden Valley” near the city of Sloan. R. at 3. Brotherhood obtained a survey indicating that the proposed property was more than 800 feet away from the nearest residential zone and the nearest gun store. R. at 4, 5. After Brotherhood sent a Conditional Use Permit application to Mojave’s Community Development Agency, the Agency recommended denying the application because the proposed site was only 736 feet from a currently inactive church owned by The Children of the Cathedral. R. at 5, n.2. The Mojave Planning Department took several measurements of the area and ultimately concluded that, no matter where Brotherhood’s “Hidden Valley” property was measured from, it did not comply with the Zoning Ordinance’s requirements. R. at 5.

After a public hearing on the effects of Brotherhood’s proposed gun store and shooting range on the community, the West County Board of Zoning Adjustments (“Zoning Board”) granted Brotherhood a variance and approved its application.³ R. at 6. The Zoning Board approved the application because a highway separated

³ The Record is silent as to why the Zoning Board from West County, as opposed to Mojave County, reviewed Brotherhood’s appeal and granted a variance.

Brotherhood's proposed property from the church property, and Brotherhood would be the only Red 888 guns dealer in Mojave. R. at 6. Thereafter, the Shady Sands Home Owners Association ("Shady Sands") appealed the Zoning Board's approval of Brotherhood's application pursuant to § 17.54.670 of Mojave's County Statutes. R. at 6, 21. The County Commissioner's Court sustained Shady Sands' appeal and revoked Brotherhood's Conditional Use Permit. R. at 6. After this final denial, Brotherhood alleges that it was unable to find a property it deemed suitable located in unincorporated Mojave County for a gun shop that also satisfied the 800-ft. requirement of the Zoning Ordinance. R. at 7.

B. Procedural Background.

Brotherhood filed a complaint in the United States District Court for the Central District of New Texas alleging due process, equal protection, and Second Amendment violations from the denial of its permit application. R. at 7. In addition, Brotherhood argued that the Zoning Ordinance violated the Second Amendment, both facially and as applied. R. at 7. The district court denied Brotherhood's motion for a preliminary injunction and dismissed its equal protection and Second Amendment claims with leave to amend. R. at 7. After amending its complaint by simply stating its previous claims in a more specific manner, the district court granted Mojave's motion for failure to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). R. at 8.

On appeal, the United States Court of Appeals for the Fourteenth Circuit in a 2-1 decision affirmed the dismissal of Brotherhood's Equal Protection claim but

reversed the dismissal of its Second Amendment claims. R. at 14. The Fourteenth Circuit held that the Zoning Ordinance burdened Brotherhood's Second Amendment rights to sell firearms and, subsequently, that it was unconstitutional as applied to Brotherhood under a heightened standard of review. R. at 10-11, 14.

SUMMARY OF THE ARGUMENT

Today, this Court must wrestle with a question at the heart of our American political identity—what do we, as a country, do when individual interests contradict the public good? Although this country is distinct among the world’s nations in regard to the extremely privileged status it affords to Second Amendment rights, even such privileged status must sometimes yield to a greater public interest. The Fourteenth Circuit erred by prioritizing the desires of an individual over the public good without considering the issue in the correct context as required by legal authority. Mojave asks this Court to recognize that sometimes individual desires must give way to superior public interests and to recognize that local governments like Mojave have a legal and ethical responsibility to look after the public good. Only by allowing Mojave to continue to serve the public good through its Zoning Ordinance can this Court reach a conclusion that both serves the best interest of the American public and accurately reflects the weight of legal authority on the issues at hand. For these reasons, Mojave urges the Court to reverse the decision of the Fourteenth Circuit on the Second Amendment issues.

I. This Court should reverse because the Zoning Ordinance must be analyzed under rational-basis scrutiny.

This case presents the Court with the opportunity to reaffirm the notion that, when reviewing the constitutionality of a law, levels of scrutiny must be applied in proportion to the severity of the burden imposed on a right. In doing so, this Court should follow its own precedence and look to the historical underpinnings of the Second Amendment: an individual right to keep and use arms in defense of hearth

and home. This Court should not grant Brotherhood's attempt to place its desire to operate a business alongside the core Second Amendment rights to keep and bear arms.

This Court only applies heightened scrutiny when a challenged law interferes with the core rights of the Second Amendment and those essential to the enjoyment of those core rights. However, the Court does not apply heightened scrutiny simply because a law might hypothetically impact the rights within the periphery of the Second Amendment. Rational-basis is the appropriate standard of review because the Zoning Ordinance's limitations on Brotherhood's right to operate a business do not meaningfully impact the ability of Mojave citizens to access, keep, or use arms. The Zoning Ordinance, which is more similar to cases in which this Court has used rational-basis review, merely places a condition on permits for the commercial sale of firearms. Additionally, the Zoning Ordinance passes constitutional muster even if reviewed under a heightened scrutiny standard. Therefore, this Court should reverse the decision of the Fourteenth Circuit and hold that Mojave's Zoning Ordinance is constitutional.

II. This Court should reverse because the Second Amendment does not secure a freestanding right to sell firearms, and any ancillary rights to sell firearms are subject to restrictions.

Brotherhood's attempt to manipulate the Second Amendment into providing a freestanding right to sell firearms ignores both the historical rights and restrictions attached to the Second Amendment. The Second Amendment at its core protects the rights of citizens to possess and use arms for the defense of hearth and home. This

Court explained that meaning using the text and the history of the Second Amendment, tracing its roots back to the English Bill of Rights. Notably, this history is completely devoid of a right to commercially sale firearms wherever one pleases, thus supporting the idea that governments should be able to regulate where persons decide to sell firearms.

Where governmental regulation begins to burden the fundamental rights of citizens, the courts are the proper place to address grievances. However, the courts are not the proper place to change every outcome that may be unfavorable. Brotherhood had its opportunity to argue for its preferred business location in Mojave County. The citizens and their representatives have reviewed its application and argument and used their discretion to deny it. Therefore, this Court should reverse the decision of the Fourteenth Circuit and hold that the Zoning Ordinance does not interfere with Mojave citizens' core Second Amendment rights.

ARGUMENT

The Bill of Rights is a codification of American values that provide limits to governmental action and is derived from the history of America. Some of these guaranteed rights and freedoms, such as the Third Amendment freedom from being required to quarter soldiers, are unique to America and arose out of oppression by the English government. Others, such as the First Amendment right to free speech, are codifications of pre-existing rights that are deeply rooted in the history of English common law. The Second Amendment protects one of the latter rights. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (“*Heller I*”). In light of its foundations, this Court has interpreted the Second Amendment and the scope of its protections through the lens of its “text and history.” *Id.* at 595. Under this textual and historical analysis, this Court and others have identified different types of rights under Second Amendment protection. *Heller*, 554 U.S. 570 at 630; *Ezell v. City of Chicago*, 651 F.3d 684, 704-06 (7th Cir. 2011) (“*Ezell I*”) (holding that the Second Amendment protects a right to practice at shooting ranges). This Court in *Heller* identified that the “core protection” of the Second Amendment is the use of firearms for self-defense and other lawful purposes. *Heller*, 554 U.S. at 630, 634.

Other courts have identified protected rights that are not part of the core Second Amendment guarantee but are essential to giving meaning of the core right of self-defense. *Ezell I*, 651 F.3d at 703; *see also Griswold v. Connecticut*, 382 U.S. 479, 482-83 (1965) (holding that peripheral rights are those necessary to secure the specific, core rights in a First Amendment context). These rights exist on the

periphery of the Second Amendment protection and relate directly to an individual's ability to "possess" and use firearms for "lawful purposes."

Outside of the individual rights protected by the periphery of the Second Amendment exist the non-possessory rights that relate to the periphery rights. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017). These third-party rights, known as ancillary rights, include the right to sell, manufacture, and distribute arms, and are even farther attenuated from the core of the Second Amendment. *Id.* In other words, ancillary rights do not directly impact the core of the Second Amendment, but rather impact the peripheral rights of the Second Amendment. *Id.*

This Court has yet to adopt a standard for analyzing Second Amendment claims, so the circuit courts have borrowed concepts from the First Amendment context to formulate an analytical framework consisting of two separate analyses. *See, e.g., U.S. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). First, the threshold issue asks whether the challenged law comes within the scope of the Second Amendment and thus is suitable for constitutional analysis. *Id.* If the court determines that the challenged law does fall within the scope of the Second Amendment, the next step is to analyze the challenged legislation under the appropriate level of scrutiny.⁴ *Id.*

⁴ This is the approach that most circuits have adopted since this Court's decision in *Heller*. *See, e.g., Marzzarella*, 614 F.3d at 89; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

I. This Court should reverse because the Zoning Ordinance must be analyzed under rational-basis scrutiny.

Assuming that the Zoning Ordinance implicates the Second Amendment and is thus suitable for constitutional analysis, the next step is to determine the appropriate standard of review. See *Heller v. District of Columbia*, 670 F.3d 1244, 1251-58 (D.C. Cir. 2011) (“*Heller II*”). While this Court has not set a standard for which level of scrutiny should be used for Second Amendment claims that are suitable for constitutional analysis, it has suggested that they be analyzed in a manner similar to the two-part analysis used in First Amendment freedom of speech claims.⁵ *Heller*, 554 U.S. at 634-35. The two-part analysis used in First Amendment freedom of speech claims consists first of a determination of the severity of the burden on the right and then an application of the proportionate level of scrutiny. *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001).

Rather than applying a rigid standard, the two-part analysis allows the Court to take into account all aspects of the challenged legislation and the circumstances in which it was enacted. This is done by first determining the proximity of the regulated action to the core of the protected right and then analyzing the severity of the burden placed on the right. *Ezell I*, 651 F.3d at 707; *Marzzarella*, 614 F.3d at 98. This two-part analysis used by the circuit courts provides the proper framework to determine the appropriate level of scrutiny for Second Amendment claims based on this Court’s precedence.

⁵ The analysis for whether the Second Amendment protects the right to sell firearms, however, is more analogous to the Sixth Amendment analysis. *Teixeira*, 873 F.3d at 689 n.23.

This two-part analysis was properly followed by the district court when it granted Mojave's motion pursuant to Rule 12(b)(6) to dismiss Brotherhood's complaint for failure to state a claim because rules governing the sale of firearms are presumptively valid. R. at 8. The Fourteenth Circuit then reversed in part and remanded, holding that a question of law existed as to whether the Zoning Ordinance is constitutional under heightened scrutiny. R. at 14. The Zoning Ordinance does not meaningfully burden the core rights protected by the Second Amendment, but if the Court holds that it does, the Court should analyze it under rational-basis review, not heightened scrutiny. Additionally, the Zoning Ordinance still passes constitutional muster under a heightened scrutiny analysis. Therefore, this Court should reverse the holding of the Fourteenth Circuit and hold that Mojave's Zoning Ordinance is constitutional.

A. Rational-basis review is proper when the challenged law merely places conditions on permits for the commercial sale of firearms.

The Fourteenth Circuit's majority opinion applied a heightened scrutiny analysis to this case without delving into why a rational-basis review was inappropriate. R. at 12-14. Upon concluding that the Zoning Ordinance implicated the Second Amendment, the majority immediately discarded rational-basis review and applied heightened scrutiny. R. at 14. While this approach may be appropriate for legislation that prohibits the core right to keep and bear arms, it is not appropriate for legislation that merely regulates the "commercial sale of firearms." *Heller*, 554 U.S. at 627. Therefore, the Court should apply a rational-basis standard to claims

such as the present claim which contest the constitutionality of “presumptively lawful” ordinances that merely regulate the “commercial sale of firearms.” *Id.*

i. The level of scrutiny applied must be proportionate to the severity of the burden imposed on the core right.

In *Heller*, this Court’s first in-depth analysis of the Second Amendment, this Court expressly left open the question of what level of scrutiny should be applied to Second Amendment claims. *Heller*, 554 U.S. at 635. *McDonald v. City of Chicago*, where the Court applied the Second Amendment to the states, is the only other in-depth analysis of the Second Amendment by this Court. *McDonald*, 561 U.S. 742, 791 (2010). However, like in *Heller*, the Court in *McDonald* left the question of the appropriate level of scrutiny for Second Amendment claims to the lower courts. *Id.* at 785-86. Today, this Court has the opportunity to settle this area of the law and provide courts with a consistent framework for analyzing Second Amendment claims.

The most appropriate approach is to adopt a standard that allows courts to consider the surrounding circumstances of challenged laws rather than one that ignores important nuances. In *Heller*, this Court explained that courts should follow a similar approach to that used in First Amendment freedom of speech claims to determine the applicable level of scrutiny under Second Amendment claims. *Heller*, 554 U.S. at 635 (analogizing level of scrutiny for Second Amendment claims to level of scrutiny for First Amendment claims and rejecting an interest-balancing approach). In First Amendment freedom of speech cases, the appropriate level of scrutiny is determined by the weight of the burden imposed on the core right being protected. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994) (*Turner*

I). Circuit courts have followed this precedent by recognizing that “[s]trict scrutiny does not apply automatically any time an enumerated right is involved.” See *Marzzarella*, 614 F.3d at 96; *Chester*, 628 F.3d at 682. To determine the appropriate level of scrutiny for Second Amendment claims, the Court should apply a test similar to First Amendment claims rather than make a categorical classification about all laws affecting Bill of Rights guarantees.

In light of this Court’s jurisprudence, the proper test for Second Amendment claims should take into account the attenuation of the regulated action from the core of the Second Amendment. See *Turner I*, 512 U.S. at 642 (explaining that regulations on speech unrelated to content are subject to a lower level of scrutiny because they pose less of a burden on the core right). Circuit courts have recognized that the analysis of laws under the Second Amendment necessarily requires context when determining which level of scrutiny should apply. *Marzzarella*, 614 F.3d at 89 (rejecting the notion that strict scrutiny applies automatically to Second Amendment claims in favor of a test to first determine the appropriate level of scrutiny); *Ezell I*, 651 F.3d at 701-704 (extrapolating principles from the First Amendment context to first determine what level of scrutiny should be applied).⁶ As the Fourth Circuit in *Chester* recognized, the appropriate level of scrutiny applicable to Second

⁶ See also *Chester*, 628 F.3d 673, 680 (4th Cir.2010); *NRA v. ATF*, 700 F.3d 185, 195 (5th Cir. 2012) (*NRA I*) (“[T]he appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010) (applying a two-part test which first “asks whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee”) (internal quotations omitted); *Heller II*, 670 F.3d at 1252 (adopting a two-part test to determine constitutionality, the first part which asks whether the provision impinges upon a right protected by the Second Amendment).

Amendment claims “depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” *Chester*, 628 F.3d at 682; *see also Turner I*, 512 U.S. at 642.

ii. Heightened scrutiny is disproportionate to the insignificant burden the Zoning Ordinance places on the right to keep and bear arms.

In construing the language of the Second Amendment, this Court held that the right to “keep and bear arms” is a limited individual right to “possess” firearms and use them in defense of hearth and home. *Heller*, 554 U.S. at 581, 583. The Court used the historical background of the Second Amendment right in this analysis because the Second Amendment is a codification of a pre-existing, natural right. *Id.* at 592. Therefore, this Court can use both its analysis in *Heller* and the historical context of the Second Amendment to determine the outer edges of the Second Amendment’s protections, and thus which laws merit heightened scrutiny and which do not.

Heightened scrutiny applies only to laws that significantly interfere with the exercise of a fundamental right. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). This Court has recognized that the fundamental right to bear arms protected by the Second Amendment, “like most rights, is not unlimited.” *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. The Court then provided some of the limitations on the Second Amendment rights in a non-exhaustive list of regulatory measures that merit a presumption of lawfulness. *Heller*, 554 U.S. at 626-27. Heightened scrutiny applies

a presumption against lawfulness to regulatory measures.⁷ This Court’s precedence, therefore, weighs against applying a rigid standard of heightened scrutiny to all Second Amendment claims.

The distinction between selling and purchasing firearms is crucial in this analysis. The Fourteenth Circuit concluded that a right to sell firearms is fundamental to the Second Amendment right because “Americans have always believed...that the right to bear arms must include the freedom to purchase and to sell weapons.” R. at 10. To support its conclusion, the court cited an 1871 case from the Tennessee Supreme Court which held that the Second Amendment included the right to purchase arms. R. at 10 (quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)). However, the Fourteenth Circuit failed to cite any source for its proposition that a right to *sell* firearms is part of the Second Amendment’s core protections.

To sell and to purchase firearms are two distinct concepts.⁸ While the two are connected, the ability to sell firearms, standing alone, is not encompassed by Second Amendment protections, which exclusively provides for the right to “bear” arms. *See Heller*, 554 U.S. at 626. Heightened scrutiny is not an appropriate standard of review unless the Zoning Ordinance significantly interferes with an individual’s right to keep and bear arms. *See Zablocki*, 434 U.S. at 388; *Teixeira v. County of Alameda*,

⁷ Heightened scrutiny in Second Amendment analyses includes intermediate and strict scrutiny, both of which require the government to overcome a presumption against lawfulness. *see Craig v. Boren*, 429 U.S. 190, 197 (1976) (discussing standards legislation must meet to pass intermediate scrutiny); *see also Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (discussing standards legislation must meet to pass strict scrutiny).

⁸ To sell is to “give up property to another for something of value.” *Sell*, *Merriam-Webster Dictionary* (11th ed. 2003). To purchase, however, is to “acquire something by means other than descent.” *Purchase*, *Merriam-Webster Dictionary* (11th ed. 2003).

873 F.3d 670, 686 (9th Cir. 2017) (The Second Amendment does not extend to “a commercial entitlement to sell” firearms as long as the challenged law does not compromise the ability to access firearms).

Brotherhood, however, can neither claim that the Zoning Ordinance prevents him from keeping firearms nor that his future customers would be unable to acquire firearms if he cannot open his store. R. at 16, 17. Rather, Brotherhood claims a personal right to operate a gun store in an area that Mojave has not zoned for such use. R. at 15. Additionally, the Record indicates that Mojave County has at least three gun stores and two shooting ranges that Mojave residents can access. R. at 15. Therefore, the Zoning Ordinance prevents neither Brotherhood nor the residents of Mojave from keeping and bearing arms, and it is therefore not a significant burden on Mojave citizens’ Second Amendment rights.

Since Mojave citizens’ Second Amendment rights are not materially burdened by the challenged Zoning Ordinance, the substance of Brotherhood’s claim does not revolve around the core or even peripheral rights of the Second Amendment. This Court has repeatedly bypassed the labels of a claim when they are not aligned with the substance of the claim. *See, e.g., John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Circuit Judge Watan from the Fourteenth Circuit said it best: this case revolves not around “individuals who claim the right to keep and bear arms for self-defense or other lawful purposes,” but “entrepreneurs who want to open a gun shop...in an area that is not zoned for that use.” R. at 15. The Second Amendment protects the individual right of the “people” to “possess and carry weapons in case of

confrontation.” *Heller*, 544 U.S. at 592. It does not protect a right of people to sell firearms “in the course of trade of business for the principal purpose of profit.” *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016). The core of the Second Amendment focuses on “the people,” defined by this Court as citizens who use firearms “for lawful purposes, most notably for self-defense within the home.” *McDonald*, 561 U.S. at 780 (2010). Therefore, this Court should examine the scope of the Second Amendment’s protections from the perspective of persons seeking to exercise their right to keep firearms, rather than from the perspective of others, like Brotherhood, who are seeking to operate a business.⁹

iii. The Zoning Ordinance is more similar to cases in which the Court has used a rational-basis review.

After determining that the challenged Ordinance burdens only ancillary rights, the next step in the analysis is to determine the appropriate standard of review. *Ezell I*, 651 F.3d at 707; *Marzzarella*, 614 F.3d at 98. The majority opinion below and many other courts of appeals have quoted the following language in *Heller*: “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.”¹⁰ *Heller*, 554 U.S. at 628-

⁹ This is analogous to medical providers under the Fourteenth Amendment context. When medical providers have challenged laws restricting the distribution of contraceptives and provision of abortions, courts consistently examine whether the challenged laws burden their patients’ right to access reproductive services, not whether the laws burden any putative right of the provider. See *Whole Woman’s Health, v. Hellerstedt*, 136 S.Ct. 2292, 2316 (2016).

¹⁰ Several courts conflict on whether this quoted language from *Heller* constituted dicta. See *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (characterizing this language as dicta); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (stating that this language is not dicta). However, the Fourth Circuit in *Marzzarella* correctly noted that as Supreme Court dicta, it still “requires serious consideration.” *Marzzarella*, 614 F.3d at 90, n. 5.

29 & n.27 (emphasis added); *see also Marzzarella*, 614 F.3d at 96. Many circuit courts have interpreted this language as rejecting the possibility of applying rational-basis review to any claim under the Second Amendment, but that conclusion fails for several reasons.

First, the quoted language in *Heller* does not support the proposition that rational-basis review would never be appropriate for a Second Amendment challenge. It simply states that if rational-basis were the only level of scrutiny applicable to Second Amendment claims then the right to keep and bear arms could be abolished by prohibitions and regulations. *Heller*, 554 U.S. at 628 n.27. Justice Scalia specifically pointed out “presumptively lawful regulatory measures” that should be analyzed under rational-basis review, such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill.” *Id.* at 626. In applying *Heller*, circuit courts have questioned whether these “presumptively lawful regulatory measures” fall outside the scope of the Second Amendment’s protection or simply fall under a lower level of scrutiny. *Hosford*, 843 F.3d at 165; *Chester*, 628 F.3d at 679; *Marzzarella*, 614 F.3d at 91.

This confusion is easily resolved by looking at the discussion Justice Scalia employed in *Heller* from which he derived the list of “presumptively lawful regulatory measures.” *Heller*, 554 U.S. at 628 n.26. In discussing the Second Amendment’s historical limitations, Justice Scalia described them as “*presumptively* lawful.”¹¹

¹¹ These exceptions include laws that prohibit “possession of firearms by felons and the mentally ill,” laws that prohibit “carrying firearms in sensitive places,” and “laws imposing conditions and qualifications on the commercial sale of firearms.” *Heller*, 554 U.S. at 626-27.

Heller, 554 U.S. at 626 (emphasis added). When courts interpret words that have an accepted legal meaning, such as the term “presumption,” they generally use the word’s legal definition. See *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 813 (1989). At the time this Court decided *Heller*, the legal community accepted the term “presumption” to mean “[a] legal inference...that a fact exists,” the legal effect of which is to “shift the burden of...persuasion on the opposing party, who can then attempt to overcome the presumption.” *Presumption*, *Black’s Law Dictionary* (9th ed. 2009). Importantly, the level of scrutiny most commonly associated with a presumption of lawfulness is the rational-basis test. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993) (holding that rational-basis review requires courts to analyze statutes under a “strong presumption of validity” and that the burden of proof shifted to party attacking the constitutionality of the statute). Therefore, a close reading of this language indicates that Justice Scalia himself intended for these types of claims to be analyzed under a rational-basis standard.

In addition, this Court has held that laws which do not burden fundamental rights, such as the Zoning Ordinance, will be upheld “so long as [they] bear a rational relation to some legitimate end.” *Romer v. Evans*, 517 U.S. 620, 632 (1996). Thus, unlike the Fourteenth Circuit’s concerns suggest, to hold that rational-basis review suffices under some circumstances will not relegate all Second Amendment challenges to rational-basis review. Therefore, a close reading of this Court’s above-quoted language in *Heller* does not support the conclusion that rational-basis review would never be an appropriate level of scrutiny under any circumstance.

Second, this Court has recognized that multiple levels of scrutiny can be appropriate for challenges to the same constitutional right. *Compare, e.g., Turner I*, 512 U.S. 622 (applying heightened scrutiny review to First Amendment challenge on must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992) to *Ginsberg v. New York*, 390 U.S. 629 (1968) (applying rational-basis review to a First Amendment challenge on penal law that prohibited the sale of “obscene” material to minors). The Fourteenth Circuit’s majority analogized the Second Amendment to First Amendment jurisprudence to conclude that the Zoning Ordinance must undergo heightened scrutiny, but it failed to recognize that not all First Amendment claims require heightened scrutiny. *See Ginsberg*, 390 U.S. at 639. Importantly, the *Ginsberg* court considered the wellbeing of youth as one of its justifications to apply rational-basis review to a First Amendment challenge, a significant factor that also formed the basis for enacting Mojave County’s Zoning Ordinance. *See Ginsberg*, 390 U.S. at 639-40; R. at 13-14. As in the context of other fundamental rights, this Court should recognize that certain claims under the Second Amendment are best suited to rational-basis review.

Third, it is important to note that this Court focused only on laws that effectively prohibited possession of handguns in both *Heller* and *McDonald*, rather than mere regulations on ancillary rights. *Heller*, 554 U.S. at 629 (addressing the constitutionality of a D.C. law that prohibited the use of handguns); *McDonald*, 561 U.S. at 750 (addressing the constitutionality of a Chicago law that prohibited the possession of all handguns). Additionally, all other Second Amendment claims to

which circuit courts have applied heightened scrutiny dealt with laws that burdened either the core right to keep and bear arms, or rights peripheral to those of the Second Amendment, such as the rights to maintain proficiency in firearm use and to acquire ammunition. *Ezell v. City of Chicago*, 846 F.3d 888, 892-93 (7th Cir. 2017) (*Ezell II*) (analyzing the constitutionality of a Chicago statute that effectively banned shooting ranges within the city); *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (upholding a San Francisco statute that restricts the types of ammunition available for purchase under intermediate scrutiny). Therefore, it is consistent with Second Amendment jurisprudence to lower the level of scrutiny applied to rights in proportion to their attenuation from the core of the Second Amendment right.

B. The Zoning Ordinance is constitutional under rational-basis review.

In analyzing legislation under rational-basis review, this Court has articulated that the challenged law must (1) conceivably further a legitimate governmental objective and (2) have a rational relation to that objective. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). Accordingly, under rational-basis review, courts apply a strong presumption of constitutionality, and the challenger bears the burden of proof to show either that the law conceivably lacks a legitimate objective or that it bears no rational relation to that objective. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955). The Zoning Ordinance in this case is rationally related to a legitimate governmental objective and is, therefore, constitutional.

i. The Zoning Ordinance advances the legitimate governmental objectives of protecting public safety and preventing crime.

Mojave enacted the Zoning Ordinance to protect public safety and prevent harm in “populated, well-traveled, and sensitive areas” of the community. R. at 13. Protecting public safety and preventing crime are as legitimate as other interests such as “regulatory efficiency” that this Court has found to be legitimate. *Beach Commc’ns, Inc.*, 508 U.S. at 318. On the other hand, alleged governmental objectives that this Court has considered to not be legitimate include those “in reckless disregard” of citizens’ rights and those that “amount to punishment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). No evidence in the Record suggests that Mojave passed the Zoning Ordinance in reckless disregard of Mojave residents’ rights or as a vindictive reaction to the community. The justification underlying the Zoning Ordinance is to protect vulnerable persons and places from the potential harm associated with gun violence, a reality that has only increased in recent years in places such as schools¹² and places of worship.¹³ R. at 13-14, 19. Therefore, Mojave’s Zoning Ordinance advances a legitimate governmental interest to protect the public and prevent crime.

¹² Since the tragic school shooting at Columbine in 1999, approximately 187,000 students have been exposed to gun violence at schools. John Woodrow Cox & Steven Rich, *Scarred by school shootings*, THE WASHINGTON POST (March 25, 2018), https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/?noredirect=on&utm_term=.192e5ece680d. This figure includes devastating shootings, such as the murder of 26 innocent children at Sandy Hook elementary and 17 teenagers at Marjory Stoneman Douglas High School. *Id.*

¹³ Nine people were killed in a historic South Carolina black church in 2015, 26 people were killed at a church in Texas in 2017, and 11 others were killed in a Pittsburgh synagogue this past October. Sarah Mervosh, *Mass Shootings at Houses of Worship: Pittsburgh Attack Was Among the Deadliest*, THE NEW YORK TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/mass-shootings-church-synagogue-temple.html> (“Mass shooting have become a recurring part of American life, and religious institutions a recurring setting”).

ii. The Zoning Ordinance has a conceivable rational relation to Mojave County's objective.

Under the rational-basis test, challenged legislation has a rational relation to the government's objective so long as there is some "conceivable basis which might support it." *Beach Commc'ns, Inc.*, 508 U.S. at 315. This conceivable basis, however, need not be the particular basis on which the legislative body made its decision to regulate the particular action. *See id.* at 318. Mojave's Zoning Ordinance places protections around residential and high-traffic areas by requiring that gun stores be located at least 800 feet away from these areas. Mojave Cty., NTX., Code § 17.54.131(B). The Zoning Ordinance was intended to displace crime related to gun stores away from protected areas by placing such protections around the identified sensitive areas. R. at 18. This provides a conceivable basis for the Ordinance, which is the actual basis for its implementation. R. at 13-14. A legislator might rationally assume that placing a buffer zone in between gun stores and sensitive areas would provide protection from gun violence in those areas. Therefore, the Zoning Ordinance bears a rational relation to its objective of protecting public safety and preventing crime associated with the presence of gun stores from growing.

C. The Zoning Ordinance is constitutional under a heightened scrutiny analysis.

The Fourteenth Circuit concluded that the Zoning Ordinance was unconstitutional after applying a poorly-explained standard of heightened scrutiny. R. at 14-15. Although courts have used the term "heightened scrutiny"

interchangeably with “intermediate scrutiny,”¹⁴ *Heller* suggests that heightened scrutiny standards under Second Amendment analysis include both intermediate and strict scrutiny. *See Heller I*, 670 F.3d at 1252-53. Although rational-basis review is the appropriate standard for this case, Mojave’s Zoning Ordinance still passes constitutional muster under both standards of heightened scrutiny review.

The Zoning Ordinance is constitutional under intermediate scrutiny analysis. Under intermediate scrutiny, a challenged law (1) must serve an important governmental objective, and (2) the means used must be substantially related to achieving that objective to be constitutional. *Craig*, 429 U.S. at 197. In other words, the means used by the government must be “substantially effective” to achieve the objective. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Mojave enacted the Zoning Ordinance to achieve three objectives. First, the Zoning Ordinance aims to protect public safety and prevent harm in “populated, well-traveled, and sensitive areas such as residentially-zoned districts.” R. at 13-14. Second, it aims to protect against “the secondary effects of gun stores, such as crime.” R. at 14. And third, it aims to preserve the “character of residential zones.” R. at 14. Both this Court and several circuit courts have held that the government’s interest in protecting public safety and protecting against crime are not only legitimate governmental interests, but compelling governmental interests that would pass even a strict scrutiny analysis. *Schall v. Martin*, 467 U.S. 253, 264 (1984) (holding that protecting the

¹⁴ *Cf. Witt v. Dept. of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (analyzing “Don’t Ask, Don’t Tell” under “heightened” scrutiny and articulating a three-pronged test that differs from the traditional test for intermediate scrutiny).

community from crime is a “legitimate and compelling state interest” that “cannot be doubted”); *Kolbe v. Hagan*, 849 F.3d 114, 139 (4th Cir. 2017) (holding that the government’s interest in protecting its citizenry is “not only substantial, but compelling”); *New York State Rifle and Pistol Ass’n, Inc. v. Cuomo*, 801 F.3d 242, 261 (2d Cir. 2015) (holding that public safety and crime prevention are compelling governmental interests). While the third objective of the Ordinance is arguably not implicated in this case,¹⁵ both the first and second objectives of protecting public safety and protecting from crime are not only legitimate, but also compelling state interests.

Additionally, under intermediate scrutiny, the challenged legislation must be “substantially related” to the “important governmental objective” in order to pass constitutional muster. *Craig*, 429 U.S. at 197. The substantially related requirement “need not be the least restrictive means of serving the interest” and requires only that the fit be “reasonable, not perfect.” *Marzzarella*, 614 F.3d at 98. Studies consistently show a strong correlation between access to gun stores and crime, and the Zoning Ordinance protects public safety and prevents crime because it prevents a large number of gun stores from operating close to sensitive areas of the community.¹⁶ R. at 19-20. Additionally, studies demonstrate that keeping gun stores away from

¹⁵ The third objective of the Ordinance is to protect the character of residential zones, but the disqualifying property in this case is not a residential zone.

¹⁶ The gun homicide rate in the United States is twenty-five times that of other high-income countries, and access to weapons increases that risk by two times. See EVERYTOWN FOR GUN SAFETY, *Gun Violence in America*, (Aug. 8, 2018), <https://everytownresearch.org/gun-violence-america/>.

sensitive and well-traveled areas is an effective method of crime displacement.¹⁷ The Ordinance is therefore substantially related to an important governmental objective and thus passes intermediate scrutiny analysis.

Mojave County's Ordinance also passes constitutional muster under strict scrutiny.¹⁸ Under strict scrutiny, the most intense form of means-end scrutiny, a challenged law is presumptively unconstitutional unless (1) it furthers an "actual, compelling government interest," and (2) the means employed are "narrowly tailored" to advance that interest. *Bernal*, 467 U.S. at 219. In the past, this Court has held that both the protection of public safety and prevention of crime are "compelling interest[s]." *Schall*, 467 U.S. at 264. As the Record demonstrates, Mojave's stated interests underlying the Zoning Ordinance are to protect the public safety from gun violence and prevent criminal activity. R. at 13-14. Therefore, the Zoning Ordinance furthers an "actual, compelling government interest." *Bernal*, 467 U.S. at 219.

Additionally, to be "narrowly tailored," the Zoning Ordinance must be the "least restrictive means [of advancing the compelling interest] among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). A statute will only be considered unconstitutional if there is another means of achieving the same result;

¹⁷ See Trent Steidley, David M. Ramey & Emily A. Shrider, *Gun Shops as Local Institutions: Federal Firearms Licensees, Social Disorganization, and Neighborhood Violent Crime*, 96 SOCIAL FORCES 1, 265-298 (Sept. 1, 2017) (conducting a study for 89 large U.S. cities and concluding that local homicide and robbery rates increase alongside the number of gun shops in a neighborhood).

¹⁸ The purpose of strict scrutiny is to protect only fundamental rights. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring). The Zoning Ordinance does not interfere with a fundamental right because, at most, it inconveniences residents who wish to purchase a firearm. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (zoning ordinances that limit construction of churches and synagogues do not violate the First Amendment).

that another statute might burden rights less is irrelevant if it would not achieve the same result. *Id.* Mojave's Zoning Ordinance protects public safety and protects sensitive areas from crime by ensuring a space of at least 800 feet between sensitive community areas and the increase in criminal activity that stems from the presence of gun stores.¹⁹ As the Record indicates, the Zoning Ordinance does not presently burden the rights of Mojave's residents because they can access firearms from multiple locations within the County. R. at 15. A less restrictive Zoning Ordinance, however, would allow ambitious entrepreneurs like Brotherhood to open gun stores near places like elementary schools, liquor stores, and religious centers. R. at 5. More importantly, a less restrictive ordinance would risk the continued violence that has plagued sensitive areas around the country in recent years.²⁰ In other words, a less restrictive ordinance would effectively defeat Mojave's compelling objective. Therefore, because the Zoning Ordinance furthers a compelling government interest through narrowly tailored means, it is constitutional under a strict scrutiny standard of review.

Despite passing constitutional muster under both intermediate and strict scrutiny analyses, the Zoning Ordinance in this case should be reviewed under a rational-basis standard because it does not interfere with a core Second Amendment right to keep and bear arms. Nothing in the history of the Second Amendment or this Court's jurisprudence supports the argument that Second Amendment claims can never be analyzed under rational-basis review. In this case, where the challenged law

¹⁹ See Steidley, *supra* note 17.

²⁰ See Cox, *supra* note 12.

does not interfere with Mojave residents' right to keep and bear arms, rational-basis review is the appropriate standard to determine the constitutionality of the Zoning Ordinance. Otherwise, by applying a blanket standard of heightened scrutiny to all laws that may theoretically impact the Second Amendment, governments like Mojave County will be unable to accomplish their legislative goals of protecting public safety and preventing criminal activity. Therefore, assuming that it implicates the Second Amendment, this Court should review the Zoning Ordinance under a rational-basis standard.

II. The Second Amendment does not secure a freestanding right to sell firearms, and any ancillary rights to sell firearms are subject to restrictions.

This Court noted first in *Heller* and reaffirmed in *McDonald* that the Second Amendment “is not unlimited” and “does not imperil every law regulating firearms.” *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. Not only is the scope of the Second Amendment protection sensibly limited when it comes to the possession and use of firearms, but it does not even encompass the right to sell firearms. If the Second Amendment protects the right to sell firearms in any way, however, it only protects it as an ancillary right relating to the right to bear arms. Therefore, this case is an example of a scenario where regulations on the sale of firearms are permissible under the Constitution when they do not burden the core right to bear arms.

The Fourteenth Circuit's majority failed to recognize the distinction between the right to sell firearms and the right to purchase firearms and thus used the words interchangeably. R. at 9. This confusion led the court to analyze the effect of the

Ordinance on Brotherhood’s potential customers’ right to purchase arms, rather its effect on Brotherhood’s right to sell arms. The court should have analyzed whether the Second Amendment protects the right to sell firearms as the Ninth Circuit did in *Teixeira*. *Teixeira*, 873 F.3d at 670. In *Teixeira*, the Ninth Circuit analyzed Teixeira’s claim that he had a right to sell firearms, not whether he had a right to purchase them,²¹ and held that the Second Amendment did not protect an individual’s right to sell firearms. *Id.* at 690. The facts in *Teixeira* are indistinguishable from the present case, and the Ninth Circuit’s legal analysis is consistent with the text and history of the Second Amendment. *Id.* Therefore, this Court should likewise hold that the Second Amendment does not protect an individual’s right to sell firearms.

A. The Second Amendment protects only an individual right to possess firearms, not an individual right to sell firearms.

The Second Amendment does not provide unlimited protection for the core right to possess firearms and provides less protections for periphery and ancillary rights as they exist further from the enumerated right. *Heller*, 554 U.S. at 626; *see also United States v. Chafin*, 423 Fed. Appx. 342, 344 (4th Cir. 2011) (no historical authority “suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual’s right to sell a firearm”). The textual and historical analyses this Court used in *Heller* and *McDonald* both led to the conclusion that the core of the Second Amendment protects “a *personal* right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” *McDonald*, 561 U.S. at 780 (2010) (emphasis added); *see also Heller*, 554 U.S. at 635. Since the

²¹ For a discussion of the right to sell firearms, *see supra* note 9.

decisions in *Heller* and *McDonald*, courts of appeals that have addressed the scope of Second Amendment protections have recognized peripheral and ancillary rights that effect the right to possess firearms for self-defense. *See, e.g., Teixeira*, 873 F.3d at 677 (recognizing the right to sell firearms as an ancillary right); *Jackson*, 746 F.3d at 967 (holding that purchase of ammunition is a periphery right protected by the Second Amendment); *Ezell I*, 651 F.3d at 708 (holding that maintaining proficiency in firearm use is protected as a periphery right).

i. The right to sell firearms is not closely related to the core rights in the text of the Second Amendment.

The peripheral rights that several courts have found within the Second Amendment, however, do not include the right to sell firearms.²² Courts have determined the peripheral rights protected by the Second Amendment by connecting them to the central component of the Second Amendment: individual self-defense or other use for lawful purposes. *See, e.g., Ezell I*, 651 F.3d at 680-91. In *Ezell I*, for example, the Seventh Circuit considered whether an ordinance that prohibited shooting ranges infringed on the Second Amendment or any of its periphery rights. *Id.* at 689-90, 91. The Seventh Circuit analyzed the ability to maintain proficiency in firearm use through shooting ranges by connecting it to the right to possess firearms for self-defense. *Id.* at 708. The Seventh Circuit concluded that the right to “maintain proficiency” in firearm use is necessary for the use of firearms for self-defense because

²² This is in contrast to its counterpart, the individual’s right to *purchase* firearms, which is a periphery right that is within the scope of Second Amendment protections.

it would be nearly impossible for a person who was not able to use a firearm proficiently to use the firearm for self-defense. *Id.*

By contrast, as a freestanding right to sell firearms, wholly detached from any consumer's ability to acquire firearms, is only an ancillary right under the Second Amendment protections because it cannot be meaningfully connected to the core rights of the Second Amendment. *Teixeira*, 873 F.3d at 682. Nothing in the plain text of the Second Amendment suggests that sellers fall within the scope of its protections. *Id.* at 683. This Court in *Heller* read the language of the Second Amendment to mean 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 case of conflict with another person.” *Heller*, 554 U.S. at 584. The *Teixeira* court correctly distinguished the Second Amendment protection of right to sell arms from the First Amendment protection of the right to sell publications. *Teixeira*, 873 F.3d at 688. The text of the First Amendment does not identify the holder of the right, and also requires interaction with other people as essential to the freedom of speech. *Id.* By contrast, the plain text of the Second Amendment identifies “the people” as the holder of the right and does not require interaction with other people to enjoy the possession and lawful use of arms. *Id.* While the core of the Second Amendment does relate to the purchase of firearms, it is not inextricably tied to the sale of firearms as a freestanding right.

As the Court explained in *Heller*, the commercial sale of firearms affects the Second Amendment only to the extent that it interferes with a person's right to keep

and bear arms for activities such as protecting one's home and defense in confrontation. *Heller*, 554 U.S. at 626-27. The Second Amendment's protections on the commercial sale of firearms do not, however, extend to a right of the people who merely wish to use the Second Amendment to make a profit. *Teixeira*, 873 F.3d at 682. As the court in *Teixeira* explained, the right of business entrepreneurs to sell arms is even further attenuated from the right to keep and bear arms because the consumer's rights may not be burdened at all by the loss of one seller in the marketplace. *Id.* at 670. Therefore, the Second Amendment does not protect the right to sell firearms as a right wholly independent of a person's right to keep and bear arms, and any protections that it does afford are subject to heavy limitations.

ii. The historical context of the Second Amendment does not support a freestanding right to sell firearms.

Further, the history of the Second Amendment confirms that a freestanding right to sell arms was not intended by the framers and thus does not come within the scope of the Second Amendment's protection. *Teixeira*, 873 F.3d at 683. Certain types of peripheral rights such as the right to obtain firearms and ammunition, and the right to maintain proficiency in firearm use, have been historically understood as necessary to the exercise of an individual's core right to bear arms, and thus protected within the scope of the Second Amendment. *Ezell I*, 651 F.3d at 704 (citing an 1868 treatise that recognized that the right to bear arms implies the right to learn to use them). However, ancillary rights of third parties such as sellers, manufacturers, and distributors have been historically understood to exist on the outer limits of the scope of the Second Amendment's protection. *Teixeira*, 873 F.3d at 682-83.

The English right to bear arms, from which the Second Amendment was derived, focused on the “right of having and using arms for self-preservation and defence [sic],” in a manner strikingly similar to the text of the Second Amendment itself. 1 William Blackstone, *Commentaries of the Laws of England* 140 (1765). Both the text of the Second Amendment and the historical understanding of the English right to bear arms focus exclusively on the citizens intending to use arms for self-defense, rather than those intending to engage in firearms commerce. *Teixeira*, 873 F.3d at 684.

The historical American understanding of the right to bear arms also supports the conclusion that the Second Amendment does not protect an individual right to sell arms. The only historical law providing any protections for the right to sell arms was created in colonial Virginia, which provided citizens the “liberty to sell armes [sic] and ammunition to any of his majesties loyall [sic] subjects inhabiting this colony.” Laws of Va., Feb., 1676-77, Va. Stat. at Large, 2 William Waller Henning, *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 403 (1823). This liberty impliedly excluded a right to sell arms to anyone outside of the colony. This exclusion of all people, including citizens of other colonies, other than citizens of the colony of Virginia indicates that this law provides a protection for the right to sell arms only as it relates to the right to purchase arms, rather than as a freestanding right within itself. The only other laws that do relate to the right to sell arms provide restrictions on the right, rather than protections. For example, Connecticut placed a complete ban

on the right of its citizens to sell firearms outside of the colony. 1 J. Hammond Trumbull, *The Public Records of the Colony of Connecticut, Prior to the Union with New Haven Colony, May, 1665*, at 138-39, 145-46 (1850). Therefore, both the history and text of the Second Amendment support the conclusion that a freestanding right to sell firearms does not fall within the scope of Second Amendment protections.

B. The Second Amendment only protects a right to sell arms when failure to do so would infringe upon the right to bear arms.

When the ability to sell arms is restricted enough that it places a burden on the periphery right of citizens to purchase arms, the Second Amendment protections may be implicated. *Teixiera*, 873 F.3d at 678. While the Second Amendment does not “guarantee a certain type of retail experience,” if a law restricts the ability to sell firearms to an extent that it meaningfully interferes with the ability to purchase firearms, then the law may implicate the Second Amendment. *Teixeira*, 873 F.3d at 680 n.13; *see also Heller* 554 U.S. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616-617 (1840) (“A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence,[sic] would be clearly unconstitutional”). Therefore, the appropriate distinction is that a right to sell firearms is relevant for the Second Amendment insofar as it obstructs to the right to purchase firearms, but it does not constitute a right within itself.

- i. Brotherhood's right to sell arms is not protected because it does not meaningfully impact the right of county residents to bear arms.**

The Fourteenth Circuit's majority opinion correctly concluded that an ordinance which merely regulates the locations of gun stores rather than "outright banning them" would most likely be constitutional. R. at 12-13. However, the majority failed to apply this logic to the facts of the case before it. There is no dispute that multiple gun stores and shooting ranges are lawfully operating in Mojave, even after it enacted the Zoning Ordinance. R. at 15. Brotherhood has not proved that his individual inability to open and operate a gun store would significantly interfere with Mojave residents' right to purchase firearms elsewhere within the county.²³ These facts are indistinguishable from those in *Teixeira*, where multiple gun stores were already operating in Alameda County, and the court found no evidence that the challenged zoning ordinance meaningfully impacted the rights of citizens to access firearms. *Teixeira*, 873 F.3d at 680. Therefore, Brotherhood has not proved that the Zoning Ordinance significantly burdens Mojave residents' right to keep and bear arms such that it would interfere with their Second Amendment rights.

Additionally, Brotherhood's challenge to the constitutionality of the locations of Mojave's existing gun stores fails. The proper inquiry regarding accessibility is not limited to a particular jurisdiction. *See Jackson*, 746 F.3d at 968 (holding that the prohibition of the sale of certain types of ammunition only indirectly burdened the

²³ Brotherhood claims that there is not an official Red 888 Guns dealer in Mojave, but as Judge Watan explained, the Second Amendment does not secure the right to purchase just any type of firearms and "the citizens of Mojave County can still purchase Red 888 Guns during gun conventions that travel through the state." *Heller*, 554 U.S. at 626-27; R. at 15.

Second Amendment because local residents could still purchase the ammunition outside of the jurisdiction). Mojave County residents do not even have to travel outside the jurisdiction to purchase firearms. R. at 15. There are other firearms dealers already residing within the county, with the closest to Brotherhood's proposed location only ten miles away. R. at 4, 21. This is distinguishable from cases such as *Ezell II*, where the zoning regulations at issue so severely limited where shooting ranges could exist that no accessible shooting ranges yet existed. 846 F.3d 888 (7th Cir. 2017).

Further, the Second Amendment does not provide protections for convenience, so a restriction that makes acquiring a firearm less convenient for consumers does not rise to the level of severely limiting Second Amendment rights. *See Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2313 (2016) (holding that increased driving distance does not always constitute undue burden); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (upholding a zoning restriction and holding that "walking a few extra blocks" did not constitute a substantial burden); *Second Amendment Arms v. City of Chicago*, 135 F.Supp.3d 743, 754 (N.D. Ill. 2015) ("A slight diversion off the beaten path is no affront to...Second Amendment rights"). Therefore, the Zoning Ordinance merely presents an inconvenient restriction on Mojave County residents by maintaining a safe distance between gun stores sensitive areas, but that does not severely limit their Second Amendment rights. R. at 4.

The only other ancillary right that the Zoning Ordinance could implicate by the denial of Brotherhood's Conditional Use permit is the right to provide training to support the peripheral right of acquiring and maintaining proficiency in firearm use, but this argument likewise fails. The Zoning Ordinance places no restriction on the right to provide firearms instruction and training. *See* Mojave Cty., NTX., Code § 17.54.131. Thus, Maxon would be within his rights to place a gun range and training facility on the proposed location so long as he limited his activities to providing training and not sales. The Zoning Ordinance is distinguishable from the Chicago ordinances in *Ezell I* which expressly banned all firing ranges, and *Ezell II*, which, although not posing an outright ban, so severely restricted the potential locations for firing ranges that they effectively constituted a ban. *Ezell I*, 651 F.3d at 691; *Ezell II*, 846 F.3d at 894.²⁴ Therefore, because the Zoning Ordinance does not place any restrictions on the right to provide training on firearm proficiency, it does not invoke Second Amendment protections.

ii. Even if Brotherhood's right to sell arms was constitutionally protected, it is subject to presumptively constitutional limitations.

All Second Amendment rights, but especially ancillary rights, are subject to presumptively constitutional limitations. *Heller*, 554 U.S. at 626-27. This Court in *Heller* recognized that the Second Amendment right to bear arms is “not unlimited” and does not protect citizens' ability to “keep and carry any weapon whatsoever in

²⁴ The effect of the Ordinance is also indistinguishable from that in *Teixeira*, where the court found that the peripheral right to access training and instruction was not burdened because the challenged ordinance did not concern such types of businesses. *Teixeira*, 873 F.3d at 681.

any manner and for whatever purpose.” *Id.* at 626. Not only did this Court recognize that the core of the Second Amendment right can be limited, but it also recognized that restrictions on ancillary rights such as “laws imposing conditions and qualifications on the commercial sale of arms” are “presumptively lawful regulatory measures.” *Id.* at 626-27, n.26. Therefore, even if a freestanding right to sell firearms was protected under the Second Amendment, it would be subject to “presumptively lawful” limitations.

To invoke Second Amendment protections, a governmental action must imperil the core right of possessing firearms for lawful purposes, particularly self-defense and protection of hearth and home. The Second Amendment at its core provides no freestanding right to sell arms. Restrictions on ancillary rights are subject to a rational-basis analysis rather than being evaluated at the heightened scrutiny requirements of a core or peripheral right. To be unconstitutional, the Zoning Ordinance must burden the ancillary right to sell arms so severely that it imperils the corresponding peripheral right to acquire firearms in pursuit of the exercise of Second Amendment core rights. Because Mojave County residents can freely purchase firearms nearby without the addition of Maxon’s store, the restriction does not substantially burden citizens’ Second Amendment rights. Additionally, because the Zoning Ordinance conceivably furthers the legitimate governmental objectives of public safety and crime reduction, and because the restriction of guns in sensitive locations is rationally related to those objectives, it is constitutional under a rational-basis analysis.

CONCLUSION

As John Adams stated, “[g]overnment is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for profit, honor, or private interests of any one man, family, or class of men.” John Adams, *Thoughts on Government* (1776). Brotherhood cannot be allowed to manipulate the Second Amendment to place its private business interests above the protection and safety of Mojave County citizens. This Court should reverse in part the holding of the Fourteenth Circuit and dismiss Brotherhood’s case for failure to state a claim.

Respectfully Submitted,

/s/ Team 96

Counsel for Petitioner