No. 21-1244

In the United States Court of Appeals for the Sixth Circuit

OAKLAND TACTICAL SUPPLY, LLC, et al.,

Plaintiffs–Appellants,

v.

HOWELL TOWNSHIP, MI,

Defendant–Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 18-cv-13443

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants submit this corporate disclosure and financial interest statement.

Oakland Tactical Supply, LLC is a nongovernmental corporate party organized and existing under the laws of Michigan with a principal place of business in Hartland Township, Michigan. Oakland Tactical Supply, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

/s/ *Peter A. Patterson*

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), Plaintiffs-Appellants respectfully request that the Court hear oral argument in this case. This case presents significant issues relating to the fundamental constitutional right to keep and bear arms. Given the nature of the issues presented, oral argument will facilitate the decision-making process. Wherefore, Plaintiffs-Appellants pray that this Court grant oral argument.

INTRODUCTION

The Second Amendment secures "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). But for that right to be effective, law-abiding citizens must have opportunity to train with the arms that they are constitutionally entitled to use for self-defense and other lawful purposes. For this reason, the right to train at shooting ranges is integral to the right to keep and bear arms under the Second Amendment. *See Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011).

Howell Township, however, effectively bans the operation of outdoor, long-distance shooting ranges by a system of zoning restrictions that allows no place to situate such a range within Township limits. The Township's exclusion of ranges for long guns forecloses training with those arms—and thereby violates a constitutional right under the Second Amendment. After *Heller*, "[i]t is no answer to say . . . that it is permissible to ban [training in long guns], so long as [training in] other firearms

(i.e., [handguns]) is allowed." *Id*. at 629. Instead, the Second Amendment applies to all "Arms" in common use for lawful purposes, and as a constitutional right, it must be "elevate[d] above all other interests." *Id.* at 635. Because "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," *id.* at 634, Howell Township must not bar citizens from training with the arms they are constitutionally entitled to keep and bear.

The district court failed to enforce this Second Amendment right. Providing no substantive argument against Plaintiffs' constitutional claim, the court flatly denied that the Second Amendment protects Plaintiffs' right to train at an outdoor, long-distance shooting range, while also denying that Plaintiffs had plausibly alleged an effective ban on *all* shooting ranges in the Township, despite Plaintiffs' focus on outdoor, long-distance ranges. In so restricting the Second Amendment's protection of the right to train with all arms in common use for lawful purposes, the district court erred. Its judgment must be reversed, and Plaintiffs must have an opportunity to prove the constitutional violation that they have more than plausibly alleged.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this action arises under the Constitution and laws of the United States.

Second Am. Compl. ¶ 17, R.E.No. 44, PageID#1091 ("SAC"). Relief is sought under 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 1983. *Id.*

The district court granted Defendant's motion to dismiss on September 10, 2020, Op. & Order Grant'g Def.'s Mot. to Dismiss, R.E.No. 84, PageID#2091 ("Order Grant'g MTD"), and entered judgment the same day, Judgment, R.E.No. 85, PageID#2092. On September 24, 2020, Plaintiffs timely moved for reconsideration or for leave to amend their complaint under Fed. R. Civ. P. 59(e) and E.D. Mich. LR 7.1(h)(3). Pls.' Br. in Supp. of Recons'g, Alt'g or Am'g in Order to Vacate J. & Granting Leave to Am. Compl., R.E.No. 86, PageID#2098 ("Mot. to Reconsider"). The court denied Plaintiffs' motion on February 9, 2021, Op. & Order Denying Pls.' Mot. for Recons. & for Leave to File a Third Am. Compl., R.E.No. 91, PageID#2190 ("Order Denying Recons."), and Plaintiffs timely noticed their appeal on March 10, 2021, from both the September 10, 2020, judgment and February 9, 2021, order. Not. of Appeal, R.E.No. 92; Fed. R. App. P. 4(a)(1)(A), (a)(4)(A)(iv).

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because Plaintiffs are appealing a final judgment of the district court.

ISSUES PRESENTED

1. Whether Howell Township's effective ban on outdoor, long-distance shooting ranges violates the Second Amendment, as incorporated against the Township by the Fourteenth Amendment.

2. Whether, accepting all allegations of the Training Plaintiffs and Oakland as true, and drawing all inferences in their favor, they plausibly alleged that the Township effectively bans outdoor, long-distance shooting ranges.

STATEMENT OF THE CASE

I. Howell Township Prohibits Outdoor, Long-Distance Shooting Ranges.

Howell Township regulates approximately 20,000 acres of unincorporated land in Livingston County, Michigan, under the Howell Township Zoning Ordinance ("Ordinance"). SAC ¶ 37, R.E.No. 44, PageID#1095–96. This Ordinance specifies permitted uses in each enumerated zoning district and "prohibit[s] any use not specifically listed," *id.* ¶ 34, R.E.No. 44, PageID#1095. *See* Ordinance art. III, §§ 3.06, 3.07, 3.10, R.E.No. 61-2, PageID#1361–62. Plaintiff-Appellant Oakland Tactical Supply, LLC, wants to use land in a former rock quarry, located in an Agricultural Residential District, to build an outdoor, long-distance shooting range. SAC ¶ 6, R.E.No. 44, PageID#1085–86. The Township, however, does not permit such ranges in *any* district. *See* Ordinance art. IV–XIII, R.E.No. 61-2, PageID#1367–1411.

To be sure, the Ordinance might *appear* to permit such ranges, but each apparent opening vanishes under scrutiny. To start, the Ordinance classifies "rifle ranges" as "open air business uses," SAC ¶ 35, R.E.No. 44, PageID#1095; Ordinance art. II, § 2.02, R.E.No. 61-2, PageID#1349—but it does "not allow Open Air Business Uses, either by right or as a special use, in any zone in Howell Township," *id.* ¶ 36, R.E.No. 44, PageID#1095. Second, in a Regional Service Commercial District and a Heavy Commercial District, the Ordinance permits certain recreational facilities—but no *outdoor* recreational facilities of any kind. *See* Ordinance art. X, § 10.02(B), R.E.No. 61-2, PageID#1395; *id.* art. XII, § 12.05, R.E.No. 61-2, PageID#1406.

Finally, the Ordinance allows "recreation and sports areas . . . completely enclosed with fences, walls, or berms," *id.* art. XI, § 11.03(b), R.E.No. 61-2, PageID#1399—but only "in the Highway Service Commercial District ('HSC District') consisting of 7 parcels with a total area of less than 30 acres," SAC ¶ 38, R.E.No. 44, PageID#1096, and only if, in the judgment of the Township, such a use does not "interfere with or interrupt the pattern of development of" enumerated, highway-service-focused uses, Ordinance art. XI, § 11.03, R.E.No. 61-2, PageID#1399 (conditioning use for recreation and sports areas on such non-interference and on requirements of Article XVI, "Special Uses"); *id.* art. XVI, § 16.02, R.E.No. 61-2, PageID#1447 (requiring Township approval of "special uses").

"The HSC District is highly developed serving the principal uses [for such a district], with only a few acres of undeveloped land available and significantly less area than that required for a safe, long-distance rifle range." SAC ¶ 41, R.E.No. 44, PageID#1097. The HSC District does not include a rifle range, or even a stand-alone recreational facility, among its principal permitted uses, *see id.* ¶ 40, R.E.No. 44, PageID#1096; Ordinance art. XI, § 11.02, R.E.No. 61-2, PageID#1399, nor is it purposed for activities such as rifle ranges that might interfere with "servicing the needs of high traffic at the interchange areas of public roads and highway facilities," *see id.* ¶ 39, R.E.No. 44, PageID#1096; Ordinance art. XI, § 11.01, R.E.No. 61-2, PageID#1399.

In short, the Ordinance would conceivably permit outdoor shooting ranges only in the HSC District, but the space and traffic-related restrictions that the Ordinance lays on uses in that district effectively ban outdoor shooting ranges of *any kind*. A fortiori, the Ordinance still more clearly bans outdoor, *long-distance* shooting ranges in the Township.

II. Training Plaintiffs Are Prohibited from Training, Especially with Long Guns, at Outdoor, Long-Distance Shooting Ranges in Howell Township.

Howell Township's prohibition on outdoor, long-distance shooting ranges burdens, among others, Jason Raines, Matthew Remenar, Scott Fresh, Ronald Penrod, and Edward George Dimitroff ("Training Plaintiffs"), all of whom mean to engage in lawful shooting activities—including long-range target shooting—within

Howell Township. SAC ¶¶ 7–15, 60–64, R.E.No. 44, PageID#1086–90, 1101–02. Each would train in Howell Township in the use of firearms for self-defense and for other lawful purposes, such as shooting competitions and hunting. *Id.* But they cannot do so, because: there is no public shooting range in Howell Township; indoor ranges in the neighboring City of Howell are unable to meet general demand and do not allow for any rifle practice at all; and the outdoor public range nearest to Oakland's property is the Island Lake Shooting Range in Green Oak Township—thirty minutes' drive from Howell Township, with expensive fees and long waiting lines. *id.* ¶¶ 7–15, R.E.No. 44, PageID#1086–90. Decisively, none of these options offers rifle shooting beyond 100 yards' distance, far less than Training Plaintiffs need. *Id.* ¶¶ 30–32, R.E.No. 44, PageID#1094.

To accommodate Training Plaintiffs and others of the 327,000 rifle target shooters and 638,000 hunters within a 100-mile radius of its proposed site, Oakland leased, with an option to purchase, 352 acres of former rock quarry land in Howell Township. *Id.* ¶¶ 5, 6, 28 R.E.No. 44, PageID#1085, 1094. Oakland made "plans to build an extensive outdoor shooting range facility for both private and public use," and therefore to "provide a safe location for residents in the area to practice target shooting for self-defense and other lawful purposes, including but not limited to a long distance (e.g. 1,000 yard) range for qualified shooters and public access rifle, shotgun and handgun ranges." *Id.* ¶¶ 5, 6, R.E.No. 44, PageID#1085–86. These plans

were halted by the Township's ban, however, when the zoning staff advised Oakland that it "could not apply for a permit for a rifle range located on Oakland's property because the Agricultural Residential District [in which the quarry property is located] does not allow open air business uses, shooting ranges, or rifle ranges." *Id.* ¶ 46, R.E.No. 44, PageID#1098.

Zoning staff also stated that Oakland should apply for a text amendment to the Zoning Ordinance to allow shooting ranges in the AR Zoning District. *Id.* ¶ 47. But after receiving Oakland's application—and its $1,000 application fee—the Township rejected the proposed amendment, keeping the effective ban on outdoor, long-distance shooting ranges in effect. *Id.* ¶¶ 48–54, R.E.No. 44, PageID#1098–1100. As of July 11, 2019, Oakland had incurred costs of approximately $130,000, and had lost revenue of approximately $1,820,000 as a result of the Township's ban, while Training Plaintiffs continued to be blocked from training with firearms, and for lawful purposes, that require outdoor, long-distance facilities. *See id.* ¶¶ 59–64, R.E.No. 44, PageID#1101–02.

III. Procedural History

On November 2, 2018, Plaintiffs Raines, Remenar, Fresh, and Oakland filed suit, challenging Howell Township's de facto ban on certain ranges as a violation of the Second Amendment, which is applicable to the Township under the Fourteenth Amendment. Compl., R.E.No. 1, PageID#1, 15. Subsequently amending their

complaint, they added Plaintiffs Penrod and Edward Dimitroff on July 11, 2019. *See* SAC, R.E.No. 44, PageID#1084. On June 19, 2020, Howell Township moved to dismiss Plaintiffs' Second Amended Complaint pursuant to Fed. R. Civ. P. 12(c). Def.'s Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(c), R.E.No. 60, PageID#1179. That same day, Plaintiffs moved for summary judgment. Pls.' Mot. for S.J., R.E.No. 61, 1277.

The district court decided both motions without a hearing and in the same order. The court, first, found no precedent for two propositions: (1) "that a municipality must permit a property owner (or a property lessee) to construct, and for interested gun owners to use, an outdoor, open-air, 1,000-foot shooting range," and (2) that "Howell Township must change its zoning ordinance to permit the construction and use of such a facility as a matter of right anywhere within the AR district." Order Grant'g MTD, R.E.No. 84, PageID#2089. Next, the court deemed implausible that "Howell Township bans all shooting ranges," *id.*, PageID#2090, because (1) Oakland "d[id] not allege that it ever sought permission to construct a shooting range on the specific piece of property it leases," and (2) "the ordinance appears on its face to allow shooting ranges in districts other than those designated AR." *Id*. PageID#2089–90. On these grounds, the court granted the Township's motion to dismiss, denied Plaintiffs' motion for summary judgment as moot, *id.*, PageID#2091, and entered judgment, Judgment, R.E.No. 85, PageID#2092.

Plaintiffs subsequently filed a motion to reconsider or to grant leave to amend, Mot. to Reconsider, R.E.No. 86, PageID#2098, but the court denied the motion, Order Denying Recons., R.E.No. 91, PageID#2190.

Plaintiffs timely appealed. Not. of Appeal, R.E.No. 92.

SUMMARY OF THE ARGUMENT

The Second Amendment guarantees law-abiding citizens the right to train in the use of "Arms," including at shooting ranges and including with long guns, for lawful purposes. Because training with long guns and for lawful purposes in Howell Township requires outdoor, long-distance shooting ranges, such ranges cannot be banned. Yet, the Howell Township Zoning Ordinance effects such a ban, in violation of the Second Amendment. Like the District of Columbia's handgun ban in *Heller*, the Township's ban would fail either under *Heller*'s categorical test or under any standard of heightened constitutional scrutiny. In holding to the contrary, the district court erred, as it did, too, to the extent that it held that Plaintiffs did not plausibly allege that the Township effectively bans outdoor, long-distance shooting ranges. Accordingly, the judgment of the district court should be reversed.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of a motion for judgment on the pleadings de novo under Federal Rule of Civil Procedure 12(c) using the same standard as for a motion to dismiss under Rule 12(b)(6)." *Warrior Sports, Inc. v.*

Nat'l Collegiate Athletic Ass'n, 623 F.3d 281, 284 (6th Cir. 2010). Therefore, this Court "'construe[s] the complaint in the light most favorable to the plaintiff and accept[s] all allegations as true' to determine whether the 'complaint . . . contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019) (quoting *Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018)).

"On a motion to dismiss [this Court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *White v. United States*, 601 F.3d 545, 551 (6th Cir. 2010) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). And where the plaintiff offers multiple factual scenarios for a particular claim, only one need be sufficient. *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995).

ARGUMENT

I. The Township's Ban Violates the Second Amendment.

A. The Second Amendment Protects the Right to Train with Long Guns for Lawful Purposes.

In *Heller*, the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. And although that landmark ruling did not purport to "clarify the entire field" of Second Amendment jurisprudence, *id.* at 635, it did set forth clear guidance about *the methodology* for deciding future disputes over the right to keep and bear arms.

Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *id.* at 634–35, evaluating whether a challenged government restriction is consistent with the Second Amendment involves close "textual analysis" and "historical inquiry." *United States v. Chester*, 628 F.3d 673, 675, 680 (4th Cir. 2010). Here, text and history clearly establish, and precedent confirms, that the Second Amendment protects training with long guns for lawful purposes—and thus also protects the outdoor, long-distance shooting ranges on which such training depends.

1. The text of the Second Amendment naturally encompasses training in the use of long guns. In its operative clause, the Second Amendment establishes that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. That text frames a general right, in unrestricted terms, giving rise to a presumption that activities with arms—such as training with them—fall within the scope of the right. *See Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 685 (6th Cir. 2016) (holding that the government bears the burden to establish "that the challenged law regulates activity outside the scope of the Second Amendment as understood at the time of the framing of the Bill of Rights"); *accord Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) ("*Ezell II*"). Specifically regarding training, moreover, the presumption is strengthened by the Amendment's explicit declaration, in the prefatory clause, that one purpose of keeping and bearing arms is

the maintenance of a "well-regulated Militia," that is, "the body of the people, trained to arms," *Heller*, 554 U.S. at 597. A right to keep and bear arms that excluded arms-training could not effect that "all able-bodied men" be "trained to arms," an express purpose of the operative clause. *Id.* at 596–97.

For these particular reasons, and for the general reason that "[c]onstitutional rights . . . implicitly protect those closely related acts necessary to their exercise," the text of the Second Amendment, standing alone, establishes that "[t]he right to keep and bear arms . . . implies a corresponding right . . . to acquire and maintain proficiency in their use." *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring in the judgment) (quotations and citations omitted). And because "Arms" in the Second Amendment includes all firearms in common use, *Heller*, 554 U.S. at 624–25, which certainly includes long guns, *see, e.g.*, *Staples v. United States*, 511 U.S. 600, 612 (1994), the right to train with "Arms" includes the right to train with long guns.

2. The same result follows from historical inquiry, which reveals that, at the time of the Founding, keeping and bearing arms included training with long guns for lawful purposes.

By the time America declared independence from Britain, Americans' training and proficiency with firearms was the pride of the nation, such that "[t]he Colonists in America were the greatest weapon-using people of that epoch in the

world." 1 CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY 1 (1910). And Americans equated firearms competence with freedom. Thus, Reverend Simeon Howard, in his famous sermon in Boston in 1773, expressed the need for a free people to be trained in arms:

> A people who would stand fast in their liberty, should furnish themselves with weapons proper for their defence, and learn the use of them. . . . However numerous they may be, if they are unskilled in arms, their number will tend little more to their security, than that of a flock of sheep does to preserve them from the depredations of the wolf: accordingly it is looked upon as a point of wisdom, in every state, to be furnished with this skill, though it is not to be obtained without great labor and expence.

SIMEON HOWARD, A SERMON PREACHED TO THE ANCIENT AND HONORABLE ARTILLERY-COMPANY, IN BOSTON, NEW-ENGLAND, JUNE 7TH, 1773 25–26 (1773). Accordingly, the Provincial Congress of Massachusetts in 1775 urged "all the inhabitants of this colony, to be diligently attentive to learning the use of arms." STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 73 (2008) (quoting *New York Journal*, April 13, 1775 at 1, col. 3).

The inhabitants had long done so. The *Boston Gazette* reported that "[b]esides the regular trained militia in New-England, all the planters sons and servants are taught to use the fowling piece from their youth, and generally fire single balls with great exactness at fowl or beast." The Boston Gazette and Country Journal (Dec. 5, 1774), *in* 4 *The Annotated Newspapers of Harbottle Dorr, Jr.* 626, MASSACHUSETTS HISTORICAL SOC'Y, https://bit.ly/3cd6xU4. An Englishman visiting New England in

1774 noted that "in the Cities you can scarcely find a Lad of 12 years that does not go a Gunning." HAROLD F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 3 (1952).

Likewise, a Virginia gentleman described American arms culture to his Scottish friend by explaining that "[w]e are all in arms, exercising and training old and young to the use of the gun." 3 PETER FORCE, AMERICAN ARCHIVES 620–21 (1840). John Zubly, a Savannah minister, warned the British that "in the strong sense of liberty, and in the use of firearms almost from the cradle, the Americans have vastly the advantage over men of their rank almost everywhere else." 1 MOSES COIT TYLER, THE LITERARY HISTORY OF THE AMERICAN REVOLUTION, 1763–1776 484 (1897). He added that American children were "shouldering the resemblance of a gun before they are well able to walk." *Id.* at 485.

Americans' constant training with firearms led to expert marksmanship. For example, John Andrews, an aide to British General Thomas Gage, recounted an incident in which Redcoats were repeatedly missing their mark on Boston Common. When an American mocked them, a British officer dared him to do better. The American repeatedly hit the target, and "[t]he officers as well as the soldiers star'd, and tho't the Devil was in the man. Why, says the countryman, I'll tell you *naow*. I have got a *boy* at home that will toss up an apple and shoot out all the seeds as its

coming down." WINTHROP SARGENT, LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772–1776 58–59 (1866).

In this same pre-Revolution moment, James Madison boasted about Virginia's marksmen: "[t]he strength of this Colony will lie chiefly in the rifle-men. . . . You would be astonished at the perfection this art is brought to. . . . I am far from being the best & should not often miss [the target] on a fair trial at" 100 yards. Letter from James Madison to William Bradford, NAT'L ARCHIVES (June 19, 1775), https://bit.ly/3uF2XII. So many Virginians wanted to join the rifle company that a competition was held:

> The commanding Officer . . . took a board . . . drew the shape of a moderate nose in the center and nailed it up to a tree at 150 yd' distance . . . . But by the first 40 or 50 that fired the nose was all blown out of the board,

and soon, "the board shared the same fate. 6 THE AMERICAN HISTORICAL REVIEW 100 (1901).

The Continental Congress used Americans' firearms training to warn King George III that Americans would make for a formidable foe: "[M]en trained to Arms from their Infancy, and animated by the [L]ove of [L]iberty, will afford neither a cheap or easy [C]onquest." 1 JOURNALS OF THE AMERICAN CONGRESS FROM 1774–1788 106–11 (adopted July 8, 1775) (1823).

Bearing out this warning, Americans' success in the Revolutionary War was widely attributed to their familiarity and training with arms. David Ramsay, a South

Carolina legislator and delegate to the Continental Congress, explained the Battle of Bunker Hill by noting that the Americans "were all good marksmen. The whole of their previous military knowledge had been derived, from hunting, and the ordinary amusements of sportsmen. The dexterity which by long habit they had acquired in hitting, beasts, birds, and marks [i.e., targets], was fatally applied to the destruction of British officers." 1 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 204 (1789). Ramsay determined that Americans had an advantage because "the inhabitants had been, from their early years . . . taught the use of arms." *Id.* at 191. Likewise, Jefferson suggested that American casualties were fewer than British casualties due to "our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun from his infancy." Letter from Thomas Jefferson to Giovanni Fabbroni (June 8, 1778), *in* 1 THE WRITINGS OF THOMAS JEFFERSON (H. A. Washington, ed., 1871).

After the war, such understanding and tradition stayed well in view. From 1787 to 1788, John Adams published his *Defense of the Constitutions of Government of the United States of America*, in which he emphasized the benefits of a militia: "That the people be continually trained up in the exercise of arms," ensures that "nothing could at any time be imposed upon the people but by their consent." 3 JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 471–72 (1787–88) (quoting MARCHAMONT NEDHAM, THE RIGHT

CONSTITUTION OF A COMMONWEALTH (1656)). *See id.* at 472 (For the same reason, "Rome, and the territories about it, were trained up perpetually in arms.").

Contemporaneously, the Federalist projected as part of the constitutional structure that there would be "a large body of citizens, little, if at all, inferior to them in discipline and the use of arms." THE FEDERALIST NO. 29 (Alexander Hamilton). And during the Constitution's ratifying conventions, Virginia and North Carolina proposed arms provisions providing that a "well regulated militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State." 37 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 253 (John P. Kaminski et al. eds., 2020) (Virginia); *id.* at 266 (North Carolina).[1] Elbridge Gerry said he preferred the "trained to arms" language to "furnish a greater certainty" that a competent militia would be maintained. *Id.* at 403. The Federal Farmer echoed this sentiment during the debates on the Constitution's ratification: "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them." 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 363 (John P. Kaminski et al., eds., 1995).

[1] Virginia's 1776 declaration of rights, authored by George Mason, included the same language. *Id.* at 113.

Antifederalists, of course, reiterated this theme between ratification of the Constitution and of the Bill of Rights. Samuel Nasson, for example, urged his congressman George Thatcher to ratify the Second Amendment because "you know to learn the Use of arms is all that can Save us from a for[eign] foe . . . . [I]f we keep up the Use of arms and become well acquainted with them we Shall al[ways] be able to look them in the face that arise up against us." Letter from Samuel Nasson to George Thatcher (July 9, 1789), *in* 2 THE COMPLETE BILL OF RIGHTS 296 (Neil H. Cogan, ed., 2015).

After the Second Amendment's ratification, Representative James Jackson declared "that every citizen was not only entitled to carry arms, but also is duty bound to perfect himself in the use of them, and thus become capable of defending his country." He asserted that "the whole body of the people ought not to be armed, and properly trained." 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DEBATES IN THE HOUSE OF REPRESENTATIVES: THIRD SESSION, DECEMBER 1790-MARCH 1791 95 (1995).

In post-ratification America, Vermont Founder Ira Allen reports, "any who have property and choose to sport with it, may turn their gardens into parks of artillery." Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 295 (1985) (quoting IRA ALLEN, PARTICULARS OF THE CAPTURE OF THE OLIVE

BRANCH, LADEN WITH A CARGO OF ARMS 403 (1798). Likewise, when as Minister to Russia John Quincy Adams left for St. Petersburg, it was fundamental to provide in his absence for his children's training with firearms:

> One of the things which I wish to have them taught . . . is the use and management of firearms. . . . The accidents which happen among children arose more frequently from their ignorance, than from their misuse of weapons which they know to be dangerous. . . . I beg you occasionally from this time to take George out with you in your shooting excursions, teach him gradually the use of the musket, its construction, and the necessity of prudence in handling it; let him also learn the use of pistols, and exercise him at firing at a mark.

3 WRITINGS OF JOHN QUINCY ADAMS 1801–1810 497 (Worthington Chauncey Ford ed., 1914).

Indeed, as Quincy Adams continued to rise in government, his countrymen continued to recognize a benefit in the people keeping their arms at hand so that, "as opportunities for hunting and practical shooting offer, they improve as marksmen." AN INQUIRY INTO THE IMPORTANCE OF THE MILITIA TO A FREE COMMONWEALTH IN A LETTER FROM WILLIAM H. SUMNER, ADJUTANT GEN. OF THE COMMONWEALTH OF MASSACHUSETTS, TO JOHN ADAMS, LATE PRESIDENT OF THE UNITED STATES 39 (1823). Thus, into the post-Founding generation, the American tradition that included training with keeping and bearing arms endured, as it had endured throughout the period surrounding the ratification of the Second Amendment.

3. In light of the textual and historical evidence supporting the right to train with arms, it is unsurprising that precedent robustly confirms that training with

arms for lawful purposes—necessarily including at outdoor, long-distance ranges—falls within the scope of the Second Amendment. To start, the *Heller* Court, in determining the nature of the Second Amendment right, quoted a treatise for the proposition that "[s]ome general knowledge of firearms is important to the public welfare; because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons of war." 554 U.S. at 619 (quoting B. ABBOTT, JUDGE AND JURY: A POPULAR EXPLANATION OF THE LEADING TOPICS IN THE LAW OF THE LAND 333 (1880)). Likewise, the Court cited the same source's statement that "a citizen who keeps a gun or pistol under judicious precautions, *practises in safe places the use of it*, and in due time teaches his sons to do the same, exercises his individual right." *Id.* (emphasis added).

Even courts denying Second Amendment challenges after *Heller* have affirmed that the right to train with arms falls within its scope. For instance, the Fourth Circuit has upheld a handgun carry permitting scheme in part because the plaintiff did not need a permit to "wear, carry, and transport handguns if he engages in target shoots and practices, sport shooting events, hunting and trapping, specified firearms and hunter safety classes, and gun exhibitions." *Woollard v. Gallagher*, 712 F.3d 865, 879 (4th Cir. 2013). Likewise, the Second Circuit has upheld a similar carry permitting scheme because it "preserve[d] legitimate interests such as training

for the national defense, the right of self defense, and recreational pursuits of hunting, target shooting and trophy collecting." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97 n.22 (2d Cir. 2012) (quotation marks omitted).

In this light, and because "[t]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees"—such that "fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579–80 (1980)—it follows first that the right to train, which is indispensable to using arms in case of confrontation and for other lawful purposes, is encompassed in the Second Amendment's fundamental right. And it follows immediately thereafter that the right to use shooting ranges, which are indispensable to training, must also be so encompassed.

Such necessary reasoning was explicitly endorsed in the *Ezell v. City of Chicago*. In that case, the Seventh Circuit held directly that zoning regulations effectively banning gun ranges violate the Second Amendment. 651 F.3d 684 (7th Cir. 2011) ("*Ezell I*"). In response, the city created zoning regulations that prohibited firing ranges in roughly ninety-eight percent of its territory—which was also held unconstitutional. *Ezell II*, 846 F.3d 888. As the Seventh Circuit explained in *Ezell I*, "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much

without the training and practice that make it effective." 651 F.3d at 704. Under *Ezell*, there is a clear constitutional right to access shooting ranges that are needed to train in the use of "Arms."

And "Arms" include long guns, of course. "The Second Amendment extends, prima facie, to all instruments that constitute bearable arms," 554 U.S. at 582; *accord Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016), and the burden falls on the government to demonstrate that a particular type of bearable arm falls outside the Second Amendment's scope, *see id.*; *Tyler*, 837 F.3d at 685; *Ezell II*, 846 F.3d at 892. Beyond that, *Heller*'s establishment of the individual right to keep and bear arms was built, in part, on Senator Charles Sumner's interpretation of the Second Amendment to include "[t]he rifle." *Id.* at 609. And since *Heller*, the Court has unanimously held that "the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.' " *Caetano*, 577 U.S. at 411. This accords with *United States v. Greeno*, in which the Sixth Circuit did not distinguish between rifle, revolver, and handgun for purposes of the Second Amendment, 679 F.3d 510, 513, 520 (6th Cir. 2012)—and accords also with the most natural reading of "Arms," a broader term than "pistols" or the like. Thus, to train with rifles or other long guns in common use for lawful purposes is protected by the Second Amendment.

To be clear, "[i]t is no answer to say . . . that it is permissible to ban [training in long guns], so long as [training in] other firearms (i.e., [handguns]) is allowed." *Heller*, 554 U.S. at 629. The Second Amendment protects, not the right to keep and bear just *some* arm, but rather an arm of one's choice, provided that it is in common use for lawful purposes. *See id.* at 624–25, 629. Likewise, the right to train to proficiency with arms at a suitable shooting range is not to be limited by the government on a case-by-case basis, but rather, it automatically attaches to all arms to which the Second Amendment applies. *See id.* at 634. Thus, the right to train to proficiency at a suitable shooting range attaches to long guns in common use for lawful purposes.

But training to proficiency with long guns requires an outdoor, long-distance range. Without an outdoor range, for example, citizens such as Plaintiff Penrod are "unable to participate" in "shooting matches with a shotgun," and those such as Plaintiff Dimitroff are "prevented from practicing with anything but a handgun." SAC ¶¶ 10, 14, R.E.No. 44, PageID#1087–88, 1090. And without a long-distance range, citizens such as Plaintiff Fresh are "unable to engage in training in the proficient use of long-range firearms." *Id.* ¶ 7, R.E.No. 44, PageID#1086. As indispensable to the constitutionally protected activity of training to proficiency with long guns, access to an outdoor, long-distance shooting range is itself protected under the Second Amendment.

Indeed, even setting aside such ranges' indispensability to proficiency with protected arms, the Second Amendment "guarantee[s] the individual right to possess and carry weapons *in case of confrontation*," *Heller*, 554 U.S. at 592 (emphasis added), whether such confrontation may arise in circumstances of combat, hunting, or self-defense, *see id.* at 599 (naming preservation of the militia, hunting, and self-defense as reasons that Americans "valued the ancient right"). Plainly, confrontations in the militia and in hunting require long-distance accuracy in outdoor conditions, as such encounters occur predominantly at distance and outdoors. Nor can the very live possibility of self-defense encounters at distance or outdoors be ignored. To take but one example, in 2017, a civilian operating a rifle outside and at distance confronted the executioner of dozens of churchgoers from seventeen months to seventy-seven years old in Sutherland Springs, Texas. Jason Hanna & Holly Yan, *Sutherland Springs Church Shooting: What We Know*, CNN (Nov. 7, 2017, 6:52 AM EST), https://cnn.it/3fzdmBg. Citizens who may face such threats have a Second Amendment right to keep and bear arms at an outdoor, long-distance range to train in case of such confrontations.

B. Howell Township's Ban on Long-Distance Rifle Ranges Is Categorically Unconstitutional.

Given that training with long guns at outdoor, long-distance ranges falls within the scope of the Second Amendment, *Heller* makes the next analytical steps clear. Because "[t]he very enumeration of the right takes out of the hands of

government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," wholesale infringements on the Amendment must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. The Township's effective ban on training with long guns at outdoor, long-distance ranges is just such an infringement of Second Amendment conduct. Accordingly, it is unconstitutional.

In *Heller*, the Supreme Court declined the invitation to analyze the ban on possessing handguns at issue under "an interest-balancing inquiry," such as that "the Court has applied . . . in various constitutional contexts, including election-law cases, speech cases, and due process cases," 554 U.S. at 689–90 (Breyer, J., dissenting). Instead, the Court determined, the right to keep and bear arms was "elevate[d] above all other interests" the moment that the People chose to enshrine it in the Constitution's text, *id.* at 635 (majority opinion). Thus, as reaffirmed in *McDonald v. City of Chicago*, the Court "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. 742, 785 (2010) (plurality opinion). So, too, here the Court should refrain from judicial interest balancing and invalidate the Township's ban. *See, e.g.*, *People v. Webb*, 131 N.E.3d 93, 97–98 (Ill. 2019) (holding Second Amendment applicable to stun guns and directly invalidating ban on their possession); *Ramirez v.*

Commonwealth, 94 N.E.3d 809, 815 (Mass. 2018) (same); *People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013) (holding Second Amendment protects carrying firearm for self-defense outside the home and directly invalidating ban on such conduct).

Importantly, even courts that elsewhere apply means-end scrutiny may adopt *Heller*'s text-and-history categorical approach in face of a ban on protected activity. For example, the Seventh Circuit, despite typically applying a levels-of-scrutiny inquiry to Second Amendment claims, has recognized that certain laws are so antithetical to the Second Amendment that they are "categorically unconstitutional." *Ezell I*, 651 F.3d at 703. Thus, it has held that the State of Illinois's "flat ban on carrying ready-to-use guns outside the home" was flatly unconstitutional. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012). The D.C. Circuit similarly invalidated categorically a District law that had the effect of banning typical citizens from carrying firearms in public under "*Heller I*'s categorical approach . . . even though [the court's] previous cases ha[d] always applied tiers of scrutiny to gun laws." *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017).

This Court, too, has applied tiers of scrutiny, *Tyler*, 837 F.3d at 685–86 (inquiring (1) whether mentally ill persons fall outside scope of the Second Amendment, and then (2) whether presumptively lawful restriction of their activity is permissible), or else the Court has *expected* to apply tiers of scrutiny, *Greeno*, 679 F.3d at 518–20 (not reaching tiers of scrutiny because conduct to be protected fell

outside scope of the Second Amendment). But such cases are distinguishable and should not prevent this Court—any more than it did the Seventh Circuit or the D.C. Circuit—from enforcing the Second Amendment as categorically invalidating a *ban* on protected conduct.

C. The Township's Ban Fails Any Level of Heightened Scrutiny.

1. Even if the Township's restrictions were not *categorically* unconstitutional, they should at the least be subjected to the highest level of constitutional scrutiny. As the Supreme Court has explained, "strict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms is not only enumerated in the constitutional text; it was also counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778. To apply mere intermediate scrutiny would relegate the Second Amendment to "a second-class right." *Id.* at 780 (plurality). To be sure, unlike *Tyler*, in which the challenged law "burden[ed] only a narrow class of individuals who are not at the core of the Second Amendment—those previously adjudicated mentally defective or previously involuntarily committed," the Township's ban on long-distance rifle ranges "burden[s] the public at large," and thus is unfit for intermediate scrutiny. *See* 837 F.3d at 691.

2. In this case, though, the standard of heightened scrutiny is immaterial, for the Township's ban on outdoor, long-distance shooting ranges fails even under intermediate scrutiny.

That is so, first, as a matter of law. By design, the Township's restrictions purport to benefit the public *only by reducing the kinds of arms-training that may occur*. That is "not a permissible strategy"—even if used as a means to the further end of increasing public welfare. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650. That conclusion follows directly from the Supreme Court's precedents in the secondary-effects area of free-speech doctrine.

The Supreme Court has held that governmental restrictions on certain types of expressive conduct—most commonly, zoning ordinances that apply specifically to establishments offering adult entertainment—are subject to merely intermediate scrutiny even though they are content-based. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–51 (1986). But a restriction survives this lesser scrutiny only if its *purpose and effect* is to reduce the negative "secondary effects" of the expression—such as the increased crime that occurs in neighborhoods with a high concentration of adult theaters—by means other than suppressing the expression itself. *Id.* at 49. As Justice Kennedy's controlling opinion in *City of Los Angeles v. Alameda Books, Inc.* makes clear, in defending a restriction as narrowly tailored to

further an important or substantial governmental interest, the government may not rely on the proposition "that it will reduce secondary effects by reducing speech in the same proportion." 535 U.S. 425, 449 (2002). "It is no trick to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech." *Id.* at 450; *see also Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015); *Grace*, 187 F. Supp. 3d at 148.

But that is precisely what the Township has done here. Its restrictive zoning policies do not regulate the *manner* of training or impose reasonable safety requirements. No, their purpose and effect is to *limit the kind of training that may occur at all*. Limits like the Township's ban of certain kinds of training thus "destroy[ ] the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations . . . but by design." *Wrenn*, 864 F.3d at 666. That is "not a permissible strategy," *Grace*, 187 F. Supp. 3d at 148, under any level of heightened scrutiny.

Even if the purpose and effect of suppressing training with long guns were not *intrinsically* unconstitutional, independently, that purpose and effect *become* unconstitutional if not sufficiently tailored to the government's asserted goals—in both of two ways. First, there must be "a close fit between ends and means," *McCullen v. Coakley*, 573 U.S. 464, 486 (2014); *accord Tyler*, 837 F.3d at 693. That

is, the government "must prove that the law in dispute does not 'regulate [bearing arms] in such a manner that a substantial portion of the burden on [arms-bearing] does not serve to advance its goals," *Billups v. City of Charleston*, 961 F.3d 673, 688 n.9 (4th Cir. 2020) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Second, the State must actually have considered alternatives to the course it adopted. *McCullen*, 573 U.S. at 494. "In other words, the government is obliged to demonstrate that it actually tried or considered less-[arms-bearing]-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Billups*, 961 F.3d at 688. The Township's ban is not sufficiently tailored in *either* sense.

In establishing fit between ends and means, "the government can rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense, but it may not rely upon mere anecdote and supposition." *Tyler*, 837 F.3d at 693–94 (quotations omitted); *accord United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) ("the Government must present more than anecdote and supposition"). But supposition is all that Howell Township presented here. Specifically, a statement by Township Planner, Carlisle Wortman, who "cautioned that permitting shooting ranges by right *may* introduce 'noise, traffic, or public safety issues' into the residential district." Mot. to Dismiss,

R.E.No. 60, PageID#1212 (emphasis added). This is insufficient evidence to satisfy any level of heightened scrutiny.

Moreover, substantially less burdensome alternatives exist. For example, in striking down Chicago's range ban, the Seventh Circuit identified several substantially less burdensome alternatives that could address the city's concerns: "straightforward range-design measures that can effectively guard against accidental injury," designated "locations for the loading and unloading of firearms," as well as "limiting the concentration of people and firearms in a range's facilities, the times when firearms can be loaded, and the types of ammunition allowed." *Ezell I*, 651 F.3d at 709. The Township did not consider any such measures, and its failure to do so is another reason that its ban fails even intermediate scrutiny.

D. The District Court Erred in Rejecting Plaintiffs' Second Amendment Claim.

The district court provided no substantive response to the argument above. Instead, its decision to dismiss the case was based on the denial (1) "that a municipality must permit a property owner (or a property lessee) to construct, and for interested gun owners to use, an outdoor, open-air, 1,000-foot shooting range," and (2) that "Howell Township must change its zoning ordinance to permit the construction and use of such a facility as a matter of right anywhere within the AR district." But these undeveloped denials cannot justify dismissing the complaint.

With respect to proposition (1), Training Plaintiffs and Oakland maintain only that a municipality must permit *some* property to be used for an outdoor, long-distance shooting range, not that it must permit *all* property to be so used. And, regarding proposition (2), Plaintiffs argue only that this ban must be declared unconstitutional and its enforcement against Plaintiffs enjoined—not that the Township must be enjoined to permit construction and use of a long-distance rifle range *anywhere* in the AR district or Township. As shown by the foregoing argument, the Second Amendment invalidates an effective ban on outdoor, long-distance shooting ranges throughout the *whole* Township; the district court's unreasoned rejection of that proposition was erroneous.

II. Plaintiffs Plausibly Alleged That Howell Township Effectively Bans Outdoor, Long-Distance Shooting Ranges.

Likewise off-point is the district court's denial that Plaintiffs have plausibly pled that "Howell Township bans all shooting ranges." Order, R.E.No. 84, PageID#2090. Plaintiffs do not maintain that they have plausibly made such an allegation because they do not need to make such an allegation to show that they are likely to succeed. While the Second Amended Complaint admittedly has some language suggesting a broader scope for the range ban, *see, e.g.*, SAC ¶ 4, R.E.No. 44, PageID#1085, the Complaint taken as a whole *at a minimum* amply alleges that Howell Township effectively bans *outdoor and long-distance* shooting ranges.

In the actual Count of the Complaint, after all, Plaintiffs plainly state that "[f]acially and as applied, Howell Township's laws effectively ban the operation of rifle ranges and other shooting ranges, thereby prohibiting numerous traditional lawful uses of firearms that the Second Amendment protects." *Id.* ¶ 70, R.E.No. 44, PageID#1103.

This allegation is based on "Paragraphs 1 through 64," which "are incorporated as though fully stated" in the Count. *Id.* ¶ 65, R.E.No. 44, PageID#1102. The immediately preceding paragraphs, 60 through 64, state that each of the Training Plaintiffs "would engage in long-range target shooting" or "long gun target shooting," as well as "other shooting activities." *Id.*, PageID#1101–02. The same point is made in the Complaint's early paragraphs introducing the parties, wherein it is plainly stated that certain Training Plaintiffs are "unable to participate" in "shooting matches with a shotgun," "unable to engage in training in the proficient use of long-range firearms," and "prevented from practicing with anything but a handgun." *Id.* ¶¶ 7, 10, 14, R.E.No. 44, PageID#1086, 1088, 1090.

Following that discussion, the Complaint identifies rifle ranges as open air businesses, *id.* ¶¶ 35, 36, R.E.No. 44, PageID#1095, and specifically reports that the Township zoning staff denied that Oakland could "apply for a permit for a rifle range located on the Property because the Agricultural Residential District . . . does not allow open air business uses, shooting ranges, or rifle ranges." *Id.* ¶ 46, R.E.No. 44,

PageID#1098. Again in paragraph 41, the Complaint focuses particularly on the need for a "safe, long-distance rifle range," observing that the HSC District lacks sufficient space for such a range. *Id.*, PageID#1097. Throughout these many allegations, the common thread is a focus on long guns, long distance, and open-air ranges—and the lack thereof. In this light, it is plain that Training Plaintiffs and Oakland assert that outdoor, long-distance shooting ranges are effectively banned.

And it is equally plain that the allegation is plausible. To be clear, even after *Iqbal* and *Twombly*, at this early stage in the proceedings, plaintiffs need only "have alleged in their complaint facts sufficient to allow the district court to draw a *reasonable* inference that the [defendant] acted unlawfully." *Est. of Barney v. PNC Bank, Nat. Ass'n*, 714 F.3d 920, 925 (6th Cir. 2013) (emphasis added). That is, "[t]he complaint's 'factual allegations must be enough to raise a right to relief above the *speculative* level.'" *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 457 (6th Cir. 2011) (emphasis added). The Rule 12(b)(6) "plausibility standard 'asks for more than a sheer possibility that a defendant has acted unlawfully' but is not akin to a probability requirement." *Meyers v. Cincinnati Bd. of Educ.*, 983 F.3d 873, 880 (6th Cir. 2020). Thus, the target of dismissals under Rule 12(b)(6) and (c) remains "an unadorned, the-defendant-unlawfully-harmed-me accusation" or "[t]hreadbare recitals of the elements of a cause of action, supported

by mere conclusory statements." *Boxill v. O'Grady*, 935 F.3d 510, 517 (6th Cir. 2019) (citations omitted).

Plaintiffs easily meet the standard of plausibly alleging that the Township effectively bans outdoor, long-distance shooting ranges. As stated above—in allegations that must be accepted as true, *Jackson*, 925 F.3d at 806—the Township characterizes open-air rifle-ranges as businesses but allows for such businesses in no district; and the HSC District, the only district that allows for outdoor recreational facilities, is purposed for traffic, and could not possibly accommodate an outdoor, long-distance rifle-range. The district court did not deny these points nor did it deny the plausibility of an allegation that the Township effectively bans outdoor, long-distance rifle ranges. Instead, it rejected only the plausibility of an allegation that *all* shooting ranges are banned.

The sole point of the district court's that might be repurposed against Plaintiffs is that Oakland failed to allege that it had made a request limited to its parcel alone. But there is no requirement in Section 1983 suits of the present sort that a party exhaust administrative remedies, *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 500 (1982); *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362–63 (6th Cir. 1992). This point was raised before the district court, Mot. to Reconsider, R.E.No. 86, PageID#2107–08, which then explicitly stated that it "did not dismiss the complaint because plaintiffs failed to allege that they had exhausted their administrative

remedies." Order Denying Recons., R.E.No. 91, PageID#2185. Nevertheless, the court relied on Plaintiffs' failure to request what the court deemed would have been the proper administrative relief from the plain impact of the Township's zoning regulations. It is difficult to see how this is anything other than a failure to exhaust administrative remedies—unless it is a failure to properly petition for a *change* in the law, which surely cannot be required before a constitutional challenge can be asserted. To be clear, under *Patsy* Plaintiffs could have brought this case *without Oakland asking for any adjustment of the zoning regulations at all*; they were not required to seek a change or exception to the law before filing suit.

There are additional reasons why the nature of Oakland's proposed text amendment does not in any way make the allegation that the Township effectively bans outdoor shooting ranges implausible. First, the actions of *Oakland* are not especially indicative of whether *the Township* maintains an effective ban on long-distance rifle ranges. Second, on the other hand, one may well infer from the fact that Oakland submitted a text amendment, rather than any other request, that there was no option under the current ordinance to build its project. That is, such action tends to show what the Plaintiffs alleged—that outdoor, long-distance shooting ranges are effectively banned under the Ordinance—and that to build its range, the Ordinance must be amended. This inference, as in favor of the non-movant, must be drawn. *Jackson*, 925 F.3d at 806. Moreover, the alleged fact that the zoning staff

advised Oakland to file the text amendment must be taken as true, too. *Id.* That fact supports the inference that the zoning staff thought that *changing the Ordinance* was the only way to build an outdoor, long-distance shooting range in the Township. Add to *both* these facts, the third alleged (indeed, undisputed) fact that the Board subsequently denied the request for an amendment, and one has further ground to suppose that the Township is opposed to such ranges and effectively bans them. At an absolute minimum, these alleged facts make it *plausible* that the Township acted in violation of the constitutional principle argued at length above: the Second Amendment protects against effective bans the right to train at outdoor, long-distance shooting ranges.

CONCLUSION

Plaintiffs-Appellants respectfully submit that the district court's judgment granting the Township's motion to dismiss should be reversed and the case should be remanded for further proceedings.

Dated: June 2, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiffs-Appellants' Opening Brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). The brief is prepared in 14-point Times New Roman font, a proportionally spaced typeface; it is double-spaced; and it contains 9,074 words (exclusive of items listed in Rule 32(f)), as measured by Microsoft Word.

/s/ Peter A. Patterson
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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on June 2, 2021, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties has been accomplished via ECF.

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Counsel for Plaintiffs-Appellants

STATUTORY ADDENDUM

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U.S. CONST. amend. II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Howell Township Zoning Ordinance art. II, § 2.02, Definitions.

. . .

Open Air Business Uses. Open air business uses operated for profit substantially in the open air shall include such uses as the following:

(a) bicycle, utility truck or trailer, motor vehicle, boats or home equipment sale, repair, or rental services.

(b) outdoor display and sales of garages, motor homes, mobile homes, snowmobiles, farm implements, swimming pools, and similar products.

(b) retail sale of trees, fruit, vegetables, shrubbery, plants, seeds, topsoil, humus, fertilizer.

(d) tennis courts, archery courts, shuffleboard, horseshoe courts, rifle ranges, miniature golf, golf driving range, children's amusement park or similar recreation uses (transient or permanent).

. . .

Howell Township Zoning Ordinance art. III, § 3.06 Application of Regulations.

The regulations established by this Ordinance within each zoning district shall be the minimum regulations for promoting and protecting the public health, safety, and general welfare and shall be uniform for each permitted or approved use of land or building, dwelling and structure throughout each district. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter
of this Ordinance, the Zoning Board of Appeals shall have power in passing upon appeals to vary or modify any rules, regulations or provisions of this Ordinance so that the intent and purposes of this Ordinance shall be observed,

public safety secured and substantial justice done, all in accordance with the provisions of Article XXII of this Ordinance and Public Act 110 of 2006.

Howell Township Zoning Ordinance art. III, § 3.07, Scope of Provisions.

A. Except as may otherwise be provided in Article XXII herein, every building and structure erected, every use of any lot, building, or structure established, every structural alteration or relocation of any existing building or structure occurring, and every enlargement of, or addition to an existing use, building and structure occurring after the effective date of this Ordinance shall be subject to all regulations of this Ordinance which are applicable in the zoning district in which such use, building, or structure shall be located.

B. Uses are permitted by right only if specifically listed as principal permitted uses in the various zoning districts or is similar to such listed uses. Accessory uses are permitted as listed in the various zoning districts or if similar to such listed uses, and if such uses are clearly incidental to the permitted principal uses. Special uses are permitted as listed or if similar to the listed special uses and if the required conditions are met.

C. All uses, buildings, and structures shall conform to the area, placement, and height regulations of the district in which located, unless, otherwise provided in this Ordinance.

D. No part of a yard, or other open space, or off-street parking or loading space required about or in connection with any use, building or structure, for the purpose of complying with this Ordinance, shall be included as part of a yard, open space, or off-street parking lot or loading space similarly required for any other use, building, or structure. Refer to Section 14.06.

E. No yard or lot existing at the time of adoption of this Ordinance shall be reduced in dimensions or area below the minimum requirements set forth herein. Yards or lots created after the effective date of this Ordinance shall meet at least the minimum requirements established herein except as otherwise provided in this Ordinance.

F. No lot, out lot or other parcel of land in a recorded plat shall be further partitioned or divided unless in conformity with the Zoning and Subdivision Control Ordinances of the Township and the Subdivision Control Act of 1967 and the Land Division Act of 1996, as amended.

G. There shall be no more than one (1) principal use located on a lot, parcel or building site, except as otherwise permitted in this Ordinance. See Section 14.06.

Howell Township Zoning Ordinance art. III, § 3.10, Permitted Zoning District Uses and Other Provisions in This Ordinance.

While each Zoning District and the uses it permits are designed to represent separate categories of compatible land uses and the regulations controlling, other Articles in this Zoning Ordinance may also appropriately apply including those provisions included in Article XIV "Supplemental Regulations", Article XV "Environmental Provisions", Article XVI "Special Uses", Article XVII "Nonconforming Land, Building and Structural Uses", Article XVIII "Off-Street Parking, Loading and Unloading Requirements", Article XIX "Sign Regulations", Article XX "Site Plan Review", Article XXVI "Roads, Driveways and Related Land Use Developments and Construction in Private Developments", Article XXVII "PUD-Planned Unit Development Projects" and Article XXVIII "Landscaping Requirements". Applicants for zoning permits should relate their requests to both the appropriate zoning district as to use and the above Articles for applicability.

Howell Township Zoning Ordinance art. X, RSC Residential Service Commercial District.

Section 10.01 PURPOSE

This District is to recognize the unique regional location existing in Howell Township around the combination of I-96, M-59 and Grand River Road and therefore plan the surrounding adjacent area in part for regionally accessible commercial developments.

Section 10.02 PERMITTED PRINCIPAL USES.

The following uses are permitted as long as the use is conducted completely within an enclosed principal building and enclosed accessory structures and areas having controlled entrances and exits with the exits having operating cashier stations where the payment of goods or services purchased can be paid by customers:

A. Retail establishments, including supermarkets, department stores, home appliance stores, hardware stores, home improvement stores and other similar types of retail outlets that sell food items, hardware goods, drugs and sundries, home improvement items, gifts, dry goods, clothing and dressmaking equipment and supplies, notions, home appliances, wearing apparel, shoes and boots, automotive equipment, parts and supplies, photographic equipment and supplies, electrical equipment and supplies, office equipment and supplies, home interior decorating equipment and supplies, art equipment and supplies, furniture, antiques, showrooms with interior and/or exterior exposure, home garden equipment and supplies, candy and confections, alcoholic and non-alcoholic beverages, toys and games, electronic equipment and supplies, musical instruments and supplies, outdoor and indoor recreation equipment and supplies, pets and pet equipment and supplies, building and construction equipment and supplies, medical and dental equipment and supplies, graphic arts equipment and supplies, computer and data processing equipment and supplies, leasing, rental, and sale of new and used motorized vehicles including but not limited to cars, trucks, recreational vehicles, and motorcycles, and other uses of a similar character that are normally an integral part of a regional shopping center.

B. Service establishments, either as completely separate units or as an integral part of any of the principal uses permitted in A. above, and additionally including service outlets for insurance, real estate, medical and dental clinics, veterinary clinics and hospitals, nursing and convalescent homes, theatres, assembly and concert halls, indoor commercial recreation, clubs, fraternal organizations and lodge halls, restaurants, private and business schools, churches, public and private office buildings, motels and hotels, and uses of a similar character that are normally an integral part of a regional shopping center.

C. Mini Warehouses.

Section 10.03 PERMITTED PRINCIPAL SPECIAL USES WITH CONDITIONS.

A. Automotive gasoline and service stations in accordance with the provisions of Article XVI, “Special Uses” for this use. See Section 16.11.

B. Drive-in retail and service establishments in accordance with the provisions of Article XVI, “Special Uses” for this use.

C. Regional shopping centers in accordance with the provisions of Article XVI, "Special Uses" for a collective grouping of two (2) or more of the uses permitted in this district.

D. Commercial Kennels subject to Section 14.42.

Section 10.04 PERMITTED ACCESSORY USES.

A. Normal accessory uses to all "Permitted Principal Uses."

B. Normal accessory uses to all "Permitted Principal Special Uses." See Section 14.34.

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Howell Township Zoning Ordinance art. XI, HSC Highway Service Commercial District.

Section 11.01 PURPOSE

The highway service commercial district is designed to provide for servicing the needs of highway traffic at the interchange areas of public roads and highway facilities. The avoidance of undue congestion on public roads, the promotion of smooth traffic flow at the interchange area and on the highway, and the protection of adjacent properties in other districts from the adverse influences of traffic are prime considerations in the location of this district.

Section 11.02 PERMITTED PRINCIPAL USES.

The following uses are permitted as long as they are conducted completely within a building except as otherwise provided for specific uses:

A. Vehicle service and repair stations for automobiles, trucks, busses and trailers. See Section 14.34.

B. Emergency facilities related to highway travelers.

C. Parking garages and parking areas.

D. Parking areas, if enclosed by a six (6) foot high fence, wall or berm.

All berms shall be completely planted with grass, ground covers, shrubs, vines and trees.

E. Bus passenger stations.

F. Retail and service establishments providing foods and services which are directly needed by highway travelers.

G. Transient lodging facilities, including motels and hotels.

Section 11.03 PERMITTED PRINCIPAL SPECIAL USES WITH CONDITIONS.

The following uses are permitted as long as they are conducted completely within a building except as otherwise provided for specific uses, and located in the District so as not to interfere with or interrupt the pattern of development of the "Permitted Principal Uses" in Section 11.02 and shall further meet the requirements of Article XVI, "Special Uses":

A. Recreation and sports buildings.

B. Recreation and sports areas, if areas are completely enclosed with fences, walls or berms with controlled entrances and exits.

C. Commercial Kennels subject to Section 14.42.

Section 11.04 PERMITTED ACCESSORY USES.

A. Normal accessory uses to all "Permitted Principal Uses."

B. Normal accessory uses to all "Permitted Principal Special Uses."

C. See Section 14.34.

Section 11.05 PERMITTED ACCESSORY USES WITH CONDITIONS.

Swimming pools for use as a part of a Highway Service Commercial District. Use in conformance with the provisions of Section 14.18.

Section 11.06 REQUIRED CONDITIONS OF ALL DISTRICT USES.

All principal and accessory uses in this District shall be required to meet the following conditions, except as otherwise specified for specific uses:

A. Barriers. Replaced by Article XXVIII.

B. Access ways. Each separate use, grouping of buildings or groupings of uses as a part of a single planned development shall not have more than two (2) access ways from a public road. Such access way shall not be located closer than 300 feet to the point of intersection of an interstate highway entrance or exit ramp baseline and the public road centerline. In cases where the ramp baseline and the public road centerline do not intersect, no access way shall be located closer than 300 feet from the point of tangency of the interstate highway ramp baseline and the public road centerline. In those instances where properties fronting on a public road are of such width or are in multiple ownership and access ways to property cannot be provided in accord with the minimum 300 feet distance from the intersection of the public road an entrance or exit ramps of an interstate highway a frontage access road shall be provided to service such properties. The access way to a frontage access road shall not be located closer than 300 feet from the point of intersection or of tangency of the interstate highway ramp baseline and the public road pavement.

. . .

Howell Township Zoning Ordinance art. XII, HC Heavy Commercial District.

Section 12.01 PURPOSE

The intent of the Heavy Commercial District is to provide an area appropriate by location and design for a meaningful and realistic commercial utilization of Grand River road frontage that caters to both the business community and the public at large for those heavy commercial uses that can coexist and be compatible with the neighboring uses within the District.

Section 12.02 PERMITTED PRINCIPAL USES

The following uses are permitted as long as they are conducted completely within a building, structure or an area enclosed and screened from external visibility beyond the lot lines of the parcel upon which the use is located, except as otherwise provided in this Ordinance.

A. Facilities necessary to the operation of all existing methods of transportation, including those for highway, rail and air, including truck terminals, railroad sidings and airplane parking ramps, servicing, repair and storage.

B. Warehousing and related bulk handling facilities, equipment and support services.

C. Bulk handling of commercial and industrial services and related facilities, equipment and support services.

D. Contractor buildings, structures and equipment and materials storage yards for building and other types of construction.

E. Building material supply establishments.

F. Construction and farm equipment sales and service establishments.

G. Leasing, rental, and sale of new and used motorized vehicles including but not limited to cars, trucks, recreational vehicles, and motorcycles.

H. Gasoline Service Stations, provided they additionally meet the requirements of Section 16.11.

I. Gasoline Service Stations combined with restaurants, convenience stores and other traveler or commuter related uses provided they are located in the same building or a combination of buildings having common walls and the same front building façades.

J. Mini Warehouses.

Section 12.03 PERMITTED PRINCIPAL SPECIAL USES WITH CONDITIONS.

The following uses are permitted as special uses in accordance with Article XVI, "Special Uses":

A. (Deleted in its entirety).

B. Junk yards which receive, temporarily store, disassemble and reclaim used or damaged goods for the purpose of a resale as used or rebuilt goods or scrap materials.

C. The following uses are permitted as long as they are conducted completely within a building, structure or an area enclosed and screened from the external visibility beyond the lot lines of the parcel upon which the use is located and subject to Article XVI, "Special Uses":

1) Electrical machinery, equipment and supplies, electronic components and accessories.

2) Professional, scientific and controlling instruments, photography and optical goods.

3) Fabricating metal products, except heavy machinery and transportation equipment.

4) Contract plastic material processing, molding and extrusion.

D. Any of the uses listed in Section 12.05 A-K provided they are developed and operated primarily to serve the principal uses permitted by right as listed in Section 12.02 and/or permitted as principal special uses as listed in this Section 12.03.

E. Commercial Kennels subject to Section 14.42.

Section 12.04 PERMITTED ACCESSORY USES.

A. Normal accessory uses to all "Permitted Principal Uses."

B. Normal accessory uses to all "Permitted Principal Special Uses."

Section 12.05 PERMITTED ACCESSORY USES WITH CONDITIONS.

The following accessory uses are permitted when they are an integral part of the principal use and located within a building or structure housing the principal use or are included as a part of the site development upon which the principal use is located:

A. Restaurants

B. Medical and health care facilities

C. Office facilities

D. Warehouse and storage facilities

E. Recreation and physical fitness facilities

F. Work clothing sales and service facilities

G. Banking facilities

H. Education, library and training facilities

I. Research and experimentation facilities

J. Truck, other vehicular and equipment service maintenance, repair and storage facilities

K. Sales display facilities and areas.

L. See Section 14.34

Section 12.06 REQUIRED CONDITIONS FOR ALL DISTRICT USES.

A. Access roads. All uses shall only have vehicular access via Burkhart Road, Grand River Road M-59 State Highway (Highland Ave.) and Tooley Road.

B. Barriers. Replaced by Article XXVIII - Landscaping Requirements.

C. Toxic waste disposal. All toxic wastes shall be disposed of in accordance with all state laws, rules and regulations governing their disposal.

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DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS