Appeal No. 21-1244

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

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

Dated: July 6, 2021

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DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Defendant/Appellee, Howell Township, makes the following disclosure:

Defendant/Appellee is a governmental entity and has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant/Appellee requests the opportunity to present oral argument in this case as it addresses the narrow issue of whether the Second Amendment protections extend to the right to construct or use an outdoor, open-air, 1,000-yard shooting range. Oral argument will assist the Court by permitting an opportunity for questions and explanations as it relates to this zoning dispute.

JURISDICTIONAL STATEMENT

Defendant/Appellee agrees with Plaintiffs/Appellants' Jurisdictional Statement.

STATEMENT OF THE ISSUE

Whether the District Court properly dismissed Plaintiffs/Appellants' claim for violation of the Second Amendment, which does not encompass a right to construct or use an outdoor, open-air, 1,000-yard shooting range.

INTRODUCTION

Plaintiffs/Appellants' Opening Brief loses sight of what this case is about: a zoning dispute. This case arose when the manager of Plaintiff Oakland Tactical Supply, LLC ("Oakland Tactical"), a firearms retail store located in Hartland (not Howell) Township, Michigan, sought a text amendment to Defendant/Appellee Howell Township's Zoning Ordinance. The proposed amendment would "allow for shooting ranges" in the Township's Agricultural Residential District. (Exhibit

A to Defendant's Answer, RE 46-2, PageID # 1134-36). Oakland Tactical alleges that it would like to open an outdoor, open-air, 1,000-yard shooting range in the Township's Agricultural Residential District. Granting the requested amendment, however, would have allowed shooting ranges as a matter of right in approximately 65% of the land within the Township. (Exhibit 2 to Defendant Motion to Dismiss, RE 60-3, PageID # 1261). The Township denied the requested text amendment.

The District Court properly held that Plaintiffs' claim failed to state a violation of their Second Amendment right to keep and bear arms. In support of its holding, the District Court highlighted that Plaintiffs provided no legal authority that the Township would be required to permit long-distance shooting ranges throughout its boundaries. Even upon reconsideration of its decision, the Court reached the same determination. Dismissal of Plaintiffs' case should be affirmed.

Plaintiffs further argue, for the first time on appeal, the historical protections of long guns. Whether long guns are protected by the Second Amendment has no bearing on the outcome of this case as the Township's Zoning Ordinance does not regulate an individual's possession of long guns, nor the shooting of such long guns on an individual's property, any ranges in the community, or any ranges that can be constructed in appropriate zoning districts within the Township.

STATEMENT OF THE CASE

I. THE ZONING DECISION.

Oakland Tactical allegedly leased a 352-acre former rock quarry with the "express purpose" of developing an "extensive outdoor shooting range facility," which would include a 1,000-yard outdoor shooting range. (Plaintiffs' Second Amended Complaint, RE 44, PageID # 1085, ¶ 6). The leased land is located within the Agricultural Residential District ("AR District") of Howell Township. (RE 44, PageID # 1098, ¶ 46). When Oakland Tactical's managing member, Michael Paige ("Paige"), learned that the AR District is not currently zoned for shooting ranges, he requested an amendment to the Zoning Ordinance which would "allow for shooting ranges in AG [sic] District." (RE 44, PageID # 1098, ¶ 48) (Exhibit A to Defendant's Answer, RE 46-2, PageID # 1134-36). The application contained no representation that Paige was seeking an amendment on behalf of Oakland Tactical (*Id.*).

The Township submitted Paige's proposed text amendment to its Township Planner, Carlisle Wortman Associates, Inc., for review. Carlisle Wortman noted, "while the applicant is interested in the ability to develop a specific piece of land and has specific plans for this land, the current petition is for an amendment to the permitted uses in the AR district. If a text amendment were approved, this would affect all land zoned AR." (Exhibit C to Defendant's Answer, RE 46-4, PageID #

1140). Under the proposed amendment, "shooting ranges would be a permitted use in the AR district." (*Id.* at PageID # 1141). Carlisle Wortman warned that permitting shooting ranges by right may introduce "noise, traffic, or public safety issues." (*Id.*). Whereas, if shooting ranges were a conditional use, the Township could review individual shooting range applications "to ensure that the use will be compatible with the existing and future surrounding uses." (*Id.*). Paige's amendment sought to allow shooting ranges by right, not by conditional (or special) use. (RE 44, PageID # 1098, ¶ 48; Exhibit A to Defendant's Answer, RE 46-2, PageID # 1134-36).

The Township Planning Commission set a public hearing to address Paige's proposed text amendment. (RE 44, PageID # 1098, ¶ 49). At the hearing, the Township Planning Commission reported the findings of Carlisle Wortman, allowed Paige to speak to the community, listened to community member responses, and ultimately voted to "recommend to the Township Board to deny the text amendment changes as presented." (10/24/2017 Public Hearing Minutes, Exhibit 2 to Defendant's Brief in Support of Motion to Dismiss, RE 60-3, PageID # 1261).

On November 13, 2017, the Township Board, "[b]ased on the information provided by the Township Planner, the recommendation of the Planning Commission and the input of the public," voted "to keep the 'AR' zoning text as

is." (11/13/2017 Township Board Meeting Minutes, Exhibit 3 to Defendant's Brief in Support of Motion to Dismiss, RE 60-4, PageID # 1266).

II. THE ZONING ORDINANCE.

The Township's Zoning Ordinance allows commercial shooting ranges in three zoning districts. Plaintiffs concede that shooting ranges are permitted in the Township's Highway Service Commercial Zoning District ("HSC District") (RE 44, PageID # 1096-97, ¶¶ 38-41). Under Section 11.03(A) of the Zoning Ordinance, "recreation and sports buildings" are allowed in the HSC District, and under Section 11.03(B), the HSC District allows "recreation and sports areas, if areas are completely enclosed with fences, walls or berms with controlled entrances and exits." (Zoning Ordinance, Article 11, §11.03(A) and (B), Exhibit 1 to Defendant's Brief in Support of Motion to Dismiss, RE 60-2, PageID # 1247-48).

While Plaintiffs' Complaint acknowledges that shooting is allowed in the HSC District, they fail to mention that indoor shooting ranges are also allowed in the Township's Regional Service Commercial Zoning District ("RSC District") and the Heavy Commercial Zoning District ("HC District"). (*Id.* at PageID # 1244, Article 10, § 10.02(B); *Id.* at PageID # 1252, Article 12, §12.05(E)). Specifically, the Zoning Ordinance allows "indoor commercial recreation" as a permitted principal use in RSC District, (*Id.* at PageID # 1244), and "recreation and physical

fitness facilities" as a permitted accessory use in the HC District. (*Id.* at PageID # 1252). Plaintiffs have not alleged any effort to site a shooting range in any of these districts.

III. THE PARTIES

Plaintiffs are Oakland Tactical and five individuals: Jason Raines, Matthew Remenar, Scott Fresh, Ronald Penrod, and Edward George Dimitroff (collectively, "Plaintiffs"). (RE 44, PageID # 1085-89, ¶¶ 5, 7-10, 12). As noted, Paige is not a party to this lawsuit. The two Plaintiffs who actually live in Howell Township (Mr. Penrod and Mr. Dimitroff) would like a shooting range in this location because their work schedules and work policies allegedly interfere with their ability to practice at other ranges. (RE 44, PageID # 1087-88, 1089, ¶¶ 10, 13). The individual Plaintiffs who live outside the Township (Mr. Fresh, Mr. Raines, and Mr. Remenar) would find it convenient to use this proposed range to "engage in long range target shooting and other shooting activities within Howell Township." (RE 44, PageID # 1086-87; 1101-02, ¶¶ 7-9, 60-62).

IV. PROCEDURAL HISTORY

Plaintiffs filed suit against the Township on November 2, 2018. (Plaintiffs' Complaint, RE 1). On April 10, 2019, the Township filed a Motion to Dismiss Plaintiffs' Complaint pursuant to Fed R. Civ. P. 12(c) alleging that Plaintiffs' Complaint failed because: (1) the Township's decision to deny Plaintiffs' proposed

text amendment did not violate the Second Amendment; and (2) Plaintiffs lacked standing. (Defendant's Motion to Dismiss, RE 20). After briefing the issues, Plaintiffs filed a Motion for Leave to File a First Amended Complaint. (RE 28). The District Court granted Plaintiffs' request to file an amended complaint and denied the Township's Motion as moot. (Order Granting Plaintiffs' Motion for Leave to File an Amended Complaint, RE 36). On June 21, 2019, the Township filed a Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to Fed R. Civ. P. 12(c) because Plaintiffs' First Amended Complaint failed for the same reasons as Plaintiffs' initial Complaint. (Defendant's Motion to Dismiss, RE 39).

After responding to the Township's Motion to Dismiss, Plaintiffs filed a Second Amended Complaint. (Plaintiffs' Second Amended Complaint, RE 44). The Second Amended Complaint named two additional plaintiffs who actually resided in Howell Township. On June 19, 2020, the Township filed another Motion to Dismiss Plaintiffs' Second Amended Complaint pursuant to Fed R. Civ. P. 12(c) (RE 60), and Plaintiffs filed a Motion for Summary Judgment. (RE 61). The District Court granted the Township's Motion to Dismiss and denied Plaintiffs' Motion for Summary Judgment as moot. (Opinion and Order Granting Defendant's Motion to Dismiss, RE 84; Judgment, RE 85). The District Court held, "the complaint should be dismissed for failure to state a claim because defendant violated none of plaintiffs' Second Amendment rights by denying the requested

zoning amendment at issue." (Opinion and Order Granting Defendant's Motion to Dismiss, RE 84, PageID # 2086).

Plaintiffs filed a Motion to Reconsider, Alter or Amend by Vacating Judgment & Motion for Leave to Amend Complaint. (RE 86). The District denied that Motion because: "plaintiffs based their claim on the outlandish proposition that Howell Township violated their Second Amendment rights by denying the application submitted by Oakland Tactical LLC's member, Mike Paige, to amend the township zoning ordinance so as to allow for shooting ranges *throughout the AR district*." (Opinion and Order Denying Plaintiffs' Motion for Reconsideration and for Leave to File a Third Amended Complaint, RE 91, PageID # 2185-86) (emphasis in the original). The District Court explained further:

> Had the township approved Paige's application, the township would have been obligated to approve any application for a shooting range on any parcel within this district so long as "dimensional regulations" (e.g., setback requirements) were met. As the Court further noted, two-thirds of all Howell Township land (13,500 acres) is zoned AR. No provision of the Constitution, including the Second Amendment, requires government entities to grant an amendment to their zoning ordinances to permit any particular activity, whether it be to build cement factories, graze cattle, or construct long-distance shooting ranges.

(RE 91, PageID # 2186).

SUMMARY OF THE ARGUMENT

Plaintiffs argue that the Township violated their Second Amendment rights by denying a text amendment which would "allow for shooting ranges" in the Township's AR District. (RE 46-2, PageID # 1134-36). The denial of this amendment had the effect of preventing Oakland Tactical from opening an "extensive outdoor shooting range facility," which would include a 1,000-yard outdoor shooting range. (RE 44, PageID # 1085, ¶ 6). Dismissal of Plaintiffs' claim pursuant to Fed. R. Civ. P. 12(c) was proper because the Second Amendment does not encompass a right to use or construct an outdoor, open-air, 1,000-yard shooting range.

The Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The Due Process Clause of the Fourteenth Amendment of the United States Constitution prevents states and local governments from infringing upon this right. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

The "core" right contained within the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) (quoting *Heller*, 554 U.S. at 635). The Seventh Circuit Court has recognized that the Second Amendment includes an ancillary right to "acquire and maintain proficiency in

firearm use through target practice at a range." *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017). Plaintiffs overstate the scope of these rights.

STANDARD OF REVIEW

"The district court's decision regarding a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is analyzed using the same de novo standard of review employed for a motion to dismiss under Rule 12(b)(6)." *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). Therefore, when reviewing "a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true," but, "legal conclusions or unwarranted factual inferences" need not be accepted as true. *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (internal quotation and citation omitted). "A motion brought pursuant to Rule 12(c) is appropriately granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Tucker*, 539 F.3d at 549 (internal quotation and citation omitted).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE TOWNSHIP DID NOT INFRINGE UPON PLAINTIFFS' SECOND AMENDMENT RIGHTS.

In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the United States Supreme Court held that the Second Amendment right to keep and bear

arms, guarantees "the individual right to possess and carry weapons in case of confrontation."[1] "The core right recognized in *Heller* is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) (quoting *Heller*, 554 U.S. at 635). Although *Heller* articulated an individual right to keep and bear arms, that right is not unlimited. *Heller*, 554 U.S. at 595.

When faced with a Second Amendment challenge, this Court conducts a two-step inquiry: First, it decides whether the challenged ordinance regulates activity that falls within the Second Amendment, as historically understood. *Greeno*, 679 F.3d. at 518. If the activity falls outside the scope of Second Amendment protection, the ordinance need not be subjected to further Second Amendment review. *Id.* If the activity is protected by the Second Amendment, the court will then determine the appropriate level of scrutiny and evaluate the strength of the government's justification for the ordinance. *Id.*

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[1] *Heller*'s holding was limited to the District of Columbia and federal enclaves. Two years later, the Supreme Court determined that the individual right to possess firearms in the home for self-defense applies to states and local governments through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

A. The Township's Zoning Decision Falls Outside The Scope Of Second Amendment Protection.

1. The Township does not ban shooting ranges.

Plaintiffs claim, "Howell Township has infringed the rights of Oakland Tactical Supply, LLC ("Oakland") to site, construct, and operate a shooting range within the borders of Howell Township, effectively banning all firearms ranges within the township, and the rights of the individual Plaintiffs to practice for lawful purposes with firearms." (RE 44, Page # ID 1085, ¶ 4). Further, "[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." (RE 44, Page # ID 1103, ¶ 70).

This allegation is false and should be not be accepted by this Court. *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009) ("[T]he tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements."). Specifically, to the extent Plaintiffs claim that the Zoning Ordinance is facially unconstitutional because the Township bans shooting ranges, Plaintiffs are simply wrong. The Township does not ban shooting ranges. As noted above, commercial shooting ranges are allowed in three districts. (Zoning

Ordinance, Article 10, § 10.02(B), Article 11, §11.03(A); Article 12, §12.05(E), RE 60-2, PageID # 1244, 1247-48, 1251-51).

Seemingly conceding that some form of shooting ranges are permitted within the Township—just not the type desired by Plaintiffs—on appeal, Plaintiffs changed their argument and now claim that the Township's Zoning Ordinance is facially unconstitutional because it "effectively bans *outdoor*, *long-distance* shooting ranges." (Appellants' Brief, Dk. 25, p. 13) (emphasis added). This position also fails. As explained below, the Second Amendment protection does not encompass a right to use or construct a commercial, outdoor, 1,000-yard shooting range. Accordingly, the District Court's judgment in favor of the Township should be affirmed.

2. The Township's Zoning Decision and Zoning Ordinance do not interfere with the individual right to keep and bear and arms for "for the core lawful purpose of self-defense."

When determining whether a challenged regulation implicates Second Amendment protection, courts evaluate whether the regulation interferes with the right to self-defense: the "central component" of the Second Amendment. *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (*Ezell I*). Read together, *Ezell I* and *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (*Ezell II*),

recognize an individual right to acquire and maintain proficiency in the use of firearms for purposes of self-defense.[2]

Plaintiffs mischaracterize the Second Amendment as protecting the right to train with "rifles or other long guns in common use for lawful purposes." (Appellants' Brief, Dk. 25, p. 31). In their Brief, Plaintiffs repeatedly claim that the Second Amendment broadly protects the use of firearms for "lawful purposes." (Appellants' Brief, Dk. 25, pp. 10, 11, 16, 17, 19, 20, 21, 22, 30, 31, 32, 33). This characterization improperly omits the emphasis that the Supreme Court has placed on self-defense: "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 (emphasis added); see also *Heller*, 554 U.S. at 630 (recognizing "the *core lawful purpose of self-defense*.") (emphasis added). The Second Amendment does not secure "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," nor does it provide unlimited protection to any ostensibly lawful use of firearms, no matter how divorced from the inherent right of self-defense. *Heller*, 554 U.S. at 626.

[2] Notably, neither *Ezell I* nor *Ezell II* analyzed outdoor shooting ranges, but rather, focused generally on one's ability to maintain proficiency in the use of firearms. *Ezell I*, 651 F.3d at 704.

In *Ezell I*, a non-binding case, the plaintiffs challenged a Chicago ordinance that mandated one hour of range training as a prerequisite to lawful gun ownership, "yet at the same time prohibit[ed] all firing ranges in the city." *Id.* at 689-690. *Ezell I*'s training prerequisite coupled with the prohibition on firing ranges in the city severely restricted lawful gun ownership in Chicago. *Ezell I* reaffirmed that "the central component of the right [to keep and bear arms] is the right of armed self-defense, most notably in the home." *Id.* at 700-01. *Ezell I* granted the plaintiffs' request for a preliminary injunction against the shooting range ban. *Id.* at 690, 711. *Ezell I* held:

> [T]he "central component" of the Second Amendment is the right to keep and bear arms for defense of self, family, and home. . . .The 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 (citing *Heller*, 554 U.S. at 599 and *McDonald*, 561 U.S. at 787).

Following *Ezell I*, Chicago revised its zoning ordinance. In *Ezell II*, the plaintiffs challenged Chicago's revised ordinance that, among other things, "allow[ed] gun ranges only as special uses in manufacturing districts" and prohibited gun ranges "within 100 feet of another range or within 500 feet of a residential district, school, place of worship, and multiple other uses." The effect of that zoning ordinance limited gun ranges to only about 2.2% of Chicago's total

acreage. *Id.* As in *Ezell I*, the court in *Ezell II* held the ordinance did not comply with the Second Amendment because it significantly interfered with the plaintiff's "core" right to self-defense. *Id.* at 894-96. *Ezell II* confirmed, "the core individual right of armed defense - as recognized in *Heller* and incorporated against the states in *McDonald* - includes a corresponding right to acquire and maintain proficiency in firearm use through target practice at a range." 846 F.3d at 892.

A right to possess (which is in no sense impacted by the Township's Zoning Ordinance) and maintain proficiency in firearms for defense of one's self, family, and home (which is not impacted in any meaningful way by the Township's Zoning Ordinance) is a far cry from Plaintiffs' desire in this case for a convenient location to practice competitive outdoor long-range shooting. Plaintiffs' have provided no authority supporting their conclusion that their desired facility falls within the established protections of the Second Amendment. Plaintiffs cite a single 2017 news article where a Texas resident confronted an active shooter "outside and at a distance" (the exact distance is not mentioned in the news article or Plaintiffs' brief) as evidence that the outdoor long-distance target shooting is protected by the Second Amendment (Appellants' Brief, Dk. 25, p 34), but offer no explanation as to why one could not train for such a confrontation on their own property within the Township (where two of the Plaintiffs reside), indoors, at a range shorter than 1,000 yards, or the ranges available in the area. The Zoning

Ordinance does not violate the rights secured by the Second Amendment because it allows for commercial shooting ranges in three zoning districts; and it does not regulate the possession of firearms or the activity of shooting at all.

3. Plaintiffs do not have a Second Amendment right to practice shooting in any location they desire.

The Second Amendment does not guarantee gun proprietors the right to sell guns or open shooting ranges in whatever location they so choose, nor does it give individuals a right to have a firearm shop or shooting range in whatever location they desire. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017) (holding that "gun buyers have no right to have a gun store in a particular location"). In *Teixeira*, the plaintiffs leased property with the intent to open a gun store. *Id.* at 674-75. The county ordinances required that "businesses selling firearms in unincorporated areas of the County be located at least five hundred feet away from . . . schools, day care centers, liquor stores," and other disqualifying properties. *Id.* at 674. The plaintiffs applied for a Conditional Use Permit. *Id.* at 675.

After a public hearing, the County Planning Department recommended that the plaintiffs' application be denied because it did not comply with the county ordinance. *Id.* The plaintiffs then commissioned a study which found that it was "virtually impossible" to open a gun store under the county ordinance. *Id.* at 676.

Thereafter, the plaintiffs filed suit against the county alleging violation of their Second Amendment right to keep and bear arms. *Id.*

The court dismissed the plaintiffs' claim because gun sellers do not have an independent Second Amendment right. *Id.* at 690. Additionally, the court held that the plaintiffs failed to state a claim on behalf of their potential customers because those customers could purchase guns elsewhere in the county even though the alternate locations may not have been as convenient as the location proposed by the plaintiff. *Id.* at 679-681. The *Teixeira* court held, "gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained." *Id.* at 680. It explained, "the Second Amendment does not elevate convenience and preference over all other considerations." *Id.*

Like in *Teixeira*, Plaintiffs' claim here was properly dismissed because the Second Amendment does not guarantee individuals the right to a firearm shop or shooting range in whatever location they so desire, even if that location is more convenient than current alternatives. *Id.*

Plaintiffs do not allege that they cannot practice shooting for the purpose of self-defense within Howell Township or neighboring areas. To the contrary, as illustrated by Exhibit B to the Township's Answer (RE 46-3, PageID # 1138), Plaintiffs have alternative locations to engage in shooting practice near Howell Township. Plaintiffs concede that, although crowded, indoor shooting ranges exist

in the nearby City of Howell (RE 44, PageID # 1094, ¶ 30). Additionally, Plaintiffs admittedly have access to a 100-yard range located just 30 minutes from the property at issue. (RE 44, PageID # 1094, ¶ 32). Plaintiffs also admit that hunting is expressly permitted in at least one district within the Township. (RE 44, PageID # 1097, ¶ 42). Further, shooting ranges are allowed in three districts. (Zoning Ordinance, Article 10, § 10.02(B), Article 11, §11.03(A); Article 12, §12.05(E), RE 60-2). Plaintiffs concede that shooting is allowed in the Township's Highway Service Commercial District ("HSC District") (RE 44, PageID # 1096, ¶ 38). Plaintiffs complain that the HSC District offers only "a few acres of undeveloped land" that is "significantly less than that required for a safe, long-distance rifle range." (*Id.* at ¶ 41), but Plaintiffs have provided no support for their allegation that 1,000-yard, outdoor range is needed for practice with long guns.

4. Plaintiffs' emphasis on long guns is unavailing.

Even assuming, for the sake of argument, that shooting practice with long guns is historically protected by the Second Amendment, the Township has not interfered with that right. The Township does not ban long guns, nor does it ban practice with such weapons. Plaintiffs provide no support for their claim that a 1,000-yard, outdoor shooting range is necessary to practice with such weapons, nor do Plaintiffs provide any support for their position that a 1,000-yard, outdoor shooting range falls within the protection of the Second Amendment as historically

understood. Historically, "the ordinary musket," a long gun referenced in Appellants' Brief, Dk. 25, p 29, "was accurate at only 100 yards or so." Ron F. Wright, *Shocking the Second Amendment: Invalidating States' Prohibitions on Taser with the District of Columbia v. Heller*, 20 Alb. L.J. Sci. & Tech. 159, 202 (2010). Further, Plaintiffs own Brief cites a letter from James Madison which referenced target shooting at 100 yards. (Appellants' Brief, Dk. 25, p 25).

The District Court correctly reasoned:

> None of the cases plaintiffs cite, and none of which the Court is aware, suggest 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 [sic] shooting range, such as plaintiffs propose. Nor have plaintiffs cited a single case that suggests 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, which in this case comprises fully two-thirds of the township's land.

Plaintiffs' contention that, because practice with long guns was historically protected by the Second Amendment, municipalities must allow 1,000-yard, outdoor shooting ranges within their bounds, is illogical. Many dense municipalities would be physically unable to accommodate such a right, and one can certainly practice with long guns at indoor ranges or ranges shorter than 1,000 yards—settings which would be less removed from the Second Amendment's core

lawful purpose of self-defense in the home, as enshrined by *Heller*, than the facility desired by Plaintiffs. *Heller*, 554 U.S. at 630.

B. The Township's Zoning Ordinance and Decision to Deny Paige's Proposed Text Amendment Survive Heightened Scrutiny.

While this step is not necessary to analyze because Plaintiffs' claimed right does not fall within Second Amendment protection, *Greeno*, 679 F.3d. at 518, this step was included in Plaintiffs' Brief on Appeal, and therefore (Appellants' Brief, Dk. 25, pp 37-41), it is included here for completeness.

Even if Plaintiffs' claim fell within the scope of Second Amendment protection under the first prong of *Greeno*, *supra*, the Township's Ordinance and decision to deny Paige's proposed text amendment survives constitutional scrutiny.

When determining the appropriate level of scrutiny to apply in a Second Amendment case, the court will consider "(1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'" *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). Although regulations that heavily burden Second Amendment rights might call for strict scrutiny, *Turaani v. Sessions*, 316 F. Supp. 3d 998, 1012-13 (E.D. Mich. 2018), "[i]ntermediate scrutiny is preferable" when reviewing Second Amendment challenges. *Tyler*, 837 F.3d at 692. "[H]eightened scrutiny is triggered only by

those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (parentheticals in the original).

Plaintiffs' allegations regarding the Township's Zoning Ordinance do not implicate the core Second Amendment right to keep and bear arms for self-defense or the implied corresponding right to acquire and maintain proficiency in firearms used for self-defense in the home. In fact, as explained above, the Township Zoning Ordinance does not ban shooting ranges or other Second Amendment activity; rather, it regulates where commercial shooting ranges may be sited in the Township in order to minimize negative secondary effects. Such time, place, or manner regulations may be analyzed like those which implicate the First Amendment. *Decastro*, 682 F.3d at 167 (explaining that in deciding whether a law substantially burdens Second Amendment rights, "it is appropriate to consult principles from other areas of constitutional law, including the First Amendment.").

Zoning regulations that affect the location of activity protected by the First Amendment are permitted when those regulations are necessary to further governmental interests. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71–73, 96

S. Ct. 2440, 2453, 49 L. Ed. 2d 310 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52, 106 S. Ct. 925, 931, 89 L. Ed. 2d 29 (1986). When evaluating the reasonableness of content-neutral time, place or manner regulations, the Court asks whether the challenged regulation "leave[s] open ample alternative channels for communication of the information." *Decastro*, 682 F.3d at 167 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293; 104 S. Ct. 3065; 82 L. Ed. 2d 221 (1984)). By analogy to First Amendment jurisprudence, laws that regulate the location of Second Amendment protected activity are constitutional when they serve an important governmental interest and leave open adequate alternative channels to exercise the right at issue. *Id.* at 168.

Notably, in their Brief on Appeal, Plaintiffs misstate Justice Kennedy's opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) as "controlling" when, in actuality, it is a concurring opinion. (Appellants' Brief, Dk. 25, p 39). Plaintiffs rely upon Justice Kennedy's reasoning which called for application of strict scrutiny to the municipal ordinance that allegedly interfered with those plaintiffs' First Amendment rights. (*Id.*). But, the plurality opinion actually applied intermediate scrutiny to the municipal ordinance at issue in that case. *Alameda Books, Inc.*, 535 U.S. at 440.

In this case, the Ordinance should be upheld because it serves significant Township interests in reasonable ways. A municipality's interest in regulating land uses within its jurisdiction is significant. *Renton*, 475 U.S. at 50 ("[A municipality's] interest in attempting to preserve the quality of urban life is one that must be accorded high respect."); *Lamar Advertising of Michigan, Inc. v. City of Utica*, 819 F. Supp. 2d 657, 663 (E.D. Mich. 2011) (A municipality's interests in enacting a zoning ordinance to protect "the public health, safety, traffic and esthetic [*sic*] character of the [municipality] are valid on their face."). Additionally, the governmental interest in regulating the use of lands within a municipality is unquestionably substantial. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) ("There is no question that Chicago—like any population center—has a substantial interest in regulating the use of its land and that the [Chicago Zoning Ordinance] promotes that interest."). "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Mount Ephraim*, 452 U.S. 61, 68; 101 S. Ct. 2176, 2182 (1981).

Further, longstanding regulations like "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" are

presumptively valid. *Heller*, 554 U.S. at 626-27. The list of presumptively lawful regulatory measures identified in *Heller* is not exhaustive. *Id.* at 627 n.26. Michigan law expressly recognizes that a local unit of government may regulate "the location, use, operation, safety, and construction of a sport shooting range." Mich. Comp. Laws § 691.1543.

Howell Township's Zoning Ordinance serves significant, substantial and important interests including the protection of public health, safety and general welfare, the need for planned, orderly growth and development of the Township, and the use of resources and land as "necessary to the social and economic well-being of present and future generations." (RE 46-5, PageID # 1147; see also RE No. 60-2, PageID # 1220). These interests are substantial and to be "accorded high respect." *Jott, Inc. v. Clinton Charter Twp.*, 224 Mich. App. 513, 528, 569 N.W.2d 841, 847 (1997) (quoting *Renton*, 475 U.S. at 50).

When Paige sought to amend the AR District to allow for the proposed shooting range, the Township reasonably opted to deny the proposed amendment to preserve its significant interests. As noted above, the Township Planner, Carlisle Wortman, reviewed Paige's application and cautioned that permitting shooting ranges by right may introduce "noise, traffic, or public safety issues" into the AR District. (Exhibit C to Defendant's Answer, RE 46-4, PageID # 1141). Based on this report, the recommendation of the Planning Commission, and the input of the

public, the Township Board voted to deny Paige's text amendment. (11/13/2017 Township Board Meeting Minutes, RE 60-4, PageID # 1266).

Consequently, the AR District regulations establish a reasonable fit with the important objectives expressed in the Ordinance. Limiting commercial shooting ranges to specific districts, such as the HSC District, and allowing private shooting ranges as an accessory use elsewhere provides the Second Amendment protection to which Plaintiffs are entitled. There is no obligation for the Township to allow commercial shooting ranges in other districts, like the AR District. To the contrary, the AR District regulations reasonably serve the significant objectives and goals of the Zoning Ordinance and the Township provides ample alternative channels for Plaintiffs to practice and maintain proficiency in their use of firearms. Thus, the Township's decision to deny Paige's text amendment was Constitutional.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant/Appellee Howell Township respectfully request that this Court affirm the District Court's judgment dismissing Plaintiffs'/Appellants' claim for violation of the Second Amendment, and grant them any other just and proper relief.

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Dated: July 6, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,793 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font Times New Roman type style.

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument, and related documents if any, was served upon the attorneys of record of all parties by the court's efiling/service system on July 6, 2021. The above statement is true to the best of my knowledge, information and belief.

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DESIGNATION OF RELEVANT ORIGINATING DOCUMENTS

RE 1	Complaint	
RE 20	Motion to Dismiss	
RE 28	Motion for Leave to File a First Amended Complaint	
RE 36	Order Granting Motion for Leave to File an Amended Complaint	
RE 39	Motion to Dismiss	
RE 44	Second Amended Complaint	
RE 46-2	Paige's Proposed Text Amendment	PageID # 1134-1136
RE 46-3	Map of Public Shooting Ranges	PageID # 1138
RE 46-4	Township Planner Report	PageID # 1140-1141
RE 46-5	Howell Twp Zoning Ordinance	PageID # 1147
RE 60	Motion to Dismiss	
RE 60-2	Zoning Ordinance	
RE 60-3	10/24/2017 Public Hearing Minutes	PageID # 1261
RE 60-4	11/13/2017 Township Board Meeting Minutes	PageID #1266
RE 61	Motion for Summary Judgment	
RE 84	Opinion and Order	
RE 85	Judgment	
RE 86	Motion to Reconsider, Alter or Amend	
RE 91	Opinion and Order	PageID # 2185-2186