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.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

This case comes before the Court on review of an order granting a motion to dismiss. As Plaintiffs demonstrated in their opening brief, the Complaint alleges that Howell Township effectively bans the operation of outdoor, long-distance shooting ranges. Because the Complaint makes that allegation, the order granting the motion to dismiss was in error. Just as the freedom of the press would not mean much without paper and ink, *see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the right to keep and bear arms would not "mean much without the training and practice that make it effective," *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("*Ezell I*"). Because the right to keep and bear arms protects a right to train with firearms, the restriction at issue should be struck down categorically. And at a minimum, heightened scrutiny should apply. And the Township has failed to show, particularly at this early stage of the litigation, that its ban is sufficiently tailored to an important government interest. For these reasons, the order granting the motion to dismiss should be reversed.

The Township makes several arguments in defense of its ban, but none justifies the district court's order dismissing the case.

First, the Township insists that it does not ban *all* shooting ranges. *See* Def.-Appellee's Br. on Appeal, Doc. 26 at 18 ("Township Br."). But as Plaintiffs' opening brief makes clear, Plaintiffs are not arguing that the Township bans all shooting

ranges. Instead, Plaintiffs allege that the Township bans the operation of outdoor shooting ranges necessary to engage in long-distance training.

Second, the Township argues that "Second Amendment protection does not encompass a right to use or construct a commercial, outdoor, 1,000-yard shooting range." *Id*. at 19. But if the Second Amendment protects a right to train with firearms (which the Township does not deny), it is incumbent on the Township to show why long-range training specifically falls outside of the scope of the Second Amendment's protection. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) ("The Second Amendment extends, prima facie, to all instruments that constitute bearable arms . . . ."). And the Township offers no compelling evidence from text, history, or tradition to support an argument that long-range training is not protected. To the contrary, long-range shooting proficiency was a critical skill at the Founding.

Third, the Township argues that Plaintiffs could train "indoors." Township Br. at 22. But the central thrust of Plaintiffs' case is that outdoor ranges are required for the full range of training in which they desire to engage. Just as "it is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms . . . is allowed," *Heller*, 554 U.S. at 629, it should be no answer to say that it is permissible to ban one type of training so long as another type of training is allowed.

Fourth, the Township argues that Plaintiffs "have access to a 100-yard range located just 30 minutes from the property at issue." Township Br. at 25. But 100 yards, of course, is only one-tenth of the maximum distance of training that Oakland Tactical intends to allow. More fundamentally, however, a jurisdiction cannot defend its infringement of a constitutional right by pointing to *another* jurisdiction where the right in question may be exercised. *See Ezell I*, 651 F.3d at 697.

Fifth, the Township suggests that the Ordinance is "presumptively lawful" under *Heller*. Township Br. at 31–32. But firearm-training regulations are nowhere mentioned in *Heller*, and the Township provides no evidence that outdoor or long-distance training traditionally has been banned. As this Court has deemed even "ambiguous historical support" insufficient to establish a ban's presumptive lawfulness, *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc), the Township's lack of evidence must fail, too.

Sixth, the Township argues that its Ban is a "time, place, or manner regulation[ ]." Township Br. at 28. But Plaintiffs' allegation is that the Township does not allow the operation of the type of range Oakland Tactical intends to build and Training Plaintiffs intend to use at any time, in any place, or in any manner. The issue in this case is whether this type of range can be operated in Howell Township *at all*.

Seventh, the Township argues that its Zoning Ordinance advances important interests such as "protection of public health, safety and general welfare," Township Br. at 31, but nowhere explains why these interests justify a flat, jurisdiction-wide ban on outdoor, long-distance ranges. Instead, the Township principally focuses on reasons—themselves speculative and insufficient to satisfy heightened scrutiny—for denying a proposed amendment to its Ordinance that would have allowed ranges in the Agricultural Residential District by right. But this is a red herring. The issue in this case is the Township's ban and the justifications for it, not whether the Township reasonably denied one proposal to remedy that ban.

In addition to the Township's response brief, another notable event has occurred since the filing of Plaintiffs' brief: the Third Circuit's decision in *Drummond v. Robinson Township*, No. 20-1722 (3d Cir. August 17, 2021), ECF No. 68. There, the Third Circuit reversed the dismissal of a Second Amendment challenge to local range restrictions much *less* burdensome than the Township's restrictions here. Robinson Township barred certain types of ranges (Sportsman's Clubs) from providing center-file rifle training and having for-profit ownership, while not restricting other types of ranges (Shooting Ranges) in these respects. Even though, unlike this case, *Drummond* did not involve a flat ban on a certain type of training, the Third Circuit held that the plaintiffs plausibly alleged a Second

Amendment violation and reversed the district court decision dismissing the case. If reversal was properly ordered in *Drummond*, it necessarily must be ordered here.

For these reasons, the district court's order granting the Township's motion to dismiss should be reversed.

I. The Township Bans Outdoor, Long-Distance Ranges.

Oakland Tactical and Training Plaintiffs argued in their opening brief that "the Complaint taken as a whole *at a minimum* amply alleges that Howell Township effectively bans *outdoor and long-distance* shooting ranges," Pls.-Appellants' Opening Br., Doc. 25 at 42 ("Op'g Br."). *Id.* at 42–47. Indeed, we explained that because of the restrictions present in the only district in which an outdoor range of *any kind* potentially could locate, the Township effectively bans *all* outdoor ranges. *Id*. at 15. The Township concedes these points by nowhere denying them and insisting only that its ban does not extend to *all* shooting ranges. Township Br. at 18–19. Thus, the sole issue in dispute is whether a total ban on outdoor shooting ranges is constitutional. We focus the discussion below on *long-distance* ranges, as that is the specific type of range Oakland Tactical intends to build. But it follows a fortiori from our arguments that an effective ban on all outdoor ranges also is unconstitutional.

The Township suggests that Plaintiffs changed their argument on appeal. But Plaintiffs' complaint, while containing some broad language, focuses extensively on

the effect of Howell Township's zoning code on outdoor and long-distance ranges. *See* Op'g Br. at 33–38. And this likewise was the focus of Plaintiffs' response to the motion to dismiss, which opened by stating that "Howell Township's Zoning Ordinance creates an effective ban on outdoor shooting ranges within the Township." Pls.' Resp. in Opp'n to Def.'s 12(c) Motion, R.E. 65, PageID#1847. The motion for reconsideration reiterated that "the infringement alleged by Plaintiffs is in reference to the Defendant Township's restrictions on *outdoor* shooting ranges." Pls.' Br. in Supp. of Recons'g, Alt'g or Am'g in Order to Vacate J. & Granting Leave to Amend Compl., R.E. 86 PageID#2109. At any rate, Plaintiffs' *claim* has remained consistent—that the Township's range restrictions violate the Second Amendment. And even if Plaintiffs were making a new argument in support of that claim by focusing on outdoor ranges on appeal—and, to be clear, they are not—there would be nothing improper about doing so. *See Gallenstein v. United States*, 975 F.2d 286, 290 n.4 (6th Cir. 1992).

II. Training at Outdoor, Long-Distance Ranges Falls Well Within the Scope of the Second Amendment.

To resist the Second Amendment's invalidation of a ban of protected conduct, the Township first argues that the conduct at issue here falls entirely outside the scope of the Second Amendment. In particular, the Township maintains that the ban does not interfere with "the core lawful purpose of self-defense." Township Br. at 19. But the Township bears the burden of proving that long-distance firearms

training falls outside the historical scope of the Second Amendment. *See Tyler*, 837 F.3d at 685. It cannot carry that burden by asserting that its training ban does not interfere with "the core lawful purpose of self-defense," Township Br. at 19, for: (A) the relevant inquiry is whether the challenged law burdens any activity within the scope of the Second Amendment, not whether it burdens self-defense; and (B) in any event, the ban *does* burden self-defense. And contrary to passing arguments by the Township, Plaintiffs' interpretation of the Second Amendment is plainly (C) not ahistorical and (D) not illogical.

A. The Ban Burdens Conduct Within the Scope of the Second Amendment.

The Township aims to exclude outdoor, long-distance training from the scope of the Second Amendment on the ground that such a ban does not implicate the Amendment's "core lawful purpose" or "central component." *Id.* at 19–21. But on the Township's own terms, this argument immediately fails: A *core* or *central* purpose is not an *exclusive* one, and the Township's citation of *Heller* and *Ezell I* notwithstanding, nothing in those cases suggests otherwise.

Indeed, *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012), on which the Township relies, *e.g.*, Township Br. at 17, excludes at this step of the analysis whether the challenged law interferes with a core or central purpose of the Second Amendment, focusing solely on "'whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood.'"

Tyler, 837 F.3d at 688 (quoting *Greeno*, 679 F.3d at 518). So, regardless of whether the Township's ban interferes with self-defense, the question is whether the ban burdens *any* conduct within the Second Amendment's scope as historically understood. And the burden is on the government 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. . . ." *Id.* at 685 (citing *Greeno*, 679 F.3d at 518). If "the historical evidence is inconclusive or suggests that the regulated activities . . . are not categorically unprotected," then the government failed to carry its burden. *Id.* at 686 (quoting *Greeno*, 679 F.3d at 518). Here, the Township has failed to provide *any* historical evidence demonstrating that firearm training was not historically protected, and the Township unquestionably burdens firearm training.

The Township's failure to carry its burden alone precludes excluding Plaintiffs' intended conduct from the scope of the Second Amendment. But it bears emphasis that the Township's focus on self-defense is too narrow. *Heller* identifies several purposes the Founding generation understood the Second Amendment to fulfill, including but not limited to self-defense. The Court reasoned that the Second Amendment's prefatory clause indicates that "preserving the militia" was "the purpose for which the right was codified," and that most Americans "undoubtedly thought it even more important for self-defense and hunting." 554 U.S. at 599. Firearm training in general and long-distance training in particular promotes each of

these purposes. A citizenry well-trained in long-distance marksmanship will form a more effective militia, be better capable of self-defense, and be better hunters than an otherwise equivalent citizenry without that experience.

B. The Ban Burdens the Right of Self-Defense.

In any event, the Township's ban on outdoor, long-distance training plainly interferes with self-defense. Although the Township questions how often confrontation outdoors or at distance may occur, *see* Township Br. at 22, it does not and cannot deny the possibility of such confrontation. And it is a matter of law that the right to self-defense in case of such confrontation "wouldn't mean much without the training and practice that make it effective." *Ezell I*, 651 F.3d at 704.

Furthermore, the self-defense Oakland Tactical's range will facilitate is by no means *limited* to confrontations taking place outdoors and at a distance; that is just the component of self-defense that would be *uniquely promoted* by the range. In addition to its long-distance range, Oakland Tactical also intends to offer "public access rifle, shotgun, and handgun ranges." Second Am. Compl. ¶ 6, R.E. 44, PageID#1086. The Township's ban on outdoor ranges therefore impacts training of all types for the lawful purpose of self-defense. And, as explained above, it also implicates the Second Amendment's protection of hunting and militia preservation.

C. The Township's Historical Evidence Is Irrelevant and Inaccurate.

By focusing on the right of self-defense, the Township elides the fact that long-distance firearm training itself is a protected Second Amendment activity. Just as the Founders deemed the right to keep and bear arms important for lawful purposes such as "preserving the militia" and "hunting," *Heller*, 554 U.S. at 599, for which long-distance firearm training is also critical, training itself was intended to be a protected activity as well. As explained in Plaintiffs' opening brief, the Founders understood that a populace trained in arms was essential for the preservation of liberty. Op'g Br. 28–35. A people "continually trained up in the exercise of arms," ensured 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 (1788) (quoting MARCHAMONT NEDHAM, THE RIGHT CONSTITUTION OF A COMMONWEALTH 89 (1656)).

Indeed, the Township does not dispute Plaintiffs' thorough historical analysis showing that the Founders understood training to be protected by the Second Amendment. Rather, the Township suggests that a long gun range is unnecessary because "[h]istorically, 'the ordinary musket,' a long gun referenced in Appellants' Brief, Dk. 25, p 29, 'was accurate at only 100 yards or so.'" Township Br. at 26 (quoting 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)). The suggestion is that the Founders' firearms could not accurately fire over 100 yards, so a 100-yard range is sufficient in the 21st century. But this is irrelevant under *Heller*—and historically inaccurate.

Heller denounced "the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment." 554 U.S. at 582. Rather, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.*; *accord Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016). The argument that the right to train with arms is limited to training with the arms that existed in the 18th century, or at the effective range of those arms, likewise "border[s] on the frivolous." The Second Amendment must protect the right to train with all arms protected by the Second Amendment. In the 21st century, permitting a 100-yard range does not achieve that protection.

Moreover, to the extent it matters, firearms in the Founding Era had ranges over 100 yards. During the Revolutionary War, General Washington "arranged a spectacular review of his riflemen." 1 CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY 79 (1910). A "mark was about equal to that a man would present standing sideways, and the range about 200 yards. . . . the riflemen, firing singly or at command, so riddled the pole that it was apparent that no enemy could survive an instant." *Id.* at 80. "General Howe," the commander-in-chief of the British land

forces, "was fully as much impressed as the spectators, and wrote home about the 'terrible guns of the rebels.'" *Id.* The riflemen soon started picking off Howe's men from long distances. "There is mention of a British soldier shot at 250 yards when only half his head was visible," and one rifleman, "seeing some British on a scow at a distance of fully half a mile, found a good resting place on a hill and bombarded them until he potted the lot." *Id.* at 81. Indeed, "it was almost certain death" for British soldiers "to expose their heads within *two hundred* yards of the riflemen." 8 OHIO ARCHEOLOGICAL AND HISTORICAL PUBLICATIONS 222 n.35 (Fred J. Heer ed., 1900) (emphasis added).

Indeed, the historical record includes still longer ranges. In a consequential moment of the war, during the Saratoga Campaign, a Pennsylvania hunter named Timothy Murphy killed General Simon Fraser from around 300 yards. SAWYER, at 86. Likewise, during the 1778 Siege at Boonesborough, the Shawnees fired into Daniel Boone's fort from hills roughly 300 yards away, LYMAN COPELAND DRAPER, THE LIFE OF DANIEL BOONE 529 (1998), and a Shawnee interpreter was said to have been shot at 600 yards. Rufus L. Porter, *Porter's Fort*, COLORADO SPRINGS GAZETTE TELEGRAPH (Jan. 2, 1973), at 18. And rifle-maker Jacobus Scout "shot an English soldier at 900 yards and killed him." THE CRAVEN HALL NEWSLETTER, vol. 19, issue 1, at 7 (March 2021), https://bit.ly/3CWMLYr; W.W.H. DAVIS, THE HISTORY OF BUCKS COUNTY, PENNSYLVANIA, FROM THE DISCOVERY OF THE DELAWARE TO THE

PRESENT TIME 222 (1876). In short, even Revolutionary-era rifles far exceeded the 100-yard range to which the Township sees fit to restrict training. In this light, too, such a restriction violates the Second Amendment.

D. The Second Amendment's Protection of Firearms Training Is Not Illogical.

The Township asserts that it would be "illogical" to hold that "municipalities must allow 1,000-yard, outdoor shooting ranges within their bounds," as "[m]any dense municipalities would be physically unable to accommodate such a right." Township Br. at 26–27. But critically absent from this argument is any indication that Howell Township is physically unable to accommodate a long-distance outdoor range. Perhaps this would be a different case if it involved a wholly urban jurisdiction that could not safely accommodate an outdoor shooting range. But that is not this case. And there is a dearth of support for "the proposition that target practice at a safely sited and properly equipped firing range enjoys no Second Amendment protection whatsoever." *Ezell I*, 651 F.3d at 706.

III. Plaintiffs Have a Right to Practice with Long-Distance Firearms *Somewhere* in the Township.

The Township suggests that Plaintiffs could train "on their own property within the Township (where two of the Plaintiffs reside), indoors, [or] at a range shorter than 1,000 yards." Township Br. at 22. Yet, on the contrary, Training Plaintiffs have alleged that they currently cannot engage in outdoor or long-distance target shooting within Howell Township, making clear that their own property is

unsuitable for that purpose. Op'g Br. at 16. Indeed, Plaintiff Penrod has alleged that he lives "in a rural part of Howell Township with horses, and he fears for his family's safety and the safety of their animals due to the sound of uncontrolled shooting occurring on other residents' properties around his property." Second Am. Compl. ¶ 11, R.E. 44, PageID#1088. "Oakland's proposed range facility" therefore "would provide a valuable asset to him and to his neighbors and the greater community by providing a safe and controlled environment for practicing shooting in Howell Township." *Id.* at PageID#1089. Additionally, Plaintiffs have explained that no range near or within the township offers training over 100 yards. Op'g Br. at 16. The Township has offered nothing to dispute these allegations, and on a motion to dismiss they must be accepted as true.

Thus, Plaintiffs seek to enforce, not a "right to practice shooting in any location they desire," Township Br. at 23, but rather a right to train with firearms to the full extent that the Second Amendment secures. Just as "it is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms . . . is allowed," *Heller*, 554 U.S. at 629, it should be no answer to say that it is permissible to ban one type of training so long as another type of training is allowed.

Nor is *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc), on which the Township relies, Township Br. at 23–24, at all to the contrary. At issue

in *Teixeira* was an Ordinance that restricted where gun stores could locate in the County of Alameda. The Ordinance thwarted the plaintiff's efforts to open a gun store, and he filed a lawsuit alleging a violation of the Second Amendment. Notably, however, Teixeira did not allege that the Ordinance amounted to a flat ban on gun stores or the sale of any particular type of firearm in the County. To the contrary, there were ten other gun stores operating in Alameda County, including one "approximately 600 feet away from the proposed site of Teixeira's planned store." *Teixeira*, 873 F.3d at 679. The court therefore held that "Teixeira fails to state a plausible claim on behalf of his potential customers that the ordinance meaningfully inhibits residents from acquiring firearms within their jurisdiction." *Id*. at 680.

Plaintiffs in this case, by contrast, allege precisely in the training context what was missing in the acquisition context in *Teixeira*—that the zoning code effectively prohibits the operation and use of long-distance firearm ranges in the Township. This case is therefore more akin to *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) ("*Ezell II*"), in which the Seventh Circuit invalidated Chicago zoning regulations that "dramatically limit[ed] the ability to site a shooting range within city limits." *Id*. at 890. Indeed, *Teixeira* expressly distinguished *Ezell II* based on the existence of other options to purchase firearms in Alameda County. *See* 873 F.3d at 679. There is no such basis to distinguish it here.

IV. The Township Cannot Deny Second Amendment Rights Because Others Honor Them.

The Township also points to the availability of a "100-yard range located just 30 minutes from the property at issue." Township Br. at 25. As an initial matter, such a range provides for training at only one-tenth the distance of the training that Oakland Tactical desires to provide and that Training Plaintiffs desire to practice. But more fundamentally, the assumption "that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction" is "a profoundly mistaken [one]." *Ezell I*, 651 F.3d at 697. Just as "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77 (1981), one cannot have the exercise of their right to train in arms infringed on the plea that it may be exercised in some other place. Indeed, "it's hard to imagine anyone suggesting that [the Township] may prohibit the exercise of a free-speech or religious liberty right within its borders on the rationale that those rights may be freely enjoyed" elsewhere. *Ezell I*, 651 F.3d at 697. This Court should join the Seventh Circuit in holding that "that sort of argument should be no less unimaginable in the Second Amendment context." *Id*.

V. The Ordinance Is Not Presumptively Lawful.

The Township tries to cast the Ordinance, which was amended in January 2021, as a "longstanding regulation[ ]" that is "presumptively lawful" under *Heller*,

Township Br. at 30–31, because a 1989 statutory provision "did not prohibit" local regulation of sport shooting ranges, MICH. COMP. LAWS § 691.1543. This argument fails for several independent reasons. To start, a single law enacted near then end of the 20th century is a novelty, not a longstanding regulation. Furthermore, the provision in question simply states, "Except as otherwise provided in this act, this act does not prohibit a local unit of government from regulating the location, use, safety, and construction of a sport shooting range." MICH. COMP. LAWS § 691.1543. We are not arguing that the Second Amendment rids the Township of all authority to regulate shooting ranges for public safety. Rather, we are arguing that the Second Amendment prohibits the Township from erecting a constructive ban on outdoor, long-distance ranges. The Township points to no evidence that such bans are longstanding in our constitutional tradition.

Finally, even if bans on outdoor ranges were longstanding, the evidence we have adduced about the importance of training and long-distance shooting acumen at the Founding would rebut any presumption of constitutionality that could arise. "[P]ost-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The Second Amendment's scope was set in 1791, *see*

Gamble v. United States, 139 S. Ct. 1960, 1975–76 (2019), and there is no indication that outdoor training was not within the Amendment's scope.

VI. The Ban Is Not a Time, Place, and Manner Regulation.

The Township also argues that its Ban is a "time, place, or manner regulation[ ]." Township Br. at 28. But Plaintiffs' allegation is that the Township does not allow the operation of the type of range Oakland intends to build and Training Plaintiffs intend to use at any time, in any place, or in any manner. *See* Op'g Br. at 7. The issue in this case is whether this type of range can be operated in Howell Township *at all*. "[A] complete ban on protected … activity" is not "properly analyzed as a time, place, and manner regulation." *See Dream Palace v. County of Maricopa*, 384 F.3d 990, 1013 (9th Cir. 2004).

VII. The Township's Alleged Interests Cannot Justify Its Ban.

Finally, the Township argues that this Court should apply the two-step, tiers-of-scrutiny analysis adopted *Greeno*, 679 F.3d at 517, Township Br. at 16–17, and that, under that analysis, its Ordinance advances important interests such as "protection of public health, safety and general welfare," that justify its Ban, *id.* at 31. This is wrong at both steps.

A. The Township's Two-Step Inquiry Is Inappropriate in This Case.

Given that training 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." 554 U.S. at 634. The Township's effective ban on training at outdoor, long-distance ranges is just such an infringement of Second Amendment conduct. Accordingly, it is unconstitutional.

As noted in Plaintiffs' opening brief, Op'g Br. at 25–28, even courts that elsewhere apply a tiers-of-scrutiny analysis may adopt *Heller*'s approach to a full ban on protected activity by law-abiding, responsible citizens. For example, the Seventh Circuit, despite typically applying a levels-of-scrutiny inquiry to Second Amendment claims, 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). Likewise, the D.C. Circuit invalidated categorically a District of Columbia law that had the effect of banning typical citizens from carrying firearms in public under *Heller*'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). The Township offers no argument against adhering in this case to such authorities, under which the Township's total ban on outdoor, long-distance training would be unconstitutional for banning

conduct protected by the Second Amendment. And conceptually, such an approach fits in at *Greeno*'s second step because there is no justification that could support a broad, wholesale ban on protected conduct. *Cf. Heller*, 554 U.S. at 628–29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights," D.C.'s handgun ban "would fail constitutional muster.").

B. Strict Scrutiny Should Apply.

If the Court exercises means-end scrutiny, under this Court's precedent the level of scrutiny depends on "(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Tyler*, at 690 (quotations marks omitted). In the circumstances of this case, strict scrutiny should apply.

To start, Plaintiffs are all "law-abiding, responsible citizens," who "are at the core of the Amendment's protections." *Id.* at 685 (quoting *Heller*, 554 U.S. at 635). Plaintiffs intend to operate and use a shooting range for lawful purposes including the purpose of self-defense. *See, e.g.,* Second Am. Compl. ¶¶ 6, 8–9, 11, 15, R.E. 44, PageID#1085–91. And because the "right [to self-defense] wouldn't mean much without the training and practice that make it effective," *Ezell I*, 651 F.3d at 704, the Township's range ban strikes at the very heart of the Second Amendment.

The Township erroneously argues that "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." Township Br. 28. The right to train plainly implicates self-defense, a central purpose of the Second Amendment, as well as the right to hunt and indeed to use firearms for any lawful purpose. Training is key to the effective exercise of Second Amendment rights. Indeed, the argument that a ban on long-range training specifically does not even implicate the Second Amendment is difficult to fathom given the centrality of long-range marksmanship to the defeat of the British in the American Revolution.

The Township's argument fails for the independent reason that it relies on the assumption that the Second Amendment's "core" is limited to the home. The Supreme Court's cases contain no such limitation. To the contrary, both *Heller* and *McDonald* make clear that the Second Amendment at its heart protects self-defense, period, not self-defense in a particular location. *See, e.g.*, *Heller*, 554 U.S. at 599 ("[S]elf-defense . . . was the central component of the right itself."); *id.* at 630 (The requirement that firearms be kept inoperable "makes it impossible for citizens to use them for the core lawful purpose of self-defense."); *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010) (*Heller* concluded that "citizens must be permitted to use handguns for the core lawful purpose of self-defense.") (cleaned up). It follows that the "core" Second Amendment right is not homebound, since "the interest in

self-protection is as great outside as inside the home." *Moore*, 702 F.3d at 941. *See also Wrenn*, 864 F.3d at 659.

Thus, when the Township argues that the Ordinance "leave[s] open adequate alternative channels to exercise the right," Township Br. at 29, it must mean that *other* rights may be exercised—such as the right to keep firearms or train indoors at shorter ranges, *id.* at 22—just not the right Training Plaintiffs wish to exercise. This is akin to a government attempting to justify a ban on political speech by emphasizing that nonpolitical speech is still allowed—a nonstarter for a constitutional argument. Accordingly, under *Heller*, "[i]t is no answer to say . . . that it is permissible to ban [long-range training], so long as [short-range training] is allowed." 554 U.S. at 629.

C. The Township Fails Even Intermediate Scrutiny.

Ultimately, this Court need not decide whether strict or intermediate scrutiny is applicable because the Township's range ban cannot pass any level of heightened review.

1. The Township's Unconstitutional Purpose Fails Intermediate Scrutiny.

The Township claims that its Ordinance is intended to "minimize negative secondary effects" of commercial shooting ranges. Township Br. at 28. But even under intermediate scrutiny, the government "may not regulate the secondary effects of speech by suppressing the speech itself." *City of Los Angeles v. Alameda Books,*

Inc., 535 U.S. 425, 445 (2002) (controlling opinion of Kennedy, J.); Op'g Br. at 38–39. For the same reason, the Township cannot regulate the secondary effects of long-distance firearm training by suppressing—moreover, banning—it.

The Township asserts that "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." Township Br. at 29. But Justice Kennedy's opinion is both a concurring opinion and the controlling opinion. "There was no majority opinion in *Alameda Books*, but because Justice Kennedy's concurrence reached the judgment on the narrowest grounds, his opinion represents the Supreme Court's holding in that case." *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cnty.*, 630 F.3d 1346, 1354 n.7 (11th Cir. 2011) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)) (cleaned up). "Justice Kennedy's opinion" in *Alameda Books* therefore "binds" lower courts. *729, Inc. v. Kenton Cnty. Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008).

What is more, the secondary effects the Township is concerned about were expressed as a mere possibility, by a single person: "[T]he Township Planner, Carlisle Wortman . . . cautioned that permitting shooting ranges by right *may* introduce 'noise, traffic, or public safety issues' into the AR District." Township Br. at 31 (emphasis added).

This is far from compelling and far short of what intermediate scrutiny requires. Under intermediate scrutiny, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). "This burden is not satisfied by mere speculation or conjecture." *Id.* at 770. Rather, the demonstration must be based on "substantial evidence." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 666 (1994) ("*Turner I*"); *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("*Turner II*").

For example, *Turner II* deferred to the government's "[e]xtensive testimony," "volumes of documentary evidence and studies," and "extensive anecdotal evidence." *Id.* at 198, 199, 202. By comparison, in *44 Liquormart, Inc. v. Rhode Island*, the government failed to justify a ban on price advertising for alcoholic beverages "without any findings of fact," 517 U.S. 484, 505 (1996), and in *Edenfield*, the Court struck down a ban on in-person solicitation by CPAs because the government "presents no studies" nor "any anecdotal evidence," 507 U.S. at 771.

Here, the Township relies only on the speculation of what "may" happen if Plaintiffs are permitted by means of one particular remedy to the Township's constitutional violation—an Ordinance amendment allowing operation of a shooting range of right in certain locations—to exercise their rights under the Second Amendment. More evidence—substantial evidence—of the harm addressed by banning outdoor and long-distance firing ranges *throughout the Township* is required

for the Township to satisfy any form of heightened scrutiny. See *Drummond*, No. 20-1722 at 26 ("On the Township's account, this rule prevents the use of powerful ammunition, reducing noise and increasing safety. But . . . this theory is just that: A theory, unsupported by evidence.").

2. The Ordinance Is Not a Sufficiently Tailored Means.

In addition, to survive intermediate scrutiny, a law must be tailored to achieving its objective. While intermediate scrutiny does not require the least restrictive alternative, "[a] complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). The Township has not shown that there is nowhere within its limits that would be a proper location for a long-distance outdoor range.

Moreover, the Township failed to show, or even argue, that it considered substantially less burdensome alternatives to address the possibility of "noise, traffic, or public safety issues," Township Br. at 31, such as those mentioned in *Ezell I*: straightforward range-design measures to guard against accidental injury, designated locations for the loading and unloading of firearms, limitations on the concentration of people and firearms in the range's facilities and the types of ammunition allowed, 651 F.3d at 709. The Township "has not shown that it seriously undertook to address the problem[s]" it has alleged "with less intrusive tools readily available to it."

McCullen v. Coakley, 573 U.S. 464, 494 (2014). That failure is fatal under intermediate scrutiny. See *Drummond*, No. 20-1722 at 26–27.

It is no answer to argue, as the Township does, that it "reasonably opted to deny the proposed amendment" to the Ordinance that would have allowed ranges in the Agricultural Residential District by right. Township Br. at 31. The question here is not whether the Township reasonably denied one proposal to remedy the Township's ban, but whether the Township justifies the ban to begin with. For all the reasons stated above, it has not.

CONCLUSION

Howell Township effectively prohibits long-distance, outdoor shooting ranges, and consequently bans training in the use of long-distance firearms. This ban violates the Second Amendment rights of Oakland Tactical and Training Plaintiffs. Accordingly, Plaintiffs have "state[d] 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)).

Plaintiffs respectfully request that this Court reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiffs-Appellants' Reply 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 6,299 words (exclusive of items listed in Rule 32(f)), as measured by Microsoft Word.

/s/ *Peter A. Patterson*
Counsel for Appellants

CERTIFICATE OF SERVICE

I certify that on August 17, 2021, an electronic PDF of the foregoing document was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys. No privacy redactions were necessary.

Dated this 17th day of August 2021.

/s/ *Peter A. Patterson*
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