IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM DRUMMOND, et al.,	)	Civil Action No. 18-1127-MJH
	)	
	)	**MEMORANDUM OF POINTS**
Plaintiffs,	)	**AND AUTHORITIES IN**
	)	**OPPOSITION TO DEFENDANTS'**
v.	)	**MOTION TO DISMISS**
	)	
ROBINSON TOWNSHIP, et al.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs William Drummond, GPGC LLC, and Second Amendment Foundation, Inc., respectfully submit their Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss.

Dated: October 31, 2018

Respectfully submitted,

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SUMMARY OF ARGUMENT

Defendants claim that the controversy is not ripe, because absent an appeal of Dorsey's denial to the Zoning Hearing Board, it is unknown whether the challenged provisions well and truly apply to Drummond's property. Even were this argument persuasive, it could reach only the Plaintiffs' as-applied claims. The finality doctrine is inapplicable to facial challenges, which by definition do not turn on whether or how the law applies in a particular situation. Neither does the finality doctrine apply to attacks on officials' course of conduct outside permitting decisions.

With respect to Plaintiffs' as-applied claims, the ripeness argument fails because Plaintiffs do not claim that Dorsey misapplied the challenged provisions. Nor is there a question as to whether the code's application to Plaintiffs is final, because the code was not enacted to deal with "Sportsman's Clubs," writ large, in IBD Districts; it was enacted specifically to target Drummond's operation of the Greater Pittsburgh Gun Club. Any appeal would have been futile, both because Plaintiffs' arguments do not come within the appellate jurisdiction of the Zoning Hearing Board, and because the Township's position here is not mysterious.

Defendants next claim that Plaintiffs lack derivative standing to assert the rights of their clients and members, because people have other nearby options to access their rights. As an initial matter, the argument confuses standing and merits issues. Defendants overlook the question of the Second Amendment Foundation's ("SAF") associational standing to assert its members' rights, which is quite plain, and they *concede* the equally obvious rights of Drummond and GPGC to assert their customers' constitutional interest in their market or function. Defendants misread the Ninth Circuit case they cite for their standing proposition. While that decision has other flaws, it correctly *upheld* derivative standing. Standing was not the issue there, and it is not an issue here.

In arguing that there are other places to shoot, the Defendants attack not standing, but the sufficiency of Plaintiffs' claims. And in doing so, they err, placing total reliance on a Ninth Circuit opinion that is completely out of step with Supreme Court and Third Circuit precedent. The Ninth Circuit applies a threshold test by which judges ask whether an infringement of the Second Amendment "meaningfully inhibits" or "actually or really" burdens rights. Under this approach, if *the judge* does not mind an acknowledged infringement, no constitutional scrutiny applies. The Supreme Court condemned this results-oriented analysis, which plainly contradicts *this* circuit's law. Controlling precedent is quite clear: if a challenged law impacts Second Amendment rights, courts are required to either, in the case of a complete ban, strike the law down; or in the case of regulation, examine the law's constitutionality under some form of heightened scrutiny. Whether judges believe the infringement is "meaningful" is unimportant.

Defendants also err in denying the Second Amendment rights to sell arms and operate gun ranges. Both activities enjoy a rich historical tradition in this country, as they are inherent in the right to bear arms. All rights have historically been subject to some measure of regulation, but the incidence of regulation does not diminish a right's status as a right.

Defendants' re-classification of the Club as one allowed only as a conditional use, rather than as of right, plainly subverted the ability to operate and access the Club for the purpose of exercising Second Amendment rights. And the prohibition of a profit interest in the Club, which is not a land use regulation and not rational even if it were, violates the right of equal protection insofar as other businesses in IBD districts are not denied the prospect of profitability.

Finally, Defendants' attacks on the substantive due process and livelihood claims depend on highly selective readings of the complaint and of precedent. Even if the ordinance was pending in February, Defendants' deception began in January. But the ordinance's introduction date is

irrelevant, in any event, because there existed for decades a property interest in the gun club. Defendants' conduct shocked the conscience because it targeted a constitutional right, and effectively subverted multiple state court judgments that addressed rights in the subject property. The livelihood claim, like the ordinance it challenges, extends well beyond the loss of a particular business opportunity. It relates to the general prohibition of livelihood interests in "Sportsman's Clubs," and is thus valid.

ARGUMENT

I. ALL OF PLAINTIFFS' CLAIMS ARE RIPE.

As Defendants confirm, it is well-established that the "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy* v. *Board of Regents of the State of Fla.*, 457 U.S. 496, 516 (1982). Defendants' assertion that Drummond should have paid the Zoning Hearing Board a visit before initiating this litigation thus rests on a different ground—ripeness—the notion that his injury is not yet complete because Dorsey's denial of his application is not the Township's final word on the matter. "Only once a 'decision maker has arrived at a definitive position on the issue' has a property owner been inflicted with 'an actual, concrete injury.'" *County Concrete Corp*. v. *Twp. of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (quoting *Williamson Cnty. Regional Planning Com.* v. *Hamilton Bank*, 473 U.S. 172, 192 (1985)).

Plaintiffs raise three types of challenges. The first, second, fourth, and sixth counts each raise both facial and as-applied challenges. *See* Complaint, Dkt. 1, at ¶ 61 (Count One: "[o]n its face, and as-applied against Plaintiffs, their members and their customers"); *id.* at ¶ 65 (Count Two: same); *id.* at ¶ 73 (Count Four: "on its face and as applied to Plaintiffs Drummond and GPGC LLC"); *id.* at ¶ 79 (Count VI: same). The third count challenges the application of a discretionary process to a

business that existed for nearly half a century as of right. The fifth count alleges that Defendants' course of conduct, without regard to a particular ordinance, amounted to a constitutional tort.

Ripeness concerns differ for each type of claim. But all the claims are ripe.

A. The Finality Doctrine Does Not Apply to Plaintiffs' Facial Challenges.

The finality rule "does not apply . . . to *facial* attacks on a zoning ordinance." *County Concrete,* 442 F.3d at164 (citing *Taylor Inv., Ltd.* v. *Upper Darby Twp.*, 983 F.3d 1285, 1294 n.15 (3d Cir. 2003)) (other citation omitted). "A 'final decision' is not necessary in that context because when a landowner makes a facial challenge, he or she argues that *any* application of the regulation is unconstitutional; for an as-applied challenge, the landowner is only attacking the decision that applied the regulation to his or her property, not the regulation in general." *Id.* (internal quotation marks omitted); *see also Cornell Cos.* v. *Borough of New Morgan*, 512 F. Supp. 2d 238, 256-57 (E.D. Pa. 2007).

To the extent that Plaintiffs allege that these injuries are caused by facially-unconstitutional laws, those injuries manifested in their final form on the day that Robinson Township enacted the challenged provisions. The facial challenges of Counts One, Two, Four and Six are simply not subject to the zoning finality rule.

B. The Finality Doctrine Does Not Apply to Drummond's Substantive Due Process Property Claim Based on Defendants' Course of Conduct.

Just as the finality rule does not apply to facial challenges that are not dependent on a specific property's characteristics, neither does it apply to claims based on zoning officials' behavior apart from their decisions of land use applications. Such "course of conduct" claims, too, are exempt from the finality rule. For example, the Third Circuit has

> held that a plaintiff landowner need not comply with the finality rule where, instead of "appealing from an adverse decision on a permit application," the plaintiff claimed that the

> defendant Township officers "deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiff's permits, and that defendants did so for reasons unrelated to the merits to the application for the permits."

County Concrete, 442 F.3d at 166 (quoting *Blanche Rd. Corp.* v. *Bensalem Twp.*, 57 F.3d 253, 267-68 (3d Cir. 1995)). In *County Concrete*, the course of conduct claim was stated when plaintiffs "alleged that the defendants abused the zoning process . . . to deprive the plaintiffs of lawful use of their property, out of impermissible personal and political animus." *Id.* "Such a course of conduct claim is 'substantively different' than a claim presented in an 'as-applied' [substantive due process] case, and 'internal review of the individual permit decisions is thus unnecessary to render such a claim ripe.'" *Cornell*, 512 F. Supp. 2d at 257 (quoting *Blanche Rd.*, 57 F.3d at 268).[1]

Count Five of the complaint does not merely complain that Defendants enacted or applied an unfortunate ordinance. Other counts address the ordinance's substantive deficiencies. Rather, this count alleges that "Defendants deprived Drummond of his property interest by frustrating and delaying his application to operate the Gun Club," such that he was subjected to an ordinance that he would not be subject to had Dorsey honestly dealt with him from the start. Complaint, ¶ 75. This allegation does not directly relate to the decisionmaking process with respect to the application once received, and is not tied down to any particular provision. This claim alleging that Defendants' "course of conduct, separate and apart from the enactment of the Ordinance, violated [Drummond's] SDP rights is ripe for federal adjudication." *County Concrete*, 442 F.3d at 167.

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[1] *Blanche Rd.* was partially overruled in *UA Theater Circuit* v. *Twp. of Warrington*, 316 F.3d 394, 400 (3d Cir. 2003) (en banc), to the extent it acknowledged substantive due process violations based merely on zoning officials' "improper motive" rather than conduct that "shocks the conscience." But regardless of how lenient or strict the standard might be for making a course of conduct claim, the claim still relates to conduct outside the consideration of a permit application. *County Concrete* thus followed *Blanche Rd.*'s exclusion of conduct claims from the finality rule three years after *UA* tightened the *Blanche Rd.* standard.

C. Plaintiffs Were Not Required to Test Their As-Applied Challenges with a Futile Appeal to the Zoning Hearing Board, Because They Do Not Claim that Dorsey Misapplied the Law.

Unlike the facial and course of conduct claims, Plaintiffs' as-applied claims are subject to the finality rule: "Where a [zoning] dispute arises *under circumstances that permit administrative review* . . . final administrative determination is favored under the ripeness doctrine." *Peachlum* v. *City of York*, 333 F.3d 429, 434 (3d Cir. 2003) (emphasis added). For example, in *Williamson County*, the Supreme Court held that "*if* a State provides an adequate procedure for seeking just compensation [for a taking of property], the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195 (emphasis added).[2] Or as one of Defendants' authorities provides, a case is not ripe where "a readily available avenue for finality exists." *Mercer Outdoor Adver., LLC* v. *City of Hermitage*, 2013 U.S. Dist. LEXIS 173827 at *19 (W.D. Pa. Dec. 11, 2013).

In this case, no such avenue existed. No procedure existed by which Dorsey's decision—that Drummond could not operate the Greater Pittsburgh Gun Club because he was not organized as a non-profit entity—could be administratively undone. The procedure identified by Defendants, an appeal to the Zoning Hearing Board, supplied no prospect of a different outcome. For their part, Defendants make only a bare-bones assertion that Drummond should have appealed Dorsey's decision, without explaining what that exercise might have accomplished, or why Dorsey's denial was insufficiently final given the claimed injury.

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[2] *Williamson County*'s extension of the finality rule may soon be overruled. *See Knick* v. *Twp. of Scott*,138 S. Ct. 1262 (2018) (granting petition for certiorari seeking to overrule *Williamson County*); *see* Question Presented in Petitioner's Brief, *Knick v. Twp. Of Scott*, No. 17-647, at i, available at https://www.supremecourt.gov/DocketPDF/17/17-647/48448/20180529114538170_EFILE%20Knick%20Brief%20on%20Merits.pdf.

An administrative appeal of Dorsey's decision would have been a complete waste of time. Under Pennsylvania law, "[t]he zoning hearing board has exclusive authority to determine whether [the zoning officer] failed to follow prescribed procedures or misinterpreted or misapplied any provision of the Township's ordinance." *Taylor Inv.*, 983 F.2d at 1292 (footnote and citation omitted). The Zoning Hearing Board lacks authority to amend the zoning code. An appeal from an officer's decision does not supply the Board that power. Defendants also do not argue, nor could they, that the Zoning Hearing Board was qualified to adjudicate Plaintiffs' constitutional challenges.

With respect to what a Zoning Hearing Board *can* hear on appeal of a zoning officer's decision, Defendants—who include Mr. Dorsey—do not claim that Dorsey failed to follow any procedures or misinterpreted or misapplied any provision of the Township's ordinance. Neither do the Plaintiffs. While Plaintiffs take issue with Dorsey's deceptive and dishonest behavior, he did apply the letter of the (unconstitutional) zoning law. Dorsey denied the application because it "did not indicate that the club was organized as a not-for profit entity." Def. Br., Dkt. 27, at 4. Was that a mistake that might have been corrected on appeal? There is no dispute that Section 601 of the revised Zoning Ordinance requires so-called "Sportsman's Clubs" to be organized as non-profits, which the historic Greater Pittsburgh Gun Club is not and never was.

"The proposition that 'litigants are not required to make futile gestures to establish ripeness' has been applied in numerous zoning and non-zoning cases to establish the necessary certainty and finality [required to establish ripeness]." *Assisted Living Assocs. L.L.C.* v. *Moorestown Twp.*, 996 F. Supp. 409, 426 (D.N.J. 1998) (quoting *Sammon* v. *New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 643 (3d Cir. 1995)) (other citation omitted) (collecting cases). This case should be another one.

Beyond Defendants' suggested, futile appeal of Dorsey's decision, Plaintiffs are constrained to note that the word "variance" is absent from Defendants' brief. Indeed, Defendants foreclose that

option. A variance may be granted only if it "will not alter the essential character of the neighborhood or district in which the property is located, no[r] substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare." Robinson Township Zoning Ordinance § 700(C)(4). Plaintiffs would agree that their Club qualifies, but the Defendants do not, arguing that a preliminary injunction would harm the neighborhood. Def. Br., Dkt. 30, at 15. And since the ordinance was enacted for the express purpose of shutting down the Club, it would have been futile for the Club to seek a variance.

II. PLAINTIFFS HAVE STANDING TO ASSERT THEIR MEMBERS AND CUSTOMERS' SECOND AMENDMENT RIGHTS.

There is no doubt that Drummond and GPGC have standing to assert the constitutional rights of their prospective customers. As Defendants concede, "[v]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." Def. Br., Dkt. 27, at 10 (internal quotation marks omitted). Individual rights inherently include the corollary rights to engage in commerce enabling their exercise, and so the reporters are replete with First Amendment cases won by bookstores and movie theaters; reproductive rights cases brought by pharmacists, doctors and clinics; and Second Amendment cases won by firearm retailers and suppliers. Among the prevailing plaintiffs in the successful challenge to Chicago's gun-range ban was Action Target, "a supplier of firing-range facilities." *Ezell* v. *City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011); *see also Ill. Ass'n of Firearms Retailers* v. *City of Chicago*, 961 F. Supp. 2d 928, 931 & n.3 (N.D. Ill. 2014) (firearm retailers have standing to challenge gun store ban on behalf of customers).

Ezell also upheld SAF's associational standing to represent its members who wished to access gun ranges in Chicago. SAF "easily me[t] the requirements for associational standing," as

> (1) [its] members would otherwise have standing to sue in their own right; (2) the interests the association[] seek[s] to protect are germane to [its] organizational purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual association members in the lawsuit.

Ezell, 651 F.3d at 696 (citing *United Food & Commercial Workers Union Local 751* v. *Brown Group*, 517 U.S. 544, 553 (1996); *Hunt* v. *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (other citation omitted). The same is true here.

Defendants do not dispute that Drummond/GPGC's customers and SAF's members have a Second Amendment right to patronize gun clubs. Defendants apparently accept circuit court decisions acknowledging the right to acquire arms, as well as the right to train with those arms, including at a gun range. Def. Br., Dkt. 27, at 9 (citing cases).[3] Plaintiffs' customers and members thus plainly have standing to challenge the laws: they are (1) suffering an injury-in-fact, in that they cannot access the Greater Pittsburgh Gun Club; (2) that injury is proximately caused by the Defendants; and (3) this Court can redress that injury by enjoining the Defendants' conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Plaintiffs can represent their interests.

Contrary to Defendants' claims, it does not matter, for standing purposes, whether people can visit *other* ranges. A person barred from a business establishment suffers an Article III injury-in-fact, even if he can visit other businesses. The availability of other options relates to the merits, to the extent of the injury and perhaps any justification for it—not to whether the injury was, in fact, sustained. It will not do to claim that A's inability to transact with B poses no case or controversy because A might instead do business with C. In striking down a New York law barring all but

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[3]At one point, Defendants backtrack slightly and cite an unpublished district court opinion for the proposition that there may not be a right to operate a gun range, Def. Br., Dkt. 27, at 12 (citing *Sundowner Ass'n* v. *Wood Cnty. Comm'n*, 2014 U.S. Dist. LEXIS 112022 (S.D. W. Va. Aug. 13, 2014)), but that court expressly reserved the issue. *Sundowner*, 2014 U.S. Dist. LEXIS 112022 at *25 ("I need not decide that issue today").

licensed pharmacists from selling contraceptives, the Supreme Court explained that

> the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition.

Carey v. *Pop. Servs. Int'l*, 431 U.S. 678, 689 (1977) (footnotes omitted); cf. *Doe* v. *Bolton*, 410 U.S. 179 (1973) (striking down requirement that abortions only be performed in hospitals, and state residency requirement for obtaining an abortion). In *Carey*, it did not matter how many other outlets existed for the sale of contraceptives. And in *Doe*, it did not matter how many other outlets provided abortions. The outlets that people wished to access in exercising those rights were closed by state action, and that much, created injury.

The Fifth Circuit rejected Defendants' standing theory in the Second Amendment context. In *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185 (5th Cir. 2012) ("*NRA*"), plaintiffs challenged the federal prohibition on handgun purchases by adults aged 18-20 from federal firearms licensees ("FFLs"), that is, from gun stores. The government claimed that plaintiffs lacked standing, because they could legally acquire handguns by other means, from private sellers or from family members. The Fifth Circuit disagreed:

> The government is correct that the challenged federal laws do not bar 18-to-20-year-olds from possessing or using handguns. The laws also do not bar 18-to-20-year-olds from receiving handguns from parents or guardians. Yet, by prohibiting FFLs from selling handguns to 18-to-20-year-olds, the laws cause those persons a concrete, particularized injury—*i.e., the injury of not being able to purchase handguns from FFLs*.

NRA, 700 F.3d at 191-92 (citation omitted) (emphasis added). That court would go on to uphold the law, but it reached the merits

Nonetheless, Defendants assert that the availability of other options negates standing to complain of an injury. "[I]n order to" have derivative standing on behalf of one's customers, "the

would-be operator of the gun store must allege that residents are unable to otherwise exercise their Second Amendment rights to purchase firearms." Def. Br., Dkt. 27, at 10 (citing *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670, 678-79 (9th Cir. 2017) (en banc)).

Defendants misread *Teixeira*, which actually rejects their argument. To be sure, *Teixeira* held that the availability of other options for gun consumers controlled the *merits*, an error the Third Circuit would not allow (*see discussion below*). *Teixeira* did so in affirming dismissal at the pleading stage, offering that the plaintiffs' "vague allegations cannot possibly state a claim for relief." *Id.* at 679. But quoting the familiar language of derivative standing, and citing to *Ezell* and *Carey*, *Teixeira* first *upheld* the plaintiffs' standing: "Teixeira, as the would-be operator of a gun store, thus has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers." *Teixeira*, 873 F.3d at 678. Standing is not the same thing as the merits.

Proceeding now to the merits, it should be readily apparent that plaintiffs have stated valid claims asserting the Second Amendment rights of their customers and members.

III. THE AVAILABILITY OF OTHER GUN RANGES IS IRRELEVANT TO THE SECOND AMENDMENT ANALYSIS.

At least in discussing Plaintiffs' claims to assert their own rights, Defendants acknowledge that Second Amendment claims are typically analyzed under the two-step regime announced in *United States* v. *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). Def. Br., Dkt. 27, at 13. But they offer no such analysis in arguing against the Second Amendment rights of Plaintiffs' customers and members. To the extent Defendants address the derivative claims, they merely press *Teixeira*'s merits argument, which they erroneously take to be an argument about standing.

Reliance on *Teixeira* is misplaced. That decision is not merely wrong, but contrary to Third Circuit (indeed, to nearly all other circuits') precedent. The Court will note that *Teixeira* did not

perform a *Marzzarella* two-step analysis in dismissing the Second Amendment claim. Had it followed *Marzzarella*, the plaintiffs would have prevailed. *Teixeira* acknowledged, as do Defendants, that there is a right to buy guns. *Teixeira*, 873 F.3d at 677-78. Shuttering a gun store thus plainly implicates the Second Amendment at *Marzzarella* step one. Applying any level of heightened scrutiny, even the lowest form of intermediate scrutiny, would have resulted in a judgment for the store owners, because Alameda County's planning department had already studied the matter extensively, held hearings, and issued a lengthy report determining that the proposed store was compatible with neighboring land uses, harmless, and needed. *Id.* at 675. Considering its own findings, the county could not hope to carry its burden justifying the store's prohibition, a political act of the county's board of supervisors that contradicted their regulators' determination.

The Ninth Circuit, however, maintained its perfect record of denying relief to Second Amendment plaintiffs by conjuring a threshold test, a means of averting government losses before even reaching *Marzarrella* step-one. It held that a Second Amendment claim is not stated unless people are "*meaningfully* constrained" from accessing the right. *Id.* at 680 (emphasis added). The complaint, in the estimation of a divided en banc panel, did not show that "potential customers [are] *meaningfully* inhibit[ed]" in their exercise of rights, *id.* (emphasis added), or "that the ordinance actually or really burdens" Second Amendment rights, *id.* at 680 n.14.

In other words, without applying any constitutional scrutiny at all, a judge can dismiss a Second Amendment case if she decides that the right is "not *really* worth insisting upon." *District of Columbia* v. *Heller*, 554 U.S. 570, 634 (2008). As this citation reveals, *Heller* flatly rejected that proposition. So does the Third Circuit, which requires "some form of heightened scrutiny" in Second Amendment cases, *Marzzarella*. 614 F.3d at 96, and has defined the options as being either strict or

intermediate, *Drake* v. *Filko*, 724 F.3d 426, 435-36 (3d Cir. 2013). In this circuit, once the Second Amendment is implicated at step one, the government bears the burden of justifying its restriction. If the restriction is properly tailored to advancing sufficiently important regulatory objectives, the government has nothing to fear.

But courts cannot opt out of enforcing fundamental rights wherever, in *their* view, the burdens are not "meaningful." The People have decided that the right—all of it—is "meaningful," by ratifying its protection in constitutional text. Whether the Greater Pittsburgh Gun Club is "actually or really" necessary, or whether its loss is "meaningful," are the wrong questions. The correct question is: what justifies banning it?

Teixeira departed not only from *Heller*, *Marzzarella*, and the raft of circuit cases that require heightened scrutiny for laws that impair Second Amendment rights. It departed from the accepted notion that Americans are ordinarily entitled to exercise their constitutional rights throughout the territory of the United States. For example, "one 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. *Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)).

In *Ezell*, the district court denied a motion to preliminarily enjoin Chicago's gun range ban, theorizing that plaintiffs who sought to use gun ranges were only harmed by the added expense of traveling outside the city to do so. The Seventh Circuit reversed. "This reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction. That's a profoundly mistaken assumption." *Ezell*, 651 F.3d at 697.

Invoking the rule of *Schad* and *Schneider*, the Seventh Circuit explained:

> The same principle applies here. It's hard to imagine anyone suggesting that Chicago 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 in the suburbs. That sort of argument should be no less unimaginable in the Second Amendment context.

Id. Instead, the city was required to justify its restriction under "a more rigorous showing" than intermediate, "if not quite 'strict scrutiny,'" *id*. at 708, something it could not do. The same holds true here.

Similarly, it is not for the Defendants to ration the exercise of Second Amendment rights. The market will ultimately decide whether there are "enough" places to shoot. Plaintiffs' business might fail, for any of the usual reasons businesses fail; it might simply displace incumbents by offering a better experience; or it might thrive alongside existing ranges, unlocking a greater exercise of fundamental rights. The Second Amendment reserves that determination to the people.

Even if the existence of other ranges is somehow relevant to the outcome, it would be premature to decide that matter on a motion to dismiss. Ranges, stores, and clubs are not fungible. Plaintiffs' full-service range is a unique proposition. They should be able to establish as much.

Defendants' final attack on the rights of Plaintiffs' customers and members is a form of ipse dixit: Drummond allegedly cannot prevail, because he was bound by the rules he challenges. This form of argument would end all constitutional litigation. But apart from its illogic, the Township cannot bootstrap its challenged restrictions to argue that Drummond "merely applied to operate a Sportsman's Club, i.e. a non-profit entity," Def. Br., Dkt. 27, at 12, because he did no such thing. Drummond sought to continue operating the Club as it had operated for nearly half a century. As the Court of Common Pleas found, that for-profit entity, including rifle fire, operated lawfully under the Township's Zoning Ordinance. Defendants had not even introduced the new definition of "Sportsman's Club" at the time Drummond first spoke with and wrote Dorsey to detail his plans for

the Greater Pittsburgh Gun Club. *See* Complaint, Dkt. 1, ¶¶ 33, 34. The Township's new definition came about as a *reaction* to Drummond's plans. Defendants' complaint that Drummond never advised that the Club would include rifle fire is most dubious, considering the Township had gone to court to enjoin the Club's rifle fire, and passed the challenged ordinance specifically to bar Drummond from hosting rifle fire at the Club after he told Dorsey of his plans to do so. At the very least, these contentions are all well-pleaded and offered in evidence.

Plaintiffs' customers and members have the right to patronize the Greater Pittsburgh Gun Club as people have historically done: to purchase and train with firearms, including common-use rifles, and to engage in all ordinary activities that might be expected at a for-profit gun club. Plaintiffs have standing to assert these rights, and they have more than adequately stated a valid claim for the protection of these rights.

IV. DRUMMOND AND GPGC HAVE A SECOND AMENDMENT RIGHT TO OPERATE A GUN CLUB.

Defendants argue that apart from Plaintiffs' derivative standing to assert their customers and members' rights, Drummond and his LLC themselves lack a right to operate the Club because there is no right to sell guns or operate a shooting range. The Third Circuit would disagree. "Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment under [*Heller*]." *Marzzarella*, 610 F.3d at 92 n.8. "[P]rohibiting the commercial sale of firearms . . . would be untenable under *Heller*." *Id.*

Defendants again look to *Teixeira*, which simply does not comport with how the Supreme Court, the Third Circuit, and other courts normally approach constitutional rights. The Ninth Circuit justified its result by claiming that "colonial government regulations included *some* restrictions on the commercial sale of firearms." *Teixeira*, 873 F.3d at 685 (emphasis added). "The colonies regulated the sale of weapons *to some degree*." *Id.* at 686 (emphasis added). But *Heller* rejected the

notion that "various restrictive law in the colonial period" could be read broadly to negate the right they regulated. *Heller*, 554 U.S. at 631. The existence of gunpowder storage laws, and laws restricting the public discharge of firearms, were not inconsistent with a right to keep and use guns for self-defense. *Id.* at 631-34.

Teixeira's other reasons for rejecting the right to sell firearms are similarly spurious. Of course neither the Second Amendment's text, nor that of its founding era analogues, refer explicitly to a right to "sell" arms. Neither does the constitutional text refer to a right to *acquire* guns, but *Teixeira* acknowledged at least aspect of the right. *Teixeira*, 873 F.3d at 677-78. Common sense dictates that the Framers were not required to spell out every possible dimension of an enumerated right. "[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579-80 (1980). Bifurcation of the right to firearms commerce into a right to acquire, which *Teixeira* recognized, and a right to sell, which it rejected, is wholly artificial and arbitrary. As a logical matter, commerce inherently involves buyers as well as sellers, who may have equal constitutional rights in the transaction. Cf. *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). More importantly, as the original *Teixeira* "panel opinion persuasively lays out[,] the historical evidence demonstrat[es] that the right to sell firearms is part and parcel of the historically recognized right to keep and bear arms." *Teixeira*, 873 F.3d at 698 (Bea, J., dissenting) (internal quotation marks omitted).

"Throughout history and to this day the sale of arms is ancillary to the right to bear arms." *Id.* at 693-94 (Tallman, J., dissenting) (footnote omitted). "As British subjects, colonial Americans

believed that they shared equally in the enjoyment of" the English right to arms, "and that the right necessarily extended to commerce in firearms." *Teixeira* v. *Cnty. of Alameda*, 822 F.3d 1047, 1054 (9th Cir. 2016) (earlier panel opinion). Provided one early colonial law, "[i]t is ordered that all persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony . . . ." Laws of Virginia, February, 1676-77, Va. Stat. At Large, 2 Hening 403 (1823). And Thomas Jefferson offered that "[o]ur citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them." Thomas Jefferson, 3 *Writings* 558 (H.A. Washington ed., 1853). The colonies did not receive the British arms embargo well. *Teixeira*, 873 F.3d at 686; *id.* at 693 (Tallman, J., dissenting).

It does not matter that the Framing Era lacked "commentary suggest[ing] that the right codified in the Second Amendment independently created a commercial entitlement to sell guns if the right of the people to obtain and bear arms was not compromised." *Id.* at 686. The Framers could not have anticipated every creative twenty-first century argument hostile to the Second Amendment right. Individuals seeking to enforce their rights need not disprove, as an historical matter, every negative proposition concocted by the right's opponents.

V. PLAINTIFFS STATE A VALID CHALLENGE TO THE CLUB'S RE-CLASSIFICATION AS A CONDITIONAL USE.

Defendants claim that Count III, which challenges the re-classification of the Greater Pittsburgh Gun Club from a permitted to a discretionary use, is a "conclusory averment" that does not explain why this classification violates Plaintiffs' rights. Def. Br., Dkt. 27, at 14. The claim is obvious enough. The Gun Club had operated for decades "as of right," Complaint, Dkt. 1, ¶ 67, as confirmed by the Court of Common Pleas' judgment. The challenged provision revoked that right: "The re-classification of the historic King Road Gun Club as a conditional rather than principal

permitted use violates Plaintiffs' Second Amendment rights, and those of their members and customers, by having the purpose and effect of barring their operation and use of the historic King Road Gun Club." *Id.* ¶ 69.

The fact that the Township has not yet invoked this mechanism is irrelevant. "The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands." *Lakewood* v. *Plain Dealer Pub. Co.*, 486 U.S. 750, 756 (1988) (internal quotation marks omitted). Moreover, Defendants at least suggest that Plaintiffs could not obtain a conditional use, because they do not meet the new standards for a "Sportsman's Club." Def. Br., Dkt. 27 at 15. This argument differs markedly from a promise to refrain from insisting upon the conditional use standards.

VI. PLAINTIFFS HAVE STATED AN EQUAL PROTECTION CLAIM.

Plaintiffs' equal protection theory is simple: businesses in IBD Districts are allowed to make money, but "Sportsman's Clubs," suddenly, are not. The new distinction, aimed squarely at Plaintiffs, has nothing to do with land use as such but is based solely on the exercise of a fundamental right. The distinction is irrational, nevermind the Township's ability to justify it under strict scrutiny as required. "[A] classification that trammels fundamental personal rights . . . must meet the strict scrutiny standard, under which a law must be narrowly tailored to further a compelling government interest." *Connelly* v. *Steel Valley Sch. Dist.*, 706 F.3d 209, 213 (3d Cir. 2013) (internal quotation marks omitted).

Defendants' attack on Plaintiffs' equal protection claim is confusing. After asserting that land use ordinances are subject to rational basis review, Defendants claim that Plaintiffs cannot complain about the treatment of "Sportsman's Clubs" in IBD Districts, because "Sportsman's

Clubs" are also allowed in other districts, along with other non-profit uses. Def. Br., Dkt. 27, at 16-17. Defendants' argument is a non-sequitor, and it bears no relation to Plaintiffs' claim.

First, foremost, and last, Plaintiffs are not attacking a land use distinction. The Greater Pittsburgh Gun Club has operated in the same location, lawfully, as a "Sportman's Club," for nearly half a century, and the zoning ordinance still allows "Sportsman's Clubs" at that location. The issue here is the prohibition on turning a profit. Drummond could operate the Club in the exact same way, conducting whatever activities may be conducted at a "Sportsman's Club," except on a charitable basis—he could give away firearms–and this provision would not stop him. The challenged section does not regulate the use of land—only how much money Drummond may accept from people.

Nor does it matter that "Sportsman's Clubs" are allowed in other districts. Plaintiffs' challenge must focus on IBD Districts because that is the classification Robinson Township has assigned to their land. Zoning is nothing if not a method of describing similarly situated properties. Presumably, all properties in a particular zone are situated similarly to each other, in a way that they are not situated similarly to properties in different zones, hence bearing different regulatory environments. So why is this particular type of enterprise—which may operate legally—singled out for its profit motive in a way that other, identically-zoned properties are not? How does turning a profit change the use of the land? It does not.

Even if the Court would view this rule as a land use restriction, and even if it would subject that restriction to mere rational basis review, Defendants do not even attempt to explain why the non-profit requirement is rational, or how it relates remotely to land use management. The motion to dismiss this claim should thus be denied. After all, the very standard Defendants cite explains that the presumption of rationality will attach "absent some reason to infer antipathy," Def. Br., Dkt. 27,

at 16 (quoting *Congregation Kol Ami* v. *Abington Twp.*, 309 F.3d 120, 133 (3d Cir. 2002)), but Defendants' antipathy stands at the root of Plaintiffs' allegations.

Moreover, under ration basis review, "land use regulations must possess a legitimate interest in promoting the public health, safety, morals, and the general welfare of its citizens in order to pass scrutiny." *Kol Ami*, 309 F.3d at 133 (citation omitted). "Land use ordinances will be deemed 'irrational' when a plaintiff demonstrates either that the state interest is illegitimate (an ends-focus) or that the chosen classification is not rationally related to the interest (a means-focus)." *Id.* The non-profit requirement flunks on both counts. The state interest here is to put the Club out of business based on the local polity's well-established antipathy. If there exists a legitimate regulatory interest, mandating that "Sportsman's Clubs" be operated as non-profits is plainly not rationally elated to advancing that interest. The Third Circuit rejects the notion that zoning ordinances "are subject to no meaningful review." *Id.* at 135. Evidence of "bare animus" or "fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding" is "likely sufficient" to establish an equal protection violation. *Id.* (citation omitted).

Finally on this point, Defendants' argument is itself irrational. Because Drummond objects to the limitations newly imposed on a "Sportsman's Club," Defendants allege that Plaintiffs are not interested in opening a "Sportsman's Club," but a "commercial shooting range." Def. Br., Dkt 27, at 17. But Drummond plainly applied to operate a "Sportsman's Club," *see* Dkt. 17-5, 27-4, 27-6, which by definition can include a shooting range, and the Club had lawfully operated in that location, range included and on a commercial basis, for decades. In the first litigation, the Township admitted, and the Court of Common Pleas found, that the Club was operating legally under the zoning ordinance. Complaint Exh. A, Dkt. 1-2, ¶ 27. In the second litigation, the Zoning Hearing Board had revoked Iron City's permit, believing it to have been issued in error: "shooting ranges are

not permitted uses, conditional uses, or special exceptions in the IBD district." The Court of Common Pleas reversed this finding on the Board's concession that ""it is a reasonable interpretation of the Zoning Ordinance that non-commercial gun clubs and shooting ranges are allowed as a permitted use in this zoning district." Complaint Exh. B, Dkt. 1-3, at 4. Iron City was allowed to operate as a for-profit entity. That there might be an overlap between a "commercial shooting range" and the pre-April, 2018 understanding of "Sportsman's Club," under which the Club historically operated, is irrelevant. Defendants do not argue, nor could they, that the Gun Club operated outside the zoning code prior to the latest, challenged ordinance.

VII. DRUMMOND PLAINLY ASSERTS A SUBSTANTIVE DUE PROCESS PROPERTY VIOLATION.

Defendants' reading of the substantive due process property claim is highly selective. They claim that at the time Drummond submitted his application, the ordinance was pending and thus he had no right to have his application considered under the old standard. But the claim relates to a pattern of deceit that started well before the ordinance was introduced or probably even formulated.

Defendants claim the ordinance was introduced February 19. Def. Br., Dkt. 27, at 18.

The Complaint alleges that Drummond was slow-rolled starting January 19, and was even put off as late as February 16. Complaint, Dkt. 1, ¶¶ 33-36. Moreover, the property interest here inhered in decades of the Club's lawful operation. The Township cannot pass an ordinance banning a business, demand that a new piece of paper be filed, and then hold up the intervening ordinance as a means of negating the property interest in the longstanding land use.

To the extent that Defendants claim their behavior does not "shock the conscience," they omit mentioning one form of behavior that the Third Circuit has held to qualify: "interfere[nce] with otherwise constitutionally protected activity." *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004). Plaintiffs identify another shocking form of misconduct nowhere mentioned in

Defendants' brief: ignoring the considered judgment of the Court of Common Pleas. The Township could not simply pass an ordinance to rid itself of a hated but lawful business, so it sought to declare the business a nuisance. It failed. Having lost that trial, it seized on what was essentially a transfer of management to re-regulate the existing business, aided by deceiving and delaying the new operator's attempts at compliance.

The state court judgments were not nothing. They reflected the way in which our society fairly resolves disputes. These judgments secured a property interest in the Club, and could not have been practically subverted without the Defendants' devious misconduct. Defendants' behavior shocks the conscience for this reason as well.

VIII. DEFENDANTS BAR PLAINTIFFS FROM EARNING A LIVING BY OPERATING ANY "SPORTSMAN'S CLUB."

Defendants misread the livelihood claim, offering that Plaintiffs have failed to state a livelihood claim because they aver having lost only "a single business opportunity." Def. Br., Dkt. 27, at 20. Not so. Plaintiffs' Sixth Count alleges that Robinson Township Zoning Ordinance Section 601 "bar[s] a profit interest in the operation of a gun club"—any "Sportsman's Club." And it challenges this provision not only as-applied, but facially as well. By law, Drummond and GPGC cannot make a living running a "Sportsman's Club," not just at the historic Greater Pittsburgh Gun Club, but anywhere in Robinson Township. They challenge the totality of this prohibition, which extends well beyond this one parcel.

CONCLUSION

We are not here because Plaintiffs "seek to rewrite the Township's Zoning Ordinance to permit their commercial venture to sell firearms at a specific location." Def Br., Dkt. 27, at 21. We are here because *Defendants* re-wrote the Township Zoning Ordinance when William Drummond

showed up to continue and restore the Greater Pittsburgh Gun Club at the specific location where it had operated for nearly half a century. Nobody is claiming an "absolute right," whatever that means, to do anything. *Id.* Rights have contours. They cover some thing, not others.

The Second Amendment encompasses the rights to visit and operate the Gun Club, while the Fourteenth Amendment encompasses rights of due process and equal protection in that longstanding establishment. Defendants do not have an "absolute power" to regulate Plaintiffs' business out of existence. Their regulatory authority is checked by our Constitution, which this Court is properly called upon to enforce.

The motion to dismiss should be denied.

Dated: October 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2018 a copy of the foregoing brief was electronically served upon all parties by filing the same with the Clerk of Court using the CM/ECF system and forwarding to all counsel of record.

/s/ Alan Gura
Alan Gura