No. 19-1394

In the United States Court of Appeals for the Third Circuit

WILLIAM DRUMMOND; GPGC LLC;
SECOND AMENDMENT FOUNDATION, INC.,

Plaintiffs-Appellants,

v.

TOWNSHIP OF ROBINSON; MARK DORSEY, Robinson Township Zoning Officer, in his official and individual capacities,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court for the Western District of Pennsylvania (Horan, J.)
(Dist. Ct. No. 2:18-CV-01127-MJH)

APPELLANTS' PETITION FOR PANEL REHEARING
Fed. R. App. P. 40

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November 28, 2019

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Appellants GPGC, LLC and Second Amendment Foundation, Inc., make the following disclosure:

I. For non-governmental corporate parties please list all parent corporations:

None.

II. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

III. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

IV. In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable

/s/ Alan Gura Dated: November 28, 2019
Signature of Counsel

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PETITION FOR PANEL REHEARING

Appellants William Drummond, GPGC LLC, and Second Amendment Foundation, Inc. ("Plaintiffs") respectfully petition the panel to rehear their appeal with respect to two points that the Court has "overlooked or misapprehended," Fed. R. App. 40(a)(2):

1. The panel opinion misread *Eichenlaub* v. *Twp. of Indiana*, 385 F.3d 274, 285 (3d Cir. 2004), in dismissing Plaintiffs' substantive due process claim on grounds that delay and misdirection do not "shock the conscience." *Eichenlaub* expressly provides that conduct intended to interfere with the exercise of constitutional rights on a plaintiff's property "shocks the conscience" for purposes of substantive due process claims. The District Court only dismissed Plaintiffs' substantive due process claim because it determined that their conduct is not protected by the Second Amendment. However, the panel opinion correctly reversed that determination. Under *Eichenlaub*, the substantive due process claim is necessarily revived as well.

2. The panel opinion contains an ambiguity suggesting it might have decided a question not reached by the District Court and not presented on appeal: which standard of scrutiny would govern Plaintiffs' claims under *Marzzarella*'s second step.[1] Plaintiffs ask the Court to clarify that the scrutiny question remains open.

Plaintiffs do not seek rehearing en banc.

ARGUMENT

I. GIVEN THE PANEL'S FINDING THAT PLAINTIFFS MAY HAVE SECOND AMENDMENT CLAIMS, THE SUBSTANTIVE DUE PROCESS CLAIM—BASED ON INTERFERENCE WITH A FUNDAMENTAL RIGHT—SURVIVES.

The panel opinion dismissed Plaintiffs' substantive due process claim "because the zoning officer's conduct is not conscious-shocking." Op. at 4. Relying on *Eichenlaub*, *supra*, 385 F.3d 274, the opinion offered that "[s]talling, delay, and failure to notify about meetings do not rise to the level of the 'most egregious' official conduct, which is required in order to shock the conscience." *Id.* This misreads *Eichenlaub*, as well as Plaintiffs' claim. And the result is inconsistent with the panel opinion's reinstatement of Plaintiffs' facial Second Amendment challenges.

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[1] *United States* v. *Marzzarella*, 614 F.3d 85 (2010).

In *Eichenlaub*, this Court supplied two examples of what constitutes the "most egregious," conscience-shocking conduct. The first example, not relevant here, involved allegations of fraud and self-dealing that may amount to a taking. *See Eichenlaub*, 385 F.3d at 285 (citation omitted).

The second example is the one Plaintiffs rely upon: cases "involv[ing] allegations of hostility to constitutionally-protected activity on the premises," *Eichenlaub*, 385 F.3d at 285, where officials are "accused of seeking to hamper development in order to interfere with otherwise constitutionally protected activity at the project site," *id.* at 286. Such cases "implicate[] more than just disagreement about conventional zoning or planning rules." *Id.* at 285 (citing *Associates in Obstetrics & Gynecology* v. *Upper Merion Twp.*, 270 F. Supp. 2d 633 (E.D.Pa. 2003) (official conduct motivated by hostility to abortion rights shocks the conscience)).

"*Eichenlaub* stands for the proposition that uses that implicate a *separately protected* constitutional right are analyzed differently than uses that do not implicate a separately protected constitutional right." *Tucker Indus. Liquid Coatings, Inc*. v. *Borough of E. Berlin*, 656 F.

App'x 1, 6 (3d Cir. 2016) (citation omitted). "Indeed . . . *Eichenlaub* makes the importance of the presence or absence of such a separate constitutional right absolutely clear." *Id.* As this Court explained,

> To "shock the conscience," the alleged misconduct must involve "more than just disagreement about conventional zoning or planning rules" and rise to the level of self-dealing, an unconstitutional "taking," *or interference with otherwise constitutionally protected activity on the property*.

Dotzel v. *Ashbridge*, 306 F. App'x 798, 801 (3d Cir. 2009) (citing *Eichenlaub*, 385 F.3d at 285-86) (emphasis added); *see also Perano* v. *Twp. of Tilden*, 423 F. App'x 234, 238 (3d Cir. 2011) (delays not shocking when "not coupled with interference with a constitutionally protected activity or ethnic bias"); *Maple Props., Inc*. v. *Twp. of Upper Providence*, 151 F. App'x 174, 179 (3d Cir. 2005) ("corruption, self-dealing, or a concomitant infringement on other fundamental individual liberties").

Plaintiffs do not raise a substantive due process challenge merely because Defendants stalled, delayed and failed to inform. Plaintiffs primarily argue that Defendants "acted 'in order to interfere with otherwise constitutionally protected activity,'—the operation of a gun club protected by the Second Amendment." Appellants' Br. 48 (quoting

Eichenlaub, 385 F.3d at 286); *see* Verified Complaint, JA63, ¶75 (alleging Defendants acted "with the purpose and effect of frustrating the exercise of fundamental Second Amendment rights."). Plaintiffs' substantive due process claim thus rises or falls with their claim to Second Amendment-protected conduct.

The District Court correctly read *Eichenlaub* and its progeny. It dismissed the substantive due process claim not because Plaintiffs merely allege stalling and misdirection, but because it erred in dismissing the Second Amendment claims at *Marzzarella*'s Step One:

> Having already determined that Plaintiffs failed to allege a violation of their Second Amendment rights, the issue here is whether Defendants' conduct—particularly the conduct of Defendant Dorsey—constitutes "the most egregious official conduct," not whether Defendants' conduct interfered with constitutionally protected activity.

JA36.

The panel opinion correctly reversed the District Court's Step One conclusion. It at least strongly suggested, if it did not hold, that Plaintiffs' facial Second Amendment challenges pass *Marzzarella*'s first step. Op. at 3 n.8 (describing as "illustrative" circuit opinions that found the Second Amendment to reach arms commerce and training); *see also*

Marzzarella, 614 F.3d at 92 n.8 ("[c]ommercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment"). As Plaintiffs pointed out, "[f]inding for [them] at *Marzzarella* step one requires reversing the dismissal of their substantive due process claim." Appellants' Br. 49.

Eichenlaub's rights-interference prong controls Plaintiffs' claim, which consciously invoked it. Because the panel already reversed the determination that Plaintiffs do not engage in constitutionally-protected activity, the panel should reverse the dismissal of Plaintiffs' substantive due process claim that was based on that error, and remand that question for reconsideration under *Eichenlaub* in light of the forthcoming *Marzarrella* Step One analysis.

II. AS THE DISTRICT COURT DID NOT REACH *MARZZARELLA*'S SECOND STEP, THE QUESTION OF WHICH HEIGHTENED SCRUTINY STANDARD APPLIES REMAINS OPEN.

The panel opinion provides that at Step One of the *Marzzarella* analysis, the District Court "skipped ahead to the time, place, and manner question." Op. at 4. Use of the article "the" suggests that time, place and manner analysis necessarily governs the case's resolution at

Step Two. If this usage was intentional, then the panel, too, may have skipped ahead to resolving a question not reached below: which standard of scrutiny applies.

As the opinion notes, *Marzzarella*'s second step requires that courts evaluate challenged measures "under some form of means-end scrutiny." Op. at 2 (quoting *Marzzarella*, 614 F.3d at 89). This Court has defined the options as being either strict or intermediate scrutiny. *See Drake* v. *Filko*, 724 F.3d 426, 435-36 (3d Cir. 2013); *Ass'n of N.J. Rifle & Pistol Clubs* v. *Att'y Gen. N.J.*, 910 F.3d 106, 117 n.19 (3d Cir. 2018).

"Time, place or manner" analysis is a form of intermediate scrutiny, *Marzzarella*, 614 F.3d at 96, which would obligate Defendants to prove a "reasonable fit" between a "substantial" government interest and the challenged regulations that does not burden more conduct than reasonably necessary. *Id.* at 97-98. But none of the challenged regulations impact the time, place, or manner of using firearms.

None of the challenged regulations restrict the Club's operating hours. Although the challenged regulations appear in a zoning ordinance, none of them restrict the Club's location: Plaintiffs are not

seeking to open a "Sportsman's Club" in a district where such uses are barred, or within a prohibited distance from another use. The Club stands where it has always been allowed for decades. Barring the Club from operating profitably in no way regulates the manner in which guns are used. And the challenged ban on shooting center-fire rifles at "Sportsmen's Clubs" cannot be a "manner" regulation, as this Court distinguished "manner" regulations from laws "designed to [or having] the effect of prohibiting the possession of any class of firearms." *Marzzarella*, 614 F.3d at 97. The scrutiny standard should be at least, as the Seventh Circuit found in the gun range context, "not quite 'strict scrutiny.'" *Ezell* v. *City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

Alas, because the District Court resolved the case at Step One, it "[did] not need to reach the means-end analysis in the . . . second prong." JA26. For their part, Defendants did not urge any particular second prong test here, Appellees' Br. 21, while Plaintiffs maintained that they should prevail under any standard of scrutiny given Defendants' complete failure to make a record, Appellants' Br. 54.

On remand, Plaintiffs will still argue that the precise standard of heightened review is unimportant where the government does not attempt to carry any burden, offering neither reasons nor (as required) *evidence* to support its position. But in any event, the panel should clarify that on remand, the question of which standard of scrutiny might apply, if a particular one must be determined, remains open.

CONCLUSION

The Court should rehear the appeal with respect to the matters raised in this petition.

Dated: November 28, 2019

Respectfully submitted,

/s/ Alan Gura

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 40 (b)(1) because it contains 1,515 words.

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 proportionately spaced typeface using Corel WordPerfect in 14 point Century Schoolbook font.

3. This file was scanned for viruses using a currently-subscribed Norton 360 Anti-Virus installation and was found to be virus-free.

/s/ Alan Gura
Alan Gura
Attorney for Appellants
Dated: November 28, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2019, I electronically filed the foregoing reply brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 28th day of November, 2019

/s/ Alan Gura
Alan Gura

EXHIBIT –
PANEL OPINION AND JUDGMENT

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1394

WILLIAM DRUMMOND; GPGC LLC; SECOND AMENDMENT FOUNDATION, INC.,

Appellants

v.

TOWNSHIP OF ROBINSON; MARK DORSEY, Robinson Township Zoning Officer,
in his official and individual capacities

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 2-18-cv-01127)
District Judge: Honorable Marilyn J. Horan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 2, 2019

Before: SHWARTZ, FUENTES and FISHER, *Circuit Judges*.

(Filed: November 14, 2019)

OPINION*

FISHER, *Circuit Judge*.

Pursuant to a local zoning ordinance, Robinson Township denied William Drummond's application to open and operate a gun club. Drummond, the Greater Pittsburgh Gun Club, LLC, and the Second Amendment Foundation, Inc. (collectively, "Drummond") then brought suit, alleging that Robinson Township and Zoning Officer

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Mark Dorsey (collectively, the "Township") had infringed their Second and Fourteenth Amendment rights.

The District Court granted the Township's motion to dismiss, and it denied Drummond's request for a preliminary injunction as moot. We will vacate and remand for further proceedings with respect to the facial Second Amendment challenges contained in Counts I and II[1] and the request for a preliminary injunction. We will affirm the District Court's judgment in all other respects.[2]

Second Amendment challenges are evaluated using a two-step framework.[3] First, courts must "ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[4] Then, if the law imposes such a burden, courts must evaluate it "under some form of means-end scrutiny."[5] Drummond argues that the District Court erred in holding, at Step One, that Sections 601 and 311(D) of the Robinson Township Zoning Ordinance do not burden his Second Amendment rights and that, as a result, the District Court also erred by failing to reach Step Two.

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[1] Counts I, II, and III also contain as-applied Second Amendment challenges to the zoning ordinance. The District Court properly held that as-applied challenges are not ripe until the plaintiff "give[s] the local zoning hearing board the opportunity to review the zoning officer's decision." J.A. 17. Because Drummond has not done so, we will affirm the dismissal of the as-applied challenges.

[2] The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). "[T]he District Court's decision on a motion to dismiss" is reviewed *de novo*. *Taksir v. Vanguard Grp.*, 903 F.3d 95, 96 (3d Cir. 2018). "With respect to the denial of a preliminary injunction, we review findings of fact for clear error, legal conclusions *de novo*, and the decision to grant or deny the injunction for an abuse of discretion." *Holland v. Rosen*, 895 F.3d 272, 285 (3d Cir. 2018).

[3] *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

[4] *Id.*

[5] *Id.*

"In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition."[6] The District Court determined, at *Marzzarella* Step One, that the nature and extent of Sections 601 and 311(D) of the Robinson Township Zoning Ordinance do not substantially burden Second Amendment rights because they leave open alternative channels for law-abiding citizens to acquire a firearm or maintain proficiency in the use of firearms through use of a time, place, and manner test.

We agree with Drummond that this was error. The District Court essentially collapsed the two-step *Marzzarella* test when it used a time, place, and manner test to evaluate the Step One inquiry—whether the law places a burden on Second Amendment rights. *Marzzarella* demonstrates that in determining whether the law places a burden on Second Amendment rights, a textual and historical analysis is required.[7] This analysis should apply the textual and historical understanding of the Second Amendment as enunciated in *Heller* to the conduct at issue: acquiring firearms and maintaining proficiency in their use.[8] A time, place, and manner test is not an

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[6] *Id.* at 92 n.8.

[7] *Id.* at 89-93. ("Our threshold inquiry, then, is whether § 922(k) regulates conduct that falls within the scope of the Second Amendment. . . . In defining the Second Amendment, the Supreme Court began by analyzing the text . . . ."; "This reading is also consistent with the historical approach *Heller* used to define the scope of the right. . . .").

[8] *See District of Columbia v. Heller*, 554 U.S. 570, 579-619 (2008). Our sister circuits have conducted such an analysis and their opinions are illustrative. *See, e.g.*, *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("[T]he core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms. (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011))); *Ezell*, 651 F.3d at 708 ("[T]he right to maintain proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.").

appropriate means to determine, at Step One, whether a burden has been placed on Second Amendment rights, and is instead appropriate under the Step Two inquiry.[9] The District Court erred when it did not perform a textual and historical analysis, but rather skipped ahead to the time, place, and manner question.

Drummond's remaining constitutional arguments fail. The zoning officer's conduct did not violate his Fourteenth Amendment rights to substantive due process because the zoning officer's conduct is not conscience-shocking. Stalling, delay, and failure to notify about meetings do not rise to the level of the "most egregious" official conduct, which is required in order to shock the conscience.[10]

Section 601 does not violate the Fourteenth Amendment's Equal Protection Clause by requiring gun clubs to operate as nonprofits while allowing other businesses within the zoning district to operate for a profit. Because gun clubs are not a protected class under the Equal Protection Clause, the ordinance is subject to only rational-basis review.[11] The profit versus nonprofit distinction in Section 601 bears a rational relationship to the Township's permissible objective of nuisance prevention because the commercial nature of a shooting range is reasonably related to the intensity of land use and the impact that such use may have on neighboring properties.

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[9] *Marzzarella*, 614 F.3d at 95-99 (borrowing from First Amendment time, place, and manner analysis in determining appropriate level of scrutiny).

[10] *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285 (3d Cir. 2004) (quoting *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 399 (3d Cir. 2003)).

[11] *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133 (3d Cir. 2002) ("[L]and use ordinances that do not classify by race, alienage, or national origin, will survive an attack based on the Equal Protection Clause if the law is 'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.'" (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974))).

After dismissing Drummond's constitutional claims, the District Court denied his request for a preliminary injunction as moot. In light of our decision to vacate and remand for further proceedings on the facial Second Amendment claims, Drummond's preliminary injunction request is no longer moot to the extent it is based on those claims.

For the foregoing reasons, we will vacate and remand with respect to Drummond's facial Second Amendment claims and the denial of the preliminary injunction. We will affirm in all other respects.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1394

WILLIAM DRUMMOND; GPGC LLC; SECOND AMENDMENT FOUNDATION, INC.,

Appellants

v.

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District Judge: Honorable Marilyn J. Horan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 2, 2019

Before: SHWARTZ, FUENTES and FISHER, *Circuit Judges*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on October 2, 2019. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered January 22, 2019, be and the same is hereby VACATED and REMANDED with respect to Drummond's facial Second Amendment claims and the denial of the preliminary injunction and AFFIRMED in all other respects. All of the above in accordance with the Opinion of this Court.

Costs shall not be taxed.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: November 14, 2019

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
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November 14, 2019

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RE: William Drummond, et al v. Township of Robinson, et al
Case Number: 19-1394
District Court Case Number: 2-18-cv-01127

ENTRY OF JUDGMENT

Today, **November 14, 2019** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App.

P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

s/ Patricia S. Dodszuweit
Clerk

By: s/ Shannon, Case Manager
267-299-4959