No. 20-1722

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' OPENING BRIEF AND JOINT APPENDIX VOL. I, pp. JA1-48

Alan Gura (Va. Bar No. 68842)
GURA PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085/703.997.7665

July 1, 2020

Counsel for Appellants

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: July 1, 2020
Signature of Counsel

TABLE OF CONTENTS

Corporate Disclosure Statement. i

Table of Contents. ii

Table of Authorities. iv

Introduction. 1

Jurisdictional Statement. 5

Statement of the Issues. 6

Statement of Related Cases. 6

Statement of the Case. 7

1. The Greater Pittsburgh Gun Club. 7

2. The Club Defeats Robinson Township's Nuisance Claim. 8

3. The Club Defeats Robinson Township's Licensing Action. 8

4. Drummond Takes Over—and Robinson Township Responds. 9

5. Procedural History. 11

i. The District Court's First Opinion. 13

ii. This Court Vacates the District Court's First Opinion. 15

iii. The District Court Re-Grants the Motion to Dismiss. 16

Summary of Argument. 18

Standard of Review. 21

Argument. 22

I. Laws Do Not Automatically Pass Heightened Scrutiny Just Because the Government Is Empowered to Do Good. 22

II. Plaintiffs Are Entitled to a Preliminary Injunction. 28

A. Plaintiffs Will Succeed on the Merits of Their Claims. . . . 28

B. The Challenged Provisions Irreparably Harm Plaintiffs. . . 32

C. The Balance of the Equities, and the Public Interest, Favor Injunctive Relief. 33

D. Plaintiffs Should Not Be Required to Post Security, as an Injunction Cannot Financially Harm Defendants. 34

III. This Case Should Be Reassigned to a Different District Judge, as the Current Judge's Impartiality Might Reasonably Be Questioned. 35

Conclusion. 40

Required Certifications

Joint Appendix, Volume I (Pages JA1-48)

Certificate of Service

TABLE OF AUTHORITIES

Cases

Arrowpoint Capital Corp. v. *Arrowpoint Asset Mgmt., LLC*,
793 F.3d 313 (3d Cir. 2015) 36, 39

Ass'n of N.J. Rifle & Pistol Clubs v. *AG N.J.*,
910 F.3d 106 (3d Cir. 2018) 23

Bd. of Trs. v. *Fox*,
492 U.S. 469 (1989). 22

Binderup v. *Atty. Gen'l*,
836 F.3d 336 (3d Cir. 2016) (en banc) 23

Bruni v. *City of Pittsburgh*,
824 F.3d 353 (3d Cir. 2016). 38

City of Los Angeles v. *Alameda Books*,
535 U.S. 425 (2002) 27

City of Renton v. *Playtime Theaters, Inc.*,
475 U.S. 41 (1986). 17, 26, 27

Davis v. *Wells Fargo*,
824 F.3d 333 (3d Cir. 2016) 21, 37

District of Columbia v. *Heller*,
554 U.S. 570 (2008). 14, 20, 24, 33

Drake v. *Filko*,
724 F.3d 426 (3d Cir. 2013). 23-25

Drummond v. *Twp. of Robinson*,
784 F. App'x 82 (3d Cir. 2019). 5, 15

Drummond v. *Twp. of Robinson*, Court of Common Pleas,
Washington Cnty., Pa., Civil No. 2018-2211.. 6

Elrod v. *Burns*,
427 U.S. 347 (1976). 32

Ezell v. *City of Chicago*,
651 F.3d 684 (7th Cir. 2011) 23, 25, 26, 33

Ezell v. *City of Chicago*,
846 F.3d 888 (7th Cir. 2017). 23, 27, 30

Gordon v. *Holder*,
721 F.3d 638 (D.C. Cir. 2013) 34

Greenleaf v. *Garlock, Inc.*,
174 F.3d 352 (3d Cir. 1999) 30

Haines v. *Liggett Group, Inc.*,
975 F.2d 81 (3d Cir. 1992) 35, 36, 39

Heller v. *District of Columbia*,
670 F.3d 1244 (D.C. Cir. 2011) 23

Hohe v. *Casey*,
868 F.2d 69 (3d Cir. 1989) 32, 33

Holland v. *Rosen*,
895 F.3d 272 (3d Cir. 2018). 22

Iron City LLC d/b/a Iron City Gun Club v. *Robinson Township*,
Court of Common Pleas, Washington Cnty., Pa.,
Civil Div. Nos. 2016-5682, 2016-7073 (April 17, 2017). 9

K.A. v. *Pocono Mt. Sch. Dist.*,
710 F.3d 99 (3d Cir. 2013) 34

Liteky v. *United States*,
510 U.S. 540 (1994). 35

Metro. Edison Co. v. *Pa. PUC*,
767 F.3d 335 (3d Cir. 2014) 30, 31

Phillips v. *Borough of Keyport*,
107 F.3d 164 (3d Cir. 1997) (en banc). 1, 26, 27

Reilly v. *City of Harrisburg*,
858 F.3d 173 (3d Cir. 2017) 28, 29

Robinson Twp. v. *Greater Pittsburgh Trap and Skeet Club*,
Court of Common Pleas, Washington County, Pennsylvania,
Civil Division No. 93-4400 (May 9, 1997). 8

Schad v. *Mt. Ephraim*,
452 U.S. 61 (1981) 25

Stilp v. *Contino*,
613 F.3d 405 (3d Cir. 2010). 32

Taksir v. *Vanguard Grp.*,
903 F.3d 95 (3d Cir. 2018) 21, 28

Teixeira v. *Cnty. of Alameda*,
873 F.3d 670 (9th Cir. 2017) (en banc). 12

United States v. *Brunson*,
416 F. App'x 212 (3d Cir. 2011).. 39

United States v. *Chester*,
628 F.3d 673 (4th Cir. 2010) 24

United States v. *DeCastro*,
682 F.3d 160 (2d Cir. 2012). 12, 14

United States v. *Grinnell Corp.*,
384 U.S. 563 (1966) 36

United States v. *Marzzarella*,
614 F.3d 85 (3d Cir. 2010). 4, 15, 16, 23, 26

United States v. *Wecht*,
484 F.3d 194 (3d Cir. 2007). 37

United States v. *Wecht*,
541 F.3d 493 (3d Cir. 2008). 36

Zambelli Fireworks Mfg. Co. v. *Wood*,
592 F.3d 412 (3d Cir. 2010). 34

Statutes and Rules

18 U.S.C. § 922(g)(9) 24

28 U.S.C. § 1291. 5

28 U.S.C. § 1292(a)(1). 5

28 U.S.C. § 1331. 5

28 U.S.C. § 1738. 30

28 U.S.C. § 2106. 35

28 U.S.C. § 2201. 5

28 U.S.C. § 2202. 5

28 U.S.C. § 455(a). 35

42 U.S.C. § 1983.. 5

Fed. R. Civ. P. 12(b)(6) 28, 29, 38

Fed. R. Civ. P. 65(c). 34

Robinson Twp. Zoning Ord. Art. 3, § 17(C) 10, 29

Robinson Twp. Zoning Ord. Art. 3, § 17(D). 11, 16

Robinson Twp. Zoning Ord. Art. 4, § 42 .. . . . . 10, 11, 17

Robinson Twp. Zoning Ord. Table 208(A).. 11

APPELLANTS' OPENING BRIEF

INTRODUCTION

If this case seems familiar, that is because this Court has already decided it once—in Plaintiffs' favor, vacating the previous dismissal's key error and remanding the case for further proceedings. Resisting that decision, the District Court ignored the call for further proceedings and instead re-granted the very same motion to dismiss that this Court had found inadequate. Entry 42 on the District Court's docket is this Court's mandate. Entry 43 is, for all intents and purposes, the same opinion this Court vacated by that mandate.

The District Court's error remains as clear as it is profound. In the District Court's view, restrictions on fundamental rights have a reasonable constitutional fit if they were enacted with the aim of serving the public good. It is undisputed that the Township can regulate land use in the public interest. Therefore, per the District Court, the regulations have a constitutionally adequate fit. Q.E.D.

This approach "reduc[es]" fundamental rights "to a charade." *Phillips* v. *Borough of Keyport*, 107 F.3d 164, 175 (3d Cir. 1997) (en banc). But

the District Court did not merely err on the substance. It deprived Plaintiffs of notice and an opportunity to be heard as to an argument never raised by the Defendants. Plaintiffs object not only to the result, but to the process that produced it. Indeed, the District Judge did not merely decline to draw reasonable inferences in Plaintiffs' favor from the complaint's factual allegations, as required on a motion to dismiss. Quite the opposite: the District Judge went so far as to dismiss the relevance of a prior judgment against the Township relating directly to this controversy, and refused to extend that judgment full faith and credit, because "facts can change" over time. Joint Appendix ("JA") 40 n.4. Plaintiffs are constrained to ask for reassignment on remand to a different District Judge.

* * *

For most of the past half-century, the Greater Pittsburgh Gun Club has safely operated on 265 rural acres held by William Drummond's family in Robinson Township, Pennsylvania. And for much of that time, the Township has pursued a vendetta on behalf of some of the club's neighbors, seeking its closure.

The Township's first two efforts to shutter the club failed in court. A nuisance trial ended with a judgment that the club is safe, and with factual findings that the then-Zoning Officer's personal animus clouded the charges. The Township unsuccessfully returned to court alleging licensing violations. This case addresses the Township's third attempt.

Undeterred by its previous losses, Robinson Township exploited a change in the club's ownership to achieve legislatively what the courts had forbidden. The Township required William Drummond, grandson of the club's founder and nephew of the land's current owner and former club manager, to obtain a new permit when he took over the club. But while slow-rolling Drummond's earnest efforts to proceed, the Township took an undisclosed track, and enacted new restrictions rendering Drummond's operation of the club impossible before accepting his paperwork. What had been permitted as of right is now a conditional use. The Township now forbids the club from being operated for a profit. And outdoor center-fire rifle shooting is banned—if the property is used as a gun club.

The Township did not try to defend these restrictions on any alleged merits. It never argued that barring Drummond from turning a profit makes the club safer, or that rifle fire proven safe at trial and otherwise still allowed on these 265 acres somehow becomes dangerous in the context of a gun club. Nor did the Township deny that these restrictions impacted Second Amendment rights. It merely argued that shuttering the club did not *meaningfully* impact constitutional rights, because people can always exercise their rights somewhere else.

The District Court accepted Defendants' argument. This Court did not. Yet notwithstanding this Court's order vacating the dismissal of Plaintiffs' facial Second Amendment challenge, and its instructions to carry out a two-step analysis under *United States* v. *Marzzarella*, 614 F.3d 85 (3d Cir. 2010), the District Court essentially repeated its previous opinion on the same record. It stated that the challenged laws have a reasonable constitutional fit because the Township is empowered to regulate for the common good, and thus dismissed the case because the Township did not completely ban Second Amendment activity.

Reversal and reassignment are warranted.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants William Drummond, GPGC LLC, and Second Amendment Foundation, Inc. ("Plaintiffs") invoked the District Court's jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202, and 42 U.S.C. § 1983. JA60, ¶6. The District Court previously issued an opinion and order granting Defendants-Appellees Township of Robinson and its Zoning Officer, Mark Dorsey's ("Defendants") motion to dismiss and denying as moot Plaintiffs' motion for a preliminary injunction. JA13-48.

This Court affirmed that order in part, vacated it in part, and remanded the case for further proceedings. *Drummond* v. *Twp. of Robinson*, 784 F. App'x 82 (3d Cir. 2019). On March 16, 2020, the District Court issued an opinion and order re-granting the motion to dismiss and again denying the preliminary injunction as moot. JA3-12. Plaintiffs timely noticed the appeal on April 1, 2020. JA1. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1).

STATEMENT OF ISSUES

1. Are Second Amendment claims subject to a substantial burden test, allowing the right to be denied in one location because it is not prohibited elsewhere? [Preserved: JA10-11; R.31 at 9-15.]

2. May laws restricting and barring gun clubs withstand Second Amendment scrutiny, at the pleading stage, when the government offers neither a regulatory rationale nor any evidence that could advance one? [Preserved: JA10-11; R. 17-1 at 9-12; R.31 at 11-15; R.32 at 4.]

3. Are Plaintiffs entitled to a preliminary injunction against an ordinance violating their Second Amendment rights? [Preserved: JA12; R.17; R.17-1; R.32.]

STATEMENT OF RELATED CASES

This case has previously been before this Court, No. 19-1394.

Plaintiff Drummond filed, but discontinued, a land use appeal relating to the allegations of this case. *Drummond* v. *Twp. of Robinson*, Court of Common Pleas, Washington Cnty., Pa., Civil No. 2018-2211.

Plaintiffs are unaware of any pending related cases.

STATEMENT OF THE CASE

1. *The Greater Pittsburgh Gun Club*

The Greater Pittsburgh Gun Club ("GPGC") has operated for most of the past fifty-three years on about 265 rural acres in Bulger, Pennsylvania. JA60, ¶11; JA61-62, ¶¶17, 20-21; JA64, ¶29. GPGC historically consisted of a clubhouse and restaurant, as well as the living quarters of its manager and the manager's family, four trap ranges, three skeet ranges, a 25-yard pistol range, a 100-yard rifle-sighting range, and a 400-yard rifle range. JA61, ¶14. The club sold memberships, range time, firearms, ammunition, targets, food and beverage, and other ordinary goods that might be found at any gun range, as well as shooting training and safety courses, and gun rental. It had as many as 800 members at any one time, but did not require membership to use its ranges. Police and military personnel also trained at the club. GPGC had always allowed the use of ordinary firearms of the kind in common use for traditional lawful purposes, including pistols, shotguns, and center-fire rifles up to .50 caliber. *Id.* ¶¶15-16.

2. *The Club Defeats Robinson Township's Nuisance Claim*

Robinson Township brought a nuisance action against GPGC, complaining about the discharge of automatic weapons, which soon ceased; the club's hours of operation; and projectiles allegedly striking nearby properties. JA62, ¶18.

GPGC prevailed. *See Robinson Twp.* v. *Greater Pittsburgh Trap & Skeet Club*, Court of Common Pleas, Washington Cnty., Pa., Civil Division No. 93-4400 (May 9, 1997), JA80-97. The Court held that the club did not constitute a nuisance and dismissed the action. Adopting the club's proposed findings of fact and law, JA80, the Court determined that the club's range was safe, that the club was not a nuisance, that the testimony of the Township's then-Zoning Officer and range neighbor, Mark Kramer, was not credible, and that Kramer harbored personal animus against GPGC's then-manager. JA88-96.

3. *The Club Defeats Robinson Township's Licensing Action*

GPGC ceased operations eleven years later, but was revived in 2016 under a new name and management. JA62, ¶¶20-21. Within three months, spurred by Kramer, Robinson Township revoked the club's

license for various alleged violations. JA63, ¶¶23-25. This effort to close the club also failed in court. *See Iron City LLC d/b/a Iron City Gun Club* v. *Robinson Twp.*, Court of Common Pleas, Washington Cnty., Pa., Civil Div. Nos. 2016-5682, 2016-7073 (April 17, 2017), JA98-105; JA63-64, ¶¶26-27.

4. *Drummond Takes Over—and Robinson Township Responds*

When the club closed in 2018, Plaintiff Drummond, grandson of the club's founder and nephew of the club's current owner and previous long-time manager, leased the land and formed GPGC LLC for the purpose of operating GPGC much as his grandfather and uncle had. JA64-65, ¶¶29-32. Drummond is a professional shooter and firearms instructor. JA59, ¶1. He is also a member of the Second Amendment Foundation, Inc. ("SAF"). *Id.* ¶3. Drummond and GPGC LLC would operate the club for his benefit and enjoyment and that of the general public, including other SAF members. JA71, ¶57.

Robinson Township, its Zoning Officer, Mark Dorsey, and the Kramers, among others, took advantage of GPGC's management change to again subvert the club's operation. Dorsey misled and slow-rolled

Drummond's efforts to submit required paperwork while the Township prepared a new ordinance rendering Drummond's operation of the club impossible. JA65-70, ¶¶33-54.

Notwithstanding GPGC's historic operation as a for-profit enterprise, the ordinance defined a "Sportsman's Club" as "a non-profit entity formed for conservation of wildlife or game, and to provide members with opportunities for hunting, fishing or shooting." JA68, ¶47; Robinson Twp. Zoning Ord. Art. 4, § 42 (formerly § 602).[1]

The Zoning Code had long required GPGC to "illustrate that the design and direction of all firing lanes shall not present a danger to public health and safety," and "show adherence to best design practices, such as the National Rifle Association's NRA Range Source Book to ensure safety." Robinson Twp. Zoning Ord. Art. 3, § 17(C) (formerly § 311(C)). "Other intensive uses shall present a plan to minimize any noise created by activities through buffering, acoustic engineering or topography." *Id.* This much remains unchanged. But the new ordinance

[1]The newly recodified Ordinance's section numbers, as posted on the Township's website (https://robinsonpa.gov/ordinances/) are not sequential.

also limited "[o]utdoor shooting activities" at "Sportsman's Clubs" so as to exclude center-fire (over .22 caliber) rifle shooting. *Id.* § 17(D) (formerly § 311(D)). The definition of "Sportsmen's Clubs" has since been amended to make Section 17(D)'s "outdoor shooting activities" the only activities permitted at "Sportsmen's Clubs." *Id.* Art. 4, § 42.[2]

By defining "Sportsman's Clubs" as non-profit uses, and by narrowly prescribing the activities now permitted at "Sportsman's Clubs," Robinson Township has effectively barred Plaintiffs' operation of the club. JA69, ¶¶50-51.

5. *Procedural History*

Drummond, GPGC, and SAF sued Robinson Township and Dorsey, seeking declaratory and injunctive relief against the new restrictions, as well as compensatory damages. Plaintiffs claimed that the profit and rifle-shooting bans, facially and as-applied to them, their customers and members, violate the Second Amendment by barring GPGC's operation. JA71-73 (Counts I and II). They further alleged that the Township

[2]The ordinance also reclassified "Sportsman's Club" from a principal permitted to a conditional use within its district. *See* Robinson Twp. Zoning Ord., Table 208(A); *see also* JA69, ¶47.

violated the Second Amendment by repealing GPGC's right to operate as a principal permitted use, JA73-74, and also brought equal protection and due process claims, JA74-76.

Plaintiffs moved for a preliminary injunction. Defendants moved to dismiss the complaint. With respect to the first two Second Amendment claims, Defendants offered that the claims were unripe, JA131-33; that Plaintiffs lacked standing, JA133-38; and that Plaintiffs Drummond and GPGC have no Second Amendment rights to provide arms and range time, JA138-39, though Defendants did not contest the Second Amendment rights of Plaintiffs' customers.

Defendants' standing argument relied on the minority position that only "substantial" Second Amendment burdens are actionable. *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc); *United States* v. *DeCastro*, 682 F.3d 160 (2d Cir. 2012). Per Defendants, Plaintiffs lacked standing because the complaint "fails to aver that Plaintiffs' customers and members cannot purchase firearms within the county," and "is devoid of any averment that Plaintiffs' prospective customers/members are unable to train with center-fire rifles elsewhere

in the County, or that doing so would impose even a minor inconvenience." JA137-38.

Defendants' opposition to the preliminary injunction motion repeated these arguments. With respect to the balancing of harms, Defendants added a conclusory assertion that because the challenged provisions are "aimed at encouraging beneficial growth, while preserving the residential nature and quality of life of Robinson Township's citizens," and GPGC is close to residential districts, "it is clear that the greater harm would be to the Township's constituents." JA164 (citations omitted). Their only evidence as to the merits: a listing of other gun stores. JA149.

Defendants did not otherwise contest the Second Amendment claims. They did *not* offer a regulatory rationale, supported by evidence, arguing that the non-profit requirement and the center-fire rifle ban satisfied some level of scrutiny.

i. *The District Court's First Opinion*

The District Court granted Defendants' motion, and denied Plaintiffs' motion as moot. It found that Plaintiffs have standing, JA25, and that

the first two facial Second Amendment claims are ripe, JA28. However, it accepted Defendants' "standing" arguments on the merits. It held that laws impacting Second Amendment rights are immune from scrutiny if, in the judge's view, they "may not *significantly* impair" or "may impose no *appreciable* burden on Second Amendment rights." JA31-32 (internal quotation marks omitted) (emphasis added).

> [O]nly "those restriction that (like the complete prohibition on handguns struck down in [*District of Columbia* v. *Heller*, 554 U.S. 570 (2008)]) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense" trigger heightened scrutiny, and thus are within the scope of the Second Amendment.

JA32 (quoting *DeCastro*, 682 F.3d at 166). And, per the District Court, rights are not substantially burdened if "adequate alternative means" remain for their exercise. JA33 (quoting *DeCastro*, 682 F.3d at 168).

The District Court viewed the requirement that GPGC operate as a nonprofit as a "place" regulation, and the prohibition on center-fire rifle use as a "manner" regulation. JA35. "Accordingly, the determination of whether any burden imposed is substantial is based on whether adequate alternatives exist." *Id.* "Because Plaintiffs fail to allege a lack of adequate alternatives, Plaintiffs fail to plead that the burdens imposed

by the [challenged regulations] are substantial. Plaintiffs thus fail to sufficiently allege that the challenged ordinances are within the scope of the Second Amendment." JA35-36. The District Court thus refused to apply any level of scrutiny. JA36.

With respect to Plaintiffs' other claims, however, the District Court did opine on the judgment GPGC obtained against the Township in the latter's nuisance claim: it found that the judgment "is not persuasive or controlling," because "facts can change" over time. JA40 n.4.

ii. *This Court Vacates the District Court's First Opinion*

This Court vacated the dismissal of Plaintiffs' facial Second Amendment challenges. It held that if the restrictions impact Second Amendment conduct (step one), the Township bears a heightened scrutiny burden in justifying those restrictions (step two). *Drummond*, 784 F. App'x at 83 (citing *Marzzarella*, *supra*, 614 F.3d 85).

With respect to step one, this Court described as "illustrative" precedent extending the Second Amendment's protection to commerce in arms and firing ranges. *Id.* at 84 n.8. It further noted that should the challenged provisions be viewed as time, place and manner restrictions,

such analysis must come at *Marzzarella*'s second step. *Id.* at 84. "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." *Id.* at 85.

iii. *The District Court Re-Grants the Motion to Dismiss*

On remand—without any further input from the parties—the District Court again dismissed the case. It held that Plaintiffs' case passed *Marzzarella*'s first step, as the contested provisions "burden conduct that, though ancillary to the core Second Amendment right to bear arms, is nonetheless within the scope of the Second Amendment's protection." JA8.

Yet at step two, the District Court did not find it necessary to await defense evidence or even a particular rationale justifying the contested provisions. First, it opined that the challenged provisions regulate time, place or manner. The District Court offered that "[b]ecause [Art. 4, § 17(D)] limits the types of outdoor shooting activities that may occur at Sportsman's Clubs, it thus regulates the manner in which persons may

maintain proficiency in firearm use in IBD Districts." JA10.[3] It also offered that "[Art. 4, § 42] regulates the place where commercial gun sales and other for-profit commercial gun range activity may occur by limiting Sportsman's Clubs to nonprofit activities." *Id.*[4] And, the District Court opined, "[t]he Township's stated objective for these regulations—nuisance prevention and protecting the public health, safety and welfare of its residents—is an important one, much like the defendant-city's interest in preventing the secondary effects of adult theaters in *Renton*." *Id.* (citing *City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986)).[5]

Citing its previous opinion, the District Court offered that restricting commercial use and rifle types relate to "land use intensity." JA11. Accordingly, in its view, such regulations *automatically* have a reasonable intermediate scrutiny fit. The entire analysis:

---

[3]No regulation forbids the shooting of center-fire rifles in the district. Just at "Sportsman's Clubs." Drummond continues to shoot center-fire rifles on the property, as do his neighbors on their properties.

[4]The provision originally did not prohibit any particular GPGC activities, provided the club was operated as a nonprofit.

[5]The Township did not state these generalized objectives in briefing a heightened scrutiny argument.

"Regulations addressing intensity of land use relate directly to, *and thus* reasonably fit with, nuisance prevention and protecting the public health, safety and welfare of its residents." JA11 (emphasis added).

The District Court then faulted Plaintiffs for not "plead[ing] any facts that show a lack of commercial gun ranges or gun ranges where center-fire rifles may be fired within the Township." *Id*. Assuming (without record evidence) that other commercial shooting ranges are equivalent and fully sufficient to meet all potential demand, the District Court held that the supposed availability of alternatives defeated the challenge. *Id.*

Plaintiffs appealed and moved for summary reversal. That motion was denied and the case set for briefing.

SUMMARY OF ARGUMENT

On remand, the District Court merely applied the thinnest veneer of heightened scrutiny terminology to its previous opinion. There is no actual scrutiny of any kind in this reformulation, no substantive difference between the District Court's vacated opinion and its latest work. Previously, the District Court dismissed the case because the

potential availability of alternatives supposedly meant that the restrictions' burden was insubstantial. Ordered by this Court to apply heightened scrutiny, the District Court again dismissed the case on account of supposed adequate alternatives—only now, adding a sentence to the effect that *all regulations, per se*, reasonably fit wholesome goals.

The first opinion held that only complete prohibitions can violate the Second Amendment; anything less is an insubstantial burden. The second opinion held that *all* regulations "addressing land use intensity . . . thus reasonably fit" legitimate goals, JA11, and any hypothetical alternative ends the inquiry. These are the same thing. Neither opinion weighed the Defendants' evidence, which has not been submitted, against their rationale, also missing.

Recitation of the police power does not instantly satisfy—at the pleading stage and without evidence—heightened scrutiny. *Of course* the Township would, if given the chance, assert that its laws are wholesome and promote the public good. It would never state that this is but the latest chapter in what another court determined to be the prosecution of a personal grudge. But it seems doubtful that this Court remanded the

case just so that the District Court would bless the Township's motives before re-dismissing on account of supposed adequate alternatives.

It is also time to end Plaintiffs' two-year wait for a ruling on their motion for a preliminary injunction. Plaintiffs have made an overwhelming case on the merits in 2018. Considering their irreparable harm, the balance of the equities, and the public interest in enforcing the Constitution, there is no point in further delay.

Finally, Plaintiffs are constrained to request that this case be reassigned to a different District Judge. This request is not made lightly. To be sure, the record is free of explicit expressions of hostility from the bench. But the record is not free of partiality. The judge has repeatedly declined to put the Defendants to their proof, and disregarded this Court's mandate in having again declared that the Second Amendment cannot be violated short of a complete, *Heller*-style prohibition.

Asked to conduct a heightened scrutiny analysis, the judge declared that all laws regulating "land use intensity" have a reasonable constitutional fit. And at the pleading stage, the judge has already refused to consider Plaintiffs' previous judgment against the Township.

A reasonable observer would question whether a judge purporting to apply heightened scrutiny in dismissing a case before the defense has submitted any briefing or evidence on the subject—a judge who declared that all land use regulations inherently have a reasonable constitutional fit, while refusing to give any weight to a previous judgment in Plaintiffs' favor—would ever be open to Plaintiffs' case.

STANDARD OF REVIEW

"We review de novo the District Court's decision on a motion to dismiss, and accept as true all well-pled factual allegations in the complaint and all reasonable inferences that can be drawn from them." *Taksir* v. *Vanguard Grp.*, 903 F.3d 95, 96-97 (3d Cir. 2018) (citation and internal quotation marks omitted). The Court must also consider "exhibits attached to the complaint [and] matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Davis* v. *Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016) (internal quotation marks omitted).

"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) (citation omitted).

ARGUMENT

I. LAWS DO NOT AUTOMATICALLY PASS HEIGHTENED SCRUTINY JUST BECAUSE THE GOVERNMENT IS EMPOWERED TO DO GOOD.

This Court reviews motions to dismiss *de novo*. It presumably did not vacate the District Court's previous decision simply for lacking a sentence declaring all regulations reasonable. Rather, this Court vacated the previous decision because heightened scrutiny analysis is actually required. That cannot happen at the pleading stage, where the Plaintiffs' allegations are presumed true and the Defendants have no *evidence*, or even a rationale for the laws.

The District Court's assertion that regulations have a "reasonable fit" if they are of a type that may serve police power goals is remarkable. Even intermediate scrutiny requires a fit "whose scope is in proportion to the interest served," employing "a means narrowly tailored to achieve the desired objective." *Bd. of Trs.* v. *Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks omitted). A fit is not reasonable just because the government asserts an important interest. A fit is "reasonable" if

"the law does not burden more conduct than is reasonably necessary." *Ass'n of N.J. Rifle & Pistol Clubs* v. *AG N.J.*, 910 F.3d 106, 119 (3d Cir. 2018) (quoting *Drake* v. *Filko*, 724 F.3d 426, 436 (3d Cir. 2013)); *Marzzarella*, 614 F.3d at 98.

And regardless of the scrutiny level, "the Government bears the burden of proof on the appropriateness of the means it employs to further its interest." *Binderup* v. *Atty. Gen'l*, 836 F.3d 336, 353 (3d Cir. 2016) (en banc) (citations omitted). Robinson Township needs "actual evidence, not just assertions," to establish the proper fit between the challenged provisions and legitimate goals. *Ezell* v. *City of Chicago* ("*Ezell II*"), 846 F.3d 888, 894 (7th Cir. 2017). It cannot "invoke [its] interests as a general matter and call it a day." *Id.* at 895. Perforce neither may a court do so on its behalf.

Appellate courts have consistently vacated decisions that rejected Second Amendment challenges absent sufficient evidence. *See Ezell II*, *supra*; *Heller* v. *District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1259 (D.C. Cir. 2011) ("the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments"); *Ezell*

v. *City of Chicago* ("*Ezell I*"), 651 F.3d 684, 709 (7th Cir. 2011) ("At this stage of the proceedings, the City has not come close to satisfying this standard . . . [it] presented no data or expert opinion to support the range ban, so we have no way to evaluate the seriousness of its claimed public-safety concerns"); *United States* v. *Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("[t]he government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between [18 U.S.C.] § 922(g)(9) and an important governmental goal").

Drake appears to be the only exception to this rule. There, a divided panel rejected a Second Amendment challenge not just at step one, but also at step two, on a motion to dismiss. It did so because the challenged law long anteceded *Heller*, and allegedly "New Jersey's legislators could not have known that they were potentially burdening protected Second Amendment conduct." *Drake*, 724 F.3d at 438; *but see id.* at 453-54

(Hardiman, J., dissenting). That explanation is unavailable here, as the challenged provisions were enacted in 2018.

Even if these were time, place and manner regulations, the existence of alternatives would be irrelevant because the regulatory fit is absent. Drawing upon the Supreme Court's holding that "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) (internal quotation marks omitted), the Seventh Circuit rejected the "profoundly mistaken assumption" that Second Amendment rights may be violated in one place because they may be exercised elsewhere. *Ezell I*, 651 F.3d at 697. And the adequacy of alternatives is itself an evidentiary question.

The District Court placed some importance on the fact that this case currently concerns a facial challenge, but that much is irrelevant, at least at this juncture. *Ezell*, too, involved a facial challenge, but the fact that gun ranges could properly be banned from at least one parcel in the City of Chicago did not automatically sanction a city-wide prohibition of all gun ranges. Nor did that fact relieve Chicago of its heightened scrutiny

burden. This Court was well-aware that it was remanding a facial challenge back to the District Court, yet it still required application of *Marzzarella*'s two-step approach, the second part of which burdens the Township with establishing a proper constitutional fit. And at the pleading stage, the District Court could not possibly determine that the challenged laws are valid against any potential "sportsman's clubs" that might otherwise be allowed, let alone against the Plaintiffs, who plead that their facility has been perfectly safe for half a century and have a previous judgment underscoring that allegation.

Renton hardly sanctions the District Court's approach. It upheld regulation upon "detailed findings," based on "a long period of study and discussion." *Renton*, 475 U.S. at 51 (citations omitted). The trial court "heard extensive testimony," including expert testimony; the record contained "substantial evidence." *Id.* (citations omitted). The secondary effects doctrine requires that Defendants must

> identify the justifying secondary effects with some particularity, that they offer some record support for the existence of those effects and for the Ordinance's amelioration thereof, and that the plaintiffs be afforded some opportunity to offer evidence in support of the allegations of their complaint. To insist on less is to reduce the First Amendment to a charade in this area.

Phillips, 107 F.3d at 175. "[A] municipality can[not] get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance," and plaintiffs may "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *City of Los Angeles* v. *Alameda Books*, 535 U.S. 425, 438-39 (2002) (plurality opinion).

Charades are no more proper in the Second Amendment field than in the First. As the Seventh Circuit declared in striking down restrictive gun range zoning, "'[t]here must be *evidence* to support the City's rationale for the challenged regulations; lawyers' talk is insufficient." *Ezell II*, 846 F.3d at 896 (internal quotation marks omitted).

Here there was not even shoddy data or reasoning—or even "lawyers' talk." Nothing in the available legislative record, JA115-23, reveals anything approaching *Renton* standards. Indeed—the District Court never even mentioned the concept that "fit" measures whether the challenged provision restricts more freedom than necessary. The notion

that Plaintiffs have rights never entered its equation. The resulting decision was based on zero evidence—and declared in the face of Rule 12(b)(6) standards requiring that *Plaintiffs*' allegations be credited, along with all their reasonable inferences. *Taksir*, 903 F.3d at 96-97. As before, all that mattered to the District Court was its supposition that alternatives to GPGC exist. Its opinion is merely a restatement of the vacated "substantial burden" opinion. It should be reversed.

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

A. Plaintiffs Will Succeed on the Merits of Their Claims.

A preliminary injunctive movant "must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Reilly* v. *City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) (footnotes omitted). "If these gateway factors are met, a court then considers the remaining two factors [the equities and the public interest] and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*

Because "the burdens at the preliminary injunction stage track the burdens at trial," *id.* at 180 (internal quotation marks omitted), and Defendants have not carried any heightened scrutiny burden, Plaintiffs must be deemed likely to succeed on their Second Amendment claims.

Indeed—Defendants have not even attempted to meet their heightened scrutiny burden. Even in the weakest cases, doing so at the pleading stage is challenging considering the lack of defense evidence and Rule 12's requirement to credit *the Plaintiffs*' factual allegations.

It is unclear how Defendants could ever establish the reasonableness of these regulations. The center-fire rifle ban is plainly both over- and under-inclusive. The Zoning Code itself demonstrates the availability of better regulatory fit by imposing safe range design requirements. Robinson Twp. Zoning Ord. Art. 3, § 17(C). And the ban addresses only the firing of rifles at "Sportsman's Clubs." It does not ban center-fire rifle practice generally, which continues constantly on the subject property as it does throughout the zone. The nonprofit requirement does not ban any activity, it just bans profit. The provision would not restrain any of GPGC's activities were it operated as a charity.

Indeed, Robinson Township is in a worse position than was Chicago in *Ezell II*. Chicago merely remained ignorant of how gun ranges interact with neighboring land uses, hoping courts would blindly defer to its desired outcome. *Ezell II*, 846 F.3d at 895. Robinson Township has had the benefit of its lost nuisance trial. The questions of whether the club is a nuisance, or poses any sort of danger when operated for profit and hosting outdoor center-fire rifle shooting, have already been adjudicated at trial. Defendants cannot re-litigate their claim.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738,

> [f]ederal courts give preclusive effect to issues decided by state courts, to not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.

Metro. Edison Co. v. *Pa. PUC*, 767 F.3d 335, 350 (3d Cir. 2014) (internal quotation marks omitted). "We must give the acts of Pennsylvania's courts the same full faith and credit in federal court that they would enjoy in Pennsylvania's courts." *Greenleaf* v. *Garlock, Inc.*, 174 F.3d 352, 357 (3d Cir. 1999) (citation omitted).

Pennsylvania's Supreme Court applies issue preclusion when:

> (1) the issue decided in the prior case is identical to the one presented in the later action;
>
> (2) there was a final adjudication on the merits;
>
> (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case;
>
> (4) the party . . . against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and
>
> (5) the determination in the prior proceeding was essential to the judgment.

Metro. Edison, 767 F.3d at 351 (internal quotation marks and footnote omitted).

Robinson Township's failed nuisance action against the club, and each and every factual and legal finding made by the Court of Common Pleas, is fully binding here to the extent that Robinson Township might claim the club, as operated historically, would pose any sort of harm:

> (1) these issues here are the exact issues decided by the state court;
>
> (2) the state court entered a final adjudication on the merits;
>
> (3) Robinson Township is the same Robinson Township that brought the prior action;

(4) it had a full and fair opportunity to litigate its action; and

(5) the issues determined were essential to the judgment.

Against this judgment, Defendants offered nothing. No evidence, no explanation, for how the challenged laws satisfy any level of heightened scrutiny. Moreover, the record here is one of active deception. If the Township had any legitimate concerns, it would have forthrightly shared them with Drummond as might be expected under the circumstances by honest people dealing fairly with each other. On this record, the outcome in Plaintiffs' favor is not in doubt.

Likelihood of success on the merits of a constitutional claim all but guarantees that "the other requirements for a preliminary injunction are satisfied." *Stilp* v. *Contino*, 613 F.3d 405, 409 (3d Cir. 2010). Nonetheless, Plaintiffs address these factors below.

B. The Challenged Provisions Irreparably Harm Plaintiffs.

Just as "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Hohe* v. *Casey*, 868 F.2d 69, 72 (3d Cir. 1989) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)), "[t]he Second Amendment protects similarly intangible

and unquantifiable interests," *Ezell I*, 651 F.3d at 699. "*Heller* held that the Amendment's central component is the right to possess firearms for protection. Infringements of this right cannot be compensated by damages." *Id.*

Of course, "[c]onstitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction." *Hohe*, 868 F.2d at 73 (citation omitted). The issue is whether the Plaintiffs are suffering "direct penalization, as opposed to incidental inhibition." *Id.* (internal quotation marks omitted). This is a case of direct and on-going prohibition. Absent injunctive relief, the club will remain shuttered. As in *Ezell I*, the harm here is irreparable.

C. The Balance of the Equities, and the Public Interest, Favor Injunctive Relief.

Injunctive relief will harm no one. The club has operated safely for nearly half a century, and the Court of Common Pleas has determined that it is not a nuisance. An injunction would not immunize Plaintiffs from the police power. Should any harm arise out of Plaintiffs' operation of the club, an injunction would not bar Robinson Township from undertaking properly tailored, *constitutional* regulations. Indeed, an

injunction could only help prevent harm to others, as the availability of firearm education and training bears directly on public safety. The club is not a social evil—it provides an essential public service.

Moreover, "the enforcement of an unconstitutional law vindicates no public interest." *K.A.* v. *Pocono Mt. Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (citation omitted). That "enforcement of an unconstitutional law is always contrary to the public interest" is "obvious." *Gordon* v. *Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (citations omitted). "[I]t may be assumed that the Constitution is the ultimate expression of the public interest." *Id.* (internal quotation marks omitted).

D. Plaintiffs Should Not Be Required to Post Security, as an Injunction Cannot Financially Harm Defendants.

Courts may dispense with Fed. R. Civ. P. 65(c)'s security requirement "when complying with the preliminary injunction raises no risk of monetary loss to the defendant," and "the balance of [the] equities weighs overwhelmingly in favor of the party seeking the injunction." *Zambelli Fireworks Mfg. Co.* v. *Wood*, 592 F.3d 412, 426 (3d Cir. 2010) (internal quotation marks omitted).

This is such a case. Defendants have no legitimate interests at stake, and the club's operation would cost the Township nothing beyond what any other business might. To the contrary, it should prove economically beneficial to the Township.

* * *

An injunction would leave Defendants free to regulate GPGC in other manners as might become necessary. But with respect to *these* restrictions, Defendants have already had plenty opportunity to submit argument and evidence. When fundamental rights are being infringed, and the defense submits no evidence, two years is long enough to decide a preliminary injunction motion.

III. THIS CASE SHOULD BE REASSIGNED TO A DIFFERENT DISTRICT JUDGE, AS THE CURRENT JUDGE'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.

This Court should use its inherent supervisory authority to reassign the case to a different district judge. 28 U.S.C. § 2106; *Liteky* v. *United States*, 510 U.S. 540, 554 (1994).[6] "The right to trial by an impartial judge is a basic requirement of due process. To fulfill this requirement—

[6]Plaintiffs are unaware of any extrajudicial indications of bias that would warrant recusal under 28 U.S.C. § 455(a).

and to avoid both bias and the appearance of bias—this court has supervisory authority to order cases reassigned to another district court judge." *Haines* v. *Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992) (internal quotation marks and citation omitted); *cf. United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966) (statement "manifesting a closed mind on the merits of the case" would disqualify judge). Reassignment is further indicated when the District Judge's conduct of the case is inconsistent with this Court's expectations upon initial remand. *United States* v. *Wecht*, 541 F.3d 493, 511 (3d Cir. 2008).

Here, "a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned." *Arrowpoint Capital Corp*. v. *Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 329 (3d Cir. 2015) (internal quotation marks omitted). What else might be said when a court conducts "heightened scrutiny" at the pleading stage, without evidence, to vindicate a defense theory it supplies *sua sponte* without affording Plaintiffs notice or an opportunity to file a brief, and in disregard of this Court's mandate to conduct further proceedings.

"It is a hallmark of partiality for one party not to be put to its burden." *United States* v. *Wecht*, 484 F.3d 194, 231 (3d Cir. 2007) (Bright, J., concurring in part and dissenting in part). And that has now happened here twice. The District Court's second opinion is consistent with the first in its disregard for Plaintiffs' fundamental Second Amendment rights. But the second time around, instantly upon remand, manifests a lack of due process. When a court consults neither evidence nor a defense rationale before racing to uphold laws under heightened scrutiny, observers may have little confidence that the court would apply heightened scrutiny to any defense (should the Township offer one)—and even less doubt as to the final outcome.

The District Court's second dismissal is also disquieting considering its earlier treatment of Plaintiffs' evidence. As the standard of review reflects, the District Court was required to consider "exhibits attached to the complaint [and] matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Davis*, 824 F.3d at 341(internal quotation marks omitted). One would imagine that the state court's prior judgment, Exhibit A to

the complaint, would be entitled to full faith and credit, and have res judicata effect. At a minimum, the previous judgment establishes that the regulations extinguish a great deal of protected activity without advancing any public safety interests, and casts doubt on the purity of the Township's motives.

The parties and the state court doubtless worked hard to develop the previous judgment. Not least on a motion to dismiss, that judgment was entitled to more deference than "facts can change." JA40 n.4. If the facts have changed, that was for the Defendants to *prove*, not for the District Court to *assume*. On a Rule 12(b)(6) motion, inferences must reasonably be drawn in Plaintiffs' favor—not against them. *Bruni* v. *City of Pittsburgh*, 824 F.3d 353, 371 (3d Cir. 2016).

Of course the District Court never specified which facts might have changed, or how, or in what way. The only change it cited was that the property was rezoned to exclude "commercial shooting ranges" "sometime before the 2016 litigation." JA40 n.4. But in that litigation, the Township conceded that Plaintiffs' club is *not* a "shooting range" of the type excluded from the zone. JA101. The court thus *reversed* the

Zoning Hearing Board's decision that the club was an impermissible shooting range. *Id.* And in any event, the Township cannot bootstrap its regulatory changes into constitutionality. Regulatory changes are the reason for this lawsuit; they do not disprove the prior judgment's validity to the effect that the club is not a nuisance, and they have no bearing on the question of heightened scrutiny fit.

Plaintiffs accept that litigation offers few guarantees. These do not include particular results, but the assignment of a judge free from even the appearance of bias is among the guarantees of due process. *Haines*, 975 F.2d at 98. Respectfully, on this record, "a reasonable person . . . would conclude that the judge's impartiality might reasonably be questioned." *Arrowpoint*, 793 F.3d at 329. Plaintiffs acknowledge that this request is extraordinary, but the record leaves them little choice, as "[a]ll indicators suggest that the District Court will refuse to alter its course." *United States* v. *Brunson*, 416 F. App'x 212, 223 (3d Cir. 2011).

CONCLUSION

The decision below should be reversed, and the case remanded with instructions to grant Plaintiffs' motion for a preliminary injunction and reassign the case to a different District Judge.

Dated: July 1, 2020

Respectfully submitted,

/s/ Alan Gura

Alan Gura (Va. Bar No. 68842)
GURA PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085/703.997.7665

Counsel for Appellants

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am an attorney in good standing of the bar of the Third Circuit.

/s/ Alan Gura
Alan Gura

DATED: July 1, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 7,174 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. The text of the electronic brief is identical to the text in the paper copies.

4. 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: July 1, 2020

No. 20-1722

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)

JOINT APPENDIX
VOL. I, pp. JA1-48

Alan Gura (Va. Bar No. 68842)
GURA PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085/703.997.7665

July 1, 2020

Counsel for Appellants

JOINT APPENDIX
TABLE OF CONTENTS

Volume I

Notice of Appeal [Dkt. 44]. . . . . JA 1

District Court Opinion and Order [Dkt. 43]. . . . . JA 3

District Court Opinion and Order [Dkt. 36]. . . . . JA 13

Volume II

Docket Entries. . . . . JA 49

Verified Complaint [Dkt. 1]. . . . . JA 58

Complaint Exh. A, *Robinson Twp.* v. *Greater Pittsburgh Trap & Skeet Club*, Court of Common Pleas, Washington Cnty., Pa., Pennsylvania, Civil Division No. 93-4400 (May 9, 1997) [Dkt 1-2]. . . . . JA 80

Complaint Exh. B, *Iron City LLC d/b/a Iron City Gun Club* v. *Robinson Twp.*, et al., Court of Common Pleas, Washington Cnty., Pa., Civil Div. Nos. 2016-5682, 2016-7073 (April 17, 2017) [Dkt. 1-3]. . . . . JA 98

Complaint Exh. C, Application Denial [Dkt. 1-4, also 27-4 and 27-6]. . . . . JA 106

Declaration of William Drummond [Dkt. 17-4]. . . . . JA 108

Robinson Twp. Bd. of Supervisors Meeting Minutes, Feb. 12, 2018 [Dkt. 17-6]. . . . . JA 115

Robinson Twp. Special Meeting, Meeting Minutes,
Feb. 19, 2018 [Dkt. 17-7].. . . . . JA 118

Robinson Twp. Special Meeting, Meeting Minutes,
Mar. 22, 2018 [Dkt. 17-8]. . . . . JA 120

Robinson Twp. Bd. of Supervisors Meeting Minutes,
Apr. 9, 2018 [Dkt. 17-9].. . . . . JA 121

Robinson Twp. Ordinance 1-2018 [Dkt. 17-10, also 27-3]. . . . . JA 124

Defendants' Memorandum of Law in Support of Motion to
Dismiss Plaintiffs' Complaint [Dkt. 27]. . . . . JA 126

Google Business Listing Printout [Dkt. 27-9]. . . . . JA 149

Defendants' Memorandum of Law in Opposition to Plaintiffs'
Motion for Preliminary Injunction [Dkt. 30]. . . . . JA 150

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

WILLIAM DRUMMOND, GPGC LLC, and SECOND AMENDMENT FOUNDATION, INC.,	) Case No. 2:18-cv-1127-MJH
Plaintiffs,	)
v.	)
ROBINSON TOWNSHIP and MARK DORSEY, Robinson Township Zoning Officer, in his official and individual capacities,	)
Defendants.	)

NOTICE OF APPEAL

Notice is hereby given that William Drummond, GPGC LLC, and Second Amendment Foundation, Inc., plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the Opinion and Order denying their motion for a preliminary injunction and granting defendants Robinson Township and Mark Dorsey's motion to dismiss, Dkt. 43, entered in this action on March 16, 2020.

Dated: April 1, 2020

Respectfully submitted,

/s/ Alan Gura
Alan Gura (VA Bar No. 68842)
Gura PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085/Fax 703.997.7665
Admitted pro hac vice

/s/ James H. McCune
James H. McCune (PA Bar No. 19852)
/s/ K. Bradley Mellor
K. Bradley Mellor (PA Bar No. 61363)
Bowles Rice
1800 Main Street, Suite 200
Cannonsburg, PA 15317
724.514.8938/Fax 724.514.8954

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2020, a copy of the foregoing notice of appeal 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

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

WILLIAM DRUMMOND, GPGC LLC, and SECOND AMENDMENT FOUNDATION, INC.,	)	Civil Action No. 18-1127
Plaintiffs,	)	Judge Marilyn J. Horan
v.	)	
ROBINSON TOWNSHIP and MARK DORSEY, Robinson Township Zoning Officer, in his official and individual capacities,	)	
Defendants.	)	

OPINION AND ORDER

In August 2018, Plaintiffs William Drummond, GPGC LLC, and Second Amendment Foundation, Inc. filed suit against Defendants Robinson Township and Zoning Officer Mark Dorsey. (ECF No. 1). In their Complaint, Plaintiffs sought relief, pursuant to 42 U.S.C. § 1983, for alleged facial and as-applied violations of the Second Amendment right to bear arms, as well as various facial and as-applied violations of the Fourteenth Amendment's Equal Protection, Due Process, and Privileges or Immunities clauses. Plaintiffs also sought a preliminary injunction. (ECF No. 17). Defendants subsequently moved to dismiss the Complaint in its entirety. (ECF No. 26). In January 2019, the Court granted the Motion to Dismiss and denied the Motion for Preliminary Injunction as moot. (ECF No. 36). Plaintiffs appealed. (ECF No. 38). The Third Circuit Court of Appeals vacated and remanded this Court's Order with respect to Plaintiffs' facial Second Amendment claims and the denial of the preliminary injunction, insofar as preliminary injunction relates to the facial Second Amendment claims. (ECF Nos. 41, 42);

Drummond v. Twp. of Robinson, 784 Fed. App'x. 82 (3d Cir. 2019). The Third Circuit affirmed this Court's Order in all other respects.

Now before the Court are Defendants' Motion to Dismiss as it relates to Plaintiffs' facial Second Amendment claims and Plaintiffs' Motion for Preliminary Injunction. For the following reasons, Defendants' Motion to Dismiss will be granted, and Plaintiffs' Motion for Preliminary Injunction will be denied as moot.

I. Background

The facts of this case are set out more fully in this Court's previous Opinion and Order at *Drummond v. Robinson Twp.*, 361 F. Supp. 3d 466 (W.D. Pa. 2019). For the purposes of this Opinion, the relevant facts are as follows.

In December 2017, Mr. Drummond entered into a ten-year lease of a 265-acre parcel within the jurisdiction of Robinson Township, Washington County, Pennsylvania. (ECF No. 1, at ¶¶ 11, 30). Mr. Drummond, through his wholly owned entity, GPGC LLC, intended to open and operate a for-profit shooting range and gun club on the property. *Id.* at ¶¶ 30–31. Mr. Drummond planned to "sell memberships, range time, firearms, ammunition, targets, food and beverage, and other ordinary goods that might be found at any gun range, as well as shooting training and safety courses to the public." *Id.* at ¶ 31.

Under Robinson Township's Zoning Ordinance, Mr. Drummond's property was zoned as an Interchange Business Development District, or IBD District. *Id.* at ¶ 12. At the time Mr. Drummond entered the lease, the Zoning Ordinance allowed Sportsman's Clubs as permitted principal uses within IBD Districts. *Id.* The Zoning Ordinance, however, did not define "Sportsman's Clubs." *Id.* Additionally, although the Zoning Ordinance did not allow

commercial outdoor shooting ranges as permitted principal uses or conditional uses in IBD Districts, it allowed them in other zones. *Id.* at ¶ 48; (ECF No. 27-1, at 10, 18, 23–24, 88).

By the time Mr. Drummond submitted his zoning permit application in March 2018, the Township had proposed certain amendments to the Zoning Ordinance that regulated Sportsman's Clubs. *Id.* at ¶ 40. The Township enacted the pending amendments in April 2018. *Id.* at ¶ 47. Through the regulation of Sportsman's Clubs, the Township sought "to avoid nuisances and provide for and protect the public health, safety and welfare for the residents within the geographic limits of the Township." (ECF No. 27-3, at 1). Accordingly, the amendments made three changes to the Zoning Ordinance, two of which are relevant here. First, the Township amended Section 601 to include a definition for "Sportsman's Club." (ECF No. 1, at ¶ 47). Under the new definition, a "Sportsman's Club" is "[a] nonprofit entity formed for conservation of wildlife or game, and to provide members with opportunities for hunting, fishing or shooting." *Id.* Second, the Township amended Section 311 to include paragraph (D), which limits outdoor shooting activities at Sportsman's Clubs "to pistol range, skeet shoot, trap and skeet, and rim-fire rifles." *Id.* at ¶ 47. According to the Complaint, Section 311(D) created a prohibition on center-fire rifles at Sportsman's Clubs, which "has significantly frustrated if not effectively barred the use of the . . . property as a gun club or shooting range." *Id.* at ¶ 51. In short, Plaintiffs allege that there is no mechanism under the Zoning Ordinance "by which anyone might be allowed to operate a for-profit gun club or shooting range within an IBD district, or shoot center-fire rifles at a 'Sportsman's Club.'" *Id.* at ¶ 49. The Township, consequently, rejected Mr. Drummond's zoning permit application. *Id.* at ¶ 53.

Plaintiffs filed the present suit, in part, to challenge the constitutionality of Sections 311(D) and 601. In Counts I and II of the Complaint, Plaintiffs contend that Sections 601 and

311(D), respectively, deprive Plaintiffs of their Second Amendment right to keep and bear arms. *Id.* at ¶¶ 61, 65. Plaintiffs also ask the Court to preliminarily enjoin the Township from enforcing Sections 311(D) and 601. (ECF No. 17). The Township seeks dismissal of Counts I and II for failure to state a claim and objects to Plaintiffs' Motion for Preliminary Injunction. (ECF Nos. 26, 28).

II. Standard of review

Rule 12(b)(6) allows a party to seek dismissal of a complaint against it on the ground that the complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss a complaint under Rule 12(b)(6), a court must first "accept all factual allegations as true" and "construe the complaint in the light most favorable to the plaintiff." *Eid v. Thompson*, 740 F.3d 118, 122 (3d Cir. 2014) (internal quotations omitted). The court then must "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Id.* A complaint is sufficient only when it is facially plausible, meaning that the court is able "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). To be plausible on its face, the complaint must contain more than "[t]hreadbare recitals of the elements of a cause of action" and "mere conclusory statements." *Id.* The court need not "accept unsupported conclusions and unwarranted inferences." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013).

III. Discussion

Plaintiffs bring two claims under 42 U.S.C. § 1983, alleging that Sections 601 and 311(D) of the Township's Zoning Ordinance, each on its face, violate the Second Amendment.

Section 1983 provides that a state actor who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. A plaintiff bringing a claim under § 1983 therefore must allege that he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). When a plaintiff alleges that the deprivation he suffers results from the existence of a particular statute—that is, the plaintiff alleges that the statute is unconstitutional on its face—the plaintiff "'must establish that no set of circumstances exists under which the [statute] would be valid.'" *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This, of course, is a difficult standard for a plaintiff to meet. *Id.*

The Second Amendment to the United States Constitution protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. To evaluate whether a deprivation of a Second Amendment right has occurred, courts use a two-pronged approach. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)). First, courts are to "ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* If the law does not impose a burden on conduct that falls within the Second Amendment's scope, then the inquiry is over. *Id.* If the challenged law does burden such conduct, courts are to move on to the second prong, under which they are to "evaluate the law under some form of means-end scrutiny." *Id.*

Regarding step one, the Court is tasked with determining whether Sections 311(D) and 601 of the Township's Zoning Ordinance regulate conduct within the scope of the Second Amendment's protection. Specifically, the Court must determine whether the right to bear arms

protects (1) the ability to shoot center-fire rifles at a gun range and (2) the operation of a for-profit gun range, which includes firearm and ammunition retail sales. To answer these questions, a textual and historical analysis is required. *Id.* at 89–93. Through such an analysis, the Supreme Court found that the core right protected by the Second Amendment is the right of "law-abiding citizens to 'use arms in defense of hearth and home.'" *Id.* at 89 (quoting *Heller*, 554 U.S. at 635). Courts have also recognized rights that, though they are ancillary to the core right, are within the ambit of Second Amendment protection. Relevant here, the Seventh Circuit found that "the 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." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). Similarly, the Ninth Circuit held that the ability to buy and sell firearms and ammunition is conduct that falls within the scope of the Second Amendment's protection. *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."); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("[T]he right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them." (internal quotations omitted)).

By limiting outdoor shooting activities at Sportsman's Clubs to "pistol range, skeet shoot, trap and skeet, and rim-fire rifles," and thus prohibiting center-fire rifles, Section 311(D) burdens a person's ability to maintain proficiency in the use of center-fire rifles. Likewise, Section 601's prohibition on commercial activities at Sportsman's Clubs regulates, in part, where firearms and ammunition may be bought and sold. Accordingly, both Sections 311(D) and 601 burden conduct that, though ancillary to the core Second Amendment right to bear arms, is nonetheless within the scope of the Second Amendment's protection.

Turning to step two, the Court must evaluate Sections 311(D) and 601 under some form of means-end scrutiny. Although the Supreme Court has stated that some form of heightened scrutiny is required, the Court has not resolved whether or when strict scrutiny or intermediate scrutiny applies to Second Amendment claims. *Heller*, 554 U.S. at 628 n.27. Courts have thus looked to First Amendment jurisprudence for guidance. *Marzzarella*, 614 F.3d at 89 n.4 (explaining that "the First Amendment is the natural choice" for guiding evaluations of Second Amendment challenges, and noting that "*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment"). The First Amendment's test for time, place, and manner regulations on speech is pertinent here, in that it may be applied to time, place, and manner regulations on the exercise of Second Amendment conduct. *Id.* at 97. Under the First Amendment test, courts apply intermediate scrutiny, meaning that the government's objective in enacting the regulation must be important and that "the fit between the challenged regulation and the asserted objective [must] be reasonable." *Id.* at 98. The reasonableness of a content-neutral time, place, or manner regulation of speech depends on whether the regulation "leave[s] open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477 (internal quotations omitted). A restriction on speech "may be invalid if the remaining modes of communication are inadequate," but, importantly, "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

In the seminal Supreme Court case, *Renton v. Playtime Theatres*, the plaintiffs challenged a zoning ordinance that restricted the location of, but did not altogether ban, adult movie theaters. *Renton v. Playtime Theatres*, 475 U.S. 41, 43, 46 (1986). The Court held that the defendant-

city's interest in "preserv[ing] the quality of urban life" by "preventing the secondary effects caused by the presence of even one such theater in a given neighborhood" was "both important and substantial." *Id.* at 50 (internal quotations omitted). The Court also found that the ordinance allowed for reasonable alternative avenues, because the ordinance left more than five percent of the entire land area of the city open to use as an adult theater. *Id.* at 53. The Court thus held that the zoning ordinance did not violate the First Amendment's protection of free speech. *Id.* at 54.

Using this First Amendment framework as guidance, the test in the Second Amendment time, place, or manner context is whether the challenged regulation reasonably fits with an important governmental interest and leaves open ample alternative channels to exercise the right at issue. And, like the First Amendment, the Second Amendment does not guarantee the right to exercise every conceivable aspect of bearing arms at all times and in all places. *Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

Because Section 311(d) limits the types of outdoor shooting activities that may occur at Sportsman's Clubs, it thus regulates the manner in which persons may maintain proficiency in firearm use in IBD Districts. Likewise, Section 601 regulates the place where commercial gun sales and other for-profit commercial gun range activity may occur by limiting Sportsman's Clubs to nonprofit activities. These sections of the Zoning Ordinance are time, place, or manner regulations of ancillary Second Amendment conduct. The Township's stated objective for these regulations—nuisance prevention and protecting the public health, safety and welfare of its residents—is an important one, much like the defendant-city's interest in preventing the secondary effects of adult theaters in *Renton*.

The issue, then, is whether the fit between these regulations and the Township's objective is reasonable and whether ample alternatives channels exist for commercial gun range activity

and for maintaining proficiency with center-fire rifles. First, as this Court explained in its previous Opinion, the commercial nature of an activity is often used as a proxy for intensity of that activity; the greater the intensity, the higher the likelihood that surrounding properties will be affected. *Drummond*, 361 F. Supp. 3d at 488 n.3. Additionally, limiting the type of firearm and type of shooting activity at Sportsman's Club likewise relates to land use intensity. Regulations addressing intensity of land use relate directly to, and thus reasonably fit with, nuisance prevention and protecting the public health, safety and welfare of its residents.

Next, as to available alternative channels, Plaintiffs contend that there are no means under the Zoning Ordinance "by which anyone might be allowed to operate a for-profit gun club or shooting range within an IBD district, or shoot center-fire rifles at a 'Sportsman's Club.'" (ECF No. 1, at ¶ 49). However, Plaintiffs frame the issue too narrowly. The issue is not whether the zoning scheme provides ample alternative channels within IBD Districts or Sportsman's Clubs. Rather, the issue is whether the zoning scheme provides ample alternative channels for commercial gun range activity and for shooting center-fire rifles within the Township as a whole. Plaintiffs do not plead any facts that show a lack of commercial gun ranges or gun ranges where center-fire rifles may be fired within the Township. In fact, commercial outdoor shooting ranges are allowed in other zones, (ECF No. 1, at ¶ 48; ECF No. 27-1), indicating that there are alternative channels within the Township through which the Second Amendment conduct at issue here can occur. Plaintiffs thus fail to meet the burden required in facial challenges, as they fail to establish that no set of circumstances exists under which these Zoning Ordinance provisions would be valid. Therefore, Plaintiffs' facial challenges in Counts I and II, which seek invalidation of Sections 601 and 311(D), respectively, must be dismissed for failure to state a claim.

IV. Conclusion

THEREFORE, based on the foregoing, Defendants' Motion to Dismiss is GRANTED and Plaintiffs' Complaint is hereby DISMISSED. As a result, Plaintiffs' Motion for Preliminary Injunction is DENIED as moot.

DATE March 16, 2020

Marilyn J. Horan
United States District Judge

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

WILLIAM DRUMMOND, GPGC LLC, and SECOND AMENDMENT FOUNDATION, INC.,	)	Civil Action No. 18-1127
	)	Judge Marilyn J. Horan
Plaintiffs,	)	
v.	)	
ROBINSON TOWNSHIP and MARK DORSEY, Robinson Township Zoning Officer, in his official and individual capacities,	)	
Defendants.	)	

OPINION AND ORDER

Plaintiffs William Drummond and GPGC LLC bring suit on their own behalf and on behalf of their clients and customers. Compl. ¶¶ 1–2, ECF No. 1. Plaintiff Second Amendment Foundation, Inc. (SAF), which has over 650,000 members and supporters across the nation, brings suit on behalf of its members, including Plaintiff Drummond. *Id.* at ¶ 3. Plaintiffs allege that Defendants, Robinson Township and Zoning Officer Mark Dorsey, infringed Plaintiffs' Second Amendment right to keep and bear arms and Fourteenth Amendment rights to equal protection, property, and livelihood by deliberately stalling Plaintiff Drummond's zoning application in order "to zone the [Greater Pittsburgh Gun Club] out of existence." *Id.* at 1.

Counts I and II of the Complaint allege that Sections 601 and 311(D), respectively, of the Robinson Township Zoning Ordinance, facially and as applied to Plaintiffs and their customers and members, deprive Plaintiffs and their customers and members of their Second Amendment right. *Id.* at ¶ 65. Similarly, Count III alleges that Table 208A of the Zoning Ordinance, as applied to Plaintiffs and their customers and members, deprives them of their Second Amendment

right. *Id.* at ¶ 70. Counts IV and Count VI allege that Section 601, facially and as applied to Plaintiffs Drummond and GPGC LLC, violates the Fourteenth Amendment rights to equal protection and to the pursuit of livelihood, respectively. *Id.* at ¶¶ 73, 79. Finally, Count V alleges that Defendants' course of conduct deprived Plaintiff Drummond of his property interest, thereby violating the Due Process Clause of the Fourteenth Amendment. *Id.* at ¶¶ 75–76. Plaintiffs request an order permanently enjoining the enforcement of the challenged ordinances and commanding Defendants to issue Plaintiff Drummond all permits necessary for the operation of the Gun Club. *Id.* at 20. Plaintiffs also request an award of compensatory damages to Plaintiffs Drummond and GPGC LLC, declaratory relief consistent with the permanent injunctions, costs of suit, and attorney fees. *Id.*

Additionally, Plaintiffs seek a preliminary injunction in this matter. ECF No. 17. Plaintiffs request that the Court enjoin Defendants from enforcing Robinson Township Zoning Ordinance Table 208A and Sections 311(D) and 601 against Plaintiffs' operation and enjoyment of the Gun Club. *Id.* Plaintiffs also request that the Court command Defendants to issue all permits necessary for the operation of the Gun Club, to which Plaintiff Drummond alleges he would be entitled absent the Defendant Township's adoption of the aforementioned Zoning Ordinance Table and Sections. *Id.*

Defendants seek dismissal of the Complaint, ECF No. 26, first arguing that Plaintiffs' claims are not ripe. Defs.' Br. 6–8, ECF No. 27. Second, Defendants challenge Counts I and II, as they pertain to Plaintiffs' customers and members, arguing that Plaintiffs failed to properly plead derivative standing. *Id.* at 8–13. Lastly, Defendants ask the Court to dismiss all counts of the Complaint for failure to state a claim upon which relief can be granted. *Id.* at 13–20.

For the following reasons, Defendants' Motion to Dismiss will be granted and Plaintiffs' Motion for Preliminary Injunction will be denied as moot.

I. Background

A. Ownership and operation of gun clubs on the King Road property

According to the Complaint, the property at issue, 920 King Road, Bulger, Pennsylvania 15019, consists of 265 acres in a "substantially rural" area. Compl. ¶¶ 11, 13, ECF No. 1. In 1967, the property became the site of a gun club called the Greater Pittsburgh Trap & Skeet Club. *Id.* at ¶ 11. At that time, the property was zoned as "A-1." *Id.* The gun club, described by Plaintiffs as "operat[ing] as much as any ordinary commercial shooting range," *Id.* at ¶ 14, engaged in commercial activities such as renting guns to patrons and selling "memberships, range time, firearms, ammunition, targets, food and beverage, and other ordinary goods that might be found at any gun range, as well as shooting training and safety courses." *Id.* at ¶ 15. Ownership of the gun club changed hands at various points before the gun club ultimately ceased operations in 2008. *Id.* at ¶¶ 17, 20.

Eight years later, in 2016, Iron City Armory, LLC leased the King Road property with plans to open a new gun club. *Id.* at ¶ 21. When Iron City Armory entered the lease, the property was zoned as an Interchange Business Development District, or IBD District. *Id.* at ¶ 23. "Sportsman's Clubs," an undefined term at that time, were permitted principal uses within IBD districts. *Id.* at ¶ 12. In 2016, Iron City Armory submitted a zoning application to the Defendant Township. *Id.* at ¶ 22. The Defendant Township approved the application and issued a permit, which allowed Iron City Armory to operate a gun club on the property. *Id.* However, the permit was issued with restrictions; namely it prohibited "sales, gun testing, rentals, [and] other commercial endeavors." *Id.*

In December 2017, Iron City Armory announced that it would cease operations the following month and that it would default on its lease. *Id.* at ¶ 29. Plaintiff Drummond, a citizen of North Carolina, then entered into a ten-year lease of the King Road property with the intention of operating the Greater Pittsburgh Gun Club (referred to hereinafter as "the Gun Club") through GPGC LLC, an entity wholly owned by Plaintiff Drummond. *Id.* at ¶¶ 30–31. Plaintiff Drummond, through GPGC LLC, planned to run the Gun Club much as the pre-2008 gun club had been, by engaging in commercial shooting range activities. *Id.* at ¶ 31. Plaintiff Drummond took possession of the King Road property in or around January 2018. *Id.* at ¶ 32.

B. Past legal action involving the King Road property

According to the Complaint, and supported by attached exhibits, there have been two prior legal challenges related to the operation of a gun club on the King Road property. First, in 1993, a nuisance action was filed in state court by the Defendant Township. *Id.* at ¶ 18. In that action, the Township sought relief related to "the discharge of automatic weapons . . . ; the club's hours of operation; and projectiles leaving the premises and striking nearby properties." *Id.* Additionally, the Township admitted in its complaint that the gun club's operation was lawful under the then-existing Robinson Township Zoning Ordinance, wherein the property was zoned as A-1. *Id.*; *see also* Compl. Ex. A, ¶ 3, ECF No. 1-2. The state court dismissed the case in 1997, nearly four years after it was filed, finding that the gun club did not constitute a nuisance. Compl. ¶ 19, ECF No. 1. That gun club entity ceased operations in 2008. *Id.* at ¶ 20.

When Iron City Armory opened its gun club in 2016, neighbors of the King Road property appealed the Defendant Township's issuance of the permit to the Zoning Hearing Board. *Id.* at ¶ 23. The Board granted the appeal, reasoning that "shooting ranges" and "shooting range facilities" were not permitted uses in IBD districts. *Id.* During the pendency of the appeal, the

Township received complaints that Iron City Armory's gun club "was engaging in forbidden commercial activity by selling bottled water, targets, and ammunition to its members." *Id.* at ¶ 24. In response, the Township served Iron City Armory with a "Notice of Violation/Cease and Desist Order." *Id.* Additionally, an undercover police operation confirmed the gun club's sale of targets and ammunition, resulting in a second cease and desist order. *Id.* The Zoning Hearing Board ultimately revoked Iron City Armory's permit, which Iron City Armory appealed. *Id.* at ¶ 25. The Zoning Hearing Board denied the appeal, finding that Iron City Armory had violated the conditions of the issued permit. *Id.*

Iron City Armory appealed the Zoning Hearing Board's decisions to the Court of Common Pleas. *Id.* at ¶ 26. In that appeal, the Zoning Hearing Board admitted that the relevant ordinance "could be read to permit non-commercial gun clubs and shooting ranges in IBD districts." *Id.* at ¶ 27. Regarding the permit revocation, the court determined that selling bottled water and targets fell "into permissible commercial operations of a gun club and do not violate the restriction" and that the ammunition sales were de minimis. *Id.* at ¶ 28. Although Iron City Armory prevailed in the appeal, the court cautioned Iron City Armory against selling ammunition in the future, because doing so might run afoul of the permit restrictions. *Id.* at ¶¶ 26, 28.

C. Plaintiff Drummond's 2018 zoning application

When Plaintiff Drummond leased the property, with plans to open his own gun club, in January 2018, the King Road property was still zoned as an IBD district. *Id.* at ¶ 12. Plaintiff Drummond alleges that, in January 2018, he approached Defendant Mark Dorsey, Robinson Township Zoning Officer, and informed him of his plans for the property. *Id.* at ¶ 33. Plaintiff Drummond asked Defendant Dorsey about what he needed to do for Plaintiffs Drummond and GPGC LLC to open and operate the Gun Club. *Id.* On Defendant Dorsey's advice, Plaintiff

Drummond wrote and sent a detailed description of his plans for the Gun Club and the King Road property to Defendant Dorsey. *Id.* at ¶¶ 33–34. Defendant Dorsey did not respond to Plaintiff Drummond, despite "numerous follow-up phone calls." *Id.* at ¶ 34.

Plaintiffs further allege that on February 12, 2018, a neighbor, who had been involved in the previous nuisance action, attended a Robinson Township Board of Supervisors' meeting, where she "sought expedited action on restrictive zoning amendments targeting the Gun Club." *Id.* at ¶ 35. Defendant Dorsey and Township Manager Crystal Brown also were in attendance. *Id.* No one advised Plaintiff Drummond that the King Road property would be discussed at that meeting. *Id.* Four days after the meeting, Plaintiff Drummond contacted Defendant Dorsey. *Id.* at ¶ 36. Defendant Dorsey informed Plaintiff Drummond that he needed to submit additional information and that they would have to meet. *Id.* Plaintiff Drummond informed Defendant Dorsey that he had already provided all of the information about his plans for the King Road property. *Id.* Defendant Dorsey then told Plaintiff Drummond, for the first time, that he would need to submit a zoning application. *Id.* Defendant Dorsey also told Plaintiff Drummond that he did not need to immediately submit the application, as he could file it when they met in person. *Id.* Plaintiff Drummond emailed Defendant Dorsey later that day, seeking to clarify which form he needed to submit. *Id.* Defendant Dorsey did not respond to Plaintiff Drummond's email. *Id.*

On February 19, 2018, the Board of Supervisors met again "for the apparent purpose of considering restrictive zoning to preclude the Gun Club's operation." *Id.* at ¶ 37. Again, no one informed Plaintiff Drummond of this meeting, but neighbors, who had been involved in the previous legal actions, were present and spoke at the meeting. *Id.* Defendant Dorsey and Township Manager Brown were also present at the meeting. *Id.* Also on February 19, 2018, Plaintiff Drummond wrote to Defendant Dorsey to advise that they could meet on February 22,

2018. *Id.* at ¶ 38. Plaintiff Drummond also indicated that he wanted to submit the required paperwork "without further delay." *Id.* Defendant Dorsey did not respond to Plaintiff Drummond. *Id.* Plaintiff Drummond eventually reached Defendant Dorsey by telephone on March 1, 2018, and they arranged to meet, along with Township Manager Brown, on March 15, 2018. *Id.* at ¶ 39. Defendant Dorsey also requested more information about the Gun Club, which Plaintiff Drummond provided by email on March 7, 2018. *Id.* Defendant Dorsey did not respond to this email. *Id.*

At the March 15, 2018 meeting, Defendant Dorsey and Township Manager Brown instructed Plaintiff Drummond to fill out a zoning application. *Id.* at ¶ 40. Plaintiff Drummond did so, and Brown and Defendant Dorsey accepted it. *Id.* Neither Brown nor Defendant Dorsey mentioned the pending zoning ordinance that would preclude Drummond's application. *Id.* On March19, 2018, as Plaintiff Drummond was driving back to North Carolina, a neighbor of the King Road property texted him, informing him about a notice posted on King Road. *Id.* at ¶ 41. The notice advised of an upcoming Special Meeting of the Board of Supervisors, which was scheduled for March 22, 2018. *Id.* The notice specified that the Special Meeting would address a zoning measure related to the Gun Club. *Id.* Plaintiffs allege that Defendant Dorsey and Township Manager Brown knew about the scheduled meeting, "but chose to conceal" it during their March 15, 2018 meeting with Plaintiff Drummond. *Id.* at ¶ 42. Plaintiffs further allege that Brown and Defendant Dorsey did this because they "knew . . . that the Township was plotting to adopt a zoning measure that would preclude Drummond's operation of the Gun Club . . . and that Drummond's efforts were being 'slow-rolled' so that he would be kept in the dark until the law had been changed." *Id.*

Plaintiff Drummond attended the March 22, 2018 Special Meeting, where he spoke in

opposition to the proposed zoning amendments. *Id.* at ¶ 43. The Board of Supervisors tabled the proposed amendments. *Id.* That night and over the following days and weeks, Plaintiff Drummond reached out to Defendant Dorsey and to the Township's Commissioners in an effort to confirm the status of his application and to offer to discuss any questions or concerns the Township might have about his plans. *Id.* at ¶ 45. Neither Defendant Dorsey nor the Commissioners responded to Plaintiff Drummond. *Id.* Further, no one informed Plaintiff Drummond that the proposed zoning amendment was on the Board of Supervisor's agenda for their April 9, 2018 meeting. *Id.* at ¶ 46.

At the April 9, 2018 meeting, the Defendant Township enacted the proposed amendments, as discussed below. *Id.* at ¶ 47. On April 16, 2018, Plaintiff Drummond went to the Robinson Township Municipal Building, where he learned about the Defendant Township's enactment of the amendment. *Id.* at ¶ 52. Plaintiff Drummond immediately contacted Defendant Dorsey to inquire about the amendments and the status of his zoning application. *Id.* Defendant Dorsey responded, providing copies of a letter he mailed on April 13, 2018 to inform Plaintiff Drummond that his application had been rejected. *Id.* at ¶ 53. The letter stated that the zoning application had been rejected because Plaintiff Drummond's plans for the Gun Club did not comply with the zoning amendments that were pending when Plaintiff Drummond submitted his application. *Id.* The following day, on April 17, 2018, Plaintiff Drummond sought information about how he might still get permission to operate the Gun Club, but Defendant Dorsey did not respond. *Id.* at ¶ 54.

According to Defendants' Brief in Support of the Motion to Dismiss, Plaintiff Drummond did not appeal the denial of his application to the Robinson Township Zoning Hearing Board. Defs.' Br. 4, ECF No. 27. Plaintiff Drummond instead appealed the Defendant Township's denial

of his application to the Washington County Court of Common Pleas in May 2018. *Id.* Plaintiff Drummond ultimately voluntarily dismissed his state court land use appeal, whereupon he filed this suit in August 2018. *Id.*

D. Defendant Township's zoning amendments

In the ordinance, enacted on April 9, 2018, the Defendant Township stated that it sought to regulate Sportsman's Clubs "in an effort to avoid nuisances and provide for and protect the public health, safety and welfare for the residents within the geographic limits of the Township." Defs.' Br. Ex. C, at 1, ECF No. 27-3. The ordinance amended the Robinson Township Zoning Ordinance in three ways. Compl. ¶ 47, ECF No. 1. First, the ordinance amended Section 601 to include a definition for "Sportsman's Club," a term that had been previously undefined. *Id.* Under the new definition, a "Sportsman's Club" is "[a] nonprofit entity formed for conservation of wildlife or game, and to provide members with opportunities for hunting, fishing or shooting." *Id.* Plaintiffs allege that by limiting the activities permitted at Sportsman's Clubs to nonprofit uses, the Defendant Township has barred Plaintiffs' operation of the Gun Club. *Id.* at ¶ 50.

Next, Section 311 of the Zoning Ordinance was amended to include paragraph D; this new paragraph provides that "[o]utdoor shooting activities shall be limited to pistol range, skeet shoot, trap and skeet, and rim-fire rifles." *Id.* at ¶ 47. According to the Complaint, this created a prohibition on center-fire rifles at Sportsman's Clubs, which "has significantly frustrated if not effectively barred the use of the historic King Road Gun Club property as a gun club or shooting range." *Id.* at ¶ 51.

Lastly, the ordinance amended Table 208A, which is a table of allowed uses in IBD districts. *Id.* at ¶ 47. Under the ordinance, Sportsman's Clubs were changed from Permitted Use to Conditional Use. *Id.* Plaintiffs also allege that under the Robinson Township Zoning

Ordinance, commercial outdoor shooting ranges are not permitted uses or conditional uses in IBD districts. *Id.* at ¶ 48. Plaintiffs further allege that there is no mechanism under the Zoning Ordinance "by which anyone might be allowed to operate a for-profit gun club or shooting range within an IBD district, or shoot center-fire rifles at a 'Sportsman's Club.'" *Id.* at ¶ 49.

II. Motion to Dismiss

In deciding a motion to dismiss a complaint under Rule 12(b)(6), a court must first "accept all factual allegations as true" and "construe the complaint in the light most favorable to the plaintiff." *Eid v. Thompson*, 740 F.3d 118, 122 (3d Cir. 2014) (internal quotations omitted). The court then must "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Id.* A complaint is sufficient only when it is facially plausible, meaning that the court is able "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). To be plausible on its face, the complaint must contain more than "[t]hreadbare recitals of the elements of a cause of action" and "mere conclusory statements." *Id.* The court need not "accept unsupported conclusions and unwarranted inferences." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013).

Defendants put forward several arguments as to why Plaintiffs' Complaint should be dismissed. Specifically, Defendants assert that Plaintiffs failed to properly plead derivative standing on behalf of their customers and members; that Plaintiffs' claims are not ripe under the finality doctrine; and that Plaintiffs failed to state claims for which relief may be granted. Defs.' Br. 5, ECF No. 27.

A. Derivative standing

Turning first to the issue of standing, Defendants challenge Counts I and II, as they pertain to Plaintiffs' customers and members, arguing that Plaintiffs lack the required associational and third-party standing. *Id.* at 8. The Supreme Court has provided a three-part test to determine associational or organizational standing. First, in order for an association or organization to have standing on behalf of its members, the association must show that "'its members would otherwise have standing to sue in their own right.'" *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 365 (3d Cir. 2015) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). This prong of the test is met when the plaintiff association "make[s] specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Second, the association must show that "'the interests it seeks to protect are germane to the organization's purpose'" and, third, that "'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Neale*, 794 F.3d at 365 (quoting *Hunt*, 432 U.S. at 343). Regarding this last prong, participation of individual members is not necessary in cases where "the association seeks a declaration, injunction, or some other form of prospective relief," because "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Hunt*, 432 U.S. at 343.

Here, Plaintiffs pleaded facts to satisfy each part of the test to establish Plaintiff SAF's standing. First, Plaintiffs allege that SAF has hundreds of thousands of members nationwide, including in Pennsylvania. Compl. ¶ 3, ECF No. 1. Plaintiffs further allege that Plaintiff Drummond is a member of SAF and that Plaintiff Drummond has been harmed by Defendants' acts. *Id.* at ¶¶ 3, 58. Second, Plaintiffs allege "[t]he purposes of SAF include promoting the exercise of the right to keep and bear arms; and education, research, publishing and legal action

focusing on the constitutional right to privately own and possess firearms, and the consequences of gun control." *Id.* at ¶ 3. Through the present lawsuit, SAF seeks to vindicate the Second Amendment rights of its members, including Plaintiff Drummond, through the invalidation of allegedly unconstitutional ordinances. *See id.* at ¶¶ 58, 61, 65, 70. Thus, the interests that SAF seeks to protect by bringing this suit are plainly germane to the association's purpose. Third, the participation of SAF members (aside from Plaintiff Drummond as the leaseholder and business owner) is not necessary to the claims SAF asserts nor to the relief SAF requests on their behalf. This is so because the relief sought by SAF is prospective: SAF seeks permanent injunctions against Defendants, preventing enforcement of the challenged ordinances and demanding issuance of land use permits, as well as corresponding declaratory relief. *Id.* at 20. Accordingly, as the Seventh Circuit has previously found, "[t]he Second Amendment Foundation . . . easily meet[s] the requirements for associational standing." *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011).

Regarding Plaintiff Drummond's and Plaintiff GPGC's third-party standing to sue on behalf of their customers, the parties agree that "'vendors 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.'" *Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (quoting *Craig v. Boren*, 429 U.S. 190, 195, (1976)), *cert. denied sub nom. Teixeira v. Alameda County*, 138 S. Ct. 1988 (2018). Defendants argue that in order to claim third-party standing on behalf of potential 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." Defs.' Br. 10, ECF No. 27. Plaintiffs dispute this, arguing that availability of other options bears on the merits of claim and not on standing. Pls.' Br. 14–16,

ECF No. 31. Plaintiffs and Defendants rely upon *Teixeira* for their respective arguments, but it is Plaintiffs' analysis that is correct. In *Teixeira*, the Ninth Circuit first held that the plaintiff, "as the would-be operator of a gun store," had standing to assert subsidiary Second Amendment rights on behalf of his potential customers. *Teixeira*, 873 F.3d at 678. The Ninth Circuit then moved into a discussion on the merits of the complaint, holding that the plaintiff's failure to plead unavailability of other gun stores was fatal under the plausibility requirement of Fed. R. Civ. P. 12(b)(6). *Teixeira*, 873 F.3d at 678–80. Therefore, Plaintiff Drummond and Plaintiff GPGC, as would-be operators of a commercial shooting range, have standing to sue on behalf of their potential customers.

Based on the foregoing analysis, Plaintiffs have properly pleaded standing to bring claims on behalf of their customers and members. The issue of availability of other commercial shooting ranges will be relevant to the merits of Plaintiffs' claims.

B. Ripeness

Defendants also argue that Plaintiffs' claims are not ripe for adjudication because Plaintiff Drummond did not appeal the denial of his application to the Zoning Hearing Board. Defs.' Br. 6, ECF No. 27. The ripeness doctrine, ultimately derived from the "case or controversy" requirement of the Constitution, "addresses questions of timing, i.e., *when* in time it is appropriate for a court to take up the asserted claim." *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 (3d Cir. 1988) (internal quotations omitted). Whether a claim is ripe for judicial review "'depends upon factors such as whether the agency action is final; whether the issue presented for decision is one of law which requires no additional factual development; and whether further administrative action is needed to clarify the agency's position.'" *Nextel Commc'ns of the Mid-*

Atlantic, Inc. v. City of Margate, 305 F.3d 188, 193 (3d Cir. 2002) (quoting *Felmeister*, 856 F.2d at 535–36).

Requiring the finality of administrative or agency action enforces the concreteness requirement of justiciability. *Peachlum v. City of York*, 333 F.3d 429, 437 (3d Cir. 2003). However, finality of administrative action should not be confused with exhaustion of administrative remedies; although they overlap, they are distinct concepts. *Id.* at 436. The finality requirement of the ripeness doctrine "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Exhaustion of administrative remedies, on the other hand, "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* A party may have a sufficiently ripe claim where the party suffers an actual, concrete injury prior to exhausting available remedial procedures.[1] *Peachlum*, 333 F.3d at 437.

Additionally, the finality requirement applies only to as-applied challenges to statutes or regulations, and not to facial challenges or course-of-conduct claims. *Cty. Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 164, 166 (3d Cir. 2006). A facial challenge asserts that any application of the statute or regulation at issue is unconstitutional; it is the "mere enactment" of the statute that causes injury, not a specific decision applying the statute. *Id.* at 164. Because there is no administrative action or decision that needs to be finalized, a facial challenge presents

[1] Plaintiffs and Defendants agree that exhaustion of administrative remedies "is not a prerequisite to an action under § 1983." *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982); Defs.' Br. 7, ECF No. 27; Pls.' Br. 3, ECF No. 31. Accordingly, their arguments focus on the finality requirement of the ripeness doctrine.

a concrete injury and, therefore, a ripe claim. *Id.* Likewise, a course-of-conduct substantive due process claim is not subject to the finality rule because the claim is based on conduct unrelated to the merits of the underlying application and the administrative decision. *Id.* at 166. The conduct is the concrete injury, separate and apart from any decision applying a statute or regulation. *Id.*

In contrast to facial challenges and course-of-conduct claims, an as-applied challenge attacks an administrative or agency decision that applied the statute or regulation at issue. *Id.* at 164. For an as-applied challenge to be ripe, the initial decisionmaker must have "'arrived at a definitive position on the issue.'" *Id.* (quoting *Williamson*, 473 U.S. at 192). In the zoning and land use context, the Supreme Court has held that "the local authorities should be given the opportunity to fully and finally determine the scope of the injury before federal claims ripen," because "[l]ocal zoning authorities are flexible institutions . . . that may 'give back with one hand what they have taken with the other.'" *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1294 (3d Cir. 1993) (quoting *MacDonald v. County of Yolo*, 477 U.S. 340, 350 (1986)). The Third Circuit has noted, "the flexibility inherent in local zoning systems 'is obviously useless if the property owners abandon their applications after rejection by civil servants with narrow authority and before seeking relief from a body with broader powers.'" *Id.* at 1294 n.16 (quoting *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 n.5 (9th Cir. 1990)). In sum, to have a ripe as-applied challenge to a zoning ordinance, a plaintiff must give the local zoning hearing board the opportunity to review the zoning officer's decision, so that the municipality can arrive at a final, definitive position. *Id.* at 1294.

Nevertheless, even if the decision underlying an as-applied challenge lacks a definitive position from the administrative body, the as-applied challenge may be sufficiently ripe where the

actions necessary to achieve a final decision would be futile.[2] *See Chassen v. Fid. Nat'l Fin., Inc.*, 836 F.3d 291, 296 (3d Cir. 2016) (recognizing futility as an exception to the ripeness doctrine). Drawing on the futility exception standard in the administrative exhaustion context, "a party must provide a clear and positive showing of futility before the District Court." *Wilson v. MVM, Inc.*, 475 F.3d 166, 175 (3d Cir. 2007).

Here, Plaintiffs bring facial and as-applied challenges to various portions of the Robinson Township Zoning Ordinance, as well as a substantive due process course-of-conduct claim. Because the finality requirement of the ripeness doctrine does not apply to Plaintiffs' facial challenges or the course-of-conduct claim, these claims are sufficiently ripe and thus are addressed on the merits, below. As regards Plaintiffs' as-applied challenges, Plaintiff Drummond did not appeal Defendant Dorsey's decision, which rejected Plaintiff Drummond's permit application, to the Zoning Hearing Board. Defs.' Br. 4, ECF No. 27. Because there has been no appeal to the Zoning Hearing Board, the Defendant Township has not had the opportunity to arrive at a final, definitive position. Plaintiffs contend that appealing to the Zoning Hearing Board would have been futile and a "complete waste of time" because Defendant Dorsey applied the letter of the law in rejecting the permit application—in other words, Plaintiffs argue that the Zoning Hearing Board had no grounds on which to reverse or alter Defendant Dorsey's decision. *Id.* at 7. Plaintiffs also argue that their plan to operate a gun club on the King Road property

[2] The futility exception to the ripeness doctrine may not apply to land use cases brought before courts within the Third Circuit, according to two unpublished Third Circuit opinions. *See Rucci v. Cranberry Township*, 130 Fed. Appx. 572, 579 (3d Cir. 2005) (finding a claim based on a land use decision to be unripe, and noting that "there is no futility exception to ripeness requirements in the Third Circuit"); *Holland Transp., Inc. v. Upper Chichester Township*, 75 Fed. Appx. 876, 878 (3d Cir. 2003) ("[W]e have not recognized the futility exception [to the finality requirement for ripeness] in land use cases."). However, due to the unpublished, and therefore non-precedential nature of these cases, this Court will address Plaintiffs' futility arguments.

qualifies for a variance, but that Defendants' position regarding the Motion for Preliminary Injunction—that the preliminary injunction should not issue because it would harm the community—forecloses that possibility. *Id.* at 7–8. However, these assertions are speculative, and as such do not present a sufficiently clear and positive showing of futility. The Zoning Hearing Board has the power "to grant variances and special exception permits," Defs.' Reply Br. 4, ECF No. 35 (citing Robinson Twp. Zoning Ordinance § 702(B)–(E)), and given the opportunity, the Zoning Hearing Board may come to a solution that resolves Plaintiffs' issues. Furthermore, a preliminary injunction is an "extraordinary remedy," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), and Defendants' opposition to the issuance of such relief does not bear on whether the Zoning Hearing Board will come to a solution that Plaintiffs find satisfactory.

Therefore, the administrative decision underlying Plaintiffs' as-applied challenges lacks finality, and as such, Plaintiffs' as-applied claims do not present concrete harm. The as-applied challenges found in Counts I, II, III, IV, and VI thus are not ripe for adjudication and must be dismissed. Plaintiffs' facial challenges and course-of-conduct claim, which are not subject to the finality rule and are therefore ripe, are addressed on their merits below.

C. Facial challenges to Township ordinances

Next, Defendants contend that the facial challenges in Counts I, II, IV, and VI, all brought under 42 U.S.C. § 1983, fail to state a claim for which relief can be granted. To establish a claim under § 1983, a plaintiff must allege that he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). Additionally, in a facial challenge, the plaintiff "seeks to vindicate not only his own rights, but those of others who may

also be adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Consequently, the plaintiff "'must establish that no set of circumstances exists under which the [statute] would be valid.'" *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This standard is particularly demanding, and, as the Supreme Court has noted, it is the "most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745. The Supreme Court has expressed disfavor for facial challenges, explaining that "'[c]laims of facial invalidity often rest on speculation' about the reach of a statute and 'run contrary to the fundamental principle of judicial restraint' by anticipating a constitutional rule before it can be decided." *United States v. One Palmetto State Armory Pa-15 Machinegun*, 115 F. Supp. 3d 544, 557 (E.D. Pa. 2015) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). Because a successful facial challenge results in complete invalidation of the statute, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 450.

Counts I and II of the Complaint claim that Sections 601 and 311(D) of the Robinson Township Zoning Ordinance, each on its face, violate the Second Amendment. Counts IV and VI allege that Section 601, on its face, also violates the Equal Protection Clause and the right to pursue a livelihood, under the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment.

1. Second Amendment claims

The Second Amendment to the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court, in *District of*

Columbia v. Heller, suggested a two-pronged approach to Second Amendment challenges. *District of Columbia v. Heller*, 554 U.S. 570 (2008). First, courts are to "ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). If the law does not impose a burden that falls within the Second Amendment's scope, then the inquiry is over. *Id.* If the challenged law does impose such a burden, courts move on to the second prong, under which they are to "evaluate the law under some form of means-end scrutiny." *Id.*

The rights protected by the Second Amendment are not without limitation. *Heller*, 554 U.S. at 626. The Supreme Court identified several limitations on the right to keep and bear arms that are derived from historical prohibitions, cautioning that "nothing in [*Heller*] should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, *or laws imposing conditions and qualifications on the commercial sale of arms*." *Heller*, 554 U.S. at 626–27 (emphasis added). The Court described this list of regulatory measures as "presumptively lawful," which the Third Circuit has interpreted to mean "they regulate conduct outside the scope of the Second Amendment," not that they are within the scope of the Second Amendment but pass constitutional muster. *Marzzarella*, 614 F.3d at 91.

However, the Supreme Court's endorsement of "laws imposing conditions and qualifications on the commercial sale of arms" cannot be read as a categorical exception, because doing so "would be untenable under *Heller*." *Id.* at 92 n.8. As the Second Circuit noted, "the Court did not expand on why [this class] of restrictions would be permissible," but "the natural explanation is that time, place and manner restrictions may not significantly impair the right to possess a firearm for self-defense, and may impose no appreciable burden on Second Amendment

rights." *United States v. Decastro*, 682 F.3d 160, 165 (2d Cir. 2012). Thus, to determine whether a condition on the commercial sale of firearms falls within or outside the scope of the Second Amendment, "a court necessarily must examine the nature and extent of the imposed condition." *Marzzarella*, 614 F.3d at 92 n.8.

In light of "*Heller*'s emphasis on the weight of the burden imposed by the D.C. gun laws," *Heller* does not "mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subjected to heightened scrutiny." *Decastro*, 682 F.3d at 166. Instead, only "those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense" trigger heightened scrutiny, and thus are within the scope of the Second Amendment. *Id.* (citing cases from other circuits, including *Marzzarella*, as supporting this approach).

To decide whether a law imposes a substantial burden on Second Amendment rights, courts have looked to other areas of constitutional law, particularly First Amendment jurisprudence, for guidance. *See Heller*, 554 U.S. at 582, 595, 635; *Marzzarella*, 614 F.3d at 89 & n.4. Relevant here is the First Amendment analysis of time, place, and manner regulations. *See Decastro*, 682 F.3d at 167–68 (applying First Amendment time, place and manner analysis to decide whether a law operated as a substantial burden on the Second Amendment's protections). Under this test, courts determine the reasonableness of a content-neutral time, place or manner regulation of speech by asking whether the regulation "leave[s] open ample alternative channels for communication of the information." *Id.* at 167 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Such regulations may have the effect of "'reduc[ing] to some degree the potential audience for [one's] speech,'" but this does not amount to an

unconstitutional burden "so long as 'the remaining avenues of communication are []adequate.'" *Id.* at 167–68 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989)).

By analogy, a "law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *Id.* at 168. Likewise, a regulation on the placement of a gun range, or the type of activity allowed at a gun range, is not a substantial burden if adequate alternatives exist for law-abiding citizens to maintain proficiency in the use of firearms. *See id.* at 166 (noting that the majority in *Heller* found that there existed "laws of colonial cities regulating time, place and manner for the discharge of firearms," which "did not much burden self-defense and had a minimal deterrent effect on the exercise of Second Amendment rights").

If a burden exists that is substantial—for example, if gun range alternatives are inadequate—and therefore within the scope of the Second Amendment, then the next step is to apply a means-end analysis. *Marzzarella*, 614 F.3d at 89. The *Heller* Court did not define whether or when strict scrutiny or intermediate scrutiny applies to Second Amendment claims; it only stated that some form of heightened scrutiny is required. *Id.* at 95; *Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). The Court did, however, distinguish between the core Second Amendment right—the right to keep and bear arms "in defense of hearth and home"—and other, ancillary rights. *Heller*, 554 U.S. at 635. Such ancillary rights include access to gun ranges and commercial gun and ammunition sales. *See Teixeira*, 873 F.3d at 677 ("the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms" (internal quotations omitted)); *Jackson v. City & County of*

San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) ("the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them" (internal quotations omitted)); *Ezell*, 651 F.3d at 708 ("the 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").

Lower courts have used the Supreme Court's distinction between the core right and ancillary rights to develop a general framework for determining the appropriate level of scrutiny. Burdens on core Second Amendment conduct are more likely to receive strict scrutiny, while burdens on ancillary Second Amendment conduct are more likely to be reviewed under intermediate scrutiny. *Ezell*, 651 F.3d at 708. As the Seventh Circuit has noted, "laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right." *Id.* Additionally, in keeping with the First Amendment time, place, and manner paradigm—in which the Supreme Court held that intermediate scrutiny applies—time, place, and manner regulations of Second Amendment conduct should accordingly be reviewed with intermediate scrutiny. *Marzzarella*, 614 F.3d at 97–98. Intermediate scrutiny in this context thus "asks whether the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels." *Id.* at 98. The regulation does not need to be the least restrictive means of serving the government's interest, but it may not impose more of a burden than is reasonably necessary. *Id.* In other words, the fit between the regulation and the government's objective in enacting the regulation does not have to be perfect, but it should be reasonable. *Id.*

Here, Plaintiffs first seek invalidation of Section 601 of the Zoning Ordinance in Count I. Compl. ¶ 61, ECF No. 1. Section 601 defines "Sportsman's Club" as "[a] nonprofit entity formed for conservation of wildlife or game, and to provide members with opportunities for hunting, fishing or shooting." *Id.* at ¶ 47. Plaintiffs allege that by restricting Sportsman's Clubs to nonprofit entities, and thereby disallowing commercial activities, the ordinance violates the ancillary Second Amendment right of access to commercial gun sales. *Id.* at ¶¶ 59–61. In Count II, Plaintiffs also seek invalidation of Section 311(D), which limits outdoor shooting activities at Sportsman's Clubs to "pistol range, skeet shoot, trap and skeet, and rim-fire rifles." *Id.* at ¶ 47. Plaintiffs assert that this "blanket prohibition on the use of center-fire rifles, without sufficient regard to their suitability at a particular location, violates the right to keep and bear arms." *Id.* at ¶ 62.

By limiting gun range activities in IBD districts to nonprofit activities, Section 601 regulates the place where commercial gun sales and other for-profit commercial gun range activity may occur. Likewise, by limiting the types of activities that may occur at Sportsman's Clubs, Section 311(D) regulates the manner in which persons may maintain proficiency in firearm use in IBD districts. These ordinances are time, place, or manner regulations. Accordingly, the determination of whether any burden imposed is substantial is based on whether adequate alternatives exist. However, Plaintiffs do not plead any facts regarding the availability or absence of other commercial gun ranges or gun ranges where center-fire rifles may be fired. Moreover, Plaintiffs plead that commercial outdoor shooting ranges are allowed in other zones in the Township, *id.* at ¶ 48, and this fact supports the existence of adequate alternatives. Because Plaintiffs fail to allege a lack of adequate alternatives, Plaintiffs fail to plead that the burdens imposed by the regulations in Sections 311(D) and 601 are substantial. Plaintiffs thus fail to

sufficiently allege that the challenged ordinances are within the scope of the Second Amendment. Therefore, Plaintiffs' facial challenges in Counts I and II, which attack Sections 311(D) and 601 under the Second Amendment, must be dismissed for failure to state a claim. As such, the Court does not need to reach the means-end analysis in the *Heller* test's second prong.

2. Equal protection claim

Plaintiffs also challenge the validity of Section 601 of the Robinson Township Zoning Ordinance under the Equal Protection Clause of the Fourteenth Amendment, in Count IV of the Complaint. *Id.* at ¶¶ 71–73. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. This means that if a law or regulation "creates distinctions between classes of people, and that action does not impermissibly interfere with fundamental constitutional rights or burden a suspect class," the law or regulation does not violate the Fourteenth Amendment "so long as it is rationally related to a legitimate government purpose." *Dungan v. Slater*, 252 F.3d 670, 674 (3d Cir. 2001) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976)). If such a distinction does interfere with fundamental constitution rights or burden a suspect class, then heightened scrutiny applies. *Brown v. City of Pittsburgh*, 586 F.3d 263, 283 n.22 (3d Cir. 2009). The level of heightened scrutiny is determined by the suspect classification or the fundamental right at issue. *Id.* (explaining that the First Amendment's time, place, and manner standard, which requires only intermediate scrutiny, applies in an Equal Protection Clause analysis of time, place, and manner restrictions as well). However, if the classification at issue in the equal protection claim implicates a fundamental right, but the plaintiff's separate claim based on that fundamental right fails, then the appropriate level of review for the equal protection claim is rational basis. *Ass'n of N.J. Rifle & Pistol Clubs v. Grewal*, 2018 U.S. Dist. LEXIS 167698, at *41 n.9 (D.N.J.

Sept. 28, 2018) (explaining that because the court determined that the plaintiffs' Second Amendment claim failed, the equal protection claim, which implicated Second Amendment rights, was subject to rational basis review rather than heightened scrutiny), *aff'd*, 2018 U.S. App. LEXIS 34380 (3d Cir. Dec. 5, 2018). Thus, to state an equal protection claim, a plaintiff must plead sufficient facts to show that the challenged law creates distinctions between classes of people and that the challenged law does not pass the appropriate constitutional means-end analysis.

Zoning schemes, by their very nature, create classifications based on uses and locations of land. They find their justification in the police power, and their scope may be defined by the law of nuisance. *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 433–34 (1989) (discussing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926)). In other words, by separating land uses based on type or intensity, local governments aim to protect the public health, safety, and welfare and reduce the frequency of nuisances. *See id.* Land use classifications are generally subject only to rational basis review. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133 (3d Cir. 2002). However, land use decisions sometimes intersect with constitutionally protected classes or fundamental rights, as in the First Amendment time, place, and manner context, which results in the need for heightened scrutiny. *See id.*; *Brown*, 586 F.3d at 283. In the First Amendment context, so long as "'the state shows a satisfactory rationale for content-neutral time, place, and manner regulation, that regulation necessarily' survives scrutiny under the Equal Protection Clause." *Brown*, 585 F.3d at 283 (quoting *McGuire v. Reilly*, 260 F.3d 36, 49–50 (1st Cir. 2001)). By analogy, if a land use regulation of the time, place, or manner of the right to keep and bear arms passes muster under Second Amendment analysis, that regulation necessarily survives scrutiny under the Equal

Protection Clause. But, as noted above, if the regulation fails under Second Amendment analysis, then rational basis applies in the equal protection analysis of the claim. *Ass'n of N.J. Rifle & Pistol Clubs*, 2018 U.S. Dist. LEXIS 167698, at *41 n.9.

Here, Plaintiffs allege that Section 601 of the Zoning Ordinance treats Sportsman's Clubs differently from other businesses in IBD districts, in that it allows other for-profit activities in IBD districts but limits Sportsman's Clubs to only nonprofit activities. Compl. ¶ 73, ECF No. 1. Plaintiffs allege that the Defendant Township made this distinction in the zoning scheme "solely on account of activity secured by the Second Amendment." *Id.* Plaintiffs frame their equal protection challenge to Section 601 as a purely economic distinction, rather than as a land use classification, that interferes with a fundamental constitutional right. *Id.* at ¶ 72; Pls.' Br. 18–19, ECF No. 31. Based on interference with a fundamental constitutional right, Plaintiffs argue that strict scrutiny applies. Pls.' Br. 18, ECF No. 31. Plaintiffs also argue, in the alternative, that even if the Court views the profit-nonprofit distinction in Section 601 as a land use matter, thus subject to rational basis analysis, Section 601 still does not pass constitutional muster. *Id.* at 19.

First, regarding what type of classification Section 601 provides, a review of other portions of the Zoning Ordinance leads to the conclusion that Section 601 is a land use matter, not a purely economic one. The overall purpose of the Defendant Township's zoning scheme "is to establish zoning districts where compatible uses of land may be located." Robinson Twp. Zoning Ordinance § 200. The Zoning Ordinance groups allowed uses into various zones by means of several criteria, including intensity, meaning, the level of impact that certain uses may have on neighboring properties. *See id.* at §§ 202–09. For example, IBD districts "provide for businesses and high-impact land uses," while Industrial districts "provide appropriate areas for forms of heavy industry, major manufacturing and similar high-intensity uses that can have a higher impact

upon surrounding properties." *Id.* at §§ 208, 209. The Zoning Ordinance regulates commercial outdoor shooting ranges, describing them as an "intensive" use and allowing them only in Special Conservation and Industrial districts. *Id.* at §§ 202, 209, 602. The definition of "Commercial Recreation, Intensive" includes commercial shooting ranges, but excludes "any non-profit conservation organization or sportsman's organization, any noncommercial target shooting conducted [on] private or public land, [and] any traditional hunting activities." *Id.* at § 602. The Zoning Ordinance explains that a distinguishing characteristic of intensive commercial recreation is "the intense level of impacts, such as noise from . . . gun fire." *Id.* It appears, then, that the commercial nature of a shooting range is related to the intensity of land use and the impact that such use may have on neighboring properties.[3] Thus, the profit-nonprofit distinction in Section 601 that Plaintiffs challenge here is a land use classification rather than simply an economic one.

Second, having already determined that Plaintiffs' Second Amendment claims fail, the appropriate level of scrutiny for analyzing the land use classification in Section 601 is rational basis review. Under rational basis review, a classification is unconstitutional "only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (internal quotations omitted). By addressing the compatibility and intensity of land uses, the profit-nonprofit classification in Section 601 is more than relevant to the Defendant Township's stated objective of nuisance prevention.[4] *See* Defs.' Br. Ex. C, at 1, ECF No. 27-3. Therefore, Section 601 passes constitutional muster.

---

[3] Moreover, the commercial nature of land use is often used as a proxy for intensity of land use. *See, e.g.*, *Cmty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 183 (3d Cir. 2005) (noting that "[i]t is not unreasonable . . . to presume that 'commercial' facilities have a greater proportionate use of the municipality's sewer service as compared to 'residential' units").

[4] Plaintiffs argue that the 1993 lawsuit, in which the Washington County Court of Common Pleas concluded that the operation of the first gun club did not constitute a nuisance, precludes a finding of validity of the zoning amendments at issue here. Pls.' Br. 21–22, ECF No. 31. However,

However, even if heightened scrutiny did apply here, the standard would be at most intermediate, not strict. As discussed above, just as the level of scrutiny for First Amendment challenges carries over to corresponding claims brought under the Equal Protection Clause, *see Brown*, 586 F.3d at 283 n.22, the standard of scrutiny applicable to Plaintiffs' Second Amendment claims—intermediate scrutiny—would carry over as well, had the Second Amendment claims not failed under Rule 12(b)(6). The issue, consequently, would be whether Section 601 has a reasonable fit with, or is substantially related to, an important governmental interest. *See Marzzarella*, 614 F.3d at 98. Zoning is an important governmental interest, *Chez Sez III Corp. v. Union*, 945 F.2d 628, 633 (3d Cir. 1991); nuisance avoidance, as a part of the foundation of zoning law, is likewise an important governmental interest, *see Euclid*, 272 U.S. at 387–88. Section 601, on its face and within the greater scheme of the Zoning Ordinance, addresses intensity and compatibility of land uses. It therefore reasonably fits with and is substantially related to the Defendant Township's stated interest in avoiding nuisances. Section 601 ultimately may not be the least restrictive means, but it need not be under intermediate scrutiny review.

In sum, Plaintiffs did not establish that they were denied equal protection of the laws because they failed to plead facts showing that any distinction made by Section 601was "wholly irrelevant" to the Defendant Township's objective. Furthermore, even if intermediate scrutiny applied, the fit between Section 601 and the Defendant Township's interest is reasonable.

---

nuisance actions are very fact-specific, and facts can change significantly over the course of twenty years. For example, at the time of the 1997 nuisance decision, the King Road property was zoned as an A-1 district. Compl. ¶ 11, ECF No. 1. Subsequently, the property was re-zoned to be an IBD district, in which commercial shooting ranges are not allowed, sometime before the 2016 litigation involving Iron City Armory. *See id.* at ¶ 23. Based on the fact-driven nature of nuisance actions and the passage of time, the Court finds that the prior nuisance action is not persuasive or controlling upon the instant case.

Therefore, Plaintiffs' facial challenge to Section 601 under the Equal Protection Clause, in Count IV of the Complaint, lacks merit and is dismissed.

3. Pursuit of livelihood claim

Finally, Defendants argue that Plaintiffs' last facial challenge to Section 601, in Count VI, also fails to state a claim for which relief can be granted. Defs.' Br. 20, ECF No. 27. Plaintiffs seek invalidation of Section 601 under the Privileges or Immunities and the Due Process Clauses of the Fourteenth Amendment, alleging that by "barring a profit interest in the operation of a gun club," Section 601 "violates the right to pursue a livelihood." Compl. ¶¶ 77–79, ECF No. 1.

The Fourteenth Amendment protects "[t]he right . . . to follow a chosen profession free from unreasonable governmental interference." *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1259 (3d Cir. 1994). However, the Fourteenth Amendment secures only "the right to pursue a calling or occupation"; it does not secure the right to a specific job. *Id.* Consequently, state action excluding a person from one particular job is not actionable under the Fourteenth Amendment guarantee of the right to pursue a livelihood. *Id.* Plaintiffs assert that "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." Pls.' Br. 22, ECF No. 31. Plaintiffs' argument on this matter, however, is not persuasive. Plaintiffs allege that Plaintiff Drummond wishes to run the Gun Club in the same manner that the first gun club was run prior to 2008. Compl. ¶ 31, ECF No. 1. Plaintiffs describe the first gun club as "operat[ing] as much as any ordinary commercial shooting range." *Id.* at ¶ 14. Plaintiffs further recognize that the Township's Zoning Ordinance distinguishes between commercial outdoor gun ranges and Sportsman's Clubs. *Id.* at ¶ 48. Plaintiffs correctly conclude that under the current definition of Sportsman's Clubs, no Sportsman's Club can operate for a profit. However, commercial outdoor shooting ranges, which

can operate for profit, are permitted within Robinson Township, but not in IBD districts. Plaintiffs Drummond and GPGC LLC may be prevented from operating a for-profit shooting range on their property, but they have not been prevented from doing so elsewhere within Robinson Township. Consequently, Plaintiffs' argument that the amendment to Section 601 of the Robinson Township Zoning Ordinance violates the Fourteenth Amendment right to pursue a livelihood fails. Plaintiffs' facial challenge in Count VI of the Complaint is therefore dismissed.

D. Substantive due process claim

Lastly, Defendants contend that Count V of the Complaint also fails to state a claim for which relief may be granted. Defs.' Br. 17–19, ECF No. 27. In Count V, Plaintiffs allege that Defendants violated Plaintiffs' substantive due process rights under the Fourteenth Amendment by "frustrating and delaying" Plaintiff Drummond's zoning application through a "deceitful course of conduct." Compl. ¶¶ 55, 75, ECF No. 1. Specifically, Plaintiffs allege that Defendant Dorsey first advised Plaintiff Drummond to submit a detailed plan, *id.* ¶ 33, and then later advised Plaintiff Drummond to submit an application, but that the application did not need to be filed immediately, *id.* at ¶ 36; that Defendant Dorsey did not call or email Plaintiff Drummond back on several occasions to answer questions or provide advice, *id.* at ¶¶ 34, 36, 38–39, 45–46; and that Defendant Dorsey failed to notify Plaintiff Drummond of the pending hearings or ordinances, *id.* at ¶¶ 35, 37, 40, 42, 46.

In order to establish a substantive due process claim, a plaintiff must plead facts showing, first, that "the particular interest at issue is protected by the substantive due process clause" and, second, that "the government's deprivation of that protected interest shocks the conscience." *Chainey v. Street*, 523 F.3d 200, 219 (3d Cir. 2008). Presently, Defendants rely on Pennsylvania's pending ordinance doctrine to argue that Plaintiffs have not established a legal

right that is protected by the Substantive Due Process Clause. Defs.' Br. 18, ECF No. 27. Under this doctrine, "zoning ordinances that are pending before the City Council are treated as law even if they are not yet adopted." *Berger v. Cushman & Wakefield of Pa., Inc.*, No. 13-5195, 2014 U.S. Dist. LEXIS 86903, at *11 (E.D. Pa. June 25, 2014). Defendants maintain that because Plaintiff Drummond submitted his zoning application after the proposed zoning amendments were introduced, no substantive right to use the King Road property as a commercial gun range arose. Defs.' Br. 18, ECF No. 27.

However, Plaintiffs argue that the pending ordinance doctrine does not address the conduct that caused Plaintiffs' alleged deprivation. Plaintiffs claim that Defendant Dorsey's conduct that began in January 2018—a month before the February 2018 introduction of the proposed amendments—violated Plaintiffs' substantive due process rights. Compl. ¶¶ 33–34, 55, 75, ECF No. 1; Pls.' Br. 21, ECF No. 31. Plaintiffs assert that a property interest, protected by the Substantive Due Process Clause, existed in January when Defendants' alleged misconduct began. Compl. ¶¶ 74–76, ECF No. 1; Pls.' Br. 21, ECF No. 31. According to Plaintiffs, the property interest in operating the Gun Club as a commercial shooting range "inhered in decades of the Club's lawful operation." Pls.' Br. 21, ECF No. 31. Additionally, Plaintiffs claim that their plans for a commercial shooting range constituted a lawful use under the Zoning Ordinance prior to the February 2018 proposed amendment. Compl. ¶ 55, ECF No. 1. It is not entirely clear, but in the Complaint and subsequent filings in this case, Plaintiffs' assertions regarding their right to use the King Road property for commercial gun range purposes prior to the zoning amendment may not be correct. First, the facts indicate that how the King Road property was initially used is irrelevant to the current case. The first gun club operated as a commercial gun club from 1967 to 2008, during which time the property was zoned as A-1. *Id.* at ¶¶ 11, 14–15. In the nuisance

litigation in the mid-1990s, Robinson Township agreed that the gun club was a lawful use in the A-1 zone. *Id.* at ¶ 18. However, the property then ceased to be used as a gun club of any type, nonprofit or for-profit, from 2008 until 2016—a period of eight years. *Id.* at ¶¶ 20–21. Based on the zoning scheme in place in 2016 when Iron City Armory sought approval to open a new gun club, it appears that the property was re-zoned to an IBD district at some point prior to 2016. *Id.* at ¶ 23. Additionally, in this second gun club, Iron City Armory operated on a non-commercial basis, as evidenced by the permit restrictions that were the subject of the 2016 litigation in the Washington County Court of Common Pleas. *Id.* at ¶¶ 22, 24–25, 27–28. The lengthy cessation of commercial shooting range activities, combined with the fact that the property was rezoned to an IBD district—wherein Iron City Armory's gun club was only allowed to operate on a non-commercial basis—points to the conclusion that any right that may have inhered in the operation of the first gun club was subsequently lost.

Second, the current Robinson Township Zoning Ordinance, relevant to the present litigation, distinguishes between commercial shooting ranges and Sportsman's Clubs beyond the provisions Plaintiffs challenge in their Complaint. Plaintiffs, by their own admission, recognize this. *Id.* at ¶ 48; Pls. Br. 20, ECF No. 31. A closer look at the definition of "Commercial Recreation, Intensive," in Section 602 of the Zoning Ordinance, points to the conclusion that even prior to the February 2018 proposed amendment, Sportsman's Clubs could not be operated on a commercial basis. According to this definition, which Plaintiffs do not challenge, intensive commercial recreation includes "outdoor commercial shooting ranges," but excludes "shooting ranges owned by or operated by any non-profit conservation organization or sportsman's organization, any noncommercial target shooting conducted private or public land, or any traditional hunting activities carried out with Pennsylvania Game Commission regulations."

Robinson Twp. Zoning Ordinance § 602. In sum, the Zoning Ordinance appears to categorize Sportsman's Clubs among other nonprofit or non-commercial uses, and perhaps did so prior to the February 2018 proposed amendment.

The foregoing facts signal to the Court that Plaintiff Drummond's plans for the King Road property may not have been allowed to begin with—meaning that the property interest of which Plaintiffs claim they have been deprived may not exist at all. However, not only is this not entirely clear at this juncture based on the facts alleged, but Defendants do not make this argument. Because Plaintiffs allege a legal right existed, Defendants do not dispute this, and further factual development is needed, the Court assumes for the sake of argument regarding the substantive due process claim that a right exists.

Defendants next argue that even if the Complaint contained an adequately pleaded legal right, Defendant Dorsey's conduct at issue in this case does not shock the conscience. Defs.' Br. 18, ECF No. 27. Conduct that shocks the conscience "varies depending on the factual context." *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003). The Third Circuit has held that "[t]o '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 Fed. Appx. 798, 801 (3d Cir. 2009) (quoting *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285–86 (3d Cir. 2004)). Generally, "[w]hat shocks the conscience is only the most egregious official conduct." *Eichenlaub*, 385 F.3d at 285 (internal quotations omitted). However, "[land] 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 East Berlin*, 656 Fed.

Appx. 1, 6 (3d Cir. 2016) (citing *Eichenlaub*, 395 F.3d at 285). Here, Plaintiffs allege that Defendants acted "with the purpose and effect of frustrating" Plaintiffs' exercise of their Second Amendment rights.[5] Compl. ¶ 75, ECF No. 1. However, 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.

The Municipal Planning Code (MPC) of Pennsylvania, which governs land use decisions, includes notice and publication requirements for municipalities that are considering changes to their zoning ordinances. *See, e.g.*, 53 Pa. C.S. §§ 10609(b), 10610. Beyond the obligations detailed in the MPC, case law is devoid of any requirement that municipalities and their zoning officers have a duty to inform landowners individually of pending legislation, upcoming zoning hearings, or actions taken at zoning hearings. Additionally, although zoning officers often dispense advice in the course interacting with the public on zoning issues, property owners who rely on that advice, even in good faith, do so at their own peril. *DeSantis v. Zoning Bd. of Adjustment*, 2011 Pa. Commw. Unpub. LEXIS 28, at *15 n.5 ("[V]ested rights cannot be gained by relying on the statements of mere ministerial officers, such as a zoning officer or his secretary.") (citing *Ferguson Township v. Zoning Hearing Bd.*, 475 A.2d 910, 912 (Pa. Commw. Ct. 1984)); *see also In re Appeal of Broad Mountain Dev. Co., LLC*, 17 A.3d 434, 444 (Pa. Commw. Ct. 2011) ("Generally, a municipal permit issued illegally or in violation of the law, or

[5] Plaintiffs also assert that Defendants "acted in derogation of the considered judgment of the Court of Common Pleas in the previous nuisance action," referring to the nuisance suit filed in 1993 and decided in 1997. Compl. ¶ 75, ECF No. 1. For reasons discussed above in footnote 4 regarding Plaintiffs' equal protection claim, the Court finds the previous nuisance action to be irrelevant to the current suit.

under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued, and it may be revoked notwithstanding that the person may have acted upon the permit. Any expenditures made in reliance upon such permit are made at the person's own peril."). Allowing property owners to recover for their reliance in these situations "would have the effect of elevating and equating informal advice to official action." *Pequea Township v. Zoning Hearing Bd.*, 180 A.3d 500, 509 (Pa. Commw. Ct. 2018); *see also Cottone v. Zoning Hearing Bd.*, 954 A.2d 1271, 1280 n.8 (Pa. Commw. Ct. 2008) ("A zoning officer's gratuitous advice . . . is not a determination."). Furthermore, and importantly, "every person is presumed to know the extent of power of the municipal authorities." *In re Appeal of Broad Mountain Dev. Co., LLC*, 17 A.3d at 444.

As regards the zoning amendments at issue here, Plaintiffs do not allege that there were any procedural deficiencies in their enactment. In fact, Plaintiffs emphasize that there were no defects and that the enactment of the zoning amendments was procedurally sound. Pls.' Br. 7, ECF No. 31. A lack of procedural defect necessarily means that Defendants followed the notice and publication requirements of the MPC, and through the required notices, Plaintiff Drummond was put on notice of the timing and content of the zoning hearings. Essentially, by asking the Court to hold Defendant Dorsey accountable for not personally informing Plaintiff Drummond of the hearings and pending ordinance, Plaintiffs ask the Court to find that Defendants owed an additional duty to Plaintiff Drummond that generally is not owed to other property owners. That Defendants had the opportunity to personally notify Plaintiff Drummond, but did not act on it, does not excuse Plaintiff Drummond from being charged with knowledge of the pending amendments and hearings. The Court, therefore, is not persuaded that Defendants' inaction here, in light of a lack of duty to act, shocks the conscience.

In addition to allegations that Defendant Dorsey failed to personally notify Plaintiff Drummond of the pending proceedings, Plaintiffs argue that Plaintiff Drummond's reliance on Defendant Dorsey's advice, which Plaintiffs characterize as Defendants' "slow-rolling" and "stonewalling," amounts to interference with Plaintiffs' constitutional rights. Compl. ¶¶ 42, 55, ECF No. 1. To the extent Plaintiff Drummond relied on Defendant Dorsey's advice, he did so at his own peril. To charge Defendants with interference or conscience-shocking conduct on this ground "would have the effect of elevating and equating informal advice to official action." *Pequea Township*, 180 A.3d at 509.

Therefore, absent interference with any constitutionally protected activity and absent any conduct by Defendants that shocks the conscience, Plaintiffs' substantive due process claim under the Fourteenth Amendment, in Count V of the Complaint, fails and must be dismissed.

THEREFORE, based on the foregoing, Defendants' Motion to Dismiss is GRANTED and Plaintiffs' Complaint is hereby DISMISSED.

III. Motion for Preliminary Injunction

In light of the dismissal, on various grounds, of each of Plaintiffs' claims, Plaintiffs' Motion for Preliminary Injunction is accordingly DENIED as moot.

DATE January 22, 2019

Marilyn J. Horan
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2020, I electronically filed the foregoing brief and volume I of the appendix 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 also served a paper copy of the brief and appendix via Federal Express on Appellees' counsel:

Trisha Gill
Litchfield Cavo LLP
603 Stanwix Street, 10th Floor
Pittsburgh, PA 15222

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

Executed this the 1st day of July, 2020.

/s/ Alan Gura
Alan Gura