No. 20-1722

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

***Appellants*,**

v.

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

***Appellees*.**

On Appeal from the United States District Court for the Western District of Pennsylvania,
No. 18-cv-1127, Hon. Marilyn J. Horan

BRIEF OF *AMICI CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AND CEASEFIRE PENNSYLVANIA EDUCATION FUND IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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Corporate Disclosure Statement

Giffords Law Center to Prevent Gun Violence is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

CeaseFire Pennsylvania Education Fund is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

/s/ James Davy

James Davy

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are two organizations that work to reduce gun violence though litigation, policy advocacy, public education, and organizing. As gun-violence-prevention organizations, *Amici* seek to ensure that towns and governments may regulate the safe use of guns while complying with the Second Amendment. Ensuring that municipalities may make zoning decisions about the use of property within their borders based on their important interests plays a key role in that work.

Giffords Law Center to Prevent Gun Violence

Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to effectively reduce gun violence. The organization was founded more than 25 years ago following a gun massacre at a San Francisco law firm. It was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to improve the safety of their communities.

CeaseFirePA

CeaseFire Pennsylvania Education Fund ("CeaseFirePA") is a statewide organization working with mayors, police chiefs, faith leaders, community organizations, and individual Pennsylvanians to take a stand against gun violence in Pennsylvania. Through outreach, education, coalition building, and advocacy, CeaseFirePA works to reduce gun violence in Pennsylvania communities, stop the flow of illegal guns onto Pennsylvania streets, and keep guns out of the hands of people who should not have them. CeaseFirePA teaches Pennsylvanians that together they can raise their voices for change. CeaseFirePA holds educational programs to demystify the citizen activism process and teach the basics of advocacy. CeaseFirePA empowers partners and supporters to share their opinions and stories and make their voices heard on the issues of gun violence and gun violence prevention.

Amici Curiae submit this brief pursuant to Fed. Rule App. Proc. 29(a) and L.A.R. 29.0, and do not repeat arguments made by the parties. Neither party's counsel authored this brief, or any part of it. Neither party's counsel contributed money to fund any part of the preparation or filing of this brief. For that matter, no person at all contributed money to fund the preparation or submission of this brief. Giffords Law Center and CeaseFirePA file this brief with the consent of the Plaintiffs-Appellants, but without the consent of the Township of Robinson Appellees, who take no position on *Amici*'s leave to file.

INTRODUCTION

Amici urge the Court to affirm the ruling of the District Court. In light of the facts giving rise to this challenge, which reflect Robinson Township's important interests at stake and which the District Court carefully considered while applying this Court's directions in *Drummond I*, this Court can affirm at either step of the *Marzzarella* framework. *Amici* ask that the Court recognize that Second Amendment facial challenges to zoning regulations impose a high pleading burden not met here. Even if the threshold burden had been met, the challengers' claims involve non-core aspects of the Second Amendment at most, which means that the challenged zoning regulation need only reasonably relate to important government interests. It does, and Plaintiff-Appellants' efforts to dress up a garden variety zoning dispute as a weighty constitutional challenge must fail. The District Court should be affirmed.

ARGUMENT

I. This appeal involves a mundane zoning dispute without Constitutional import

The District Court properly dismissed the claims brought by the three Plaintiff-Appellants—William Drummond of North Carolina, the Greater Philadelphia Gun Club, LLC; and the Second Amendment Foundation, Inc. (collectively, "GPGC"). Ultimately, GPGC's claims are "a mundane zoning dispute dressed up as a Second Amendment challenge." *Teixeira v. County of Alameda*, 822 F.3d 1047, 1064 (9th Cir. 2016) (en banc) (Owens, J., concurring). On appeal, GPGC insists

that the Township has a "vendetta" against them, and that this is only "the latest chapter in . . . the prosecution of a personal grudge" by the Township. Appellants' Br. 2, 19. But a fuller accounting of the history of the gun club and the Drummond family's connection to it suggests no grudge. That history involves fraud, theft, and illegal firearms trafficking, and a Township willing to preserve gun-club access within its borders. Not only does GPGC's framing obscure the underlying facts, but it also presents an incomplete version of the procedural history of the litigation to support a groundless argument that the case should be reassigned. On remand, the District Court carefully and faithfully applied this Court's directions from *Drummond I*. This Court should reject GPGC's framing in its consideration of the issues at stake.

a. The history of the property reflects not a vendetta, but the Township's important regulatory interests

Prior gun clubs on the property

In GPGC's telling, the commercial firing range it wishes to operate simply continues a half-century-old family business that operated safely yet faced a Township "vendetta." Appellant Br. 2. The reality is more complicated.

Drummond observes that a gun club managed by his uncle operated on the property until it closed in 2008, but he does not identify the uncle and does not state why the club closed. *Id.* at 3, 8. The uncle who ran the prior gun club—the same uncle who still owns the gun-range property and leased it to Drummond, *id.* at 9—

is Joseph Donald "Tex" Freund. In 2000, Freund pleaded guilty to eight felonies, including two counts of operating a chop shop, two counts of insurance fraud, and theft by deception. *Commonwealth v. Freund*, No. CP-02-CR-4831-2000 (CCP Allegheny). As a convicted felon, he was prohibited from possessing or selling firearms.

The gun club did not close in 2008 because of a Township vendetta. It was raided in 2006 by federal agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives. In 2008, federal prosecutors—neither the state, nor the Township—brought a six-count information against Freund, his sister, and the gun club, alleging that Freund possessed and sold more than 150 guns plus ammunition as a convicted felon, and that he falsified gun-sales records using his sister—Drummond's aunt—as a straw seller. *United States v. Freund*, No. 08-382, Docs. 1, 2 (W.D. Pa. 2008). The gun club itself was prosecuted on two counts. *Id.* Freund, his sister, and the gun club pleaded guilty on all counts, and Freund was sentenced to three years in prison plus three years' supervised release. *Id.*, Docs. 13, 19, 27, 59.

In short, Drummond's uncle's gun club closed because it was a criminal operation and the man who ran it went to federal prison. That man running the criminal operation that swept in his own family, Drummond's uncle, still owns the property and leased it to Drummond "for the purpose of operating GPGC much as his . . . uncle had." Appellant's Br. 9.

The Zoning Ordinances

GPGC's account also omits important facts about the township zoning ordinance it challenges. GPGC asserts that its plan to run the gun club as a for-profit gun range "had been permitted as of right" but that the Township "exploited" the change in ownership when Drummond took over to add new restrictions making his operation impossible, all presumably in service of the Township's quarter-century vendetta. Here again, the reality is different.

GPGC is correct that Freund's gun club sold guns and ammunition, albeit illegally. Back then, the property was zoned A-1, and the Township admitted that Freund's gun club was a lawful use. JA15–16. But in 2006 a new freeway, the Southern Beltway, was completed through the township, adjacent to the gun-club property, and the township undertook comprehensive rezoning in order to promote economic development along the highway corridor. That rezoning occurred years before Drummond took over the club. The gun-club property, like others adjacent to the new freeway, was rezoned as an Interchange Business Development District (IBD). The ordinance provided that, in IBD districts, non-profit "Sportsman's Clubs" were a permitted use. JA15. Although it did not define that term, the same ordinance provided *different* zoning categories, outside of IBD districts, where for-profit commercial outdoor gun ranges *were* allowed. *Id.*

So when GPGC's predecessor, Iron City Armory, submitted a zoning application to open a new gun club on the same property in 2016, two years before GPGC did, the zoning permit prohibited gun sales and other commercial activities. *Id.* Iron City Armory's permit was soon revoked after the Township received complaints, confirmed by an undercover police investigation, that the gun club was selling targets and ammunition in violation of its permit. JA16–17. The Township upheld that revocation on the ground that commercial sales were not permitted in IBD districts. *Id*. A judge restored the permit after finding that the ammunition sales were *de minimis*, but warned the club against future commercial sales. JA17.

This additional factual context demonstrates that GPGC's zoning application to run a commercial gun range on an IBD-zoned property was not denied due to any Township "vendetta." In reality, the property had been rezoned as part of a comprehensive new zoning regime prompted by the construction of a freeway years before. Both the licensing and license-revocation proceedings involving Iron City Armory made clear that a commercial gun range was not permitted on this IBD-zoned property—but, significantly, would have been allowed elsewhere in the township—long before Drummond entered the picture.

GPGC's Litigation Choices

When the Township's zoning officer rejected Drummond's zoning application, Drummond had the chance to appeal the officer's denial to the Township's

zoning board, but he did not. JA20. While Drummond filed a state-court action to challenge the denial, he then voluntarily dismissed it. JA21. Instead, GPGC filed the present suit in federal court without giving the Township or the state court the opportunity to address its claims in the first instance.

That choice hamstrung GPGC's ability to bring a claim under an easier as-applied standard. In the federal suit, GPGC initially asserted both facial and as-applied Second Amendment challenges. The District Court dismissed the as-applied challenges and this Court affirmed that dismissal, because GPGC did not first undertake its available review options. *Drummond v. Twp. of Robinson*, 784 F. App'x 82, 83&n.1 (3d Cir. 2019) (*Drummond I*) ("The District Court properly held that as-applied challenges are not ripe until the plaintiff gives the local zoning board the opportunity to review the zoning officer's decision." (internal quotation marks and alteration omitted)).

After *Drummond I*, the only live claim left is GPGC's facial challenge. Because of GPGC's own choice to skip local and state review, the issue is not whether the Township's zoning ordinance violates the Second Amendment *as it applies to the gun club.* GPGC can prevail only if it can prove that "no set of circumstances exists under which the [zoning ordinance] would be valid," that is, that the ordinance "is unconstitutional in all of its applications," which is "the most difficult challenge

to mount successfully." *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (en banc); *see* section II, *infra*.

GPGC insists that the facial nature of its surviving claim is "irrelevant" to this Court's disposition. Appellant Br. 25. That is not so. The relevance to GPGC's legal arguments is discussed in section II, but the facial nature of the sole surviving claim also renders GPGC's own factual story irrelevant to the appeal. The theme of GPGC's story is that the Township's zoning ordinance was only the latest chapter in a decades-long "vendetta" against a family's business. Even if this one-sided story squared with the record—which it does not, *see supra* at I.a.—it would be beside the point. GPGC lost that fight when it chose to rush into federal court instead of first seeking redress from the township board and the state courts. GPGC's overheated tale reflects a basic unwillingness to accept this Court's ruling affirming dismissal of its as-applied claim.

b. The District Court carefully applied this Court's directions in *Drummond I*

GPGC builds on its unsupported accusations of a vendetta by the Township by asserting that the District Court acted with bias as well. GPGC assails the District Court by alleging that its handling of the case on remand from *Drummond I* was so inappropriate that this Court must not only reverse, but must reassign the matter to a different judge. These assertions are remarkable in substance and rhetoric. In

GPGC's telling, the District Court reduced important rights to a "charade," it "ignored" this Court's direction and "disregarded" its mandate, it "merely applied the thinnest veneer of . . . terminology to its previous opinion" and "rac[ed] to uphold laws," it made "remarkable" assertions and issued a "disquieting" ruling. Appellant Br. 1, 18, 22, 37 (internal quotation marks omitted). The record, GPGC charges, "is not free of partiality"—that is, Judge Horan's partiality. *Id.* at 20. This barrage is unsupported by the record.

The District Court's initial ruling in 2019, the one this Court reviewed in *Drummond I*, was thorough, balanced, and reasonable. After setting out the facts with care, it ruled in GPGC's favor on associational standing, and it ruled in GPGC's favor on customer standing relying entirely on a case from another circuit. JA23–25. It ruled that GPGC's as-applied challenges were not ripe but its facial challenges were. JA25–29. It correctly stated the law governing facial challenges and Second Amendment claims. JA29–30. It followed a squarely-on-point Second Circuit case which held that time, place, and manner restrictions that leave open alternative avenues to exercising the right do not burden Second Amendment rights. JA31–36 (citing *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012)). Finally, it analyzed at length and dismissed GPGC's equal protection, due process, and substantive due process claims.

In *Drummond I*, this Court affirmed the District Court on all grounds except one. Rejecting GPGC's contrary arguments, it affirmed dismissal of the equal protection, due process, substantive due process, and as-applied Second Amendment claims. 784 F. App'x at 84–85&n.1. The Court vacated the dismissal and remanded solely as to the facial Second Amendment claim. Implicitly diverging from the Second Circuit case the District Court had followed, *Drummond I* held that the District Court erred by essentially collapsing the two-step test set out in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), when it used a time, place, and manner test at step one instead of step two of this Circuit's Second Amendment analysis. *Id*. at 84. At step one, courts determine whether a regulation reaches conduct within the scope of the Second Amendment, based on a textual and historical analysis. *Id*. At step two, the time, place and manner test "is . . . appropriate." *Id.* The Court simply "vacate[d] and remand[ed] for further proceedings with respect to the facial Second Amendment challenges," without any express direction as to what form the remand should take beyond its description of the dismissal order's analytic error. *Id*. at 83, 85.

GPGC also blames the District Court for its own inactivity. *Drummond I* issued on November 14, 2019, and the District Court entered it on its docket the same day. In the *123 days* between *Drummond I* and the District Court's remand opinion, GPGC filed nothing. It did not request briefing. It did not request any evidentiary

development. It did not request a status conference. In fact, it did not request anything. Instead, in this appeal, GPGC blasts the District Court for ruling "instantly upon remand," "without any further input from the parties" and "without affording Plaintiffs notice or an opportunity to file a brief." Appellant Br. 16, 36, 37. But far from moving "instantly," the District Court took no action while GPGC sat silent for over four months.

On the substance, and contrary to GPGC's rhetoric, the District Court followed *Drummond I* faithfully by applying the analysis this Court instructed. The District Court recounted the relevant facts anew, in detail and with citations to the record. JA4–6. On *Marzzarella*'s step one, it analyzed exactly the question this Court directed it analyze. *Drummond I* found that "[t]he District Court erred when it did not perform a textual and historical analysis." 784 F. App'x at 84. So, on remand, the District Court noted that "[t]o answer these questions, a textual and historical analysis is required." JA8. And far from reissuing the first opinion, the District Court reversed course from its first analysis, ruling that GPGC did satisfy step one, even though it relied entirely on two out-of-circuit opinions to do so, JA8, and even though this Court could affirm dismissal on step one rather than step two. *See* section II.b., *supra*.

The District Court similarly followed this Court's instructions faithfully at step two. As *Drummond I* directed, it applied means-end scrutiny to the challenged

provisions. JA9–11. It observed that the time, place, and manner test was pertinent at step two, JA9, consistent with *Drummond I*'s statements that such an analysis is "appropriate" at step two rather than step one. It looked to First Amendment law to determine how to apply the time, place, and manner test, JA9–10, just as *Drummond I* indicated it should, 784 F. App'x at 84 n.9. After careful legal and factual analysis, it concluded that the Township zoning provisions were time, place, and manner restrictions. JA10. It observed that the Township's interest, stated in the zoning ordinance itself, was important. JA10. It concluded that the fit with its objective was "reasonable," JA10–11, relying in part on *Drummond I*'s conclusion that the ordinance "bears a rational relationship to the Township's permissible objective of nuisance prevention because the commercial nature of a shooting range is *reasonably related* to the intensity of the land use and the impact that such use may have on neighboring properties," 784 F. App'x at 85 (emphasis added). And it observed that alternative channels were available to exercise the burdened Second Amendment activities, given the evidence that the Township allowed commercial gun ranges in other zones and given GPGC's failure to meet its facial-challenge burden of showing that the regulation was unconstitutional in all circumstances. JA11.

When it comes to the District Court's disposition of its claim, just as with the factual record, GPGC's position relies on an incomplete picture.

II. The District Court properly dismissed the facial challenge

This Court should affirm the dismissal of GPGC's complaint, and it may do so based on failures at either *Marzzarella* step one or step two. First, this Court should affirm the District Court because the important government interests reasonably served by the regulation satisfy the prescribed means-end scrutiny at step two. The Township has a number of important interests at stake that the zoning regulation directly serves, including a number of non-empirical interests that GPGC rejects. Second, although the District Court in the opinion presently on appeal reversed its initial analysis and found a burden at step one, *see* section I.b., *supra*, this Court could affirm based on the lack of Second Amendment burden in all applications posed by the regulation at issue. This Court's opinion in *Drummond I* did not presume a facial burden, and this Court may affirm on any basis in the record. And accepting GPGC's arguments about these pleadings in a *facial* challenge could effectively foreclose granting motions to dismiss of Second Amendment complaints.

a. The District Court correctly determined that the regulation directly serves important government interests at *Marzzarella* step two

Regardless of whether GPGC has carried its substantial burden at *Marzzarella* step one, GPGC's failure at *Marzzarella* step two supports affirmance. *Drummond I* remanded for the District Court to undertake the two-step analysis sequentially rather than collapsing it into one step. *See* section I.b., *supra*. It did not express an

opinion on the outcome of that analysis or the level of scrutiny that should be applied at the second step. Here, the District Court appropriately upheld the challenged regulations after applying intermediate scrutiny and a First Amendment-informed "time, place, and manner" test, selected because the presumptively lawful zoning regulation at issue here "leaves open ample alternative channels to exercise the right at issue." JA10. This Court should affirm because the zoning regulation satisfies means-end scrutiny by reasonably serving the Township's undisputedly important interests.

When analyzing Second Amendment challenges at step two, the nature of the challenged law or regulation dictates the applicable level of scrutiny. Where, as here, the regulation does not burden a "core" Second Amendment right, it need satisfy only intermediate scrutiny. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General of N.J.*, 910 F.3d 106, 117 (3d Cir. 2018); *see also Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013). The zoning regulations at issue do not burden a core right, because they do not regulate the purchase or possession of firearms, or the use of firearms for home defense. These regulations do not even burden ancillary training rights in all applications, because the scheme allows non-profit and commercial firearms ranges across zones. Instead of imposing substantial restrictions on core rights or even ancillary training rights, zoning regulations like the Township's manage quality of life for the people in their communities. Considering the attenuated nature

of the burden and the Township's presumptive authority to regulate, the District Court correctly applied an intermediate scrutiny analysis that considered "whether the challenged regulation reasonably fits with an important governmental interest."[1] JA10.

i. The Township's important interests

The zoning regulation at issue directly serves a number of important government interests. The District Court correctly found that the challenged regulation furthers the Township's important "stated objective of nuisance prevention, protecting the public health, and preserving the safety and welfare of its residents." JA10. *Drummond I* itself dismissed GPGC's equal protection claim after recognizing the Township's interest in nuisance prevention, and the Supreme Court has repeatedly recognized "compelling interests in public health" for purposes of regulations that might burden constitutional rights. *Wheaton College v. Burwell*, 134 S.Ct. 2806, 2808 (2014); *see also Calvary Chapel Dayton Valley v. Sisolak*, No. 19A-1070 (July

[1] In carefully following the instructions from this Court in *Drummond I*, the District Court perhaps even applied a more stringent version of intermediate scrutiny than necessary, because even in the context of intermediate scrutiny at step two, courts' "means-end review is arguably less rigorous" where the regulations in question "do not restrict the core right of armed defense, but rather burden activity laying closer to the margins of the right." *Kanter v. Barr*, 919 F.3d 437, 447 n.10 (7th Cir. 2019) (applying *Ezell* and observing that "empirical evidence of a public safety concern can be dispensed with altogether" where the weight of historical evidence suggests that a regulation burdens only marginal activity). As noted, the zoning ordinance here burdens only activity at the outskirts of the Second Amendment.

24, 2020) (Alito, J.) (observing that the state "undoubtedly has a compelling interest in . . . protecting the health of its citizens"). Notably, GPGC does not dispute that nuisance prevention, protecting public health, or preserving the safety and welfare of citizens are important objectives.[2]

Instead, GPGC and its *amici* argue that the District Court erred by not demanding empirical evidence corroborating its interests. But courts considering analogous constitutional challenges regularly credit non-empirical interests. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015) (crediting interest in "public confidence in judicial integrity" even though that interest "does not easily reduce to precise definition, nor does it lend itself to proof by documentary record"); *City of L.A. v. Alameda Books*, 535 U.S. 425, 439 (2002) (crediting city officials' informed judgments about effects of ordinance even where the city failed to furnish specific "empirical data" showing "that its ordinance will successfully lower crime"). Many regulations address hard-to-quantify interests, but this observation applies strongly to zoning decisions, which by nature regulate things—quiet enjoyment of neighborhoods, for example—to which governments cannot easily assign empirical value.

ii. The regulation reasonably serves those interests

As the District Court found, the zoning regulation satisfies intermediate

[2] Although GPGC appears to accuse the District Court of conjuring up these objectives for the Township, Appellant Br. 17&n.5, in fact the Township identified these objectives in the zoning ordinance itself. JA5.

means-end scrutiny because it reasonably serves its important government interests. Simply put, the Township reasonably concluded that allowing commercial gun ranges in some areas, but not in others, advanced its residents' health, welfare, and well-being. Under intermediate scrutiny, this Court requires that "the fit between the challenged regulation and the asserted objective be reasonable, not perfect." *Marzzarella*, 614 F.3d at 98. In this context, this Court recently upheld at step two of the Second Amendment framework a regulation that categorically bans particular types of magazines, because the regulation "does not disarm an individual" and "imposes no limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess." *N.J. Rifle & Pistol*, 910 F.3d at 122. Similarly, in this case the District Court correctly found that the challenged zoning regulation reasonably advances the Township's interests because it allows "ample alternative channels … for commercial gun range activity and for maintaining proficiency with center-fire rifles," while restricting commercial gun ranges in other areas to protect noise levels in service of public health and welfare of residents.

GPGC and its *amici* challenge this conclusion by arguing that the District Court should have demanded empirical proof that the zoning ordinance furthers the Township's objectives. But the Supreme Court has repeatedly explained that heightened means-end scrutiny does not require legislatures to furnish exact empirical justifications for regulations that burden constitutional rights; rather, legislatures make

informed judgments based on available information of all varieties. The Supreme Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)). In cases involving minimal burdens on peripheral asserted rights, where scrutiny reflects the reduced burdens, Courts do not demand unanimous empirical evidence. *Accord, e.g.*, *Mahoney v. Sessions*, 871 F.3d 873 (9th Cir. 2017) (in challenge to policy that "does not impose a substantial burden on the Second Amendment right," crediting city's "reasonable inference[s]" that policy furthers public safety objectives); *see also Drake*, 724 F.3d at 438, 439 (according substantial deference to legislature's predictive judgments that a regulation will accomplish its objectives, and describing "conflicting empirical evidence as to the relationship" between the interest and the regulation).

GPGC's remaining arguments on the District Court's step two analysis fail under *Drummond I* and this Court's precedent. Because GPGC's litigation choices foreclosed an as-applied challenge, it instead must demonstrate that the regulation does not reasonably serve important interests in *all circumstances. E.g. Chicago v. Morales*, 527 U.S. 41, 78 (1999) (affirming that a party bringing a facial challenge in the First Amendment context must "establish that the statute was unconstitutional

in all its applications"); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (holding that facial challengers must show that "no set of circumstances exists under which the act would be valid."). Because the overall zoning scheme permits commercial gun ranges within the Township, and because the overall zoning scheme even permits non-commercial gun ranges within the particular zone, the regulation amounts to the type of time, place, and manner restriction that courts regularly uphold as serving important government interests. The District Court correctly found that GPGC did not state a valid facial claim against the zoning scheme as a whole.

This Court should affirm the District Court's determination that there is an adequate means-end fit. In doing so, the Court should decline GPGC's invitation to impose evidentiary and proof burdens on the Township that resemble a test far more stringent than intermediate scrutiny, especially, as here, in the context of a facial challenge. This Court should also reject GPGC's assertion that a district court can never dismiss a Second Amendment challenge for lack of a record at *Marzzarella* step two, because this Court has previously affirmed a district court's dismissal on the papers at step two. *Compare* Appellants' Br. 22, 26 (arguing "at the pleading stage, the District Court could not possibly determine that the challenged laws are valid"), *with Drake*, 724 F.3d 426, 434-35, 436-37 (affirming at step two, even though "New Jersey has not presented us with much evidence to show how or why its legislators arrived at this predictive judgment" and declining "to hold that the fit

here is not reasonable merely because New Jersey cannot identify a study or tables . . . upon which it based its predictive judgment").[3] GPGC's suggestion that this Court cannot affirm a dismissal at step two is foreclosed by *Drake*.

b. The zoning regulation does not burden Second Amendment rights in all applications, and so fails at *Marzzarella* step one

Although this Court could affirm the District Court's step two analysis, it could also affirm because GPGC's claim fails at step one. This Court may affirm on any basis in the record. *Fairview Twp. v. EPA*, 111 F.2d 517, 524 n.15 (3d Cir. 1985). Here, failure to carry its high burden at *Marzzarella*'s first step presents just such an independent ground. First, because its only surviving challenges to the zoning regulation are facial, GPGC would have to allege that the zoning regulation unconstitutionally burdened its Second Amendment rights in all applications—which it did not. Second, GPGC's challenge does not meet the high burden imposed on challenges to presumptively lawful regulatory measures. Even to the extent GPGC asserts indirect burdens on the rights of others and might have derivative standing, crucial differences between First and Second Amendment rights doom its theory. Third, GPGC's request for reversal would require this Court to accept the implicit assertion that *all*

[3] The District Court's ruling in *Drake* addressed simultaneous motions to dismiss and for summary judgment on the parties' joint request that the Court "resolve the suit based solely on the motions submitted" because the "lawsuit presents purely legal issues." *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 818 (D.N.J. 2012).

Second Amendment challenges, even those that facially lack merit, *require* development of an evidentiary record, which would apparently foreclose ever granting motions to dismiss in Second Amendment challenges. As noted, this Court should reject that theory, especially in, as here, a facial challenge.

First, GPGC's facial challenge fails at *Marzzarella* step one because it does not plausibly allege a burden on Second Amendment rights in all circumstances. In the context of facial challenges in analogous constitutional contexts, this Court and others have repeatedly held that plaintiffs must show that a challenged regulation fails in all applications. *See, e.g.*, *Morales*, 527 U.S. at 78 (requiring facial challenger to "establish that the statute was unconstitutional in all its applications"); *Salerno*, 481 U.S. at 745 (holding that facial challengers must show that "no set of circumstances exists under which the act would be valid"). This rule applies to facial challenges in all contexts except in First Amendment cases involving overbreadth. *See New York v. Ferber*, 458 U.S. 747, 769-773 (1982); *see also Johnson v. United States*, 135 S. Ct. 2551, 2567 (2015) (referring to the showing required "except in First Amendment cases" and applying the "no-set-of-circumstances rule").[4]

GPGC's facial allegations here simply do not meet that burden. In this context a facial challenge would have to allege that the regulation in question violates the

[4] There is no Second Amendment "overbreadth" doctrine. *See, e.g.*, *Piszczatoski*, 840 F. Supp. 2d at 819 ("The Third Circuit does not 'recognize an 'overbreadth' doctrine' in the context of the Second Amendment.") (citing *United States v. Barton*,

Second Amendment in all applications. But Plaintiff-Appellants cannot claim the zoning regulation violates the Second Amendment in all applications for the simple reason that the purportedly-burdened activities can still take place in other parts of the Township, or even in the same place without a commercial motive. GPGC and others can operate a gun range, for profit, in the Township of Robinson. As the District Court recognized, "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." JA11. Here, where GPGC's claim concerns zoning regulations' effect on their ability to operate a *particular* property at a *particular* location, their facial challenge must be dismissed. *Compare Teixeira*, 873 F.3d at 691 (Tallman, J., concurring in part

633 F.3d 168, 172 n.3 (3d Cir. 2011)); *see also United States v. Chester*, 628 F.3d 673, 688 (4th Cir. 2010).

and dissenting in part),[5] *with Ezell v. City of Chicago*, 846 F.3d 888, 890 (7th Cir. 2017).[6]

Second, GPGC's pleadings do not meet the high burden *Marzzarella* step one imposes on challenges to presumptively lawful regulatory measures. As this Court acknowledged in an as-applied challenge to a presumptively lawful regulation, "not only is the burden on the challenger to rebut the presumptive lawfulness of the exclusion at *Marzzarella*'s step one, but the showing must also be strong. That's no small task." *Binderup v. Attorney General of the United States*, 836 F.3d 336, 347

[5] Concurring with the majority that "Teixeira's facial Second Amendment challenge fails because appellants cannot demonstrate that the zoning ordinance is unconstitutional in *all* of its applications. Notably, Teixeira did not allege that none of the existing gun stores in the county can comply with the ordinance. The district court properly dismissed the facial challenge to Alameda County's zoning ordinance"; then opining (in dissent) that Teixeria "has the better argument on the as-applied challenge."

[6] GPGC cites *Ezell* extensively, but does not acknowledge the fatal distinction between the facts of *Ezell* and the facial challenge in this case. In *Ezell*, the City of Chicago imposed a zoning regulation that "prohibited firing ranges everywhere in the city," and then re-regulated to make only 2.2% of the city's total acreage "even theoretically available," allowing for a plausible allegation of a total ban. *Id*. Here, as the District Court noted, Appellees allow exactly such ranges in other township zones—in a substantially smaller community than Chicago, besides. JA8.

(3d Cir. 2016) (en banc). The step one burden to rebut a presumption of lawfulness falls even more heavily on plaintiffs pressing facial challenges.

"Presumptively lawful regulatory measures," defined non-exhaustively, have historically constrained the scope of Second Amendment rights. *District of Columbia v. Heller*, 554 U.S. 570, 626-27&n.26 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). Such regulations include "laws imposing conditions and qualifications on the commercial sale of arms," *Heller*, 554 U.S. at 627, which date to the founding era. *See Teixeira*, 873 F.3d at 685 ("The government provided and stored guns, controlled the conditions of trade, and financially supported private firearms manufacturers. … At least two colonies also controlled more generally where colonial settlers could transport or sell guns."). Presumptively lawful regulations also include those that limit where the right may be exercised. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1130 (10th Cir. 2015) (citing *Heller*'s "list of multiple locations outside the home" where restrictions on gun carry are presumptively lawful and upholding a limit on firearms in federal buildings); *see also Kachalsky v. Cnty. Of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012) (specifically contrasting the Second Amendment with the First regarding locational restrictions on exercise of the right). Restrictions on the location of Second Amendment exercise, and conditions on commercial sales, are presumptively lawful. This regulation happens to do

this through zoning.[7] The Township's zoning scheme "fits comfortably within the longstanding tradition of regulating" the conditions and locations of firearm trade as well as the use of land based on noise, intensity of use, and other factors, and so fails at step one. *Drake*, 724 F.3d at 433-34.

GPGC has the separate step one problem that its facial challenge does not attack a law, presumptively lawful or otherwise, that burdens Second Amendment rights in all circumstances, much less that burdens core Second Amendment rights in all circumstances. The District Court properly concluded that this challenge does not implicate burdens on "core" Second Amendment rights at all. *See* JA8; *Marzzarella*, 614 F.3d at 92 ("at its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home"). But in fact GPGC's facial challenge does not implicate non-core rights either, since there is no Second Amendment right to operate a commercial gun store or range in a location of the operator's choosing. The Second Amendment "confers

[7] Zoning as a mechanism has existed for longer than the requirement that applicant license holders "demonstrate a justifiable need to obtain a permit" to carry a handgun, a law this Court upheld in *Drake* as a longstanding restriction outside the scope of the Second Amendment. 724 F.3d at 431-32 (3d Cir. 2013) ("it is not clear that pre-ratification presence is the only avenue to a categorical exception" from Second Amendment scrutiny (quoting *Marzzarella*, 416 F.3d at 93)). The handgun carry permit law at issue in *Drake* existed for about 90 years, *see id*., and zoning laws that preserve public welfare through restrictions on property and buildings have existed for longer than that. *See, e.g. Welch v. Swasey*, 214 U.S. 91 (1909) (upholding a limitation on the height of buildings in residential sections of Boston).

a right on the 'people' who would keep and use arms, not those desiring to sell them." *Teixeira*, 873 F.3d at 683. This is because under the proper analysis "historical evidence … demonstrates that the right codified in the Second Amendment did not encompass a freestanding right to engage in firearms commerce divorced from the citizenry's ability to obtain and use guns." *Id*. at 684. And, as noted, in a facial challenge, GPGC has failed to allege that it could not operate a gun range in other locations allowed by the Township.

To the extent that GPGC's facial challenge purports to concern indirect burdens on the Second Amendment rights of non-party gun range customers, their challenge still fails. That is because GPGC fails to show that zoning limitations that prevent a commercial gun range from opening in one particular location impermissibly infringe the asserted Second Amendment right to buy firearms at and train at a gun range anywhere nearby. In fact, the purported indirect burden of limitations on sale or training at Plaintiff-Appellants' particular range has "little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms." *Teixeira*, 873 F.3d at 687. A zoning regulation that would "limit[] a proprietor's ability to open a new gun store . . . does not burden conduct falling within the Amendment's scope and is necessarily allowed by the Amendment." *Id.* (citing *Peruta v. San Diego Cnty.*, 824 F.3d 919, 939 (9th Cir. 2016), and *Marzzarella*, 614 F.3d at 89). Even accepting derivative standing, in a facial challenge, GPGC must

show that the Township's residents cannot buy firearms or train as a result of the zoning scheme, which it cannot. GPGC's own desire to sell guns, charge money for range time, and otherwise earn profits at one particular location does not receive protection, particularly when such profit-driven activities are permitted at other locations within the jurisdiction.

Third, GPGC's insufficient pleadings fail at either *Marzzarella* step, but this Court should affirm dismissal at step one to maintain the analytical utility of step one. GPGC's assertion that the Government must produce evidence merely because it has asserted a burden on Second Amendment rights requires this Court to accept two incorrect propositions. One, that the Court must credulously accept plaintiffs' implausible assertion that a neutral zoning regulation is facially invalid because it effects a total ban on the exercise of some non-parties' core Second Amendment rights, even where the face of the pleadings do not allege a burden in all circumstances. If accepted, step one would serve virtually no analytical purpose in a motion-to-dismiss posture. Two, in combination with GPGC's assertion that step two requires an evidentiary record to defend a zoning ordinance, GPGC's proposed rubber stamp at step one would apparently foreclose *ever* granting a motion to dismiss of a Second Amendment challenge because the government defendant has not yet

produced evidence for the step two analysis. This Court must not accept such a formulation, especially in light of pleading standards for other constitutional claims—and especially in a *facial* challenge. *See* section II.a.ii.

For the above reasons, *Amici* urge the Court to affirm the District Court's dismissal of the complaint as having failed to carry the required burden at *Marzzarella*'s first step.

III. Even if this Court agrees with GPGC on the merits, remand to the same District Court would be the appropriate outcome

This Court should affirm the dismissal, *see* section II. But even if this Court disagrees with *Amici*'s position and remands for further record development, *see, e.g.*, *Reilly v. City of Harrisburg*, 858 F.3d 173, 175 (3d Cir. 2017),[8] the proper remedy is remanding to the same District Court. Although GPGC spends the bulk of its brief re-arguing the preliminary injunction which the District Court denied as moot and seeking reassignment to a different district court, *see* section I.b., these requests have no basis in precedent or normal practice.

This Court should not countenance GPGC's request for a reassignment. Such a decision "should be considered seriously and made only rarely." *Huber v. Taylor*, 532 F.3d 237, 251 (3d Cir. 2008). Such rare circumstances include, for example,

[8] *Reilly* reversed and remanded a challenge to an ordinance for consideration by the District Court in the first instance despite the appellants' "request that we decide the merits of their attack on the constitutionality of the ordinance." 858 F.3d at 175.

reassignment only upon a *third* appeal where this Court had already ruled in the *second* appeal that the District Court did not follow its mandate from the *first* appeal. *United States v. Wecht*, 541 F.3d 493, 511 (3d Cir. 2008). By contrast, this Court has declined to reassign in a third remand despite noting that even in its second remand it had been "hopeful that the Magistrate Judge and District Judge would cease making these kinds of irrelevant, categorical statements for several reasons, including that they are unnecessary and might cast our judicial system in a bad light by leading an observer to question the impartiality of these proceedings," and that "despite our admonishment" in the second opinion, "this commentary continued since we last remanded this case." *Pearson v. Prison Health Serv.*, 850 F.3d 526, 544 (3d Cir. 2017). Even in GPGC's telling, nothing in this record justifies reassignment, and as noted, that telling omits key facts, undermining its assertions of bias.

CONCLUSION

For the reasons provided above, *Amici* ask the Court to affirm the District Court. It could do so at either *Marzzarella* step one or two. At a minimum, if the Court remands for additional record development, it should do so to the same District Court rather than reassigning the matter.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

I, Jim Davy, certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit Court of Appeal.

Dated: August 13, 2020

/s/ James Davy

James Davy, Esq.

CERTIFICATE OF COMPLIANCE

I, Jim Davy, hereby certify as follows:

(1) the Brief for Amicus Curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 14-point Times New Roman font;

(2) the Brief for Amicus Curiae complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,771 words, excluding those parts of the brief excluded by Fed. R. App. P. 32(f), as calculated using the word count function on Microsoft Word software;

(3) the text of the electronic and hard copies of the Brief for Amicus Curiae is identical; and

(4) the electronic copy of the Brief for Amicus Curiae was scanned for electronic viruses on August 13, 2020, before transmission to this Court, and no viruses were detected.

Dated: August 13, 2020

/s/ James Davy

James Davy, Esq.

CERTIFICATE OF SERVICE

I, Jim Davy, certify that on August 13, 2020, I caused a copy of this Brief for Amicus Curiae to be filed with the Clerk of Court and served on all counsel of record using the *CM/ECF* system.

I also certify that within the time limits specified, I will have caused seven (7) hard copies of the instant brief to be hand-delivered to the Clerk of the Third Circuit Court of Appeals, in accordance with the Rules.

Dated: August 13, 2020

/s/ James Davy

James Davy, Esq.