No. 24-178

IN THE

Supreme Court of the United States

OAKLAND TACTICAL SUPPLY, LLC, *et al.*,

Petitioners,

v.

HOWELL TOWNSHIP, MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HOWELL TOWNSHIP'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment presumptively protects against restrictions burdening the right to train with firearms commonly possessed for lawful purposes?

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INTRODUCTION

Respondent Howell Township is a rural community in Michigan that has a Euclidean form of zoning dividing the community into 12 different land use districts. Although four land use districts allow commercial shooting ranges in Howell Township and firearm training is freely allowed as an individual activity throughout Howell Township, it is impermissible for there to be a commercial shooting range in certain areas of Howell Township.

Petitioners consist of several individuals that live throughout Michigan and a business that leases land in Howell Township. Petitioners have a desire and preference to commercially train at a shooting range that would facilitate shooting up to 1,000 yards and want to do so at their convenient location in Howell Township—which is not located in one of the four zoning districts that allows commercial shooting ranges. The one-count complaint in this case alleges that the Second Amendment has been violated by depriving Petitioners of their preference under the land use restrictions in Howell Township's Zoning Ordinance.

The claims were dismissed at the pleading stage prior to this Court issuing its decision in *New York State Rifle & Pistol Association, Incorporation v. Bruen*, 142 S. Ct. 2111 (2022), with the trial court concluding that the allegations do not invoke the protections of the Second Amendment. A remand resulted in the application of *Bruen* and another dismissal for the reason the proposed course of conduct was not covered by the plain text of the Second Amendment. The decision of the trial court was affirmed on appeal with the Sixth Circuit agreeing that

the proposed course of conduct was not covered by the plain text of the Second Amendment.

Petitioners seek review in this case as to "[w]hether the Second Amendment presumptively protects against restrictions burdening the right to train with firearms commonly possessed for lawful purposes." Pet. i. The immediate problem is the Sixth Circuit already answered this question in the affirmative by recognizing that some training with firearms was protected by the Second Amendment and narrowly holding that commercial training at a preferred location in Howell Township or at extremely long distances was not protected by the Second Amendment. The Sixth Circuit clarified that the conduct could not be characterized as just a "right to train with firearms" because the Zoning Ordinance does not infringe that activity—Petitioners and others in Howell Township are able to train with firearms under the Zoning Ordinance. Petitioners claim the decision of the Sixth Circuit created a circuit split by referencing pre-*Bruen* decisions from the Third and Seventh Circuits. The circuits, however, all agree that some training with firearms is protected via implication, and consideration of additional holdings from the Ninth Circuit reveals support for the position taken by the Sixth Circuit in this case that training at a preferred location or at extremely long distances is not protected by the Second Amendment. Petitioners additionally contend that the analysis below somehow conflicts with *Bruen* and *Heller*. Review is not warranted on these grounds, however, because the Sixth Circuit appropriately applied Second Amendment jurisprudence. Strictly applying the *Bruen* framework, the Sixth Circuit defined Petitioners' proposed course of conduct and provided a textual analysis consistent with

Heller in determining that the plain text of the Second Amendment did not protect the conduct at issue. The appropriate review by the Sixth Circuit forecloses the need for review by this Court.

To the extent this Court nevertheless desired to address issues of the protection of ancillary rights under the Second Amendment, this case would prove to be a poor vehicle to do so. This is because the case is the first of its kind and percolation in the lower courts would aid this Court's review. In addition, even if this Court granted review, it would be unable to fully delve into the question presented because the factual predicate necessary to address ancillary rights is non-existent. Petitioners do not allege that the training facility and length they prefer to train at is closely related to any core rights protected by the text of the Second Amendment. There are other undeveloped portions of the record for purposes of this Court's consideration, including standing and the second prong of *Bruen*.

Howell Township respectfully requests this Court to deny the petition for certiorari.

STATEMENT OF THE CASE

I. Factual Background.

Respondent Howell Township is a rural community of approximately 7,000 people situated in Livingston County, Michigan. Howell Township is a zoned community, and the Howell Township Zoning Ordinance was adopted consistent with the Michigan Zoning Enabling Act, Mich. Comp. Laws §§ 125.3101 – 125.3702 (2006), and its

predecessor. Michigan law provides that when zoning regulations are adopted, including amendments thereto, the qualified electors are able to seek a referendum of the regulations. MCL 125.3402. The qualified electors of Howell Township did not seek a referendum related to any of the restrictions at issue in this case—which is indicative of the lack of issue the community has with the Zoning Ordinance. Michigan law additionally prohibits a total ban of a land use "in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exists where the use may be appropriately located or the use is unlawful." MCL 125.3207. No claim that a total ban on firearm training has been made by Petitioners—including those living in Howell Township—which cuts against the arguments made through this case that the Township has adopted an outright ban through its zoning regulations.

Petitioners are five individuals—Scott Fresh, Jason Raines, Matthew Remenar, Ronald Penrod and Edward Dimitroff (collectively, the "Individual Petitioners")—and one business—Oakland Tactical Supply, LLC ("Oakland Tactical") (collectively, "Petitioners"). App.31a-37a. Only two of the Individual Petitioners live in Howell Township, and Oakland Tactical does not own, but rather, leases land in Howell Township that is in the AG-Residential District. App.31a-37a.

Prior to filing suit, Petitioners desired to use the leased land to operate a commercially run, outdoor, open-air, 1,000-yard shooting range, but recognized that such a range was not permitted under the Zoning

Ordinance sometime after leasing the property. Mike Paige, the managing member for Oakland Tactical, proposed to Howell Township a textual amendment of the Zoning Ordinance that would allow shooting ranges on any property in the AG-Residential District without discretion of Howell Township's planning commission and board. App.45a. Howell Township denied this request, understanding that such a textual amendment would allow shooting ranges throughout the largest residential zoning district in Howell Township without proper review. App.45a-46a. No other actions—*e.g.*, requesting conditional rezoning of the parcel, seeking an interpretation of the Zoning Ordinance text, etc.—were taken prior to filing this lawsuit.

At the time this lawsuit was filed, Howell Township allowed for commercial shooting ranges—both indoor and outdoor—in three zoning districts: the Highway Services Commercial Zoning District, the Regional Service Commercial Zoning District, and the Heavy Commercial Zoning District. Howell Township amended the Zoning Ordinance in good faith during the pendency of the lawsuit to clarify any ambiguity that Petitioners claimed shooting ranges were not allowed in Howell Township.[1] It is undisputed the Zoning Ordinance as amended consistent with the Township's Master Plan allows shooting ranges—both indoor and outdoor—in four land use districts: the Regional Service Commercial

1. The Sixth Circuit recognized the original Zoning Ordinance was "ambiguous" but that the amendments thereto foreclosed whatever ambiguity existed. App.621a-622a. The amendment of a zoning ordinance to clarify ambiguity is routine in litigation under Michigan zoning law. *Lockwood v. City of Southfield*, 93 Mich. App. 206, 212 (1979).

District, the Highway Service Commercial District, the Industrial Flex Zone District, and the Industrial District. It is additionally undisputed Howell Township does not regulate the individual activities of target shooting, training, or hunting. It is further undisputed Howell Township also allows in any district for there to be accessory uses and accessory structures that are customarily incidental to principal uses—*i.e.*, individuals discharging firearms in Howell Township on property. This means the Individual Petitioners are able to and presently do engage in target shooting practice and training in the Township without any conflict with the Zoning Ordinance. Notwithstanding, Petitioners filed suit seeking to enjoin the Zoning Ordinance so that an outdoor, open-air, 1,000-yard, commercial shooting range could be constructed and used, and requested damages for the missed opportunity at operating such a commercial range during the time Oakland Tactical had leased the land. App.51a-52a.

II. Procedural Background.

On November 2, 2018, Petitioners filed suit in the United States District Court for the Eastern District of Michigan against Howell Township alleging a single count under the Second Amendment. ECF No. 1. Petitioners amended their complaint twice but maintained a one-count complaint under the Second Amendment. ECF No. 44; App.30a-53a.

On June 19, 2020, Howell Township moved to dismiss Petitioners' operative complaint under Federal Rule of Civil Procedure 12(c) arguing Petitioners lack standing and failed to state a claim for a violation of the Second Amendment. ECF No. 61. The District Court granted

Howell Township's motion reasoning that Howell Township did not violate any Second Amendment rights and that the Zoning Ordinance on its face allows shooting ranges in other districts. ECF No. 4; App.19a-27a. Petitioners moved to reconsider and thereafter appealed.

On June 23, 2022, this Court issued its decision in *New York State Rifle & Pistol Association, Incorporation v. Bruen*, 142 S. Ct. 2111 (2022). Petitioners' appeal was pending, so the Sixth Circuit remanded the case to the District Court to consider the plausibility of Petitioners' Second Amendment claim under the *Bruen* framework. ECF No. 43-1; App.1a-7a. In the process, the Sixth Circuit noted that Petitioners had alleged several proposed courses of conduct, and "most recently framed its proposed course of conduct as the right to train on 'outdoor, long-distance shooting ranges.'" App.6a.

On February 17, 2023, the District Court again dismissed Petitioners' complaint—strictly applying *Bruen*—determining the proposed course of conduct was best described as "the construction and use of an outdoor, open-air 1,000-yard shooting range" and opining that "conduct is clearly not covered by the plain text of the Second Amendment." ECF No. 117; App.644a-645a. The District Court rejected another new framing of the proposed course of conduct by Petitioners explaining the "proposed course of conduct could not be simply 'training with firearms' because the zoning ordinance does not prohibit 'training with firearms.'" App.644a. Petitioners appealed again.

On May 31, 2024, the Sixth Circuit affirmed the decision of the District Court with all three judges writing opinions:

Judge White. Judge White delivered the opinion of the Sixth Circuit and agreed with Petitioners "that at least some training is protected, not as a matter of plain text, but because it is a necessary ancillary to the right defined in *Heller*." App.609a. However, Judge White explained the inquiry under *Bruen* did not stop there because *Bruen* requires attention and precision when defining the proposed course of conduct—courts are required to "look to the intersection of what the law at issue proscribes and what the Petitioners seek to do." App.618a. The proposed course of conduct of Petitioners was defined by Judge White as either "(1) engaging in commercial firearms training in a particular part of the Township; [or] (2) engaging in long-distance firearms training within the Township." App.619a. Neither course of conduct was protected by the plain text of the Second Amendment because Petitioners failed to make any "convincing argument that the right [to engage in firearm training] extends to training in a particular location or at the extremely long distances Oakland Tactical seeks to provide. Nor have they established that the Zoning Ordinance infringes on the rights the Second Amendment Protects (i.e., a right necessary for self-defense)." App.620a.

Judge Cole (Concurring). Judge Cole agreed with the decision of Judge White but penned a separate concurrence to explain his position that the Sixth Circuit should not have expounded "on whether ancillary rights exist as a necessary

implication to the Second Amendment." App.625a-626.

Judge Kethledge (Dissenting). Judge Kethledge recognized that this was a "hard case in which the majority" addressed the issues "thoughtfully and evenhandedly." App.628a. Judge Kethledge dissented because he disagreed Petitioners' "claims fall outside the coverage of the Second Amendment's text on the grounds that" the training is specified to a particular location. App.633a. Judge Kethledge reasoned the allegation the Individual Petitioners sought to engage in firearm training was enough to survive the first step of *Bruen* and the Township should be required to demonstrate that its regulations were "consistent with the Nation's historical traditions of firearm regulation." App.636a. Judge Kethledge's dissent, however, failed to acknowledge that the individuals can train throughout Howell Township.

On June 14, 2024, Petitioners requested en banc review, but the petition was denied on July 8, 2024. ECF No. 43-1. A petition for a writ of certiorari was filed with this Court on August 16, 2024.

REASONS FOR DENYING THE PETITION

I. This Court's Review of the Question Presented is Unnecessary.

Petitioners have requested this Court to review "[w]hether the Second Amendment presumptively protects

against restrictions burdening the right to train with firearms commonly possessed for lawful purposes." Pet. i. Posed in a broad sense focused on the right to train, this Court's review is entirely unnecessary for the following two reasons.

A. The Sixth Circuit Already Answered the Question Presented in the Affirmative.

Two of the three judges below explicitly recognized the answer to the question presented was yes, and the other judge concurred only to state the question need not be answered:

> *Judge White*: "We agree with the latter argument—that at least some training is protected, not as a matter of plain text, but because it is a necessary ancillary to the right defined in *Heller*." App.609a.
>
> *Judge Cole (Concurring)*: "Because it is unnecessary for us to take a position on ancillary rights to the Second Amendment, we would be best served by waiting to see how the law develops and if the Supreme Court addresses the issue directly." App.627a.
>
> *Judge Kethledge (Dissenting)*: "Training with firearms is obviously necessary to using them effectively; restrictions on training can therefore hinder the right to bear arms; and so a right to training with firearms might well be expressly (and not just impliedly) covered by the Second Amendment's text. Either way, as

> a matter of precedent and common sense, the Second Amendment's text cover a right to train with firearms." App.630a.

Judge White even went so far as to review and organize positions of individual Justices on the Supreme Court understanding this Court would likely accept some training with firearms is protected to make clear the Sixth Circuit was not overlooking the recognition that some training with firearms is constitutionally protected. App.609a-610a. But the actual holding by Judge White was limited insofar as it held that training at a preferred location in Howell Township or at extremely long distances was not protected by the Second Amendment.

The point is that given the Sixth Circuit's recognition that some training with firearms is protected in dismissing the case, review by this Court would be entirely academic. App.644a; App.621a-622a. The answer to the question would be particularly advisory on this point because Petitioners have no such injury—Howell Township and Petitioners agree that individual persons discharging firearms for target shooting and hunting on private or public property is not limited by the Zoning Ordinance.

B. Petitioners Do Not Allege They Are Unable to Engage in Conduct Covered by the Question Presented.

Petitioners focus on firearm training in the question presented to this Court—but Petitioners do not claim that they are unable to train in Howell Township; rather, Petitioners claim they are unable to commercially train at a preferred location that is convenient for them. This is

paramount to understand at this stage because it further reveals the question being presented to this Court is academic in nature. Perhaps more importantly, however, it reveals the lack of support that exists for review based on the authority cited.

The authority relied on by Petitioners is Justice Thomas' concurrence in *Luis v. United States*, 578 U.S. 5 (2016) and Justice Alito's dissent in *New York State Rifle & Pistol Association v. City of New York*, 590 U.S. 336 (2020). Both cases are cited for the proposition that ancillary rights—*i.e.*, those rights associated with the core right under the Second Amendment—are categorically protected by the plain text of the Second Amendment. App.1. The problem with reliance on these opinions is that the cases dealt with regulations that precluded the exercise of core constitutional rights through severe restrictions on closely related activities to the exercise of core rights under the Second Amendment. A critical reading of the cases—not merely cherry-picking specific quotes—is necessary to understand this point completely.

The issue in *Luis* was whether a federal statute providing that a Court may freeze all assets of a criminal defendant before trial was violative of the Sixth Amendment. *Id.* at 8-10. A plurality of justices endorsed a balancing test to determine whether the seizure of assets violated the Sixth Amendment and held the government's interest in preserving a criminal defendant's assets for eventual forfeiture does not trump her constitutional right to spend legitimately acquired assets on an attorney. *Id.* at 23. Justice Thomas wrote separately disavowing the balancing test but agreed that a total freeze of assets violates the Sixth Amendment. *Id.* at 25. Petitioners

claim that Justice Thomas here recognized categorical protections for ancillary rights. What Petitioners fail to mention is Justice Thomas' dicta concerning incidental burdens related to the core right under the Sixth Amendment:

> Numerous laws make it more difficult for defendants to retain a lawyer. But that fact alone does not create a Sixth Amendment problem. For instance, criminal defendants must still pay taxes even though "these financial levies may deprive them of resources that could be used to hire an attorney." . . . So I lean towards the principal dissent's view that incidental burdens on the right to counsel of choice would not violate the Sixth Amendment. [*Id.* at 34.]

This was an analysis where Justice Thomas was engaging in a test similar to *Bruen* relying on the "Sixth Amendment's text and common-law backdrop." *Id.* at 24. Even the authority that Justice Thomas relies on—*i.e.*, Justice Scalia's dissenting opinion in *Hill v. Colorado*, 530 U.S. 703, 745 (2000)—qualifies the protection of activities related to the exercise of a core right:

> There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself. [*Id.*]

The allegations in this case do not even border on the point to which Petitioners could allege that it is a regulation of the core right of the Second Amendment

itself—making reliance on Justice Thomas' concurrence in *Luis* inapposite. In other words, Petitioners are unable to position themselves in the shoes of the plaintiff in *Luis* because they do not allege they are unable to engage in closely related conduct necessary to effectuate the core right under the Second Amendment.

The issue in *City of New York* related to an entire ban on an activity that is concomitant to the core right under the Second Amendment. *Id.* at 337. A regulation completely prohibited individuals from transporting firearms to a shooting range outside of the City, and there were no alternative means to train within the City. *Id.* Although the case became moot due to a change in the regulations, Justice Alito dissented, encouraging the Court to review an issue that could repeat itself in the future. *Id.* at 340. Justice Alito discussed that a complete ban on training is problematic under the Second Amendment because there is a corresponding right to engage in training "necessary to use it responsibly." *Id.* at 364-365. It was that right—*i.e.*, the right to engage in any firearm training at all—that was implicated in the case. The key language is in this sentence by Justice Alito: "Once it is recognized that the right at issue is a concomitant of the same right recognized in *Heller*, it became incumbent on the City to justify the restrictions its rule imposes[.]" *Id.* at 365. The right "at issue" involved transporting the firearm to a training facility because training generally was completely restricted within the City—so it was concomitant to the right recognized in *Heller*. Conversely, the right "at issue" in this case cannot be training generally because there is not an infringement of firearm training closely related to the core rights of the Second Amendment by the challenged regulation in Howell Township. Yet, in

its question presented, Petitioners allege the right "at issue" is training with firearms generally but that is not restricted by Howell Township.

The point here is that review is unnecessary because Petitioners do not allege they are unable to engage in the conduct in the question presented, making this case markedly different from *Luis* or *City of New York*.

* * *

This Court should not waste its resources to engage in a purely academic debate as to whether training is protected by the Second Amendment provided the Sixth Circuit answered the question in the affirmative and Petitioners do not allege they are unable to engage in the conduct in the question presented.

II. The Claimed Circuit Split is Illusory.

Petitioners compare two pre-*Bruen* cases from the Third and Seventh Circuits to the Sixth Circuit post-*Bruen* case to claim a split amongst the circuits for whether training with firearms is protected under the Second Amendment. *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684 (7th Cir. 2011); *Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888 (7th Cir. 2017); *Drummond v. Robinson Township*, 9 F.4th 217 (3d Cir. 2021). Petitioners oversell the distinction between these pre-*Bruen* cases and this case post-*Bruen*. Similar to the Third and Seventh Circuits, the Sixth Circuit recognized that some training with firearms was protected under the Second Amendment—but the Sixth Circuit held that a specific type of training at their preferred location was not covered. In discussing

the purported circuit split, Petitioners also fail to address the holdings of the Ninth Circuit that further support the decision of the Sixth Circuit. *See Jackson v. City & County of San Francisco*, 746 F.3d 953 (2014); *Teixeira v. County of Alameda*, 873 F.3d 670 (2017). Based on a proper reading of these decisions, there is no conflict among the circuits and review is not warranted.

A. The Circuits Agree Some Training with Firearms is Protected.

The problem with the argument made by Petitioners is that they overstate the holdings in *Ezell I*, *Ezell II*, and *Drummond*, while misstating the holding of the Sixth Circuit. The holdings all agree: some training with firearms is protected. App.609a ("at least some training is protected").

In *Ezell I*, the Seventh Circuit took on the narrow textual question as to whether "range training is categorically unprotected by the Second Amendment" and determined that it was not. *Id.* at 705-706. The analysis of the Seventh Circuit did not require significant nuance into the type of training at issue because the City of Chicago had enacted a "firing-range ban" and individual training within the City was not practical. *Id.* at 708. So, all that was before the Seventh Circuit in *Ezell I* was the question as to whether any range training was protected because no training otherwise was allowed under the City of Chicago's zoning scheme. That circuit court held that range training was not categorically unprotected. Taken to its logical conclusion, this means the Seventh Circuit held that only some training is protected by the Second Amendment.

In *Ezell II*, seven years after *Ezell I* was decided, the Seventh Circuit considered a slightly modified zoning scheme enacted by the City of Chicago. Instead of a complete ban, an amended zoning ordinance provided that "about 2.2% of the city's total acreage even theoretically" could site a shooting range. *Id.* at 894. Still several years pre-*Bruen*, the Seventh Circuit was not required to look at the proposed course of conduct, so it relied on its previous holding that not all range training was categorically unprotected to advance to a scrutiny analysis in the face of essentially a ban on training. *Id.* at 893 ("Range training is not categorically outside of the Second Amendment"). The zoning scheme—that is obviously different than the one enacted by Howell Township—was struck down again under scrutiny analysis. *Id.* at 892-896. The Seventh Circuit's holding remained limited insofar as it only recognized that some training was protected by the plain text of the Second Amendment.

Collectively, the Seventh Circuit in *Ezell I* and *Ezell II* narrowly held that range training is not categorically unprotected—*i.e.*, some range training is protected. This was an easy decision to arrive at based on the City of Chicago's essential ban on range training and the City's landscape not being conducive to individuals training on their own properties, nearby ranges, and public lands like can be done in Howell Township. The Seventh Circuit did not hold that range training of any form or fashion was categorically protected.

The Third Circuit was no different. In *Drummond*, there were two zoning restrictions at issue: (1) the "rim-fire rifle rule" that limited the weapons that could be used at a shooting club; and (2) the "non-profit ownership rule"

that required sportsman clubs to be nonprofit in nature. *Id.* at 224. Still pre-*Bruen*, the Third Circuit engaged in an analysis where it first determined if the restrictions implicated the Second Amendment or if they fell within an exception to the Second Amendment's guarantee. *Id.* at 226. If the restriction did implicate the Second Amendment, only then would the Third Circuit engage in a scrutiny analysis. *Id.* at 229.

In the context of the rim-fire rifle rule, the Third Circuit considered whether it was excepted by the protections of the Second Amendment by analyzing whether the "ratifiers approved regulations barring training with common weapons ***in areas where firearms practice was otherwise permitted***." *Id.* at 227 (emphasis supplied). In the context of the non-profit ownership rule, the Third Circuit considered whether "our ancestors accepted prohibitions on the commercial operation of gun ranges ***in areas where they were otherwise allowed.***" *Id.* (emphasis supplied). In response to both inquiries, the Third Circuit determined "neither type of regulation rests on deep historical foundations" and therefore held that the Second Amendment afforded protection to the conduct, and that was the extent of the holding that is relevant to this case. *Id.* at 225-226. In fact, the Third Circuit explicitly stated it was only analyzing the two zoning restrictions at issue: "we survey only the historical terrain necessary to settle whether the specific rules Drummond challenges fall within 'exceptions to the Second Amendment.'" *Id.* at 226. The Third Circuit even recognized that not all rules "restricting firearm purchase and practice to zoning districts compatible with those uses trigger heightened scrutiny" and there is not a "standalone right to . . . range time" under the Second Amendment. *Id.* at 228.

The Sixth Circuit below recognized the holdings in *Ezell I*, *Ezell II*, and *Drummond* by acknowledging that "some training with firearms" is protected by the Second Amendment. App.609a. In other words, the Sixth Circuit and the Third and Seventh Circuits agree some training is protected.

B. The Holdings of the Circuits Do Not Conflict.

Petitioners erroneously contend that the decision of the Sixth Circuit is "irreconcilable" with the holdings of *Ezell I*, *Ezell II*, and *Drummond*. Pet. 14. As stated, the Seventh Circuit in *Ezell I* and *Ezell II* held that range training was not categorically unprotected, and *Drummond* held that regulations on the types of guns that can be discharged or the corporate status of a company where training is otherwise allowed implicated the Second Amendment. Applying these holdings to the decision below leads to no conflict, and considering decisions from the Ninth Circuit supports the line the Sixth Circuit drew in this case.

The Sixth Circuit preliminarily recognized that some training with firearms was protected as a matter of implication. App.609a. *Ezell I*, *Ezell II*, and *Drummond* do not conflict therewith. The Sixth Circuit could not stop there in its analysis, however; *Bruen* demands courts not look to a broad concept encompassed within the Second Amendment—*e.g.*, the right to self-defense—but rather the specific proposed course of conduct at issue—*e.g.*, carrying handguns publicly for self-defense. *Bruen*, 142 S. Ct. at 2134. Strictly applying the *Bruen* framework, the Sixth Circuit determined the specific training activities at issue were "engaging in commercial firearm training in a particular part of the Township" and "engaging in long-distance firearms training within the Township." *Ezell I*,

Ezell II, and *Drummond* did not deal with either of these types of training, so the claim of a conflict necessarily fails.

Moreover, *Ezell I*, *Ezell II*, and *Drummond* dealt with effective bans. Here, the Sixth Circuit determined no effective ban existed because individual training was permitted, and commercial range training in a particular location could occur in four districts with no limit and the length of the range. The issue Petitioners have with the Zoning Ordinance is that they are not able to train at their preferred distance in their preferred location of Howell Township.

The claimed conflict here seems to essentially be that it is not possible to recognize ancillary rights while not extending protection to all claimed ancillary rights. The authority from the Ninth Circuit left out of Petitioners' argument reveals that is not true.

The Ninth Circuit addressed ancillary rights alleged to be concomitant to the core right under the Second Amendment in *Jackson v. City & County of San Francisco*, 746 F.3d 953 (2014), in evaluating a regulation that purportedly eliminated a person's ability to obtain ammunition. The Ninth Circuit recognized there could be a problem if the regulation prohibited the purchase of firearms thereby making "it impossible to use firearms for their core purpose." *Id.* at 967. However, the Ninth Circuit ultimately held that the regulations "do not destroy the Second Amendment right" and survived the then-applicable scrutiny analysis. *Id.* at 970.

Three years later, the Ninth Circuit considered another challenge couched in the context of ancillary

rights in *Teixeira v. County of Alameda*, 873 F.3d 670 (2017). The regulation there prohibited firearm sales near residentially zoned districts, schools and day-care centers, other firearm retailers, and liquor stores. *Id.* at 673. The plaintiff alleged that the zoning restrictions violated the Second Amendment by impairing the sales of firearms and restricting firearm training. *Id.* at 676-681. The Ninth Circuit—while distinguishing both *Ezell I* and *Ezell II*—explained that "gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained" and the zoning regulations did "not burden conduct falling within the" Second Amendment. *Id.* at 689-690.

Jackson and *Teixeria* explain that there is nothing inconsistent about the recognition of ancillary rights and recognizing that not all ancillary right cases invoke the protections of the Second Amendment—which is exactly what the Sixth Circuit held in this case. In fact, the idea that there is not a Second Amendment right to have a shooting range in a preferred location is one that the circuits are in agreement on when one considers the opinion below and *Teixeira*.

* * *

Petitioners suggest this Court grant review because decisions out of the Third and Seventh Circuits conflict with the decision of the Sixth Circuit. Pet. 14. Pre-*Bruen* holdings that training is not categorically unprotected, *Ezell*, 651 F.3d at 705-706, and specific aspects of training implicate the Second Amendment, *Drummond*, 9 F.4th at 225-226, do not conflict with the decision below that strictly applied *Bruen*, and a full review of circuit holdings

reveal the Sixth Circuit correctly addressed ancillary rights.

III. The Sixth Circuit Appropriately Applied Second Amendment Jurisprudence.

Petitioners argue as an additional basis for review that the Sixth Circuit's decision conflicts with both *Bruen* and *Heller*. But the Sixth Circuit appropriately analyzed the case under Second Amendment jurisprudence by defining the proposed course of conduct consistent with *Bruen* and engaging in a textual analysis faithful to *Heller*.

A. The Sixth Circuit's Analysis of the Proposed Course of Conduct was Consistent with *Bruen*.

This Court announced in *Bruen* the framework to analyze claims under the Second Amendment:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. [*Id.* at 24.]

The threshold inquiry as to whether conduct is covered by the Second Amendment requires a court to determine "whether the plain text of the Second Amendment protects [the] proposed course of conduct." *Id.* at 32.

This Court in *Bruen* immediately defined the proposed course of conduct as "carrying handguns publicly for self-

defense." *Id.* Even pre-*Bruen*, this Court consistently identified and defined the conduct at issue in Second Amendment challenges before determining whether the conduct is protected by the Second Amendment. For example, in *United States v. Miller*, the Court characterized the course of conduct as "the possession or use of a 'shotgun having a barrel of less than eighteen inches in length[.]'" 307 U.S. 174, 178 (1939). Similarly, in *Heller*, the Court characterized the conduct at issue as the possession of a handgun in one's own home for self-defense. 554 U.S. at 628. In *McDonald v. City of Chicago*, this Court described the conduct at issue as "Chicago residents who would like to keep handguns in their homes for self-defense[.]" 561 U.S. 742, 750 (2010) (plurality opinion). *Bruen* similarly looked at the conduct of responsible law-abiding persons wanting to carry arms in public for self-defense and what was being regulated. In summary: look to what a plaintiff seeks to do and what is being regulated to define the conduct claimed to be protected by the Second Amendment.

The Sixth Circuit adhered to the analysis laid out in *Miller*, *Heller*, *McDonald*, and, most importantly, *Bruen*, when it analyzed the proposed course of conduct on a specific level, as it explicitly explained:

> The *Bruen* Court's approach to defining the proposed course of conduct bears this out. In *Bruen*, the challenged law required gun-license applicants who sought to carry firearms in public to show "proper cause" for the issuance of an unrestricted license to carry a concealed handgun. 597 U.S. at 12-13. The *Bruen* plaintiffs wished to carry their handguns in public

> for self-defense and applied for unrestricted licenses, which were denied for failure to show proper cause. *Id.* at 15-16. Rather than defining the proposed conduct at the high level of generality urged by Plaintiffs—*i.e.*, "carrying handguns"—the Court's definition incorporated the purpose and location of the plaintiffs' desired action. The Court defined the "proposed course of conduct" as "carrying handguns publicly for self-defense," which it found to be covered by the plain text of the Second Amendment. *Id.* at 32.

The Sixth Circuit's intentional application of *Bruen* has been emphasized here because Petitioners repeatedly morphed their proposed course of conduct from that in the operative complaint—*i.e.*, the construction and use of an outdoor, open-air, 1,000-yard commercial shooting range—to a general course of conduct—*i.e.*, the general right to train with firearms.

The Sixth Circuit ultimately resolved the difficulty in defining the proposed course of conduct by remaining consistent with *Bruen* and looking at "the intersection of what the law at issue proscribes and what the plaintiff seeks to do." App.618a. The Sixth Circuit analyzed the allegations and looked at whatever activity was being infringed:

> Plaintiffs' allegations and arguments make clear both that they wish to engage in conduct more specific than "firearms training" and that the Zoning Ordinance does not infringe their right to possess and carry arms in case

of confrontation. First, as Plaintiffs stress, the Zoning Ordinance does not in fact ban all training—it permits "shooting on private property as an accessory use throughout the Township." One of Plaintiffs' repeated objections is that the Zoning Ordinance places restrictions on commercial shooting ranges, while allowing "unorganized" non-commercial shooting on private property. It is uncontested that Oakland Tactical could invite the individual Plaintiffs to train on its property as guests. Thus, at a minimum, Plaintiffs' proposed conduct necessarily involves commercial training.

And, examining Plaintiffs' allegations and argument, their proposed conduct is narrower than commercial training alone. The core of Plaintiffs' challenge is that Oakland Tactical seeks to construct a commercial range within Howell Township offering target shooting at up to 1,000 yards . . . Plaintiffs allege that the Zoning Ordinance prevents them from engaging in their desired training in two ways: first, it prohibits any commercial facility on Oakland Tactical's leased parcel of land; and second, the zoning districts permitting commercial recreational facilities do not contain sufficient "undeveloped land available . . . for a safe, long-distance rifle range."

Plaintiffs have therefore offered two proposed courses of conduct: (1) engaging in commercial firearms training in a particular part of the

> Township; and (2) engaging in long-distance firearms training within the Township. [App.618a-620a.]

The Sixth Circuit explicitly rejected the framing of the conduct that Petitioners put forward to this Court—*i.e.*, that the conduct is training with firearms generally—for the reason it belies what is even being regulated: "the Zoning Ordinance does not in fact ban all training—it permits 'shooting on private property as an accessory use throughout the Township . . . [and] the Zoning Ordinance [ ] does not prohibit'" shooting ranges in Howell Township. App.618a-619a.

To be sure, Petitioners' view that any activity that touches training is protected by the Second Amendment is absurd and was rightly rejected. Accepting that view, courts could only look to whether there is any conduct that involves training generally, and, if so, then the government must justify a regulation that is challenged.

This Court has considered such an absurd view in the context of the First Amendment in response to claims that any purported burden on speech warrants protection. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, a business owner claimed that a generally applicable New York law that resulted in the closure of a bookstore warranted First Amendment protection. *Id.* at 698. The bookstore argued that the closure of the store burdened the right to free speech. *Id.* at 705. In response, this Court explained that claim—*i.e.*, an incidental burden prompts constitutional protections—proved to be too much:

> Nonetheless, respondents argue that the effect of the statutory closure remedy impermissibly burdens its First Amendment protected bookselling activities. The severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location. In any event, this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. [*Id.* at 705-706.]

The idea that any conduct may warrant constitutional protections because of a purported incidental burden on the exercise of a constitutional right is simply a step too far. The appropriate inquiry under the Second Amendment looks to whether conduct is being infringed.

Judge White carefully considered exactly what activity was being infringed in concluding that it was either engaging in commercial training at a particular place in the Township or at extremely long distances. App.619a-620a. Judge White even took a more conservative approach then necessary by analyzing the extremely long-distance component separate from training in a particular location, instead of analyzing them as the singular proposed conduct as alleged in the operative complaint. In dissent, Judge Kethledge failed to consider the intersection of the conduct and the challenged regulation by defining the conduct as "firearms training" without considering whether the Zoning Ordinance prohibits the same. The error is obvious: without an infringement there is no cause of action under the Second Amendment. *See*, *e.g.*, *Teixeira*, 873 F.3d at 689-690. The Zoning Ordinance

allows for firearm training in four zoning districts, and the ability to engage in firearm training as an accessory use throughout Howell Township is undisputed.

The Sixth Circuit's definition of the proposed course of conduct in this case was the result of a strict application of *Bruen* as demanded by this Court's decisions, and *Bruen* then required a textual analysis consistent with *Heller*.

B. The Sixth Circuit's Textual Analysis was Consistent with *Heller*.

This Court explained in *Heller* it is the operative clause of the Second Amendment that controls: "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose." 554 U.S. at 577. The prefatory clause is limited to resolving ambiguity: "prefatory clause [is used] to resolve an ambiguity in the operative cause . . . [b]ut apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *Id.* at 577-578.

This Court interpreted the meaning of "keep" "bear" and "arms" and defined the right as one to "have weapons" and "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 582-584. *Heller* confirmed its conclusion of this textual analysis by looking at the textual meanings from the following specific history: "English history dating from the late 1600s, along with American colonial views leading up to the founding," "state constitutions that preceded and immediately

followed adoption of the Second Amendment," and "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 600-01, 605, 662, n. 28). *Heller's* textual approach resulted in the Second Amendment protecting the core right for "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 544 U.S. at 635; *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (Stevens, J., dissenting) (plurality opinion) (quoting *Heller*, 554 U.S. at 635). The right, however, was not unlimited: "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." *Id*. at 595.

The Sixth Circuit applied the analysis to both of Petitioners' proposed courses of conduct: "(1) engaging in commercial firearms training in a particular part of the Township; and (2) engaging in long-distance firearms training within the Township." App.619a. The Sixth Circuit recognized that the analysis began "one step removed from the plain text" because they were alleging "implied ancillary rights." App.618a.

In analyzing the conduct of commercial firearms training in Howell Township, the Sixth Circuit had no issue in concluding that "the Second Amendment protects the right to engage in commercial firearms training as necessary to protect the right to effectively bear arms in case of confrontation[.]" App.620a.[2] However, the

2. In recognizing that commercial training—as opposed to just training—was protected by the Second Amendment, the

Sixth Circuit similarly had no issue in concluding the Zoning Ordinance "does not interfere with the Second Amendment right to keep and bear arms in case of confrontation" because "the ordinance permits shooting ranges—commercial training—within the Township." App.620a. The issue was squarely—as defined in the proposed course of conduct—whether the Second Amendment protected commercial training in a particular location of Howell Township.

Petitioners utterly fail to explain the errors of the Sixth Circuit's textual analysis focused on the proposed courses of conduct and instead revert back to the characterization of the proposed course of conduct. Pet. 22. As clearly explained by the Sixth Circuit, the proposed course of conduct cannot simply be training with firearms because the Zoning Ordinance does not infringe on that right in Howell Township—the Zoning Ordinance restricts where Petitioners can locate a shooting range.

In analyzing the correct proposed courses of conduct, the Sixth Circuit focused on whether the conduct was "necessary" to effectuate the core rights recognized in *Heller* under the Second Amendment. *Luis*, 578 U.S. at 26 (providing protections to "closely related acts necessary" to the exercise of core constitutional rights) (Thomas, J., concurring); *City of New York*, 590 U.S. at 365 (providing the right to take a gun to the range is protected to the extent it is "necessary to use it responsibly") (Alito, J., dissenting).

Sixth Circuit noted that commercial training had to be protected because, if not, there would be individuals who otherwise would not be able to engage in training. App.620a.

As to the first proposed course of conduct, the Sixth Circuit held that it was not necessary for Petitioners to train in a specific location of Howell Township to effectuate the core right under the Second Amendment. App.620a. Judge Kethledge disagreed because in his view the "circumstance of place" is not relevant to determine whether the plain text of the Second Amendment covers conduct. App.633a. The point missed here is that the specific location Petitioners claim a Second Amendment right to is necessarily part of the claim because the Zoning Ordinance does not ban commercial training in Howell Township. It is Petitioners—not Judge White—that brought the "circumstance of place" into this case when they alleged a right to train at a preferred location in Howell Township. Judge White correctly concluded the Second Amendment does not protect the right to have a commercial shooting range anywhere in Howell Township. The reason is because shooting at the specific location leased by Petitioners is not necessary to effectuate the core right in the Second Amendment as Petitioners are able to train in other areas of Howell Township. Most notably, Judge Kethledge failed to address or explain why training at a particular location was necessary to effectuate the core rights under the Second Amendment.

Turning to the second proposed course of conduct and whether the Second Amendment protects long-distance firearms training in Howell Township, the entire panel agreed—including Judge Kethledge dissenting—that conduct was not protected: "We cannot conclude . . . the plain text of the Second amendment covers the second formulation of Plaintiffs' proposed course of conduct—the right to commercially available sites to train to achieve proficiency in long-range shooting at distances up to 1,000

yards," App.623a, "I have no quarrel with the majority's point about 'extremely long distances,'" App.632a. The reason is because the core right of the Second Amendment announced in *Heller*—that arms be kept or borne for self-defense or in cases of confrontation—does not require training at distances greater than a half-mile. In other words, the panel agreed training at extremely long distances as Petitioners suggest is not necessary to effectuate the core purpose of the Second Amendment—at least not on the evidence that was provided.

Petitioners claim the Sixth Circuit erred because "firearms in common use for lawful purposes have an effective range that extends to 1,000 yards." Pet. 26. That argument misses the mark entirely by ignoring the core purpose of the Second Amendment explained in *Heller*: the Second Amendment's purpose is to secure the right for "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. The entire panel of the Sixth Circuit agreed on this point, and Petitioners have not identified any other court that has recognized a right to engage in training at such great distances, why training at such long distances is concomitant to the core purpose of the Second Amendment, or why training at a shorter distance is in any way infringed by the Zoning Ordinance.

* * *

Petitioners seek to engage in outdoor, open-air, commercial firearm training in Howell Township at distances beyond 1,000-yards but are unable to on the land Oakland Tactical leases because of the Zoning Ordinance. The Sixth Circuit strictly applied *Bruen* by looking at what Petitioners seek to do and what the Zoning Ordinance

restricts. The intersection of the activity Petitioners seek to engage in and what the Zoning Ordinance restricts led the Sixth Circuit to conclude Petitioners' proposed course of conduct was either commercially training at a preferred location in Howell Township or training at long distances of 1,000 yards in Howell Township. A textual analysis consistent with *Heller* determined that neither proposed course of conduct was necessary to protect the core purpose of the Second Amendment to possess and carry weapons in cases of confrontation. No further review by this Court is necessary.

IV. Even if this Court Desires to Address the Issue of Ancillary Rights, this Case is a Poor Vehicle to Use.

Petitioners attempt to convince this Court that this case is an ideal vehicle for this Court to review the issue of protection of ancillary rights under the Second Amendment. Pet. 18. The opposite is true.

Preliminarily, and although overlooked by Petitioners, this Court must understand that granting review in this case would be to grant review of the first federal case post-*Bruen* to deal with intersection of purported ancillary rights under the Second Amendment and zoning regulations. This Court recognizes under these circumstances that it is appropriate for this Court to decline review and allow percolation in the lower courts. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring) ("[B] ecause further percolation may assist in our review of the issue of first impression, I join the Court in declining to take up the issue now"); *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., concurring) ("The legal

question [ ] is complex and would benefit from further percolation in lower courts prior to this Court granting review"). Review in the context of Petitioners' framing of the question presented—whether training with firearms is protected by the Second Amendment—seems particularly problematic as an answer by this Court on that issue would reverberate down to other ancillary rights claimed under the plain text of the Second Amendment post-*Bruen* and deprive this Court from having the benefit of independent review as to whether a variety of claimed ancillary rights are protected under the plain text of the Second Amendment. Simply put, review at this point in time would be entirely premature even if this Court feels compelled to address the issue of ancillary rights under the Second Amendment.

The next issue with granting review in this case relates to Petitioners' failing to explain the entire factual predicate which this case relies. Pled pre-*Bruen*, Petitioners' proposed course of conduct has shapeshifted at every turn in an attempt to state a claim. In the Sixth Circuit's initial review—where it remanded the case back to the District Court because of this Court's decision in *Bruen*—it noted as much. App.6a. By the time the case made it back to the Sixth Circuit, Petitioners—without ever amending their complaint—had gone even further by no longer asserting the right to train outdoor or at long ranges and instead alleged just a general right to train. The problem is that Petitioners have failed to explain, let alone allege in their operative complaint, how the Individual Petitioners are unable to engage in training and the discharge of firearms in Howell Township.

A review of the actual allegations by Petitioners in the operative complaint as opposed to the arguments made

by the lawyers will help this Court avoid being surprised in the event it grants review that the allegations do not match the arguments. *See* Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 LITIGATION 25 (1998) ("By the same token, if the facts are snarled in confusion the Court will deny review. Such a case presents the danger of an unpleasant and costly surprise: once the true facts have been unraveled, it may appear that the 'issue presented' is not really presented at all"). The allegations make clear that it is only convenience desired by Petitioners: all Petitioners allege is that other shooting ranges are not adequate or convenient and they would prefer a shooting range in Howell Township. App.31a-37a. None of the Petitioners allege that it is not possible to train with firearms. What this means is that the review of the question presented should not be granted because the allegations do not match the arguments. Perhaps a different case will make its way through the Court's post-*Bruen* where the general right to train is infringed—but this is not that case.

The final issue with granting review for this case relates to all of the unresolved issues in this case. Not only are there issues of standing that were raised by Howell Township but not relied on below in dismissing the case, but Judge Kethledge raised his own concerns about Oakland Tactical's standing. App.635a-636a. In addition, to the extent this case were to ever advance to Howell Township providing historical analogues to support its zoning regulations, dismissal there would be inevitable as regulations on shooting ranges have historical connections. *See*, *e.g.*, *Ezell I*, 651 F.3d at 705-706 (discussing historical regulations akin to Euclidean zoning schemes); *Drummond*, 9 F4th 217 at 228 (discussing the

relevant historical authorities pointed out in *Ezell I*). Yet, as this Court is well aware, additional issues may arise based on this Court's recent opinion in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), where seven different opinions were issued concerning the application of history and tradition in assessing the constitutionality of a regulation in a particular case.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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