No. 20-1722

# In the United States Court of Appeals for the Third Circuit

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

*Plaintiffs-Appellants*,

v.

**TOWNSHIP OF ROBINSON; MARK DORSEY, ROBINSON TOWNSHIP ZONING OFFICER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,**

*Defendants-Appellees*.

On Appeal from the United States District Court
for the Western District of Pennsylvania
Case No. 2:18-cv-01127-MJH

## BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, AND MADISON SOCIETY FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following statements:

**Firearms Policy Coalition** has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

**Firearms Policy Foundation** has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

**Madison Society Foundation** has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Joseph G.S. Greenlee*
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## STATEMENT OF INTEREST

**Firearms Policy Coalition ("FPC")** is a nonprofit membership organization that defends constitutional rights—including the right to keep and bear arms—and promotes individual liberty. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education.

**Firearms Policy Foundation ("FPF")** is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights.

**Madison Society Foundation ("MSF")** is a nonprofit corporation based in California. MSF seeks to promote and preserve the right to keep and bear arms by offering education and training to the public.

This case concerns *amici* because this Court's interpretation of the Second Amendment, and the standard of review it applies to Second Amendment cases, directly impact their organizational interests.

Additionally, the organizations have substantial experience and expertise in the Second Amendment field that would aid the Court.[1]

[1] No counsel for a party authored this brief in whole or in part. No party or counsel contributed money intended to fund the preparation or submission of this brief. No person other than *amici* and their members contributed money intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The district court upheld severe restrictions on Second Amendment rights with no supporting evidence. Specifically, Robinson Township forbids Mr. Drummond's gun club from operating for a profit—effectively prohibiting firearms commerce among other activities—and forbids outdoor center-fire rifle shooting on the property, but only if the property is used as a gun club.

The Supreme Court has made clear that the right to keep and bear arms is a fundamental right, not to be singled out for specially unfavorable treatment. But the district court applied a feeble version of heightened scrutiny by not requiring the government to justify the burdens it imposed.

The district court followed First Amendment jurisprudence in applying intermediate scrutiny to what it deemed a time, place, and manner regulation of Second Amendment conduct—firearms training and commerce. But the district court omitted every meaningful intermediate scrutiny requirement in upholding the regulation.

Intermediate scrutiny requires that the government: (1) produce substantial evidence; (2) overcome rebuttal evidence; (3) refrain from

suppressing the protected conduct in the same proportion as secondary effects; (4) prove that the government objective is achieved more effectively through the regulation; (5) consider substantially less burdensome alternatives; and (6) consider overinclusivity and underinclusivity. None of these requirements could be satisfied with the dearth of evidence the government provided. But the district court ignored these requirements.

Instead, the district court allowed the government to justify the law with no evidence of any "fit" between the restrictions and the interests they purportedly further—nuisance prevention and protecting the public health.

Justices of the Supreme Court have repeatedly lamented lower courts' disregard for the right to keep and bear arms. And few courts have required as little justification from the government as the district court required here.

## ARGUMENT

### I. The district court applied a feeble, watered-down version of intermediate scrutiny.

The district court applied First Amendment intermediate scrutiny, but it did not hold the government to any of its requirements. As detailed in Parts A–F of this section, true intermediate scrutiny requires that the government: (1) produce substantial evidence; (2) overcome rebuttal evidence; (3) refrain from suppressing the protected conduct in the same proportion as secondary effects; (4) prove that the government objective is achieved more effectively through the regulation; (5) consider substantially less burdensome alternatives; and (6) consider overinclusivity and underinclusivity. The district court ignored *all* these requirements. Instead, it created a feeble version of intermediate scrutiny, contrary to the precedent of the Supreme Court.[2] *See McDonald*

[2] The district court believed it was following Supreme Court precedent in applying intermediate scrutiny, explaining that "the Supreme Court has stated that some form of heightened scrutiny is required" for Second Amendment challenges. *Drummond v. Robinson Twp.*, No. CV 18-1127, 2020 WL 1248901, at *3 (W.D. Pa. Mar. 16, 2020) (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008)). But it is worth noting that while this Court has adopted a heightened scrutiny test, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), the Supreme Court has not endorsed it, and some Justices have disavowed it. *See Rogers v. Grewal*, No. 18-824, 2020 WL 3146706, at *3 (U.S. June 15, 2020)

*v. City of Chicago, Ill.*, 561 U.S. 742, 785–86 (2010) (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)) ("this Court decades ago abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights'").

### A. The government must provide substantial evidence and cannot rely on shoddy reasoning or data.

Under intermediate scrutiny, "the [government] bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). "This burden is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770–71. While "courts must accord substantial deference to the predictive judgments" of legislatures, this

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(Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari) ("This approach raises numerous concerns. For one, the courts of appeals' test appears to be entirely made up. The Second Amendment provides no hierarchy of 'core' and peripheral rights. And the Constitution does not prescribe tiers of scrutiny. Moreover, there is nothing in our Second Amendment precedents that supports the application of what has been described as a tripartite binary test with a sliding scale and a reasonable fit.") (citations, quotations, and brackets omitted).

"does not mean, however, that they are insulated from meaningful judicial review altogether." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 665–66 (1994) ("*Turner I*").

Thus, the government cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). Rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Edenfield*, 507 U.S. at 770–71. The demonstration must be based on "substantial evidence." *Turner I*, 512 U.S. at 666; *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("*Turner II*").

*Turner II* deferred to the government's "[e]xtensive testimony," "volumes of documentary evidence and studies," and "extensive anecdotal evidence." *Id.* at 198, 199, 202. By comparison, in *44 Liquormart, Inc.*, the government failed to justify a ban on price advertising for alcoholic beverages "without any findings of fact," 517 U.S. at 505, and in *Edenfield*, the Court struck down a ban on in-person solicitation by CPAs because the government "presents no studies" nor "any anecdotal evidence." 507 U.S. at 771.

The district court here considered no data, no statistics, no studies, no anecdotal evidence, nor any other empirical evidence. The only evidence the government offered as to the merits was a list of gun stores in the county, showing that firearms can be purchased elsewhere. JA149. More evidence—*substantial* evidence—must be required of the government to satisfy any form of heightened scrutiny.

### B. The plaintiffs must be able to present rebuttal evidence, and the government must then overcome the plaintiffs' showing.

Under *Alameda Books*, if the government meets its initial burden of providing evidence that "fairly support[s]" its rationale, the plaintiffs have an opportunity to "cast direct doubt on this rationale, either by demonstrating that the [government's] evidence does not support its rationale or by furnishing evidence that disputes the [government's] factual findings." 535 U.S. at 438–39. "If plaintiffs succeed in casting doubt on a [government] rationale in either manner, the burden shifts back to the [government] to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

The district court did not require evidence from the government, did not allow the plaintiffs an opportunity to cast doubt on the government's

rationale, and did not require the government to then overcome the plaintiffs' demonstration.

### C. Protected activity cannot be suppressed in the same proportion as the targeted secondary effects.

Under intermediate scrutiny, the government "may not regulate the secondary effects of [protected conduct] by suppressing the [protected conduct] itself." *Alameda Books*, 535 U.S. at 445 (Kennedy, J.).[3] Thus, it is impermissible to "reduce secondary effects by reducing speech in the same proportion." *Id.* at 449. "The rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech." *Id.* at 449–50.

The D.C. Circuit, consistent with *Alameda Books*, rejected the argument that "the most effective method of limiting misuse of firearms . . . is to limit the number of firearms present in the home." *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015) ("*Heller*

[3] Justice Kennedy's opinion is often considered the controlling opinion in *Alameda Books*. *See e.g.*, *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cty., Fla.*, 630 F.3d 1346, 1355 (11th Cir. 2011) ("because Justice Kennedy's concurrence reached the judgment on the narrowest grounds, his opinion represents the Supreme Court's holding in that case.") (citing *Marks v. United States,* 430 U.S. 188, 193 (1977)).

*III*"). "[T]aken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home." *Id*.

Here, the law is aimed at the secondary effects of firearms training and commerce: "nuisance prevention and protecting the public health, safety and welfare of its residents." *Drummond*, 2020 WL at *4. But the law's effect is the suppression of a constitutional right—the same firearms training and commerce—in the same proportion; entirely. *See id.* at *3 ("both Sections 311(D) and 601 burden conduct . . . within the scope of the Second Amendment's protection.").

Even if the law achieves the objective—and there is no proof that it does, especially because a state court previously determined that the club did not constitute a nuisance—the method is unconstitutional. *Drummond v. Robinson Twp.*, 361 F. Supp. 3d 466, 476 (W.D. Pa. 2019). "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989) (quoting *Frisby v. Schultz,* 487 U.S. 474, 485 (1988)). The exercise of a constitutional right is not an appropriately targeted evil.

### D. The government must prove that the objective is achieved more effectively through the regulation.

Intermediate scrutiny requires the government to prove that "the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 782–83. Put differently, "[i]t must demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664.

Here, there is no evidence that the law has any positive effect. 'They [the government] did *not* offer a regulatory rationale, supported by evidence, arguing that the non-profit requirement and the center-fire rifle ban satisfied some level of scrutiny." Op. Br. at 13. In the absence of evidence, the district court vaguely stated that, "the commercial nature of an activity is often used as a proxy for intensity of that activity; the greater the intensity, the higher the likelihood that surrounding properties will be affected. Additionally, limiting the type of firearm and type of shooting activity at Sportsman's Club likewise relates to land use intensity." *Drummond*, 2020 WL at *4 (citing *Drummond*, 361 F. Supp. 3d at 488 n.3). True intermediate scrutiny requires much more.

### E. The government must consider substantially less burdensome alternatives.

Under intermediate scrutiny, a court must ensure that "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800.

In the First Amendment context, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014). In the Second Amendment context, Justice Breyer's intermediate scrutiny-like balancing test proposed in his *Heller* dissent considered "reasonable, but less restrictive, alternatives." *Heller*, 554 U.S. at 710 (Breyer, J., dissenting).

This Court has considered less burdensome alternatives in the Second Amendment context. *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 122, 124 n.28 (3d Cir. 2018). So have several others. *Heller III*, 801 F.3d at 277–78; *Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) ("*Ezell I*"); *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012); *United States v. Reese*, 627 F.3d 792,

803 (10th Cir. 2010); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1128 (10th Cir. 2015).

Striking down a restriction on shooting ranges, the Seventh Circuit noted "the availability of straightforward range-design measures that can effectively guard against accidental injury" and that "[o]ther precautionary measures might include limiting the concentration of people and firearms in a range's facilities, the times when firearms can be loaded, and the types of ammunition allowed." *Ezell I*, 651 F.3d at 709. The court also cited range safety manuals, and range safety statutes from other states, which demonstrated the availability of less burdensome alternatives. *Id.* at 709–10.

The Fourth Circuit recently explained its less-burdensome-requirement rule while applying intermediate scrutiny to a content-neutral speech restriction:

> the government must, inter alia, present evidence showing that — before enacting the speech-restricting law — it "seriously undertook to address the problem with less intrusive tools readily available to it." *See McCullen*, 573 U.S. at 494, 134 S.Ct. 2518. In other words, the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest. *Id.*; *see also* [*Reynolds v. Middleton*, 779 F.3d 222, 231–32 (4th Cir. 2015)]. The government's burden in this regard is satisfied

> only when it presents "actual evidence supporting its assertion[s]." *See Reynolds*, 779 F.3d at 229.

*Billups v. City of Charleston, S.C.*, 961 F.3d 673 (4th Cir. 2020). Rather than require "actual evidence" that the government "actually tried or considered" less restrictive alternatives, the district court omitted the consideration of less burdensome alternatives from its analysis.

### F. Intermediate scrutiny requires the consideration of overinclusivity and underinclusivity.

Heightened scrutiny requires the consideration of overinclusivity and underinclusivity. *See* Op. Br. at 29. While the law appears overinclusive—in that there is no indication it furthers any interest—it is also underinclusive.

"If a regulation fails to cover a substantial amount of conduct implicating the asserted compelling interest, its underinclusiveness can be evidence that the interest is not significant enough to justify the regulation." *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010). Indeed, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation marks and citation omitted).

To survive intermediate scrutiny, then, the government had to show that a rule restricting center-fire rifle practice but not center-fire handgun practice, rim-fire rifle practice, or rim-fire handgun practice is sufficiently tailored to its interest; that forbidding center-fire rifle practice on the property *only* if it operates as a gun club is sufficiently tailored; that prohibiting plaintiffs from conducting commercial sales while allowing other gun stores to operate within the township is sufficiently tailored; and that forbidding the club to operate for-profit but allowing the same club to operate as a non-profit is sufficiently tailored.

## II. The district court treated the Second Amendment as a second-class right.

"[T]he right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778. It is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment." *Id.* at 778–79, 780.

Justices of the Supreme Court have repeatedly lamented that some lower courts, like the district court here, treat the right to keep and bear arms as a disfavored right. *See Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Despite the clarity with which we described

the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (denouncing "noncompliance with our Second Amendment precedents" by "several Courts of Appeals"); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (noting "a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment"); *Rogers v. Grewal*, No. 18-824, 2020 WL 3146706, at *2 (U.S. June 15, 2020) (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari) ("many courts have resisted our decisions in *Heller* and *McDonald*. Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework") (citation omitted).

Recently, in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, where the Court held that the Second Amendment

claims had been mooted, several Justices went out of their way to denounce lower courts' treatment of the Second Amendment. 140 S. Ct. 1525 (2020). Justice Kavanaugh expressed "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*," adding that "[t]he Court should address that issue soon." *Id.* at 1527 (Kavanaugh, J., concurring). Justice Alito, joined by Justices Gorsuch and Thomas, criticized the district court and the Second Circuit for omitting heightened scrutiny requirements: "Although the courts below claimed to apply heightened scrutiny, there was nothing heightened about what they did." *Id.* at 1541–42 (Alito, J., dissenting). "A court conducting any form of serious scrutiny would have demanded that the City provide some substantiation . . . but nothing like that was provided or demanded." *Id.* at 1543. The Justices added that if "the mode of review in this case is representative of the way *Heller* has been treated in the lower courts . . . there is cause for concern." *Id.* at 1544.

Perhaps no court has upheld a law that infringes on the right to keep and bear arms with less evidence than the district court did here. Even for this commonly disfavored right, the district court's treatment of it appears to be unprecedented.

## CONCLUSION

Because the district court treated the Second Amendment as a second-class right by upholding burdensome restrictions while requiring no evidence from the government, the district court's decision should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,182 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionately spaced Century Schoolbook font.

I certify that the text of the electronic brief and the hard copies of the brief are identical.

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I certify that I am admitted to practice in the Third Circuit Court of Appeals, and that I am a member in good standing.

Dated this 8th day of July 2020.

/s/ *Joseph G.S. Greenlee*
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## CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Third Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 8th day of July 2020.

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