No. 24-178

In the Supreme Court of the United States

OAKLAND TACTICAL SUPPLY, LLC, ET AL.,

Petitioners,

v.

HOWELL TOWNSHIP, MI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REASONS FOR GRANTING THE PETITION

There is a clear split in the Circuits over whether locational restrictions on firearm training implicate the Second Amendment. The Sixth Circuit, in the decision below, answered no, improperly importing judicial interest-balancing into its analysis of the text of the Second Amendment. The Third and Seventh Circuits have answered yes. This Court's review is needed to resolve the split in authority on this important issue, and this case provides an excellent vehicle for doing so. Respondent Howell Township's arguments opposing this Court's review lack merit.

I. This case presents a clear circuit split.

This case presents a direct split with decisions of the Third and Seventh Circuits. Howell Township's zoning ordinance (a) bars all commercial range training in Petitioner Oakland Tactical's zoning district, while freely allowing the same training in that district if done privately, and (b) effectively bars commercial long-range training throughout the Township. The Sixth Circuit held that these restrictions did not even implicate the plain text of the Second Amendment. In *Drummond v. Robinson Township*, 9 F.4th 217 (3d Cir. 2021), by contrast, the Third Circuit held that a zoning ordinance not only implicated the Second Amendment but failed text-and-history analysis when it (a) limited center-fire rifle training to certain zoning districts and (b) limited for-profit, commercial firearms training to certain districts. And in *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) ("*Ezell II*"), the Seventh Circuit held that a zoning ordinance violated the Second Amendment when it (a) limited shooting ranges to manufacturing districts and (b)

imposed various buffer zones between shooting ranges and other uses of property. Respondent's attempts to explain away this clear split in authority fail.

First, Respondent repeatedly emphasizes that *Drummond* and *Ezell II* were decided "pre-*Bruen*." *See* BIO 2, 15, 17, 18, 21. That is true, but it does not mitigate the split. The Sixth Circuit in the decision below held that Howell Township's challenged firing range restrictions did not even implicate the plain text of the Second Amendment. That decision conflicts with the analyses of *Drummond* and *Ezell II*, which both concluded that similar zoning restrictions implicated the Second Amendment under the text-and-history part of the pre-*Bruen* analysis generally applied by the courts of appeals. That part of the analysis, this Court explained in *New York State Rifle & Pistol Association v. Bruen*, was "broadly consistent with *Heller*" and with *Bruen*'s text-and-history framework for resolving Second Amendment challenges. 597 U.S. 1, 19 (2022). And the Third and Seventh Circuit's analyses are flatly contrary to the Sixth Circuit's textual analysis in this case. That *Drummond* and *Ezell II* were decided pre-*Bruen* does not, therefore, undermine the validity of the split in the slightest. Indeed, *Drummond*'s pre-*Bruen* textual and historical analysis was cited approvingly in *Bruen* itself when discussing how to analogize to historical restrictions to assess the scope of the Second Amendment right. *Id.* at 30; *see* Pet. 16–17.

Second, Respondent attempts to distinguish *Drummond* by arguing that it concerned "regulations barring training with common weapons in areas where firearms practice was otherwise permitted' " and " 'prohibitions on the commercial operation of gun

ranges in areas where they were otherwise allowed,' " BIO 18 (quoting *Drummond*, 9 F.4th at 227) (emphasis in BIO omitted). While this description is accurate as far as it goes, it provides no principled distinction between *Drummond* and this case. At bottom, both concern township zoning ordinances that limit certain types of training in certain zoning districts while allowing it in others. The Third Circuit correctly concluded that such restrictions implicate the Second Amendment, while the Sixth Circuit incorrectly concluded that they do not.

Third, Respondent attempts to cast *Drummond* and *Ezell II* as involving "effective bans" on training. But this plainly is incorrect with respect to *Drummond*. Indeed, the Third Circuit there explained that the ordinance at issue *did not* amount to a "total ban" on "firearms … practice in the Township" and "preserve[d] avenues for citizens to acquire weapons and maintain proficiency in their use." *Drummond*, 9 F.4th at 230 (first quoting *Ezell v. City of Chicago*, 651 F.3d 684, 690 (7th Cir. 2011)). The nature of the restriction in *Drummond* therefore serves only to highlight the Sixth Circuit's split with that case.

Respondent's argument is closer to the mark with respect to *Ezell II*, but even there the ordinance at issue "severely limit[ed] where shooting ranges may locate"; it did not "outright ban" them. 846 F.3d at 893–84. What is more, nothing in the opinion indicates that the court would have held the Second Amendment not even implicated if more land area had been reserved for firearms training. Indeed, while the dissenting judge in *Ezell II* departed from the majority by disaggregating the manufacturing-districting restriction and distancing requirements and would have

upheld the latter under a scrutiny analysis, the judge did not suggest that the restriction did not even implicate the Second Amendment, despite the fact that analyzing it alone "would increase the availability of sites for firing ranges appreciably." *Id.* at 902 (Rovner, J., dissenting in part and concurring in part). What is more, Petitioners' case was dismissed on the pleadings, and Petitioners have never conceded that Howell Township's ordinance, as a practical matter, would allow any range viably to operate in Township (none currently do), much less an outdoor training facility offering a long-distance rifle range in addition to ranges providing for training with handguns, shotguns, and rifles at shorter distances. And in any event, even if the Court were to conclude that this case is distinct enough from *Ezell II* to avoid a clean split, that still would leave a clean split with *Drummond*.

II. This is an exceptionally important issue, and the decision below is fundamentally incompatible with this Court's precedents.

Respondent's attempts to buttress the decision below merely highlight the fundamental flaws in that decision. To begin with, Respondent makes the spurious claim that "[t]wo of the three judges below explicitly recognized" that the Second Amendment presumptively protects the right to train with firearms, BIO 10, as though that excuses the decision and renders this dispute "entirely academic" because Petitioners could train, they just cannot train where or how they want to train, BIO 11. Rather than excusing the Sixth Circuit's analysis, these arguments expose its flaws. The central problem with the panel's analysis is the failure to require Respondent to prove that

the restrictions at issue in this case are consistent with this Nation's historical tradition of firearms regulation. Rather, the panel effectively and improperly imported an atextual, interest-balancing analysis into interpretation of the plain text of the Second Amendment (is sufficient training allowed in the Township as a whole?) instead of asking simply whether the activity in question (operation and use of Oakland Tactical's planned training facility) is within the scope of that plain text. Once it is acknowledged that the plain text covers training generally (as the Sixth Circuit purported to do), it should be clear that the training Oakland Tactical would offer is covered. There certainly is nothing in the plain text to suggest otherwise.

Respondent counters that it is not enough that the Second Amendment covers training since "Petitioners do not claim that they are unable to train in Howell Township; rather, Petitioners claim that they are unable to commercially train at a preferred location that is convenient for them." BIO 11. But the right to train with firearms obviously "covers" training in a particular place (either Howell Township generally or "a preferred location" within the Township more specifically). In other words, there is no plausible way to interpret the bare words of the Second Amendment to wholly *exclude* the training that Oakland Tactical seeks to offer. *Heller* and *Bruen* are instructive here. If Respondent were right, it is not clear that the plain text would have been implicated by the District of Columbia's handgun ban since even with the handgun ban in place residents of the District could have still engaged in armed self-defense, just not with a "preferred" firearm. And if Respondent were right, it is not

clear why *Bruen* instructed lower courts to engage in analogical reasoning to assess sensitive place restrictions, *see* 597 U.S. at 30–31, as such restrictions do not flatly bar carry. But Respondent is not right. The plain text of the Second Amendment sweeps broadly; finer-grained distinctions (such as where training takes place or the nature of that training) can only be assessed with reference to history.

Respondent similarly fails in its attempts to render the decision below consistent with the precedent of this Court. As Petitioners explained, *see* Pet. 19–20, members of this Court repeatedly have indicated that the Second Amendment necessarily protects the right to train with firearms. The *Heller* majority approvingly quoted a historical source explaining that the right "to bear arms implies … learning to handle and use them in a way that makes them ready for their efficient use." *District of Columbia v. Heller*, 554 U.S. 570, 617–18 (2008) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 271 (1868)). In *Luis v. United States*, Justice Thomas explained in a concurring opinion that a Second Amendment that did not protect a right to train "would be toothless," 578 U.S. 5, 26–27 (2016) (Thomas, J., concurring). And in *New York State Rifle & Pistol Association v. City of New York*, Justice Alito, along with Justices Gorsuch and Thomas as well as Justice Kavanaugh in relevant part, concluded that the Second Amendment protects the right "to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly." 590 U.S. 336, 365 (2020) (Alito, J., dissenting); *id.* at 340 (Kavanaugh, J., concurring).

Respondent takes aim at the latter, seeking to distinguish Justice Alito's *City of New York* dissent, but its attempt fails. Respondent wrongly characterizes that case as involving a flat ban on training, stating that individuals could not "transport[] firearms to a shooting range outside of the City, and there were no alternative means to train within the City." BIO 14. But that is simply not true, as there were "seven firing ranges in the City," *City of New York*, 590 U.S. at 341, in addition to the option of training with rented firearms outside the City. This fact is a real problem for Respondent, because its attempt to distinguish the *City of New York* dissent is predicated on the assertion that "training generally was completely restricted within the City." BIO 14.

Once Respondent's factual error is corrected, it is clear that the Sixth Circuit's analysis is incompatible with Justice Alito's *City of New York* dissent. The New York City ordinance did not ban training altogether, but rather banned training outside of the City with the same firearm a person kept in his or her home in the City. All that was needed to decide that this restriction implicated the plain text was the conclusion that the Second Amendment covers training as a "necessary concomitant" of "the right to keep a handgun in the home for self-defense." *City of New York*, 590 U.S. at 364 (Alito, J., dissenting). There was no pause to consider whether the seven ranges in the City were sufficient. Instead, at that point it was "incumbent on the City to justify the restrictions its rule imposes." *Id.* at 365.

The Sixth Circuit improperly relieved Howell Township of the burden to justify its training restrictions with history and instead effectively

concluded as a matter of policy that Howell Township's restriction was not severe enough to implicate the Second Amendment. As Justice Kavanaugh explained in his *Rahimi* concurrence, the Second Amendment, like many provisions of the Constitution, is "broadly worded," and "absent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy." *United States v. Rahimi*, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring). This Court has held repeatedly that courts are bound to follow history, not policy, *see, e.g., Bruen*, 597 U.S. at 19, and Justice Kavanaugh went on to explain at length in his *Rahimi* concurrence why history is the correct guide, 144 S. Ct. at 1912–22. The Court below necessarily engaged in the sort of policy-making that this Court has forbidden, Pet. 28–29, given that neither the Second Amendment's plain text nor this Court's precedent establishes that the training Oakland Tactical would offer is outside the ambit of the Second Amendment.

Respondent also attempts to justify the decision below by comparing it to this Court's First Amendment caselaw, but like many of its other arguments, that one also backfires. Respondent appeals to this Court's decision in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), but that case is wholly inapposite. There, the Court rejected a First Amendment challenge to the enforcement "of a statute authorizing closure of a premises found to be used as a place for prostitution and lewdness because the premises are also used as an adult bookstore." *Id.* at 698. Key to the Court's decision that the First Amendment was not implicated was the fact that the effect on speech was

wholly incidental—"the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." *Id*. at 707. But there is nothing incidental about the effect of Howell Township's ordinance. It singles out firing ranges and divvies up where in the Township they can be located. If the same were done for bookstores, the First Amendment would be implicated. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986). The Second Amendment is entitled to at least as much protection as the First. *Bruen*, 597 U.S. at 70.

III. This case is an excellent vehicle.

The alleged vehicle problems identified by Respondent are illusory. Respondent argues that review here is premature and that "it is appropriate for this Court to decline review and allow percolation in the lower courts." BIO 33. But that only makes sense if one ignores, as Respondent does, a clear circuit split on the issue of whether local rules restricting training with firearms even trigger Second Amendment scrutiny. And to the extent that the case under review is "the first federal case post-*Bruen* to deal with" this issue, BIO 33, that cuts *in favor* of review, not against it, since the Sixth Circuit below was less faithful to *Bruen*'s text-and-history methodology than was *Drummond* even before *Bruen* was decided.

Next, Respondent claims that this case is problematic because "Petitioners' proposed course of conduct has shapeshifted," and it faults Petitioners for "no longer asserting the right to train outdoor[s] or at long ranges and instead alleg[ing] just a general right to train." BIO 34. But as explained above, the Second

Amendment's "general right to train" as a textual matter covers all manner of training with protected firearms, which is what Oakland Tactical would like to offer its customers. What is more, the nature of that training has not changed. Indeed, it is spelled out clearly in the operative complaint: if allowed, Oakland Tactical would operate "one or more outdoor shooting ranges to provide a safe location for residents in the area to practice target shooting for self-defense and other lawful purposes, including but not limited to a long-distance (e.g., 1,000 yard) range for qualified shooters and public access rifle, shotgun, and handgun ranges on North Fleming Road in Howell Township." Pet.App.32a. That training is covered by the plain text of the Second Amendment.

Respondent raises the specter of standing issues, but there are none that would impede this Court's consideration of this case. All concede that Oakland Tactical at present is barred by the Township's zoning ordinance from operating its planned training facility, and even if that were to change for some reason Oakland Tactical also has sought damages for economic harm the Township's ordinance has caused it. Pet.App.50–51a. Judge Kethledge did not express any "concerns" about Article III standing, but rather stated that Oakland Tactical's ability to litigate its customers' Second Amendment rights would be left to be addressed on remand, while also acknowledging that there are individual plaintiffs in the case who are asserting their own rights. *See* BIO 35 (citing Pet.App.635a–636a). This issue did nothing to interfere with Judge Kethledge's ability to opine that he would have ruled for Petitioners, and it would do

nothing to interfere with this Court's ability to do the same.

CONCLUSION

The Court should grant the petition for certiorari.

November 5, 2024

Respectfully submitted,

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