NO. 462A14 NINTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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AARON BYRD and ERIC COOMBS,	)	
	)	
Petitioners,	)	
	)	From Franklin County
v.	)	13 CVS 450
	)	
FRANKLIN COUNTY, NORTH CAROLINA,	)	
	)	
	)	
Respondent.	)	

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BRIEF OF *AMICUS CURIAE* SECOND AMENDMENT FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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Interest of Amicus Curiae in This Matter

Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization whose purposes include education, research, publication, and legal action focusing on the Constitutional right to own and possess firearms and to use them lawfully. SAF has over 650,000 members and supporters nationwide, including members in North Carolina and in Franklin County, North Carolina. As an advocate for the rights of firearms owners, including the right to develop and maintain proficiency in the use of firearms, SAF and its members have a strong interest in the issue of whether the people of a North Carolina county may enjoy the use of a shooting range.

On its face, this case appears to involve only the judicial interpretation of Franklin County's Unified Development Ordinance ("UDO"), but it also implicates an important Constitutional question. Specifically, the majority decision of the Court of Appeals interprets the UDO to prohibit entirely the construction and operation of shooting ranges in Franklin County, North Carolina. Such a judicial interpretation would result in the impermissible infringement of the Second Amendment rights of the people of Franklin County, North Carolina. Moreover, such a judicial interpretation would run contrary to established Constitutional jurisprudence, in particular *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), in which the United States Court of Appeals for the Seventh

Circuit held that a local government could not ban shooting ranges.

Amicus respectfully submits that because of the importance of the Constitutional issues raised by the Court of Appeals' opinion and because the parties have not addressed these Constitutional issues, SAF's participation as *amicus* in this case should be allowed.

ARGUMENT

The majority opinion of the Court of Appeals incorrectly interprets the UDO to arrive at an unconstitutional result. The Second Amendment protects the right of the people to maintain proficiency in the use of firearms at a shooting range, and bans on shooting ranges are subjected to something close to strict Constitutional scrutiny. If the UDO would indeed ban shooting ranges, then it would impermissibly infringe on the Second Amendment rights of the people of Franklin County, North Carolina. Moreover, when there is any doubt about the interpretation a statute, rule, or ordinance, courts must interpret it to avoid an unconstitutional result. The Court of Appeals' opinion, which interprets the UDO to apply unconstitutionally, should therefore be reversed.

I. *Heller* and the analytical framework of a Second Amendment question.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that the Second Amendment guarantees the individual right to keep and bear arms. *Heller* did not dictate the precise analytical framework that courts must use to determine whether a challenged law violates the Second Amendment. However, courts following *Heller* have used a framework in which a court first determines whether an activity is protected by the Second Amendment and then applies the appropriate level of scrutiny to determine whether the challenged law impermissibly infringes on the right. *See, e.g., Woollard v. Gallagher*, 712 F.3d

865, 874–75 (4th Cir. 2013); *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Mazzarella*, 614 F.3d 85, 89 (3rd Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

The level of scrutiny for Second Amendment challenges is not well-settled, but complete bans on Second Amendment activity are subjected to something close to strict scrutiny. The Supreme Court in *Heller* specifically rejected the deferential "rational basis" test, and therefore that test does not apply to Second Amendment challenges. *Heller*, 554 U.S. at 628, n. 27. But the Supreme Court did not state the level of scrutiny applied in *Heller* or in the case that closely followed, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). It was therefore left to future cases to determine the level of scrutiny that would be applied to specific laws.

Strict scrutiny applies when a law strikes at the very heart of the Second Amendment right, such as keeping and bearing arms for self-defense in one's home. *See, e.g., National Rifle Ass'n, supra*, 700 F.3d at 195; *Sylvester v. Harris*, 41 F. Supp. 3d 927, 960–61 (E.D. Cal. 2014). Meanwhile, intermediate scrutiny has been applied when laws affect conduct that is less central to the Second

Amendment right, such as prerequisites for the purchase of handguns. *See, e.g.*, *Woollard, supra*, 712 F.3d at 875–76.

Courts are particularly stringent when analyzing laws that extinguish the Second Amendment rights of law-abiding citizens, as opposed to laws that merely *regulate* Second Amendment activity. For example, in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the City of Chicago banned shooting ranges entirely, and the plaintiffs challenged this ban in part because it did not *regulate* the Second Amendment rights of law-abiding citizens. Instead, the law *banned* law-abiding citizens' rights to maintain proficiency with their firearms. The Seventh Circuit applied "a more rigorous showing than [intermediate scrutiny], if not quite strict scrutiny." *Ezell*, 651 F.3d at 708. The Court reasoned that:

> The City's firing-range ban is not merely regulatory; it *prohibits* the "law-abiding, responsible citizens" of Chicago from engaging in target practice in the controlled environment of a firing range. This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess arms for self-defense.

Id. (emphasis in original, quotations in original).

II. A ban on shooting ranges impermissibly infringes on the people's Second Amendment rights.

Under this analytical framework, the Court of Appeals' interpretation of the Franklin County UDO must be examined first to determine whether the UDO would infringe on an activity protected by the Second Amendment. Here, the

effect of the UDO, as interpreted by the Court of Appeals, is to prohibit entirely the construction and operation of shooting ranges in Franklin County, North Carolina. If this were the correct interpretation of the UDO, then the UDO would infringe on a protected Second Amendment activity.

Heller holds that the Second Amendment ensures individuals the right to keep and bear arms. *Ezell*, discussed above, holds that the right to keep and bear arms implies the right to practice and maintain proficiency with those arms and that operation of shooting ranges is an activity necessarily protected by the Second Amendment. 651 F.3d at 704–11. In the words of the Seventh Circuit: "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Id*. at 704. The Seventh Circuit also quoted the *Heller* opinion, which observed that "to bear arms implies something more than the mere keeping; it implies learning to handle and use them . . .; it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order." *Id.* (quoting *Heller*, 554 U.S. at 616, 617–18). By this reasoning, the Seventh Circuit held that a ban on shooting ranges, which is the same result as the Court of Appeals' interpretation of the Franklin County UDO, infringed on an activity protected by the Second Amendment.

The next inquiry is whether a prohibition on shooting ranges in Franklin County would survive under the appropriate level of scrutiny. The level of scrutiny that should be applied to such a prohibition is more than intermediate scrutiny, "if not quite strict scrutiny." *Ezell*, 651 F.3d at 708. Accordingly, if Franklin County wanted to ban shooting ranges, it would be required to "establish a close fit between the range ban and actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." *Id.* at 708–09. Franklin County is primarily rural and covers nearly 500 square miles. A complete prohibition of shooting ranges in such a county simply cannot pass constitutional muster. The Court of Appeals' interpretation of the UDO therefore results in an unconstitutional infringement on the Second Amendment rights of the people of Franklin County.[1]

[1] An issue also raised in *Ezell* was whether the City of Chicago's ban was constitutional because Chicago residents could exercise their Second Amendment rights in another jurisdiction. *Id.* at 698–99. The Seventh Circuit firmly rejected this notion, citing a U.S. Supreme Court freedom of speech case that held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 697 (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77 (1981)). This principle has also been applied in the context of the freedom of religion. *See, e.g., Islamic Center of Mississippi, Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 298-99 (5th Cir. 1988). Accordingly, the UDO, as interpreted by the Court of Appeals, could not be defended on the grounds that the people of Franklin County could exercise their Second Amendment rights elsewhere.

III. The Court of Appeals' opinion is an incorrect interpretation of the UDO because laws must be interpreted to avoid unconstitutionality.

The majority opinion of the Court of Appeals produces an unconstitutional result. This Court recognized nearly 40 years ago that "[w]hen reasonably possible, a statute, or an administrative rule, should be construed so as to avoid serious doubt as to its constitutionality." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 291 N.C. 55, 70, 229 S.E.2d 268, 277 (1976). This rule has been consistently applied by the North Carolina appellate courts. *See Delaconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 648 (1985)("The cardinal principle of statutory construction is to save and not destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."). *See also State v. Petersilie*, 334 N.C. 169, 181, 432 S.E.2d 832, 839 (1993)("the Court will strive to interpret a statute to avoid serious doubt about its constitutionality")(citing *Delaconte*); *State v. Stines*, 200 N.C. App. 193, 198, 683 S.E.2d 411, 416 (2009); *State v. Worthington*, 89 N.C. App. 88, 91–92, 365 S.E.2d 317, 320 (1988).

The Court of Appeals therefore should have interpreted the UDO as argued by the Petitioners. The Petitioners contend, as a matter of straightforward interpretation, that *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 697 S.E.2d 458 (2010) controls. This is correct, because *Land* applies the principle that

zoning schemes prohibiting use of land must be strictly construed. As Judge Hunter observed in his dissenting opinion, "[t]he *Land* Court made clear that the law favors uninhibited use of private property over government restrictions." *Byrd v. Franklin County*, 765 S.E.2d 805, 811 (2014).

CONCLUSION

Straightforward judicial interpretation, correctly applying the principles from *Land*, should have resulted in the Court of Appeals ruling in favor of Petitioners. In light of the unconstitutional effect of the Court of Appeals' interpretation of the UDO, this Court should reverse the decision below and rule in favor of the Petitioners.

This the 28th day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Brief of *Amicus Curiae* Second Amendment Foundation, Inc. In Support of Petitioners** was served upon all parties to this action by mailing via First Class U.S. Mail a copy thereof to their counsel of record at the address indicated below at this date.

This the 28th day of May, 2015.

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