NO. 10-56971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, ET AL.,

Plaintiffs-Appellants,

V.

COUNTY OF SAN DIEGO, ET AL.,

Defendants-Appellees.

On Appeal From the United States District Court
For the Northern District of California,
Case No. 09-CV-2371

AMICUS CURIAE BRIEF OF NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The National Rifle Association of America, Inc., has no parent corporations. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

Respectfully submitted,

/s/ Paul D. Clement
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Counsel for Amicus Curiae *National Rifle Association of America, Inc.*

Dated: May 27, 2011

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IDENTITY OF *AMICUS CURIAE*

The National Rifle Association of America, Inc., ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has approximately four million individual members and 10,700 affiliated members (clubs and associations) nationwide. NRA has a strong interest in this case because large numbers of NRA members reside within the Ninth Circuit and will be affected by any ruling this Court issues concerning the standard under which courts are to review government actions that burden the right to keep and bear arms.

Pursuant to Federal Rule of Appellate Procedure 29, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

NRA continues to believe, as it argued as *amicus curiae* in *Nordyke v. King*, ___ F.3d ____, 2011 WL 1632063 (9th Cir. May 2, 2011), that strict scrutiny should apply to all laws that burden Second Amendment rights. But whether the policy challenged here is analyzed under that framework or under the "substantial burden" framework that this Court adopted in *Nordyke*, the outcome is the same. Whatever room there may be for application of a different level of scrutiny to laws

that impose only incidental burdens on Second Amendment rights, the Constitution cannot countenance anything less than strict scrutiny for laws that "substantially burden the right to keep and to bear arms." *Id.* at *6. That conclusion is compelled by the Supreme Court precedent *Nordyke* invoked when adopting a substantial burden test. Because the policy challenged here plainly imposes a substantial burden upon Second Amendment rights, it is (at a minimum) subject to strict scrutiny, a standard that it cannot remotely survive.

ARGUMENT

I. Laws That Substantially Burden The Right To Keep And Bear Arms Are, At A Minimum, Subject To Strict Scrutiny.

Nordyke left open the question "precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights." 2011 WL 1632063 at *6 n.9. The Supreme Court's opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), answer that question; they require the application of strict scrutiny. Indeed, those decisions provide ample support for the proposition that strict scrutiny applies to *all* laws that burden the fundamental rights protected by the Second Amendment, a position that NRA continues to maintain is correct.[1] For largely the

[1] Although this Court rejected that position in *Nordyke*, petitions for panel rehearing and rehearing *en banc* remain pending in that case. *See Nordyke v. King*, No. 07-15763, Doc. No. 180.

same reasons, strict scrutiny certainly applies to laws that *substantially burden* Second Amendment rights.

1. When a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). This is hardly a stray observation. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985) ("governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied"); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) ("the standard of review that [is] appropriate" for "a fundamental right" is "strict scrutiny"); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest"); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights . . . are given the most exacting scrutiny"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . ."); *Foucha v. Louisiana*, 504 U.S. 71,

115 (1992) (Thomas, J., dissenting) ("Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny' . . . ."); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (when a statute "touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of" review); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 544 (9th Cir. 2004) ("[T]he test for when a law is subject to strict scrutiny is when that law *impacts* a fundamental right, not when it infringes it." (emphasis in original; citing *Shapiro*)).[2]

McDonald laid to rest any doubt about the fundamental nature of the right to keep and bear arms, declaring that "the right to bear arms was fundamental to the newly formed system of government." 130 S. Ct. at 3037; *accord id.* at 3042 ("[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *see also Nordyke*, 2011 WL 1632063 at *2 ("the [*McDonald*]

[2] Of course, the levels-of-scrutiny framework does not govern if an enumerated right directly suggests its own standard, such as the Fourth Amendment's prohibition on "unreasonable searches," or is by its terms absolute where it applies, such as the Sixth Amendment's guarantee that the accused "shall enjoy," *inter alia*, the right to confront witnesses.

Court went to great lengths to demonstrate that the right to keep and bear arms is a 'fundamental' right").[3]

Indeed, whether the right to keep and bear arms is fundamental was the basic question presented in *McDonald*: To decide "whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process, . . . we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty." 130 S. Ct. at 3036 (emphasis omitted). And the same basic question figured prominently in *Heller*. Indeed, the very first sentence of the Court's analysis of this question in *McDonald* stated that "[o]ur decision in *Heller* points unmistakably to [an affirmative] answer." *Id.*[4] *Heller* explained that, "[b]y the time of the founding, the right to have arms had become fundamental for

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[3] Among the many examples of *McDonald*'s explicit recognition that the right to keep and bear arms is fundamental, *see* 130 S. Ct. at 3041 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental."); *id.* at 3037 ("The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."); *id.* at 3038 n.17; *id.* at 3040 (39th Congress's "efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental"); *id.* at 3041 ("In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection.").

[4] Justice Thomas joined this part of the opinion of the Court and agreed that the Second Amendment right is fundamental. *See id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("[T]he plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is 'fundamental' to the American 'scheme of ordered liberty'. . . . I agree with that description of the right.").

English subjects." 554 U.S. at 593. It was this fundamental "pre-existing right" that the Second Amendment "codified." *Id.* at 592. Accordingly, the right to keep and bear arms, like any other fundamental right, should be subject to strict scrutiny.

2. Notwithstanding the considerable body of Supreme Court precedent supporting the proposition that strict scrutiny applies to all restrictions upon fundamental rights, this Court concluded in *Nordyke* that "only regulations which *substantially burden* the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." 2011 WL 1632063 at *6 (emphasis added). But given the Supreme Court precedent applying strict scrutiny to fundamental rights, two propositions about *Nordyke* surely follow: 1) strict scrutiny is plainly the form of heightened scrutiny applicable to those regulations that substantially burden Second Amendment rights, *cf.* at *6 n.9 (declining to decide "precisely what type of heightened scrutiny applies to [such] laws"), and 2) any material interference with the fundamental right protected by the Second Amendment qualifies as a substantial burden. Any other reading of *Nordyke* would render it incompatible with a wall of Supreme Court precedent.

To the extent that "the Supreme Court does not apply strict scrutiny to every law that regulates the exercise of a fundamental right," *id.* at *6, that is only because "[n]ot every law which makes a right more difficult to exercise is, ipso

facto, an *infringement* of that right." *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion) (emphasis added). But by the same reasoning, laws that *do* infringe upon fundamental rights are constitutional, if at all, only if they withstand strict scrutiny analysis, *i.e.*, if they are "narrowly tailored to serve a compelling state interest." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005).

That is clear from the cases upon which this Court relied in *Nordyke* when it adopted the substantial burden test. For example, the Court noted that regulations relating to the time, place, or manner in which free speech rights may be exercised have, in some instances, been subjected to a form of intermediate scrutiny. *Nordyke*, 2011 WL 1632063 at *6 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). But the Court also explained that intermediate scrutiny will not save a time, place, or manner restriction that is "so broad as to *burden substantially* one's freedom of speech." *Id.* at *10 (emphasis added); *see also id.* at *6 (such restrictions are constitutional only if they "are not too cumbersome"). Indeed, time, place, or manner restrictions that do not "leave open ample alternatives channels for communication" cannot even be saved by strict scrutiny, but are instead per se unconstitutional. *Clark v. Cmty. for Creative Non-Violence*, 48 U.S. 288, 293 (1984); *see also Nordyke*, 2011 WL 1632063 at *5 (same); *id.* at *10

(citing *Martin v. Struthers*, 319 U.S. 141 (1943), and *Schneider v. New Jersey*, 308 U.S. 147, 162–63 (1939), for same).[5]

Nordyke also analogized to the undue burden test the Supreme Court has applied in the context of analyzing restrictions on the right to obtain an abortion. *See id.* at *6 (citing *Gonzales v. Carhart*, 550 U.S. 124 (2007)). Under that test as well, a regulation is unconstitutional — again, regardless of whether it might satisfy strict scrutiny — if its "'purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.'" *Carhart*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 878). Thus, in that context, the finding of a substantial burden is not just an avenue to the application of strict scrutiny; it is fatal. That analogy thus similarly confirms that nothing less than (and perhaps not even) strict scrutiny will do for regulations that substantially burden fundamental rights. *Cf.* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research*

[5] The district court appeared to derive its intermediate scrutiny analysis in part based on its understanding that "restrictions on the time, place, and manner of speech are subject to a form of intermediate scrutiny." Appellants' Excerpts of Record (E.R.), Vol. I, at 10. Because the court failed to recognize that "even content-neutral time, place, and manner restrictions are suspect if they fail to 'leave open ample alternative channels for communication,'" *Nordyke*, 2011 WL 1632063 at *10 (quoting *Ward*, 491 U.S. at 791), its understanding and application of that doctrine was erroneous.

Agenda, 56 UCLA L. Rev. 1443, 1454 n.39 (2009) (reading "*Casey* as saying that if the law imposes a substantial burden . . . it is per se unconstitutional").

Finally, *Nordyke* noted that strict scrutiny does not apply to every law that imposes any burden on the right to vote or associate for political purposes. *See Nordyke*, 2011 WL 1632063 at *6 (citing *Burdick v. Takushi*, 504 U.S. 428, 432 (1992)). But in the voting rights context, the Supreme Court has reserved reasonableness review for those regulations that "impose[] only *modest* burdens" on associational rights; those that impose more "severe burden[s] . . . are subject to strict scrutiny." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451–52 (2008) (emphasis added); *see also Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003) ("[W]here the statute in question substantially burdens fundamental rights, such as the right to vote . . . strict scrutiny applies and the statute will be upheld only if the state can show that the statute is narrowly drawn to serve a compelling state interest.").

3. As these cases make clear, when *Nordyke* instructed courts to "use the doctrines generated in these related contexts for guidance in determining whether a gun-control regulation is impermissibly burdensome," *Nordyke*, 2011 WL 1632063 at *5, it directed courts to doctrines in which laws that substantially burden fundamental rights are either unconstitutional as a result or, at a minimum, constitutional only if the substantial burden satisfies strict scrutiny. Accordingly,

the contention that restrictions that "substantially burden the right to keep and bear arms," *id.* at *6, should be subject to anything less than strict scrutiny reduces to the contention that the right to keep and bear arms is a lesser constitutional right. Any such contention would have been deeply misguided before *McDonald* and is completely foreclosed in its wake.

First, the Court has reiterated that there are no second-class citizens when it comes to enumerated constitutional rights. Once a right is recognized as fundamental, it cannot be relegated to a lower plane: No constitutional right is "less 'fundamental' than" others, and there is "no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *accord Ullmann v. United States*, 350 U.S. 422, 428–29 (1956) ("To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.").

Second, the Court has applied this rule against "disrespect[ing] the Constitution" in the specific context of the right to keep and bear arms and has emphatically rejected repeated attempts to deprive that right of the same dignity afforded other fundamental rights. *Heller* admonished that "[t]he very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the

right is really worth insisting upon." 554 U.S. at 634. And *Heller* explained that the "Second Amendment is no different" from the First Amendment in that it was the product of interest-balancing by the People themselves, and the People chose to make both rights fundamental. *Id.* at 635. In *McDonald*, confronted with the argument that the Second Amendment right, even though fully recognized as an individual, enumerated right in *Heller*, should be deemed less than fundamental, the Court rejected that argument in the plainest terms: "what [respondents] must mean is that the Second Amendment should be singled out for special — and specially unfavorable — treatment. We reject that suggestion." 130 S. Ct. at 3043 (plurality op.); *see also id.* at 3044 (rejecting plea to "treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

It is accordingly too late in the day to argue that the right to keep and bear arms is less fundamental than the other individual rights enumerated in the Constitution or should be diluted to provide less protection than the Framers guaranteed in the constitutional text. There is consequently no basis to review *any* regulations that burden that right, let alone those that burden it *substantially*, under anything less demanding than the strict scrutiny that governs restrictions upon exercise of other fundamental rights.

4. Finally, that strict scrutiny applies to laws that substantially burden Second Amendment rights is confirmed by the approaches that the Supreme Court rejected in *Heller* and *McDonald* and this Court rejected in *Nordyke*. *Heller* explicitly and definitively rejected not only rational basis review, 554 U.S. at 628 n.27, but also Justice Breyer's "interest-balancing" approach — which was intermediate scrutiny by another name. *See id.* at 634; *McDonald*, 130 S. Ct. at 3050 (plurality op.) ("while [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion"). Justice Breyer called his approach "interest-balancing" because of his view that the government's interest in regulating firearms — some version of protecting public safety — would always be important or compelling. Thus, in his view, whether the level of scrutiny were strict (requiring a compelling government interest) or intermediate (requiring only an important interest), the government interest would always qualify, and the analysis would really turn on a search for the appropriate degree of fit, which Justice Breyer described as interest-balancing. *See Heller*, 554 U.S. at 687–91 (Breyer, J., dissenting).

Terminology aside, however, Justice Breyer's approach in substance was simply intermediate scrutiny. Justice Breyer relied (*see id.* at 690) on cases such as *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), which explicitly apply

intermediate scrutiny. Indeed, Justice Breyer invoked *Burdick v. Takushi*, 504 U.S. 428 (1992), the case on which the United States principally relied in advocating that the Court adopt intermediate scrutiny. *See* Br. of United States, *Heller*, at 8, 24, 28.

This Court rejected a similar version of intermediate scrutiny in *Nordyke*. There, Judge Gould suggested in a concurring opinion that "*reasonableness* should be [a court's] guide in the Second Amendment context," and should govern all regulations save those that "specifically restrict defense of the home, resistance of tyrannous government, or protection of country." *Nordyke*, 2011 WL 1632063 at *15–*16 (Gould, J., concurring in part and in the judgment). The majority disagreed, explaining that "the Supreme Court has rejected an approach that would enforce the Second Amendment wholly, or primarily, through rational basis review." *Id.* at *10. In doing so, the Court rejected Judge Gould's suggestion "that there is a difference between 'rational basis review' and 'reasonableness review,' in that the latter 'focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists.'" *Id.* at *11 (quoting concurrence at *16 (internal quotation marks omitted)). As the Court explained, that "interest-balancing test sounds exactly like Justice Breyer's 'interest-balancing' test," which the Supreme Court rejected "in no uncertain terms." *Id.* at *11.

Heller, *McDonald*, and *Nordyke* thus make clear that the kind of reasonableness review that applies in the intermediate scrutiny context is so malleable as to provide "no constitutional guarantee at all." *Heller*, 554 U.S. at 633. A standard rejected by both courts as *categorically* underprotective of Second Amendment rights clearly cannot govern analysis of regulations that "*substantially burden"* such rights. *Nordyke*, 2011 WL 1632063 at *6 (emphasis added).

II. Section 12050, As Interpreted By The County, Substantially And Unconstitutionally Burdens Second Amendment Rights.

As this Court recognized when it adopted the substantial burden test in *Nordyke*, and rejected Judge Gould's suggested approach, it intended that test to be *more* protective of Second Amendment rights than intermediate scrutiny, not less. By requiring courts to focus on the burden a regulation imposes, rather than the strength of the Second Amendment "interest" at stake, the substantial burden test precludes courts from "constrict[ing] the scope of the Second Amendment in situations where they believe the right is too dangerous." *Nordyke*, 2011 WL 1632063 at *4; *see also Heller*, 554 U.S. at 634 ("A constitutional guarantee subject to future judges' assessment of its usefulness is no constitutional guarantee at all."). Because the district court's analysis in this case achieved precisely that forbidden result, it plainly cannot stand. Under any proper understanding of the scope of the rights protected by the Second Amendment, the County's policy

imposes a substantial and unconstitutional burden on the Amendment's "core lawful purpose of self-defense." *Id.* at 630.

1. As interpreted and applied by the County, California's regulatory scheme effectively eviscerates the right to self-defense outside the home. Section 12031 prohibits individuals from carrying loaded firearms openly in public absent the narrowest of exceptional circumstances: (1) "immediate, grave danger," defined as "the brief period before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance"; or (2) "grave danger because of circumstances forming the basis of a current restraining order." Cal. Penal Code § 12031(j)(1)–(2). Section 12031 thus reserves the right to carry a loaded firearm openly to only those few individuals who face an imminent or documented threat, and forecloses to all others this common avenue of self-defense.

Section 12050 on its face, by contrast, promises much more. It allows an individual to obtain a permit to carry a concealed loaded firearm upon, among other things, a showing of "good cause." Cal. Penal Code § 12050. On its face, this provision fills the self-defense gap section 12031 creates, by ensuring that those individuals who do not fall within the narrow exceptions for carrying a loaded firearm openly may still carry a concealed loaded firearm for the constitutionally protected purpose of self-defense. Accordingly, although section

12031, standing alone, substantially burdens Second Amendment rights, section 12050 leaves open the possibility that California's regulatory scheme might provide "sufficient alternative avenues" for exercising the right to self-defense outside the home. *Nordyke*, 2011 WL 1632063 at *7.

Unfortunately, the County's interpretation of section 12050 eliminates the promise of the provision's text and forecloses that alternative avenue. According to the County, an applicant can demonstrate "good cause" only by documenting "a set of circumstances that distinguishes the applicant from other members of the general public and causes him or her to be placed in harm's way." E.R., Vol. I, at 2–3. "Generalized fear for one's personal safety is not, standing alone considered 'good cause.'" *Id.* at 3. Thus, the County's interpretation reads into section 12050 the same restrictive limitations found in section 12031, thereby depriving most law-abiding individuals — all those who do not face an imminent or documented threat to their safety — of the only lawful manner under the California Penal Code of carrying a loaded firearm in public. The regulatory scheme applied by the County therefore imposes a substantial burden on Second Amendment rights.

The same facts make clear that the County's policy is not remotely narrowly tailored, as strict scrutiny demands. The policy is not limited to those individuals who pose a heightened threat to other individuals, or to those few sensitive public places in which firearms might pose a particularly acute danger. Instead the policy

governs *all* individuals who cannot document that they face an imminent and grave threat, and *all* public places in which those individuals might want to carry a loaded firearm for self-defense. Because the policy, as applied to the vast majority of law-abiding individuals, "requires arms to be so borne as to render them wholly useless for the purpose of defence," it is "clearly unconstitutional.'" *Heller*, 554 U.S at 629 (quoting *State v. Reid*, 1 Ala. 612, 616–17 (1840)).

2. The district court's conclusion to the contrary reflects a fundamentally misguided and startlingly narrow conception of the Second Amendment. As the Court explained in *Heller*, "the natural meaning of 'bear arms'" is to "be[] armed *and ready* for offensive and defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (emphasis added; internal quotation marks omitted)); *see also id.* at 592 (the Second Amendment "guarantee[s] the individual right to possess and carry weapons *in case of confrontation*" (emphasis added)). It is a matter of simple common sense that an individual cannot be "ready" to defend himself if he cannot load his weapon until *after* a grave threat to his safety has presented itself. It is thus hardly surprising that the County made no attempt to rebut testimony from the Plaintiffs' expert witness that keeping a firearm unloaded until the moment a threat materializes is neither a common nor a meaningful method of self-defense. *See* E.R., Vol. II, at 165–66.

Yet the district court rejected both common sense and the Plaintiffs' evidence to reach its untenable conclusion that the County's interpretation of Section 12050 imposes little (if any) burden upon the right to self-defense. The court explained that Section 12031 "permits loaded open carry for *immediate* self-defense" and does not "restrict[] the open carry of unloaded firearms and ammunition ready for instant loading" "should the need for self-defense arise." E.R., Vol. I, at 8–9 (emphasis added). For those reasons, it concluded that "to the extent that . . . [the County's] policy burden[s] conduct falling within the scope of the Second Amendment, if at all, the burden is mitigated by . . . section 12031." *Id.* at 9.

But the right to carry a firearm only for *immediate* self-defense is no right at all. The "right" does not materialize until it is too late to exercise. Unless criminals and other who pose the threats that a right to self-defense protects against plan to announce their intent to present a grave and immediate threat and then take a time out to enable the potential victim to exercise his or her Second Amendment rights, a right to immediate self-defense is entirely illusory.

As is clear from its analysis, the district court erroneously assumed that a policy does not *burden* the right to self-defense unless it *eliminates* the right entirely, not just practically, but theoretically. *Cf.* E.R., Vol. I, at 8 (claiming "an important distinction between section 12031 and District of Columbia law at issue in *Heller*, which required that the firearm in the home be rendered and kept

inoperable *at all times*"). That reasoning cannot be squared with *Nordyke*, which requires a challenged regulation to leave open not just *any* means, but "*reasonable* alternative means," by which to exercise the core constitutional right to self-defense. *Nordyke*, 2011 WL 1632063 at *7; *see also id.* (analogizing to test of whether a challenged speech restriction "'leaves open *ample* alternative channels for communication'" (quoting *Ward*, 491 U.S. at 791; emphasis added)). Nor can it be squared with *Heller*, which recognized that "'a statute which, under the pretense of regulating, amounts to a destruction of the right, *or which requires arms to be so borne as to render them wholly useless for the purpose of defence*, would be clearly unconstitutional.'" *Heller*, 554 U.S at 629 (quoting *Reid*, 1 Ala. at 616–17; emphasis added).

3. The district court made a similar mistake when it deemed the County's policy, "[a]t most, . . . subject to intermediate scrutiny." E.R., Vol. I, at 12. The district court arrived at that conclusion only after erroneously asserting that "the 'core' Second Amendment right" is limited to "possession in the home." E.R., Vol. I, at 11. *Heller* says no such thing. As the Court explained, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." 554 U.S. at 634–35. The Court's extensive review of that historical understanding led it to the conclusion that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of

confrontation." *Id.* at 592; *see also id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment"). Although it went on to note that "*the need* for [self-defense] is most acute" in the home, the Court found the right itself, and not the place in which one exercises it, "central to the Second Amendment." *Id.* (emphasis added).

Indeed, *Heller* plainly contemplates that the right to self-defense extends outside the home. For example, when the Court searched in vain for past restrictions as severe as the District's handgun ban, it deemed restrictions that applied *outside* the home most analogous, and noted with approval that "some of those [restrictions] have been struck down." *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846) (striking down prohibition on carrying pistols openly), and *Andrews v. State*, 50 Tenn. 165, 187 (1871) (same)). Such laws could hardly be analogous to D.C.'s invalid law or represent "severe" restrictions on the right to self-defense, *id.* at 629, if the Second Amendment's "core" protection were limited to "possession in the home." E.R., Vol. I, at 11. The same is clear from the Court's suggestion that law forbidding firearms in schools and certain government buildings are "presumptively lawful." *Heller*, 554 U.S. at 626–27 & n.26. The Court would have had no need to single out these truly "sensitive places," *id.* at 626, if *all* restrictions on the right to keep and bear arms outside the home are subject to a less rigorous constitutional analysis.

This Court's opinion in *Nordyke* supports the same conclusion. The Court repeatedly emphasized that the plaintiffs in *Nordyke* alleged that the challenged ordinance burdened only their right to "display and sell guns on county property"; "they d[id] *not* allege that they wish to carry guns on county property for the purpose of defending themselves while on that property." 2011 WL 1632063 at *7 (emphasis added); *see also id.* at *1 n.4, *7 nn.10–11. Accordingly, the Court stressed that the question before it was "whether a ban on gun shows at the county fairgrounds substantially burdens the right to keep and bear arms; not whether a county can ban all people from carrying firearms on all of its property for any purpose." *Id.* at *7. The Court's careful efforts to avoid suggesting that the latter would be constitutional make clear that it, too, recognized that the core right to self-defense is not limited to "possession in the home." E.R., Vol. I, at 11; *see also Nordyke*, 2011 WL 1632063 at *10 (rejecting Judge Gould's suggestion (at *15) that heightened scrutiny should only apply to "regulations aimed at restricting defense of the home, resistance of tyrannous government, and protection of country").

4. As the foregoing reflects, the district court's analysis suffered from the very mistake the Supreme Court sought to preclude in *Heller* and this Court sought to foreclose in *Nordyke*. According to the district court, the right to carry a loaded firearm in public — even for the lawful purpose of self-defense — is entitled to

little, if any, constitutional protection because it "presents a recognized threat to public order and poses an imminent threat to public safety." E.R., Vol. I, at 12 (internal quotation marks omitted). In other words, the district court "constrict[ed] the scope of the Second Amendment" based on its belief that "the right [to carry a loaded firearm in public] is too dangerous." *Nordyke*, 2011 WL 1632063 at *4. That is precisely what the Supreme Court admonished against when it rejected Justice Breyer's "interest-balancing" approach in *Heller*; as the Court explained, "the very enumeration of the [Second Amendment] takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634.

By ignoring *Heller*'s warning against inserting such policy preferences into its analysis, the district court effectively rendered its ultimate ruling a foregone conclusion. Having already decided that the right to carry a firearm in public is "too dangerous" to warrant protection, the district court had little difficulty summarily declaring the County's interest in protecting against that unsubstantiated danger "important and substantial." E.R., Vol. I, at 12. In doing so, the court all but eliminated the government's burden to demonstrate that a restriction on a fundamental right is constitutional — a burden of proof that should have applied even under the "intermediate scrutiny" analysis that the district court

purported to apply. *See, e.g.*, *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) ("[U]nless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law.").

Indeed, the district court appears to have applied a level of scrutiny even less protective of Second Amendment rights than the rejected approaches of Justice Breyer and Judge Gould. Justice Breyer presumed that the government would always have a compelling or important interest in regulating Second Amendment rights, meaning courts should focus on the reasonableness of the fit between the regulation and the government's interest. *See Heller*, 554 U.S. at 687–91 (Breyer, J., dissenting). That approach was rejected "in no uncertain terms" as insufficiently protective of Second Amendment rights. *Nordyke*, 2011 WL 1632063 at *11. But the district court did Justice Breyer one better. Once the district court concluded that the government had an important interest in combating gun violence, it deemed that interest sufficient to sustain the County's interpretation of Section 12050 as constitutional. *See* E.R., Vol. I., at 12. The court engaged in no meaningful consideration of the fit between the County's interest and the County's highly unusual interpretation of Section 12050.

Only the district court's decision to apply a test less demanding than the unequivocally rejected "interest-balancing" test could explain the result below. The County's interpretation of "good cause" would violate any meaningful conception of the Second Amendment. The County interprets "good cause" as meaning a particularly good cause that distinguishes an applicant from the average citizen. The fundamental problem with that interpretation is that every individual has a Second Amendment right and a corresponding right to self-defense. There is no need for an individual to demonstrate an especially good reason that he should enjoy a constitutional right guaranteed to all by our founding document. Courts would not tolerate for one second a regime that granted free speech or the privilege against self-incrimination only to those who demonstrated an unusual need for the Constitution's protections. The Second Amendment is no different. Under any appropriate standard of review, this Court should reject the County's interpretation that denies all but a select few a right guaranteed by the Constitution to all.

The district court also ignored the basic principle that, to be permissible, a regulation must have only "the *incidental* effect of making it more difficult" to exercise a fundamental right, which is evident when a regulation "serves a valid purpose . . . not designed to strike at the right itself." *Carhart*, 550 U.S. at 157–58. In *Nordyke*, for example, the Court rejected the plaintiffs' challenge because the challenged ordinance did not aim to exclude gun shows from Alameda County

altogether, but rather only served what the court deemed a valid purpose of "declin[ing] to use government funds or property to facilitate" them. *Nordyke*, 2011 WL 1632063 at *8. By contrast, the policy challenged here is expressly designed to preclude individuals from carrying loaded handguns in public, based on the County's judgment that the right to self-defense is too dangerous to be trusted to the majority of law-abiding citizens. Government action that substantially burdens Second Amendment rights not incidentally, but by design, cannot withstand constitutional scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-size and type-face requirements of Rule 32(a) of the Federal Rules of Appellate Procedure. The textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 5,976 words as determined by the word-counting feature of Microsoft Word 2007 in 14-point, Times New Roman typeface.

Respectfully submitted,

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Dated: May 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 27, 2011. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul D. Clement
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Dated: May 27, 2011