08-15773

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID K. MEHL; LOK T. LAU; FRANK FLORES,

Appellants,

v.

LOU BLANAS, individually and in his official capacity as SHERIFF OF COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO, SHERIFF'S DEPARTMENT; KAMALA D. HARRIS, Attorney General, State of California,

Appellees.

On Appeal from the United States District Court
for the District of California

Case No. 2:03-cv-02682 MCE KJM
The Honorable Morrison C. England, Jr., Judge

SUPPLEMENTAL BRIEF OF APPELLEE ATTORNEY GENERAL OF CALIFORNIA IN RESPONSE TO COURT ORDER OF JULY 20, 2012 [DKT. #34]

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CONSTITUTIONAL PROVISIONS

Appellee Kamala D. Harris, Attorney General of California, respectfully submits this brief in response to the Court's July 20, 2012, order directing that supplemental briefs be filed "addressing the effect, if any, on the certified issues in this case of *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010)." (Dkt. # 34.)

I. THE EFFECT OF *MCDONALD V. CITY OF CHICAGO* AND *NORDYKE V. KING* ON THE ISSUES PRESENTED IN THIS CASE

A. *McDonald v. City of Chicago*

In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) the Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), specifically, "the right to possess a handgun in the home for the purpose of self-defense." *McDonald*, 130 S. Ct. at 3050. *McDonald* was a major departure from precedent which had held that the Second Amendment limits only federal action. *See*, *e.g.*, *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 731 (9th Cir. 1992).

In the event that the Court concludes that appellants have standing to pursue this appeal, *McDonald* has two effects. First, it requires the Court to

decide what Second Amendment standard of review applies to California statutes requiring a license to carry a concealed weapon in public (a "CCW license"). Second, it requires the Court to decide whether California's CCW license requirement passes the applicable standard of review. These questions are addressed below.

B. *Nordyke v. King*

Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012) (en banc) was thought by many to be a vehicle for the Ninth Circuit to articulate a standard of review applicable to cases involving claims arising under the Second Amendment. It ultimately was not.

Nordyke concerned a county ordinance that apparently made it a misdemeanor to possess a firearm or ammunition on county property – in this case a fairground – during a gun show. *Nordyke v. King [Nordyke I]*, 644 F.3d 776, 780 (9th Cir. 2011). A panel opined that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke I*, 644 F.3d at 786. The Ninth Circuit ordered en banc review and prohibited citation of the panel opinion as precedent. *Nordyke v. King [Nordyke II]*, 664 F.3d 774 (9th Cir. 2011). At oral argument before the en banc panel, the County of Alameda interpreted its ordinance in such a way that no Second Amendment

issue was presented. The county asserted that firearms could be offered for sale at a gun show on the county fairground so long as they were not in the actual possession of participants and were secured to prevent unauthorized use. *Nordyke v. King [Nordyke III]*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc). Accepting the county's interpretation, the Ninth Circuit concluded that the ordinance was permissible no matter how broad the scope of the Second Amendment. *Id*. The standard of review issue therefore was left "for another day." *Id*.

Nordyke III stands for the proposition that certain firearm restrictions have such minimal impact that they withstand any level of Second Amendment scrutiny. Beyond that, *Nordyke III* has no effect on appellants' Second Amendment claims.

Nordyke III also considered an equal protection claim. The *Nordyke* appellants claimed that an exception in the county firearm ordinance for artistic events was designed to favor military reenactors over gun show participants. *Nordyke II*, 644 F.3d at 794. *Nordyke III* resolved this issue in a footnote:

> As to the Nordykes' equal protection claim, because the ordinance does not classify shows or events on the basis of a suspect class, and because we hold that the ordinance does not violate either the First or Second Amendments, rational basis scrutiny applies. The equal protection claim fails

> because Alameda County could reasonably conclude that gun shows are more dangerous than military reenactments. This is enough to satisfy rational basis scrutiny. *See Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489, 75 S. Ct. 461, 99 L.Ed. 563 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.").

Nordyke III, 681 F.3d at 1043, n. 2 (internal citations omitted).

The same approach should be taken to appellants' equal protection claims in the present action. As set forth in the Attorney General's Answering Brief and as further explained below, the CCW statutes at issue here do not violate the Second Amendment, and therefore rational basis scrutiny applies. The challenged statutes easily withstand such scrutiny.

II. THE COURT SHOULD ADOPT A "SUBSTANTIAL BURDEN" FRAMEWORK FOR EVALUATING SECOND AMENDMENT CLAIMS

The Supreme Court of the United States has not marked the outer bounds of what conduct the Second Amendment protects (*Heller*, 554 U.S. at 635) and it has not defined the standard of review that applies to laws regulating conduct within its scope. *Id*. at 628, 634. Nor has the Ninth Circuit. *Nordyke III*, 681 F.3d 1044. Appellee urges this Court to adopt the "substantial burden" test articulated in *United States v. DeCastro*, 682 F.3d 160 (2d Cir. 2012).

In *DeCastro*, the Second Circuit held that "heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment." *Id.* at 164. The court also observed that *Heller* does not "mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Id.* at 166. *DeCastro*'s approach is very similar to the test adopted by the vacated panel decision in *Nordyke I*, 644 F.3d at 786 ("only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment"). *DeCastro* emphasized that its approach was consistent with that of other circuits which have endorsed applying varying degrees of scrutiny based not only on the degree of burden on the Second Amendment right, but also on the extent to which the regulation impinges on the "core" of the right. *DeCastro*, 682 F.3d at 166.

This Court should, for many reasons, adopt the *DeCastro* substantial burden test. It accommodates *Heller*'s caution that the scope of the Second Amendment right is not unlimited, and its recognition of the many and varied forms of firearms regulation that have existed throughout our

country's history (such as concealed weapons prohibitions, storage laws, and felon-possession prohibitions). *Heller*, 554 U.S. at 626-27 & n. 26, 632; *see also U.S. v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc), *cert. denied* 131 S. Ct. 1674 (2011) (*Heller* should not be treated "as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense"). It also is appropriate in light of the Supreme Court's recognition that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 130 S. Ct. at 3046 (quotation marks omitted).

Certainly the Court should not accept appellants' invitation to adopt strict scrutiny for *any* regulation that impacts the Second Amendment right to possess a handgun in the home for self-defense, no matter how light the burden. (AOB at 55.) This approach has not been adopted by any court. As *DeCastro* explained in justifying the "substantial burden" standard:

> A similar threshold showing is needed to trigger heightened scrutiny of laws alleged to infringe other fundamental constitutional rights. The right to marry is fundamental, but "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship" are not subject to the "rigorous scrutiny" that is applied to laws that "interfere directly and substantially with the right to marry." *Zablocki v. Redhail,* 434 U.S. 374, 386-87 (1978). The right to vote is fundamental, but "the rigorousness of our inquiry

> into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi,* 504 U.S. 428, 434 (1992).
>
> The weight of the burden matters in assessing the permissible bounds of regulation in other constitutional contexts as well, such as takings, abortion, and free speech. *See Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1014-16 (1992) (only those regulations on property that go "too far" require the payment of just compensation under the Takings Clause (internal quotation marks omitted)); *Stenberg v. Carhart,* 530 U.S. 914, 921 (2000) (prior to fetal viability, a state may not enact laws that impose an "undue burden" on a woman's decision to terminate her pregnancy, *i.e.,* regulations that have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion") . . .; *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (reasonable time, place or manner restrictions are subject to lesser scrutiny as long as they are content neutral and preserve "ample alternative channels for communication of the information").

DeCastro, 682 F.3d at 167 (parallel citations and some internal quotation marks omitted).

Other circuits join *DeCastro* in holding that courts must consider the severity of the burden on Second Amendment rights in deciding what level of scrutiny to apply. *See, e.g.*, *Heller v. District of Columbia,* 670 F.3d 1244, 1261, 1252 (D.C. Cir. 2011) ("we determine the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right"); *Ezell v. City of Chicago,* 651 F.3d 684, 703 (7th Cir. 2011) ("Borrowing from the [Supreme] Court's First Amendment doctrine,

the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right *and the severity of the law's burden* on the right") (emphasis added); *United States v. Masciandaro,* 638 F.3d 458, 470 (4th Cir.), *cert. denied*, 132 S. Ct. 756 (2011) (to determine standard of review, "we would take into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation").

This Court should adopt a "substantial burden" test like the one used in *DeCastro*.

III. THE CCW STATUTES AT ISSUE HERE DO NOT SUBSTANTIALLY BURDEN SECOND AMENDMENT RIGHTS AND DO NOT TRIGGER HEIGHTENED SCRUTINY

A. California's CCW Licensing Laws Withstand Rational Basis Scrutiny

California's CCW licensing statutes (Cal. Penal Code §§ 26150, 26155)[1] do not trigger heightened scrutiny because they do not substantially burden the Second Amendment right defined by *Heller* and *McDonald*: the right to possess a handgun in the home for self-defense. The public carry of

[1] Unless otherwise noted, all statutory references are to the California Penal Code.

firearms is outside the scope of the Second Amendment, as defined by the Supreme Court. *See Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1174 (E.D. Cal. 2011) (Second Amendment "does not create a fundamental right to carry a concealed weapon in public"); *Moore v. Madigan*, 2012 WL 344760, *10 (C.D. Ill. 2012) ("*Heller* did not recognize a Second Amendment right to possess operable firearms in public"); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 831 (D. N.J. 2012) (New Jersey CCW licensing scheme "unequivocally" falls outside the scope of the Second Amendment because it does not burden the right to possess handguns in the home for self-defense); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011), *cert. denied sub nom. Williams v. Maryland*, 132 S. Ct. 93 (2011) (if the Supreme Court meant its holdings in *Heller* and *McDonald* to extend beyond home possession, "it will need to say so more plainly"); *cf. Woollard v. Sheridan*, 2012 WL 695674, *7, *13 (D. Md. Mar. 2, 2012) (the right to bear arms is not limited to the home; intermediate scrutiny applied to Maryland statute requiring a "good and substantial reason" for permit to carry handgun in public).

California makes generous allowance for the Second Amendment right defined by *Heller* and *McDonald*. Californians may keep loaded and concealable firearms in their homes, businesses and other private property.

§ 25605(b). Further, while California law generally prohibits the carry of a loaded firearm in public (§ 25850[2]), the prohibition is subject to significant exceptions. Most notably, it does not apply to persons who believe that either they or their property are in immediate, grave danger and that carrying a weapon is necessary. § 26045. It also does not apply to (a) persons in their place of residence, including a temporary residence or campsite (§ 26055), (b) persons engaged in a lawful business, and their authorized employees, within the place of business (§ 26035), (c) holders of a license to carry a concealed weapon (§ 26010), (d) hunters in areas where hunting is legal (§ 26040), (e) persons making a lawful arrest (§ 26050), (f) members of the military engaged in their duties (§ 26000), (g) persons at a firing range or shooting club (§ 26005), or (h) armored vehicle guards (§ 26015).

Under rational basis scrutiny, a legislative classification will be upheld if it is rationally related to a legitimate government interest. *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002). The general purpose of the CCW law is "to control the threat to public safety in the indiscriminate possession and carrying about of concealed and loaded weapons." *People v.*

[2] Section 25850 prohibits the public carry of a *loaded* firearm. Section 25400 prohibits the carry of a *concealed* firearm. Neither applies in one's residence (§§ 25605(b), 26055) or to holders of CCW licenses (§§ 25655, 26010).

Melton, 206 Cal. App. 3d 580, 589 (1988) (discussing pre-recodification law). This is an important, even compelling, interest. *See U.S. v. Salerno,* 481 U.S. 739, 745 (1987) (describing government interest in public safety as "compelling"). The CCW licensing statutes are at the very least rationally related to this important interest. *See Richards*, 821 F. Supp. 2d at 1175 (Yolo County CCW policy rationally related to governmental interests of maintaining public safety and preventing gun-related crime).

B. Alternatively, California's CCW Licensing Laws Withstand Intermediate Scrutiny

Even if the Court were to conclude that intermediate scrutiny is the appropriate standard of review,[3] California's CCW licensing system would pass that level of scrutiny. The Ninth Circuit has not yet adopted an intermediate scrutiny standard applicable to Second Amendment cases, but in a challenge to San Diego County's CCW policy, the Southern District applied the intermediate scrutiny test articulated by the Third Circuit:

> [I]ntermediate scrutiny requires the asserted governmental end to be more than just legitimate; it must be either "significant," "substantial," or "important," and it requires the "fit between the challenged regulation and the asserted objective be reasonable, not perfect."

[3] All the cases cited above as applying rational basis scrutiny also, as an alternative holding, applied intermediate scrutiny.

Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010), quoting *United States v. Marzzarella*, 614 F.3d 85, 98 (3rd Cir. 2010), cert. denied, 131 S. Ct. 958 (2011).

As to the first prong of the substantial interest test, there can be no doubt that California's interest in its CCW laws is substantial. The purpose of the CCW law is "to control the threat to public safety in the indiscriminate possession and carrying about of concealed and loaded weapons," *Melton*, 206 Cal. App. 3d at 589, an interest that is at the very least important. *See Salerno,* 481 U.S. at 745 (describing government interest in public safety as "compelling").

As to the second prong, California has concluded that the right to carry a concealed or loaded weapon in public should be conditioned on a showing of good character and good cause, and that local law enforcement officials are best suited to make this determination. §§ 26150, 26155. Sheriffs and police chiefs must publish their policy for reviewing applications. § 26160. Any particular policy is reviewable in court. *See Peruta*, 758 F. Supp. 2d at 1110 (upholding San Diego County CCW license policy from a variety of constitutional challenges); *Richards*, 821 F. Supp. 2d at 1175 (upholding Yolo County CCW license policy from a variety of constitutional

challenges). And any particular CCW licensing decision is reviewable for abuse of discretion. *Salute v. Pitchess*, 61 Cal. App. 3d 557, 560 (1976)

No doubt other licensing systems are imaginable, but under intermediate scrutiny, the fit between interest and policy need only be "reasonable, not perfect." *Marzzarella*, 614 F.3d at 98; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (when election laws impose non-severe burdens on First and Fourteenth Amendment associational rights, State's asserted regulatory interests need only be sufficiently weighty to justify the limitation; "elaborate, empirical verification of the weightiness of the State's asserted justifications" is not required).

Post-*McDonald*, many Second Amendment challenges have been made to state laws that impose open carry prohibitions, concealed carry prohibitions, and handgun licensing regimes. The overwhelming majority of these statutes have been upheld. *See Peruta*, 758 F. Supp. 2d at 1117 (upholding San Diego County CCW licensing policy adopted pursuant to the same statutes that are at issue here); *Moore*, 2012 WL 344760 at *14 (Illinois statute generally barring possession of a firearm outside the home withstands intermediate scrutiny); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 272 (S.D.N.Y. 2011) (upholding New York licensing scheme requiring

CCW license applicants to show "proper cause"); *Piszczatoski*, 840 F. Supp. 2d at 837 (upholding New Jersey licensing scheme requiring a showing of "justifiable need" to carry a handgun in public); *Richards*, 821 F. Supp. 2d at 1175 (upholding Yolo County CCW policy adopted pursuant to the same statutes that are at issue here); *Williams*, 10 A.3d at 1177 (upholding Maryland statute requiring "good and sufficient reason" for issuance of permit to carry a handgun in public); *cf*. *Woollard*, 2012 WL 695674 at *13 (Maryland statute requiring "good and sufficient reason" requirement for issuance of permit to carry a handgun in public does not withstand intermediate scrutiny).

California's CCW licensing laws are reasonably related to the important government interest in public safety, and for that reason withstand intermediate scrutiny.

IV. CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated: August 10, 2012

Respectfully submitted,

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SA2008303349

CERTIFICATE OF COMPLIANCE
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FOR 08-15773

I certify that: (check (x) appropriate option(s))

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August 10, 2012
Dated

/s/ George Waters
George Waters
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: *David K. Mehl, et al. v. Lou Blanas, et al.*

Case No. 08-15773

I hereby certify that on August 10, 2012, I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

Supplemental Brief of Appellee Attorney General of Calfiornia In Response to Court Order of July 20, 2012 [Dkt. #34]

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 10, 2012, at Sacramento, CA.

L. Carnahan	/s/ *L. Carnahan*
Declarant	Signature