No. 07-15763

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, *et al.*,

Plaintiffs-Appellants,

v.

MARY V. KING, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California in Case No. CV 99-04389 MJJ

AMICUS CURIAE BRIEF OF NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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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.

Dated: August 18, 2010

Respectfully submitted,

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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.

All parties have consented to the filing of this *amicus curiae* brief.

ARGUMENT

I. THE RIGHT TO KEEP AND BEAR ARMS IS FUNDAMENTAL, AND RESTRICTIONS ON THAT RIGHT ARE SUBJECT TO STRICT SCRUTINY.

This Court should hold, after *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that restrictions on the right to keep and bear arms are subject to strict scrutiny. That conclusion follows both from *McDonald*'s holding that the right to keep and bear arms is incorporated through the Fourteenth Amendment because of its fundamental nature and from *Heller*'s rejection of rational basis scrutiny and Justice Breyer's "interest-balancing" approach, which was simply intermediate scrutiny by another name.

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); *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").[1] *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.").[2]

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[1] 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' . . . ."). 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.

[2] Among many other examples of *McDonald*'s explicit recognition that the right to keep and bear arms is fundamental, *see also, e.g.*, *id.* at 3041 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only

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." *Id*. at 3036 (emphasis omitted). The very first sentence of the Court's analysis of this question stated that "[o]ur decision in *Heller* points unmistakably to [an affirmative] answer." *Id*.[3] *Heller* explained that, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. It was this fundamental "pre-existing right" that the Second Amendment "codified." *Id.* at 2797. Burdens on Second Amendment rights are thus subject to strict scrutiny. *See also United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009).

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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.").

[3] 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.").

2. Although *Heller* did not explicitly state that "strict scrutiny" is required of laws that restrict the rights protected by the Second Amendment, that is because the *Heller* Court eschewed levels of scrutiny in favor of an approach that focused more directly on history, which provided a clear answer to the ordinance before the Court in *Heller*. As *Heller* explained, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 128 S. Ct. at 2818; *see also id*. at 2821. Nonetheless, *Heller* points clearly to strict scrutiny as the level of scrutiny that would be required within a levels-of-scrutiny framework or when history did not provide a definitive answer, and *McDonald*'s incorporation holding eliminated any potential doubt on that score. *Heller* may leave open a debate between strict scrutiny and the *sui generis* historical approach that it applied,[4] but *Heller* and *McDonald* leave no room for debate between strict scrutiny and any lesser standard.

Even before *McDonald*, the inadequacy of intermediate scrutiny was clear from *Heller* itself. *Heller* explicitly and definitively rejected not only rational basis review, *id.* at 2818 n.27, but also Justice Breyer's "interest-balancing" approach—which was intermediate scrutiny by another name. *See id*. at 2821; *McDonald*, 130 S. Ct. at 3050 (plurality op.) ("while [Justice Breyer's] opinion in *Heller*

[4] The Chief Justice suggested at oral argument that a levels-of-scrutiny framework was atextual and unhelpful. *See* Tr. of Oral Arg., *Heller*, at 44.

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*, 128 S. Ct. at 2851-52 (Breyer, J., dissenting).

Terminology aside, however, Justice Breyer's approach in substance was simply intermediate scrutiny. Justice Breyer relied (*see id*. at 2852) on cases such as *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Med. Center*, 535 U.S. 357 (2002), which explicitly apply intermediate scrutiny. Even more revealingly, 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 U.S., *Heller*, at 8, 24, 28. Because Justice Breyer's interest-balancing amounted to intermediate scrutiny and the Court rejected it (and reaffirmed that rejection in *McDonald*), it would be inappropriate for this Court to adopt intermediate scrutiny as the standard for judging restrictions on the right to keep and bear arms.

3. Contrary to Justice Breyer's rejected suggestion in dissent, *see Heller*, 128 S. Ct. at 2851, *Heller*'s underlying logic—that the right to keep and bear arms is fundamental and that restrictions on the right require strict scrutiny—is entirely consistent with its dictum that certain types of restrictions, such as bans on possession by felons and the mentally ill and "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," are "presumptively lawful," *id.* at 2817 & n.26.

First, a State obviously has a compelling interest in prohibiting firearm possession by violent felons and the insane. The interest in keeping private firearms out of certain *truly* sensitive places may well be compelling as well. Thus, it was of no great moment that the *Heller* Court suggested that in future cases the government might easily prove that laws prohibiting firearm possession by convicted felons, or possession in sensitive places like courthouses or prisons, satisfy strict scrutiny. Because "[t]he fact that strict scrutiny applies 'says nothing about the ultimate validity of any particular law,'" predicting that such restrictions will be upheld is in no way inconsistent with requiring strict scrutiny. *Johnson v. California*, 543 U.S. 499, 515 (2005) (citation omitted); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (stating in First Amendment context that

"presumptive invalidity does not mean invariable invalidity"). This Court need not overread the "presumptively lawful" dictum to mean any more than that.[5]

Second, it is possible that the *Heller* Court may have been stating merely that, based on its preliminary understanding of the relevant history, such restrictions appear to fall outside the bounds of the right as understood at the time of the Framing, with future cases available to test that proposition and refine the precise contours of the right. *See* 128 S. Ct. at 2821 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. . . . [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").[6] Indeed, in his concurring opinion in *McDonald*,

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[5] In some truly sensitive places it may be that there is an applicable test that takes into account the specific context, such as *Turner v. Safley*, 482 U.S. 78 (1987), in the prison context. But such a context-specific test does not undermine the general applicability of strict scrutiny. One could say, for example, that restrictions on speech in prison are "presumptively lawful," citing *Turner*, without undermining the general applicability of strict scrutiny to restrictions on speech.

[6] *See also United States v. Skoien*, __ F.3d __, No. 08-3770, 2010 U.S. App. LEXIS 14262, at *6 (7th Cir. 2010) (en banc) ("That *some* categorical limits are proper is part of the original meaning . . . ."); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1449 (2009) ("Sometimes, a constitutional right isn't violated by a restriction because the restriction is outside the terms of the right as set forth by the constitution.").

Justice Scalia specifically explained that "[t]he traditional restrictions [on the right to keep and bear arms] go to show the scope of the right, not its lack of fundamental character." *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring).

The need for strict scrutiny of restrictions on the rights protected by the Second Amendment is hardly undermined by the recognition that there may be categories of conduct relating to keeping and bearing arms that fall outside the scope of the Second Amendment. After all, the fact that there are categories of *un*protected speech is hardly a justification for applying less than strict scrutiny to laws that restrict protected speech. *See, e.g.*, *R.A.V.*, 505 U.S. at 382-83 ("From 1791 to the present . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas . . . . We have recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations."). Just as "a limited categorical approach has remained an important part of our First Amendment jurisprudence," *id*. at 383, *Heller*'s suggestion that certain categories of historically supported restrictions are lawful is entirely consistent with recognizing that restrictions on rights that are protected by the Second Amendment must be subjected to strict scrutiny.

4. In the end, given the general rule that restrictions on fundamental constitutional rights are subject to strict scrutiny, the contention that restrictions on Second Amendment rights should be permitted under a less-demanding standard

reduces to the contention that the right to keep and bear arms is a lesser right. Any such contention would have been deeply misguided before *McDonald*, and in light of *McDonald* no such contention is remotely tenable.

First, the Court has reiterated that it is improper to prefer certain enumerated constitutional rights while relegating others 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." 128 S. Ct. at 2821. 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. *Id*. at 2816. In

McDonald, confronted with the argument that the Second Amendment right, even though an individual, enumerated right as held by *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. There is consequently no basis to review restrictions on that right under anything less demanding than the strict scrutiny that governs challenges to restrictions on other fundamental rights. *Heller*'s historical approach was no less demanding than ordinary strict scrutiny, and certain types of restrictions may be conducive to that approach. But to the extent that a levels-of-scrutiny analysis is to apply, the scrutiny must be strict.

II. THE ORDINANCE FAILS TO MEET HEIGHTENED SCRUTINY.

Ultimately, regardless of the precise level of scrutiny this Court applies, the County's ordinance does not pass constitutional muster. The ordinance singles out Second Amendment activity for unique, disfavored treatment and attempts to

render county property a Second Amendment-free zone. Second Amendment activity receives less protection than wholly unprotected conduct and radically less protection than First Amendment activity. But "treat[ing] 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" is exactly what the *McDonald* Court held could not be done. *Id.* at 3044 (plurality op.).

1. The ordinance singles out Second Amendment activity for disfavored treatment and declares county property a Second Amendment-free zone in ways that fail any applicable standard of review. The ordinance treats Second Amendment activity far less favorably than other protected conduct, such as First Amendment activity, and indeed treats Second Amendment activity far less favorably than activities that enjoy no constitutional protection whatsoever. Indeed, the ordinance effectively attempts to banish all Second Amendment activity from county property.

It is difficult to find precedents for an ordinance that so directly attacks a fundamental constitutional right. Perhaps the closest analog is the ordinance unanimously invalidated by the Supreme Court in *Bd. of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). That ordinance sought to create a "virtual 'First Amendment Free Zone'" in Los Angeles International Airport ("LAX"). *Id.* at 574. The parties disputed vigorously

whether LAX was a public forum triggering strict scrutiny or a non-public forum triggering lesser scrutiny. *Id.* at 573-74. In the end, the Supreme Court found it unnecessary to resolve that question because the ordinance failed any applicable level of scrutiny. *Id.* at 574-75. The same is true of the ordinance here. By singling out Second Amendment activity for unique disfavor and attempting to decree all county property a Second Amendment-free zone, the ordinance fails strict scrutiny, or any other level of scrutiny that could apply.

The County regularly schedules public and private events at its fairgrounds. Those events include the county fair, the Scottish Caledonian Games, and presumably a host of other events from antique shows to book fairs. Some of those activities trigger only minimal constitutional protection, yet the County welcomes those activities on its property. At the same time, the ordinance prohibits law-abiding citizens—with few exceptions—from exercising their Second Amendment rights on that same property.

This difference in treatment renders the ordinance invalid. The Court's admonition that the right to keep and bear arms must not "be singled out for special—and specially unfavorable—treatment," *McDonald*, 130 S.Ct. at 3043, has the same import for *enforcing* that right as for incorporating it. Indeed, *McDonald* made clear that Second Amendment rights are no less fundamental than First Amendment rights. By *encouraging* book fairs and theatrical performances, the

County concedes that the fairgrounds are suitable for private events and expressive activity (in a way that truly sensitive locations like courthouses and prisons presumably are not). By opening its fairgrounds as a forum for such events, while simultaneously *prohibiting* gun shows, the County demonstrates that it prefers activity protected by the First Amendment—and some *unprotected* activity—over activity protected by the Second Amendment.[7] This should come as no surprise, given the striking evidence of outright animus by County decisionmakers against Second Amendment rights. *See Nordyke v. King*, 563 F.3d 439, 443, *vacated* 575 F.3d 890 (9th Cir. 2009) (noting that author of ordinance "declared she had 'been trying to get rid of gun shows on Count[y] property' for 'about three years,' but she had 'gotten the run around from spineless people hiding behind the constitution, and been attacked by aggressive gun toting mobs on right wing talk radio'"). The resulting ordinance cannot be hidden from constitutional scrutiny: the County's attempt to treat the right to keep and bear arms as "a second-class

[7] In fact, the ordinance makes explicit the second-class status of the right to keep and bear arms. Although firearms possession by law-abiding citizens at a peaceful gun show in a public forum is prohibited, the County has sanctioned firearms possession for a few narrow purposes, including "by an authorized participant in a motion picture, television, video, dance or theatrical production or event . . . ." Alameda County Code § 9.12.120(F)(4). The County thus tolerates Second Amendment rights only where they are incident to First Amendment conduct. This exception puts a fine point on the disparity between the County's treatment of these rights—a disparity that is particularly problematic in light of *Heller*'s emphasis on the similarities between the First and Second Amendments. *See* pp. 9-10, *supra*.

right" compared to First Amendment rights is directly contrary to *McDonald*, 130 S. Ct. at 3044, and "disrespect[s] the Constitution," *Ullmann*, 350 U.S. at 429.

Finally, to the extent the County tries to justify exclusion of gun shows on the ground that they are commercial events, that post-hoc rationalization fails. For one thing, the ordinance prohibits *all* firearm possession, not just possession at gun shows. Yet even if the ordinance were limited to commercial gun shows, it would fail. It would be one thing if the County prohibited *all* commercial enterprises on county property. But the County permits a variety of commercial events at the fairgrounds—just not commercial events that it dislikes because they involve the exercise of Second Amendment rights. Indeed, the County invited the Nordykes to plan a commercial event—a gun show without the actual guns. The idea of a gun-less gun show may have been absurd, but it confirmed beyond doubt that the County set guns, as opposed to commercial enterprise, in its sights. Moreover, by banning possession, the County singles out the constitutionally protected aspect of gun shows for prohibition—hardly a mark in favor of constitutionality.

2. The ordinance's singling out and hostile animus are enough to invalidate it. But the ordinance also fails because it lacks any measure of tailoring. The ordinance states that it "will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the county." § 9.12.120(A). However, the ordinance is not remotely tailored to serve the County's public safety

interest. It broadly bans firearm possession by "[e]very person" on county property. § 9.12.120(B). That breadth alone makes the ordinance suspect given *Heller*'s recognition that all law-abiding citizens have the right to keep and bear arms (even though the right may not extend to "felons and the mentally ill"). 128 S. Ct. at 2816-17. The ordinance gets things backward by first burdening every citizen's Second Amendment rights but then granting exceptions to certain favored persons, such as guards and messengers for financial institutions. § 9.12.120(F)(2).[8]

The ordinance also applies to *all* county property—a blatant overreach. The fairgrounds can hardly be equated with "sensitive places such as schools and government buildings." *Heller*, 128 S. Ct. at 2817. By permitting the Scottish Games, the County admits the fairgrounds are not so sensitive as to require prohibiting all firearms at all times. But an exception for thespians does not show narrow tailoring; rather, it shows impermissible favoritism for First Amendment protected conduct over Second Amendment protected conduct. *See* pp. 11-14, *supra*.

The corresponding California statute also reveals the ordinance's lack of tailoring. The state statute *permits* gun shows in public buildings, with safeguards

[8] That the ordinance requires guards to obtain "a valid certificate" is not a valid distinction. Ordinary law-abiding citizens should have the same right to obtain such a certificate—and to keep and bear arms—as those whom the County favors.

such as requiring vendors to keep firearms unloaded and secured except for brief mechanical demonstrations to buyers. Cal. Pen. Code § 12071.4(b)(5). That statute may not preempt local ordinances as a matter of state law, *see Nordyke*, 563 F.3d at 444, but it vividly reveals a narrower way to protect the County's public safety interest. Had the County followed the State's approach—affirming the rights of law-abiding citizens while specifically targeting public safety measures—the ordinance would stand a far greater chance of satisfying heightened scrutiny.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

Date: August 18, 2010

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CERTIFICATE OF COMPLIANCE

This brief complies with the enlargement of brief size granted by Court order dated July 19, 2010. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 4,052 words, less than the 4,200-word equivalent to the 15-page limit in the Court's order, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). *See* Circuit Rule 32-3.

Dated: August 18, 2010

Respectfully submitted,

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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 August 18, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have deposited the foregoing brief with UPS for overnight delivery to the following non-CM/ECF participants:

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