No. 07 – 15763

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, *et al.*,
Appellants

v.

MARY V. KING, *et al.*,
Appellees

Appeal from the U. S. District Court
for the Northern District of California
D.C. No. CV 99-04389-MJJ

AMICUS CURIAE BRIEF OF THE CALIFORNIA RIFLE & PISTOL ASSOCIATION FOUNDATION IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

CALIFORNIA RIFLE & PISTOL ASSOCIATION FOUNDATION

The California Rifle & Pistol Association Foundation has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

Date: August 17, 2010

Respectfully Submitted,

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IDENTITY OF THE *AMICUS CURIAE*

The California Rifle and Pistol Association (CRPA) Foundation is a non-profit entity classified under section 501(c)(3) of the Internal Revenue Code and incorporated under California law, with headquarters in Fullerton, California. The CRPA Foundation seeks to raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms. The CRPA Foundation also supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans.

Consent to File

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

ARGUMENT

I. UNDER THE CATEGORICAL APPROACH APPLIED BY THE UNITED STATES SUPREME COURT, LEGISLATIVE FINDINGS CANNOT JUSTIFY A PROHIBITION ON SECOND AMENDMENT-PROTECTED ACTIVITY ON ALL COUNTY PROPERTY

Nationwide, gun shows are commonly held at fairgrounds. Googling "gun show fairgrounds" results in countless hits. Gun shows were held at the Alameda County fairgrounds until Supervisor Mary King introduced her bill "to get rid of

gun shows on County property[.]" *Nordyke v. King*, 563 F.3d 439, 443 (9th Cir. 2009) (vacated). "Before the County passed the law at issue in this appeal, the Alameda gun shows routinely drew about 4,000 people. The parties agree that nothing violent or illegal happened at those events." *Id*. Yet gun shows are now banned at the Alameda County fairgrounds because Alameda County Code § 9.12.120(b) provides: "Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor."

The issue here is whether Alameda County's mere recitation of unsubstantiated allegations, even if labeled "legislative findings," can trump a core constitutional right – the mere possession of a firearm, together with the ability to buy and sell a firearm at a place where gun shows are commonly held. The answer is no.

While asserting no nexus to gun shows in particular, the County's ordinance nonetheless generically "finds" that "gunshot fatalities are of epidemic proportions in Alameda County" and "[p]rohibiting the possession of firearms on County property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the County." *Id.* at 443, 461. *See also* Alameda County § 9.12.120(a). This is insufficient to justify the ordinance.

In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the District sought to rely on legislative "findings" similar to Alameda's to justify banning the possession of handguns. Without *any* consideration or even mention of the legislative findings, *Heller* took the following categorical approach:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. . . . Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.

Id. at 2817-18.

Heller rejected Justice Breyer's "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id*. at 2821. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem . . . ." *Id*.

The District's findings stated that the goal of the ban was "to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia." *Id*. at 2854 (Breyer, J., dissenting). Justice Breyer unsuccessfully sought to rely on the committee report proposing the handgun ban which recited statistics on firearm-related violence and murder. *Id*. at 2854-55 (Breyer, J., dissenting). *Heller* nonetheless rejected the dissent's conclusions

based on the legislative findings, remarking:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The 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.

Id. at 2821 (emphasis in original).

Similarly, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), made one bare mention of Chicago's legislative finding, and accorded it no discussion at all. 130 S. Ct. at 3026 (quoting Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982) stating that the handgun ban was enacted to protect residents "from the loss of property and injury or death from firearms"). *McDonald* upheld the right of residents to enhance their safety by having arms for their defense, noting that "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *Id.* at 3049.

Generally speaking, the Court does not allow legislative fact-finding to undermine fundamental rights. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications. v. Virginia*, 435 U.S. 829, 843 (1978). Moreover, even under the relatively relaxed scrutiny that applies to indirect impositions on relatively less protected speech, such as regarding the location of an adult bookstore, the Court

has emphasized that a municipality cannot "get away with shoddy data or reasoning. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002).[1] And, if plaintiffs "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings," then "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."[2] *Id*. at 438-39.

Alameda County's purported findings are of the same self-serving type as those rejected by the Court in *Heller* and *McDonald* – a bare recitation of mayhem with firearms and the jump to a conclusion that a firearm prohibition is required for public safety. The County's findings present *no* data, not even shoddy data,

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[1] The above applies to speech that is *less* protected than ordinary speech. *Compare id.* at 443-44 (Scalia, J., concurring) ("the business of pandering sex" may be banned) with *id*. at 448 (Kennedy, J., concurring) (noting exceptions to rule that "the government has no power to restrict speech based on content[.]"). Possession of firearms, including at gun shows, under the Second Amendment is hardly equivalent to "sexual and pornographic speech" for which only intermediate scrutiny applies under the First Amendment. *See Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir. 2003).

[2] Courts must not "abdicate our 'independent judgment'" in according "complete deference to a local government's reliance" on non-germane studies. *Abilene Retail No. 30, Inc. v. Board of Com'rs of Dickinson County, Kan*., 492 F.3d 1164, 1175-76 (10th Cir. 2007) (concluding that "a material dispute of fact exists as to whether the Board has established such a connection[]" between the activity in question and adverse effects).

establishing a nexus between a reduction in violent crime and a law banning the possession of firearms on County property, including at gun shows.[3] Even under the standard of intermediate scrutiny, the County must present "relevant evidence,"[4] not just general allegations. It hasn't and it can't.

II. THE RIGHT IS FUNDAMENTAL AND STRICT SCRUTINY APPLIES

The Second Amendment recognizes a fundamental right to keep and bear arms, restrictions on which are subject to strict scrutiny. A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). Under the strict-scrutiny test, the government must prove that a restriction "is (1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

The Second Amendment right is incorporated through the Due Process Clause of the Fourteenth Amendment because "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty," and is "deeply rooted in this

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[3] *See New Albany DVD, LLC v. City of New Albany, Ind.*, 581 F.3d 556, 560 (7th Cir. 2009) ("New Albany has not supplied evidence that 'fairly supports' the idea that adult bookstores located near churches or residences attract thieves . . . .").

[4] *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 173 (2d Cir. 2007) ("Because defendants cannot show that they relied on *relevant evidence* . . ., they cannot establish that the Ordinance furthers a substantial government interest.") (emphasis added).

Nation's history and tradition . . . ." *McDonald*, 130 S. Ct. at 3036. The right was considered fundamental "by those who drafted and ratified the Bill of Rights[,]" *id*. at 3037, as well as by "the Framers and ratifiers of the Fourteenth Amendment." *Id*. at 3042. Accordingly, the Second Amendment "protects a right that is fundamental from an American perspective" and "applies equally to the Federal Government and the States." *Id.* at 3050.

McDonald refused "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 . . . ." *Id*. at 3044. "[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *Heller*, 128 S. Ct. at 2797(emphasis in original). This precludes use of the rational-basis standard of review. *Id*. at 2818 n.27. The term "reasonable" is a synonym of "rational,"[5] and *McDonald* rejected the power "to allow state and local governments to enact any gun control law that they deem to be reasonable . . . ." 130 S. Ct. at 3046.

As noted, *Heller* also rejected Justice Breyer's "interest-balancing inquiry," *Heller*, 128 S. Ct. at 2821, which was essentially a form of intermediate scrutiny.

The correct test here is strict scrutiny.

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[5] *Webster's New World Dictionary* 1118 (3d College ed. 1991).

III. THE BAN ON GUNS SHOWS AT THE FAIRGROUNDS MAY NOT BE UPHELD UNDER THE "SENSITIVE PLACE" EXCEPTION LISTED IN *HELLER*

A. The County's Ordinance Has No Historical Analog

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 128 S. Ct. at 2821.

At the founding of our nation, there was no equivalent to Alameda's County-property (including fairgrounds) ban. Buying and selling firearms was a commonplace and necessary component of the right to keep and bear arms. From the time in 1776 when the first State constitutions were adopted through the end of that century, no laws were on the books which remotely would be precedent for the ordinance at issue. *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 126-68 (2008) (State-by-State survey). In every State, regardless of whether it had a bill of rights, the rights peaceably to assemble and to keep and bear arms were recognized as fundamental. *Id*. At a gun show, these rights are being exercised simultaneously.

In fact, the ability to acquire firearms was considered not just a right, but also a duty. The Militia Act of 1792 required "every free able-bodied white male citizen" aged 18 to 44 years old to "be enrolled in the militia" and to "provide himself with a good musket or firelock." Militia Act of 1792, ch. 33, 1 Stat. 271

(1792)(repealed 1903). Jefferson wrote in 1793: "Our citizens have always been free to make, vend, and export arms. It is the constant occupations and livelihood of some of them." 6 THOMAS JEFFERSON, WRITINGS 252-53 (P. Ford ed. 1895).

The right to have arms, and thus to buy and sell them, continued to be considered fundamental in the early Republic.[6] *McDonald*, 130 S. Ct. at 3038 (citing abolitionist LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 66 (1860)). Spooner argued that slavery was inconsistent with the Second Amendment, under which "any man has a right either to give or sell arms to those persons whom the States call slaves . . . ." *Id*. at 98.

The Fourteenth Amendment was adopted in part to extend Second Amendment rights to African Americans. *McDonald*, 130 S. Ct. at 3038. For instance, a Mississippi law prohibited them from possession of a firearm without a license. *Id*. (quoting Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1). Similar laws in other states prohibited a white person from selling or giving a firearm to an African American. *McDonald*, 130 S. Ct. at 3038.

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[6] *See generally* Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347 (Feb. 1999). Since this case concerns gun exhibitions at fairgrounds, it is worth noting that the first World's Fair – the 1851 London Crystal Palace Exhibition – featured Cyrus McCormick with his reapers and Samuel Colt with his revolvers, both getting rave reviews. *See* World Fairs *available at* http://www.answers.com/topic/world-s-fair (last visited Aug. 8, 2010). Colt, "the star attraction of the American section," displayed some 450 guns. R.L. WILSON, COLT: AN AMERICAN LEGEND 59 (1985).

In explaining the aims of the Fourteenth Amendment, *McDonald* pointed to the Freedmen's Bureau Act, which protected "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms* . . . ." 130 S. Ct. at 3040 (emphasis in original). This explicitly protected the right to acquire and dispose of arms.

Nineteenth-century courts recognized that the right to have arms includes the right to buy and sell them. "The right to keep arms, necessarily involves the right to purchase them . . . ." *Andrews v. State*, 50 Tenn. 165, 178 (1871).[7] *See Heller*, 128 S. Ct. at 2809 (favorably quoting *Andrews*).

Efforts to restrict gun sales in the early twentieth century continued in the Jim Crow South. It was argued that "in the Southern states where the negro population is so large, . . . this cowardly practice of 'toting' guns has always been one of the most fruitful sources of crime," and thus "a prohibitive tax [should be] laid on the privilege of handling and disposing of revolvers and other small arms . . ." Comment, "*Carrying Concealed Weapons*," 15 VA. L. REG. 391-92 (1909). Virginia passed a prohibitive tax, but it was held to be unconstitutional. *Commonwealth v. O'Neal*, 13 VA. L. REG., N.S. 746 (Hustings Ct. - Roanoke

[7] *See also id.* at 178 (right to keep arms "necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted[]").

1928). But with the exception of those notorious Jim Crow laws, there is simply no analog to the Alameda County ordinance.

B. The County's Ordinance Does Not Cover "Sensitive Places" In The Sense Used in *Heller*

The ordinance prohibits possession of a firearm on any County property rather than specific sensitive places within the meaning of *Heller*. *Heller* did not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 128 S. Ct. at 2816-17.

But the ordinance prohibits possession of a firearm on *any* County property, rather than specific, "sensitive places" demonstrated by the County to actually to be such. This case involves whether fairgrounds, when used for a gun show – where all persons on the premises (unlike a school or government building) are there voluntarily for the same firearms-related purpose (and are heavily regulated by state laws governing gun shows in the process) – constitutes a "sensitive place" without regard to the use and people who are present. It does not.[8]

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[8] Nor is the prohibition on gun shows a valid condition on the commercial sale of arms. "[T]he specific language chosen by the Court refers to 'prohibitions' on the possession of firearms by felons and the mentally ill . . . as opposed to regulations, whose validity would turn on the presence or absence of certain circumstances . . . ." *United States v. Marzzarella*, 2010 WL 2947233, *3 (3d Cir. 2010). Sales regulations fall in the latter category:

Because the "sensitive places" dictum in *Heller* was directed largely to the United States' brief,[9] federal law is the place to look in defining what *Heller* meant. *See* Brief of United States as Amicus Curiae at 3, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). Federal law prohibits possession of a firearm in sensitive places such as a federal facility or a federal court facility, provided that signs are posted conspicuously. 18 U.S.C. § 930. "Federal facility" is narrowly defined as "a building or part thereof" where federal employees regularly perform their duties. *Id*. § 930(g)(1). "Federal court facility" is defined as the courtroom,

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> Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment under this reading. . . . In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.

Id. n.8. The constitutional right to possess an object, whether it be a book or a firearm, implies the right to buy and sell such object. "Without those peripheral rights the specific rights would be less secure." *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (holding that free speech and press include "the right to distribute, the right to receive, . . . and freedom to teach").

[9] *See, e.g.*, Brief of United States as Amicus Curiae at 21 n.5, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (the Second Amendment may have limited or no application to special federal enclaves such as military bases, where the government has always enjoyed greater leeway in regulating the private conduct of individuals who voluntarily enter).

chambers, and various rooms and offices for official use. *Id*. § 930(g)(3). Federal law also prohibits firearm possession in other places deemed sensitive. *E.g.*, *id*. §922(q)(2) (school zone); § 1791 (prison). But federal law does *not* prohibit firearm possession on *all* federal property, such as other federal buildings and open spaces. Rather, Congress has consistently acted to protect Second Amendment rights. Congress has recognized that the Second Amendment protects the right to buy and sell firearms, including at gun shows. In enacting the Firearms Owners' Protection Act of 1986, Congress declared that it was amending the Gun Control Act to ensure consistency with the Second Amendment:

> The Congress finds that–
> (1) the rights of citizens--
> (A) to keep and bear arms under the Second Amendment to the United States Constitution; . . .
> require additional legislation to correct existing firearms statutes and enforcement policies .

Firearm Owners' Protection Act §1(b), Pub. L. No. 99-308, 100 Stat. 449 (1986). One such amendment provided that a federal firearms licensee may conduct business at "a gun show or event sponsored by any national, State, or local organization, or any affiliate of any such organization devoted to the collection, competitive use, or other sporting use of firearms in the community . . . ." 18 U.S.C. § 923(j), 100 Stat. at 455-56. It further provided that the amendment did not "diminish in any manner any right to display, sell, or otherwise dispose of firearms" in effect under prior law. *Id*. "This would include, for instance, existing

rights of non-licensees to transact exchanges at gun shows." S. REP. NO. 98-583, 19 (1984).[10]

Similarly, California prohibits possession of a firearm at "any state or local public building," which it defines with specificity. CAL. PENAL CODE § 171b. An exemption is provided for gun shows. *Id*. § 171b(b)(7). California extensively regulates gun shows, including in regard to gun safety and lawfulness of transactions. *See, e.g.*, CAL. PENAL CODE §§ 12070(b)(5), 12071(b)(1), 12071.1, 12071.4.[11]

In contrast with the above, Alameda County Code § 9.12.120(b) prohibits possession of a firearm "on County property." That is, *all* County property, regardless of its nature – without any relevant limitation. This renders the term "sensitive place" meaningless. The fact that 4,000 people may attend a gun show,

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[10] *See also* the Protection of Lawful Commerce in Arms Act § 2(b)(2), Pub. L. No. 109-92, 119 Stat. 2095(2005) (recognizing Second Amendment rights and declaring purpose of Act "to preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.").

[11] There has been some nationwide controversy about gun shows because in some states firearms can sometimes be sold by private parties without purchaser background checks. This is *not* the case in California, however, because the special Gun Show Act (CAL. PENAL CODE § 12070 *et seq*.) requires all sales at the gun show to go through a licensed "transfer dealer" at the gun show. That dealer performs the background check and registers the firearm in the same manner as in their gun stores. Appellees have stipulated that sales at the Appellants' gun show have always conformed to this law.

Nordyke, 563 F.3d at 443, hardly makes it a sensitive place – otherwise all gun shows would be sensitive places. And they are all there voluntarily for a common purpose – it is not as if a school is in session or government employees are working at their jobs at the fairgrounds.

As noted above, fairgrounds are a common venue for gun shows throughout the United States. Just as *Heller* used a nationwide "common use" test to determine which types of firearms are constitutionally protected, 128 S. Ct. at 2817, application of a similar nationwide "common use" test establishes that fairgrounds are not "sensitive places."

CONCLUSION

The Court should reverse the judgment of the District Court and declare Alameda County Code § 9.12.120(b) void.

Date: August 17, 2010

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Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-41 for Case Number 07-15763

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 3,711 words 336 lines of text or 15 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

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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 17, 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 mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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