CIVIL NO: 07-15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs and Appellants,

vs.

MARY V. KING, et. al.,

Defendants and Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. MARTIN J. JENKINS
(CASE NO. CV-99-04389-MJJ)

APPELLEES' SUPPLEMENTAL BRIEF REGARDING THE IMPACT OF *McDONALD v. CHICAGO*

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I. Introductory Statement

McDonald v. City of Chicago, 561 U.S. ___, 130 S.Ct. 3020 (June 28, 2010) (plurality opinion of Alito, J.) (Thomas, J. concurring), holds that the Second Amendment protects a fundamental right that is fully applicable to the states and local governments. In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *vacated*, — F.3d —, 2010 WL 2721856 (9th Cir. July 12, 2010), this Court arrived at the same conclusion regarding the "right to keep and bear arms" and treated Appellants' challenge as invoking a fundamental right, fully consistent with the Supreme Court's holding in *McDonald*. 563 F.3d at 457-58.

McDonald reiterates and reaffirms the Supreme Court's conclusions in *District of Columbia v. Heller*, 554 U.S. ---, 128 S.Ct. 2783 (2008), regarding the nature and scope of the Second Amendment right. *See McDonald*, 130 S.Ct. at 3036-47. *McDonald* reiterates that individual self-defense is the "central component" of the Second Amendment. *Id.* at 3036. The *Heller* decision makes clear that the right to possess a handgun in the home for lawful self-defense is the core right protected by the Second Amendment. 128 S.Ct. at 2817. *McDonald* reaffirms that holding. 130 S.Ct. at 3036, 3047. Here, however, Appellants admit that "[g]uns at gun shows are not weapons. They are not being used to protect life or property." Excerpts of Record in Appeal No. 07-15763 (ER2), Vol. II, pp. 319, lns. 12-14. Instead, Appellants challenge the County's Ordinance on the theory

that, as applied to the Nordykes' gun show on the Fairgrounds, the Ordinance effectively prevents them from holding a profitable gun show and thus indirectly makes purchasing firearms for self-defense more difficult. *See* 563 F.3d at 458; *see also* ER2, Vol. II, pp. 284-327. Assuming *arguendo* that indirect effect, the Ordinance does not render armed self-defense impossible as a practical matter. It leaves ample alternative venues for gun shows in the County and elsewhere nearby, and ample alternative venues for the purchase of firearms. *See* ER2, Vol. II, pp. 417-432.

Further, neither *Heller* nor *McDonald* suggests the Second Amendment entitles Appellants to purchase and sell firearms on government-owned property, or to possess them to facilitate such transactions. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 509-11 (1989) (State's decision not to allow use of public facilities and staff for abortions places no governmental obstacle in path of woman who chooses to terminate her pregnancy, and leaves woman in same position as if State had chosen not to operate public hospitals). Accordingly, this Court correctly determined that the Ordinance does not directly impede exercise of the protected right by Appellants. 563 F.3d at 460.

The Supreme Court has yet to clarify the level of review applicable to Second Amendment challenges. But nothing in *Heller* or *McDonald* even hints that the Court intends to deviate from its repeated admonition that before any level

of heightened scrutiny is triggered, the reviewing court must find that the challenged law directly burdens the protected fundamental right invoked. *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 547 (1983), *citing Harris v. McRae,* 448 U.S. 297, 322 (1980). As the Third Circuit recently noted, *Heller* suggests such a two-pronged approach is appropriate to Second Amendment challenges. *See U.S. v. Marzzarella*, —F.3d—, No. 09-3185, 2010 WL 2947233, *2 (3rd Cir. July 29, 2010). First, the court should consider whether the challenged law directly burdens conduct falling within the scope of the Second Amendment's guarantee. If not, the court's inquiry is complete. If so, the court applies a level of scrutiny that is appropriate to the specific challenge. *Ibid.*

As noted above, however, Appellants claim only an indirect burden on protected conduct. *See* 563 F.3d at 458 (noting the "Nordykes counter that the Ordinance indirectly burdens effective, armed self-defense because it makes it more difficult to purchase guns").[1] Therefore, Appellants' challenge does not pass the first prong of the test described in *Marzzarella.*

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[1] Congress' statement in the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et seq.*, regarding the Second Amendment and citizen access to firearms cannot be treated as defining the scope of the right. The U.S. Supreme Court continues to make clear that under the U.S. Constitution, the judicial branch, not the executive or legislative branch, determines what the law is. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch. 137 (1803); *see also Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980).

Moreover, the Ordinance is within two of the categorical exclusions from the Second Amendment identified in *Heller* and reaffirmed in *McDonald*. As a regulation of certain government-owned property, the Ordinance falls within *Heller's* "presumptively valid" category of laws regulating "sensitive places," as this Court has already determined. 563 F.3d at 459-60. *See* ER2, Vol. II, p. 404, Subd.(a). In addition, because Appellants challenge the Ordinance with respect to how it limits where guns may be purchased and sold, the Ordinance also fits within *Heller's* categorical exclusion for laws regulating commercial sales of firearms. 128 S.Ct. at 2816-17.

Accordingly this Court need not decide what level of scrutiny a court should apply in the context of a law that, unlike the Ordinance, directly burdens a protected right and is not "presumptively valid." The *Heller* Court clearly expressed a reluctance to decide issues not presented by the facts of the case before it, noting Second Amendment jurisprudence is in its infancy. 128 S.Ct. at 2821 (declining to determine incorporation issue, and declining to determine standard of review). Moreover, under any level of heightened scrutiny that may be appropriate to a Second Amendment challenge, the Ordinance is constitutional, as shown in Section V below.

II. The Record Before This Court Supports This Court's Prior Conclusions That The Ordinance Does Not Directly Burden Protected Conduct And Is Within A Categorical Exclusion From the Second Amendment's Protection.

With certain exceptions, the Ordinance prohibits firearms possession on certain open space, County-owned property, including the County Fairgrounds, County historic sites, and similar venues. ER2, Vol. II, pp. 404-405. It does not regulate firearms possession throughout the unincorporated territory (most of which is owned by private property owners or other public entities). It does not regulate residential property.[2] Appellants challenge the Ordinance as applied to the Nordykes' gun shows on the County Fairgrounds.[3] By statute, Alameda County

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[2] By statute, the existence of a separate corporate body, the Housing Authority of the County of Alameda, precludes ownership of public housing by the County. *See* Cal. Health & Safety Code §§ 34201(c), 34240, 34315(b), (e), (f), and 34400(d).

[3] Appellants' as-applied challenge implicates only application of the Ordinance to the Fairgrounds. Should Appellants seek to challenge the Ordinance on its face, this Court should decide their as-applied challenge first and if that challenge fails, as it does, any such facial challenge also fails. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991) (facial challenge should not be entertained when "as-applied" challenge could resolve case). To the extent the Amicus Curiae Brief of the California Rifle & Pistol Association Foundation urges that the Ordinance is invalid as applied to property other than the Fairgrounds, such a facial challenge is not before this Court. Moreover, on its face the Ordinance does not directly burden the right to possess a firearm for self-defense. As noted in footnote 2, above, the Ordinance does not apply to residential property. The Ordinance is also

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must manage all County-owned property in the interests of its inhabitants. Cal. Gov. Code § 23004(d). As government proprietor of the County Fairgrounds, in particular, the County must operate and manage the Fairgrounds for the principal purpose of the County agricultural fair. *See* Cal. Gov. Code §§ 25900 *et seq*. *See also* Cal. Food & Agric. Code §§ 4401 *et seq*. (governing use of state funds for County fair purposes). The Fairgrounds or portions thereof may be leased for an event sponsored by private parties, provided such event "will not interfere with the use of such property for fair purposes." Cal. Gov. Code § 25908. Alameda County contracts with the Alameda County Fair Association to conduct the Fair and operate and manage the Fairgrounds as allowed by California Government Code section 25905. *See* ER2, Vol. III, p. 440, Fact 8. All net proceeds received by the Association from whatever source must be deposited in the County Treasury in a separate fund, and may be expended only for support of the County Fair, including maintenance and operation of the County's fair facilities. Cal. Gov. Code § 25905. Thus, in considering non-fair uses of the Fairgrounds, the County must evaluate risks, financial or otherwise, that could jeopardize its duty to

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not a strict liability regulation. Accordingly, if an individual possessed a firearm on County-owned property for self-defense, that affirmative defense would be available in any prosecution under the Ordinance. *See People v. King*, 38 Cal.4th 617, 625, 42 Cal.Rptr.3d 743 (2006) (possession of firearms in violation of California law is not a strict liability offense and requires a culpable mental state).

maintain that venue for its principal purpose, the County fair.

The Ordinance was enacted after a mass shooting on the Fairgrounds during the County fair. ER2, Vol. II, p. 404, Subd.(a). Twelve people, most under the age of 21, the youngest of whom was 8, were injured. ER2, Vol. II, p. 400, ¶ 4. Eight victims suffered gunshot wounds and four victims sustained injuries in the crowd panic and melee following the shootings. *Id.* Emergency response teams, medical helicopters, and 157 law enforcement officers responded to the scene. *Id.* at p. 401, ¶ 5. Several victims had to be transported by helicopter to nearby hospitals. *Id.* The perpetrator was arrested in possession of a semi-automatic handgun. *Id.* at p. 401, ¶ 6.

The shootings gave rise to nineteen tort claims against the County. These claims culminated in eleven lawsuits alleging the County failed to take sufficient measures to protect the public by failing to prevent weapons from entering the Fairgrounds.[4] Excerpts of Record in Appeal No. 99-17551 (ER1) Vol. I, Tab 13, pp. 13-74; Supp. ER1, Vol. I, pp. 104-124. This shooting incident, the high level of gun homicides and injuries in the County, and that firearms rank as the leading

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[4] Contrary to statements of Appellants' counsel at oral argument before the en banc panel, the PLCAA does not immunize the County from liability for shootings. Its protections extend only to those in the business of manufacturing, importing or selling firearms. 15 U.S.C. § 7901, *et seq.*

cause of death for young people ages 15 through 24 in Alameda County, were among the findings made by the County Board of Supervisors in adopting the Ordinance. ER2, Vol. II, p. 404, Subd.(a). These findings are sufficient to justify the application of the Ordinance to the Fairgrounds.

As noted above, by its terms the Ordinance includes certain exceptions.[5] A participant in a production or event on the Fairgrounds may possess a firearm for use in the production or event provided the firearm is in the immediate possession of that participant or is secured when not in the participant's immediate possession.[6] ER2, Vol. II, p. 404, Subd.(f)(4). Unlike the Ordinance, State law does not limit the number of firearms that vendors or members of the public may bring onto the Fairgrounds for a gun show, or require they be kept in actual or constructive possession. *See* Cal. Penal Code §§ 12071.4(a)(5)&(j) (requiring firearms be secured in a manner that prevents operation except when their mechanical condition is being demonstrated).

During the Nordykes' gun shows, thousands of firearms were present on the

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[5] Because the Ordinance is not a strict liability regulation, California law also recognizes that self-defense may provide an exception to the Ordinance's prohibition in certain circumstances. *See* footnote 3 above.

[6] This exception applies only to firearms, not to ammunition, which is also prohibited for possession under the Ordinance.

Fairgrounds, and ammunition was offered for sale. ER2, Vol. III, p. 444, Fact 36. Attendance at their shows averaged around 4000 people. *Id.*, Fact 37. Other events (such as antique shows, and dog and cat shows) took place in locations on the Fairgrounds at the same time as the gun show. ER1, Vol. I, Tab 1, p. 27.

As noted above, the Ordinance applies only to certain County-owned property, and does not regulate throughout the unincorporated territory. It therefore leaves in tact numerous alternative venues for gun shows and gun sales. Between February 2003 and June 2005, not less than 242 gun shows were offered throughout California, in various venues, including in convention centers, exposition centers, and at the Cow Palace, and including gun shows on numerous occasions in Hayward (located in Alameda County), San Jose, San Mateo, and Antioch. ER2, Vol. II, pp. 420-431. The Nordykes (aka TS Trade Shows) offered gun shows on ten dates in 2005 in San Jose, which is about 27 miles from the County Fairgrounds. *Id.* at 417. In 1999, just prior to adoption of the Ordinance, there were 29 licensed firearms dealers operating in Alameda County and 109 licensed dealers operating in next-door Contra Costa County. ER1, Vol. I, Tab 13, p. 83.

As discussed more fully below, in the context of the applicable law, the foregoing facts amply demonstrate the challenged Ordinance does not directly burden Appellants' protected rights under the Second Amendment and that it should be treated as presumptively valid under *Heller* and *McDonald*.

III. The Right Protected By The Second Amendment Is Not Unlimited And Nothing In The Historical Record Or Applicable Law Supports Appellants' Claim to Protection Under the Amendment.

Heller and *McDonald* make clear that the right protected by the Second Amendment is not unlimited.[7] *See Heller*, 128 S.Ct. at 2821. As explained above, Appellants admit the Ordinance does not directly burden the core right or prevent them from exercising that right. The Ordinance also does not prevent any

[7] In *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), this court found that *Heller's* categorical exclusions are not dicta and bind lower courts. While there is some dispute in other courts regarding whether the categorical exclusions are dicta, several courts of appeal have given the language careful consideration in deciding Second Amendment challenges before them. The Supreme Court itself reaffirmed the presence of these limitations in *McDonald*. *See U.S. Marzzarella*, —F.3d—, No. 09-3185, 2010 WL 2947233, *2, n.5 (3d Cir. July 29, 2010). *See also U.S. v. Skoien,* —F.3d—, No. 08-3770, 2010 WL 2735747, *2 (7th Cir. July 13, 2010) ("although the passages we have quoted are not dispositive, they are informative. They tell us that statutory prohibitions on the possession of weapons by some persons are proper and, importantly for current purposes, that the legislative role did not end in 1791").

Appellant from possessing a firearm as a participant in an event at the Fairgrounds, provided the firearm is secured when not in that participant's immediate possession. ER2, Vol. II, p. 405, subd.(f)(4). Indeed, the Scottish Games held at the Fairgrounds complies with that requirement. ER2, Vol. III, p. 445, Facts 40-42. The General Manager of the Fairgrounds asked the Nordykes to submit a written plan for conducting their gun show in compliance with the Ordinance, but the Nordykes never did so. ER2, Vol. III, p. 443, Fact 26; p. 444, Fact 32.

Nevertheless, Appellants assert that the carrying onto the Fairgrounds of an unlimited number of firearms, unfettered by an immediate possession restriction, is conduct protected by the Second Amendment because it indirectly burdens purchase of arms. The historical record provides no support for such a claim.

Heller observes that the right secured by the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[8] 128 S.Ct. at 2816. The right to bear arms as commonly

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[8] Contrary to the Supreme Court's express direction in *Heller* and *McDonald*, Amicus Curiae California Rifle & Pistol Association Foundation asserts that a fundamental right exists to possess a firearm on any and all government property regardless of any need for defense of self or property. This assertion disregards that the Court in *Heller* and *McDonald* expressly limited the scope of its analysis to the right to possess a firearm in the home for self-defense where "the need for defense of self, family, and property is most acute." 130 S.Ct. at 3036. As noted above, the Ordinance does not regulate residential property, and

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understood at the time of ratification did not include a right to possess firearms on government property for purchase or sale; or a right to unregulated possession of firearms in public places; or a right to unregulated possession of firearms by an armed assembly in a public venue.[9] *Heller* itself recognizes a categorical exclusion for prohibitions on firearms possession on government property, albeit government buildings. 128 S.Ct. at 2816-17; *see also* 40 U.S.C. § 5104(e) prohibiting the carrying or ready accessibility of firearms on the United States Capitol Grounds or in any Capitol buildings (originally enacted July 31, 1946, just 8 years after enactment of the "long standing" prohibition on firearms possession by felons recognized as a categorical exclusion in *Heller*).

Further, gun shows such as the Nordykes' are events of quite recent vintage. The advent of gun sale-type gun shows results from rule changes by the Bureau of Alcohol, Tobacco & Firearms ("ATF") in 1984, when ATF liberalized restrictions

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Appellants have admitted that "[g]uns at gun shows are not weapons. They are not being used to protect life or property." ER2, Vol. II, pp. 319, lns. 12-14. Thus the Nordykes' gun show is simply not within the scope of the right as articulated in *Heller* and *McDonald*.

[9] *See* 4 William Blackstone, Commentaries at *149, citing laws making the public carrying of weapons as a breach of the peace, including the Statute of Northampton, 2 Edw. 3, c. 3 (1328), which prohibited any person from going "armed by night or by day, in fairs, markets, nor in the presence of Justices or other ministers, nor in no part elsewhere…"

regarding sales by licensed firearms dealers.[10] *See* 27 C.F.R. § 178.100 (1984) (redesignated 27 C.F.R. § 478.100 on Jan. 24, 2003). Prior to the rule change, licensed dealers were permitted to sell firearms only from the address specified on their licenses. The new rule allowed them to sell firearms at gun shows in the same state.[11]

Summarizing comments to the proposed rule change in 1984, ATF stated:

> "A strong underlying reason of many of those who expressed opposition to adoption of their [sic] proposal was that the proposal would seriously jeopardize or destroy the gun show as they understood it. Many individuals see the gun show as a social event of major importance devoted to educational and historical values which would be diluted by the admission of licensees selling modern firearms. This commercialization of the gun show would, in their view, be tantamount to the destruction of the gun show."

Sale of Firearms and Ammunition by Licensees at Gun Shows, 49 Fed. Reg.

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[10] The Code of Federal Regulations defines a gun show as "a function sponsored by a national, state or local organization, devoted to the collection, competitive use, or other sporting use of firearms or an organization or association that sponsors functions *devoted* to the collection, competitive use, or sporting use of firearms." 27 C.F.R. § 478.100(b) (January 24, 2003). This definition makes no reference to gun sales.

[11] This change was then also enacted by statute in the 1986 Firearms Owners Protection Act, resulting in the current proliferation of gun shows involving licensed dealers. *See* Tom Diaz, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 43-49 (The New Press 1999) (citing a letter submitted by the Executive Director of the National Alliance of Stocking Gun Dealers to hearings of the U.S. Subcommittee on Crime and Criminal Justice).

46889-01, p. 46889 (Nov. 29, 1984) (to be codified at 27 C.F.R. pt. 178), 1984 WL 132398.

In short, the conduct Appellants claim is within the Second Amendment guarantee is far attenuated from the conduct acknowledged in *Heller* as the "core right," and is also outside the protection of the right to bear arms as commonly understood historically. Moreover, the Ordinance is within two of the "presumptively valid" categories of firearms regulation recognized in *Heller* and reaffirmed in *McDonald*, as explained in Section IV below.

IV. The Ordinance Is A Presumptively Valid Regulation Because The County Is Acting As Proprietor Of Government Property In Enforcing It.

To the extent the Ordinance limits the location of, or venues for, firearms purchase or sale, it is a regulation of commercial firearms sales, and falls squarely within that category of presumptively valid regulations. *Heller*, 128 S.Ct. at 2816-17. To the extent the Ordinance prohibits possession of firearms on the Fairgrounds, that venue is within the "sensitive places" category recognized in *Heller*.

Although the *Heller* Court gave the examples of government buildings and schools when describing this category, the Court also specifically stated that its list was not exhaustive. *Id*. at 2816-17, n.26. Neither *Heller* nor *McDonald* explains

how a court should determine additional "sensitive places." This Court previously determined that the Fairgrounds shares characteristics of government buildings or schools, the two examples of "sensitive places" provided in *Heller*. 563 F.3d at 459-60.

In addition, like government buildings and schools, the Fairgrounds is a venue maintained principally for an aspect of government-sponsored activity. When regulating these venues to support, maintain or further that principal purpose, government is acting primarily in its proprietary role. In the context of the First Amendment, government has wider leeway to regulate its property when it is acting principally as proprietor of that property, rather than as sovereign. 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, 1473 (June 2009). The First Amendment analogy is appropriate here given that the *Heller* Court invoked First Amendment jurisprudence in its discussion of categorical exclusions from the Second Amendment, as well as elsewhere in the opinion. 128 S.Ct. at 2799, 2816.

As noted in Section II above, as proprietor of the County Fairgrounds, the County is charged by the State with maintaining and operating that property to support its use for the County agricultural fair. The County has direct experience with the human and financial risks of firearms possession on the Fairgrounds: That

experience is cited by the County in the Ordinance's findings. ER2, Vol. II, p. 404, Subd.(a). That experience shows that firearms possession on the Fairgrounds gives rise to risks that threaten the County's ability to maintain the property for its principal purpose, and that threaten the public safety of its inhabitants enjoying that venue. ER1, Vol. I, Tab 13, pp. 13-74; Supp. ER1, Vol. I, pp. 104-124. At the same time, like regulation of firearms possession in government buildings and schools, the Ordinance places no direct obstacle to purchase of, or possession of, a firearm for self-defense in the home. Like the State's decision upheld in *Webster*, 492 U.S. at 509, the Ordinance leaves Appellants in exactly the same position as if the County had chosen not to operate a fairgrounds at all, or had decided to operate the Fairgrounds only for the agricultural fair.

In the context of a traditional public forum, the government as proprietor versus government as sovereign distinction is not made. Volokh, *supra*, at 1474. But the Fairgrounds is a limited or designated public forum when in use for the fair. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). *See also* ER1, Vol. II, Tab 15, p. 10, lns. 2-10 (County Fairgrounds is a different type of public forum than an open street). When in use for other events, it is a nonpublic forum, because its use is limited to certain groups

or events. *Pleasant Grove City v. Summum*, 555 U.S. ---, 129 S.Ct. 1125, 1127 (2009).[12] Also, like schools and government buildings, the Fairgrounds is public property where children are often present. The public safety concerns associated with their presence may legitimately be taken into consideration by government as proprietor. The Fairgrounds shares all these key characteristics with government buildings and schools, amply supporting this Court's decision to treat the Fairgrounds as within the "sensitive places" category recognized in *Heller*.

V. The Ordinance Would Survive Any Level Of Scrutiny Even If It Directly Burdened the Second Amendment Right.

Even if the Ordinance were not within a "presumptively valid" category under *Heller* (and it is), the Ordinance as applied to Appellants survives any level of scrutiny the courts have used to decide post-*Heller* Second Amendment

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[12] The public forum doctrine also does not apply in the First Amendment context where, as is the case here, the government property or program is not capable of accommodating a large number of speakers without defeating the essential function of the land or program. *See Pleasant Grove City*, 129 S.Ct. 1125 (2009). Accordingly, the Fairgrounds, when in use for events other than the County fair, should be subject to the same rules as nonpublic fora, where government may impose reasonable, "viewpoint neutral" restrictions. Also, even in the limited public forum context, the Supreme Court has recognized that crowd control concerns are a legitimate basis for reasonable time, place or manner restrictions of speech on a Fairgrounds. *See Heffron,* 452 U.S. at 650-54.

challenges. Neither *McDonald* nor *Heller* explains how a court should go about determining the appropriate level of scrutiny to apply to a law that (unlike the Ordinance) directly burdens the right to keep and bear arms. However, *Heller's* recognition of categorical exclusions is not consistent with a "strict scrutiny" approach to Second Amendment challenges. *D.C. v. Heller*, 698 F.Supp.2d 179, 186-87 (D.D.C. 2010). In *U.S. v. Marzzarella,* the Third Circuit stated that "whether or not strict scrutiny may apply to particular Second Amendment challenges, it is not the case that it must be applied to all Second Amendment challenges. Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way." *Marzzarella,* —F.3d—, No. 09-3185, 2010 WL 2947233, *7.

Courts considering Second Amendment challenges since *Heller* have not come to a consensus on this issue. The general trend appears to be towards an intermediate level of scrutiny. *See D.C. v. Heller,* 698 F.Supp.2d at 188. *See also* Brief of Amici Curiae Legal Community Against Violence, *et al.* in Support of Defendants--Appellees, p. 15. To date, no court has used a strict scrutiny test when considering a post-*Heller* Second Amendment challenge.

The challenged Ordinance meets any such intermediate level of scrutiny because it meets even a strict scrutiny level of review. There are two compelling state interests embodied in the Ordinance: (1) The County's interest in meeting its statutory obligations as proprietor of the County Fairgrounds, and (2) the County's interest in minimizing the risk of shootings in that venue, with the consequent risk of gunshot wounds and injuries due to crowd panic. The Ordinance is narrowly drawn to meet those compelling interests, allowing some limited possession of firearms for Fairgrounds events, when that possession can be readily supervised. Appellants assert the County should simply use metal detectors for all other events but allow the gun show to proceed with no restrictions except those imposed under State law. 563 F.3d at 463. That position assumes that the state law restrictions ensure gun possession at gun shows will never give rise to shootings, an assumption that the Board of Supervisors is not constitutionally required to accept and one that the evidence does not support.

VI. Conclusion

For all the reasons set forth above and in the County's prior briefs in this matter, the District Court's order granting summary judgment to the County should be affirmed.

DATED: August 18, 2010

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In accordance with Ninth Circuit Rule 32-3, subparagraph (3), this certifies that this proportionally spaced brief contains 3,621 words (excluding the tables of contents and authorities, and this certificate [FRAP 32(a)(7)(B)(iii)]), which, divided by 280, yields 12.9 pages in compliance with the 15-page limit set by Order dated July 19, 2010. The brief's type face and type style comply with FRAP 32(a)(5) and (a)(6).

I declare that the foregoing is true and correct

Executed on August 18, 2010

s/ Sayre Weaver
Sayre Weaver

9th Circuit Case Number(s) 07-15763

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