

No. 08-1521

In the
Supreme Court of the United States

OTIS McDONALD, ET AL., *Petitioners,*

v.

CITY OF CHICAGO, ET AL., *Respondents.*

**On Writ of Certiorari to the United States
Court of Appeals
for The Seventh Circuit**

**AMICUS CURIAE BRIEF OF THE
APPELLANTS FROM THE NINTH CIRCUIT
INCORPORATION CASE of
NORDYKE V. KING, MADISON SOCIETY,
and GOLDEN STATE SECOND AMENDMENT
COUNCIL – IN SUPPORT OF REVERSAL**

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I. INTERESTS OF AMICI¹

Russell and Sallie Nordyke, along with the other named plaintiff/appellants in the case of *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), have a special interest in the outcome of this case. They are gun show promoters, exhibitors and vendors who operate at county fairgrounds throughout Northern and Central California. The County of Alameda passed an ordinance forbidding the possession of guns on county property, which includes the County Fairgrounds. The ordinance was intended to, and has the effect of banning the Nordykes' gun shows at that venue.

A *sua sponte* order was issued by the Circuit for the case to be reheard *en banc*. *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009). *En banc* argument took place on September 24, 2009. The case was then withdrawn from submission pending the outcome of this case.

Amicus Virgil McVicker, in addition to being a named plaintiff in the *Nordyke* case, is president of the Madison Society. The society is a membership organization whose purpose is to sponsor public interest litigation to preserve and protect the constitutional right to keep and bear arms for its members and all responsible law-abiding citizens.

¹ The parties were notified ten days prior to the due date of this brief and all consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel for party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus Golden State Second Amendment Council is an open membership association based in the San Francisco Bay Area of California. The purpose of the association is to educate the general public and influence public policy regarding the right to keep and bear arms; including but not limited to the right of self-defense, the rights of hunters, and the hobbies of collecting and sport shooting of firearms.

II. ARGUMENT SUMMARY

Even though incorporation is the question presented by the grant of *certiorari* in this case; the historical analysis of the fundamental nature of the “right to keep and bear arms” and its significance to American jurisprudence, has already been fully examined by this Court in *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, (2008).

That historical/legal analysis already makes a sufficiently strong case for Fourteenth Amendment *due process* incorporation of the Second Amendment under the test in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), a three-judge panel of the Ninth Circuit performed the required analysis suggested by this Court in *Heller*, 128 S. Ct. at 2813 n.23. That opinion, found the Second Amendment incorporated against state and local governments.

The Seventh Circuit demurred on the incorporation question. *McDonald v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009). However, even if *stare decisis* trumps the plain language and contemporary understanding of the Fourteenth Amendment, the Seventh Circuit still had a duty to articulate constitutional reasons for

denying the *McDonald* plaintiffs the protections of the Second Amendment. The three-judge panel in that Circuit did not even perform the *Duncan v. Louisiana* “required analysis.” This is sufficient justification for reversal.

The clear implication of the question presented by *certiorari* in the *McDonald* case is that the mechanism of incorporation for the Second Amendment will be through the Fourteenth Amendment’s Privileges or Immunities Clause and/or its Due Process Clause.² This would suggest that the Supreme Court may be open to a reexamination of its holding in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

Purging the legacy of *Slaughterhouse* is reason enough to reconsider the post-civil war insurgency against the Fourteenth Amendment manifested by that case and its progeny.³ However, overruling *The Slaughterhouse Cases* is only useful to Second Amendment litigants and the lower courts if this Court provides a standard of review for the underlying fundamental right.

² Silberman, L., *The Law and More with Judge Laurance Silberman*. Stan. U. (Aug. 5, 2009), suggests the Second Amendment may not require incorporation because it is broadly written and does not address Congressional authority like the First Amendment’s “Congress shall make no law [...]” Video and transcript: <http://www.hoover.org/multimedia/uk/63317727.html>

³ *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Ill.*, 116 U.S. 252 (1886); *Miller v. Tex.*, 153 U.S. 535 (1894); and *The Civil Rights Cases*, 109 U.S. 3 (1883).

A second plain error made by the Seventh Circuit was its suggestion (almost an implied finding) that the right of self-defense itself can be abrogated by state and local governments. That implied finding not only contradicted *Heller* itself – it ran afoul of dozens of Supreme Court cases holding that the right of self-defense is recognized by our constitutional case law in ways that should make it enforceable against the states by any method of incorporation. See *Logan v. United States*, 144 U.S. 263 (1892); *Gourko v. United States*, 153 U.S. 183 (1894); *Starr v. United States*, 153 U.S. 614 (1894); *Thompson v. United States*, 155 U.S. 271 (1894); *Beard v. United States*, 158 U.S. 550 (1895); *Allison v. United States*, 160 U.S. 203 (1895); *Brown v. Walker*, 161 U.S. 591 (1896); *Wallace v. United States*, 162 U.S. 466 (1896); *Alberty v. United States*, 162 U.S. 499 (1896); *Acers v. United States*, 164 U.S. 388 (1896); *Allen v. United States*, 164 U.S. 492 (1896); *Rowe v. United States*, 164 U.S. 546 (1896); *Andersen v. United States*, 170 U.S. 481 (1898); and *Brown v. United States*, 256 U.S. 335 (1921).⁴

The modern talisman of the three-tiered method of judicial scrutiny was not explicitly used in these turn-of-the-century cases. Perhaps that is why these cases were overlooked by the Seventh Circuit.

In those states that do not have a state constitutional right to keep and bear arms (California, Iowa, Maryland, Minnesota, New Jersey and New York) this newly incorporated right will be the only substantive protection of this enumerated right.

⁴ Collected from: David Kopel, *The Supreme Court's Thirty-Five Other Second Amendment Cases*. 18 *St. Louis University Public Law Review* 99 (1999).

In those states with a Second Amendment analog in their constitutions, incorporation will guarantee a baseline right, in much the same way that the criminal procedure protections of the Fourth, Fifth, and Sixth Amendments have standardized the minimum rights afforded the accused throughout the United States.

Incorporation of the Bill of Rights is a form of constitutional preemption that insures a baseline uniformity of the rights, privileges and immunities of all persons entitled to the protections of our Constitution, in every jurisdiction subject to its reach. This is the very essence of the Fourteenth Amendment.

Of course enforcement of constitutional rights against the states, does not prevent those states from affording greater protection of those rights. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), for operation of this principle in a First Amendment context.

The incorporation issue was foreshadowed, but not compelled, by the facts of *Heller*. It may be argued that the scrutiny question is similarly not yet ripe for resolution in the *McDonald* case. However when the court below spent as much ink on how the Second Amendment might be applied in the states (i.e., a state might have the power to nullify the right of self-defense), as it did about whether it applies to the states, it was addressing scrutiny.

When a lower court passes on an issue *sua sponte*, the issue may properly be presented to the Supreme Court. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). (raising such an issue before the Court is particularly appropriate where the question (1) is in a “state of evolving definition and uncertainly,” and (2) is “one of importance to the administration of

federal law”). See also *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), (“even if this were a claim not raised by the petitioner below, we would ordinarily feel free to address it since it was addressed by the court below”).

Since judicial scrutiny and the incorporation issues are inextricably intertwined in *McDonald*, this Court should resist the minimalist approach of *Heller* now that the Second Amendment will apply in 50 more jurisdictions. The sheer number of potential cases and controversies that may arise after incorporation of this Amendment suggests that this Court may want to address the scrutiny issue now, even if only in the name of judicial economy.

III. WHY SCRUTINY MATTERS

The rules for judicial scrutiny of the Second Amendment are critical for at least two reasons: (1) to define the substantive “right to keep and bear arms” in a way that insures uniform justice throughout the United States, and (2) to keep judicial scrutiny of fundamental rights in general – as a device for insuring liberty – from turning into a unprincipled empty gesture with no application to future cases.

The *Heller* opinion made it clear that certain long standing regulations of the right to keep and bear arms were presumptively valid under the Second Amendment. *Heller*, at 128 S. Ct. 2816-17. However the Court provided no abstract rules for determining that validity beyond the concrete examples cited.

Several cases involving felons in possession of firearms have attempted to exploit *Heller*. See e.g., *United States v. Gilbert*, 286 Fed. Appx. 383, 2008 U.S.

App. LEXIS 15209 at 4-5 (9th Cir. 2008) (noting that the possession of machine guns and short-barreled rifles and possession of firearms by felons are all still prohibited post-*Heller*); *United States v. Harden*, 2008 U.S. Dist. LEXIS 54717, at *1-2 (D. Or. 2008) (upholding prohibition on possession by felons). *United States v. White*, 2008 U.S. Dist. LEXIS 60115, 2008 WL 3211298 (S.D. Ala.) (citing *United States v. Walters*, 2008 U.S. Dist. LEXIS 53455, 2008 WL 2740398 (D.V.I.)) ("no court has, ever under an individual rights interpretation of the Second Amendment, found 18 U.S.C. § 922(g) constitutionally suspect."). With justification, these cases were summarily adjudicated in accordance with the *Heller* decision, i.e., the Second Amendment does not protect violent criminals.

But most guns in the United States are possessed by law-abiding citizens. A rule for scrutinizing state action that touches on Second Amendment rights is particularly critical when the government is interfering with the rights of the law-abiding when they are engaged in activities that are already well-regulated and that present no danger to the public.

The *Nordyke* three-judge panel ultimately found for the County in that case and the ordinance withstood challenges under the First, Second, and Fourteenth Amendments. Whether the *Nordyke* three-judge panel's scrutiny analysis on those claims was correct is still an open question. An analysis of that opinion, as it relates to scrutiny (on the First, Second, and Fourteenth Amendment claims) is presented here in the hope that this information will aid the Court in resolving the incorporation and scrutiny issues raised in the *McDonald* case.

A. The *Nordyke* Panel's Scrutiny Analysis Was Just Plain Wrong.

The Supreme Court did not announce a formal standard of review in *Heller*. This omission was criticized in *Nordyke*, at 563 F.3d 458. However, **rational basis** is clearly off the table. See *Heller*, at 128 S. Ct. 2818, n.27.

Even though the *Nordyke* panel suggested that Second Amendment rights should trigger the same strict scrutiny standard of review as First Amendment rights *Nordyke*, at 563 F.3d 458, n.19; they appeared to abandon that test when they proceeded to engage in the kind of balancing test rejected by *Heller*, at 128 S. Ct. 2821. See *Nordyke*, at 563 F.3d. 457-60.

The *Nordyke* three-judge panel also invoked a “sensitive places” doctrine/definition that was introduced, but not explained, in *Heller*, at 128 S. Ct. 2816-17. See *Nordyke*, at 563 F.3d. 459-60.

What is unique about the *Nordyke* fact pattern is that it is particularly well suited to a discussion of “judicial scrutiny” as a legal doctrine, because it forces us to compare and contrast a new application (Second Amendment) of tiered scrutiny with those areas of constitutional law that have historically analyzed rights in this way. (e.g., First Amendment and Equal Protection). Even if the *Nordyke* panel got the result right, Second Amendment litigants in the *McDonald* case (and throughout the country) would benefit from an authoritative explanation from this Court as to why they got it right.

The Nordykes held their gun shows at the County Fairgrounds, without incident, for more than 10 years before the case was filed in 1999. They have continued

to hold gun shows at other fairground venues for more than 20 years. The California Department of Justice and local law enforcement testified that the gun shows promoted by the Nordykes, locally and throughout the state, are safe and well regulated.

The government in the *Nordyke* case admits that the gun shows at the fairgrounds are neither a primary nor a secondary source of crime. Alameda County cites no discreet public safety reasons for its ordinance. Its sole justification is generalized statistics about violent crime rates, which have nothing to do with the Nordykes' gun show activities.

Nordyke's First Amendment component rests on the Defendants' concession that possession of guns at gun shows can convey particularized messages, likely to be understood by their intended audience. The author of the ordinance (King) even announced in a press release that the purpose of the law was to ban gun shows and eliminate the fairgrounds as "*a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.*"

The Equal Protection aspect of the case arises because the County permits the Caledonian Scottish Games to possess firearms at the fairgrounds for their expressive purposes, but still prohibits gun shows that operate under substantially identical regulations.

The right to possess a gun at a gun show arises out of an ancillary "right to keep" which implies a right to acquire or purchase. The Second Amendment protects two distinct rights – "the right to keep" and "the right to bear" arms. *Heller*, at 128 S. Ct. 2830-31. It also arises out of the "right to bear" or carry arms for lawful purposes. *Heller*, at 128 S. Ct. 2793 *passim*.

The County of Alameda has even maintained the absurd position that gun shows and gun sales can take place on county property (e.g., the Fairgrounds) as long as no guns are present.

There is no so called “gun show loop-hole” in California as state law requires that all firearm sales (including those at gun shows) be processed through a federal and state licensed firearm dealer. The County conceded that the Nordykes’ gun shows complied with all federal and state laws, and all safety regulations relating to gun shows and firearm transactions.

A recitation of the sheer volume of federal and state laws regulating sales, possession and gun show activities would exceed the limited space permitted in this brief. It is an undisputed fact that the promoters, exhibitors, vendors and patrons comply with all these laws. Brief examples include: (1) guns at gun shows must be unloaded and **secured in a manner that prevents operation**, except for brief periods of mechanical demonstration for a prospective buyer; (2) no person (except security and sworn peace officers) may possess a firearm and the ammunition for that firearm at the same time; (3) no person under 18 years is permitted to attend a gun show unless accompanied by an adult; and (4) no person may bring a gun to a gun show unless they have a government issued photo identification, and the firearm must be tagged and identified with the information from that I.D.

These state/federal laws are substantially identical to the exceptions for gun possession contained in the Alameda ordinance. Yet the *Nordyke* panel found no violation of equal protection (in the exercise of a fundamental right) when it differentiated the gun shows from the Caledonian Scottish Games.

The *Nordyke* panel cited *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992), and *Harris v. McRae*, 448 U.S. 297, 315-16 (1980), for the proposition: “not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.” But these cases dealt with a demand that government maintain medical facilities, personnel, funding and equipment to perform abortions for women (indigent or not) who sought to exercise their right to an abortion. Furthermore, the laws forbidding abortions that were challenged in these cases all had lifesaving exceptions for the life of the mother. See *Casey*, at 505 U.S. 877-95. Self-defense (preservation of innocent life) is the primary right recognized in *Heller* for which keeping, bearing, and acquiring arms is the means.

The *Nordyke* plaintiffs were not asking the Court to force the County to maintain the fairgrounds so that they could conduct gun shows. They were asking to compete on a level playing field with other organizations (e.g., Scottish Games, County Fair, Auto Shows, Dog Shows, Antique Shows, Sportsman Shows, Art Shows, etc...) that leased the fairgrounds for their events.

The County had not offered a scintilla of evidence that the Nordykes’ gun shows imposed a greater burden on the County than any other event. In fact, the Nordykes contribute to the County by paying to lease the venue, they maintained insurance like any other promoter, and they comply with all special laws directed at their particular endeavor; all while generating indirect revenue for the County through rent, food sales, parking fees and sales taxes.

Nor were the Nordykes complaining about a mere burdening of any of their rights. They would welcome

any appropriate regulation designed to address issues of gun safety and crime prevention.⁵ But the ordinance is not an appropriate regulation aimed at a community evil. It seeks to ban gun shows and the “gun culture” from county property through the pretext of public safety.

Furthermore, the citation to *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009), in *Nordyke*, at 563 F.3d 459, n.21, is confusing. If the panel means that the county is free to express its own anti-gun viewpoint under a Second Amendment analysis, why does its later First Amendment analysis proceed as if the ordinance is a neutral regulation instead of the county’s pretextual vehicle for a partisan anti-gun message? First Amendment scrutiny can not be that different from Second Amendment scrutiny.

The sponsor of the ordinance, Mary King (County Supervisor) sent a memorandum to County Counsel prior to introducing the ordinance. It was copied to all board members. It requested that County Counsel research a way to prohibit gun shows on county property. The memorandum clearly set forth a purposeful intent, based on political philosophy, to deny gun shows access to county property.

The County, speaking through Supervisor King, issued a press release in connection with the ordinance. That press release reiterated that the purpose of the pending legislation was to deny gun shows access to

⁵ E.g., The County could supplement the State law that prohibits a person from simultaneously possessing a firearm and the ammunition for the firearm, by requiring ammunition vendors to be physically segregated from the firearm vendors.

the fairgrounds because the County did not agree with the political values of the people attending gun shows. (i.e., The County should not provide “[...] *a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.*”)

The Nordykes are entitled to the factual inference that their gun shows were targeted for extinction because of the political values expressed at gun shows and the County’s disagreement with those values. This targeting of a disfavored group is relevant to the scrutiny discussion of the First Amendment (under a *Texas v. Johnson* analysis), the Second Amendment (overbreadth), and the Fourteenth Amendment (Equal Protection). See also: *Romer v. Evans*, 517 U.S. 620 (1996).

Nordyke is wholly different from *Pleasant Grove City v. Summum* because the Nordykes are not asking to place a **permanent monument** on county property. But the panel’s strong inference that the County is engaged in anti-gun propaganda as a property owner, is certainly probative as to whether the County is engaged in the regulation of expressive conduct by banning gun shows in order to “send a message” that guns are bad. And because the County is engaged in its own expression and the regulation of expression by others, the panel should have applied the more rigorous scrutiny analysis under *Texas v. Johnson*, 491 U.S. 397 (1989).

Another inconsistency arises with a finding that the County’s ban on gun shows does not violate Equal Protection (of a fundamental right) vis-à-vis guns possessed at gun shows vs. guns possessed at the Scottish Games. The guns at gun shows are secured pursuant to state law. While the guns at the Scottish

Games are secured pursuant to a county ordinance. This is a distinction without a difference and cannot survive strict scrutiny of a fundamental right under an Equal Protection claim.

Under the First and/or Second Amendment and under an Equal Protection (for fundamental rights) analysis, the government is required to: (1) produce evidence, (2) that demonstrates a compelling interest, (3) and prove that the government's regulation is not more restrictive of the right(s) than is necessary to address the compelling interest. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972).

The County failed on all three counts because it has conceded that gun shows are not a source of any community evil. So if the County's exclusion of gun shows from the Fairgrounds is based on a desire to engage in a hoplophobic message for Second Amendment purposes, then its ordinance is invalid under *Heller*, as it is not designed to address public safety or crime prevention. And if the County is expressing its hoplophobia by banning the expressive conduct of possessing guns at gun shows, then it is violating the First Amendment's commandment against censorship; and/or it is violating Equal Protection by permitting expression with guns by the Scottish Games, but forbidding expression with guns at gun shows.

B. The *Nordyke* Panel's "Sensitive Place" Analysis was Wrong.

The *Nordyke* three-judge panel also indulged the County's argument that the fairgrounds is a "sensitive place."

But the County presented no evidence – none – that the Fairgrounds (or indeed any county property) is a “sensitive place.” How could it? Discovery was closed and this case was already on appeal out of the district court when the *Heller* opinion was filed on June 26, 2008. *Heller*’s “sensitive places” concept was set forth in *dicta* at 128 S. Ct. at 2816-17:

[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to 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. (*Emphasis added*)

The adjective “longstanding” modifies the noun “prohibition” regarding felons and the mentally ill; and it might be stretched to cover sensitive places.

There was no factual record in the *Nordyke* case that the county fairgrounds had a longstanding history as a sensitive place. The facts construed in the light most favorable to the Nordykes are: (1) Mary King had been trying for “years” to get rid of gun shows, (2) the Nordykes had conducted gun shows at the Alameda Fairgrounds for almost 10 years before the ordinance was passed, and (3) the Nordykes continued to hold gun shows at other fairgrounds throughout California while this case has been pending. When and how did “fairgrounds” as a class of property undergo a transformation to a sensitive place?

The *Nordyke* panel tried to describe a distinction without a difference for the ways guns are handled at gun shows (**secured** unless the gun is being mechanically demonstrated to the buyer) and the way guns are handled during the Scottish Games (**secured** until the re-enactors are actually staging their mock battles). This has nothing to do with defining a sensitive place. A sensitive place, like a courthouse, would neither permit mock battles nor gun shows.

How can the fairgrounds be a sensitive place if secured guns are possessed at gun shows, but “not-a-sensitive” place when guns are possessed by “*authorized participants in a motion picture, television, video, dance or theatrical production or event, [...]*” ? [Alameda Ordinance § 9.12.120(f)(4).] Neither the County nor the *Nordyke* opinion provides any compelling explanation for this inconsistency. Why aren’t gun show patrons and exhibitors, who pay their admission and follow all federal and state laws regulating gun shows, “*authorized participants*” at an event? Furthermore, why is the County’s property **not sensitive** to functional movie prop guns, but **is sensitive** to gun show guns which are secured unless being mechanically demonstrated?

How can the fairgrounds be a “sensitive place” when the ordinance exempts imitation firearms or BB guns and air rifles? [Alameda Ordinance § 9.12.120(d).] An airport “sterile area” or airliner does not tolerate the presence of imitation firearms. See Cal. Pen. Code § 171.5.

Persons with valid licenses to carry loaded and concealed firearms under Cal. Penal Code § 12050, are also exempt from the ordinance. [Alameda Ordinance § 9.12.120(f)(3).] A jail or prison does not permit such

licensees to retain their weapons when interviewing or visiting inmates.

The County's ordinance is not delineating "sensitive places." At best, the County is describing permissible and impermissible "uses" of guns, which negates any argument that county property is *per se* sensitive to the presence of guns.

The only place where the ordinance attempts to define "places" is where it exempts from the ordinance "local public buildings" as defined in Cal. Pen. Code § 171b. [Alameda Ordinance § 9.12.120(c).] This state law in California bans guns in government buildings, but this code section cited by the ordinance specifically includes an exception for the **purpose of conducting a law-abiding gun show**. See Cal. Pen. Code § 171b(b)(7)(A) and § 171b(b)(7)(B).

Consider these easily verified general facts regarding places where guns show up in parks and fairgrounds:

- The publication: [Gun Shows: Brady Checks and Crime Gun Traces](http://www.atf.gov/pub/treas_pub/gun_s how.pdf) was jointly published in January 1999, by the United States Department of Justice and the Department of the Treasury See http://www.atf.gov/pub/treas_pub/gun_s how.pdf. Gun shows are described on page 4. Nationally there were 4,442 gun shows advertised in a trade publication for calendar year 1998. California was among the top 10 states where gun shows took place. "*Ordinarily, gun shows are held in public arenas, civic centers, fairgrounds, and armories,...*"

- On May 22, 2009, President Obama signed into law a bill that was passed with bipartisan support that permits law-abiding citizens to possess firearms in National Parks – consistent with the law of the state in which the park is located. [The Credit CARD Act of 2009, Pub. L. No. 111-24, 123 Stat, 1734 (2009).]

These facts can be judicially noticed for the proposition that public places, where many people gather, like: parks, fairgrounds, public arenas, civic centers, and government buildings where gun shows take place, are **not** longstanding examples of historically “sensitive places.”

The *Nordyke* three-judge panel made a prejudicial unwarranted finding regarding sensitive places. The County did not even request that the case be returned to the trial court so that it could attempt to prove that its fairgrounds (or indeed all of Alameda County’s properties) are particularly sensitive places.

Neither is there is any legal basis for the panel’s creation of a definition of “sensitive place” out of the *dicta* in *Heller*. The panel did note that “Second Amendment law remains in its infancy” and that *Heller* itself “does not provide much guidance.” *Nordyke*, at 563 F.3d 460.

This state of affairs should have triggered a default fundamental rights analysis. It should be the County’s burden to demonstrate a compelling justification for classifying its fairgrounds as a sensitive place, and the County must be required to demonstrate that there is no less burdensome regulation that addresses the

compelling interest that they assert.⁶ The County did not meet that burden, and the *Nordyke* three-judge panel was wrong to give it a pass on this issue.

An expansive interpretation of “sensitive places” is not unique to the *Nordyke* facts. In its post-*Heller* opposition to a motion for summary judgment in *Palmer v. District of Columbia*, Civil Action No.: 09-01482 (HHK), an ongoing challenge to D.C.’s complete ban on carrying firearms, the defendants argued that the entire federal enclave is a sensitive place:

Defendants aver that the whole of the District of Columbia should be considered a “sensitive” place, given its dense concentration of iconic structures, government facilities, embassies, and regular meetings of diplomats and leaders from around the world. *See Hearing on the Impact of Proposed Legislation on the District of Columbia’s Gun Laws Before the House Comm. on Oversight & Government Reform* (Sept. 9, 2008). (Testimony of Cathy L. Lanier, Chief of Police) at 5 (“[T]he District of Columbia, as the seat of the Federal government with its multitude of critical official and symbolic buildings, monuments, and events and high-profile public officials traversing its streets every

⁶ For example, the County took steps to control the unlawful possession of deadly weapons at the fairgrounds by the simple expedient of installing metal detectors at the entrance to the fairgrounds during the county fair.

day, is a city filled with “sensitive” places. Our laws should reflect that reality.”⁷

Without guidance from this Court, judicial scrutiny of infringements of the Second Amendment will proceed in a chaotic and, perhaps, regionally-biased manner among the Circuits. Certainly the *en banc* panel of the Ninth Circuit would benefit from a word or two about judicial scrutiny when they revive their deliberations of the *Nordyke* case after the opinion in *McDonald* is published.

IV. JUDICIAL SCRUTINY: SECOND AMENDMENT

Judicial scrutiny requires identification of the role of the constitutional right at issue.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.

N.Y. Times. Co. v. United States,
403 U.S. 713, 717 (1971).
Justice Hugo Black, Concurring.

7

Heller examined the Second Amendment in a context of the right of self-defense in the home, because those were the facts of that case. Without an articulation of the contours of the right, the *Nordyke* panel felt constrained to recognize the right solely in that context. *Nordyke*, at 563 F.3d 458. And because the county ordinance challenged in that case merely burdened the right outside the home it was upheld.

How is it possible that an un-enumerated fundamental right (abortion) is important enough to warrant an “undue burden” test⁸ – but an enumerated right may be so circumscribed? Will judicial scrutiny of the Second Amendment enhance or further erode the device of three-tiered scrutiny?⁹ What will be the replacement doctrine?

The Second Amendment plays a vital role in our republic. As *Heller* points out, at the very least it recognizes a Blackstone-like fundamental “law of nature” in the use of force by individuals for self-defense. *Heller*, at 128 S. Ct. 2798. Only recently in the dissent on Second Amendment issues, Chief Judge Kozinski and Judge Gould of the Ninth Circuit have offered defense of the community and resistance against tyranny to the catalogue of Second Amendment

⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁹ For a discussion about the way recent Supreme Court decisions (e.g., *Lawrence v. Tex.*, 539 U.S. 558 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).) may be undermining a principled approach to tiered scrutiny. See Professor Calvin R. Massey’s article: *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. Pa. J. Const. L. 945 (2004).

values important to the republic. See, respectively: *Silveira v. Lockyer*, (*reh'g denied*) 328 F.3d 567, 569-70 (9th Cir. 2003); *Nordyke v. King*, 563 F.3d 439, 464 (9th Cir. 2009).

The First and Second Amendment complement each other. They share a common purpose by recognizing that liberty of thought is useless without the right to defend ideas. Our constitutional form of government also recognizes that liberty of action leads to anarchy without a civic *virtu* of understanding that is brought about by a “marketplace” of ideas. These amendments taken together remind us that that marketplace is best protected by the governed and the government.

The *Nordyke* three-judge panel suggested that a fundamental rights analysis (i.e., strict scrutiny) should be applied to the Second Amendment in much the same way as the First Amendment. *Nordyke*, at 563 F.3d 458, n.19. Instances of government action surviving strict scrutiny are rare and have historically been confined to equal protection and racial classification schemes. See *Korematsu v. United States*, 323 U.S. 214 (1944), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

With the *Heller* presumption that long standing regulations will survive strict scrutiny, *Heller*, at 128 S. Ct. 2816-17, it becomes imperative to define the compelling government interest at stake in Second Amendment cases. Future judges who take up the “loaded weapon” described in Justice Jackson’s dissent in *Korematsu*, at 323 U.S. 246, need to know how to use strict scrutiny in a safe and responsible manner.

Prevention, and if that fails, prosecution of criminal violence should be the only compelling

justification for infringing the individual's right to keep and bear arms. Background checks to prevent violent and mentally unstable persons from acquiring firearms are the quintessential means for achieving this government interest.

Rules that make sensitive places like courthouses, jails, and prisons off limits to private firearms, where the government must exercise a monopoly of force – because that is the function of the building – probably pass constitutional muster. This might be a Second Amendment analogue to the First Amendment's anecdote about shouting fire in a crowded theater. *Schenck v. United States*, 249 U.S. 39 (1919).

Rules regulating, but not prohibiting, the carrying of firearms in non-sensitive places, should probably take the form of non-discretionary, ministerial duties, not unlike issuing a driver's license or parade permit. See *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992). Though for a contrary view, see the state Constitutions of Vermont (Vt. Const. ch. 1, art. 16) and Alaska (Alaska Const. art. 1, § 19).

Maintaining uniformity in the application, operation, and interpretation of laws that touch on fundamental rights, especially in the context of criminal law, is another important constitutional value that should apply equally to all fundamental rights. See generally, *Bush v. Gore*, 531 U.S. 98 (2000). Of course this must be done in a way that recognizes that states have legitimate interests in addressing their own policy considerations. *Danforth v. Minn.*, 552 U.S. 264 (2007).

The *Nordyke* case initially had a preemption claim. *Nordyke*, at 563 F.3d 444. In 2000, the Ninth Circuit certified to the California Supreme Court the question

whether state laws regulating gun shows and the possession of firearms preempted the Ordinance. *See Nordyke v. King*, 229 F.3d 1266 (9th Cir. 2000). The California Supreme Court answered that the Ordinance was not preempted. *See Nordyke v. King*, 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761.

That all occurred before *Heller*. When she was sitting on that Court, Associate Justice Janice Rogers Brown (currently of the D.C. Circuit Court of Appeals) dissented from the finding of “no preemption” – in part – because her colleagues on the California Supreme Court refused to analogize the rights of the gun show promoters to core First Amendment rights. At the time of that decision, the law in the Ninth Circuit was that individuals had no standing to assert Second Amendment rights. *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996). Furthermore, the State of California does not recognize a right to keep and bear arms in its own State Constitution. *See Kasler v. Lockyer*, 23 Cal. 4th 472, 480 (2000).¹⁰

Justice Brown went on to warn that even small intrusions on liberty can erode personal freedom just as surely as the malignant acts of dictators. *See Nordyke v. King*, at 118 Cal. Rptr. 2d 768-69. Her point was that uniformity of law was as much a component of liberty as the underlying substantive constitutional right. At a minimum state laws that trench on the right to keep and bear arms should be uniform within their respective jurisdictions.

¹⁰ This was another case addressing *equal protection* and the right to keep and bear arms, in which Justice Brown also wrote a dissent. *Kasler v. Lockyer*, 23 Cal.4th 472, 503-10 (2000).

An opinion in the *McDonald* case that incorporates the Second Amendment against the states, but which also includes a holding that all laws regulating the “right to keep and bear arms” must be uniform within each state serves the following functions: (1) Since firearms are ubiquitous, exercising the right to possess firearms should not conflict with the right of intrastate travel¹¹; (2) law-abiding firearm owners need only acquaint themselves with federal and state laws, instead of being held criminally accountable in every town, city, county, and parish they travel through within their state while exercising a fundamental right; and (3) instead of the municipal codes of tens of thousands of cities and counties being subjected to challenges under the Second Amendment, a constitutionally recognized, baseline preemption of “the right to keep and bear arms” that funnels down those challenges to the bodies of law of 50 states plus one federal body of law, strangles the majority of potential lawsuits in their crib.¹²

Turning to a conventional analysis, based on case law, of the Chicago Municipal Code challenged in the *Mc Donald* case: (1) The handgun ban is D.O.A. via *Heller* upon a finding that the Second Amendment applies to state and local governments under either theory of incorporation; (2) The re-registration scheme, with its forfeiture consequences and arbitrary

¹¹ Interstate travel with firearms is already protected by the *Firearm Owner’s Protection Act*, Pub. L. No. 99-308, 100 Stat. 449 (1986).

¹² This would be the corollary application of the principle at work in the *Protection of Lawful Commerce in Arms Act*, Public Law 109-92; 15 U.S.C. § 7901-7903.

deadlines, would not even pass rational basis review under *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See also: *Lawrence v. Tex.*, 539 U.S. 558 (2003), which applied a kind-of rational basis test by refusing to apply intermediate or strict scrutiny to laws infringing on sexual intimacy; (3) The fee requirements are fatally tied to the re-registration scheme, but probably still fail as a special tax that burdens a constitutional right. See generally: *Minneapolis Star & Tribune Co. v. Minn. Commissioner of Revenue*, 460 U.S. 575 (1983).

Scrutiny of Chicago's gun laws in the abstract should start with a presumption of invalidity to the extent that Illinois State law already regulates "the right to keep and bear arms." That would assume Illinois state law meets a compelling government interest test and that those laws are necessary to address that interest.¹³ The Second Amendment, as an equally dignified part of the Bill of Rights, deserves at least this level of judicial scrutiny.

V. CONCLUSION

This renaissance of the Second Amendment must be vigorous, principled and complete. The Bill of Rights

¹³ See *Nonsubstance Reorganization of Deadly Weapon Statutes*, Calif. Law Revision Commission (June 2009). In response to a veto message on SB 1140 (Scott)(2004) by California Gov. Schwarzenegger, citing byzantine complexities in his state's firearms laws, the legislature commissioned this study to revise and simplify California's Deadly Weapons Control Act. <http://www.clrc.ca.gov/pub/Printed-Reports/RECpp-M300.pdf>

will only work if virtuous citizens are exercising all of their rights as actual limitations on government. The Court can, and should, take this opportunity to provide all of the jurisdictions in this country with rules for judicial scrutiny of the Second Amendment, at the same time it takes up the issue of incorporation.

Associate Justice Hugo L. Black liked to say that written constitutions are indigenous to the United States, and that the consequences of the freedoms guaranteed by the Bill of Rights were already taken into account by those who wrote and ratified that document. He went on to warn against the danger of granting any branch of government the power to balance its interests against the rights of the people.

In his iconic speech¹⁴ on the Bill of Rights, Justice Black quoted one of his heroes, Thomas Jefferson, to remind us that, “Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.”

In that same speech, Justice Black gave us a (reverse) countdown of the “absolute” constitutional values set forth in the Bill of Rights. He did not patronize the Second Amendment as less than absolute, so long as the arms that are regulated (not banned) are necessary to a well-regulated militia.¹⁵

¹⁴ James Madison Lecture at New York University School of Law on February 17, 1960. Black, Hugo L., *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

¹⁵ Having served in the Senate when the 1934 National Firearms Act (NFA) was passed and on the Supreme Court when *United States v. Miller*, 307 U.S. 174 (1939), was decided, Justice Black was in a unique

Justice Black's dissent in *Adamson v. California*, 332 U.S. 46 (1947), is emerging as the inevitable standard for application of at least the Bill of Rights to state action, even though Privileges or Immunities incorporation may subsume more than those Ten Constitutional Commandments. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

The contest on the Court between the "balancers" and the "absolutists" evolved into the present day three-tiered approach to constitutional rights. In order to keep one-tenth of the Bill of Rights from becoming a "blank paper by construction" this Court should define the contours of judicial scrutiny for the Second Amendment along side the incorporation question.

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position to expound on the relationship between mere regulatory legislation (i.e., the taxing of machine guns and short-barreled shotguns) and the absolute protections afforded individuals by all of the Bill of Rights as against government action infringing any one of those rights.