No. 07-15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs-Appellants,

v.

MARY KING, et al.,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Northern District of California
Hon. Martin J. Jenkins
(CV-99-04389-MJJ)

BRIEF *AMICUS CURIAE* OF SECOND AMENDMENT FOUNDATION, INC. IN SUPPORT OF APPELLANTS SEEKING REVERSAL

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August 18, 2010

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CORPORATE DISCLOSURE STATEMENT

The Second Amendment Foundation, Inc., has no parent corporations. No publicly traded company owns 10% or more of *amicus* corporation's stock.

Dated: August 18, 2010

Respectfully submitted,
Second Amendment Foundation, Inc.
Amicus Curiae

By: /s/ Alan Gura
Alan Gura
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Second Amendment Foundation, Inc. ("SAF"), a non-profit educational foundation, seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every State of the Union, including thousands in California. SAF organized, and prevailed, in *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 179 L. Ed.2d 894 (2010).

The Court's interpretation of the Second Amendment directly impacts SAF's organizational interests, as well as SAF's members and supporters, who enjoy exercising Second Amendment rights. SAF has substantial expertise in the field of Second Amendment rights that would aid the Court.

CONSENT TO FILE

All parties have consented to the filing of this brief.

INTRODUCTION

As the first significant Ninth Circuit opinion applying the Second Amendment in the wake of *McDonald* v. *City of Chicago*, the opinion in this case will be looked to for guidance in many cases. But precedent is sometimes taken as a kind of Rorschach test, with parties and courts finding patterns and signals not predicted, much less intended, by the authors. Courts are thus understandably careful to occasionally disclaim any unintentional guidance. *See*, *e.g.*, *McDonald*, 177 L. Ed.2d at 926 (providing "assurances" that "incorporation does not imperil every law regulating firearms").

The Court's decision in this case could unintentionally confuse as much as clarify, as district courts are awaiting its guidance in pending cases that logically should not be analyzed in the same manner as the instant case. This Court should emphasize that it is not answering questions not before it, and carefully place its guidance within the context of a framework for resolving Second Amendment cases—a framework that must await future litigation to fully develop. As is the

case with claims arising under other constitutional provisions, not all Second Amendment disputes can be resolved with a single approach.

SUMMARY OF ARGUMENT

This case cannot be resolved merely by interpreting the scope of the Second Amendment; or by determining any categorical scope of the Amendment's protection; or with reference to the time, place and manner standards reserved for questions respecting the bearing of arms. Unlike other types of Second Amendment disputes, as the Court's July 19 order recognizes, this case should be resolved by identifying and applying an appropriate standard of review for construing the right in light of the challenged ordinance.

Intermediate review, a means of raising scrutiny for quasi-suspect cases that would otherwise be decided under the rational basis test, or lowering review in cases where it has been pre-determined that the regulatory burden is slight, is not an appropriate standard of review for administering fundamental rights, which are typically addressed with strict scrutiny review.

Although many gun laws would withstand application of strict scrutiny, the ordinance challenged here does not. It follows that neither

could the ordinance survive intermediate review, were that the standard.

ARGUMENT

I. THE TEST FOR RESOLVING A SECOND AMENDMENT CLAIM DEPENDS UPON THE NATURE OF THE DISPUTED PROHIBITION OR REGULATION.

Many Second Amendment cases may be resolved without employing a means-ends standard of review. The Supreme Court declined to adopt any "level of scrutiny" in striking down two laws—a handgun ban and a functional firearm ban—and directing the application of a third law—a carry-permit requirement, under the Second Amendment. *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2010). As discussed *infra*, Washington's functional firearm ban and home-carry permit scheme simply conflicted with the Second Amendment's core. The city's handgun ban failed a distinct "common use test" for protected arms. And separately, the Court advised that the right to carry guns included an inherent time, place and manner test.

These approaches warrant study. Before addressing "the level of scrutiny that should be applied to the ordinance in question," Order,

July 19, 2010, this Court should first determine whether a level of scrutiny is required at all. And if, as apparently all parties and *amici* urge, the ordinance must be analyzed with reference to a standard of review, this Court should first clarify why such an approach, as opposed to the other approaches demonstrated by *Heller*, is to be followed.

A. Resolving Cases by Defining the Right's Core

With respect to Washington's complete ban on the possession of functional firearms within the home, the Court simply offered that the ban "makes it impossible for citizens to use [guns] for the core lawful purpose of self-defense and is hence unconstitutional." *Heller*, 128 S. Ct. at 2818. That law stood at the opposite end of the spectrum from "longstanding prohibitions" that "the full scope of the Second Amendment" might not reach. *Id.* at 2816. The Court made clear that historical analysis guided its understanding of what would lie at the right's core, and what conduct might be outside the scope of its protection. Laws conflicting with the Second Amendment right's core protections could not survive. Laws reflecting historical practices would be presumptively valid.

And if history would serve as a guide as to what might be within the Second Amendment (e.g., the use of guns for self-defense) and what might be without it ("longstanding prohibitions"), the Court decidedly rejected one source of guidance: "We know of no other enumerated constitutional right whose *core protection* has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 2821 (emphasis added).

This same process, identifying whether a regulation conflicts with a "core protection" of the Amendment without resort to interest-balancing, resolved Heller's challenge to a requirement that he obtain an unavailable permit to move a handgun inside his home. The D.C. Circuit found the restriction violated the Second Amendment's core:

> It is sufficient for us to conclude that just as the District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised–i.e, self-defense.

Parker v. *District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom, Heller*.[1] The Supreme Court affirmed using the same

[1]Heller did not request a public-carry permit. *Id.*

approach, concluding the city had no discretion to refuse issuance of the permit: "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Heller*, 128 S. Ct. at 2822.

B. Arms Prohibitions: The Common-Use Test

A similar categorical, non-balancing approach resolved the handgun ban's constitutionality. First, "arms" as used in the Second Amendment are "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 128 S. Ct. at 2791 (citations omitted).[2] Second, "the sorts of weapons protected [by the Second Amendment are] those 'in common use at the time.'" *Heller*, 128 S. Ct. at 2817 (quoting *United States* v. *Miller*, 307 U.S. 174, 179 (1939)). "[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 128 S. Ct. at 2815-16.

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[2] "[A]ll firearms constituted 'arms.'" *Heller*, 128 S. Ct. at 2791 (citation omitted).

Using this two-step approach—first, is the object an "arm," second, would it be expected in common use by law-abiding people—the handgun ban was easily resolved:

> It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition on their use is invalid.

Heller, 128 S. Ct. at 2818. Again, the question was resolved with a categorical common-use test, not with a standard of review.

C. Carrying Restrictions: Time, Place, and Manner

The right to arms is secured "*most notably* for self-defense within the home," *McDonald*, 177 L. Ed.2d at 922 (emphasis added),but not exclusively so. "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 128 S. Ct. at 2793 (citations omitted). To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* (quoting *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting); BLACK'S LAW DICTIONARY 214

(6th ed. 1998)); *see also Heller*, 128 S. Ct. at 2804 ("the Second Amendment right, protecting only individuals' liberty to keep and carry arms . . ."), at 2817 ("the right to keep and carry arms").

The right to carry has certain inherent categorical limitations: the right is "not unlimited," as there is no right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 128 S. Ct. at 2816. And "laws forbidding the carrying of firearms in sensitive places" are "presumptively lawful." *Id.* at 2817 & n.26. In other words, the act of carrying a gun is subject to a time, place, and manner regime. The D.C. Circuit had reached this conclusion explicitly. *See Parker*, 478 F.3d at 399 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989)).

Notably, although the County's fairgrounds would not qualify as a "sensitive place," that is not the relevant inquiry. The County, after all, *permits* the carrying of guns with the appropriate state license, imposing no additional burden on the bearing of arms. The manner in which these licenses are issued is not before the Court, and Plaintiffs do not seek to carry guns, or allow the carrying of guns by their

customers, as that activity is understood under *Heller*'s definition of "bear arms." Exploration of the "sensitive places" doctrine must await an appropriate case.

D. Level of Scrutiny Review: Construing the Second Amendment

Heller's lesson, that the Second Amendment constitutionality of at least some gun laws some may be resolved without reference to a level of scrutiny, has evaded some courts. For example, in the Third and Seventh Circuits, "apply[ing] some level of 'means-ends' scrutiny to establish whether the regulation passes constitutional muster" follows automatically from a finding that the Second Amendment is implicated. *United States* v. *Williams*, 2010 U.S. App. LEXIS 16194 at *13 (7th Cir. Aug. 5, 2010) (citation omitted); *United States* v. *Marzzarella*, 2010 U.S. App. LEXIS 15655 at *6 (3d Cir. July 29, 2010). As shown above, this approach is erroneous, as it fails to account for several more logical, and in any event, Supreme Court-mandated, means of deciding Second Amendment claims.

Yet the Third Circuit conceded that there is at least one intermediate step to be taken between concluding that the Second

Amendment is implicated and applying a means-end level of scrutiny, acknowledging that Washington's functional firearms ban was "unconstitutional under any form of means-end scrutiny applicable to assess the validity of limitations on constitutional rights." *Marzzarella*, at *5.

Marzzarella is helpful in another of its observations. Seeking "guidance in evaluating Second Amendment challenges . . . [w]e think the First Amendment is the natural choice. . . the structure of First Amendment doctrine should inform our analysis of the Second Amendment." *Id.*, at *6-7 n.4. The First Amendment framework mirrors what has already been seen in the Second: as with the common use test for protected arms, some cases turn on whether conduct is "speech," and then, ask whether the speech is of the sort envisioned for protection; other cases turn on historically-understood contours of the right; or time, place and manner analysis.

And yet many regulations lacking longstanding historical antecedents nonetheless implicate constitutionally-enumerated interests. If these regulations do not fall into a discrete categorical test,

the Constitution must still be construed in a manner allowing the regulations to be tested. If "[i]nterpretation" is "[t]he activity of determining the linguistic meaning—or semantic content—of a legal text," then "[c]onstruction" is "[t]he activity of translating the semantic content of a legal text into legal rules, paradigmatically in cases where the meaning of the text is vague." Lawrence Solum, *District of Columbia v. Heller and Originalism*, ILL. PUB. LAW RESEARCH PAPER NO. 08-14, at 44 (Feb. 9, 2009), *available at* http://ssrn.com/abstract=1241655; *see also* Keith Whittington, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 7 (1999).

This is where the Court's July 19 directive, to consider the "standard of review," comes into play.

II. THE ORDINANCE IS SUBJECT TO A STANDARD OF REVIEW, AS IT IMPLICATES SECOND AMENDMENT RIGHTS WITHOUT HISTORICAL ANTECEDENT AND CANNOT BE RESOLVED BY *HELLER*'S MORE SPECIFIC TESTS.

Reviewing the ordinance in the context of the above-described framework, the ordinance falls into the fourth category: a means-end

standard of review. The right to have arms on at least some public property is within the Second Amendment's original understanding, *see, e.g., McDonald*, 177 L. Ed.2d at 921 n.27 (referencing "settlers' dependence on game for food and economic livelihood"), and if the ordinance were as broad as a ban on all guns from all public property at all times, this Court could dispatch it in the manner of Washington, D.C.'s late functional firearms ban.

Yet the County's prohibition does not go so far. Significantly, it exempts individuals' state-licensed gun carrying, and the use of guns at events such as the Scottish Games. As intended and applied, the ordinance functions as a ban on commerce in arms at the county fairgrounds. The ordinance does not implicate the common-use test, as it is not directed at specific guns or types of guns. And as the ordinance does not implicate the carrying of arms, the "sensitive places" doctrine and time, place, or manner considerations are irrelevant.

But the ordinance does implicate Second Amendment interests:

> [C]ertain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Richmond Newspapers v. *Virginia*, 448 U.S. 555, 579-80 (1980). A complete ban on gun commerce would violate the Second Amendment right at its core. *Marzzarella*, at *15 n.8. "Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them." 3 THE WRITINGS OF THOMAS JEFFERSON 230 (T.J. Randolph, ed., 1830). The County can no more ban the sale of protected guns than it can ban the sale of protected books, *Virginia* v. *Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988); contraceptives, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), or perhaps even the sale of sex toys, *Reliable Consultants, Inc.* v. *Earle*, 517 F.3d 738 (5th Cir. 2008); *but see Williams* v. *Morgan*, 478 F.3d 1316 (11th Cir. 2007).

Whether commerce in arms may be banned at the County fairgrounds must be analyzed under a means-ends standard of review.

III. HEIGHTENED, INTERMEDIATE REVIEW IS AN INAPPROPRIATE SECOND AMENDMENT CONSTRUCTION TEST WHERE PRECEDENT CALLS FOR STRICT SCRUTINY.

Heller emphatically took rational basis off the Second Amendment table. 128 S. Ct. at 2818 n.27. And while the Supreme Court has "never

provided a coherent explanation of the characteristics which, either overtly or covertly, trigger intermediate review," Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1614 (2d ed. 1988), it has been quite clear regarding the triggering of strict scrutiny.

> There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . ."

Heller, 128 S. Ct. at 2818 n.27 (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). "[C]lassifications affecting fundamental rights are given the most exacting scrutiny." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (citation omitted). The Second Amendment secures a fundamental right. *McDonald*, 177 L. Ed.2d at 921 (majority op.) & 938 (Thomas, J., concurring).

The notion that the Second Amendment might be subject to intermediate review was first raised, unsuccessfully, by the Solicitor General in *Heller*. In the government's understanding, intermediate review was so toothless that its application might have saved even the District of Columbia's handgun and functional firearms bans—perhaps

after trial, no less. Br. of the United States, No. 07-290, at 27-32. That is reason enough to be suspicious of the standard's ability to secure any measure of Second Amendment rights.

But intermediate scrutiny's problems are doctrinal as well as practical. In *Heller*, the government drew the intermediate standard from two election-law cases, applying the standard where challenged restrictions were insufficiently "severe" to merit strict scrutiny. *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). That dual-level analysis might function in the election context, where some rules are bound to be arbitrary (e.g., voting on Tuesday rather than Wednesday). And indeed, an intermediate standard of review may apply to an enumerated right under circumstances where the right's exercise is "of less constitutional moment." *Cent. Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980). But intermediate, heightened rational basis review is inapplicable writ-large to fundamental rights.

Indeed, intermediate scrutiny is not a reduced form of strict scrutiny; it is an enhanced version of rational basis review. "'[I]ntermediate' scrutiny permits us to evaluate the rationality of the legislative judgment . . . we employ this standard to aid us in determining the rationality of the legislative choice." *Plyler* v. *Doe*, 457 U.S. 202, 217 n.16 (1982). This aid is invoked in "quasi-suspect" cases, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985), where the government's classifications do not relate to enumerated rights or suspect classes, and would thus trigger only un-enhanced rational basis review in the absence of intermediate scrutiny's boost. *Romer* v. *Evans*, 517 U.S. 620, 631 (1996).

Strict scrutiny, on the other hand, is not merely required as the default standard of review for Second Amendment rights by virtue of the fact that these rights are now recognized as fundamental. It is also extremely practical. The government's interest in gun regulation is frequently claimed to be absolutely critical to public safety, with bold predictions of accidental or criminal carnage in a law's absence. Accordingly, if a gun law must be upheld, it should be upheld precisely

because the government has a compelling interest in its regulatory impact.

And because the governmental interest may be strong in this arena, applying the ordinary level of strict scrutiny for enumerated rights to gun regulations will not result in wholesale abandonment of the country's basic firearm safety laws. Strict scrutiny is context-sensitive, "far from the inevitably deadly test imagined by the Gunther myth." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 795 (2006). "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors* v. *Pena*, 515 U.S. 200, 237 (1995); *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003). In 2001, the Fifth Circuit announced a version of strict scrutiny to evaluate gun laws under the Second Amendment, permitting regulations that are

> limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.

United States v. *Emerson*, 270 F.3d 203, 261 (5th Cir. 2001); *United*

States v. *Everist*, 368 F.3d 517, 519 n.1 (5th Cir. 2004) (strict scrutiny undecided, though "it remains certain that the federal government may not restrain the freedom to bear arms based on mere whimsy or convenience"). The Fifth Circuit has yet to strike down a law for violating the Second Amendment–and Americans within that circuit safely enjoy gun shows.

IV. THE ORDINANCE FAILS BOTH STRICT SCRUTINY AND INTERMEDIATE REVIEW.

The sale of constitutionally-protected articles on public property is often protected. *See*, *e.g.*, *Wexler* v. *City of New Orleans*, 267 F. Supp. 2d 559 (E.D. La. 2005) (enjoining ban on sidewalk book sales); *Washington Free Community, Inc.* v. *Wilson*, 334 F. Supp. 77 (D.D.C. 1971) (enjoining ban on newspaper sales in parks). While not all public property is suitable for commerce, or for commerce in particular articles, the County permits commerce on its fairgrounds—and permits the possession of firearms on its fairgrounds—but bars the intersection of the two activities.

It is hard to imagine what the important, much less compelling, governmental interest is in banning such sales. The government has a

compelling interest in safety, generally, but violence in the context of lawful firearms commerce is virtually unknown in this country. Certainly, the record contains no evidence of it. The relationship between safety and banning gun shows is not even conjectural. And as the County otherwise permits guns on its fairgrounds, the sales ban's enormous impact on Second Amendment rights, and the numerous less-restrictive alternatives available to the County to ensure the gun shows maintain their unblemished safety records, inescapably lead to the conclusion that the ordinance fails any level of scrutiny.

CONCLUSION

Appellants have stated a valid cause of action for violation of Second and Fourteenth Amendments rights.

Dated: August 18, 2010

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CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 3,546 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect 12 in 14 point Century Schoolbook font.

/s/ Alan Gura
Alan Gura
Counsel for Amicus Curiae
Dated: August 18, 2010

CERTIFICATE OF SERVICE

On this, the 18th day of August, 2010, I served the foregoing Amicus Curiae Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 18th day of August, 2010

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/s/ Alan Gura
Alan Gura