

No. 07-15763

**In the
United States Court of Appeals for the Ninth Circuit**

RUSSELL ALLEN NORDYKE, ET AL.,
Appellants,

v.

MARY V. KING, ET AL.,
Appellees.

**On Appeal from the
United States District Court for
the Northern District of California**

**Brief *Amicus Curiae* of
Gun Owners of California, Inc., Gun Owners of America, Inc.,
and Gun Owners Foundation
In Support of Appellants and Reversal**

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of California, Inc., Gun Owners of America, Inc., and Gun Owners Foundation, through their undersigned counsel, submit this Disclosure Statement pursuant Federal Rules of Appellate Procedure 26.1 and 29(c).

These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Herbert W. Titus, Esquire, who is counsel of record, William J. Olson, Esquire, John S. Miles, Esquire, and Jeremiah L. Morgan, Esquire, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615.

s/Herbert W. Titus

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INTEREST OF *AMICI CURIAE*

The *amici* are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code, and each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law, with particular emphasis on constitutional guarantees related to firearm ownership and use.¹ Each of the following *amici* has filed *amicus curiae* briefs in other federal litigation involving such issues, including District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008) and McDonald v. City of Chicago, 561 U.S. ___, 130 S.Ct. ___, 2010 U.S. LEXIS 5523 (2010):

- **Gun Owners of California, Inc.** (www.gunownersca.com)
- **Gun Owners of America, Inc.** (www.gunowners.org)
- **Gun Owners Foundation** (www.gunowners.com)²

¹ *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

² A more complete description of each of the *amici* appears in their brief *amicus curiae* filed in Heller, pp. 1-2 (Feb. 11, 2008), <http://www.lawandfreedom.com/site/constitutional/DCvHellerAmicus.pdf>, and in McDonald, pp. 1-4 (Nov. 23, 2009), http://www.lawandfreedom.com/site/firearms/McDonald_Amicus.pdf.

SUMMARY OF ARGUMENT

District of Columbia v. Heller, 554 U.S. ____ (2008), 128 S.Ct. 2783, recognized that the Second Amendment to the United States Constitution codified a preexisting, individual right. McDonald v. City of Chicago, 561 U.S. ____ (2010), 2010 U.S. LEXIS 5523, extended the application of that right to the states. Both of these decisions implicitly recognize that Americans have a private property right to buy, possess, use, and sell protected arms, without which the Second Amendment would be meaningless. This property right also clearly protects the right of manufacturers and dealers to make, advertise, and sell firearms.

Gun shows allow buyers and sellers to engage in such constitutionally-protected activity. Such shows facilitate commerce between geographically diverse groups, where a wide variety of arms and munitions are offered at competitive prices. Since both firearms and ammunition are highly regulated by California law, and may only be sold face to face (and usually only through licensed dealers) gun shows provide a much needed source of lawful arms for residents of Alameda County.

Appellants' gun show is a lawful private enterprise under state and federal

law. The Alameda County Fairgrounds are promoted as open to the public, including for those engaged in lawful private enterprise. Having opened the Fairgrounds for public use, the County Supervisors are not now free to pick and choose classes of law-abiding citizens and merchants, and exclude them from using the Fairgrounds for nothing more than exercising a constitutionally protected, enumerated right.

Nor should the County Supervisors be permitted to justify their ordinance with *ex post* claims of responding to gun violence, when it is abundantly clear from the record, the legislative history, and text of the ordinance itself that the true purpose behind the ordinance was to target peaceful, law-abiding gun owners and to satisfy one Supervisor's personal agenda.

ARGUMENT

I. THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS RECOGNIZED IN HELLER, AND APPLIED TO THE STATES IN MCDONALD, INCLUDES A PERSONAL RIGHT OF ACCESS TO THOSE ARMS PROTECTED BY THE SECOND AMENDMENT.

A. The Right to Keep and Bear Arms Is an Individual, Private Property Right.

In District of Columbia v. Heller, 554 U.S. ____ (2008), 128 S.Ct. 2783, the Supreme Court recognized that the Second Amendment to the United States Constitution protects a preexisting, individual right possessed by all American citizens. *Id.* at 2799. Heller also determined that a central purpose of the Second Amendment is self-defense against both criminals and tyrants, and that the District of Columbia could not prohibit the lawful possession of firearms in the home. *Id.* at 2818.

In McDonald v. City of Chicago, 561 U.S. ____ (2010), 2010 U.S. LEXIS 5523, the Court extended application of the Second Amendment to the states, finding that the right to keep and bear arms is “among those fundamental rights necessary to our system of ordered liberty,” and as such it binds states and local governments in the same way as it binds the federal government.³ *Id.* at 64.

³ The panel reached a similar conclusion in its April 2009 opinion. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

Not only have these recent Supreme Court decisions recognized an individual right to firearms ownership, the Court's opinions implicitly recognize that Americans possess a private property right to constitutionally-protected arms.

The prefatory clause of the Second Amendment explains the significance of the "militia" to the preservation of the free state. In United States v. Miller, 307 U.S. 174 (1939), the Court listed various founding-era state laws which presuppose the method by which the militia would become armed.

Massachusetts required that every single man "furnish[] himself with arms."

Miller at 180-81. Likewise, New York statutes required that each person

"provide himself" with firearms. *Id.* In Virginia, only if the person

demonstrated "that he is so poor that he cannot purchase the arms herein

required, such court shall cause them to be purchased out of the money arising

from delinquents." *Id.*

Both Heller and McDonald explained the important difference between the standing army and the militia, the latter of which were required to bring their own weapons with them for service. Heller at 2800, 2811; McDonald at 46. In order to fulfill the Second Amendment's purpose to secure a citizens' militia

(Heller at 2866), the Second Amendment right to keep and bear arms presupposed the existence of a personal property right to acquire, possess, use, and sell firearms, the exercise of which cannot be infringed (penalized, discouraged, or impeded) by the state.

B. The Second Amendment Protects the Private Property Right to Buy, Sell, and Trade Protected Arms.

Unless the Second Amendment secures a private property right in firearms, it could not have its intended effect — to protect the right to keep and bear arms. It is a basic maxim of property law that true ownership of property includes the right to purchase, the right to control, and the right to dispose of that property. *See generally* J. Kent, II Commentaries on American Law, Lecture XXXIV, pp. 255-76 (Claitor's, Baton Rouge: 1827). If the government could ban the sale of firearms, the only way to possess one would be to craft a firearm for one's self — a skill possessed by few Americans — thereby rendering the right a nullity for most.

Thus, the Second Amendment protects not only the right of individuals to keep and bear arms for their personal use, but also to protect the right of manufacturers to design and build them, and the right of dealers to advertise and

sell them. *See, e.g.,* D. Young, The Founders' View of the Right to Keep and Bear Arms, pp. 37-38 (2007).

C. The Second Amendment Right Extends to Gun Shows.

Gun shows are held to stimulate interest and facilitate commerce in firearms. Sellers, by exhibiting and offering firearms for sale, make protected arms available for sale to citizens. Buyers, by purchasing and keeping firearms, are able to engage in protected Second Amendment activities.

Gun shows are conducted similarly to a flea market, with vendors purchasing space at tables and displaying their merchandise.⁴ Gun shows are an efficient way of bringing together buyers and sellers who, were it not for the show, would be too geographically distant from one another to conduct business. Additionally, gun shows often provide **the only** economically viable way for some dealers to conduct business, since they provide a large number of people in one location, resulting in a comparatively high volume of business in a short period of time, coupled with low overhead in setting up a temporary booth, as opposed to operating a fixed brick-and-mortar store. This enables gun owners to have access to a wider variety of firearms, ammunition, and accessories than

⁴ All federal and state firearm laws are in effect during gun shows.

they otherwise would, often at a lower cost than at a local gun store.

Moreover, beginning February 1, 2011, California Penal Code Section 12318 takes effect, providing that “the delivery or transfer of ownership of handgun ammunition may only occur in a face-to-face transaction” with a burden on the seller to confirm the identity of the purchaser. Penal Code Section 12318(a). This law would effectively halt the supply of ammunition that in the past Californians have purchased over the Internet and have had shipped via common carriers such as UPS and FedEx. No longer able to purchase ammunition online or by mail, Californians will be left to find ammunition at gun stores and gun shows. If the effect of the new state law were allowed to be exacerbated by the County’s ordinance, and other similar ordinances, the gun show option would be restricted and the rights of law-abiding gun owners to acquire ammunition would be severely curtailed.

II. THE SECOND AMENDMENT SECURES APPELLANTS’ THE RIGHT OF ACCESS TO THE COUNTY FAIRGROUNDS IN THIS CASE.

A. Appellants’ Gun Show Is a Lawful Private Enterprise Protected by the Second Amendment.

The firearms industry in California is heavily regulated by both federal and state law. The California Attorney General has published a booklet which

summarizes “California Firearms Laws” — the summary alone is 55 pages. Even so, it is unquestioned that Appellants’ gun show is a lawful business enterprise in the State of California, and that there is “no evidence” of any “violent criminal activity” or “any violation of federal or state firearm laws.” Stipulated Facts #43 and 44.

B. The Alameda County Fairgrounds Are Generally Accessible to Lawful Private Enterprise Activities.

The panel opinion relies on Heller’s “sensitive places” exception, where the Supreme Court implied the government had authority to regulate firearms in places like “schools and government buildings.” Nordyke v. King, 563 F.3d 439 (9th Cir. 2009), Slip Op. (“Panel Op.”) at 4499-4500, citing Heller, 128 S.Ct. at 2816-17. Here, the County has argued, and the panel accepted, that the Alameda County fairgrounds is a sensitive place, and thus firearms can be restricted there. The panel characterizes sensitive places as those where “high numbers of people might congregate [which] presumably ... risks harm to great numbers of defenseless people....” Panel Op. at 4500.

The panel’s definition of “sensitive places” is flawed, and has led the Court to a mistaken conclusion. By using the term “sensitive places,” the Supreme Court was referring to the government’s control as proprietor of

facilities designated for certain government purposes. The term has to do with the government’s relationship with the facility and the facility’s designated use — not the number of people who might attend an event there. This definition would cover facilities such as schools and courthouses, which are not open generally to the public to come and go at will. *See, e.g., Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506-07 (1969).

The Alameda County fairgrounds, on the other hand, is dedicated as a “public use” facility.⁵ The Alameda County “Parks, Recreation & Historic Sites Directory” lists the fairgrounds as a county park, and mandates that one of the qualifications for such designation is “[p]ublic use and accessibility.”⁶ The County claims that “[m]ore than 3 million persons will have participated in events at the Alameda County Fairgrounds during 2008.” *Id.* Not only is the fairgrounds open to the public, the County has designated it to be used by lawful

⁵ Alameda County Fairgrounds “Approval 2009 Annual Budget” (Oct. 2008), http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_11_18_08/GENERAL%20ADMINISTRATION/Regular%20Calendar/Agricultural_Fair_Association_Annual_Budget.pdf. *See also* Panel Op. at 4471.

⁶ Alameda County “Parks, Recreation & Historic Sites Directory” (2003), p. 6. http://www.acgov.org/cda/planning/ordinance/documents/IntroductoryPages_TO_C.pdf.

commercial enterprises. Consequently, the fairgrounds “is host to trade and consumer shows, festivals, corporate picnics, and much more.”⁷ Thus, the nature of the County’s interest in and, consequently its right to limit use of the fairgrounds, is fundamentally different from that with respect to a school or a courthouse.

The California Supreme Court has noted that “a county is given substantial authority to manage its property, including the most fundamental decision as to how the property will be used.” Nordyke v. King, 27 Cal. 4th 875 (2002) at 882. Yet, the County has decided that the fairgrounds be put to public use, including lawful commercial use. Having opened the fairgrounds to the public, the County cannot thereafter decide to exclude businesses engaged in an activity that is constitutionally protected by an enumerated right. In other words, having made the decision that the class (commercial activity) to which appellants belong will be permitted to use the fairgrounds, the County cannot thereafter single out for discriminatory treatment a subclass of merchants and consumers attempting to exercise a constitutionally-protected right. Such a discriminatory ordinance violates the “public use” nature of the fairgrounds, and places an unconstitutional

⁷ <http://www.alamedacountyfair.com/EventSolutions.php>

content-based restriction on a group that wishes to engage in peaceful and lawful commercial activity. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

The panel’s opinion next attempts to differentiate between what it terms “government interference with the activity” and “the government’s decision not to ... facilitate ... such activity.” Panel Op. at 4499. The panel believed that the County’s decision to prohibit gun shows was not interference, but rather a decision not to facilitate, because “the Second Amendment ... does not contain an entitlement to bring guns onto government property.” *Id.* at 4499. That reasoning is faulty, failing to draw a distinction, for example, between a county jail and a public park. *Compare, e.g., Adderley v. Florida*, 385 US 39 (1966) with *Hague v. CIO*, 307 US 496, 515 (1939). It is simply wrong to say that one particular group has no “entitlement” to use County property after the County has granted **everyone** an entitlement to use the property. Indeed, once the County specifies that the intended use of the property is for the public, it cannot then single out, by discriminatory regulation, groups of peaceful, law abiding citizens — exercising a constitutionally-protected right — that it does not like,

and exclude them from the property. *See e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981).

C. This County Ordinance Prohibiting Appellants' Gun Show Infringes on Appellants' Second Amendment Rights.

Further evidence of the discriminatory nature of the County ordinance is the fact that it does not prohibit all guns on County property. The fourth exception in the ordinance allows the Scottish Games to use firearms in depicting ancient battles. Alameda County Code Section 9.12.120(F)(4). Thus, the County has not even targeted gun owners as a class, but rather only those gun owners who are part of a “gun culture” against which one Supervisor Mary V. King appears to have a personal vendetta, discussed below. Such singling out of a particular group of law-abiding people which the County Board does not like is a constitutionally-impermissible reason for enacting any form of legislation, and particularly so when it involves attacking those exercising a constitutionally-protected right.

The panel’s opinion found that “the Board passed the Ordinance in response to a shooting that occurred the previous summer...” which had no connection to the gun show. Panel Op. at 4471. The panel concluded that “the

County has offered a perfectly **plausible** purpose for the Ordinance: the reduction of **gun violence** on County property.” *Id.* at 4504 (emphasis added).

However the panel also acknowledged that Ms. King “had ‘been trying to get rid of **gun shows** ...’” — not “**gun violence**” — for years. *Id.* at 4472 (emphasis added). Such discriminatory intent is further evidenced by Ms. King’s statements in her May 20, 1999 memorandum requesting from County Counsel a “way to prohibit **gun shows**.” Undisputed Facts, p. 3, fact 9. Contrary to what the panel claims, the concern Ms. King expressed was not about “gun violence,” but instead about gun owners — or “people [who] display guns for worship as deities [and] treat [guns] as icons of patriotism.” Panel Op. at 4472.

The record shows that Ms. King introduced the County ordinance not in response to some perceived problem of gun violence at gun shows, but to discriminate against gun shows, because she wanted to impede gun owners as a class from exercising their constitutionally-protected rights. By prohibiting gun shows, the current rules by design and effect discriminate against a group of merchants for no reason other than that such shows entail the display of firearms.

The Alameda County Board of Supervisors may not enact discriminatory ordinances to impede people with whom they disagree — or even dislike — for

exercising a constitutionally-protected right in a place that is open to the public for commercial activity. *See, e.g.,* Police Dep't. of Chicago v. Mosley, 408 U.S. 97 (1972). The panel should not accept the County's "**plausible**" *ex post* attempt to justify its law as responsive to violence, but should instead look to the **actual** clear and unambiguous purpose for which it was originally enacted — to discriminate against gun owners.

CONCLUSION

For the reasons stated herein, the challenged portions of the Alameda County Code should be found to violate the Second Amendment of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the page limitation set forth by the Court's Order of July 19, 2010, excluding the parts of the brief exempted by Rule 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 a proportionally spaced typeface using WordPerfect version 10.0.0.990 in 14-point CG Times.

s/Herbert W. Titus

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Dated: August 18, 2010

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of California, Inc., *et al.*, in Support of Appellants and Reversal, was made, this 18th day of August 2010, by the Court's Case Management/Electronic Case Files system upon the following attorneys for the parties:

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