



## Summary of *Nordyke v. King* 5/5/11

### I. Introduction

On May 2, 2011, the Ninth Circuit Court of Appeals announced its latest decision in *Nordyke v. King*, a suit brought by a gun show promoter challenging an Alameda County ordinance prohibiting the possession of firearms or ammunition on County-owned property. In a majority opinion written by Judge O’Scannlain, the Ninth Circuit rejected the plaintiff-appellants’ First Amendment, Second Amendment and Fourteenth Amendment claims. The court did, however, direct the district court to grant the appellants leave to amend their complaint on their Second Amendment claim. Additionally, Judge Gould filed a concurrence that did not join the majority’s holding that firearms regulations that substantially burden the right to bear arms must be evaluated under heightened scrutiny.

### II. Second Amendment Claim

In *Nordyke*, the appellants claimed that the ordinance violated their Second Amendment rights by prohibiting them from holding a gun show on county property. As the court noted, the plaintiffs’ complaint did not allege “that any of the plaintiffs wished to carry guns onto county property for the purpose of defending themselves while on that property.”

#### A. Heightened Scrutiny Only Applies to Regulations that Substantially Burden the Second Amendment

After reviewing the case’s lengthy procedural history, the court stated that the question of what standard of review to apply in Second Amendment cases had not been resolved by the Supreme Court in either *Heller* or *McDonald*. Citing lower court decisions, Judge O’Scannlain observed that some courts had determined that “only regulations which substantially burden the right to keep and to bear arms should receive heightened scrutiny,” while “[o]ther courts would apply strict scrutiny to all gun-control regulations.”

The *Nordyke* court held that it was appropriate to apply heightened scrutiny only where a regulation substantially burdens the Second Amendment, rejecting the appellants’ argument that strict scrutiny ought to apply to all firearm regulations. “The Supreme Court’s reasoning in *Heller* and *McDonald*,” the court said, “suggests that heightened scrutiny does not apply unless a regulation substantially burdens the right to keep and to bear arms for self-defense.” In *Heller*, the *Nordyke* court reasoned, the Supreme Court emphasized the severity of the handgun ban’s impact on the ability of District residents’ “core right to armed self-defense.” *Heller* contrasted “the handgun ban’s heavy burden on effective self-defense” with laws that had only a remote impact on the right to bear arms, including eighteenth-century gunpowder storage laws and colonial discharge prohibitions.

## **B. Substantial Burden Test Is More Appropriate Than Always Applying Strict Scrutiny**

*Heller*, said O’Scannlain, also supported the conclusion that it was not appropriate to apply strict scrutiny to every firearm law. Strict scrutiny would require a court to determine “whether each challenged gun-control regulation is narrowly tailored to a compelling governmental interest (presumably, the interest in reducing gun crime). But *Heller* specifically renounced an approach that would base the constitutionality of gun-control regulations on judicial estimations of the extent to which each regulation is likely to reduce such crime.” The *Heller* majority rejected Justice Breyer’s interest-balancing approach, the court concluded, because it “would allow judges to constrict the scope of the Second Amendment in situations where they believe the right is too dangerous.” *Heller* “sorted...regulations based on the burden they imposed on the right to keep and to bear arms for self-defense,” not based on “the extent to which the regulation furthered the government’s interest in preventing crime.”

The *Nordyke* court was also “satisfied that a substantial burden framework will prove to be far more judicially manageable than an approach that would reflexively apply strict scrutiny to all gun-control laws.” The court framed the application of strict scrutiny as an inquiry into “whether the regulation is narrowly tailored to that interest,” which would require the court to decide “whether the regulation is *likely to be effective* (or, at least, whether less burdensome regulations would be as effective).” (Emphasis in original) The court stated that a determination of the effectiveness of firearms laws was “a task better fit for the legislature.” A “burdensomeness” evaluation, by contrast, would not produce as many “difficult empirical questions,” in part because similar inquiries were already used in other constitutional contexts, like abortion and content-neutral speech. Significantly, while the court held that heightened scrutiny would apply to laws that substantially burden the Second Amendment, it did not decide what level of scrutiny would apply in those cases.

Judge O’Scannlain’s opinion explicitly rejected the appellants’ argument that strict scrutiny was required because *McDonald* recognized the Second Amendment as a fundamental right. O’Scannlain stated that, “the Supreme Court does not apply strict scrutiny to every law that regulates the exercise of a fundamental right, despite language in some cases suggesting the contrary. Instead, in a variety of contexts, the Court applies mere rational basis scrutiny to laws that regulate, but do not significantly burden, fundamental rights.” The court cited several other areas of law where courts apply a burdensomeness threshold, including abortion (examining whether a restriction poses an “undue burden”), speech (“time, place, or manner” restrictions are permissible if they are “not too cumbersome”), elections (“severe” restrictions trigger strict scrutiny), and marriage (regulations that “significantly interfere” with the right trigger strict scrutiny).

## **C. Guidance on Burdensomeness**

Before analyzing whether the Alameda County ordinance significantly burdened the Second Amendment, the court offered several observations about burdensomeness derived from other areas of law:

- “Where, as here, government restricts the distribution of a constitutionally protected good or service, courts typically ask whether the restriction leaves open sufficient alternative avenues for obtaining the good or service...[W]hen deciding whether a restriction on gun sales substantially burdens Second Amendment rights, we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes.”
- “Similarly, a law does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise....Thus, regulations of gun sales do not substantially burden Second Amendment rights merely because they make it more difficult to obtain a gun.”
- “Finally, a regulation is particularly unlikely to impose a substantial burden on a constitutional right where it simply declines to use government funds or property to facilitate the exercise of that right...Regulations that simply refuse to provide government subsidies to gun dealers, therefore, do not constitute a substantial burden on the right to keep and to bear arms.”

#### **D. Complaint Fails to State Second Amendment Claim**

Applying these principles, the court found that the appellants’ complaint failed to allege sufficient facts to state a Second Amendment claim. The court stated that the complaint “does not assert that the Ordinance makes it materially more difficult to obtain firearms. Nor does it allege a shortage of places to purchase guns in or near Alameda County. In any event, the Ordinance does not prohibit gun shows, but merely declines to host them on government premises.” Because the complaint had been submitted over six years ago, prior to the creation of “all of the Supreme Court’s modern Second Amendment case law,” the court stated that “there may well be facts which the *Nordykes* did not consider relevant in 2004...but which, if now alleged, might plausibly suggest that the Ordinance substantially burdens the *Nordykes*’ Second Amendment rights.” Because of this concern, the Ninth Circuit directed the district court to grant the plaintiffs the opportunity to amend their complaint.

#### **E. Response to Judge Gould’s Concurrence**

The *Nordyke* court concluded its Second Amendment discussion by responding to Judge Gould’s concurrence. Under Judge Gould’s proposed standard of review, heightened scrutiny would only apply to “arms regulations falling within the core purposes of the Second Amendment, that is, regulations aimed at restricting defense of the home, resistance of tyrannous government, and protection of country.” By contrast, “incidental burdens on the Second Amendment right (analogous to time, place, and manner speech restrictions)” would only face “reasonableness review.”

O’Scannlain acknowledged that it was not clear how different Judge Gould’s proposed test was from the court’s “substantial burden” approach. “Both approaches,” the court observed, “would require a court to determine the extent to which a regulation interferes with the right to keep and

to bear arms, and both would apply heightened scrutiny only to regulations whose interference with the right reaches a certain threshold.”

The court, however, expressed concern that Judge Gould’s approach “could also be read as applying mere rational basis scrutiny to every gun-control regulation that is not a complete ban on handguns.” Because “almost every gun-control regulation—even those amounting to de facto gun bans” would survive rational basis, the court wrote, such an approach would make the Second Amendment have “no effect.” The court used the example of content-neutral time, place, and manner restrictions, which, while generally permissible, become constitutionally suspect “if they fail to ‘leave open ample alternative channels for communication.’” The court rejected Judge Gould’s distinction between “reasonableness” and “rational basis” approaches, concluding that the description of reasonableness as an interest-balancing approach “sounds exactly like Justice Breyer’s ‘interest-balancing’ test” that the majority rejected in *Heller*.<sup>1</sup>

### III. First Amendment

Addressing the appellants’ First Amendment claim, the court “assume[d], without deciding, that the display of guns at a gun show is expressive conduct,” because Alameda County did not contest that gun possession at a gun show might involve protected speech. The court then turned to the question of the level of scrutiny to apply to the ordinance. Under established First Amendment jurisprudence, if a law is “related to the suppression of free expression,” then strict scrutiny would apply; if the law “hits speech without having aimed at it,” an intermediate scrutiny standard would be used.

The appellants argued that strict scrutiny was appropriate because the ordinance was “adopted...in order to prevent members of the ‘gun culture’ from expressing their views about firearms and the Second Amendment,” citing on one supervisor’s remarks. The court, however, observed that “the Ordinance’s language suggests that gun violence, not gun culture, motivated its passage,” noting the ordinance’s findings about gun deaths and injuries in Alameda County. The court stated that “the feelings of one county official do not necessarily bear any relation to the aims and interests of the county legislature as a whole,” and noted that other First Amendment cases “determined whether the law at issue was related to the suppression of speech without psychoanalyzing its authors.” Additionally, exceptions in the ordinance for historical recreations and artistic productions did not “suggest unconstitutional favoritism.”

The court applied the intermediate scrutiny test articulated in *O’Brien*, which held that “a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that

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<sup>1</sup> The majority and Judge Gould also diverged on the significance of *Heller*’s discussion of certain “presumptively lawful regulatory measures,” including prohibitions on firearm possession by felons and the mentally ill, prohibitions on possession in sensitive places, and laws imposing conditions on the sale of firearms. Judge Gould concluded that *Heller* meant that these laws merited (and would satisfy) rational basis review. The majority disagreed, stating, “we read ‘presumptively lawful regulations’ to mean ‘regulations which we presume will survive constitutional scrutiny,’ and to say nothing about what standard of review should be applied to them. This reading fits with the context in which the remark was made: cautioning readers against overreading the opinion.”

interest.” In concluding that the ordinance satisfies the *O’Brien* test, the court found “sufficient evidence to suggest that the Ordinance furthers the County’s interest in keeping those on its property safe from gun crime,” and that there were no less restrictive ways to keep firearms off county property: “The County thought it dangerous for people to possess firearms on its property. Banning or strictly regulating gun possession on county land is a straightforward response to such a danger.”

#### **IV. Equal Protection**

Finally, the *Nordyke* court rejected the appellants’ claim alleging that the ordinance’s exceptions for artistic events violated the Equal Protection Clause. The court held that because the ordinance did not burden a suspect class, it would survive scrutiny if it had a rational basis. The court noted that, “although the right to keep and to bear arms for self-defense is a fundamental right, that right is more appropriately analyzed under the Second Amendment.” Finding that “[t]he County could reasonably conclude that gun shows are more dangerous than military reenactments,” the court concluded that the ordinance’s exceptions met rational basis scrutiny.