

No. 08-15773

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID K. MEHL; LOK T. LAU; and FRANK FLORES,
Plaintiffs-Appellants,

vs.

LOU BLANAS, individually and in his official capacity as SHERIFF OF
COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO,
SHERIFF'S DEPARTMENT; COUNTY OF SACRAMENTO; BILL
LOCKYER, Attorney General, State of California; and RANDI ROSSI,
State Firearms Director and Custodian of Records,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:03-cv-02682 MCE KJM

The Honorable Morrison C. England, Jr., Judge

APPELLANTS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
THE IMPACT OF HELLER AND MCDONALD ON THIS CASE AND THE PROPER STANDARD OF SECOND AMENDMENT REVIEW	1
INCORPORATION OF THE SECOND AMENDMENT BY MCDONALD	4
THE IMPACT OF NORDYKE ON THIS CASE	5
ISSUE PRESENTED BASED ON THE IMPACT OF NORDYKE AND MCDONALD	6
IMPACT OF NORDYKE AND MCDONALD AS APPLIED TO THE FACTS OF THIS CASE	7
CONCLUSION	15
STATEMENT OF RELATED CASES	16
CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

CASES:

<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432, 440 (1986).....	2
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	<i>passim</i>
<i>Hickman v. Block</i> , 81 F.3d 98 (9th Cir. 1996).....	1
<i>Mass. Bd. of Retirement v. Murgia</i> , 427 U.S. 307 (1976).....	3
<i>McDonald v. City of Chicago</i> , 130 S. Ct. 3020 (2010).....	<i>passim</i>
<i>Nordyke v. King</i> , 681 F.3d 1041 (9th Cir. 2012).....	<i>passim</i>
<i>Romer v. Evans</i> , 517 U.S. 620, 631 (1996).....	2
<i>Schweiker v. Wilson</i> , 450 U.S. 221, 230 (1981).....	2
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969).....	2, 4
<i>Silveira v. Lockyer</i> , 312 F.3d 1052 (9th Cir. 2002).....	1-3
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978).....	2, 4

STATUTES:

California Penal Code § 25400.....	7, 12
California Penal Code § 25450-25475.....	12
California Penal Code § 25850.....	7, 12
California Penal Code § 25900-25925.....	12
California Penal Code § 26150-26225.....	7, 8, 12
California Penal Code § 26300-26325.....	12

I. INTRODUCTION

The Court has requested supplemental briefing addressing the effect of *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) on the certified issues in this case. As discussed below, the effect of *Nordyke* and *McDonald* on the certified issues in this case is substantial. These cases have effectively changed the law that directly impacts the certified issues in this case. As is discussed below, the law applied by the District Court is no longer applicable and when the new law is applied to the facts of this case Plaintiffs' prevail on their claims.

II. THE IMPACT OF HELLER AND MCDONALD ON THIS CASE AND THE PROPER STANDARD OF SECOND AMENDMENT REVIEW

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms. 554 U.S. at 595, 625. At the time the *Heller* opinion was issued, and at the time this case was before the District Court, the Ninth Circuit's Second Amendment jurisprudence had a contrary viewpoint. At the time, case law in the Ninth Circuit held that the Second Amendment did not confer upon state residents any individual right to own or possess guns or other firearms. *See e.g. Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996). In *Silveira*, this Court held that "the Second Amendment impose[d] no limitation on California's ability to enact legislation regulating or prohibiting the

APPELLANTS' SUPPLEMENTAL BRIEF - 1

possession or use of firearms...” 312 F.3d at 1087. Based on this interpretation, laws restricting the use, possession, and/or ownership of firearms were subject to only rational basis review. *Id.* at 1088. Therefore, based on this interpretation, had California elected to ban private gun ownership all together such a ban would have been upheld assuming the statute was rationally related to a legitimate state interest and narrowly tailored to achieve that interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

However, when a state statute burdens a fundamental right or targets a suspect class, that statute receives heightened scrutiny under the Fourteenth Amendment’s Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Statutes that treat individuals differently based on their race, alienage, or national origin “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1986). Statutes infringing on fundamental rights are subject to the same searching review. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel).

While in *Heller* the Supreme Court declined to specifically establish a level of scrutiny for evaluating Second Amendment restrictions, the Court did foreclose the possibility of an “interest balancing inquiry.” *Id.* at 634. As stated in *Heller*:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through *Skokie*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very product of an interest-balancing by the people—which Justice BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id. at 634-35 (internal citations omitted). The above language also implicitly forecloses the possibility of rational basis review for evaluating Second Amendment restrictions. As this Court noted in *Silveira*, “the Supreme Court has observed that the rational-basis test is “a relatively relaxed standard reflecting the Court’s awareness that the drawing of lines that create distinctions” is primarily a task for legislatures. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (quotes in original). 312 F.3d at 1088. Applying only rational basis review to Second Amendment restrictions would afford even less protection than an interest

balancing approach and therefore cannot be applied as the correct standard of review.

Although in *Heller* the Court did not specifically establish a level of scrutiny for evaluating Second Amendment restrictions, it can be read from the opinion that either intermediate or strict scrutiny should apply. Thankfully this ambiguity was clarified in *McDonald*. In *McDonald* the Court held that the Second Amendment right to keep and bear arms is “fundamental to *our* scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition,” thus defining the Second Amendment right to keep and bear arms for the purpose of self-defense as fundamental. 130 S. Ct. at 3036, 3050 (emphasis in original) (internal citations omitted). The same as other fundamental rights, regulations restricting the Second Amendment right to keep and bear arms for self-defense should therefore be subject to strict scrutiny. *See, e.g., Zablocki*, 434 U.S. 374 (1978); *Shapiro*, 394 U.S. 618 (1969).

III. INCORPORATION OF THE SECOND AMENDMENT BY MCDONALD

McDonald not only clarified the appropriate level of scrutiny to be applied in Second Amendment cases, it also resolved another question left open by the Court in *Heller*. The restrictions challenged in *Heller* were not state restrictions because the challenged restrictions only applied within the limits of the District of Columbia. 554 U.S. at 573-76. The *Heller* opinion left open the question of

whether the Second Amendment applied to the states. At the time this case was argued before this Court, this remained an open question. In *McDonald*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. 130 S. Ct. at 3050. Therefore, we now know from *Heller* and *McDonald* that the Second Amendment confers a fundamental individual right to keep and bear arms for the purpose of self-defense and that regulations infringing upon that right should be subject to strict scrutiny.

IV. THE IMPACT OF NORDYKE ON THIS CASE

This Court's first opportunity to apply this standard was in *Nordyke*. However, *Nordyke* did not deal with the use of firearms for self-defense but rather dealt with the sale of firearms at a gun show, *i.e.* a commercial transaction involving firearms. 681 F.3d at 1043-44. In *Nordyke*, the regulation at issue was a requirement that when conducting a gun show firearms not in the actual possession of the authorized participant be secured (such as with a sturdy cable attaching the firearm to a table) to prevent unauthorized use. *Id.* at 1044. The regulation also allowed buyers to physically inspect properly secured firearms. *Id.* In *Nordyke* this Court held that Plaintiffs could not state a viable Second Amendment claim and also stated that no matter how broad the scope of the Second Amendment as applied to Plaintiffs' gun shows the regulation was permissible. *Id.* The Plaintiffs

in this case agree with the Court's application of the law in *Nordyke*. First, as stated in *Heller*, "the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. Even if strict scrutiny had been applied to the regulations in *Nordyke*, the regulations would not likely have been found to offend the constitution. The county's regulation requiring firearms not in the actual possession of the authorized participant to be secured to a table by a sturdy cable to prevent unauthorized use is justified by the compelling government interest of providing for the health and safety of all gun show attendees and participants as the property is owned by the county. Additionally, the regulation is narrowly tailored as it does not prevent buyers from physically inspecting properly secured firearms nor does it require the firearms to be secured when in the actual possession of the authorized participant. Second, displaying and selling firearms at a gun show does not infringe upon the right to keep and bear arms for the purpose of self-defense. Implicit in the right to keep and bear arms is access to and the ability to purchase firearms and suitable ammunition. However, the county's regulations in *Nordyke* did not prevent the purchase or sale of the firearms. 681 F.3d at 1043-44. Therefore the Court correctly concluded that the *Nordyke* Plaintiffs could not state a viable Second Amendment claim.

V. ISSUE PRESENTED BASED ON THE IMPACT OF NORDYKE AND MCDONALD

The facts of this case are very different from the facts in *Nordyke*. This case deals with the issuance of permits to carry a concealed weapon (“CCW”). The ability to carry a concealed weapon goes directly to the heart of the fundamental right to keep and bear arms for the purpose of self-defense. Unlike *Nordyke*, here Plaintiff’s do state a viable Second Amendment claim. The question here is whether as applied to the facts of this case does the state’s licensing scheme and Sacramento County’s application of it pass constitutional muster.

VI. IMPACT OF NORDYKE AND MCDONALD AS APPLIED TO THE FACTS OF THIS CASE

California has strict laws regulating the possession of firearms by private individuals within the state. California Penal Code section 25400 prohibits the carrying of a concealed weapon unless an individual applies for and receives permission to do so pursuant to California Penal Code sections 26150-26225. In addition, California Penal Code section 25850 prohibits the carrying of any loaded weapon by a private individual on his or her person or in his or her car. What this regulatory scheme amounts to is that no private individual in California may possess a loaded firearm outside their home or office without prior authorization from the state. Since individuals are subject to violence outside of their homes and offices, the question is whether this regulatory scheme infringes upon Californians fundamental right to keep and bear arms for the purpose of self-defense. As was

made clear in *Heller*, “the right secured by the Second Amendment is not unlimited.” 554 U.S. at 626. In *Heller*, the Supreme Court stated:

Although we 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.

Id. at 626-27. California’s regulatory scheme does at least in theory provide individuals with an avenue through which they are able to exercise their constitutional right to carry a concealed weapon for the purpose of self-defense through the CCW permit issuance process. The question is then whether this process is justified by a compelling government interest and is narrowly tailored to achieve that interest by the least restrictive means. The Plaintiffs-Appellants in this case argue that California’s current CCW permit issuance policy is not narrowly tailored and does not employ the least restrictive means to ensure that those who are unfit to carry a concealed weapon are prevented from doing so while at the same time allowing qualified law-abiding citizens to obtain such a permit.

Under California’s current system, California Penal Code sections 26150-26225 allow a county sheriff or city police chief to deny any applicant, other than retired peace officers, without giving or having any reason whatsoever. This policy is what is referred to as a “may-issue” policy. This is in contrast to the majority of

states that employ a “shall-issue” policy under which a CCW will be granted to all applicants who are not disqualified based on certain enumerated criteria. To clarify, many states do not allow felons, the mentally ill, violent offenders, and other like individuals to obtain CCW permits but grant them to all other applicants who are not disqualified. Applicants in “shall-issue” states are not required to demonstrate “good cause” as a prerequisite to obtaining a CCW permit.

In California, an application for a CCW permit usually begins by completing the California Department of Justice Standard Application for License to Carry a Concealed Weapon. (SER0038, SER0053). With reference to this case, the standard Department of Justice (“DOJ”) application was completed by Plaintiff Mehl twice. Mehl submitted his first application on July 16, 2002. *Id.* On the DOJ application it states, “Review Section 7 and be prepared to answer these questions orally. Do not write anything in Section 7 unless specifically directed to do so by the licensing agency.” *Id.* Pursuant to these instructions Mehl completed all sections other than Section 7 and submitted his application for processing. Defendant Lou Blanas was the Sheriff for Sacramento County at the time Mehl submitted both his CCW permit applications. Amber Wong processed all CCW applications under Blanas at the time Mehl submitted his applications. (ER000994-937). Although the DOJ application is very clear on its face that Section 7 is to be left blank absent instructions to the contrary, there was some contention from

Defendants that Mehl's application was incomplete since Section 7 had not been completed. Mehl's initial application was returned to him with sticky note instructing him to complete the application presumably due to his failure to complete Section 7. However, when questioned in her deposition about the proper procedure for completing Section 7, Ms. Wong stated that if Section 7 of the application was not filled out by an applicant that she would then fill it in herself by contacting the applicant. The actual procedure in Sacramento County was to have the applicant come into the station for an interview to complete the section. (ER000943-944). Prior procedure in Sacramento County was to have the detective call the applicant and fill in the section. (ER000947). Ms. Wong also testified that returning an application with a sticky note for the applicant to complete an application was not proper procedure. (ER000950:14-21).

On October 29, 2002, Mehl was advised by Defendant Blanas (via Dehnam) that his July 16, 2002, application was denied because he had not met the good cause criteria. It is important to note that Mehl's application was not denied because he never submitted an application or because his application was incomplete. In addition, Mehl was advised that he could "re-apply" after one year. (SER0070). Such a statement only makes sense if Mehl's application was denied for cause and not because it was incomplete. An applicant submitting an incomplete application would not be required to wait a year before reapplying but

could simply complete and resubmit the application. Regardless, one year later Mehl submitted a second application again pursuant to the instructions contained in the DOJ application. This time no one from the sheriff's office contacted Mehl and his application was summarily denied in 2003. (SER0151 ¶ 6). Any question as to Mehl's standing to bring this Second Amendment claim against the defendants should be resolved by this discussion and the discussion on this issue in Appellants' Reply Brief.

Importantly, the denial of Mehl's CCW permit application in this manner was permissible prior to *Heller* and *McDonald* when viewed as a Second Amendment challenge alone. Prior to *Heller* there was no individual right for private citizens to keep and bear arms in California. Until *McDonald* was decided, the individual right to keep and bear arms for self-defense conferred by *Heller* was not extended to the states. Based on the case law in the Ninth Circuit prior to these decisions there was no limitation on the state's ability to regulate, prohibit, or all out ban private firearm ownership. Therefore, before *Heller* and *McDonald*, a Second Amendment claim alone challenging California's CCW issuance policy would not have gotten very far.

However, today the law has changed and so must California's CCW issuance policy. A sheriff or police chief does not have the authority to deny a law-abiding citizen the right to be approved for a CCW permit, assuming that

individual has the proper training and is not disqualified by certain criteria which serve a compelling government interest and that is narrowly tailored to achieve that interest through the least restrictive means. California's current discretionary "may-issue" policy does not meet that standard.

The current discretionary "may-issue" policy employed by California opens the door for abuses in the issuance of CCW permits. Although prior to *Heller* and *McDonald* a Second Amendment claim alone challenging California's CCW permit issuance policy would not have gotten very far, an Equal Protection claim challenging the same policy would have had merit even under prior Ninth Circuit precedent. Not only does California's CCW issuance policy provide an exemption for retired peace officers, in its application certain individuals other than retired peace officers also receive preferential treatment over others. See C.P.C. §§ 25400, 25450-25475, 25850, 25900-25925, 26150-26225, 26300-26325. For example, in Sacramento County individuals who contributed to Sheriff Blanas' reelection campaign and provided other benefits and services to the sheriff received CCW permits in exchange. A regulatory scheme that stands in the way of an individual being able to lawfully exercise his or her constitutional right to keep and bear arms for self-defense cannot be used as a bargaining chip for a sheriff to receive favors and contributions to his reelection campaign. The facts of this case are a classic

example of what can happen when elected officials are granted absolute, unfettered discretion in the implementation of policy.

Pursuant to California Penal Code section 26150(a), a sheriff “may issue” a CCW permit if an applicant demonstrates good cause exists for issuance of the license but the sheriff is not required to issue the permit. In this case Mehl applied twice. He was denied both times. However, if Mehl had purchased a home for Sheriff Blanas, allowed Blanas to fly in his private jet, contributed thousands of dollars to his reelection campaign, or simply been a close friend of the sheriff, then Mehl’s application very likely would have been approved.

In fact, Edwin Gerber’s application for a CCW permit was approved by Sheriff Blanas even though Gerber did not complete or even submit the required DOJ application. The difference between Mehl and Gerber is that Gerber had close connections with the sheriff. Blanas personally approved Gerber’s “verbal” application on July 26, 2006, and then Gerber back-dated a “written” application to July 25, 2006. *Compare* ER000209 with ER000210-215; *See also* Blanas’ Depo. commencing at ER000898, *and specifically* Blanas Depo. 46:7-16, 47:9-48:25, 55:11-18, 63:14-67:7 at ER000898-ER000900; ER000903; ER001066l. Blanas personally approved Gerber’s application even though it was Ms. Wong who should have processed the application.

Defendant Blanas testified that: (1) he personally issued a CCW to Mr. Gerber; (2) that both Mr. Gerber and Gerber's company Energetic Painting and Drywall, Inc. have contributed to Blanas' political campaigns for Sheriff of Sacramento County; (3) that Gerber and Blanas own a vacation home together in Reno, Nevada; and (4) that Sheriff Blanas flies in Mr. Gerber's private jet. (Blanas' Depo. commencing at ER000898, *and specifically* Blanas Depo. 46:7-16, 47:9-48:25, 55:11-18, 63:14-67:7 at ER000898-ER000900; ER000903; ER001066; ER001336.)¹

Gerber received his CCW permit based on an oral application without even a criminal background check being performed. The proverbial buzzword for bypassing the written application process is that the issuance of a CCW is an "emergency." In Gerber's case, the emergency was that he carried large sums of cash and wore expensive jewelry. (ER000214; *See generally* Wong Depo. at ER000960-978, *page and line numbers* 62:7-106:23. 63:1-10, 66:18-80:87:6-22; 85:22-86:20.) Gerber's case is only one example. The record is full of other like instances.

¹ Former Lt. Twomey of the Sheriff's Department connects the facts commencing at ER000126, ¶ 61; ER000132, ¶ 107; ER000135, ¶ 116; ER000143, ¶ 147; ER000151, ¶ 184; ER000155, ¶ 196-199; ER000170, ¶ 262; ER000177, ¶ 302-306.

In summary, Mehl had to submit two written applications only to be blown off. However, Gerber and others were able to circumvent the system through bribes and favors. A regulatory scheme that allows for such corruption simply cannot pass constitutional muster when the regulations infringe upon an enumerated, fundamental constitutional right.

VII. CONCLUSION

Based on the discussion above, Plaintiffs-Appellants respectfully request that this Court find that California's "may-issue" CCW permit issuance policy does not pass constitutional muster as it unconstitutionally infringes on Californians' right to keep and bear arms for the purpose of self-defense.

Dated this 10th day of August 2012.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(a)(c)(d), I certify that I am not aware of any related cases pending before this Court.

Dated this 10th day of August 2012.

Respectfully submitted,

_____/s/_____
Gary W. Gorski
Attorney at Law

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

I certify that pursuant to Fed. R. App. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached supplemental brief is proportionally spaced, has a typeface of 14 points or more and contains no more than 15 pages and 4,083 words.

Dated this 10th day of August 2012.

Respectfully submitted,

_____/s/_____
Gary W. Gorski
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 10th day of August 2012.

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