CIVIL NO: 07-15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs and Appellants,

vs.

MARY V. KING, et. al.,

Defendants and Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. MARTIN J. JENKINS
(CASE NO. CV-99-04389-MJJ)

APPELLEES' BRIEF REGARDING REHEARING EN BANC

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I. INTRODUCTION

A judge of this Court has called for a vote to determine whether this case will be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a). As shown below, the panel followed controlling precedent and correctly affirmed the District Court's judgment against Plaintiffs ("Nordykes") on their First Amendment and Fourteenth Amendment Equal Protection claims. The panel also followed controlling precedent in holding that the Ordinance regulates conduct that is an exception to the right protected under the Second Amendment. Accordingly, the Ordinance does not implicate the right to keep and bear arms. The panel was thus correct in affirming the District Court order denying the Nordykes leave to amend to allege a claim under the Second Amendment, because that claim would have been futile. *Nordyke v. King, et al.*, 563 F.3d. 439 (9th Cir. 2009) (hereinafter "*Nordyke IV*").[1]

The panel's **holdings** are consistent with prior decisions of this Court. Therefore, en banc review is not necessary to secure or

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[1] The Nordykes conceded at oral argument that it was not necessary for the panel to remand the case for any further factual development.

maintain uniformity of the Court's decisions. None of these **holdings** implicates a matter of exceptional national importance. Accordingly, en banc review is not warranted.

However, in dictum, the panel prematurely and unnecessarily examined whether the right protected by the Second Amendment should be incorporated against states and local governments through the Fourteenth Amendment. Moreover, the opinion disguises this dictum as a holding.

A majority of this Court's judges may conclude there is serious risk that future courts will treat the panel's propositions regarding incorporation as binding precedent, instead of dicta. If so, or if a majority of this Court cannot confidently conclude that the panel's propositions regarding incorporation should be treated as dicta, and rehearing en banc is ordered, then the Court should order rehearing solely on the issue of incorporation of the Second Amendment.

As shown below, on the incorporation issue the panel's conclusions are inconsistent with the controlling precedents of the United States Supreme Court and of this Court, and are in conflict with recent decisions of the United States Courts of Appeals for the

Second and Seventh Circuits. In addition, the incorporation issue is one of exceptional national importance.

II. THE PANEL CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT IN FAVOR OF THE COUNTY ON THE NORDYKES' FIRST AMENDMENT CHALLENGE

The panel correctly affirmed the District Court's judgment in favor of the County on the Nordykes' First Amendment challenge to the Ordinance. The District Court's judgment on this claim is consistent with controlling precedent, and the District Court applied the appropriate level of scrutiny to reach its decision. The panel correctly conducted de novo review of the decision and did not err in affirming that judgment.

As the panel correctly found, when the controlling law is applied to the Nordykes' First Amendment challenge to the Ordinance, that law mandates the conclusion that the Ordinance furthers significant legitimate police power interests, that the Ordinance is unrelated to suppression of free speech, and that any incidental restriction of speech is no greater than necessary to achieve the County's interests. *Nordyke IV*, 563 F.3d at 460-463.

The panel presumed for purposes of argument that "gun possession in the context of a gun show may involve certain elements

of protected speech" and assumed "without deciding, that the Nordykes' possession of guns amounts to speech under the *Spence* test." *Id.* at 460 (citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1974).) The panel then correctly applied the less stringent standard articulated in *United States v. O'Brien*, 391 U.S. 367, 377 (1968) because the Ordinance is "unrelated to the suppression of free expression." *Nordyke IV*, 563 F.3d at 460.

The panel correctly rejected the Nordykes' argument that the court should second guess the legislators' motives in adopting the Ordinance and that the proper focus is on the language of the Ordinance and its impact. *Nordyke IV*, 563 F.3d at 461. Relying on the United States Supreme Court's holding in *O'Brien, supra*, the panel noted that "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." 563 F.3d at 461. The panel also noted that in *Texas v. Johnson*, 491 U.S. 397 (1989) the court determined whether the law at issue was related to the suppression of speech without "psychoanalyzing" its authors. *Nordyke IV*, 563 F.3d at 461.

Both *Texas v. Johnson, supra,* and *U.S. v. O'Brien, supra,* remain controlling law. *See, United States v. Eichman*, 496 U.S. 310 (1990) (affirming the principles of *Texas v. Johnson, supra*). The intent of the legislature is not the salient issue when the express language and application of the Ordinance are constitutional. *See, City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986). Accordingly, the panel properly concluded that the Ordinance's stated purpose, the reduction of gun violence, is a "perfectly plausible" and legitimate legislative purpose, that the *O'Brien* test is the appropriate test for reviewing the Nordykes' challenge to the Ordinance, and that the District Court did not err in holding the Ordinance satisfies the *O'Brien* test. *Nordyke IV*, 563 F.3d at 461-463 (County not required to show the Nordykes' gun shows create or contribute to the problem the Ordinance seeks to address; challenges to the validity of regulation or statute need "not be judged solely by reference to the demonstration at hand," *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984)). Thus the panel correctly applied controlling law to affirm the District Court's judgment on the Nordykes' First Amendment Claim and en banc

review of the panel's holding is not necessary to secure or maintain uniformity of the court's First Amendment case law.

III. THE PANEL CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT IN FAVOR OF THE COUNTY ON THE NORDYKES' EQUAL PROTECTION CLAIM

The panel properly affirmed the District Court's judgment in favor of the County on the Nordykes' Equal Protection claim. *Nordyke IV*, 563 F.3d at 463. In its review of the judgment, the panel performed the equal protection analysis mandated by controlling law, the same analysis the District Court performed. The panel noted that even if the Nordykes were able to demonstrate that the Ordinance creates a governmental classification as described in *Christy v. Hodel*, 857 F.2d 1324, 1331 (1988), "the Nordykes cannot point to a similarly situated 'control group'" as required by *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). *Nordyke IV*, 563 F.3d at 464. The panel continued: "the Nordykes have not argued they could meet the exception's requirement that firearms be secured whenever an authorized participant is not actually using them. No wonder. They have admitted that the very nature of gun shows, in which vendors show weapons to prospective buyers and admirers, makes it impossible." *Id.*

In so holding, the panel applied the equal protection test set forth in *Christy v. Hodel, supra,* and *Freeman v. City of Santa Ana, supra,* both controlling cases. Accordingly, en banc review of the panel's decision rejecting the Nordykes' equal protection claim is unnecessary.

IV. THE FIRST AMENDMENT AND EQUAL PROTECTION ISSUES ARE NOT UNUSUAL OR OF EXCEEDING NATIONAL IMPORTANCE

The challenged Ordinance is a prohibition on possession of firearms or ammunition on County-owned property, except in situations where the firearm is used by an authorized participant of events, and secured from use thereafter. *Nordyke IV*, 563 F.3d at 443-444. An ordinance regulating conduct on County-owned property is not novel or unusual. As the panel correctly noted, the United States Supreme Court recently confirmed that governmental entities have a "great deal of leeway in managing their own property." 563 F.3d at 459, n. 21 (citing *Pleasant Grove City v. Summum*, --- U.S. ---, 129 S.Ct. 1125, 1131 (2009).

Recently in *D.C. v. Heller*, --- U.S. ---, 128 S.Ct. 2783 (2008), the Supreme Court also recognized the preemptive validity of longstanding laws prohibiting the carrying of firearms on certain

government property, specifically government buildings and schools. 128 S.Ct. at 2816-17. The *Nordyke IV* panel correctly concluded "the open, public spaces the County's Ordinance covers fit comfortably within the same category as schools and government buildings." *Nordyke IV*, 563 F.3d at 460. As these cases show, there is simply nothing unusual or novel about a County Ordinance proscribing such conduct on *County*-owned property. Accordingly, en banc review of the panel's holdings affirming judgment in favor of the County on the Nordykes' First Amendment and Equal Protection claims is unnecessary.

V. THE NINTH CIRCUIT PANEL CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ERR IN DENYING THE NORDYKES LEAVE TO AMEND THEIR COMPLAINT TO ALLEGE A SECOND AMENDMENT CLAIM

The panel also correctly held that the District Court did not err in denying the Nordykes leave to amend their complaint to add a claim challenging the Ordinance under the Second Amendment. *Nordyke IV*, at 445. The District Court held such an amendment would be futile. Excerpts of Record ("ER") at p. 227. The rationale for the order, issued February 11, 2005, was this Court's earlier decision in *Nordyke, et al. v. King, et al.* 319 F.3d 1185, 1191 (9th Cir. 2003) (*Nordyke III*). ER at 227.

In *Nordyke III,* this Court held that any Second Amendment claim by the Nordykes was barred by the Ninth Circuit's earlier decisions in *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996). *Nordyke III*, at 1191. Here, the panel held the conduct regulated by the Ordinance, possession of firearms on publicly owned, open space property, is an exception to the right to keep and bear arms protected by the Second Amendment. *Nordyke IV*, at 460. Therefore, leave to amend to allege a Second Amendment claim would have been "futile." *Id.* Accordingly, the panel correctly affirmed the District Court's order denying the Nordykes leave to amend to allege a Second Amendment claim.[2]

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[2] The panel asserted it had to first decide whether *Heller* abrogated *Hickman* because "*Hickman* rested on our conclusion that the Second Amendment protects only a collective right. " *Nordyke IV*, at 445. However, *Hickman* stated an alternative ground for its holding, namely that the Second Amendment is not incorporated against the states, citing *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992). *Hickman*, 81 F.3d at 103, n 10. The panel's actual holding on amendment of the Nordykes' complaint did not require it to ascertain either the nature of the right protected by the Second Amendment, or whether it is incorporated, because the panel concluded the Ordinance regulates conduct that is an exception to the protected right. *Nordyke IV*, at 459-460. Thus, the panel **did not** need to decide whether *Heller* abrogates either *Hickman's* collective right holding, or its alternative incorporation holding.

Specifically, the panel concluded with considerable ease that the government-owned "public spaces" where the challenged Ordinance prohibits firearms possession are "comfortably" within the category of "sensitive places" where bans on firearms possession are "presumptively valid" and that "prohibiting firearms possession on municipal property fits within the exception from the Second Amendment for 'sensitive places' that *Heller* recognized." *Nordyke IV* at 459-460, emphasis added. As a result, the panel also correctly held that amendment of the Nordykes' complaint to allege a Second Amendment claim would have been "futile." *Nordyke IV* at 460.

The County is not aware of any decision by any other court holding that a prohibition of firearms possession on publicly owned property implicates the right protected by the Second Amendment. Accordingly, there appears to be no split in the courts requiring en banc review of this holding in *Nordyke IV* to secure or maintain uniformity of the Court's decisions.

Nor does the panel's holding on this point implicate a matter of national importance. As the panel noted, the Supreme Court has recognized that governmental entities have a great deal of leeway in managing their own property. *Nordyke IV,* at 459, n. 21 (citing

Pleasant Grove City v. Summum, __U.S.__, 129 S.Ct. 1125, 1131 (2009). *See also Heller*, 128 S.Ct. at 2816-17 (acknowledging prohibitions of firearms on publicly owned property such as government buildings and schools are among the "long standing" firearms possession bans that are "presumptively valid.").

However, the opinion's unnecessary exposition on the issue of incorporation of the Second Amendment is seriously problematic. The panel's determination regarding the incorporation question is plainly superfluous to its holding. It was unnecessary, and therefore dictum, for the panel to reach whether the right acknowledged in *Heller* constrains state and local governments through the Fourteenth Amendment, given the panel's conclusion that the challenged Ordinance regulates conduct - possession of firearms in sensitive public places - that is an exception to the right, even when directly challenged under the Second Amendment. *Nordyke IV*, at 459-460, citing *Heller*.

Given principles of judicial restraint, including the avoidance of unnecessary constitutional adjudication, the panel could have, and should have, disposed of the incorporation issue by noting that even if the Second Amendment right were to be incorporated through the

Fourteenth Amendment, *Heller* teaches us that the challenged Ordinance regulates conduct outside the scope of the right protected by the Second Amendment. Accordingly, there is no scenario in which the Nordykes' proposed amendment to allege a Second Amendment claim would be anything but futile.

The opinion treats incorporation as a holding by characterizing it as an issue the panel was required to decide, when it was not. *Nordyke IV,* at 446. By so doing, the panel's opinion creates the potential for substantial confusion.

It is undoubtedly true that "[a] judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'" *U.S. v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring). Nevertheless, as aptly observed by the Hon. Pierre N. Leval, Judge, United States Court of Appeals for the Second Circuit:

> "The problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law….
>
> "We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding – in disguise, so to speak. When we do so, we exercise a lawmaking power that we do not rightfully possess. Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication. When we do

> so, we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided."

Pierre N. Leval, JUDGING UNDER THE CONSTITUTION: DICTA ABOUT DICTA, Madison Lecture, 81 N.Y.U.L.R. 1249, 1250 (Oct. 2006).

The *Nordyke IV* opinion also examines whether, and to what degree, the challenged Ordinance may infringe the "core right" acknowledged in *Heller*, as if that discussion was germane to its holding. *Nordyke IV*, at 459. Having concluded that the Ordinance regulates conduct outside the protection of the right altogether, this discussion was also superfluous.

In short, the panel enunciated the proposition that the Second Amendment is incorporated against the states and local governments through the Fourteenth Amendment. The panel then held that the challenged Ordinance does not implicate the right protected by the Second Amendment, the same conclusion it would have reached had it rejected the proposition that the Second Amendment is incorporated. As Leval explains, where, as here, "the insertion of the rejected proposition into the court's reasoning, in place of the one adopted, would not require a change in either the court's judgment or the reasoning which supports it, the proposition is dictum. It is

superfluous. It had no functional role in compelling the judgment." Leval, 81 NYULR 1249, 1257.[3]

When a court announces a rule of law that has no consequence for the outcome of the case, the court does not have to "pay the price" for the rule it declares, which increases the risk of "defective rules." Also, law "made" through dictum is difficult to correct. A party cannot appeal an erroneous legal rule announced in dictum, and no party will have a motive to try to get the bad proposition corrected. Leval, 1262 -1263.

Lawmaking through dicta has no constitutional legitimacy. Courts make law "because the rule of stare decisis evolved to require that courts judge consistently…. Courts make law only as a consequence of the performance of their constitutional duty to decide

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[3] Leval also discusses why a court may venture beyond the issue in controversy to announce a rule of law (as the *Nordyke* panel did here), one of the "most common manifestations of disguised dictum." "The reasons are numerous and grow in part out of our human frailties. (1) At times our exuberance for a point of view gets out of hand. (2) At times we may devise a strategic gambit in ideological warfare. We may reach beyond the case in order to preempt colleagues who might later decide a further issue in a manner not to our liking. (3) …judges may at times be prey to vanity…(4) We are also tempted by the seductive lure of establishing landmark precedent…" Leval, 81 NYULR 1249, 1263-1264.

cases. They have no authority to establish law otherwise." Leval, 81 NYULR 1249, 1259-1260.

The *Nordyke IV* panel correctly affirmed the District Court order denying the Nordykes leave to amend their complaint to allege a Second Amendment claim because such amendment was futile. The panel correctly held that the Ordinance is presumptively valid, and regulates a subject matter that is excepted from the protection of the right to keep and bear arms. The panel's propositions regarding incorporation of the Second Amendment were not necessary to that holding and should be regarded as without constitutional legitimacy.

VI. ANY EN BANC REVIEW SHOULD BE LIMITED TO THE ISSUE OF INCORPORATION

As set forth above, the **holdings** of this panel were correct, and rehearing en banc is not warranted. If a majority of this Court's judges conclude that there is serious risk that future courts will treat the panel's propositions regarding incorporation as a holding, or a majority cannot confidently conclude that the panel's discussion of the incorporation question should be treated as dictum, and vote to rehear the case en banc, then the County urges this Court to order rehearing en banc solely on the issue of incorporation.

As the Court of Appeals for the Seventh Circuit concluded in its June 2, 2009 opinion in *National Rifle Assn. etc., et al. v. City of Chicago, et al.*, __F.3d ___, 2009 WL 1515443 (7th Cir. (Ill.))(petition for certiorari filed June 3, 2009), the U.S. Supreme Court's holdings in *United States v. Cruikshank*, 92 U.S. 542 (1875), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894) that the Second Amendment applies only to the federal government, are controlling on the issue of incorporation in this case. The Seventh Circuit characterized the *Nordyke IV* panel as concluding "*Cruikshank*, *Presser* and *Miller* may be bypassed as fossils." *Id.* at p. 1. The Seventh Circuit found this view irreconcilable with the repeated admonition of the Justices that the Supreme Court reserves to itself the prerogative of overruling its own decisions. *NRA v. City of Chicago*, *supra*, at 1, 2.

> "Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined the rationale. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Id., citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

The Seventh Circuit also rejected claims that *Cruikshank, Presser* and *Miller* had no direct application because those decisions did not expressly consider the line of argument plaintiffs were presenting to support their argument for incorporation.

> "Plaintiffs say that a decision of the Supreme Court has 'direct application' only if the opinion expressly considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision by the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument."

Id. at 1, 2, citing *Heller*, 128 S.Ct. at 2813 n. 23.

The faulty "direct application" reasoning rejected by the Seventh Circuit in *Chicago/Oak Park*, is the **same** reasoning the *Nordyke IV* panel relied on to bypass this Court's earlier and controlling decision in *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992), that the Second Amendment is not incorporated against state and local governments through the Fourteenth Amendment. *See Nordyke IV,* at 447-448. It is also the faulty reasoning the Nordyke panel used to bypass the controlling holdings in *Cruikshank, Presser* and *Miller*. *See Nordyke IV,* at 448.

The *Nordyke IV* panel was bound by the holdings in *Fresno Rifle, Cruikshank, Presser* and *Miller* on the question of incorporation. If the panel's incorporation determination is viewed as a holding, the panel erred in ignoring these controlling precedents, and en banc review is warranted to secure uniformity of the court's decisions, and because the incorporation question is of national importance.

As the Seventh Circuit also noted, the *Heller* Court's comment that *Cruikshank's* continuing validity was not presented by the case before it, was not an invitation for the inferior courts to go their own ways without regard to *Cruikshank's* holding. For a court to do so undermines the uniformity of national law and may compel the Justices to grant certiorari before they think a question ripe. *NRA v. City of Chicago, supra,* at 2.

Nordyke IV is also at odds with the post-*Heller* decision in *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). Moreover, there are serious flaws in the panel's analysis on the merits of the incorporation issue. The Seventh Circuit rejected as too reductive the panel's focus on whether the right to keep and bear arms is "deeply rooted in this nation's history and tradition. *See NRA v. Chicago*, ---F.3d---, 2009

WL 1515443, p. 2 ("'selective incorporation' cannot be reduced to a formula.").

The Seventh Circuit also noted that individual rights may take a different shape when asserted against a state, rather than the national government, giving examples to illustrate how a particular state's "common law gloss" on the affirmative defense of self-defense could impact how the right is viewed. *NRA v. Chicago*, ---F.3d ---, 2009 WL 1515443, at p. 3. The County raised similar arguments in its supplemental brief on the incorporation issue, which the Nordyke panel rejected. *See* County's Supplemental Brief, at pp. 7 through 21, and *Nordyke IV*, at 456.

Finally, the Seventh Circuit emphasized that the incorporation debate implicates federalism, the Constitution's structural element establishing a "federal republic where local differences are to be cherished elements of liberty rather than extirpated in order to produce a single, nationally applicable rule….Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." *NRA v. Chicago,* ---F.3d ---, 2009 WL 1515443, at p. 3. The County raised similar federalism concerns in its supplemental brief on incorporation, which the *Nordyke IV* panel simply ignored.

See County's Supplemental Brief at pp. 7 through 21, pp. 47-53, and County's Reply Brief to Supplemental Brief of Appellants, at pp. 37-38.

As the Seventh Circuit correctly concluded, "how arguments of this kind will affect proposals to 'incorporate' the second amendment are for the Justices rather than a court of appeals." *NRA v. City of Chicago, supra,* at 3-4. In short, if a majority of this Court understands the panel's holdings to include a holding that the Second Amendment is selectively incorporated through the Fourteenth Amendment, then rehearing en banc solely on the incorporation issue is warranted. The *Nordyke IV* panel erred in reaching that question at all and further erred in its answer to that question.

DATED: June 8, 2009

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CERTIFICATE OF COMPLIANCE

In accordance with the Ninth Circuit Rules, this certifies that the Appellees' Brief Regarding Rehearing En Banc does not exceed 4,200 words, including footnotes and excluding the title page, table of contents, table of authorities, and certificate of compliance. According to the word count function on the word processing program used, this brief contains 4,088 words.

I declare that the foregoing is true and correct

Executed on June 8, 2009

s/ Sayre Weaver
Sayre Weaver

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2009, 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 appellate CM/ECF system.

s/ Debbie Nager Reid
Debbie Nager Reid

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