No. 08-1521

In The Supreme Court of the United States

OTIS P. MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THIRTY-FOUR CALIFORNIA DISTRICT ATTORNEYS; EIGHT NEVADA DISTRICT ATTORNEYS; GRAHAM COUNTY, ARIZONA, FORMER SHERIFF RICHARD MACK; MENDOCINO COUNTY, CALIFORNIA, SHERIFF THOMAS D. ALLMAN; TEHAMA COUNTY, CALIFORNIA, SHERIFF CLAY D. PARKER; CALIFORNIA RIFLE & PISTOL ASSOCIATION FOUNDATION; LONG BEACH POLICE OFFICERS ASSOCIATION; SAN FRANCISCO VETERANS POLICE OFFICERS ASSOCIATION; ARIZONA CITIZENS DEFENSE LEAGUE; TEXAS CONCEALED HANDGUN ASSOCIATION; VIRGINIA CITIZENS DEFENSE LEAGUE; BLOOMFIELD PRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

C. D. MICHEL*
GLENN S. MCROBERTS
HILLARY J. GREEN
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard,
Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444

Counsel for Amici Curiae
**Counsel of Record*

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INTERESTS OF *AMICI CURIAE*[1]

Amici are district attorneys, police organizations, and other persons and groups concerned with protecting the public safety benefits of citizens possessing firearms for self-defense.

Thirty-Four California and Eight Nevada District Attorneys

The thirty-four California and eight Nevada County elected District Attorneys in this brief represent populous counties such as Orange, Fresno, and San Bernardino, as well as mid-sized and rural counties.

The interests of additional *amici* are described in Appendix B.

SUMMARY OF ARGUMENT

The *Heller* majority's final words were: "[I]t is not the role of this Court to pronounce the Second

[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amendment extinct."[2] Having saved the Second Amendment from that fate, it is equally true that it is not the role of this Court to deem Second Amendment rights less worthy of incorporation than other rights of the people enumerated in the Bill of Rights. Accurately considered the "true palladium of liberty,"[3] the people's right to keep and bear arms should be incorporated into the Due Process Clause of the Fourteenth Amendment, and rightfully take its place alongside all the other fundamental rights that the right to arms secures.[4]

The people's right to arms is inextricably tied to the equally fundamental right to defend oneself – to fight to save one's own life. The former is often indispensable to effectuate the latter. *Heller* noted that founding-era legal scholars considered these rights inseparable. In fact, an original justice of this Court, Justice Wilson, described the right to use deadly force to repel a homicidal attacker as "the great natural law of self preservation which, as we have seen,

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[2] *District of Columbia v. Heller*, 128 S.Ct. 2783, 2822 (2008).

[3] *Id.* at 128 S.Ct. at 2805 (quoting from St. George Tucker's version of Blackstone's Commentaries: "This may be considered as the true palladium of liberty. . . . The right to self-defence is the first law of nature. . . .").

[4] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897, pp. 620-621 (4th ed. 1873) ("The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic . . . "), cited in *Heller*, 128 S.Ct. at 2840.

cannot be repealed or superseded, or suspended by any human institution."[5]

While the question of incorporation was not squarely before this Court in *Heller*, this Court nonetheless effectively made the case for incorporation there. Finding an individual right to arms in the first place requires the same inquiry needed to test for incorporation of that right. *Heller* informs, if not resolves, the issue of incorporation by reaffirming that armed self-defense is an "inherent," "natural," "fundamental," "right." *See Heller*, 128 S.Ct. at 2793, 2797-2799, 2801, 2809, 2817. And further, the "inherent right of self-defense has been central to the Second Amendment right" to keep and bear arms. *Heller*, at 2817.

It is difficult to read *Heller* without acknowledging, whether by hearty agreement or begrudging concession, that the right to keep and bear arms must be incorporated, under *any* test. The Court's landmark decision in *Heller* concluded that the Second Amendment's right to arms is "deeply rooted in this Nation's history and tradition," is "fundamental to the American scheme of justice," and is "necessary to an Anglo-American regime of ordered liberty." *See Heller*, at 2793, 2797-2799, 2801, 2809, 2817. Those *are* the tests for incorporation. *See Moore v. East*

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[5] 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., Philadelphia: Lorenzo Press, 1804); *see Heller*, 128 S.Ct. at 2793, 2817.

Cleveland, 431 U.S. 494, 503 (1977) (plurality op.); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968).

Section I examines why the cases relied upon in *National Rifle Association of Am., Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009) (hereafter, "*NRA v. Chicago*") do not preclude incorporation. Section II examines the applicable tests for incorporation and suggests why the Second Amendment is properly incorporated. We cover both topics summarily knowing that they will be covered thoroughly by the parties and other *amici*.

Section III is the focus of this brief. There, we examine this Court's self-defense jurisprudence. Our examination takes place in the context of Judge Easterbrook's thought-provoking observations in *NRA v. Chicago.* But the main focus is on this Court's own self-defense cases – cases widely cited by state and federal courts – to illustrate that *armed* self-defense rights are far more than a "common-law gloss on criminal statutes." Rather, armed self-defense is a fundamental right founded on traditional principles well-established in our judicial system, our laws, our society, and our culture.

Section IV takes a closer look at the nature of firearms, the connection between arms and the right to self-defense, and how the Founders believed the two inseparable.

Section V touches on *NRA v. Chicago's* references to federalism, and shows why federalism poses no obstacle to incorporation.

ARGUMENT

California, the home state of most of the District Attorneys represented herein, is one of the few states without a constitutional provision expressly guaranteeing a right to keep and bear arms.[6] Yet California's Supreme Court found that even a *felon* nonetheless had a *right* to use his friend's handgun to shoot an attacker in self-defense, and could not be prosecuted for possessing the firearm for that purpose. The court found that the prohibition against felons possessing handguns "was not intended to affect *a felon's right* to use a concealable firearm in self-defense[.]" *People v. King*, 22 Cal. 3d 12, 24, 582 P.2d 1000, 1007 (1978) (emphasis added). This Court came to a similar conclusion in *Starr v. United States*, 153 U.S. 614, 623 (1894), finding an alleged horse thief had the right to defend himself against an overzealous posse.

These holdings are not an anomaly. They reflect a judicial recognition of the American tradition of gun ownership and use, and an acknowledgment of the fundamental right to armed self-defense.[7] This tradition and right are also recognized in state constitutions, statutes, and in this Court's own jurisprudence. *People v. King* and countless other cases confirm that the right to keep and bear arms *is* the

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[6] States that guarantee the right to arms and/or self-defense and their respective provisions are listed in Appendix A, attached hereto.

[7] "Arms" or "armed self-defense" herein refer to firearms.

"true palladium of liberty," and the right to armed self-defense is fundamental to the American scheme of justice.

That being the case, the Seventh Circuit's postulations in *NRA v. Chicago*, 567 F.3d at 857 and the cases consolidated thereunder are incongruous. First, the appellate court defers to this Court on the matter of incorporation, suggesting the fate of the Second Amendment "under the Court's selective (and subjective) approach to incorporation is hard to predict." *Id*. at 858-859. Then, the court observes that the right of "[s]elf defense is a common-law gloss on criminal statutes." *Id*. at 859. From that premise, the Seventh Circuit Court hypothesized that this Court might find self-defense rights subject to state abrogation, or "arms" limited, for example, to long guns only or even to "pepper spray." *Id.* at 860.

The Court's observations in *NRA v. Chicago* appear based on a common but mistaken belief that there is little legal authority supporting a right to self-defense, beyond criminal statutes. In sections III and IV, we dispel this myth by reviewing the substantial body of law that supports a right to armed defense, including numerous cases by this Court dating back to the 1800's. First, however, we review the incorporation doctrine, and how it applies here.

I. INCORPORATION OF THE SECOND AMENDMENT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS A MATTER OF FIRST IMPRESSION

The Seventh Circuit concluded it was barred by Supreme Court precedent from considering selective incorporation of the Second Amendment.[8] Supreme Court decisions from 1876, 1886, and 1894 *did* hold that the Second Amendment did not apply directly to the States. *See United States v. Cruikshank,* 92 U.S. 542 (1876); *Presser v. Illinois,* 116 U.S. 252 (1886); *Miller v. Texas,* 153 U.S. 535 (1894). But none of those cases addressed whether the Second Amendment applies against the states *through the Due Process Clause* – for they could not. Those cases were decided before the advent of the selective incorporation doctrine, and before this Court even hinted that fundamental provisions of the Bill of Rights are incorporated through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 241 (1897).[9] So they addressed only

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[8] *See NRA v. Chicago*, 567 F.3d at 857, *citing Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009).

[9] *Heller*, 128 S.Ct. at 2812-2813 & n.23, explains that *Cruikshank,* "in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government." (citing *Cruikshank* 92 U.S. at 553). But *Heller* also noted the "limited discussion of the Second Amendment in *Cruikshank,*" *Heller*, 128 S.Ct. at 2813, simply did not address the possibility of incorporation of the right to keep and bear

(Continued on following page)

whether the Second Amendment applies *directly* against the states – a very different question than the one presented here.[10] As a matter of fact, law,[11] and logic the Supreme Court has never directly ruled on this issue.

The most natural reading of the *Cruikshank, Presser, Miller* triumvirate – indeed, the only reading that comports with the actual text, posture, and structure of those opinions – is that they reaffirmed the now unremarkable constitutional principle that the Bill of Rights, *standing alone,* restrains only the

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arms in the Fourteenth Amendment's Due Process Clause. Indeed, in discussing the Second Amendment's application, the *Cruikshank* Court noted that the "[S]econd [A]mendment declares that it shall not be infringed; but this, *as has been seen,* means no more than it shall not be infringed by Congress." *Cruikshank,* 92 U.S. at 553 (emphasis added). The "as has been seen" language refers to the Court's preceding discussion of the First Amendment: "The First Amendment to the Constitution . . . like other amendments *proposed and adopted at the same time, was not intended to limit the powers of the State governments* in respect to their own citizens, but to operate upon the National government alone." *Id.* at 552 (emphasis added). At this point the *Cruikshank* opinion cites *Barron v. Mayor of Baltimore,* 32 U.S. 243 (1833). So *Cruikshank's* Second Amendment discussion simply reaffirmed the basic principle of *Barron* that the Bill of Rights originally, of its own terms, applied *directly* only to the federal government.

[10] *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257 (1983).

[11] *Heller*, 128 S.Ct. at 2813, n.23 (2008) (courts must apply current Fourteenth Amendment jurisprudence).

federal government.[12] This Court is thus free to follow its own suggestion in *Heller's* famous footnote 23, and "engage in the sort of *Fourteenth Amendment* inquiry required by our later cases."[13] *Heller*, 128 S.Ct. at 2813 n.23.

II. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS FUNDAMENTAL AND THUS INCORPORATED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Numerous cases confirm what Justice Scalia has said: "virtually all" individual rights found in the Bill of Rights have been incorporated against the States via the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 34 (1991) (Scalia, J., concurring in judgment); *see also Planned Parenthood v.*

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[12] *See, e.g.,* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 484 (2d ed., Aspen Publishers, 2002) ("Technically, the Bill of Rights still applies directly only to the federal government; *Barron v. Mayor & City Council of Baltimore* never has been expressly overruled. Therefore, whenever a case involves a state or local violation of a Bill of Rights provision, to be precise it involves that provision as applied to the states through the due process clause of the Fourteenth Amendment").

[13] Of course, the Court also may take this opportunity to consider whether the Second Amendment is incorporated via the Privileges or Immunities provisions of the Fourteenth Amendment, but in that event must address the contrary precedent of the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873). We leave that issue to the parties and other *amici* to press.

Casey, 505 U.S. 833, 847 (1992) ("We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States").[14] Thus, if the rights protected by the Second Amendment are "fundamental," then the Second Amendment likewise restricts state infringement of those rights through the Fourteenth Amendment.

"Fundamental" rights have been defined as those "necessary to an Anglo-American regime of ordered liberty," *Duncan,* 391 U.S. at 150 n.14, or "deeply rooted in this Nation's history and tradition." *Glucksberg,* 521 U.S. at 721. To determine whether the right to keep and bear arms is "fundamental," this Court must engage in a culturally specific inquiry, canvassing the attitudes and historical practices of the founding-era and post-Civil War period because those times produced the constitutional provisions at issue.

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[14] The Due Process Clause of the Fourteenth Amendment prohibits states from infringing rights that are "fundamental." *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968). Any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas,* 380 U.S. 400, 403 (1965) (referencing *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)); *see, e.g., Wallace v. Jaffree,* 472 U.S. 38, 49 (1985) ("[W]hen the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power").

In *Heller*, this Court already effectively conducted this incorporation analysis, albeit for a different but related purpose. In determining whether the right to arms was a right of the people or the state, *Heller* canvassed the attitudes and historical practices of the Founding era and post-Civil War period – and more. *Heller* explored the history and foundations of the ancient right of self-defense and the right to arms for that purpose. After its exhaustive analysis, this Court concluded that self-defense is an "inherent," "natural," "fundamental," "right." *See Heller*, at 2793 (natural right of defense), 2797-2798 (pre-existing right), 2798 (fundamental right), 2799 (natural right), 2801 (central right), 2809 (natural right), and 2817 (inherent right).

The Court came to a similar conclusion concerning the Second Amendment's origins and links to self-defense. It found the "inherent right of self-defense has been central to the Second Amendment right[ ]" to keep and bear arms, *id*. at 2817, and further, that while self-defense "had little to do with the right's *codification*; it was the *central* component of the right itself." *Id*. at 2801 (emphasis in original).

Given *Heller's* findings, the incorporation determination reduces to a simple syllogism: (1) all fundamental rights of the people enumerated in the Bill of Rights are incorporated by, and apply to, the states through the Fourteenth Amendment; (2) *Heller* found the Second Amendment embodied a fundamental right of the people to keep and bear arms; and therefore (3) the Second Amendment is incorporated

by, and applies to, the states through the Fourteenth Amendment.[15]

Accordingly, we will not repeat *Heller's* "fundamental rights" analysis, here. To the extent we revisit the analysis in *Heller*, we do so in the context of our review of this Court's own cases on armed, self-defense, and of *NRA v. Chicago,* which questions the inevitability of incorporation.

III. THE SUPREME COURT HAS RECOGNIZED A FUNDAMENTAL RIGHT TO ARMED SELF-DEFENSE, DATING BACK TO THE NINETEENTH CENTURY

NRA v. Chicago considered itself bound by *Cruikshank*, *Presser*, and *Miller*, deferring to this Court on whether Second Amendment rights should be incorporated. *NRA v. Chicago*, 567 F.3d at 857. Consequently, the *NRA v. Chicago* court did not engage in the inquiry suggested in *Heller's* footnote 23. Judge Easterbrook, writing for the panel, did however offer provocative observations on incorporation,

[15] While *NRA v. Chicago and Maloney v. Cuomo* held against incorporation – or at least declined to consider the issue, deferring instead to this Court – and did not engage in the incorporation analysis referred to in *Heller's* footnote 23, the Ninth Circuit case holding in favor of incorporation did. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *reh'g en banc granted*, 575 F.3d 890 (July 29, 2009). While the initial opinion is not binding, pending rehearing, it nonetheless provides an objective incorporation analysis in harmony with this Court's decision in *Heller*.

the right of self-defense, and its corollary right to arms. Those observations conflict with *Heller* and other decisions of this Court, and thus warrant discussion.

A. Self-Defense Is More Than A "Common-Law Gloss On Criminal Statutes," It Is A Universally Recognized Fundamental Right

NRA v. Chicago suggests the right to self-defense is a "common-law gloss on criminal statutes," and may be a "right" so lacking in foundation that state legislatures would be free to abrogate it entirely. *NRA v. Chicago*, 567 F.3d at 859. Without a right to self-defense, however, the right to keep and bear arms is stripped of one of its fundamental tenets – indeed, its core motivating principle, as the court reveals in posing its self-described "farfetched" hypothetical:

> Suppose a state were to decide that people cornered in their homes must surrender rather than fight back – in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the second amendment protects only the interests of law-abiding citizens.

Id. "Farfetched" perhaps too gently describes that hypothetical. If, as *NRA v. Chicago* suggests, some

states are moving toward criminalizing – and have authority to criminalize – self-defense, then the *Heller* decision came down none too soon.[16]

The court's hypothetical rests on the false premise that the "right" to self-defense is divorced from self-preservation, from survival, from natural law, i.e., that it is solely a creature of the legislature. The court indicates that, rather than being a fundamental right, self-defense is little more than an affirmative defense, a statutory entitlement to avoid criminal prosecution for bodily injury inflicted upon an aggressor by the intended victim – *if* the victim survives. And further, that despite a "common-law gloss" applied by courts, self-defense remains a mere legislative creation legislatures can revoke at will. *Id*. at 859-860.

Heller, however, put to rest the belittling notion that the bedrock right to self-defense, i.e., the right to fight for one's own life, is mere legal varnish. And it did so repeatedly. *Heller*, 128 S.Ct. at 2793, 2797-2799, 2801, 2809, 2817 (finding self-defense an "inherent," "natural," "fundamental" and pre-existing "right").

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[16] In fact, the trend is in the opposite direction, with more states abandoning duty to retreat legislation in favor of "castle-doctrine" legislation to protect victims from criminal prosecution for defending hearth and home. *See* Denise Drake, *The Castle Doctrine: Expanding a Right to Stand Your Ground*, 39 ST. MARY'S L.J. 573, 575-576 n.12 (2008) (stating that at least 15 states have adopted the model castle doctrine).

B. The Right To Self-Defense Is Well-Established In State And Federal Law

A central argument in *Heller* is that the right to keep and bear arms is inextricably tied to a fundamental, *individual* right to self-defense, a right well-established in state and federal law – especially when defending hearth and home, a principle known as the "castle doctrine." As Judge Cardozo explained in *People v. Tomlins*, 213 N.Y. 240 (Ct. App. 1914):

> It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than two hundred years ago it was said by Lord Chief Justice Hale (1 Hale's Pleas of the Crown, 486): In case a man is assailed in his own house, he "need not fly as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight." Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England. It was so held by the United States Supreme Court in *Beard v. United States* (158 U.S. 550).

Tomlins, 213 N.Y. at 243; *see also People v. Jones*, 3 N.Y.3d 491, 495-496 (Ct. App. 2004) (at least since *Tomlins*, the castle doctrine has been part of New York's statutory and decisional law, which in turn grew out of the common law).[17]

In addition to *Beard*, Judge Cardozo cites two more self-defense opinions by this Court (discussed below), and references leading treatises, scholars, and several other state opinions for the same proposition.[18] Moreover, the *Beard* decision cited by Judge

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[17] The castle doctrine has long been recognized in the context of the Fourth Amendment, *see, e.g.,* SEMAYNE'S CASE, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603), *cited with approval in Payton v. New York*, 445 U.S. 573, 592 n.44 (1980).

[18] "In that case [*Beard*] there was a full review of the authorities, and the rule was held to extend not merely to one's house but also to the surrounding grounds. That case has been followed by the same court in later decisions. (*Alberty v. U.S., 162 U.S. 499*; *Rowe v. U.S., 164 U.S. 546, 557*.) The same rule is enforced in Michigan (*Pond v. People, 8 Mich. 150*; *People v. Keuhn, 93 Mich. 619*); in New Jersey (*State v. Zellers, 7 N.J.L. 220*); in Vermont (*State v. Patterson, 45 Vt. 308*); in Wisconsin (*State v. Martin, 30 Wis. 216*); in Alabama (*Green v. State, 96 Ala. 24*) [sic]; in Georgia (*Haynes v. State, 17 Ga. 465*); in Florida (*Wilson v. State, 30 Fla. 234*); in Ohio (*State v. Peacock, 40 Ohio St. 333*); in North Carolina (*State v. Taylor, 82 N.C. 554*); and in other jurisdictions. It is also stated as undoubted law in all the leading treatises. (1 Wharton Crim. Law, sec. 633; 1 Bishop Crim. Law, secs. 858, 859; 3 Russell on Crimes, 207, 213; 2 East Pleas of the Crown, 372; Foster's Crown Cases, c. 3, p. 273.) The rule is the same whether the attack proceeds from some other occupant or from an intruder. It was so adjudged in *Jones v. State (76 Ala. 8, 14)*. 'Why,' it was there inquired, 'should one retreat from his own house, when assailed by a partner or co-tenant, any more than when assailed by a stranger who is

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Cardozo is only one of many cases where this Court and others have recognized the right to defend oneself and others, and the right to use lethal force in doing so.[19]

C. This Court Has Recognized The Fundamental Right To *Armed* Self-Defense On Multiple Occasions, Often Reversing Criminal Convictions Where Lower Courts Failed To Honor That Right

Conventional wisdom suggests a paucity of Supreme Court case law concerning firearms and self-defense, and thus little pre-*Heller* support for a fundamental right to *armed* self-defense. This can be seen in the lack of attention paid to this Court's own self-defense cases by those analyzing the roots of the

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lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return?' We think that the conclusion there reached is sustained by principle, and we have not been referred to any decision to the contrary. The duty to retreat, as defined in the charge of the trial judge, is one applicable to cases of sudden affray or *chance medley*, to use the language of the early books. (Blackstone Comm. bk. IV, ch. XIV; East Pleas of the Crown, *supra*; Russell on Crimes, *supra*; *People v. Fiori, 123 App. Div. 174, 188*.) We think that if the situation justified the defendant as a reasonable man in believing that he was about to be murderously attacked, he had the right to stand his ground." *Tomlins*, 213 N.Y. at 243-244.

[19] Later, then-Justice Cardozo commented further on incorporation of fundamental rights, speaking for a Court that included Chief Justice Hughes and Justices Brandeis and Stone. *See Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937).

Second Amendment right to arms.[20] As noted above, the court in *NRA v. Chicago* reflects this "wisdom" by deeming the right to self-defense a "common-law gloss," easily removed. *NRA v. Chicago*, 567 F.3d at 859. But to the extent the court in *NRA v. Chicago* suggested the right to armed self-defense is not solidly grounded in American culture and legal tradition, the court was mistaken.

On the contrary, a substantial body of self-defense – and armed self-defense – case law exists dating back to the late 1800's.[21] These cases show that courts routinely treat self-defense as a natural right, and armed self-defense as an extension of that right under proper circumstances. To make the point, we examine a few of this Court's more prominent cases on the subject, along with examples of other cases that engage in their own, independent review of the right to armed self-defense and its historic roots.

Gourko v. United States marks the beginning of a string of cases out of the Western District of

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[20] Many analysts also seem unaware that almost all state constitutions include some variation of the right to armed self-defense, from the founding era, forward, *see* Appendix A.

[21] *See* DAVID B. KOPEL, STEPHEN P. HALBROOK, AND ALAN KORWIN, SUPREME COURT GUN CASES 15 (Candice M. DeBarr ed., Bloomfield Press) (2004) (breaking down 14 armed, self-defense cases by fundamental elements, and examining 92 firearms cases, generally); *see also* David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (Gun Control Symposium 1999).

Arkansas, where this Court reversed convictions because of improper jury instructions on self-defense provided by Judge Isaac Parker (widely known as the "hanging judge"). *Gourko v. United States,* 153 U.S. 183 (1894). *Gourko* involved a dispute between coal miners. Victim Peter Carbo, who "possessed extraordinary physical strength and was regarded as a dangerous character," accused the smaller John Gourko of taking money for certain lots of coal dug by Carbo. Carbo threatened to shoot Gourko "down like a dog." *Id.* at 183. In response to Carbo's threats, Gourko armed himself. In a later confrontation, Gourko shot and killed the unarmed Carbo. Gourko was convicted of murder. *Ibid*.

Gourko appealed, claiming Judge Parker erred by instructing the jury that, because Gourko had armed himself, the verdict could *not* be manslaughter; it had to be either murder or justifiable homicide based on self-defense. Justice Harlan, writing for the Court, found the instructions constituted prejudicial error, noting that arming oneself for necessary self-defense in response to a threat did not preclude a verdict of manslaughter based on a subsequent encounter, provided the case for manslaughter was otherwise made. *Id.* at 191-192.

Thus, assuming the facts did *not* support a finding that Gourko shot Carbo in self-defense, it was up to the jury, not the judge, to decide the nature of the homicide. In other words, "manslaughter" did not become "murder" solely because Gourko armed himself well before he killed Carbo. Under the

circumstances, arming himself might have been a reasonable precaution, given Carbo's threats of violence, and thus did not necessarily show an intent to kill. Gourko had a *right to armed self-defense*. *Ibid.*; *accord Thompson v. United States*, 155 U.S. 271, 283 (1894); *Wallace v. United States*, 162 U.S. 466, 474 (1896).

On the heels of *Gourko*, Chief Justice Fuller ruled that defendant Henry Starr, a teenager wanted for stealing horses, was entitled to defend himself when fired upon by a peace officer who failed to identify himself. *Starr v. United States*, 153 U.S. 614 (1894). The officer had tracked down Starr to serve a warrant, but decided upon seeing him to shoot first and serve later. Starr shot back. The Court found that even an accused horse thief in hiding could defend himself, reasoning that each person "is entitled to protect his life." *Id*. at 623; *cf. People v. King*, *supra*, 22 Cal. 3d at 24 (felon had a *right* to use otherwise prohibited firearm in self-defense).

In *Beard v. United States*, the Court again reviewed Judge Parker's jury instructions on several principles of self-defense. *Beard v. United States,* 158 U.S. 550 (1895). *Beard* arose out of a family dispute between Mr. Beard and his nephews, the three Jones brothers, over ownership of a cow. Edward Jones, who had been living with the Beards following his mother's death, claimed the cow belonged to his mother and thus was rightfully his; further, he determined to leave the farm and take the cow with him. In an initial confrontation with the Jones

brothers, one of whom was armed with a shotgun, Mr. Beard disputed Edward's claim, and told him to file a legal action to settle the matter. Beard ordered the brothers off the property and told them not to come back, which of course they did. In the meantime, Will Jones publicly avowed his intention to get the cow or kill Beard. Beard heard of these threats right before the fatal encounter. *Id*. at 551-553.

When Edward and his older brothers returned to the farm, this time armed with pistols, they quarreled with Mrs. Beard, who refused to let them take the cow. It was while the boys were arguing with Mrs. Beard in a field some 50 yards from the farmhouse that Mr. Beard arrived on the scene, returning from town. He was carrying his shotgun, as was his custom. Mr. Beard ordered the boys to leave. They refused. Will Jones moved aggressively toward Beard and, while exclaiming "Damn you, I will show you," moved his hand as if to draw his pistol. When Jones got within a few feet of Beard, Beard hit him on the head with his shotgun, causing serious injury. Jones died soon thereafter. *Id*. at 552-553.

Beard was tried and convicted of manslaughter. On appeal, Beard argued that Judge Parker's lengthy jury instructions on self-defense misstated the law and prejudiced his case. The Court agreed, finding that the trial court incorrectly limited the "castle doctrine" (no duty to retreat) to one's actual dwelling. That interpretation precluded a finding of justifiable homicide if Beard could have retreated, because Beard struck the fatal blow while in his field, not his

house. Justice Harlan stated: "we cannot agree that the accused was under any greater obligation, when on his own premises, near his dwelling-house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling-house." *Id*. at 559-560; *see also Tomlins*, *supra*, 213 N.Y. at 243 (Cardozo, J). The Court further found that someone in Beard's position "is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger[,] and if he kills him in so doing it is called justifiable self-defence[.]" *Id*. at 562.[22]

[22] The common law right to self-defense has sometimes been misunderstood as always entailing a duty to retreat if possible before using deadly force. That is false, based on a common law distinction we no longer make – between killings among quarreling good people and the killing of criminals. In early common law times 15 year old boys trotted around with swords and most adults, male and female, carried a knife – not for protection but as a tool, and especially as the common tool for eating. Deadly quarrels among teenagers were commonplace, so the common law developed a rule that if you killed another *good citizen* you were at fault even if he had started the quarrel and he had escalated it to deadly force. If you had retreated as far as you could before killing him, you got a pardon. You still had not acted from right and all your worldly possessions were forfeit. This was called a killing *se defendendo*. *See* Don Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 147 n.24 (1986). But *se defendendo* was only the rule if you had harmed society by killing another good person. When necessarily killing robbers and other felons you were serving the law by preventing the commission of a felony and you were commended for serving the community as well as yourself. Retreat was not required when you killed a criminal rather than a good person. Neither is it in most American jurisdictions today. In the 2000's

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The Court in *Beard* found other errors in Judge Parker's instructions on self-defense, and took the opportunity to explore the origins of self-defense doctrine. In doing so, the Court turned to other courts and legal scholars, including the Supreme Courts of Ohio (*Erwin v. State*, 29 Ohio St. 186 (1876)) and Indiana (*Runyan v. State*, 57 Ind. 80 (1877)), East's Pleas of the Crown, Foster's Crown Cases, Bishop's New Criminal Law, Wharton on Criminal Law, etc. *Beard*, 158 U.S. at 560-563.

The point here is not to list the fundamental elements or examine the subtle nuances of the right to self-defense, but to illustrate that this Court has explored, *on multiple occasions*, the origins of that right and its link to the right to keep and bear arms. *Beard*, *Gourko*, *Starr* and at least ten other Supreme Court cases do that to varying degrees.[23] And the

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at least 15 states adopted the Marion Hammer law which abrogates any duty to retreat rule; *see* Drake, *supra* note 16.

[23] *See, e.g.*, *Brown v. United States*, 256 U.S. 335, 343 (1921) (no duty to retreat from anywhere the defendant had a right to be; also known for Justice Holmes' quote: "Detached reflection cannot be demanded in the presence of an uplifted knife."); *Allen v. United States*, 164 U.S. 492 (1896) (self-defense case heard three times by the Court, with the final case being known for the "Allen charge" given to deadlocked juries), 157 U.S. 675, 679-680 (1895) (decision to carry arms did not negate claim of self-defense), and 150 U.S. 551, 561-562 (1893) (defendant not held to standard of judge or jury when assessing threat in heat of the moment); *Rowe v. United States*, 164 U.S. 546, 558 (1896) (defendant had no duty to retreat or to "so carefully aim[ ] his pistol as to paralyze the arm of his assailant without more seriously wounding him."); *Acers v. United States*, 164 U.S. 388, 391

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right to self-defense and right to arms are discussed further in cases citing this Court's decisions.

For example, *Beard* has been cited in over 100 cases on armed self-defense, with many jurists in those cases, e.g., Judge Cardozo in *Tomlins*, *supra*, exploring at length the origins and nature of the those rights. Of course, the citations go in both directions as seen above in *Beard's* references to cases in Ohio and Indiana. The result is a substantial body of law providing this Court with ample support for finding the Second Amendment's right to arms and underlying right to self-defense, together, are part of this country's history and traditions. The Second Amendment guarantees the means necessary to exercise the most fundamental right of all – the right to survive. It is an expression of the natural law of self preservation. *See Heller*, 128 S.Ct. at 2797-2799 (right to arms is fundamental).

In sum, these cases show that not only self-defense, but armed self-defense, is a fundamental right deeply rooted in our history and traditions.

(1896) (stone can be a "deadly weapon"); *Alberty v. United States*, 162 U.S. 499, 508 (1896) (victim is not bound to retreat when on own property, and may use such force as necessary to repel the assault.); *Wallace, supra,* 162 U.S. 466, 474-475 (carrying arms in response to earlier threat does not necessarily show an intent to kill in later confrontation); *Allison v. United States,* 160 U.S. 203, 211 (1895) (son who shot abusive father entitled to have jury consider self-defense); *Thompson*, *supra*, 155 U.S. 271, 283 (right to armed self-defense, as in *Gourko*, in response to threat did not negate self-defense claim).

Because the right to armed self-defense is central to the Second Amendment, *Heller*, 128 S.Ct. at 2817, these cases also support incorporation of the Second Amendment. *See Moore v. East Cleveland*, 431 U.S. 494, 502-503 (1977) (plurality op., discussing various tests for protecting fundamental rights via incorporation); *see also Washington v. Glucksberg*, 521 U.S. 702, 727 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

IV. FIREARMS ARE ESSENTIAL TO THE RIGHT TO SELF-DEFENSE

One of Judge Easterbrook's more unconventional suggestions was that a right to "arms" be limited by state and local governments to, for instance, "pepper spray." *NRA v. Chicago*, 567 F.3d at 859-860. But that comment fails to appreciate the unique role firearms play in self-defense, a role most people understand, intuitively, but one often left unexplained.

A. Firearms Are Unique Among Weapons

Although the *unlawful* violent misuse of firearms is sensationalized by the media,[24] one primary lawful use of firearms is for protection and safety. This crucial and greater role is exercised daily across the

[24] *See* JOHN R. LOTT, JR., THE BIAS AGAINST GUNS – WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG (Regnery Publishing, 2003).

country, with little fanfare.[25] Properly used, firearms (particularly handguns) are weapons that defend. They are unique in allowing the weak to defend against aggression and victimization by the strong. Criminals always have the decided advantage of choosing the time, place, and victim. The presence of an intended-victim's firearm provides a semblance of balance to that life-threatening equation.[26]

The defensive nature of firearms is part of the reason why we as a society have chosen to arm the police and ourselves. Criminological studies find that in confrontations between criminals and armed citizens, the armed citizens usually win.[27] For example, 80 percent or more of attackers flee when victims just *display* a gun in self-defense.[28] And, Professor

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[25] GARY KLECK AND DON B. KATES, ARMED: NEW PERSPECTIVES ON GUN CONTROL (Prometheus Books, NY 2001) (summarizing the frequency of defensive gun use based on 13 early surveys and the National Self-Defense Survey).

[26] This was illustrated vividly by the recent murders at Fort Hood, where dozens of unarmed soldiers could not defend against a single armed attacker. The attacks went unabated until an armed officer arrived at the scene. *See* Greg Jaffe and Dan Eggen, *Heroic Civilian Police Officer "Walked up and Engaged" Shooter*, The Washington Post, November 6, 2009 *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/06/AR2009110601931.html (last visited November 17, 2009).

[27] Don Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS (Timothy Lytton ed., University of Michigan Press) (2005).

[28] *Id.* at 68.

Southwick's study finds that in those criminal attacks, "The use of a gun by the victim significantly reduces her chance of being injured. . . ."[29] Another study finds that "firearms are used over half a million times a year [in America] against home invasion burglars; *usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired*."[30]

The foregoing quote is emphasized because it represents the consistent outcome of confrontations between criminals and gun-armed citizens. Armed citizens have two immense advantages, which may explain why criminals usually flee without firing a shot. First, gunshots attract police, a result as adverse to criminals as it is welcome to victims. Second, roughly 85 percent of people wounded by gunshot survive if given medical care.[31] Victims unequivocally welcome such medical help. But criminals would

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[29] Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUST. 351, 362 (2000); *see also* Jongyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861 (2004).

[30] David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 166 (2008) (citing Robert M. Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997) (reporting results of study conducted by the CDC) (emphasis added).

[31] Don B. Kates, *The Value of Civilian Handgun Possession as Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991).

rather avoid it. For criminals, going to a hospital is typically just a first step toward going to prison.

Thus, generally speaking, firearms alter the balance of power between criminals and victims, and in some respects give victims the advantage. That is, firearms are *comparatively* less useful to criminals than victims. Conversely, the absence of firearms leaves victims defenseless without appreciably inconveniencing criminals, who can victimize unarmed citizens and commit most crimes even *without* a firearm because, as noted above, criminals have the luxury of choosing the time, place, and victim.

B. As A Matter Of Common Sense, The Right To Self-Defense Implies The Right To Arms

The court in *NRA v. Chicago* tried unsuccessfully to distinguish the right to arms from the right to self-defense. *NRA v. Chicago*, 567 F.3d at 859-860 (suggesting "pepper spray" might suffice). The right to self-defense without access to the tools essential for self-defense is no right at all. The *Heller* decision left no doubt on this point. To reiterate, the "inherent right of self-defense has been central to the Second Amendment right" to keep and bear arms, *Heller*, 128 S.Ct. at 2817. And, while self-defense had little to do with the *codification* of the right to arms, "it was the *central* component of the right itself." *Id*. at 2801 (emphasis in original).

With respect to spray cans and similar products, studies show these half-measures are simply ineffective against anyone sufficiently inebriated, under narcotic influence – or just very angry.[32] In other words, as a practical matter, sprays are ineffective to defend against exactly the people from whom victims need defense. A "right" to self-defense without a correlative right to *firearms* is no right at all. That is why modern philosophers overwhelmingly conclude that a right of self-defense entails a right to possess a gun.[33] The Founders were of a similar mind.

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[32] As to the ineffectiveness of chemical sprays due to range, power, and deterrent capacity, *see*, *e.g*., James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141 (1989); *see also* MASSAD AYOOB, THE TRUTH ABOUT SELF-PROTECTION 314-322 (Bantam, 1983) (indicating pepper spray is only useful as dog repellent). Even stronger irritants such as Mace should "*not* be used in life-threatening encounters! It would be extremely foolish to use Mace on a suspect immediately capable of employing a deadly weapon. That is simply not what it was designed for." *Id*. at 316 (italics in original).

[33] Michael Huemer, *Is There A Right to Own A Gun?*, 29 SOC. THEORY & PRAC. 297 (2003); *see also* Todd C. Hughes and Lester H. Hunt, *The Liberal Basis of the Right to Bear Arms*, 14 PUB. AFF. Q. 1 (2000); Lance Stell, *Self-Defense and Handgun Rights*, 2 J. L., ECON. & POL'Y 265 (2006); Samuel C. Wheeler, *Self-Defense Rights and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431 (1997): and *Arms as Insurance*, 13 PUB. AFF. Q. 111 (April, 1999).

C. The Founders Understood That The Right To Self-Defense Included The Right To Arms

The Founders inherited the view that self-defense is the first right – and embraces the right to arms – from the philosophers they knew, especially Locke[34] and Hobbes.[35]

The Founders did not entertain any theoretical distinction between the right of self-defense and the right to possess arms for self-defense. An original justice of this Court, law professor James Wilson, was a member of the Continental Congress and the

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[34] Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA L. REV. 103, 118 n.35 (1987) (referencing Locke that by the laws of nature everyone is both: a) "*bound to preserve himself*" and b) entitled to have and use "what tends to the preservation of the Life, the Liberty, Health, Limb or Goods. . . .") (italics in original).

[35] THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL ch. XIV, p. 86 (A.R. Waller ed., Cambridge University Press 1904 (1651) stressed the inclusion of the right to arms within the right to self-defense as follows:

> "The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, his own life. . . .
>
> A law of nature, *lex naturalis*, is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his own life, or *taketh away the means of preserving the same*, and to omit that by which he thinketh that it may be best preserved" (emphasis added).

principal draftsman of the Pennsylvania Constitution. Wilson explained the right to use deadly force to repel a homicidal attacker:

> [I]t is the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution. This law, however, is expressly recognized in the Constitution of Pennsylvania: "*The right of the citizens to bear arms in defence of themselves shall not be questioned.*"[36]

Modern philosophy and the Founders agree: any academic distinction between the right of self-defense and the right to possess arms for self-defense is a distinction without a difference.

V. FEDERALISM DOES NOT BAR INCORPORATION OF A FUNDAMENTAL RIGHT

NRA v. Chicago suggests that principles of federalism might militate against ruling in favor of Second Amendment incorporation. *NRA v. Chicago*, 567 F.3d at 860. This argument fails in the first instance because there are no – and hence the court failed to

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[36] *See* Wilson, *supra* note 5, at 84 (emphasis added); *see also* STEPHEN HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 262 (2008) (quoting Roger Sherman's avowal that he "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty and property, by whomsoever made").

produce any – late 18th Century authorities indicating states have the power to abolish pre-existing human rights – much less the premier "human right" of self-defense, which necessarily includes the right to be armed to exercise that right effectively.

Second, such considerations should have been directed to the Supreme Court over a century ago when that Court began subjecting state powers to the Bill of Rights. Unless this Court wishes to revisit the validity of the incorporation doctrine, *in full*, then an appeal to federalism cannot legitimize any argument against incorporation of a substantive "right of the people" enshrined in the Bill of Rights.

Moreover, the federalism argument presents a curious contradiction. On the one hand, it rests upon a belief that the Founders intended that citizens have the "right to keep and bear arms" to resist tyranny, put down rebellions, and repel invasions. On the other hand, it argues that these same citizens could be prohibited by states from possessing those same arms to prevent murder, rape and home invasion (regardless of the express individual rights protected by the Bill of Rights).

Finally, the federalism argument conflicts with what the actual, founding-era Federalists believed. To natural-law philosophers (whom the Founders revered), self-defense was "the primary law of nature," the primary reason for man entering society. Believing self-preservation to be the very reason for society's creation and existence, they held this

right – which they understood to encompass the right to arms – "cannot be repealed or superseded, or suspended by any human institution,"[37] – including the states.

As shown in the substantial body of law above, although the right to armed-self-defense is reflected in nearly all state constitutional provisions, states were not the source of that right. Nor can states abolish it. As Justice Black declared, concurring in *Duncan*, "I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights." *Duncan* 391 U.S. at 170.

CONCLUSION

The individual right of self-defense, and the right to keep and bear arms necessary for self-defense, are integral parts of this nation's laws and tradition. The Founders understood the fundamental nature of these inseparable rights, and the need to protect them to secure all other rights in a free society. Legal scholars and philosophers, too, understood the right of self-defense as the first law of nature, and the right to arms as its corollary. This Court has recognized both rights on multiple occasions, as have state courts and legislatures.

[37] *See* Wilson, *supra* note 5, at 84.

While often unstated, the link between self-defense and the right to arms is the unique function firearms serve in human society. Firearms in the hands of law-abiding citizens uniquely allow the weak to defend against victimization by the strong. Nations that ban firearms have not managed to control crime, nor even disarm criminals. Only the law-abiding disarm themselves in reaction to such laws. The effect has often been to promote violence, not dissuade it.

This result fulfills the prediction of "the father of criminology," Cesare Beccaria. His comments are doubly worthy of attention: First, because they are the flowery 18th Century precursor of the modern slogan: "When guns are outlawed, only outlaws will have guns." Second, because Thomas Jefferson translated this passage from the Italian and wrote it into his collection of great quotations:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be

> violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty – so dear to men, so dear to the enlightened legislator – and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.[38]

Beccaria, known and esteemed by our Founders, speaks directly of the need to protect fundamental rights from the vagaries of state and local officials, who would unwittingly aid assailants. This Court saved the Second Amendment from extinction in *Heller*. Now it should breathe some life into it. The fundamental rights embodied in the Second Amendment deserve the same protection afforded other fundamental rights.

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[38] Don Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 91 (1992) (referencing CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 87-88 (Henry Paolucci, tr., Bobbs-Merrill, 1963)).

The decision of the Seventh Circuit should be reversed.

Date: November 20, 2009

Respectfully submitted,

C. D. MICHEL*
GLENN S. MCROBERTS
HILLARY J. GREEN
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard,
Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444

Counsel for Amici Curiae
**Counsel of Record*

APPENDIX A
LIST OF STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO KEEP AND BEAR ARMS

Alabama: That every citizen has a right to bear arms in defense of himself and the state. Art. I, § 26 (enacted 1819, art. I, § 23, with "defence" in place of "defense," spelling changed 1901).

Alaska: A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State. Art. I, § 19 (first sentence enacted 1959, second sentence added 1994).

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Art. II, § 26 (enacted 1912).

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. Art. II, § 5 (enacted 1868, art. I, § 5).

1836: That the free white men of this State shall have a right to keep and to bear arms for their common defence. Art. II, § 21.

California: No express right to keep and bear arms provision. However, a right to self defense is provided: All people . . . have inalienable rights. Among these are enjoying and defending life and liberty. . . . Art. I, § 1.

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. Art. II, § 13 (enacted 1876, art. II, § 13).

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Art. I, § 15 (enacted 1818, art. I, § 17). The original 1818 text came from the Mississippi Constitution of 1817.

Delaware: A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use. Art. I, § 20 (enacted 1987).

Florida: (a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the

transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun. Art. I, § 8 (sections (b)-(d) added in 1990).

1838: That the free white men of this State shall have a right to keep and to bear arms for their common defence. Art. I, § 21.

1865: Clause omitted.

1868: The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State. Art. I, § 22.

1885: The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne. Art. I, § 20.

1968: The right of the people to keep and bear arms in defense of themselves and of the lawful authority

of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

Georgia: The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. Art. I, § 1, ¶ VIII (enacted 1877, art. I, § XXII).

1865: A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. Art. I, § 4.

1868: A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne. Art. I, § 14.

Hawaii: A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. Art. I, § 17 (enacted 1950).

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage

of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony. Art. I, § 11 (enacted 1978).

1889: The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law. Art. I, § 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. Art. I, § 22 (enacted 1970).

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Art. I, § 32 (enacted 1851, art. I, § 32).

1816: That the people have a right to bear arms for the defense of themselves and the State, and that the military shall be kept in strict subordination to the civil power. Art. I, § 20.

Iowa: No express right to keep and bear arms provision. However, a right to self defense is provided: All men and women . . . have . . . inalienable rights . . . of enjoying and defending life. . . . Art. I, § 1.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. Bill of Rights, § 4 (enacted 1859, art. I, § 4).

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties. . . .

Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. §1 (enacted 1891).

1792: That the right of the citizens to bear arms in defense of themselves and the State shall not be questioned. Art. XII, § 23.

1799: That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned. Art. X, § 23.

1850: That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms. Art. XIII, § 25.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. Art. I, § 11 (enacted 1974).

1879: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not

prevent the passage of laws to punish those who carry weapons concealed. Art. 3.

Maine: Every citizen has a right to keep and bear arms and this right shall never be questioned. Art. I, § 16 (enacted 1987, after a collective-rights interpretation of the original provision).

1819: Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned. Art. I, § 16.

Maryland: No provision.

Massachusetts: The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. Pt. 1, art. 17 (enacted 1780).

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Art. I, § 6 (enacted 1835).

Minnesota: No provision.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Art. III, § 12 (enacted 1890, art. 3, § 12).

1817: Every citizen has a right to bear arms, in defence of himself and the State. Art. I, § 23.

1832: Every citizen has a right to bear arms in defence of himself and of the State. Art. I, § 23.

1868: All persons shall have a right to keep and bear arms for their defence. Art. I, § 15.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Art. I, § 23 (enacted 1945).

1820: That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned. Art. XIII, § 3.

1865: Same as above, but with "the lawful authority of the State" instead of "the State." Art. I, § 8.

1875: That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons. Art. II, § 17.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Art. II, § 12 (enacted 1889).

Nebraska: All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed. Art. I, § 1 (right to keep and bear arms enacted 1988).

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. Art. I, § 11(1) (enacted 1982).

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state. Pt. 1, art. 2-a (enacted 1982).

New Jersey: No express right to keep and bear arms provision. However, a right to self defense is

provided: All persons . . . have certain natural and unalienable rights, among which are those of . . . defending life. . . . Art. 1, § 1.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. Art. II, § 6 (first sentence enacted in 1971, second sentence added 1986).

1912: The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.

New York: No provision.

North Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. Art. 1, § 30 (enacted 1971).

1776: That the people have a right to bear arms, for the defence of the State; and, as standing armies, in

time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power. Bill of Rights, § XVII.

1868: A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Art. I, § 24.

1875: Same as 1868, but added "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed. Art. I, § 1 (right to keep and bear arms enacted 1984).

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict

subordination to the civil power. Art. I, § 4 (enacted 1851).

1802: That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power. Art. VIII, § 20.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. Art. II, § 26 (enacted 1907).

Oregon: The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.] Art. I, § 27 (enacted 1857, art. I, § 28).

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Art. 1, § 21 (enacted 1790, art. IX, § 21).

1776: That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination, to,

and governed by, the civil power. Declaration of Rights, cl. XIII.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. Art. I, § 22 (enacted 1842).

South Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. Art. 1, § 20 (enacted 1895).

1868: The people have a right to keep and bear arms for the common defence. Art. I, § 28.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. Art. VI, § 24 (enacted 1889).

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. Art. I, § 26 (enacted 1870).

1796: That the freemen of this State have a right to keep and bear arms for their common defence. Art. XI, § 26.

1834: That the freemen of this State have a right to keep and bear arms for their common defence. Art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. Art. I, § 23 (enacted 1876).

1836: Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power. Declaration of Rights, cl. 14.

1845: Every citizen shall have the right to keep and bear arms in lawful defence of himself or the State. Art. I, § 13.

1868: Every person shall have the right to keep and bear arms in the lawful defence of himself or the State, under such regulations as the legislature may prescribe. Art. I, § 13.

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. Art. I, § 6 (enacted 1984).

1896: The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.

Vermont: That the people have a right to bear arms for the defence of themselves and the State – and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. Ch. I, art. 16 (enacted 1777, ch. I, art. 15).

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. Art. I, § 13 (enacted 1776 without explicit right to keep and bear arms; "therefore, the right to keep and bear arms shall not be infringed" added in 1971).

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men. Art. I, § 24 (enacted 1889).

West Virginia: A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use. Art. III, § 22 (enacted 1986).

Wisconsin: The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose. Art. I, § 25 (enacted 1998).

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Art. I, § 24 (enacted 1889).

APPENDIX B
Statement of Interests of Additional Amici

CALIFORNIA DISTRICT ATTORNEYS

Alpine County, California, District Attorney Will Richmond Will Richmond previously served as District Attorney for Thiare County, and as Deputy Chief Assistant U.S. Attorney for Eastern District of California. He was appointed Alpine County District Attorney in 2002, and then elected to the position.

Amador County, California, District Attorney Todd Reibe First elected in 1999, Todd Reibe was re-elected in 2002 and 2006.

Butte County, California, District Attorney Michael Ramsey Michael Ramsey has served as a prosecutor for 29 years, and as Butte County District Attorney for over 20 years. During his administration the department has instituted 17 special prosecution units and investigative programs.

Colusa County, California, District Attorney John Poyner John Poyner was first elected District Attorney in 1986, and has been re-elected ever since. He is California District Attorneys Association President-Elect for 2007-2008.

Del Norte County, California, District Attorney Michael D. Reise Michael D. Reise was elected to his first term in 2002, and re-elected in 2006.

El Dorado County, California, District Attorney Vern Pierson As a career prosecutor, Vern Pierson

has served as a vertical prosecutor for domestic violence and sexual assault. He helped create the *Field Guide* used by thousands of California police officers, and he is the author of the annually-updated *California Evidence Pocketbook*. He teaches trial advocacy and the laws of evidence to California prosecutors. Since 1999, he has served on the committee that provides the annual legal revisions for Peace Officers Standards and Training (P.O.S.T.).

Fresno County, California, District Attorney Elizabeth A. Egan Elizabeth Egan was elected in 2002. She heads one of the largest prosecutorial agencies in California.

Glenn County, California, District Attorney Robert Holzapfel Robert Holzapfel was first elected District Attorney of Glenn County in 1990 and was re-elected 1994, 1998, 2002, and 2006.

Kern County, California, District Attorney Edward Jagels Edward Jagels was first elected District Attorney of Kern County in 1983, at the age of 33. He is a past President of the California District Attorneys Association. He has served on the Governor's Law Enforcement Steering Committee, the Attorney General's Policy Council on Violence Prevention, and was co-author and campaign chair of the Crime Victims Justice Reform Act (Prop. 115).

Kings County, California, District Attorney Ron Calhoun Ron Calhoun was first elected in 1999, and is currently serving his third term.

Imperial County, California, District Attorney Gilbert Otero Gilbert Otero was first elected in 1992, and is currently serving his fourth term. He is a past President of the California District Attorneys Association.

Madera County, California, District Attorney Michael R. Keitz Michael R. Keitz was appointed District Attorney in October 2008. Prosecutor for 17 years. Past recognition by the Elks Lodge as Prosecutor of the Year. A former Reserve Deputy Sheriff of 19 years of experience.

Mariposa County, California, District Attorney Robert H. Brown Former Naval Commander Robert H. Brown began his career as a lawyer after retiring from the U.S. Navy. He has been a prosecutor since 1985, and was elected District Attorney in 2002 and re-elected in 2006.

Mendocino County, California, District Attorney Meredith Lintott. Meredith Lintott began her career as a prosecutor in 1987, receiving the "Prosecutor of the Year" award in 1988. Lintott was elected District Attorney in 2007 and that same year received Victim's Right's Recognition from Crime Victim's United.

Merced County, California, District Attorney Larry Morse Larry Morse joined the District Attorney's office in 1993, and was elected District Attorney in 2006. He was named Prosecutor of the Year by A Women's Place of Merced County and by the Central Valley Arson Investigators Association.

Modoc County, California, District Attorney Gary Woolverton After more than 30 years in private practice, specializing in workman's compensation, Gary Woolverton was elected District Attorney in 2006.

Mono County, California, District Attorney George Booth George Booth has worked as a criminal defense attorney, and Deputy District Attorney and Assistant District Attorney for Mono County. He has been in the District Attorney's Office for 18 years.

Orange County, California, District Attorney Tony Rackauckas Before being elected District Attorney, Tony Rackauckas had served as Presiding Judge of the Appellate Department of the Superior Court, and before that as a judge of the Superior Court and the Municipal Court. He was elected District Attorney in 1998, and re-elected in 2002 and 2006. During his time in office, gang membership has decreased by 8,500 members, a reduction of 45 percent. There are 55 fewer gangs.

Placer County, California, District Attorney Brad Fenocchio Brad Fenocchio joined Placer County District Attorney's office in 1985, and was first elected District Attorney in 1994. He received the Rural and Medium County Outstanding Prosecutor of the Year Award for the State of California in 2003; the National Association of Counties 2003 Achievement Award presented to the Placer County

District Attorney's Office for its innovative Community Agency Multi disciplinary Elder Team; and the Attorney General's Distinguished Service Award for Elder Abuse Prosecution presented by California Attorney General's Office in 2003.

San Benito County, California, District Attorney Candice Hooper Candice Hooper was first elected in 2006. She has been a prosecutor for 22 years.

San Bernardino, California, District Attorney Michael Ramos Michael Ramos was elected 2002 and re-elected in 2006. In 2004 he was appointed to California Victim Compensation and Government Claims Board, and was elected to the California District Attorneys Association Board of Directors. He was given the Latino of the Year Award in 1999, by the Redlands Northside Impact Committee.

San Diego County, California, District Attorney Bonnie M. Dumanis Bonnie Dumanis was elected in 2003 and is the first woman to serve as District Attorney for the County of San Diego. She served as a prosecutor for twelve years under former District Attorney Ed Miller. In 1994 she was elected to serve in the Municipal Courts and in 1998 she was elected to the San Diego Superior Court.

San Joaquin County, California, District Attorney James Willett James Willett was appointed District Attorney of San Joaquin County in April 2005. He has served the District Attorneys Office for

the last 26 years, 10 of which were as Assistant District Attorney.

Santa Barbara County, California, District Attorney Christie Stanley Christie Stanley joined the Santa Barbara County District Attorney's office in 1980. In 1984 she was recognized as "Deputy District Attorney of the Year." She was elected in 2006.

Shasta County, California, District Attorney Gerald C. Benito Gerald C. Benito was first elected District Attorney in 2003.

Sierra County, California, District Attorney Larry Allen Larry Allen was elected District Attorney/ Public Administrator of Sierra County on March 5, 2002 and took office as the County's 37th District Attorney on January 6, 2003.

Siskiyou County, California, District Attorney J. Kirk Andrus J. Kirk Andrus was appointed District Attorney in 2005, and was elected in 2006. He is the youngest District Attorney in California.

Solano County, California, District Attorney David W. Paulson Before joining the District Attorney's Office in 1977, David W. Paulson had served as a military trial judge and as an appellate military judge on the Navy's highest court, the Navy-Marine Corps Court of Criminal Appeals. He was appointed District Attorney by the Board of Supervisors in 1993, elected in 1994, and re-elected in 1998, 2002, and 2006. He is a past President (2004-2005) of the California District Attorneys Association (CDAA), and

served as CDAA Director in 1995-1997. He is also a past President (2005-2006) of the Board of Directors of the Institute for the Advancement of Criminal Justice (IACJ), and currently serves as the Editor-in-Chief of *The Journal of the Institute for the Advancement of Criminal Justice*. Mr. Paulson was recently appointed Chair of the Board of Advisors for the new LL.M. in Prosecutorial Science program at Chapman University School of Law.

Sutter County, California, District Attorney Carl V. Adams Carl V. Adams is the senior elected District Attorney in California. He was first elected in 1982, and has been re-elected six times. He serves on the Board of the California District Attorneys Association.

Tehama County, California, District Attorney Gregg Cohen Gregg Cohen was first elected in 1998, re-elected in 2002 and again in 2006. He is a member of the Rotary and former member of the California District Attorneys Association (CDAA). He also has served on several committees with CDAA.

Trinity County, California, District Attorney Michael Harper Michael Harper was elected in 2006. Prior to taking office he was Deputy District Attorney in Trinity County from 2001-2007, and has worked as a prosecutor for 15 years.

Tulare County, California, District Attorney Phil Cline Phil Cline began his career as a prosecutor in 1978 with the Tulare County District

Attorney's Office. Before being appointed District Attorney in 1992, he had specialized for seven years in homicide cases. He was first elected in 1994. He created Tulare County's Rural Crime Program, the first of its kind in the nation. He is a past President of the Tulare County Police Chiefs Association.

Ventura County, California, District Attorney Gregory Totten Gregory Totten was first elected in 2002, and was re-elected in 2006. He has been named the Ventura County Kiwanis "Law Enforcement Officer of the Year." He serves on the Board of Directors of the California District Attorneys Association.

Yolo County, California, District Attorney Jeff W. Reisig Jeff Reisig was first elected District Attorney in 2006. He was three times named Yolo County Prosecutor of the Year.

NEVADA DISTRICT ATTORNEYS

Churchill County, Nevada, District Attorney Arthur E. Mallory Arthur E. Mallory was elected as District Attorney of Churchill County in November 1998. He also is a member of the State of Nevada Commission on Judicial Selection since 2003. He also serves on the State Commission on Rural Courts and the Advisory Committee on Criminal Justice in Rural Areas.

Esmeralda County, Nevada, District Attorney Todd Leventhal Todd Leventhal was elected in 2006

to serve his first term. He works as both a criminal defense attorney and District Attorney.

Humboldt County, Nevada, District Attorney Russell D. Smith Russell Smith was admitted to the Nevada State Bar on May 4, 2004.

Lander County, Nevada, District Attorney Hy Forgeron Hy Forgeron was admitted to the Nevada State Bar on October 1, 1973.

Lyon County, Nevada, District Attorney Robert Auer Robert Auer has served as the elected Lyon County District Attorney for the past three years. He has practiced public law for the past 25 years. During that time he has worked for the Nevada Supreme Court, Deputy District Attorney for Carson City and Lyon County, Deputy Attorney General for Nevada.

Mineral County, Nevada, District Attorney Cheri Emm-Smith Cheri Emm-Smith was appointed to the position in May 2002 and elected to two terms (2002 and 2006).

Pershing County, Nevada, District Attorney Jim Shirley Jim Shirley was first elected in 2002, and was re-elected in 2006. He is a member of the National District Attorneys Association.

Washoe County, Nevada, District Attorney Richard Gammick Richard Gammick was first elected in 1994 and was re-elected in 1998 and 2002. He was a Reno Police Officer, a Major in the United States Army, with a combat tour in Vietnam. He served in the Nevada Army National Guard, and was

a legal advisor for the Reno Police Department as a Deputy Reno City Attorney.

LAW ENFORCEMENT

Graham County, Arizona, Former Sheriff Richard Mack Richard Mack was the first sheriff in the nation to file a lawsuit against the Clinton administration, seeking to stop federal intrusion on states' rights associated with the Brady bill. That case was ultimately settled in the United States Supreme Court as *Printz v. United States*, 521 U.S. 898 (1997), a victory for states and a long-sought limitation on federal power over the states. A graduate of the FBI National Academy (1992), Mack holds a B.A. in Latin American Studies and Sociology from Brigham Young University, and is the author of five books. He has been integrally involved in the struggle to preserve the right to keep and bear arms, and the right of the individual to lawful self-defense for much of his professional career. Sheriff Mack sees the threat posed by Chicago's near total ban on private gun ownership as unacceptable infringement on the public's fundamental rights corrosive to our constitutional republic.

Mendocino County, California, Sheriff Thomas D. Allman Thomas Allman has been a law enforcement officer since 1981. He has served in a variety of assignments, including undercover narcotics work targeting methamphetamine. He was elected Sheriff in 2006.

Tehama County, California, Sheriff Clay D. Parker Clay Parker has been a law enforcement officer since 1981. He was elected Sheriff in 1999.

ASSOCIATIONS

California Rifle & Pistol Association Foundation The CRPA Foundation was established in 2004 as a 501(c)3 non-profit corporation. CRPA Foundation promotes and encourages firearms and hunting safety and education; educates individuals with respect to firearms, firearms history, firearms technology, hunting, safety and marksmanship; and supports litigation advancing Second Amendment rights.

Long Beach Police Officers Association The Long Beach Police Officers Association (LBPOA) was incorporated on June 24, 1940. It is made up of men and women who serve for the Long Beach Police Department from the police officer, corporal, sergeant and lieutenant ranks. The association ensures the protection and preservation of peace officer rights.

San Francisco Veterans Police Officers Association The San Francisco Veteran Police Officers Association (SFVPOA) represents retired San Francisco officers and is active in protecting their interests, particularly their interest in being able to defend themselves from the criminals they have arrested throughout their careers. SFVPOA is also active in protecting its members' interests in post-retirement employment.

The Arizona Citizens Defense League (AzCDL) The Arizona Citizens Defense League was founded in 2005 by a group of people seeking a sustained, coordinated, statewide effort to protect and expand the rights of law-abiding gun owners. The AzCDL represents 2,500 Arizonans and is growing rapidly. The group's founders, two of whom are now registered lobbyists, have been instrumental in drafting and enacting numerous pro-rights improvements in Arizona's gun laws. AzCDL believes the proper emphasis of gun laws should be on criminal misuse, and that law-abiding citizens' rights to own and carry firearms should be vigorously protected and unencumbered by unnecessary laws or regulations. AzCDL views the Chicago-style gun bans addressed in *NRA v. Chicago* as a threat to personal liberty, beyond any legitimately delegated power, and infringing directly upon the Second Amendment rights of Americans.

The Texas Concealed Handgun Association (TCHA) The Texas Concealed Handgun Association began as the Texas Concealed Handgun Instructor Association in 1997, one year after the Texas concealed handgun law (CHL) went into effect. The association's membership initially consisted of instructors trained by the Texas Department of Public Safety and licensed to train and certify Texas residents to legally carry sidearms under the law. In 2003, the association expanded its membership to include license holders and anyone interested in carrying a concealed handgun for self-defense and currently has more than 1,500 members. Among

TCHA's objectives are: 1) promotion, continuation, and improvement of the Texas concealed handgun law, 2) promoting responsible firearm safety, ownership, and use in our communities, 3) promotion of high standards of instruction and training, 4) to provide mission-relevant information to its members, the community, legislators and the media, and 5) to support the right of responsible, law-abiding citizens to own, keep, and lawfully carry firearms for personal protection.

The Virginia Citizens Defense League (VCDL) The Virginia Citizens Defense League is a non-profit C4 corporation whose group's mission is to advocate for laws that protect the rights of its members and all Virginians to own and carry firearms for self-defense and all lawful purposes. Incorporated in 1997, it currently has over 5,000 members and 13,000 subscribers to its email alert system. Before it was incorporated as VCDL, the Northern Virginia Citizens League was a major force in getting "shall issue" concealed-handgun permits enacted in 1995. VCDL has been successful in requiring localities, which were violating Virginia's gun laws to the detriment of their citizens, to come into compliance. VCDL believes that *NRA v. Chicago*, decided in favor of the people's right to keep and bear arms, would enhance and protect the rights of Virginians and all Americans to keep and bear arms for the time-honored tradition and practice of self-defense.

PUBLISHERS

Bloomfield Press Bloomfield Press is the largest publisher and distributer of gun-law books in the nation, founded in 1988 to publish and describe the gun laws for the state of Arizona, in plain English. It grew in classic entrepreneurial fashion and its flagship book, *The Arizona Gun Owner's Guide*, went into its 24th edition in October, 2009. The firm maintains a national directory to every statute available online in the country in an effort to inform and protect the right of the citizenry, and publishes a blog with over 30,000 subscribers. Company owner and publisher Alan Korwin is a nationally recognized expert on gun law, with eight of his own eleven books addressing that subject, including the unabridged, *Supreme Court Gun Cases* (co-written with David B. Kopel and Stephen P. Halbrook, Ph.D.), and the unabridged federal guide, *Gun Laws of America* (with Michael P. Anthony).