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July 6, 2009

Via: E-File

U.S. Court of Appeals for the Ninth Circuit  
95 7<sup>th</sup> Street  
San Francisco, California 94103-1526

Re: Nordyke, et al., v. King, et al., Case No.: 07-15763  
Pending Case – Filed April 20, 2009.  
*En Banc* Vote Pending pursuant to May 18, 2009 Order.  
Original Panel: Arthur L. Alarcon, Diarmuid F. O'Scannlain  
and Ronald M. Gould

Your Honors:

On or about June 15, 2009, Appellants sent a letter pursuant to Federal Rule of Appellate Procedure 28(j). The letter included notice that petitions for *certiorari* had been filed in the United States Supreme Court in two cases out of the Seventh Circuit Court of Appeals:

*National Rifle Association of America, Inc., et al., v. City of Chicago, et al.* Case No.: 08-1497, and

*Otis McDonald, et al., v. City of Chicago, Illinois, et al.*  
Case No. 08-1521.

These Seventh Circuit cases address the issue of incorporation of the Second Amendment against state and local government action.

The State of California has filed an *amicus curiae* brief in support the petitioners in those cases. California cites the omission of a “right to

keep and bear arms” from the California State Constitution as one of the important reasons for the Supreme Court to grant *certiorari*. This argument by the Attorney General mirrors one of the arguments made in Plaintiff/Appellants’ FRAP 35(a) brief currently under submission.

A true and correct copy of the California Attorney General’s brief is attached to this letter.

Respectfully Submitted,

/s/

Donald Kilmer  
Attorney for Appellants

encl: Brief of the State of California as Amicus Curiae in Support of  
Petitioners.

Nos. 08-1497; 08-1521

**In the Supreme Court of the United States**

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NATIONAL RIFLE ASSOCIATION, INC., ET AL.,  
PETITIONERS,

v.

CITY OF CHICAGO, ILLINOIS, ET AL., RESPONDENTS.

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OTIS McDONALD, ET AL., PETITIONERS,

v.

CITY OF CHICAGO, ILLINOIS, ET AL., RESPONDENTS.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN  
SUPPORT OF PETITIONERS**

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**STATEMENT OF COMPLIANCE WITH SUPREME  
COURT RULE 37.2(a)**

Pursuant to Rule 37.4, the consent of the parties to file this brief is not required. California provided notice on July 6, 2009, that it would file this brief and believes that no party will be prejudiced by the filing.

### **QUESTION PRESENTED**

Whether the right of the People to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting the possession of handguns in the home.

## INTEREST OF *AMICUS CURIAE*

California has a strong interest in protecting the constitutional rights of its citizens. But unlike many states, California has no state constitutional counterpart to the Second Amendment. Unless the protections of the Second Amendment extend to citizens living in the States as well as to those living in federal enclaves, California citizens could be deprived of the constitutional right to possess handguns in their homes as affirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

## INTRODUCTION

This Court recently held that the Second Amendment prevents the federal government from denying citizens the right to possess handguns in their homes. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). But the decision did not resolve the more important question of whether this limitation applies to the States through the Fourteenth Amendment. The petitions in these cases should be granted so the Court may address this question. In granting the petitions and ruling upon the merits, the Court should extend to the states *Heller's* core Second-Amendment holding that the government cannot deny citizens the right to possess handguns in their homes, but also provide guidance on the scope of the States' ability to reasonably regulate firearms.

## REASONS FOR GRANTING THE PETITIONS

The Court should grant review for two reasons. First, the Court should grant review to resolve the split in the circuits on the important question of whether the Second Amendment applies to the states. This question is particularly important because certain states, such as California, have no state constitutional counterpart to the Second Amendment. Second, the Court should grant review because further guidance is needed to define the scope of the States' legitimate interests in reasonably regulating firearms.

### **I. THESE PETITIONS SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE CIRCUITS ON THE IMPORTANT QUESTION OF WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES.**

The Ninth Circuit Court of Appeals has held that the individual right guaranteed by the Second Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). The Second Circuit has concurred with the Seventh Circuit in reaching the opposite conclusion. *Maloney v. Cuomo*, 554 F.3d 56 (2nd Cir. 2009). This split has created confusion regarding the nature of citizens' Second-Amendment rights and the power of States to enact reasonable regulations governing firearms. These petitions should be granted to resolve the lower-court split and the confusion it has engendered.

**II. THESE PETITIONS SHOULD BE GRANTED TO AFFIRM THE APPLICABILITY OF THE SECOND AMENDMENT TO THE STATES AND TO PROVIDE GUIDANCE ON THE SCOPE OF PERMISSIBLE FIREARMS REGULATIONS.**

In affirming that the Second Amendment guarantees an individual right to keep and bear arms, the Court in *Heller* noted that its ruling permitted reasonable regulation of firearms. It declared that nothing in the decision should “be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 128 S. Ct. 2783, 2816-17 (2008). But the Court declined to elaborate on the extent of the government’s authority to regulate firearms or to establish a standard of review applicable to asserted Second-Amendment infringements. *Id.* at pp. 2817-19.

Further guidance on these issues is needed in California, which has been a national leader in passing common-sense legislation to regulate firearms. The Unsafe Handgun Act, for example, aims to reduce handgun crime and promote handgun safety. Cal. Penal Code § 12125 et seq. It prohibits the manufacture or sale of any “unsafe handgun” in California, including those that lack certain safety features such as a chamber-load indicator. Cal. Penal Code § 12126(c). This law has furthered important governmental interests while not interfering with the ability of our state’s residents to purchase and possess a wide range of handguns: Over 1,300 handguns have been certified by California as meeting the law’s requirements. See



<http://certguns.doj.ca.gov/>. Nonetheless, California is presently defending the law against a federal constitutional challenge. *Peña v. Cid*, 2:09-cv-01185-FCD-KJM, 2009 (U.S. Dist., E.D. Cal.).

The petitions in these cases should be granted to provide needed guidance on the scope of the States' ability to reasonably regulate firearms while extending to the states *Heller's* core Second-Amendment holding that government cannot deny citizens the right to possess handguns in their homes.

Dated: July 6, 2009

Respectfully submitted

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CERTIFICATE OF SERVICE  
When All Case Participants are Registered for the  
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U.S. Court of Appeals Docket Number(s):

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) \_\_\_\_\_ .

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

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CERTIFICATE OF SERVICE  
When Not All Case Participants are Registered for the  
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U.S. Court of Appeals Docket Number(s):

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Jul 9, 2009 .

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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