

No. 07 – 15763 [DC# CV 99-4389-MJJ]

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RUSSELL ALLEN NORDYKE; et al.,  
*Plaintiffs - Appellants,*

vs.

MARY V. KING; et al.,  
*Defendants - Appellees.*

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APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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**PLAINTIFF-APPELLANTS' FRAP 35(a) BRIEF**

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**CORPORATE DISCLOSURE STATEMENT**

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

VIRGIL McVICKER is president of the MADISON SOCIETY, a not-for-profit Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

Dated: June 8, 2009

\_\_\_\_\_  
/s/

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## INTRODUCTION

Filed in 1999, *Nordyke v. King (Nordyke V)*; 563 F.3d 439 (9th Cir. 2009) raises issues under the First, Second and Fourteenth Amendments. The case requires a rigorous examination of the sources and purposes of these Amendments.

There are two grounds for *en banc* determination under FRAP 35(a): (1) consideration is necessary to secure or maintain uniformity of the court's decision; and/or (2) the proceeding involves a question of exceptional importance.

Plaintiffs/Appellants' response to this Court's May 18, 2009 Order will assume that the call for a vote is based on this case's exceptional importance.

Last term, the Supreme Court permanently altered Second Amendment jurisprudence in *District of Columbia v. Heller*; 554 U.S. \_\_\_, 128 S.Ct. 2783, (2008). In this Circuit, three cases that had blocked any individual from asserting a fundamental right to “*keep and bear arms*” had their holdings completely undermined by *Heller* – they were: *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); *Hickman v. Block*, 81 F.3d 98 (9th Cir.1996); and *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

Writing in *Silveira v. Lockyer*, 312 F.3d at 1067, Judge Stephen Reinhardt forecast the inevitable resolution of the incorporation issue raised in this case.<sup>1</sup>

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<sup>1</sup> From *Silveira*, 312 F.3d at 1067, “*Fresno Rifle* itself relied on *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Ill.*, 116 U.S. 252 (1886), decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause. [...] One point about which we

The *Nordyke V* panel was correct as a matter of law regarding incorporation; but its analysis of underlying substantive law was flawed.

### **JURISDICTION**

Plaintiff-Appellants rely upon the jurisdictional statements in their original briefs, and this Court's May 18, 2009 order.

### **STATEMENT OF THE CASE**

Plaintiff-Appellants rely upon the Statement of the Case and the procedural history set forth in their original briefs.

### **STATEMENT OF FACTS**

This case was appealed after a denial of a motion to amend (to add a Second Amendment cause of action) and a grant of summary judgment in favor of the County of Alameda (on First Amendment and Equal Protection causes of action).

To the extent that the panel's statement of facts set forth in *Nordyke V* is consistent with the record, Nordykes refer to that opinion. [See: Appendix A]

To the extent that the panel's statement of facts and factual inferences is inconsistent with the record or has omitted important facts (and inferences), we shall provide citations to the record.<sup>2</sup> [See: Appendix B]

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are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. See *Emerson*, 270 F.3d at 221 n.13.”

<sup>2</sup> This includes the Joint Statement of Undisputed Facts (JSUF). The parties conceded in their briefs, and during oral arguments that the Court had sufficient facts (as set forth in the JSUF) to decide the Second Amendment issue without



## I. INCORPORATION WAS CORRECTLY DECIDED

The panel's discussion of the 14<sup>th</sup> Amendment's Due Process incorporation of the Second Amendment is correct as a matter of law. It is modeled on the Supreme Court's analysis in *Heller*, which is itself an analysis of the foundations and history of the ancient right of self-defense and the right to keep and bear arms for that purpose.

*En banc* reconsideration of incorporation is unnecessary under the doctrines articulated in *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744, fn. 1 (9th Cir. 2003); *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003).

"[T]he issues decided by the higher court **need not be identical** in order to be controlling. Rather, the [Supreme Court] must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie, supra*, 335 F.3d at 900 (emphasis and brackets added).

Furthermore, the circuit courts are bound by the "mode of analysis" of the holdings of Supreme Court decisions. See: *In re Stern*, 345 F.3d 1036, 1043 (9th Cir. 2003).

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further discovery. However, Nordykes never conceded that factual assertions (many outside of the record) by the county were entitled to reasonable inferences or that Plaintiff-Appellants had waived any evidentiary burden imposed on the County by the FRCP or a civil rights analysis.

**II. THE PANEL’S FUNDAMENTAL RIGHTS ANALYSIS REGARDING THE FIRST, SECOND AND FOURTEENTH AMENDMENT (EQUAL PROTECTION) WAS FLAWED.**

The Supreme Court’s failure to announce a standard of review in *Heller* was criticized by the panel. However, **rational basis** is off the table. See: *Heller*, 128 S.Ct. at 2818, fn. 27. Footnote 19 of the *Nordyke V* opinion suggested that Second Amendment rights should trigger the same strict scrutiny standard of review as First Amendment rights.

That is why it was puzzling, when the panel proceeded to engage in the kind of balancing test rejected by *Heller*, 128 S.Ct. at 2821. [*Nordyke V* at § B.1.] The panel also invoked a “sensitive places” doctrine/definition that was introduced, but not explained, in *Heller*, 128 S.Ct. at 2816-17. [*Nordyke V* at § B.2.] This ill-defined concept arose out of a decision that was filed nine (9) years after Alameda passed its ordinance; a law which contains exactly zero (0) reference to “sensitive places” as a term of art, and which provides no definition of “sensitive place.”

The Second Amendment issue was reviewed after a denial of a motion to amend the complaint. Because the panel made a finding that amendment would have been futile – it was required to adjudicate facts in the same manner as a motion to dismiss under FRCP 12(b)(6). See: *Adorno v. Crowley Towing & Transp. Co.* 443 F.3d 122, 126 (1st Cir. 2006) – in assessing "futility," court applies same standard governing motions to dismiss under FRCP Rule 12(b)(6).

For all of the issues (First/Second Amendment and Equal Protection) the parties (and the court) relied upon a JSUF that was submitted as part of a summary judgment motion. Inferences drawn from summary judgment evidence must be viewed in the light most favorable to the nonmoving party – i.e., the Nordykes. *Eastman Kodak Co. v. Image Technical Services, Inc.* 504 U.S. 451, 456 (1992).

**A. There Are No Facts in the Record Supporting Any Finding That the Nordykes’ Gun Shows Impose Any “Burden” on the County.**

The Second Amendment protects two distinct and express enumerated rights – “the right to keep” and “the right to bear” arms. *Heller*, 128 S.Ct. at 2830-31 A Second Amendment right to possess a gun at a gun show arises out of an ancillary “right to keep” which implies a “right to acquire/purchase.” It also arises out of the “right to bear” or carry arms. *Heller*, 128 S.Ct at 2793 *et seq.*

The County of Alameda has maintained all along that gun shows and gun sales can take place on county property (e.g., the Fairgrounds) as long as no guns are present. [JSUF ¶ 14] The County has also inconsistently conceded that firearm sales require the physical presence of the firearm to be sold in order to comply with state and federal laws that require documentation of serial number, make, model and caliber of the firearm in order to insure a lawful sale. [JSUF ¶ 38]

There is no “gun show loop-hole” as California law requires that all firearm sales (including those at gun shows) be processed through a federal and state licensed firearm dealer. [JSUF ¶ 86] The County conceded that the Nordyke’s gun

shows comply with all federal and state laws, and all safety regulations relating to gun shows and firearm transactions. [JSUF ¶¶ 43, 44, 49, 50, 85]

A recitation of the sheer volume of federal and state laws regulating sales, possession and gun show activities (all of which the promoters, exhibitors, vendors and patrons have complied with) would exceed the limited space permitted in this brief.<sup>3</sup> Brief examples include: (1) guns at gun shows must be unloaded and **secured in a manner that prevents operation**, except for brief periods of mechanical demonstration for a prospective buyer [JSUF ¶ 52]; (2) no person (except security and sworn peace officers) may possess a firearm and the ammunition for that firearm at the same time. [JSUF ¶ 53]; (3) no person under 18 years is permitted to attend a gun show unless accompanied by an adult [JSUF ¶ 54]; and (4) no person may bring a gun to a gun show unless they have a government issued photo identification, and the firearm must be tagged and identified with the information from that I.D. [JSUF ¶¶ 55, 56, 57].

The panel cited *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) and *Harris v. McRae*, 448 U.S. 297, 315-16 (1980) for the proposition: “not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.” But these cases dealt with a demand that government maintain medical facilities, personnel, funding and equipment to perform abortions for women

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<sup>3</sup> CA’s Gun Show Enforcement & Security Act is attached. [Appendix C](#).

(indigent or not) who sought to exercise their right to an abortion. Furthermore, the laws forbidding abortions that were challenged in these cases all had life saving exceptions for the life of the mother. See *Casey*, 505 U.S. at 877-895. Self-defense (preservation of innocent life) is the primary right recognized in *Heller* for which keeping, bearing, and acquiring arms is the means.

The Nordyke plaintiffs are not asking the County to maintain the fairgrounds so that they can conduct gun shows. They are asking to compete on a level playing field with other organizations (e.g., Scottish Games, County Fair, Auto Shows, Dog Shows, Antique Shows, Sportsman Shows, Art Shows, etc...) that lease the fairgrounds for their events. The County has not offered a scintilla of evidence that the Nordyke gun shows impose a greater burden on the County than any other event. The Nordykes pay to lease the venue like any other promoter, they maintain insurance like any other promoter, and they comply with all special laws directed at their particular endeavor; all while generating revenue for the County through rent, food sales, parking fees and sales taxes.

The Nordykes are not complaining about a mere burdening of any of their rights. They welcome any appropriate regulation designed to address issues of safety and crime prevention.<sup>4</sup> But the ordinance is not an appropriate regulation

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<sup>4</sup> For example: The County could supplement the State law that prohibits a person from simultaneously possessing a firearm and the ammunition for the firearm. They could require that ammunition vendors be physically segregated from the firearm vendors. This regulation would not violate any rights.

aimed at a community evil. It seeks to ban gun shows and the “gun culture” from county property through a pretext of public safety.

The panel’s citation to *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009) at fn. 21 is confusing. If the panel means that the county is free to express its own anti-gun viewpoint under a Second Amendment analysis, why does its later First Amendment analysis proceed as if the ordinance is a neutral regulation instead of the county’s pretextual vehicle for a partisan anti-gun message?

The challenged ordinance’s sponsor, Mary V. King (county supervisor) sent a memorandum to county counsel on May 20, 1999. The memo was copied to all board members, requesting that Mr. Winnie (county counsel) research a way to prohibit gun shows on county property. [JSUF ¶ 9] The memorandum clearly sets forth a purposeful intent, based on political philosophy, to deny gun shows access to county property. [Id.]

The County, speaking through Supervisor King, issued a press release on July 20, 1999. That press release reiterated that the purpose of the pending legislation was to deny gun shows access to the fairgrounds because the County did not agree with the political values of the people attending gun shows. (i.e., The county should not provide “[...] a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.”) [JSUF ¶ 11]

The Nordykes are entitled to the factual inference that their gun shows were

targeted for extinction because of the political values expressed at gun shows and the County's disagreement with those values. This targeting of a disfavored group is relevant to the legal discussion of the First Amendment (under a *Texas v. Johnson* analysis), the Second Amendment (overbreadth) and the Fourteenth Amendment (Equal Protection). See also: *Rohmer v. Evans*, 517 U.S. 620 (1996).

This case is wholly different from *Pleasant Grove City v. Sumnum* because the Nordykes are not asking to place a **permanent monument** on county property. But the panel's strong inference that the County is engaged in anti-gun propoganda as a property owner, is certainly probative as to whether the County is engaged in the regulation of expressive conduct by banning gun shows in order to "send a message" that guns are bad. And because the County is engaged in its own expression and the regulation of expression by others, the panel should have applied the more rigorous analysis under *Texas v. Johnson*, 491 U.S. 397 (1989).

Another inconsistency arises with a finding that the County's ban on gun shows does not violate equal protection (of a fundamental right) *vis-á-vis* guns possessed at gun shows vs. guns possessed at the Scottish Games. The guns at gun shows are **secured** pursuant to state law. [JSUF ¶ 52] While the guns at the Scottish Games are **secured** pursuant to a county ordinance. [JSUF ¶¶ 16, 17, 31, 40-42] This is a distinction without a difference; except for the fact that the County has no ideological objection to the Scottish Games.

Both a fundamental rights (First and/or Second Amendment) and Equal Protection analysis requires the government to: (1) produce evidence, (2) that demonstrates a compelling interest, (3) and prove that the government’s regulation is not more restrictive of the right(s) than is necessary to address the compelling interest. See: *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The County failed on all three counts because it has conceded that gun shows are not a source of **any** community evil. If the County’s exclusion of gun shows from the Fairgrounds is based on a desire to engage in a hoplophobic message for Second Amendment purposes, then its ordinance is invalid under *Heller*, as it is not designed to address public safety or crime prevention. And if the County is expressing its hoplophobia by banning the expressive conduct of possessing guns at gun shows, then it is violating the First Amendment’s commandment against censorship and/or it is violating Equal Protection by permitting expression with guns by the Scottish Games, but forbidding expression with guns by gun shows.<sup>5</sup>

**B. The Fairgrounds is Not a “Sensitive Place.”**

The panel also indulged the County’s argument that the Fairgrounds is a “sensitive place.” This argument should fail for lack of evidentiary support, as well as legal reasons.

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<sup>5</sup> Possession of guns at gun shows is expressive conduct, which is likely to be understood by its intended audience. [Order Granting Summary Judgment. ER, Vol. III of IV, Tab: 17, ER page no.: 0625]



The County presented no evidence – none – that the Fairgrounds (or indeed all county property) is a “sensitive place.” How could they? This case was already on appeal out of the district court when *Heller* was filed on June 26, 2008.

*Heller*’s “sensitive places” concept was set forth in *dicta* at 128 S.Ct. at 2816-17:

[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. (Emphasis added)

The term “longstanding” modifies the policies regarding: (1) felons and the mentally ill, (2) sensitive places, and (3) commercial sales.

There is no factual record in this case that the county fairgrounds have a longstanding history as a sensitive place. The facts (and inferences) construed in the light most favorable to the Nordykes are: (1) Mary King had been trying for “years” to get rid of gun shows at the fairgrounds [JSUF ¶ 9], (2) the Nordykes had conducted gun shows at the Alameda Fairgrounds for almost 10 years before the ordinance was passed [JSUF ¶¶ 43, 44], and (3) the Nordykes continued to hold gun shows (presumably) at other fairgrounds throughout California [JSUF ¶ 33, 34, 49, 50, 85] while this case has been pending. When and how did “fairgrounds” as a class of property undergo a transformation to a sensitive place?

How can the fairgrounds be sensitive to gun show guns, but not the Scottish

Games’ guns? [JSUF ¶¶ 16, 17, 31, 40-42] Under the equal protection analysis, the panel tried to describe a distinction without a difference regarding the ways guns are handled at gun shows (**secured** unless the gun is being mechanically demonstrated to the buyer – see JSUF ¶ 52) and the way guns are handled during the Scottish Games (**secured** until the re-enactors are actually staging their mock battles – see JSUF ¶¶ 41, 42). This has nothing to do with defining a sensitive place. A sensitive place, like a courthouse, wouldn’t permit mock battles.

How can the fairgrounds be a sensitive place if secured guns are possessed at gun shows, but “not-a-sensitive” place when guns are possessed by “*authorized participants in a motion picture, television, video, dance or theatrical production or event, [...]*” ? [JSUF ¶ 24] The County does not provide any compelling explanation for this double inconsistency. Why aren’t gun show patrons and exhibitors, who pay their admission and follow all federal and state laws regulating gun shows, “*authorized participants*” at an event? Furthermore, why is the county’s property **not sensitive** to functional movie prop guns, but **is sensitive** to gun show guns which are secured unless being mechanically demonstrated?

How can the fairgrounds be a “sensitive place” when the ordinance exempts imitation firearms or BB guns and air rifles as defined in Government Code § 53071.5? [Alameda Ordinance § 9.12.120(d)] An airport “sterile area” or airliner does not tolerate the presence of imitation firearms. CA Penal Code § 171.5.

Persons with valid licenses to carry loaded and concealed firearms under CA Penal Code § 12050 are also exempt from the ordinance. [Alameda Ordinance § 9.12.120(f)(3)] A jail or prison does not permit such licensees to retain their weapons when interviewing or visiting inmates.

The County's ordinance<sup>6</sup> is not delineating "sensitive places." At best, the county is describing permissible and impermissible "uses" of guns, which negates any argument that county property is sensitive to the presence of guns.

The only place where the ordinance attempts to define "places" is where it exempts from the ordinance "local public buildings" as defined in California Penal Code § 171b. [Alameda Ordinance § 9.12.120 (c)] This state law bans guns in government buildings, but this code section specifically includes an exception for the **purpose of conducting a law-abiding gun show**. See Cal. Pen. Code §§ 171b(b)(7)(A) and 171b(b)(7)(B).

Consider these additional inferential facts regarding sensitive places:

- The publication: Gun Shows: Brady Checks and Crime Gun Traces was jointly published in January 1999 by the U.S. Department of Justice, the Department of the Treasury and the BATF. See: [http://www.atf.gov/pub/treas\\_pub/gun\\_show.pdf](http://www.atf.gov/pub/treas_pub/gun_show.pdf). Gun shows are described on page 4. Nationally there were 4,442 gun shows advertised in a trade publication for calendar year 1998. California was among the top 10 states where gun shows took place. "*Ordinarily, gun shows are held in public arenas, civic centers, fairgrounds, and armories,...*"

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<sup>6</sup> See Appendix D for a copy of the Alameda ordinance.

- On May 22, 2009, President Obama signed into law a bill that was passed with bipartisan support that permits law-abiding citizens to possess firearms in National Parks – consistent with the law of the state in which the park is located. [The Credit Card Act of 2009]

These facts can be judicially noticed for the proposition that public places, where many people gather, like: parks, fairgrounds, public arenas, civic centers, and government buildings where gun shows take place, are **not** longstanding examples of historically “sensitive places” that should permit any government to ban the possession of firearms without some compelling reason.

The panel made an unwarranted finding regarding sensitive places that was prejudicial to the Nordykes. The County did not even request that the case be returned to the trial court so that they could attempt to prove that their fairgrounds (or indeed all of Alameda County’s properties) are particularly sensitive places.

Nor is there is any legal basis for the panel’s creation of a definition of “sensitive place” out of the *dicta* in *Heller*. The panel does note that “Second Amendment law remains in its infancy” and that *Heller* itself “does not provide much guidance.” [*Nordyke V*, § B.2.]

This is where a default fundamental rights analysis should have kicked in. It should be the County’s burden to demonstrate a compelling justification for classifying its fairgrounds as a sensitive place, and the County must be required to demonstrate that there is no less burdensome regulation that addresses the

compelling interest that they assert.<sup>7</sup> The County has not met that burden, and cannot meet that burden on the facts of this case.

### CONCLUSION

This is an exceptionally important case now that the Second Amendment's constitutionally recognized right to "*keep and bear arms*" protects the law-abiding citizens of California, whose state constitution omits that right. See: *Kasler v. Lockyer*, 23 Cal.4th 472, 480 (2000). An *En Banc* Court should not disturb the panel's well-articulated affirmation of this right as applied to state action.

For equally important reasons, *en banc* consideration would be useful to correct the errors by the panel that lead to a practical defeat of the right for a group of law-abiding citizens who want to conduct safe and historically well-regulated gun shows in a public forum.

If *en banc* review is granted, the Nordykes respectfully request an order that additional briefing be permitted and that any briefing schedule address the issue of when amicus curie briefs would be due.

Respectfully Submitted on June 8, 2009,

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/s/  
Donald Kilmer, Attorney for Nordykes

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<sup>7</sup> For example, the County took steps to control the unlawful possession of deadly weapons at the fairgrounds by the simple expedient of installing metal detectors at the entrance to the fairgrounds during the county fair. [JSUF ¶ 48] This is an alternative solution for controlling deadly weapons (during the county fair) that does not involve banning gun shows from the fairgrounds.

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief is limited to 15 pages and contains 3,790 words, excluding the part of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect Version 12 in Times New Roman 14 point font.

Date: June 8, 2009

                                  /s/                                    
Donald Kilmer, Attorney for Appellants

**APPENDIX A**

563 F.3d 439, \*; 2009 U.S. App. LEXIS 8244, \*\*



LEXSEE 563 F.3D 439

**RUSSELL ALLEN NORDYKE; ANN SALLIE NORDYKE,  
dba TS Trade Shows; JESS B. GUY; DUANE DARR;  
WILLIAM J. JONES; DARYL N. DAVID; TASIANA  
WESTYSCHYN; JEAN LEE; TODD BALTES; DENNIS  
BLAIR, R.L. ADAMS; ROGER BAKER; MIKE  
FOURNIER; VIRGIL MCVICKER, Plaintiffs-Appellants,  
v. MARY V. KING; GAIL STEELE; WILMA CHAN;  
KEITH CARSON; SCOTT HAGGERTY; COUNTY OF  
ALAMEDA; COUNTY OF ALAMEDA BOARD OF  
SUPERVISORS, Defendants-Appellees.**

**No. 07-15763**

**UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT**

***563 F.3d 439; 2009 U.S. App. LEXIS 8244***

**January 15, 2009, Argued and Submitted, San Francisco,  
California  
April 20, 2009, Filed**

**PRIOR HISTORY:** [\*\*1]

Appeal from the United States District Court for the Northern District of California.  
D.C. No. CV-99-04389-MJJ. Martin J. Jenkins, District Judge, Presiding.  
*Nordyke v. King*, 319 F.3d 1185, 2003 U.S. App. LEXIS 2911 (9th Cir. Cal., 2003)

**DISPOSITION:** AFFIRMED.

**COUNSEL:** Donald E. Kilmer, Jr., Law Offices of Donald Kilmer, San Jose, California, argued the cause for the plaintiffs-appellants and filed the briefs. Don B. Kates, Esq., Battleground, Washington, was also on the supplemental briefs.



563 F.3d 439, \*; 2009 U.S. App. LEXIS 8244, \*\*

Richard E. Winnie, County Counsel, Alameda County, California, argued the cause for the defendants-appellees and was on the briefs. T. Peter Pierce, Richards, Watson & Gershon, Los Angeles, California, filed the brief; Sayre Weaver, Richards Watson & Gershon, Los Angeles, California, was also on the brief.

C.D. Michel, Trutanich-Michel, LLP, Long Beach, California, filed a brief on behalf of amici curiae the National Rifle Association of America, Inc., and the California Rifle & Pistol Association. Stephen P. Halbrook, Law Offices of Stephen P. Halbrook, Fairfax, Virginia, was also on the brief.

Tracy Duell-Cazes, Law Offices of Tracy Duell-Cazes, San Jose, California, filed a brief on behalf of amici curiae Professors of Law.

Vanessa A. Zecher, Law Offices of Vanessa A. Zecher, San Jose, California, [\*\*2] filed a brief on behalf of amici curiae Professors of Law, History, Political Science, or Philosophy.

Alan Gura, Gura & Possessky, PLLC, Alexandria, Virginia, filed a brief on behalf of amicus curiae *Second Amendment* Foundation, Inc.

Jordan Eth, Morrison & Foerster LLP, San Francisco, California, filed a brief on behalf of Amici Curiae the Legal Community Against Violence, City of Oakland, City and County of San Francisco, Brady Center to Prevent Gun Violence, California Peace Officers' Association, California Police Chiefs Association, California State Sherrifs' Association, Coalition to Stop Gun Violence, Violence Policy Center, and Youth Alive!. Jacqueline Bos and Angela E. Kleine, Morrison & Foerster LLP, San Francisco, California, were also on the brief.

**JUDGES:** Before: Arthur L. Alarcon, Diarmuid F. O'Scannlain, and Ronald M. Gould, Circuit Judges. Opinion by Judge O'Scannlain; Concurrence by Judge Gould.

**OPINION BY:** Diarmuid F. O'Scannlain

## OPINION

[\*442] O'SCANNLAIN, Circuit Judge:

We must decide whether the *Second Amendment* prohibits a local government [\*443] from regulating gun possession on its property.

I

A

Russell and Sallie Nordyke operate a business that promotes gun shows throughout California. A typical gun show involves [\*\*3] the display and sale of thousands of firearms, generally ranging from pistols to rifles. Since 1991, they have publicized numerous shows across the state, including at the public fairgrounds in Alameda County. Before the County passed the law at issue in this appeal, the Alameda gun shows routinely drew about 4,000 people. The parties agree that nothing violent or illegal happened at those events.

In the summer of 1999, the County Board of Supervisors, a legislative body, passed Ordinance No. 0-2000-22 ("the Ordinance"), codified at Alameda County General Ordinance Code ("Alameda Code") section 9.12.120. The Ordinance makes it a misdemeanor to bring onto or to possess a firearm or ammunition on County property. Alameda Code § 9.12.120(b). It does not mention gun shows.

According to the County, the Board passed the Ordinance in response to a shooting that occurred the previous summer at the fairgrounds during the annual County Fair. The Ordinance begins with findings that "gunshot fatalities are of epidemic proportions in Alameda County." *Id.* § 9.12.120(a). At a press conference, the author of the Ordinance, Supervisor Mary King, cited a "rash of gun-related violence" in the same year [\*\*4] as the fairground shooting. She was referring to a series of school shootings that attracted national attention in the late 1990s, the most notorious of which occurred at Columbine High School in Littleton, Colorado. <sup>2</sup>

1 Police ultimately apprehended the shooter, who had nothing to do with the Nordykes or their gun shows.

2 See, e.g., Pew Research Center for the People & the Press, Columbine Shooting Biggest News Draw of 1999, <http://people-press.org/report/48/columbine-shooting-biggest-news-draw-of-1999> (last visited April 4, 2009).

But the Nordykes insist that something more sinister was afoot. They point to some of King's other statements as evidence that she actually intended to drive the gun shows out of Alameda County. Shortly before proposing the Ordinance, King sent a memorandum to the County Counsel asking him to research "the most appropriate way" she might "prohibit the gun shows" on County property. King declared she had "been trying to get rid of gun shows on Country property" for "about three years," but she had "gotten the run around from spineless people hiding behind the constitution, and been attacked by aggressive gun toting mobs on right wing talk radio." At her press [\*\*5] conference, King also said that the County should not "provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism." Without expressing any opinion about King's remarks, the Board of Supervisors adopted the Ordinance.

County officials then exchanged several letters with the Nordykes. The General Manager of the fairgrounds asked the Nordykes to submit a written plan to explain how their next gun show would comply with the Ordinance. As the County Counsel had told the General Manager, the Ordinance did not expressly prohibit gun shows or the sale of firearms. The Nordykes insisted then and maintain now that they cannot hold a gun show without guns; [\*444] perhaps because they thought it futile, they never submitted a plan.

During the same period, representatives of the Scottish Caledonian Games ("the Scottish Games") inquired about the effect of the new law on the activities they traditionally held on the fairgrounds. Those activities include reenactments, using period firearms loaded with blank ammunition, of historic battles. After the inquiries, the County amended the Ordinance to add several exceptions. Importantly, the Ordinance [\*\*6] no longer applies to

[t]he possession of a firearm by an authorized participant in a motion picture, television, video, dance, or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use.

Alameda Code § 9.12.120(f)(4). This exception allows members of the Scottish Games to reenact historic battles if they secure their weapons, but it is unclear whether the County created the exception just for them.

By the time the County had written this exception into the Ordinance, the Nordykes and several patrons of and exhibitors at the gun shows (collectively, "the Nordykes") had already sued the County and its Supervisors under 42 U.S.C. § 1983 for various constitutional violations. The amendment did not mollify them, and their lawsuit has wended through various procedural twists and turns for nearly a decade.

B

Two rulings of the district court are now before us, the tangled history of which we summarize.

1

Initially, the Nordykes argued that the Ordinance violated their *First Amendment* right to free speech [\*\*7] and was preempted by state law. They sought a temporary restraining order, which the district court treated as an application for a preliminary injunction. *Nordyke v. King, (Nordyke III)*, 319 F.3d 1185, 1188 (9th Cir. 2003). After the district court denied the injunction, we accepted the case for an

interlocutory appeal. Rather than reach the merits of the case, we certified to the California Supreme Court the question whether state laws regulating gun shows and the possession of firearms preempted the Ordinance. *See Nordyke v. King (Nordyke I)*, 229 F.3d 1266 (9th Cir. 2000). The California Supreme Court answered that the Ordinance was not preempted. *See Nordyke v. King (Nordyke II)*, 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761, 44 P.3d 133, 138 (Cal. 2002).

We proceeded to address the Nordykes' challenges under the *First* and *Second Amendments*.<sup>3</sup> Construing the *First Amendment* challenge as a facial one, we rejected their argument that the statute burdened the expressive conduct of gun possession. *Nordyke III*, 319 F.3d at 1190. Our opinion noted that its rejection of the facial attack did not "foreclose a future as applied challenge to the Ordinance." *Id.* at 1190 n.3.

3 Due to developments in the law while the certified question [\*\*8] was pending in the California Supreme Court, the Nordykes filed and we granted a motion to file supplemental briefing on a *Second Amendment* claim. *Nordyke III*, 319 F.3d at 1188.

We also concluded that our prior opinion in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), precluded the Nordykes' *Second Amendment* [\*445] claim. *Nordyke III*, 319 F.3d at 1191. *Hickman* had held "that individuals lack standing to raise a *Second Amendment* challenge to a law regulating firearms" because the right to keep and bear arms was a collective one. *Id.* at 1191-92. We remanded the case for further proceedings.

2

On remand, the Nordykes moved for leave to file a Second Amended Complaint. They wished to rephrase their *First Amendment* challenge, arguing that, as applied to their use of the fairgrounds, the Ordinance violated their freedom of expression by making gun shows impossible. In addition, the Second Amended Complaint contained as-applied versions of other constitutional challenges, including an equal protection claim. The district court allowed the Nordykes to add all of those claims, but denied the motion to add a *Second Amendment* cause of action. The district court explained that because *Nordyke III's* holding [\*\*9] on the collective nature of the right to keep and bear arms precluded the claim, there was no sense in relitigating it.

After two motions to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, only the expressive conduct claim under the *First Amendment* and the equal protection claim survived. The County moved for summary judgment on those remaining claims, which the district court granted. The Nordykes timely appealed.

3

In their opening brief on appeal, the Nordykes explicitly noted a pending petition for certiorari in the Supreme Court in the case of *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and explained that, should the Court grant the petition, they would request a stay and file supplemental briefs. The Court, of course, did grant the petition for certiorari. Though we initially denied the request for a stay, the decision in *Heller* came down shortly thereafter, which prompted us to allow the parties to file supplemental briefs. Thus, the Nordykes appeal not only the district court's grant of the County's motion for summary judgment, but also the district court's denial of their motion for leave to amend their complaint to add a cause of action pursuant to the *Second Amendment*.

## II

We [\*10] begin with the Nordykes' attempt to revive their *Second Amendment* claim. The district court rested its denial of leave to amend the complaint on our precedent that an individual lacks standing to bring a *Second Amendment* challenge because the right it protects is a collective, not an individual one. See *Hickman*, 81 F.3d at 102-03; see also *Nordyke III*, 319 F.3d at 1191. The Nordykes now argue that the Supreme Court's decision in *Heller* abrogates our case law and compels the district court to grant their motion for leave to amend their complaint.

To reach this argument on the merits, we must first decide whether *Heller* abrogated *Hickman*. It did. *Hickman* rested on our conclusion that the *Second Amendment* protects only a collective right; *Heller* squarely overruled such conclusion. See *Heller*, 128 S. Ct. at 2799 ("There seems to us no doubt, on the basis of both text and history, that the *Second Amendment* conferred an individual right to keep and bear arms."). Thus the basis for *Hickman's* holding has evaporated, and the opinion is clearly irreconcilable with *Heller*. In such circumstances, we consider our prior decision abrogated by higher [\*446] authority. See *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) [\*11] (en banc).

4 Indeed, the County does not dispute this point in its supplemental briefing.

The second obstacle facing the Nordykes is incorporation. That is, we must decide whether the *Second Amendment* applies to the states through the Fourteenth, a question that *Heller* explicitly left open. See 128 S. Ct. at 2813 n.23. Finally, even if the *Fourteenth Amendment* does incorporate the Second against the states, we must determine whether it actually invalidates the Ordinance.

## A

There are three doctrinal ways the *Second Amendment* might apply to the states: (1) direct application, (2) incorporation by the *Privileges or Immunities Clause of the*

*Fourteenth Amendment*, or (3) incorporation by the *Due Process Clause* of the same Amendment.

1

Supreme Court precedent forecloses the first option. The *Bill of Rights* directly applies only to the federal government. *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247-51, 8 L. Ed. 672 (1833). "Although the Supreme Court has incorporated many clauses of the *Bill of Rights* into the *Due Process Clause of the Fourteenth Amendment*, the Supreme Court has never explicitly overruled *Barron*." *Nordyke III*, 319 F.3d at 1193 n.3 (Gould, J., specially concurring). Therefore, the *Second Amendment* [\*\*12] does not directly apply to the states. See *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1875) (citing *Barron* as a basis for the conclusion that "[t]he *second amendment* . . . means no more than that [the right to keep and bear arms] shall not be infringed by Congress"); see also *Presser v. Illinois*, 116 U.S. 252, 265, 6 S. Ct. 580, 29 L. Ed. 615 (1886) (concluding that the *Second Amendment* "is a limitation only upon the power of Congress and the National government, and not upon that of the State").

2

We are similarly barred from considering incorporation through the *Privileges or Immunities Clause*. The Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *U.S. Const. amend. XIV, § 1*. Under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), this language protects only those rights that derive from United States citizenship, but not those general civil rights independent of the Republic's existence, see *id.* at 74-75.<sup>5</sup> The former include only [\*447] rights the Federal Constitution grants or the national government enables, but not those preexisting rights the *Bill of Rights* merely protects from federal invasion. *Id.* at 76-80. [\*\*13] The *Second Amendment* protects a right that predates the Constitution; therefore, the Constitution did not grant it. See, e.g., *Heller*, 128 S. Ct. at 2797 ("[I]t has always been widely understood that the *Second Amendment*, like the *First* and *Fourth Amendments*, codified a *pre-existing* right."). It necessarily follows that the *Privileges or Immunities Clause* did not protect the right to keep and bear arms because it was not a right of citizens of the United States. See *Cruikshank*, 92 U.S. at 553; cf. *Presser*, 116 U.S. at 266-67 (holding that the "right to associate with others as a military company" is not a privilege of citizens of the United States).

5 We are aware that judges and academics have criticized *Slaughter-House's* reading of the *Privileges or Immunities Clause*. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 527-28, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (Thomas, J., dissenting) ("Because I believe that the demise of the *Privileges or Immunities Clause* has

contributed in no small part to the current disarray of [the Supreme Court's] *Fourteenth Amendment* jurisprudence, I would be open to reevaluating its meaning in an appropriate case."); *id.* at 522 n.1 (collecting academic sources); Michael Anthony Lawrence, *Second Amendment [\*\*14] Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 *Mo. L. Rev.* 1, 12-35 (2007); *see also* Akhil Reed Amar, *The Bill of Rights* 163-230 (1998) (arguing that the *Privileges or Immunities Clause* applies against the states all "personal privileges" of individual citizens, whether enumerated in the *Bill of Rights* or not, but not the rights of the states or the general public). Nevertheless, *Slaughter-House* remains good law. We note, however, that the substantive due process doctrine, which we discuss *infra* pp. 4481-83, appears to arrive at a result similar to that urged by the dissenters from the Supreme Court's opinion in *Slaughter-House*. Compare *Washington v. Glucksberg*, 521 U.S. 702, 719-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) ("[T]he *Due Process Clause* [of the *Fourteenth Amendment*] specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . ." (internal quotation marks and citation omitted)), with *Slaughter-House*, 83 U.S. at 122 (Bradley, J., dissenting) ("In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against [\*\*15] violation by the States of the fundamental rights of the citizen.").

3

The final avenue for incorporation is that by which other provisions of the *Bill of Rights* have come to bind the states: selective incorporation through the *Due Process Clause of the Fourteenth Amendment*. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (right to criminal jury); *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (privilege against compelled self incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 *Ohio Law Abs.* 513 (1961) (exclusion of evidence obtained by unreasonable search and seizure); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (*Establishment Clause*).

a

The initial hurdle to selective incorporation is our decision in *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992). There, we concluded that the *Second Amendment* applies only to the federal government. *Id.* at 729-31. The Nordykes argue that, although we precluded direct application of the *Second Amendment* and incorporation through the *Privileges or Immunities Clause*, we did not address selective incorporation through the *Due Process Clause*. We agree.

*Fresno Rifle* does not specify which Clause of the [\*\*16] *Fourteenth Amendment*--the *Privileges or Immunities Clause* or the *Due Process Clause*--we rejected as the instrument of incorporation. Certainly, plaintiffs "argue[d] that the *Fourteenth Amendment* incorporates the Second such that it limits the actions of states in addition to those of Congress," and we rejected such argument. *Id.* at 729 "Until such time as *Cruikshank* and *Presser* are overturned," we stated, "the *Second Amendment* limits only federal action, and we affirm the district court's decision 'that the *Second Amendment* stays the hand of the National Government only.'" *Id.* at 731 (citation omitted). The County argues that this reliance on *Cruikshank* and *Presser* precludes any incorporation.

But close examination of our opinion in *Fresno Rifle* defeats such argument. First, we noted that *Cruikshank* and *Presser* [\*448] held that "the *Second Amendment* constrains only the actions of Congress, not the states," a proposition that merely follows from *Barron*. *Id.* at 729. Moving from direct application of the *Bill of Rights* to incorporation, we then concluded that *Cruikshank* and *Presser* foreclosed the argument of the plaintiffs that the *Fourteenth Amendment* incorporated the Second. *Id.* ° As discussed [\*\*17] above, *Cruikshank* and *Presser* involved direct application and incorporation through the *Privileges or Immunities Clause*, but not incorporation through the *Due Process Clause*. This suggests we referred to those cases as shorthand to reject the first two theories, but not the third--selective incorporation through the *Due Process Clause*.

6 We also rejected the argument that *Miller v. Texas*, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812 (1894), limits the holdings of *Cruikshank* and *Presser*. See *Fresno Rifle*, 965 F.2d at 730.

The litigation history of *Fresno Rifle* bolsters this impression. The plaintiffs rested their incorporation argument primarily on historical evidence that the *Privileges or Immunities Clause* incorporated the right to keep and bear arms. Brief of Appellant at 39-43, *Fresno Rifle*, 965 F.2d 723 (No. 91-15466). Though they referred to *Duncan*, a case involving selective incorporation, they did so in support of a brief, quixotic argument that the *Fourteenth Amendment* "automatically incorporates every provision of the *Bill of Rights*." *Fresno Rifle*, 965 F.2d at 730. For this proposition they cited not the majority opinion, but Justice Black's concurrence in *Duncan*, in which he reiterated his long-held view [\*\*18] that the *Bill of Rights* applied in its entirety to the states. Brief of Appellant at 35, *Fresno Rifle*, 965 F.2d 723 (No-91-15466) (citing *Duncan*, 391 U.S. at 162 (Black, J., concurring)); *Fresno Rifle*, 965 F.2d at 730 (citing *Duncan*, 391 U.S. at 162 (Black, J., concurring); see also *Duncan*, 391 U.S. at 166 (Black, J., concurring (arguing that the *Privileges or Immunities Clause* "express[es] the idea that henceforth the *Bill of Rights* shall apply to the States"). 7 In rejecting



this attempt to revive Justice Black's view, which never commanded a majority of the Supreme Court, we simply noted that "[t]his theory of total incorporation . . . has been continually rejected." *Fresno Rifle*, 965 F.2d at 730 (internal quotation marks omitted).

7 Justice Black's complete view was that "the *Fourteenth Amendment*, as a whole, makes the *Bill of Rights* applicable to the States. This would certainly include the language of the *Privileges [or] Immunities Clause*, as well as the *Due Process Clause*." *Duncan*, 391 U.S. at 166 n.1; see also *Adamson v. California*, 332 U.S. 46, 74-75, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947) (Black, J., dissenting). But the discussion in *Duncan* that the plaintiffs in *Fresno Rifle* cited concerned only the *Privileges or Immunities Clause*, [\*19] the same Clause their briefs focused on. *Fresno Rifle* probably rejected Justice Black's more holistic theory too, but it still left untouched the theory of selective incorporation through the *Due Process Clause*. Cf. *Twining v. New Jersey*, 211 U.S. 78, 99, 29 S. Ct. 14, 53 L. Ed. 97 (1908) (noting that, even if a right is not incorporated by *Privileges or Immunities Clause*, what we would now call selective incorporation by the *Due Process Clause* "requires separate consideration"), *overruled on other grounds by Malloy*, 378 U.S. at 6.

Thus, we did not, in *Fresno Rifle*, reach the question of whether the *Second Amendment* is selectively incorporated through the *Due Process Clause*. Perhaps because neither party raised the predicate arguments, we certainly "did not engage in the sort of *Fourteenth Amendment* inquiry required by [the Supreme Court's] later cases." *Heller*, 128 S. Ct. at 2813 n.23. \* It [\*449] is upon that *Fourteenth Amendment* inquiry which we now embark.

8 Other circuits have similarly relied on *Presser* to reject arguments for direct application or total incorporation, without addressing selective incorporation. See, e.g., *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d Cir. 2009) (per curiam) (rejecting [\*20] direct application); *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982) (rejecting direct application and total incorporation).

b

The *Fourteenth Amendment* bars "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." *U.S. Const. amend. XIV*, § 1. Under the doctrine known as substantive due process, this Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). In this conception, due process encompasses certain

"fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). Selective incorporation is a species of substantive due process, in which the rights the *Due Process Clause* protects include some of the substantive rights enumerated in the *first eight amendments to the Constitution*. See *Twining*, 211 U.S. at 99 ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."); see also *Glucksberg*, 521 U.S. at 720 (speaking of enumerated [\*\*21] rights together with implied fundamental rights in the context of substantive due process). Both selective incorporation and substantive due process require us to pose the same question: is a right so fundamental that the *Due Process Clause* guarantees it? Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights.

Under the familiar early formulation of *Palko v. Connecticut*, only those rights "implicit in the concept of ordered liberty" were incorporated. 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). The analysis thus excluded those rights "not of the very essence of a scheme of ordered liberty," including only those without which "a fair and enlightened system of justice would be impossible." *Id. Palko*, in other words, invited an exercise in speculative political philosophy, guided by "a study and appreciation of the meaning, the essential implications, of liberty itself." *Id. at 326*.

The Supreme Court ultimately abandoned this abstract enterprise in favor of a more concretely historical one. In *Duncan*, the Court recognized that it had jettisoned the metaphysical musings of *Palko* for an analysis [\*\*22] grounded in the "actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country." 391 U.S. at 149 n.14. Therefore, incorporation turns on "whether given this kind of system a particular procedure is fundamental--whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* In determining whether the *Due Process Clause* incorporated the right to jury trials in criminal cases, *Duncan* noted that every American state "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* The Court also reviewed the place of the right in pre-Founding English law and in the Founding era itself. See *id. at 151-54* [\*450] [\*451] (citing the English Declaration and *Bill of Rights*, Blackstone's Commentaries, early state constitutions, and other evidence from the Founding era).

We are persuaded that the same inquiry, though slightly rephrased, also applies to individual rights unconnected to criminal or trial procedures. Just as *Duncan* defined "fundamental rights" as those "necessary to an Anglo-American regime of ordered

[\*\*23] liberty," so the Supreme Court has determined, outside the context of incorporation, that only those institutions and rights "deeply rooted in this Nation's history and tradition" can be fundamental rights protected by substantive due process. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion); *id.* at 503 n.10 (noting the similarity between this general substantive due process inquiry and the incorporation test stated in *Duncan*); *see also Glucksberg*, 521 U.S. at 721 ("Our Nation's history, legal traditions, and practices . . . provide the crucial guideposts for responsible decisionmaking [in the area of substantive due process]" (internal quotation marks and citation omitted)). The latter line of cases informs our analysis here, because incorporation is logically a part of substantive due process. Indeed, the nonincorporation cases amount to a model for straightforward application of *Duncan* outside the context of criminal procedure. °

9 To be sure, individual rights unconnected to criminal procedure have been incorporated before. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 160, 60 S. Ct. 146, 84 L. Ed. 155 (1939) (noting that the "freedom of speech and of the press" is incorporated). [\*\*24] However, in general, the Court either employed the *Palko*-style test, *see, e.g., Wolf v. Colorado*, 338 U.S. 25, 26-27, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) (incorporating the right against unreasonable searches and seizures), *overruled on other grounds by Mapp*, 367 U.S. at 654-55, which it abandoned in *Duncan*, or it simply stated that the right in question was incorporated without substantive analysis, *see, e.g., Schneider*, 308 U.S. at 160 n.8 (citing as its lead case *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), which assumed without deciding that the *Due Process Clause* incorporated the freedom of speech and of the press); *see also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 67 S. Ct. 374, 91 L. Ed. 422 (1947) (plurality opinion) (incorporating the right against cruel and unusual punishments). The only other mode of analysis in the case law is the historical approach the Court explicitly sanctioned in *Duncan*. *See, e.g., Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-41, 17 S. Ct. 581, 41 L. Ed. 979 (1897) (incorporating the right to just compensation for property taken for public use on the basis of principles of the common law as revealed in cases on the right to property, in Thomas Cooley's seminal treatise on constitutional limitations, [\*\*25] and in Justice Joseph Story's *Commentaries on the Constitution of the United States*).

To summarize, our task is to determine whether the right to keep and bear arms ranks as fundamental, meaning "necessary to an *Anglo-American* regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14 (emphasis added). If it does, then the *Fourteenth Amendment* incorporates it. This culturally specific inquiry compels us to determine whether the right is "deeply rooted in this Nation's history and tradition."

*Glucksberg*, 521 U.S. at 721 (internal quotation marks and citation omitted). Guided by both *Duncan* and *Glucksberg*, we must canvass the attitudes and historical practices of the Founding era and the post-Civil War period, for those times produced the constitutional provisions before us.

c

The *Second Amendment* reads: "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." *U.S. Const. amend. II*. The prefatory clause of this Amendment describes the right it protects. The Supreme Court has explained that the phrase necessary to the "security of a free State," means necessary to the "security of a free polity." <sup>10</sup> See [\*\*26] *Heller*, 128 S. Ct. at 2800 (internal quotation marks omitted). Thus the text of the *Second Amendment* already suggests that the right it protects relates to an institution, the militia, which is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14. The parallel is striking, particularly because the militia historically comprised all able-bodied male citizens. *Heller*, 128 S. Ct. at 2799.

10 Some have argued that the text of the prefatory clause suggests precisely the opposite: that the right to keep and bear arms was only important for protecting the states from federal encroachment. See *Parker v. Dist. of Columbia*, 375 U.S. App. D.C. 140, 478 F.3d 370, 406 (D.C. Cir. 2007) (Henderson, J., dissenting) ("The Amendment was drafted in response to the perceived threat to the 'free[dom]' of the 'State[s]' posed by a national standing army controlled by the federal government." (alteration in original)); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 *Chi.-Kent L. Rev.* 403, 499 (2000) ("Most significantly, the Select Committee substituted 'State' for 'country' as the referent of the 'best security' clause, so that [\*\*27] the proposed amendment now addressed more directly antifederal solicitude for state security."). This argument cannot survive the Supreme Court's admonition in *Heller* that "the phrase 'security of a free state' and close variations seem to have been terms of art in 18th-century political discourse, meaning a 'free country' or free polity." *Heller*, 128 S. Ct. at 2800 (citing Eugene Volokh, "Necessary to the Security of a Free State," 83 *Notre Dame L. Rev.* 1, 5 (2007)).

This necessary "right of the people" existed before the *Second Amendment* as "one of the fundamental rights of Englishmen." *Id.* at 2797-98. *Heller* identified several reasons why the militia was considered "necessary to the security of a free state." First, "it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary . . . . Third, when the able-bodied men of a

nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 2800-01. In addition to these civic purposes, *Heller* characterized the right to keep and bear arms as a corollary to the individual right of self-defense. *Id.* at 2817 ("[T]he inherent right of self-defense has been central [\*\*28] to the *Second Amendment* right."). Thus the right contains both a political component--it is a means to protect the public from tyranny--and a personal component--it is a means to protect the individual from threats to life or limb. *Cf.* Amar, *supra*, at 46-59, 257-66.

We must trace this right, as thus described, through our history from the Founding until the enactment of the *Fourteenth Amendment*.

i

We begin with the Founding era. *Heller* reveals evidence similar to that on which *Duncan* relied to conclude that the *Due Process Clause* incorporated the right to a jury in criminal cases. *Heller* began with the 1689 English Declaration of Right (which became the English Bill of Rights), just as *Duncan* did. *Compare Heller*, 128 *S. Ct.* at 2798 (noting that the Declaration of Right included the right to bear arms), with *Duncan*, 391 *U.S.* at 151 (noting that the Declaration of Right included the right to a jury trial).<sup>11</sup> Thus [\*\*452] the right to keep and bear arms shares ancestry with a right already deemed fundamental. *Cf. Resweber*, 329 *U.S.* at 463 (plurality opinion) (relying solely on the presence of a prohibition against cruel and unusual punishments in the English Bill of Rights for the conclusion that [\*\*29] it is incorporated into the *Due Process Clause*).

11 The County contends that, because the English Bill of Rights only secured the right to bear arms against the Crown, it is not a fundamental right worthy of incorporation. But the precise contours of the English Bill of Rights are beside the point. As a clear statement of the "undoubted rights and liberties" of Englishmen, Bill of Rights, 1689, 1 *W. & M.*, c. 2, § 7 (Eng.), it is a precursor to our own *Bill of Rights*. Therein lies its significance.

The parallel continues. *Heller* noted the emphasis Blackstone placed on the right, just as *Duncan* had looked to Blackstone. *Compare Heller*, 128 *S. Ct.* at 2798 ("Blackstone . . . cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen." (citation omitted)), with *Duncan*, 391 *U.S.* at 151-52 (citing Blackstone). This is significant because Blackstone "constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 *U.S.* 706, 715, 119 *S. Ct.* 2240, 144 *L. Ed.* 2d 636 (1999). His theoretical treatment of the right to bear arms provides insight into how American colonists would have understood it.

Blackstone gave the right to bear arms pride of place in [\*\*30] his scheme. He divided rights of persons into absolute and relative rights. *See* William Blackstone, 1 Commentaries \*123-24. It is "the principal aim of society," according to Blackstone, "to protect individuals in the enjoyment of those absolute rights," *id.* at \*124-25; England alone among nations had achieved that aim. Blackstone defined these absolute rights as "personal security, personal liberty, and private property." *Id.* at \*141. The English Constitution could only secure the actual enjoyment of these rights, however, by means of certain "barriers" designed "to protect and maintain [them] inviolate." *Id.* The right to bear arms ranked among these "bulwarks of personal rights." *Id.* Blackstone considered the right "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at \*144; *see also Heller*, 128 S. Ct. at 2798-99 ("[T]he right secured in 1689 as a result of the [abuses of the Stuart monarchy] was by the time of the founding understood to be an individual right protecting against both public and private violence."). For readers [\*\*31] of Blackstone, therefore, the right to bear arms closely followed from the absolute rights to personal security, personal liberty, and personal property. <sup>12</sup> It was a right crucial to safeguarding all other rights.

12 Blackstone's view of the right to bear arms pervades the writings of the Revolutionary generation. *See, e.g.*, Samuel Adams, Letter to the Editors, Boston Gazette, Feb. 27, 1769, *reprinted in* 1 *The Founders' Constitution* 90 (Philip B. Kurland & Ralph Lerner eds., 1987). It also suffused public discourse at the time of the *Fourteenth Amendment's* enactment. *See* Amar, *supra*, at 261-64 (providing examples); *infra* pp. 4492-94.

The behavior and words of the colonists themselves also demonstrate the right's importance. As *Heller* pointed out, the American colonists of the 1760s and 1770s strongly objected to royal infringements on the right to keep and bear arms, just as they objected to the Crown's interference with jury trials, a fact which *Duncan* highlighted. *Compare Heller*, 128 S. Ct. at 2799 ("[T]he Crown began to disarm the inhabitants of the most rebellious areas[, which] provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."), *with Duncan*, 391 U.S. at 152 [\*\*32] ("Royal interference with the jury trial was deeply resented."). A year before the infamous [\*453] Boston Massacre in 1770, one pamphleteer commented on the tensions between suspicious colonists and the British troops quartered in the city:

Instances of the licentious and outrageous behavior of the *military conservators* of the peace still multiply upon us, some of which are of such a nature . . . as must serve fully to evince that a late vote of this town,

calling upon the inhabitants to provide themselves with arms for their defense, was a measure as *prudent* as it was *legal*: such violences are always to be apprehended from military troops, when quartered in the body of a populous city . . . . It is a natural right which the people have reserved to themselves, confirmed by the [English] *Bill of Rights*, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

*A Journal of the Times*, Mar. 17, 1769, New York Journal, Supp. 1, April 13, 1769, quoted in Stephen Halbrook, *A Right to Bear Arms* 7 (1989). Thus, the events of the age confirmed Blackstone's assessment [\*\*33] of the nature of the right.

Revolutionary agitators and theoreticians further advocated this Blackstonian view of the right to keep and bear arms. Two years after the Boston Massacre, Samuel Adams wrote, in a report of one of the Committees of Correspondence, that

"[a]mong the Natural Rights of the Colonists are these[:] First, a right to Life; Secondly, to Liberty; thirdly, to Property; *together with the Right to support and defend them in the best manner they can*-- Those are evident Branches of, rather than deductions from, the Duty of Self-Preservation, commonly called the first Law of Nature."

Samuel Adams, *The Rights of the Colonists* (1772), reprinted in 5 *The Founders' Constitution*, *supra*, at 394, 395 (emphasis added). Writing to an American unionist in 1775, Alexander Hamilton threatened armed resistance to British invasions of American rights. See Alexander Hamilton, *The Farmer Refuted* (1775) reprinted in 1 *The Works of Alexander Hamilton* 55, 163 (Henry Cabot Lodge ed., 1904) ("If [Great Britain] is determined to enslave us, it must be by force of arms; and to attempt this, I again assert, would be nothing less than *the grossest infatuation, madness itself.*"); see also *id.* at 62-64 [\*\*34] (referring to Blackstone's conception of "absolute rights").<sup>13</sup>

13 Such rhetoric went beyond what Blackstone himself, a believer in Parliamentary supremacy, was prepared to support. See 1 Blackstone, *supra*, \*157. Colonial advocacy of the right to revolution by arms therefore bore a closer similarity to the theories of political philosophers like John Locke than it did to those of Blackstone. It nonetheless is significant for our purposes that the colonists considered the Blackstonian right to be intrinsic to their defense of all

their rights by revolution, regardless of whether Blackstone himself might have supported the American position.

Thus, if the suspension of trial by jury, taxation without representation, and other offenses constituted the most offensive instances of British tyranny, the ability to call up arms-bearing citizens was considered the essential means of colonial resistance. Indeed, the attempt by British soldiers to destroy a cache of American ammunition at Concord, Massachusetts, sparked the battles at Lexington and Concord, which began the Revolutionary War. For the colonists, the importance of the right to bear arms "was not merely speculative theory. It was the [\*\*35] lived experience of the[ ] age." Amar, *supra*, at 47 (referring to Locke's conception of the right of revolution).

[\*454] This lived experience informed the colonists when they set out to form a government. They considered, by the light of experience as well as of education, that preserving the right to bear arms was the appropriate way both to resist the evil of standing armies and to render the evil unnecessary. *See Heller, 128 S. Ct. at 2800-01*. Advocating for the new Constitution, Hamilton argued that "if circumstances should at any time oblige the government to form an army of any magnitude[,] that army can never be formidable to the liberties of the people while there is a large body of citizens . . . who stand ready to defend their own rights and those of their fellow-citizens." *The Federalist No. 29*, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As it was to many of his fellow citizens, a citizenry possessed of arms and trained in their use "appear[ed] to [Hamilton] the only substitute that c[ould] be devised for a standing army, and the best possible security against it, if it should exist." *Id.*

This brief survey of our history reveals a right indeed "deeply rooted in this [\*\*36] Nation's history and tradition." Moreover, whereas the Supreme Court has previously incorporated rights the colonists fought for, we have here both a right they fought for and the right that allowed them to fight.

ii

Evidence from the post-Revolutionary years strengthens this impression. Supreme Court Justice James Wilson, one of the framers of the Pennsylvania Constitution and the Federal Constitution, referred, in one of his lectures on the common law (delivered serially from 1790 to 1791), to the right of self defense as "the great natural law of selfpreservation, which . . . cannot be repealed, or superseded, or suspended by any human institution. . . . [It is] expressly recognized in the constitution of Pennsylvania." James Wilson, *Lecture on the Right of Individuals to Personal Safety*, in 3 *The Works of the Honorable James Wilson* 77, 84 (Bird Wilson ed., Phila., Lorenzo Press 1804). St. George Tucker, editor of "the most important early American edition of Blackstone's Commentaries," *Heller, 128 S. Ct. at 2799*,



extolled the right to bear arms as the "true palladium of liberty." St. George Tucker, *View of the Constitution of the United States, in 1 Blackstone's Commentaries* app. [\*\*37] at 300 (St. George Tucker ed., Phila., William Birch Young & Abraham Small 1803). Emphasizing the right's importance, Tucker cautioned that "[w]herever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." *Id.* Justice Joseph Story, in his influential *Commentaries on the Constitution*, echoed that sentiment. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1890, at 746 (Boston, Hilliard, Gray & Col. 1833) ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers . . .").

Furthermore, state constitutions confirm the importance of the right to keep and bear arms throughout our history. "Four States adopted analogues to the Federal *Second Amendment* in the period between independence and the ratification of the *Bill of Rights*[, and b]etween 1789 and 1820, nine states adopted [such] analogues." *Heller*, 128 S. Ct. at 2802-03. Thus, as of 1820, thirteen of the twenty-three [\*\*38] states admitted to the Union had *Second Amendment* analogues. We must take account of this prevalence of state constitutional analogues to the *Second Amendment*, [\*455] just as the Supreme Court noted the ubiquity of state constitutional provisions guaranteeing juries in criminal cases when it incorporated that right. *See Duncan*, 391 U.S. at 153-54. The statistics are not as overwhelming as those before the Court in *Duncan*, but they are nonetheless compelling.<sup>14</sup>

14 As of today, forty-four states protect the right to bear arms. *See Eugene Volokh, State Constitutional Rights to Keep and Bear Arms*, 11 *Tex. Rev. L. & Pol.* 191, 205 (2006).

These materials reflect a general consensus, in case law as well as commentary, on the importance of the right to keep and bear arms to American republicanism. *See, e.g., Heller*, 128 S. Ct. at 2805-09 (discussing materials). They show the continued vitality of the right that the Englishmen of the Glorious Revolution declared, Blackstone lauded, and the American colonists depended upon.

iii

Finally, we survey the period immediately following the Civil War. Although it has not been considered dispositive in *Fourteenth Amendment* cases, the understanding of the [\*\*39] Framers of that Amendment logically influences whether a right is fundamental, in the sense of deeply rooted in our history and traditions and necessary to an Anglo-American conception of ordered liberty.

As *Heller* recognized, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the *Second Amendment* in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." 128 S. Ct. at 2809-10; see also Amar, *supra*, at 192 (noting that "slavery led to state repudiation of virtually every one of the . . . freedoms [in the *Bill of Rights*]"). One major concern in these debates was the disarming of newly freed blacks in Southern states by statute as well as by vigilantism. See *Heller*, 128 S. Ct. at 2810. Many former slave states passed laws to that effect. See, e.g., Act of Nov. 29, 1865, 1865 Miss. Laws 165 ("[N]o freedman, free Negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife . . ."). Brigadier General Charles H. Howard, in a letter provided to Congress, reported to the head of the Freedmen's Bureau that the "militia organizations in the opposite county [\*\*40] of South Carolina (Edgefield) were engaged in disarming the negroes. . . . Now, at Augusta, . . . I have authentic information that these abuses continue. In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities." Report of the Joint Committee on Reconstruction, H.R. Rep. No. 39-30, pt. 3, at 46 (1st Sess. 1866).

The Framers of the *Fourteenth Amendment* sought to end such oppressions. During the debates surrounding the Freedmen's Bureau Act, the Civil Rights Act, and the *Fourteenth Amendment*, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" someone's "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller*, 128 S. Ct. at 2811. Representative Bingham, a principal author of the *Fourteenth Amendment*, argued that it was necessary to overrule *Barron* and apply the *Bill of Rights* to the states. In his view, *Barron* was wrongly decided because the *Bill of Rights* "secur[ed] to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of [\*\*41] persons-- those rights dear to freemen and formidable only to tyrants." *Id.* at 1090. Representative James Wilson, a [\*456] supporter of the *Fourteenth Amendment*, described Blackstone's scheme of absolute rights as synonymous with civil rights, in a speech in favor of the Civil Rights Act of 1866 (a precursor to the *Fourteenth Amendment*). *Id.* at 1115-19. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms," among other rights, as inherent in a "republican government." *Id.* at 1629. The reports and testimony contain similar evidence, confirming that the Framers of the *Fourteenth Amendment* considered the right to keep and bear arms a crucial safeguard against white oppression of the freedmen. Stephen P. Hallbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, at 9-38 (1998); see also Amar, *supra*, at 261-66.

We also note that the target of the right to keep and bear arms shifted in the period leading up to the Civil War. While the generation of 1789 envisioned the right as a component of local resistance to centralized tyranny, whether British or federal, the generation of 1868 envisioned the right as safeguard to protect individuals [\*\*42] from oppressive or indifferent local governments. *See Amar, supra*, at 257-66. But though the source of the threat may have migrated, the antidote remained the same: the individual right to keep and bear arms, a recourse for "when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 Blackstone, *supra*, at \*144.

iv

The County does little to refute this powerful evidence that the right to bear arms is deeply rooted in the history and tradition of the Republic, a right Americans considered fundamental at the Founding and thereafter. The County instead argues that the states, in the exercise of their police power, are the instrumentalities of the right of self-defense at the heart of the *Second Amendment*. This argument merely rephrases the collective rights argument the Supreme Court rejected in *Heller*. Indeed, one need only consider other constitutional rights to see the poverty of this contention. State police power also covers, for instance, some of the conduct the *First Amendment* protects, but that does not deny individuals the right to assert *First Amendment* rights against the states.<sup>15</sup>

15 Another argument to which the County devotes considerable [\*\*43] time is a rather idiosyncratic peroration on political philosophy. The County argues that the ideas of eighteenth-century social contractarianism--the general political philosophy of men like Blackstone and Locke--presumed that individuals sacrificed their perfect liberty in nature to fight to preserve themselves in order to secure the benefits of the social contract. Though perhaps true as a summary statement, this argument says nothing about the extent to which society limits the absolute or natural right of self-defense.

Once the County actually addresses modern incorporation doctrine, it relies on general assertions that run afoul of *Heller*. For example, the County declares that "the English common law tradition does not recognize an individual's right to possess a firearm as a fundamental right." *Heller* plainly contradicts that statement because it says that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *128 S. Ct. at 2798*. The County also claims that *Heller* "nowhere concludes that an individual right to possess firearms for personal self-defense is a fundamental right." But that misses the point. If *Heller* had indeed held that [\*\*44] the right to keep and bear arms was a fundamental right as we use the term in substantive due process doctrine, then the issue would be foreclosed. The

point is that language throughout *Heller* suggests that the right is fundamental [\*457] by characterizing it the same way other opinions described enumerated rights found to be incorporated.

Surely, we tread carefully, for "guideposts for responsible decisionmaking in this uncharted area are scarce and openended." *Glucksberg*, 521 U.S. at 720 (internal quotation marks and citation omitted). But we have before us a right both "careful[ly] descri[bed]," because listed in the *Bill of Rights* and associated with an understanding dating to the Founders, and, as the foregoing history reveals, "deeply rooted in this Nation's history and tradition." *Id.* at 721 (internal quotation marks and citation omitted). Thus, because the right to keep and bear arms can meet the criteria set by *Duncan* and *Glucksberg*, we have undertaken the further historical analysis necessary to confirm what in *Heller* was only a suggestion.<sup>16</sup>

16 Because, as *Heller* itself points out, 128 S. Ct. at 2813 n.23, *Cruikshank* and *Presser* did not discuss selective incorporation through the [\*\*45] *Due Process Clause*, there is no Supreme Court precedent directly on point that bars us from heeding *Heller's* suggestions. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls . . ."). *But see Maloney*, 554 F.3d at 58-59 (concluding that *Presser* forecloses application of the *Second Amendment* to the states).

d

We therefore conclude that the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the "true palladium of liberty." Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is [\*\*46] indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited.<sup>17</sup> We are therefore persuaded that the *Due Process Clause of the Fourteenth Amendment* incorporates the *Second Amendment* and applies it against the states and local governments.<sup>18</sup>

17 By speaking of the two parts of the incorporation inquiry separately-- "deeply rooted in this Nation's history and tradition" and "necessary to an

Anglo-American regime of ordered liberty"--we do not mean to imply a distinct two-pronged test. The incorporation cases and the substantive due process cases both treat these two phrases as aspects of a holistic inquiry.

18 The County and its amici point out that, however universal its earlier support, the right to keep and bear arms has now become controversial. *See generally* Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637 (1989). But we do not measure the protection the Constitution affords a right by the values of our own times. If contemporary desuetude sufficed to read rights out of the Constitution, then there would be little benefit to a written statement of them. Some may disagree with the decision of the Founders to [\*\*47] enshrine a given right in the Constitution. If so, then the people can amend the document. But such amendments are not for the courts to ordain.

## B

Though we conclude that the *Due Process Clause of the Fourteenth Amendment* applies the protections of the *Second Amendment* to state and local governments, the question remains whether such [\*458] application invalidates the specific Ordinance the Nordykes challenge.

1

Again, we begin with *Heller*, which did not announce any standard of review, though it precluded rational basis review as an insufficient protection for a specifically enumerated right. <sup>19</sup> *See Heller*, 128 *S. Ct.* at 2817 n.27. Rather than insist on a standard of review at the outset, the *Heller* Court evaluated the regulation at issue against the kind of conduct the *Second Amendment* protected from infringement.

19 Fundamental rights usually receive strict scrutiny as a matter of substantive due process doctrine. *See, e.g., Glucksberg*, 521 *U.S.* at 721. But where the *Due Process Clause* incorporates one of the rights enumerated in the *Bill of Rights*, the standard of review becomes that appropriate to the specific right. For example, *First Amendment* rights, whether against the states or the federal [\*\*48] government, trigger the same standards of review. We find no reason to treat the *Second Amendment* differently.

The Court began its analysis of the District of Columbia's law by noting what activity the law covered: "the law totally bans handgun possession *in the home*. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, *rendering it inoperable*." *Id.* at 2817 (emphases added). Next, the Court connected the statute's operation to the conduct the *Second Amendment* protects: "the inherent right of self-defense has been central to the *Second Amendment*

right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Id.* It was thus the statute's burdens on effective self-defense that implicated the *Second Amendment*. More particularly, *Heller* noted that the "prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute." *Id.* For the Court, this meant that, no matter the intensity of constitutional scrutiny, the District's law could not survive.

*Heller* tells us that the *Second Amendment's* guarantee revolves [\*\*49] around armed self-defense. If laws make such self-defense impossible in the most crucial place--the home--by rendering firearms useless, then they violate the Constitution.

But the Ordinance before us is not of that ilk. It does not directly impede the efficacy of self-defense or limit self defense in the home. Rather, it regulates gun possession in public places that are County property.

The Nordykes counter that the Ordinance indirectly burdens effective, armed self-defense because it makes it more difficult to purchase guns. They point to case law on the right to sexual privacy as an analog. In *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), for instance, the Supreme Court measured state regulations limiting access to contraceptives by the same yardstick as they would a total ban on contraceptives. *See id. at 688*. Just as the Court held that "[l]imiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives," *id. at 689*, so the Nordykes argue that limiting the availability of firearms burdens their right to keep and bear arms for the purpose of self-defense. [\*\*50] <sup>20</sup>

20 The County responds that the Nordykes' objection to the Ordinance has nothing to do with self-defense and everything to do with profit. According to the County, the *Second Amendment* does not protect the right to sell guns profitably and efficiently on County property. This is beside the point. The emphasis *Heller* placed on effective armed self defense requires an inquiry into whether the Ordinance renders such self defense impossible as a practical matter.

[\*459] But "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.). Indeed, "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care . . . for abortion," for instance. *Id. at 874*. Even though the Supreme Court has recognized a right to an abortion, it has approved some of those regulations.

The Court has also held that the government need not fund abortions, even though women have a substantive due process right to obtain them. *See Harris v. McRae*, 448 U.S. 297, 315-16, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). In *Harris*, [\*\*51] the Court drew a crucial distinction between government interference with activity the Constitution protects and the government's decision not to encourage, to facilitate, or to partake in such activity. "Although the liberty protected by the *Due Process Clause* affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions," *Harris* declared, "it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 317-18.<sup>21</sup> If we apply these principles here, we conclude that although the *Second Amendment*, applied through the *Due Process Clause*, protects a right to keep and bear arms for individual self-defense, it does not contain an entitlement to bring guns onto government property.

21 Similarly, the Supreme Court recently confirmed that governments have a great deal of leeway in managing their own property. For example, they can adopt certain messages as their own and decline to adopt others without infringing the *Free Speech Clause of the First Amendment*. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131, 172 L. Ed. 2d 853 (2009).

The County also points to the famous passage [\*\*52] in *Heller* in which the Court assured that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

*Heller*, 128 S. Ct. at 2816-17 (emphasis added). The County argues that its Ordinance merely forbids the carrying of firearms in sensitive places, which includes the Alameda County fairgrounds and other County property.

The Nordykes object that the County has provided no way to determine what constitutes a "sensitive place." But neither did *Heller*; *Second Amendment* law remains in its infancy. The Court listed schools and government buildings as examples, presumably because possessing firearms in such places risks harm to great numbers of defenseless people (e.g., children). Along the same lines, we notice that government buildings and schools are important to government functioning.

The Nordykes argue that the Ordinance is overbroad because it covers more than such sensitive places. They list the areas [\*460] covered: "open space [\*\*53] venues, such as County-owned parks, recreational areas, historic sites, parking lots of public buildings . . . and the County fairgrounds." The only one of these that seems odd as a "sensitive place" is parking lots. The rest are gathering places where high numbers of people might congregate. That is presumably why they are called "open space venues." Indeed, the fairgrounds itself hosts numerous public and private events throughout the year, which a large number of people presumably attend; again, the Nordykes' gun shows routinely attracted about 4,000 people. Although *Heller* does not provide much guidance, the open, public spaces the County's Ordinance covers fit comfortably within the same category as schools and government buildings.

To summarize: the Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it. The Ordinance falls on the lawful side of the division, familiar from other areas of substantive due process doctrine, between unconstitutional interference with individual rights and permissible government nonfacilitation of their exercise. Finally, prohibiting firearm [\*\*54] possession on municipal property fits within the exception from the *Second Amendment* for "sensitive places" that *Heller* recognized. These considerations compel us to conclude that the *Second Amendment* does not invalidate the specific Ordinance before us. Therefore, the district court did not abuse its discretion in denying the Nordykes leave to amend their complaint to add a *Second Amendment* claim that would have been futile.

### III

The Nordykes also appeal from the district court's grant of summary judgment on their claim under the *First Amendment*.

We have already laid out the template for analyzing the *First Amendment* claim, albeit in the context of a facial challenge:

In evaluating [the Nordykes'] claim, we must ask whether "[a]n intent to convey a particularized message [is] present, and [whether] the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). If the possession of firearms is expressive conduct, the question becomes whether the County's "regulation is related to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 403, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). If so, strict scrutiny applies. If not, we must apply [\*\*55] the less stringent standard announced in *United*



*States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

*Nordyke III*, 319 F.3d at 1189 (alterations in original). Because the County "does not contest that gun possession in the context of a gun show may involve certain elements of protected speech," we assume, without deciding, that the Nordykes' possession of guns amounts to speech under the *Spence* test.

A

1

Next, the question is whether to apply strict scrutiny to the Ordinance under *Johnson* or "the less stringent standard" of *O'Brien*.

The level of scrutiny depends on whether the Ordinance is "unrelated to the suppression of free expression," *Johnson*, 491 U.S. at 407 (internal quotation marks and citation omitted), which in turn hinges on the aim of the law. [\*461] The government may not "proscribe particular conduct *because* it has expressive elements. . . . A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the *First Amendment* requires." *Id.* at 406 (internal quotation marks and citation omitted). In other words, courts determine the aim of a law by evaluating "the governmental interest at stake." *Id.* at 406-07. [\*\*56] If a law hits speech because it aimed at it, then a court must apply strict scrutiny; but if it hits speech without having aimed at it, then a court must apply the *O'Brien* intermediate scrutiny standard.

2

The Nordykes argue that the County adopted the Ordinance in order to silence members of the so-called "gun culture" from expressing their political and social views about firearms and the *Second Amendment*. However, the language of the statute suggests that gun violence, not gun culture, motivated its passage. Section 9.12.120(a) recites several statistics about gunshot deaths and injuries in Alameda County and then concludes that "[p]rohibiting the possession of firearms on County property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the County." *Id.*

Nevertheless, the Nordykes point to alternative evidence of the statute's purpose: the comments of Supervisor King and the section 9.12.120(f)(4) exception for authorized firearm use at certain artistic events.

As we have quoted them above, *supra* pp. 4471-72, King's private and public remarks could be read to suggest that she harbored a motive to exclude people of a

certain [\*\*57] view from the fairgrounds. But the feelings of one County official do not necessarily bear any relation to the aims and interests of the County. Indeed, the Supreme Court has admonished litigants against attributing the motivations of legislators to legislatures:

*What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation . . . which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.*

*O'Brien*, 391 U.S. at 384 (emphasis added).

In *Johnson*, too, the Court determined whether the law at issue was related to the suppression of speech without psychoanalyzing its authors. The opinion never even mentioned legislative history or the stated motives of any legislator. Instead, it analyzed the statute in terms of the interests the State declared, not the personal likes or dislikes of the law's backers. Other *First Amendment* cases are of a piece. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) ("The ordinance by its [\*\*58] terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." (emphasis added) (internal quotation marks and alterations omitted)); *Boos v. Barry*, 485 U.S. 312, 320-21, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (opinion of O'Connor, J.).

This approach is particularly appropriate here, because the County has offered a perfectly plausible purpose for the Ordinance: the reduction of gun violence on [\*462] County property. The Ordinance itself proclaims that purpose; even Supervisor King expressed it during her press conference.

Undeterred, the Nordykes also argue that the statute's exception for certain artistic productions or events indicates its constitutionally suspect relation to the suppression of speech. They cry foul because the Ordinance effectively bans gun shows at the fairgrounds by regulating gun possession there so strictly, while it goes out of its way to accommodate the Scottish Games. But most statutes have exceptions; they only suggest unconstitutional favoritism if what they allow generates the same problems [\*\*59] as what they permit. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510-12, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion). The Scottish Games reenact old battles; the Nordykes sponsor heavily attended gun

shows. It is not difficult to see how 4,000 shoppers trading in modern firearms pose more danger than a crowd of history buffs in traditional garb playing with blank ammunition. In any event, only if the Scottish Games ensure that "authorized participants" possess the firearms or that the firearms are secure can they get the benefit of the exception. If the Nordykes could meet one of those criteria, they could get the benefit of the exception as well.

We reject the Nordykes' invitation to apply strict scrutiny because we conclude that the Ordinance is "unrelated to the suppression of free expression." *Johnson*, 491 U.S. at 407 (internal quotation marks and citation omitted). Instead, *O'Brien's* heightened scrutiny standard applies.

## B

"[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on *First Amendment* freedoms." *O'Brien*, 391 U.S. at 376. [\*\*60] More specifically, "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

The first prong has more relevance to the federal government, for it exercises only enumerated powers. The reverse, of course, is the case with state and local governments. Unless the Constitution specifically removes a power from the states, they have the authority to use it. <sup>22</sup> *U.S. Const. amend. X* ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also Cruikshank*, 92 U.S. at 551 ("The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people."). We pass over the first prong because the Nordykes [\*\*61] make no argument that municipalities lack the power to regulate firearms possession on their own property.

22 A power of the State to do something, of course, is separate from the rights of individuals, which may preclude states from doing things they have the power to do.

The second prong requires us to evaluate whether the Ordinance furthers the County's interest in promoting safety [\*\*463] and discouraging violence. The Nordykes argue that, given their as-applied, as opposed to a facial, challenge, the

Ordinance is unconstitutional because the County cannot show that any violence ever occurred at their gun shows. But courts analyze the constitutionality of statutes as applied to a litigant in the abstract, regardless of whether or not he has himself actually created the problem that motivates the law he challenges. *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296-97, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) ("[T]he validity of this regulation need not be judged solely by reference to the demonstration at hand."); *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1013 n.6 (9th Cir. 1996) (noting, in the context of an as-applied challenge, that the government need not "offer any concrete [\*\*62] evidence demonstrating that [the plaintiff's activities] actually" caused the harm the government sought to prevent). The County could reasonably believe that guns are as dangerous at the Nordykes' gun shows as they are at other events on County property.

The third prong of the *O'Brien* test simply repeats the threshold inquiry of whether the statute is unrelated to the suppression of free expression, which we addressed above. We therefore move on to the final, fourth prong: that the restriction be no greater than necessary. The Nordykes argue that there are other, less restrictive ways the County could reduce gun violence, such as by using metal detectors. But how would metal detectors prevent gun violence on County property unless County officials could confiscate the guns that those devices discovered? And County officials could not confiscate the weapons or turn away armed visitors unless it were illegal to bring firearms on County property. The County thought it dangerous for people to wander around its property armed. To ban or strictly to regulate gun possession on County land is the only straightforward response to such a danger.

We conclude that the Ordinance passes the *O'Brien* [\*\*63] test as applied to the Nordykes' gun shows. The district court properly granted summary judgment to the County on this claim.

#### IV

The Nordykes' final claim alleges a violation of the *Equal Protection Clause*. It revolves around their suspicion that the exception in the Ordinance for certain artistic events, Alameda Code § 9.12.120(f)(4), was designed to favor groups like the Scottish Games over gun show participants, a favoritism resting on the County's disdain for the "gun culture."

The first part of equal protection analysis is to determine whether the government has classified people. *See Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988). "Once the plaintiff establishes governmental classification, it is necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared. The goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control

group." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (internal quotation marks and citations omitted).

Section 9.12.120(f)(4) exempts from the Ordinance's reach "[t]he possession of a [\*\*64] firearm by an authorized participant in a motion picture, television, video, dance, or theatrical production or event," as long as the participant secures the gun when he is not actually using it. Alameda Code § 9.12.120(f)(4). In other words, the statute distinguishes between those who are [\*464] authorized participants in the specified productions or events and those who are not. Though this might amount to a classification, the Nordykes cannot point to a similarly situated "control group." The Scottish Games, with their historical reenactments, are a very different kettle of fish from the Nordykes and their gun shows. Crucially, the Nordykes have not argued that they could meet the exception's requirement that firearms be secured whenever an authorized participant is not actually using them. No wonder. They have admitted that the very nature of gun shows, in which vendors show weapons to prospective buyers and admirers, makes it impossible.

We conclude that the Nordykes are not situated similarly to the Scottish Games in that they cannot meet the safety requirements of the exception. The district court was therefore correct to award the County summary judgment on this claim as well.

V

For [\*\*65] the foregoing reasons, we AFFIRM the district court's grant of summary judgment to the County on the Nordykes' *First Amendment* and equal protection claims and, although we conclude that the *Second Amendment* is indeed incorporated against the states, we AFFIRM the district court's refusal to grant the Nordykes leave to amend their complaint to add a *Second Amendment* claim in this case.

**AFFIRMED.**

**CONCUR BY:** Ronald M. Gould

**CONCUR**

GOULD, Circuit Judge, concurring:

I concur in Judge O'Scannlain's opinion but write to elaborate my view of the policies underlying the selective incorporation decision. First, as Judge O'Scannlain has aptly explained, the rights secured by the *Second Amendment* are "deeply rooted in this Nation's history and tradition," and "necessary to the Anglo-American regime of ordered liberty." The salient policies underlying the protection of the right to bear arms are of inestimable importance. The right to bear arms is a bulwark against external invasion. We should not be overconfident that oceans on our east and west

coasts alone can preserve security. We recently saw in the case of the terrorist attack on Mumbai that terrorists may enter a country covertly by ocean routes, landing in small [\*\*66] craft and then assembling to wreak havoc. That we have a lawfully armed populace adds a measure of security for all of us and makes it less likely that a band of terrorists could make headway in an attack on any community before more professional forces arrived. <sup>1</sup> Second, the right to bear arms is a protection against the possibility that even our own government could degenerate into tyranny, and though this may seem unlikely, this possibility should be guarded against with individual diligence. Third, while the *Second Amendment* thus stands as a protection against both external threat and internal tyranny, [\*465] the recognition of the individual's right in the *Second Amendment*, and its incorporation by the *Due Process Clause* against the states, is not inconsistent with the reasonable regulation of weaponry. All weapons are not "arms" within the meaning of the *Second Amendment*, so, for example, no individual could sensibly argue that the *Second Amendment* gives them a right to have nuclear weapons or chemical weapons in their home for self-defense. Also, important governmental interests will justify reasonable regulation of rifles and handguns, and the problem for our courts will be to define, [\*\*67] in the context of particular regulation by the states and municipalities, what is reasonable and permissible and what is unreasonable and offensive to the *Second Amendment*.

1 English history as summarized by Winston Churchill shows constant recourse to militia to withstand invading forces that arrived not rarely from England's neighboring lands. *See generally* 2 Winston S. Churchill, *History of the English Speaking Peoples: The New World* (Dodd, Mead, & Co. 1966); 3 Winston S. Churchill, *History of the English Speaking Peoples: The Age of Revolution* (Dodd, Mead, & Co. 1967). Also, during World War II, when England feared for its survival and anticipated the possibility of a Nazi invasion, its homeland security policy took into account that its Home Guard might slow or retard an offensive, which could come at any point on the coastline, until trained military forces could be brought to bear to repel an invader--because "England was to be defended by its people, not destroyed." *See generally* 1 Winston Churchill, *Their Finest Hour* 161-76, esp. 174-76 (Houghton Mifflin Co. 1949).

**APPENDIX B**

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**ORIGINAL  
FILED**

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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 RUSSELL ALLEN NORDYKE, et al.,

13 Plaintiffs,

14 vs.

15 MARY V. KING, et al.,

16 Defendants.

Case No.: CV-99-04389-MJJ

JOINT STATEMENT OF UNDISPUTED  
FACTS

Date: October 3, 2006  
Time: 9:30 a.m.  
Judge: Honorable Martin Jenkins  
Courtthouse: U.S. Court House  
450 Golden Gate Avenue  
San Francisco, CA 94102

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18 The parties hereby stipulate that the following facts are undisputed for purposes of  
19 Defendants' pending summary judgment motion. The Defendants object to the inclusion  
20 of some of the facts for the reasons noted immediately underneath each particular fact  
21 objected to. The undisputed facts set forth herein may be challenged and/or objected to  
22 by any party at a later stage of the proceedings in this case, consistent with the Federal  
23 Rules of Evidence, the Federal Rules of Civil Procedure and all Local Rules.

UNDISPUTED FACT	EVIDENTIARY SUPPORT
1. On July 4, 1998 a shooting occurred at the Alameda County Fairgrounds (a.k.a. Pleasanton Fairgrounds) during the annual County Fair. The shooting resulted in gunshot wounds to 8 people.	1. Declaration of James Knudsen: Exhibit A attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</b>

**COPY**

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>2. The July 4, 1998 shooting incident resulted in the arrest and conviction of the shooter: Jamai Johnson. He was sentenced to California State Prison upon conviction.</p>	<p>2. <b>DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSION: #26.</b></p>
<p>3. The July 4, 1998 shooting incident at the Pleasanton Fairgrounds was not associated in any way with any of the Plaintiffs or their activities during gun shows at the Pleasanton Fairgrounds.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>3. <b>DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSION: #30 and #31.</b></p>
<p>4. The Defendant COUNTY OF ALAMEDA BOARD OF SUPERVISORS is the duly elected legislative body with the power to pass ordinances in accordance with the county charter and in accordance with the laws of the State of California. The BOARD OF SUPERVISORS also has ultimate administrative authority over the Pleasanton Fairgrounds.</p>	<p>4. Paragraph 31 of the Defendants' <b>AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</b></p>
<p>5. In 1999, Defendants MARY V. KING, GAIL STEELE, WILMA CHAN, KEITH CARSON, and SCOTT HAGGERTY were the duly elected members of the Board of Supervisors for the County of Alameda, California.</p>	<p>5. Paragraph 32 of the Defendants' <b>AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</b></p>
<p>6. The Alameda County Fairgrounds (aka: The Pleasanton Fairgrounds) is located in Alameda County. Public and private events are scheduled at the fairgrounds on a regular basis.</p>	<p>6. Paragraph 33 of the Defendants' <b>AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</b></p>
<p>7. The Alameda County Fairgrounds is situated within a Public and Institutional zoning district on unincorporated county property within the City of Pleasanton, California. The Fairgrounds were awarded to the County in a Final Order of Condemnation filed on November 17, 1965 "for public purposes, namely, for the construction thereon of necessary public buildings, . . ." [See: <u>County of Alameda v. Meadowlark Dairy Corp, Ltd.</u>; Case No.: 322722]</p> <p>Defendant's Objection(s): Relevance.</p>	<p>7. Paragraph 34 of the Defendants' <b>AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</b></p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>8. The Alameda County Fair Association is a non-profit corporation which manages the fairgrounds through an Operating Agreement with the County of Alameda.</p>	<p>8. Paragraph 35 of the Defendants' <b>AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</b></p>
<p>9. On May 20, 1999, Defendant, Mary V. King sent a memorandum to County Counsel – Richard Winnie – requesting that he research a way to prohibit gun shows on County Property.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>9. <b>DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #1, #2, and #3.</b> See <u>Exhibit A</u> of the <b>PLAINTIFFS' REQUEST FOR ADMISSION.</b></p>
<p>10. On July 20, 1999, Alameda County Supervisor, Mary V. King issued a press release announcing a proposed ordinance to restrict firearm possession on county property.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>10. <b>DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #6, #7 and #8.</b> See <u>Exhibit B</u> of the <b>PLAINTIFFS' REQUEST FOR ADMISSION.</b></p>
<p>11. On July 20, 1999, Alameda County Supervisor, Mary V. King made a speech in connection with the announcement of a proposed ordinance prohibiting possession of firearms on county property.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>11. <b>DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #11, #12 and #13.</b> See <u>Exhibit C</u> of the <b>PLAINTIFFS' REQUEST FOR ADMISSION.</b></p>
<p>12. On July 26, 1999, Plaintiffs' Counsel sent a letter to Alameda County Counsel requesting clarification of the terms on the proposed ordinance and requesting informal resolution of any issues relating to implementation and interpretation of the Ordinance as it applied to gun shows.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>12. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>
<p>13. On August 17, 1999, the Alameda County Board of Supervisors adopted Ordinance No.: 0-2000-11. Which later became Section 9.12.120 of the Code of Alameda County. The Ordinance prohibits the possession of firearms on County Property, including the Fairgrounds.</p>	<p>13. <b>DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #16, #17 and #18.</b> See <u>Exhibit D</u> of the <b>PLAINTIFFS' REQUEST FOR ADMISSION.</b></p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>14. On August 23, 1999, Richard Winnie, Alameda County Counsel, sent a letter and copy of the Ordinance to Richard K Pickering, the General Manager of the Pleasanton Fairgrounds. The letter disagrees with the press reports that the ordinance prevents gun shows, and asserts that gun shows may be conducted on the fairgrounds without the presence of firearms. The letter also states that the Ordinance does not proscribe the sale of firearms or ammunition on county property, provided that such articles cannot be displayed on the premises.</p>	<p><b>14. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #16, #17 and #18. See Exhibit D of the PLAINTIFFS' REQUEST FOR ADMISSION.</b></p>
<p>15. In a September 7, 1999 letter, the General Manager of the Alameda County Fairgrounds requested a written plan from the Nordyke Plaintiffs asking that they explain how they would conduct their gun show at the Alameda County Fairgrounds in compliance with the Ordinance.</p>	<p><b>15. PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.  And <u>Exhibit B</u> attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</b></p>
<p>16. During the months of August and September, 1999 the Scottish Caledonian Games contacted the Fairground's Manager, the Alameda County Sheriff, Alameda County Counsel and Defendant Scott Haggerty regarding the Ordinance's impact on the Scottish Games held at the Fairgrounds. The Scottish Games involve the display/possession of rifles with blank cartridges in connection with historical re-enactments of gun battles.</p> <p>Defendant's Objection(s): Relevance as to first sentence.</p>	<p>16. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.</p>
<p>17. The Scottish Caledonian Games, another cultural event that takes place at the Pleasanton Fairgrounds, which involves the possession and display of firearms was not required to submit a written plan for conducting their event in compliance with the Ordinance.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>17. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>18. On September 16, 1999, Plaintiffs' Counsel sent a second letter to Alameda County Counsel seeking to avoid litigation regarding the Ordinance and its effect on Plaintiffs' gun shows. The letter also stated that Plaintiffs could not practically or profitably conduct a gun show without guns.</p>	<p>18. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p> <p>And <u>Exhibit C</u> attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</b></p>
<p>19. On September 17, 1999, the Plaintiffs filed this action.</p>	<p>19. Judicial Notice of Docket Report.</p>
<p>20. On September 20, 1999, Alameda County Counsel Richard Winnie sent a letter to the Alameda Board of Supervisors recommending changes to the Ordinance.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>20. <b>DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #21, #22 and #23.</b> See: <u>Exhibit E</u> of the <b>PLAINTIFFS' REQUEST FOR ADMISSION.</b></p>
<p>21. On September 24, 1999, Plaintiffs' Counsel sent a third letter to Alameda County Counsel seeking to avoid litigation and maintain the status quo in order to explore options regarding the Ordinances' application to gun shows at the Alameda County Fairgrounds.</p>	<p>21. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>
<p>22. On September 28, 1999, The Alameda County Board of Supervisors passed Ordinance 0-2000-22, which amended Alameda County Code Section 9.12.120.</p>	<p>22. See Exhibit A attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</b></p>
<p>23. The Ordinance still prohibits the possession of firearms on County property.</p>	<p>23. See Exhibit A attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. 9-12-120(b).</b></p>
<p>24. The Ordinance contains an exception for the possession of firearms for: "authorized participants in a motion picture, television, video, dance or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use."</p>	<p>24. See Exhibit A attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. 9-12-120(f)(4).</b></p>
<p>25. On October 19, 1999, Defendants' Counsel responded to Plaintiffs' overtures to avoid litigation in a letter to Plaintiffs' Counsel.</p>	<p>25. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>26. On October 20, 1999, Plaintiff's Counsel sent a letter to the General Manager of the Pleasanton Fairgrounds requesting contractual and/or legal authority for his request that Plaintiffs provide a written plan for conducting gun shows in compliance with the ordinance.</p>	<p>26. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p> <p>See also Exhibit D attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</b></p>
<p>27. November 3, 1999, this Honorable Court issued an Order denying Plaintiffs' request for pre-trial injunctive relief.</p>	<p>27. Judicial Notice of Docket Report.</p>
<p>28. Plaintiffs (Nordykes) canceled the gun show scheduled for the weekend of November 6/7, 1999 due to:</p> <ul style="list-style-type: none"> <li>a. prevent the fraud of hosting a gun-less gun show,</li> <li>b. the Court's November 3, 1999 Order denying injunctive relief,</li> <li>c. the demand by the fairgrounds to produce a written plan for hosting a gun-less gun show, which the Plaintiffs were unable to do.</li> <li>d. cancellation of reservations by several vendors and exhibitors due to the passage of the Ordinance.</li> </ul> <p>Defendant's Objection(s): Relevance.</p>	<p>28. See ¶¶ 34 and 35 of the <b>AMENDED VERIFIED COMPLAINT FOR DAMAGES, INJUNCTION, AND DECLARATORY JUDGMENT.</b> Entered on the Docket on November 16, 1999.</p>
<p>29. In a December 10, 1999 letter, the Events Coordinator of the Alameda County Fairgrounds released all reserved dates held for Plaintiffs for the year 2000.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>29. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>
<p>30. On January 5, 2000, the Events Coordinator of the Alameda County Fairgrounds sent a letter to the Nordykes returning their deposits for the year 2000, because Plaintiffs could not produce a plan to hold gun shows (without firearms) that would comply with the Ordinance.</p>	<p>30. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p> <p>See also Exhibit E attached to <b>DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</b>; and declaration of Rick Pickering at ¶ 6.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>31. As of November 3, 2005, The Scottish Games have never been required to submit a plan (written or otherwise) about how their show would comply with the Ordinance. Instead, the Alameda County Counsel and Alameda County Sheriff simply “assured” the Fairground’s management that the Scottish Games complied with the Ordinance as amended.</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>31. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.</p>
<p>32. To date, the Nordykes have not explained how they could conduct a gun show at the Alameda County Fairgrounds (without firearms) consistent with the Ordinance.</p>	<p>32. Declaration of Rick Pickering at ¶ 7.</p>
<p>33. In 2005, the Nordykes held multiple gun shows in California.</p>	<p>33. See Exhibit F attached to <b>DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.</b></p>
<p>34. In 2005, there were at least 22 gun shows in California.</p>	<p>34. See Exhibit G attached to <b>DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.</b></p>
<p>35. Plaintiffs’ gun shows “bring hundreds, if not thousands, of firearms to one location.”</p>	<p>35. <b>THIRD AMENDED COMPLAINT</b> at ¶ 60.g.</p>
<p>36. Plaintiffs’ gun shows “involve the exhibition, display and offering for sale” of firearms.</p>	<p>36. <b>THIRD AMENDED COMPLAINT</b> at ¶ 17.</p>
<p>37. Attendance at the Plaintiffs’ gun shows at the Alameda County Fairgrounds was at least 4,000 people.</p>	<p>37. <b>THIRD AMENDED COMPLAINT</b> at ¶ 45.</p>
<p>38. At Plaintiffs’ gun shows, in order for a firearm to be sold, it must be physically inspected by both the seller and the buyer to insure correct documentation of the serial number, make, model and caliber of the weapon; and to insure that the firearm may be legally sold.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>38. <b>THIRD AMENDED COMPLAINT</b> at ¶¶ 60.i – 60.n.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>39. Fairground’s Manager, Richard Pickering, based on his knowledge of firearms and his experience as an NRA instructor is not aware that any firearms subject to the County’s ban on possession, and not within an exception to the ban, have been allowed on the Fairgrounds.</p>	<p>39. Declaration of Richard Pickering at ¶ 9.</p>
<p>40. The Scottish Games events held at the Alameda County Fairgrounds involve historical re-enactments of gun battles.</p>	<p>40. Declaration of Richard Pickering at ¶ 13.</p>
<p>41. The General Manager, Richard Pickering, has no personal knowledge of any live ammunition being used in the historical re-enactments that are part of the Scottish Games, and that he would take immediate steps to prevent or prohibit the use of live ammunition in such a situation, and that rifles used during the historical re-enactments are required to be unloaded or loaded with blank cartridges.</p>	<p>41. Declaration of Richard Pickering at ¶ 13.</p>
<p>42. According to Richard Pickering, as part of the Ordinance being enforced, it is only those persons directly participating in the historical re-enactments who may possess a rifle, and those persons are required to have the firearm in their actual possession and when not in their possession, to secure the rifle.</p>	<p>42. Declaration of Richard Pickering at ¶ 13.  See also: Exhibit A (§ 9.12.120(f)(4)) attached to <b>DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.</b></p>
<p>43. Defendants have no evidence of any violent criminal activity occurring at any gun show hosted by the Nordykes and held at the Alameda County Fairgrounds for the years 1991 through Feb. 27, 2006.  Defendant’s Objection(s): Relevance.</p>	<p><b>43. DEFENDANTS’ RESPONSE TO PLAINTIFFS’ REQUEST FOR ADMISSION: #30.</b></p>
<p>44. Defendants have no evidence of any violation of federal or state firearm laws occurring at any gun show hosted by the Nordykes and held at the Alameda County Fairgrounds for the years 1991 through February 27, 2006.  Defendant’s Objection(s): Relevance.</p>	<p><b>44. DEFENDANTS’ RESPONSE TO PLAINTIFFS’ REQUEST FOR ADMISSION: #31.</b></p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>45. The Alameda Ordinance contains no language directing any interested party to any particular department or agency of the County of Alameda for decisions regarding interpretations of the Ordinance.</p> <p>Defendant's Objection(s): Relevance.</p>	<p><b>45. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #35.</b></p>
<p>46. The Alameda Ordinance does not prohibit an offer to sell a firearm.</p>	<p><b>46. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #41.</b></p>
<p>47. The Alameda Ordinance does not prohibit the actual sale of a firearm.</p>	<p><b>47. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #41.</b></p>
<p>48. Sometime after the July 4, 1998 shooting, the Alameda County Fair Association purchased metal detectors for the purpose of detecting weapons at the entrance to the County Fairgrounds.</p> <p>Defendant's Objection(s): Relevance.</p>	<p><b>48. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #27.</b></p>
<p>49. Randi Rossi, the Director of the Firearms Division of the California Department of Justice, is aware of no violations of any state or federal laws occurring at the gun shows hosted by the Nordykes. Furthermore, the Nordykes are in compliance with the promoter requirements of California Penal Code § 12071.4, a.k.a.: Gun Show Enforcement and Security Act of 2000.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>49. Deposition of Randi Rossi. 16:12 – 22:18.</p>
<p>50. Ignatius Chinn, a Special Agent Supervisor with the Firearms Division of the California Department of Justice, is aware of no violations of any federal and/or state laws by the Nordykes while putting on their gun shows.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>50. Deposition of Ignatius Chinn. 12:5 – 12:8.</p>



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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>51. California Penal Code § 12071.4 otherwise known as the Gun Show Enforcement and Security Act of 2000 became state law after the Nordykes canceled their last show at the Alameda County Fairgrounds in November, 1999.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p><b>51. REQUEST FOR JUDICIAL NOTICE</b> Re: LEGISLATIVE HISTORY OF PENAL CODE § 12071.4.</p>
<p>52. California Penal Code § 12071.4(b)(5) requires gun show promoters to verify that all firearms in their possession at the show or event will be unloaded, and that the firearms will be secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a prospective buyer.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p><b>52. REQUEST FOR JUDICIAL NOTICE</b> Re: California Penal Code § 12071.4(b)(5).</p>
<p>53. California Penal Code § 12071.4(g) mandates that no person at a gun show or event, other than security personnel or sworn peace officers, shall possess at the same time both a firearm and ammunition that is designed to be fired in the firearm. Vendors having those items at the show for sale or exhibition are exempt from this prohibition.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p><b>53. REQUEST FOR JUDICIAL NOTICE</b> Re: California Penal Code § 12071.4(g).</p>
<p>54. California Penal Code § 12071.4(h) mandates no member of the public who is under the age of 18 years shall be admitted to, or be permitted to remain at, a gun show or event unless accompanied by a parent or legal guardian. Any member of the public who is under the age of 18 shall be accompanied by his or her parent, grandparent, or legal guardian while at the show or event.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p><b>54. REQUEST FOR JUDICIAL NOTICE</b> Re: California Penal Code § 12071.4(h).</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>55. California Penal Code § 12071.4(i) mandates that persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j).</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p><b>55. REQUEST FOR JUDICIAL NOTICE</b> Re: California Penal Code § 12071.4(i).</p>
<p>56. California Penal Code § 12071.4(k) mandates all persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p><b>56. REQUEST FOR JUDICIAL NOTICE</b> Re: California Penal Code § 12071.4(k).</p>
<p>57. California Penal Code § 12071.4(j) mandates that all firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm:</p> <ul style="list-style-type: none"> <li>(1) The gun owner's signature.</li> <li>(2) The gun owner's printed name.</li> <li>(3) The identification number from the gun owner's government-issued photo identification.</li> </ul> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p><b>57. REQUEST FOR JUDICIAL NOTICE</b> Re: California Penal Code § 12071.4(j).</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>58. Plaintiff DARYL DAVIS has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>58. See <b>DECLARATION OF DARYL DAVIS, Plaintiff.</b> ¶¶ 10 – 15.</p>
<p>59. Plaintiff DARYL DAVIS has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>59. See <b>DECLARATION OF DARYL DAVIS, Plaintiff.</b> ¶¶ 10–15.</p>
<p>60. Plaintiff DARYL DAVIS has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant’s Objection(s): Relevance and Hearsay.</p>	<p>60. See <b>DECLARATION OF DARYL DAVIS, Plaintiff.</b> ¶¶ 16 – 18.</p>
<p>61. Plaintiff DUANE DARR has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>61. See <b>DECLARATION OF DUANE DARR, Plaintiff.</b> ¶¶ 8 – 12.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>62. Plaintiff DUANE DARR has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>62. See <b>DECLARATION OF DUANE DARR, Plaintiff.</b> ¶¶ 8– 12.</p>
<p>63. Plaintiff DUANE DARR has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant’s Objection(s): Relevance and Hearsay.</p>	<p>63. See <b>DECLARATION OF DUANE DARR, Plaintiff.</b> ¶¶ 13 – 16.</p>
<p>64. Plaintiff DUANE DARR has testified that the physical presence of a firearm is necessary to conduct and contract for the sale of a firearm, especially antique firearms.</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>64. See <b>DECLARATION OF DUANE DARR, Plaintiff.</b> ¶¶ 13 – 16.</p>
<p>65. Plaintiff JESS GUY has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>65. See <b>DECLARATION OF JESS GUY, Plaintiff.</b> ¶¶ 8 – 19.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>66. Plaintiff JESS GUY has testified through declaration, that he supports the National Rifle Association's interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>66. See <b>DECLARATION OF JESS GUY, Plaintiff.</b> ¶¶ 8 – 19.</p>
<p>67. Plaintiff JESS GUY has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>67. See <b>DECLARATION OF JESS GUY, Plaintiff.</b> ¶¶ 20 – 21.</p>
<p>68. Plaintiff JESS GUY attended the NORDYKE'S gun show at the Santa Clara County Fairgrounds on the weekend of April 8 &amp; 9, 2006. He was present when the pictures that are attached to his declaration were taken and he made the observations set forth in paragraphs 22.a. – 22.s of his declaration.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>68. See <b>DECLARATION OF JESS GUY, Plaintiff.</b> ¶¶ 22 – 24.</p>
<p>69. Plaintiff VIRGIL Mc VICKER has testified through declaration, that he is a member of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to "keep and bear arms."</p> <p>Defendant's Objection(s): Relevance.</p>	<p>69. See <b>DECLARATION OF VIRGIL Mc VICKER, Plaintiff.</b> ¶¶ 12 – 14.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>70. Plaintiff VIRGIL Mc VICKER has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>70. See <b>DECLARATION OF VIRGIL Mc VICKER, Plaintiff.</b> ¶¶ 12 – 14.</p>
<p>71. Plaintiff VIRGIL Mc VICKER has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant’s Objection(s): Relevance Hearsay.</p>	<p>71. See <b>DECLARATION OF VIRGIL Mc VICKER, Plaintiff.</b> ¶¶ 15 – 18.</p>
<p>72. Plaintiff MIKE FOURNIER has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>72. See <b>DECLARATION OF MIKE FOURNIER, Plaintiff.</b> ¶¶ 5 – 7.</p>
<p>73. Plaintiff MIKE FOURNIER has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>73. See <b>DECLARATION OF MIKE FOURNIER, Plaintiff.</b> ¶¶ 5 – 7.</p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>74. Plaintiff MIKE FOURNIER has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>74. See <b>DECLARATION OF MIKE FOURNIER, Plaintiff.</b> ¶¶ 8 – 9.</p>
<p>75. Plaintiff MIKE FOURNIER does not have a permit to carry concealed weapons pursuant to California Penal Code § 12050.</p>	<p>75. See <b>DECLARATION OF MIKE FOURNIER, Plaintiff.</b> ¶¶ 10 – 13.</p>
<p>76. Plaintiff MIKE FOURNIER sells, at his store and at gun shows, many of the same kinds of engraved and commemorative firearms that are shown in the book <u>Steel Canvas – The Art of American Arms</u>, by R.L. Wilson.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>76. See <b>DECLARATION OF MIKE FOURNIER, Plaintiff.</b> ¶¶ 10 – 13.</p>
<p>77. Patrons and exhibitors attend gun shows for various reasons, but overwhelmingly attend them in order obtain political information about their “right to keep and bear arms” and to assemble with like-minded individuals regarding their common culture (i.e., the gun culture.)</p> <p>Defendant's Objection(s): Relevance.</p>	<p>77. See the more than 300 <b>THIRD PARTY DECLARATIONS IN SUPPORT OF INJUNCTIVE RELIEF</b> filed on or about September 17, 1999; including the <b>DECLARATION OF AMY HO</b> which includes the statistical breakdown regarding statements made by patrons and exhibitors filed the same day.</p>
<p>78. Patrons and exhibitors at Plaintiffs’ gun shows are strongly opposed to attending gun shows, and overwhelmingly state that they will not attend gun shows, where the possession of firearms, and the therefore the presence of firearms is prohibited.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>78. See video taped interviews of patrons and exhibitors attending the April 8/9, 2006 gun show at the Santa Clara County Fairgrounds, attached to: <b>DECLARATION OF PLAINTIFFS’ COUNSEL DONALD KILMER RE: TAPED INTERVIEWS AT T.S. GUN SHOW AT SANTA CLARA COUNTY FAIRGROUNDS APRIL 8/9, 2006.</b></p>
<p>79. Guns and the possession of guns, especially at gun shows, can convey political messages.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>79. See: <b>PLAINTIFFS EXPERTS’ REPORT.</b></p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>80. The possession of firearms on county property, and therefore the ability to hold gun shows on county fairgrounds, has been banned in the counties of: Alameda, Sonoma, San Mateo, Marin; and the City of Santa Cruz.</p> <p>Defendant's Objection(s): Relevance and Lack of Foundation.</p>	<p>80. <b>PLAINTIFFS' INITIAL DISCLOSURES</b> under F.R.C.P. 26 – See: <u>Exhibit N</u> attached thereto.</p>
<p>81. Plaintiffs RUSSELL and SALLIE NORDYKE have testified through their declarations, that they are members of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, their belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant's Objection(s): Relevance.</p>	<p>81. See: <b>DECLARATION OF RUSSELL AND SALLIE NORDYKE.</b> ¶¶ 27 &amp; 28.</p>
<p>82. Plaintiffs RUSSELL and SALLIE NORDYKE have testified through their declarations, that they support the National Rifle Association's interpretation of the Second Amendment; and that they host gun shows with guns, in part, in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (California) where that right is called into question by current state and federal case law.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>82. See: <b>DECLARATION OF RUSSELL AND SALLIE NORDYKE.</b> ¶¶ 27 &amp; 28.</p>
<p>83. Plaintiffs RUSSELL and SALLIE NORDYKE have testified that there is a great likelihood that others would understand these messages. This is based on their own observations of people possessing and handling guns at gun shows they host and promote.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>83. See: <b>DECLARATION OF RUSSELL AND SALLIE NORDYKE.</b> ¶¶ 29 – 37.</p>



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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

<p>84. Plaintiffs RUSSELL and SALLIE NORDYKE are unwilling to commit a fraud upon their regular exhibitors, vendors and patrons by hosting a gun-less gun show. They maintain that the very idea is absurd.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>84. See: <b>DECLARATION OF RUSSELL AND SALLIE NORDYKE.</b> ¶¶ 29 – 37.</p>
<p>85. Plaintiffs RUSSELL and SALLIE NORDYKE maintain that they comply with all Federal and State Laws regulating the firearms industry and gun shows in particular, and that they are members of the National Association of Arms, Inc., and that they follow that associations guidelines for conduct safe and lawful gun shows.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>85. See: <b>DECLARATION OF RUSSELL AND SALLIE NORDYKE.</b> ¶¶ 29 – 37.</p>
<p>86. There is no gun show loophole at California Gun Shows that comply with California law.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>86. Deposition of Randi Rossi. 11:9 – 16:12.</p> <p>See: <b>DECLARATION OF RUSSELL AND SALLIE NORDYKE.</b> ¶¶ 32 &amp; 33.</p>
<p>87. Plaintiffs RUSSELL and SALLIE NORDYKE have sustained monetary losses in the form of lost profits from the ban on gun shows at the Alameda County Fairgrounds. They also have monetary losses (though not sought in this suit) from the ban on gun shows in the Counties of Marin, Sonoma and San Mateo.</p> <p>Defendant's Objection(s): Relevance and Lack of Foundation.</p>	<p>87. See: <b>DECLARATION OF RUSSELL AND SALLIE NORDYKE.</b> ¶ 36.d.</p>
<p>88. Alameda County Counsel's Office is authorized to interpret the Ordinance and its exceptions.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>88. <b>DEFENDANTS' RESPONSES TO PLAINTIFFS' INTERROGATORIES. #21.A.</b></p>

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**UNDISPUTED FACT**

**EVIDENTIARY SUPPORT**

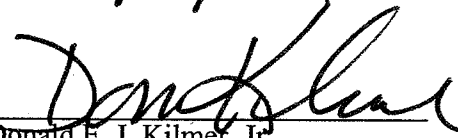
<p>89. Richard Pickering, General Manager of the Alameda County Fairgrounds, has no authority to grant exceptions to Alameda County Ordinances.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>89. See <u>Exhibit 8</u> attached to Deposition of Rick K. Pickering.</p>
<p>90. Richard Pickering, General Manager of the Alameda County Fairgrounds, referred all decisions about exceptions to Alameda Ordinance to County Counsel and/or the Alameda County Sheriff.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>90. Deposition of Rick K. Pickering. 36: 18 – 39:18 and 72:19 – 75:2. 80: 1 – 10.</p>
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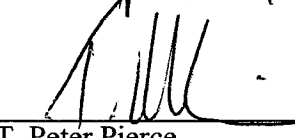
The parties agree, by and through counsel, that facsimile signatures shall constitute originals.

SO STIPULATED.

Date: Sept 1, 2006

Date: September 1, 2006

  
 Donald E. J. Kilmer, Jr.  
 Attorney for Plaintiffs

  
 T. Peter Pierce  
 Attorney for Defendants

**APPENDIX C**

**CALIFORNIA GUN SHOW SECURITY  
AND ENFORCEMENT ACT OF 2000**

CALIFORNIA PENAL CODE SECTION 12071.4

12071.4. (a) This section shall be known, and may be cited as, the Gun Show Enforcement and Security Act of 2000.

(b) All gun show or event vendors shall certify in writing to the producer that they:

(1) Will not display, possess, or offer for sale any firearms, knives, or weapons for which possession or sale is prohibited.

(2) Acknowledge that they are responsible for knowing and complying with all applicable federal, state, and local laws dealing with the possession and transfer of firearms.

(3) Will not engage in activities that incite or encourage hate crimes.

(4) Will process all transfers of firearms through licensed firearms dealers as required by state law.

(5) Will verify that all firearms in their possession at the show or event will be unloaded, and that the firearms will be secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a prospective buyer.

(6) Have complied with the requirements of subdivision (e).

(7) Will not display or possess black powder, or offer it for sale.

(c) All firearms transfers at the gun show or event shall be in accordance with applicable state and federal laws.

(d) Except for purposes of showing ammunition to a prospective buyer, ammunition at a gun show or event may be displayed only in closed original factory boxes or other closed containers.

(e) Prior to the commencement of a gun show or event, each vendor shall provide to the producer all of the following information relative to the vendor, the vendor's employees, and other persons, compensated or not, who will be working or otherwise providing services to the public at the vendor's display space if firearms manufactured after December 31, 1898, will be offered for sale:

(1) His or her complete name.

(2) His or her driver's license or state-issued identification

card number.

(3) His or her date of birth.

The producer shall keep the information at the show's or event's onsite headquarters for the duration of the show or event, and at the producer's regular place of business for two weeks after the conclusion of the show or event, and shall make the information available upon request to any sworn peace officer for purposes of the officer's official law enforcement duties.

(f) Vendors and employees of vendors shall wear name tags indicating first and last name.

(g) No person at a gun show or event, other than security personnel or sworn peace officers, shall possess at the same time both a firearm and ammunition that is designed to be fired in the firearm. Vendors having those items at the show for sale or exhibition are exempt from this prohibition.

(h) No member of the public who is under the age of 18 years shall be admitted to, or be permitted to remain at, a gun show or event unless accompanied by a parent or legal guardian. Any member of the public who is under the age of 18 shall be accompanied by his or her parent, grandparent, or legal guardian while at the show or event.

(i) Persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j).

(j) All firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm:

- (1) The gun owner's signature.
- (2) The gun owner's printed name.
- (3) The identification number from the gun owner's

government-issued photo identification.

(k) All persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer.

(l) Unless otherwise specified, a first violation of this section is an infraction. Any second or subsequent violation is a misdemeanor. Any person who commits an act which he or she knows to be a violation of this section is guilty of a misdemeanor for a first offense.

**APPENDIX D**

## Chapter 9.12

### FIREARMS AND DANGEROUS WEAPONS

#### 9.12.120 Possession of firearms on county property prohibited.

A. Findings. The board of supervisors finds that gunshot fatalities and injuries are of epidemic proportions in Alameda County. During the first five years of the 1990's, eight hundred seventy-nine (879) homicides were committed using firearms, and an additional one thousand six hundred forty-seven (1,647) victims were hospitalized with gunshot injuries. Firearms are the leading cause of death among young people between the ages of fifteen (15) and twenty-four (24) in Alameda County. Between July 1, 1996 and June 30, 1997, one hundred thirty-six (136) juveniles were arrested in Oakland for gun-related offenses. On July 4, 1998 a shooting incident on the Alameda County Fairgrounds resulted in several gunshot wounds, other injuries and panic among fair goers. Prohibiting the possession of firearms on county property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the county.

B. Misdemeanor. Every person who brings onto or possesses on county property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor.

C. County Property. As used in this section, the term county property means real property, including any buildings thereon, owned or leased by the county of Alameda (hereinafter "county"), and in the county's possession, or in the possession of a public or private entity under contract with the county to perform a public purpose, including but not limited to real property owned or leased by the county in the unincorporated and incorporated portions of the county, such as the county park in Sunol and the Alameda County Fairgrounds in the city of Pleasanton, but does not include any "local public building" as defined in Penal Code Section 171b(c), where the state regulates possession of firearms pursuant to Penal Code Section 171b.

D. Firearm. "Firearm" is any gun, pistol, revolver, rifle or any device, designed or modified to be used as a weapon, from which is expelled through a barrel a projectile by the force of an explosion or other form of combustion. "Firearm" does not include imitation firearms or BB guns and air rifles as defined in



Government Code Section 53071.5.

E. Ammunition. "Ammunition" is any ammunition as defined in Penal Code Section 12316(b)(2).

F. Exceptions. Subsection 9.12.120B does not apply to the following:

1. A peace officer as defined in Title 3, Part 2, Chapter 4.5 of the California Penal Code (Sections 830 et seq.);
2. A guard or messenger of a financial institution, a guard of a contract carrier operating an armored vehicle, a licensed private investigator, patrol operator, or alarm company operator, or uniformed security guard as these occupations are defined in Penal Code Section 12031(d) and who holds a valid certificate issued by the Department of Consumer Affairs under Penal Code Section 12033, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment;
3. A person holding a valid license to carry a firearm issued pursuant to Penal Code Section 12050;
4. The possession of a firearm by an authorized participant in a motion picture, television, video, dance or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use.
5. A person lawfully transporting firearms or ammunition in a motor vehicle on county roads;
6. A person lawfully using the target range operated by the Alameda County sheriff;
7. A federal criminal investigator or law enforcement officer; or
8. A member of the military forces of the state of California or of the United States while engaged in the performance of his or her duty.

G. Severability. If any provision of this section or the application thereof to any

person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(Ord. 2000-22, 1999: Ord. 2000-11 § 1)

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number(s): 07-15763

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.

Signature \_\_\_\_\_

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CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

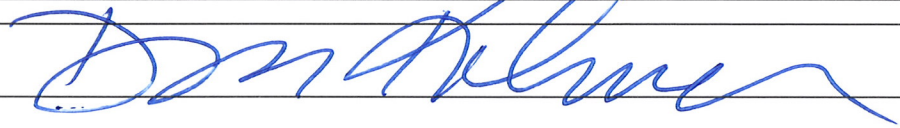
U.S. Court of Appeals Docket Number(s): 07-15763

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) Jun 8, 2009 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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:

- Alan Gura, 101 N. Columbus St., Ste 405, Alexandria VA 22314
- C.D. Michel, 180 E. Ocean Blvd., Ste 200, Long Beach CA 90802
- Don B Kates, 22608 N.E. 269th Ave., Battleground WA 98604
- Richard Winnie, 1221 Oak St., Ste 463, Oakland CA 94612-4296
- Vanessa A Zecher, 111 W St. John St., Ste 710, San Jose CA 95113

Signature 



GUN  
SHOWS:  
BRADY CHECKS  
AND CRIME GUN  
TRACES

JANUARY 1999

**GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES**

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Exhibit 1: President’s Memorandum Concerning Preventing Firearms Sales to Prohibited Purchasers

Exhibit 2: Digest of Selected States with Laws Regulating Transfers of Firearms Between Unlicensed Persons or Gun Shows

Appendix

## EXECUTIVE SUMMARY

More than 4,000 shows dedicated primarily to the sale or exchange of firearms are held annually in the United States. There are also countless other public markets at which firearms are freely sold or traded, such as flea markets. Under current law, large numbers of firearms at these public markets are sold anonymously; the seller has no idea and is under no obligation to find out whether he or she is selling a firearm to a felon or other prohibited person. If any of these firearms are later recovered at a crime scene, there is virtually no way to trace them back to the purchaser.

The Brady Handgun Violence Prevention Act (Brady Act) provides crucial information about firearms buyers to Federal firearms licensees (FFLs), but does not help nonlicensees to identify prohibited purchasers. Under the Brady Act, FFLs contact the Federal Bureau of Investigation's National Instant Criminal Background Check System (NICS) to ensure that a purchaser is not a felon or otherwise prohibited from possessing firearms. Until the Brady Act was passed, the only way an FFL could determine whether a purchaser was a felon or other person prohibited from possessing firearms was on the basis of the customer's self-certification. The Brady Act supplemented this "honor system" with one that allows licensees to transfer a firearm only after a records check that prevents the acquisition of firearms by persons not legally entitled to possess them. Since 1994, the Brady Act has prevented well over 250,000 prohibited persons from acquiring firearms from FFLs.

The Brady Act, however, does not apply to the sale of firearms by nonlicensees, who make up one-quarter or more of the sellers of firearms at gun shows. While FFLs are required to maintain careful records of their sales and, under the Brady Act, to check the purchaser's background with NICS before transferring any firearm, nonlicensees have no such requirements under current law. Thus, felons and other prohibited persons who want to avoid Brady Act checks and records of their purchase buy firearms at these shows. Indeed, a review of criminal investigations by the Bureau of Alcohol, Tobacco and Firearms (ATF) reveals a wide variety of violations occurring at gun shows and substantial numbers of firearms associated with gun shows being used in drug crimes and crimes of violence, as well as being passed illegally to juveniles.

On November 6, 1998, President Clinton determined that all gun show vendors should have access to the same information about firearms purchasers.<sup>1</sup> He directed the Secretary of the Treasury and the Attorney General to close the gun show loophole. President Clinton was particularly concerned that felons and illegal firearms traffickers could use gun shows to buy large quantities of weapons without ever disclosing their identities, having their backgrounds checked, or having any other records maintained on their purchases. He asked the Secretary of the Treasury and the Attorney General to provide him with recommendations to address this problem.

In developing recommendations for responding to the President's directive, the Department of the Treasury and the Department of Justice sought input from

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<sup>1</sup> See exhibit 1.

United States Attorneys, FFLs, law enforcement organizations, trade associations, and a wide range of other groups interested in firearms issues. The suggestions of these disparate groups ranged from doing nothing to establishing an outright ban on all sales of firearms at gun shows or by anyone other than an FFL. The United States Attorneys expressed particular concern with the complexity of the statutory definition of “engaged in the business” of dealing in firearms and noted that this made unlicensed firearms traffickers unusually difficult to prosecute.

The recommendations in this report build upon existing systems and expertise to achieve the President’s goals of preventing sales to prohibited persons and better enabling law enforcement to trace crime guns.

First, “gun show” would be defined to include not only traditional gun shows but also flea markets and other similar venues where firearms are sold.

Second, ATF would register all persons who promote gun shows. Promoters would be required to notify ATF of the time and location of each gun show, provide ATF with a list of vendors at the show, indicate whether the vendors are FFLs, ensure that all vendors are provided with information about their legal obligations, and require that vendors acknowledge receipt of this information. If a registered promoter fails to fulfill these obligations, ATF would consider revoking or suspending the promoter's registration or imposing a civil monetary penalty. Criminal penalties would also be available in certain circumstances.

Third, if any part of a firearms transaction, including display of the weapon, occurs at a gun show, the firearm could be transferred only by, or with the assistance of, an FFL. Therefore, if a nonlicensee sought to transfer a firearm, an FFL would be responsible for positively identifying the purchaser, conducting a Brady Act check on the purchaser, and maintaining a record of the transaction. This is the same system that has been used successfully for many years when someone wishes to transfer a firearm to a nonlicensee in another State.

Fourth, FFLs would be responsible for submitting strictly limited information concerning all firearms transferred at gun shows (e.g., manufacturer/importer, model, and serial number) to ATF’s National Tracing Center (NTC). No information about either the seller or the purchaser would be given to the Government (with the exception of instances in which multiple sales reports are required).<sup>2</sup> Instead, the licensees would maintain this information in their files, as is done with all firearms sold by FFLs today. The NTC would request this information from an FFL only in the event that the firearm subsequently became the subject of a law enforcement trace request.

Fifth, the Department of the Treasury and the Department of Justice will review the definition of “engaged in the business” and make recommendations for legislative or

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<sup>2</sup> As required by the Gun Control Act, FFLs must complete multiple sales records whenever two or more handguns are sold to the same purchaser within 5 business days.

regulatory changes to better identify and prosecute, in all appropriate circumstances, illegal traffickers in firearms and suppliers of guns to criminals.

Sixth, the Federal Government should commit additional resources to combat the illegal trade of firearms at gun shows. Without a commitment to financially support this initiative, the effectiveness of this proposal would be limited.

Seventh, in conjunction with the firearms industry, a campaign should be undertaken to encourage all firearms owners to take steps when selling or otherwise disposing of their weapons to ensure that they do not fall into the hands of criminals, unauthorized juveniles, or other prohibited persons.

Taken together, these recommendations will address the President's goals of preventing firearms sales to prohibited persons at gun shows and better enabling law enforcement to trace crime guns. Whenever any part of a firearms transaction takes place at a gun show, the requirements of the Brady Act will apply, and records will be kept to allow the firearm to be traced if it is later used in crime. If unlicensed individuals wish to sell their personal collections of firearms at gun shows, they will now have the obligation—and the means—to ensure that they are not selling their guns to felons or other prohibited persons. The recommended steps impose reasonable obligations in connection with firearms transactions at gun shows while significantly enhancing law enforcement's ability to prevent criminals from getting guns and to apprehend those who use firearms in the commission of crimes.



## 1. DESCRIPTION OF GUN SHOWS

### Sponsorship and Operation of Gun Shows

Shows that specialize primarily in the sale and exchange of all types of firearms are frequent and popular events.<sup>3</sup> According to the periodical "Gun Show Calendar" (Krause Publications), 4,442 such shows were advertised for calendar year 1998. The following are the 10 States where shows were conducted most frequently in 1998:

<u>State</u>	<u>Number of Shows</u>
Texas	472
Pennsylvania	250
Florida	224
Illinois	203
California	188
Indiana	180
North Carolina	170
Oregon	160
Ohio	148
Nevada	129

Most of the shows were promoted by approximately 175 organizations and individuals. Most promoters are State and local firearms collector organizations with large memberships, including one group that has 28,000 members. The remainder of the gun shows were promoted by individual collectors and businesspeople. Ordinarily, gun shows are held in public arenas, civic centers, fairgrounds, and armories, and the vendor rents a table from the promoter for a fee ranging from \$5 to \$50. The number of tables at shows varies from as few as 50 to as many as 2,000.

Most of the shows are open to the public, and individuals generally pay an admission price of \$5 or more to the promoter. In rare instances, public access is limited by invitation only. Most gun shows occur over a 2-day period, generally on weekends, and draw an average of 2,500-5,000 people per show.<sup>4</sup>

Both FFLs and nonlicensees sell firearms at these shows. FFLs make up 50 to 75 percent of the vendors at most gun shows. The majority of vendors who attend shows sell firearms and associated accessories and other paraphernalia. Examples of accessories and paraphernalia include holsters, tactical gear, knives, ammunition, clothing, food,

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<sup>3</sup> ATF interviewed promoters, made field observations, and reviewed data obtained over a 5-year period to provide information for this report.

<sup>4</sup> This information was provided by officials from the National Association of Arms Shows, which represents many of the gun show promoters.

military artifacts, books, and other literature. Some of the vendors offer accessories and paraphernalia only and do not sell firearms.

Public markets for the sale of firearms are not limited to the specialized firearms shows. Large quantities of firearms are also sold by nonlicensees at flea markets and other organized events. At some flea markets, FFLs have established permanent premises from which they conduct their business.

Both the specialized firearms shows and the broader commercial venues such as flea markets are collectively referred to as “gun shows” in the remainder of this report.

### **Types of Firearms Sold**

The types and variety of firearms offered for sale at gun shows include new and used handguns, semiautomatic assault weapons,<sup>5</sup> shotguns, rifles, and curio or relic firearms.<sup>6</sup> In addition, vendors offer large capacity magazines<sup>7</sup> and machinegun parts<sup>8</sup> for sale.

The “high-end” collector and antique shows and the sporting recreational shows are generally produced by the sporting organizations or avid collectors and enthusiasts. The overall knowledge of the Federal firearms laws and regulations by these promoters is

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<sup>5</sup> Semiautomatic assault weapons may be legally transferred in unrestricted commercial sales if they were manufactured on or before September 13, 1994. Weapons manufactured after that date may be transferred to or possessed by law enforcement agencies, law enforcement officers employed by such agencies for official use, security guards employed by nuclear power plants, and retired law enforcement officers who are presented the weapons by their agencies upon retirement. (See 18 U.S.C. § 922(v).)

<sup>6</sup> Curios or relics are firearms of special interest to collectors by reason of some quality other than those associated with firearms intended for sporting use or as offensive or defensive weapons. Curios or relics include firearms that are at least 50 years old, are certified by the curator of a Government museum to be of museum interest, or are other firearms that derive a substantial part of their value from the fact that they are novel, rare, or bizarre or because of their association with some historical figure, period, or event. (See 27 C.F.R. § 178.11.)

<sup>7</sup> Magazines with a capacity of more than 10 rounds may be transferred or possessed without restriction if they were manufactured on or before September 13, 1994. Large capacity magazines manufactured after that date may be transferred to or possessed by law enforcement agencies, law enforcement officers employed by such agencies for official use, security guards employed by nuclear power plants, and retired law enforcement officers who are presented the magazines by their agencies upon retirement. (See 18 U.S.C. § 922(w).)

<sup>8</sup> The National Firearms Act (NFA), 26 U.S.C. Chapter 53, regulates machineguns, which are defined as any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term also includes the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. (See 26 U.S.C. § 5845.) Machineguns must be registered with the Secretary of the Treasury, and those manufactured on or after May 19, 1986, are generally unlawful to possess. (See 18 U.S.C. § 922(o).) Parts for machineguns that do not fall within the statutory definition of machinegun (e.g., they are not conversion kits or frames or receivers) may be legally sold without restriction.

good, and the weapons offered for sale are mostly curios or relics or higher quality modern weapons. At other shows, vendors may be less knowledgeable about the Federal firearms laws, and many of the guns sold are of lower quality and less expensive.

### **Atmosphere**

The casual atmosphere in which firearms are sold at gun shows provides an opportunity for individual buyers and sellers to exchange firearms without the expense of renting a table, and it is not uncommon to see people walking around a show attempting to sell a firearm. They may sell their firearms to a vendor who has rented a table or simply to someone they meet at the show. Many nonlicensees entice potential customers to their tables with comments such as, “No background checks required; we need only to know where you live and how old you are.” Many of these unlicensed vendors actively acquire firearms from other vendors to satisfy a buyer's request for a specific firearm that the vendor does not currently possess. Some unlicensed vendors replenish and subsequently dispose of their inventories within a matter of days, often at the same show. Although the majority of people who visit gun shows are law-abiding citizens, too often the shows provide a ready supply of firearms to prohibited persons, gangs, violent criminals, and illegal firearms traffickers.

Many Federal firearms licensees have complained to ATF about the conduct of nonlicensees at gun shows.<sup>9</sup> These licensees are understandably concerned that the casual atmosphere of gun shows, combined with the absence of any requirement that an unlicensed vendor check the background of a firearms purchaser, provides an opportunity for felons and other prohibited persons to acquire firearms. Because Federal law neither requires the creation of any record of these unlicensed sales nor places any obligations upon gun show promoters, information is rarely available about the firearms sold should they be recovered in a crime.

### **Gun Shows and Crime**

It is hardly surprising, therefore, that a review of ATF's recent investigations indicates that gun shows provide a forum for illegal firearms sales and trafficking. In preparing this report, the Department of the Treasury, the Department of Justice, ATF, and outside researchers<sup>10</sup> reviewed 314 recent investigations that involved guns shows in some capacity.<sup>11</sup> The investigative reports came from each of ATF's 23 field divisions

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<sup>9</sup> When appropriate, ATF investigated these complaints and took action ranging from warning letters explaining the need for a license to engage in the business of dealing in firearms, to referring a case to the United States Attorney for prosecution.

<sup>10</sup> David M. Kennedy and Anthony Braga, both of the John F. Kennedy School of Government, Harvard University.

<sup>11</sup> See Appendix, table 1. The large majority of the investigations reviewed for this report were from 1997 and 1998. The remainder of the investigations was from the years 1994 through 1996, with one investigation each from 1991 and 1992. Forty-one investigations involved what may be described as flea markets, and three investigations involved firearms sales at auctions. The methodology of the review and a more detailed analysis of the results are set forth in the appendix.

throughout the country<sup>12</sup> and involved a wide range of criminal activity by FFLs, unlicensed vendors, and felons conspiring with FFLs.<sup>13</sup> The investigations also involved a wide variety of firearms, including handguns, semiautomatic assault rifles, and machineguns.

Together, the ATF investigations paint a disturbing picture of gun shows as a venue for criminal activity and a source of firearms used in crimes. Felons, although prohibited from acquiring firearms, have been able to purchase firearms at gun shows. In fact, felons buying or selling firearms were involved in more than 46 percent of the investigations involving gun shows.<sup>14</sup> In more than a third of the investigations, the firearms involved were known to have been used in subsequent crimes.<sup>15</sup> These crimes included drug offenses, felons in possession of a firearm, assault, robbery, burglary, and homicide.<sup>16</sup>

Firearms involved in the 314 reviewed investigations numbered more than 54,000.<sup>17</sup> A large number of these firearms were sold or purchased at gun shows. More than one-third of the investigations involved more than 50 firearms, and nearly one-tenth of the investigations involved more than 250 firearms. The two largest investigations were reported to have involved up to 7,000 and 10,000 firearms, respectively. These numbers include both new and used firearms.<sup>18</sup>

The investigations reveal a diversity of Federal firearms violations associated with gun shows.<sup>19</sup> Examples of these violations include straw purchases,<sup>20</sup> out-of-State sales by

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<sup>12</sup> See Appendix, table 2.

<sup>13</sup> See Appendix, table 3. Current and former FFLs were the subject of a significant number of investigations.

<sup>14</sup> See Appendix, table 3.

<sup>15</sup> See Appendix, table 4.

<sup>16</sup> See Appendix, table 4.

<sup>17</sup> See Appendix, table 5.

<sup>18</sup> See Appendix, table 6. Because tracing a firearm generally requires an unbroken chain of dispositions from manufacturer to first retail purchaser, used guns--including those sold at gun shows--have rarely been traceable.

<sup>19</sup> See Appendix, table 7.

<sup>20</sup> A "straw purchase" occurs when the actual buyer of a firearm uses another person, the "straw purchaser," to execute the paperwork necessary to purchase a firearm from an FFL. Specifically, the actual buyer uses the straw purchaser to execute the firearms transaction record, purporting to show that the straw purchaser is the actual purchaser of the firearm. Often, a straw purchaser is used because the actual purchaser is prohibited from acquiring the firearm because of a felony conviction or another disability.

FFLs, transactions by FFLs without Brady Act checks, and the sale of kits that modify semiautomatic firearms into automatic firearms. Engaging in the business without a license was involved in more than half of all the investigations. Nearly 20 percent involved FFLs who were selling firearms “off-the-book.”<sup>21</sup> The central violation in approximately 15 percent of the investigations was the transfer of firearms to prohibited persons such as felons or juveniles not authorized to possess firearms. Nearly 20 percent of the investigations involved violations of the National Firearms Act (NFA), which regulates the possession of certain firearms such as machineguns.<sup>22</sup>

An examination of individual cases illustrates how gun shows are connected to criminal activity.

- In 1993, ATF uncovered a Tennessee FFL who purchased more than 7,000 firearms, altered the serial numbers, and resold them to two unlicensed dealers who subsequently transported and sold the firearms at gun shows and flea markets in North Carolina. The scheme involved primarily new and used handguns. All three pled guilty to Federal firearms violations. The FFL was sentenced to 15 months’ imprisonment; the unlicensed dealers were sentenced to 21 and 25 months’ imprisonment, respectively.
- In 1994, ATF recovered two 9mm firearms and the NTC traced them to an FFL in Whittier, California. The FFL had sold over 1,700 firearms to unlicensed purchasers over a 4-year period without maintaining any records. Many of the sales occurred at swap meets in California. The firearms were then sold to gang members in Santa Ana and Long Beach, California. Many of the firearms were recovered in crimes of violence, including homicide. Of the five defendants charged, two were convicted--the FFL and one of his unlicensed purchasers. Each was sentenced to 24 months’ imprisonment.
- In 1995, an ATF inspector in Pontiac, Michigan, discovered a convicted felon who used a false police identification to buy handguns at gun shows and resold them for profit. Among the firearms purchased were sixteen new and inexpensive 9mm and .380 caliber handguns. Detroit police recovered several of the firearms while investigating a domestic disturbance. The defendant pled guilty to numerous Federal firearms violations and was sentenced to 27 months’ imprisonment.

In addition to analyzing the ATF investigations, ATF supplemented the information with data from the NTC. Approximately 254 individuals identified in the ATF gun show-related investigations were checked against data in the Firearms Tracing System and related data bases. Of these, 44 appeared in the multiple purchase records with an

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<sup>21</sup> “Off-the-book” sales are those made by FFLs without conducting Brady Act background checks and without recording the sale as required by the law and regulations.

<sup>22</sup> Under the NFA, certain firearms and other weapons must be registered. (See 26 U.S.C. chapter 53.) Table 8 shows the types of weapons involved in the investigations involving NFA violations. For example, more than half of the NFA investigations involved machineguns, while 11 percent involved grenade launchers.

average of 59 firearms per person. Of the 44 individuals, 15 were associated with 50 or more multiple sale firearms; these individuals had a total of 188 crime guns traced to them, an average of approximately 13 firearms each. The largest number of multiple sales firearms associated with one individual was 472; this individual had 53 crime guns traced to him. These patterns are not in and of themselves proof of trafficking. Rather, they are indicators investigators use to assist in trafficking investigations.

It is difficult to determine the precise extent of criminal activities at gun shows, partly because of the lack of obligations upon unlicensed vendors to keep any records. Nevertheless, the information obtained from the ATF investigations demonstrates that criminals are able to obtain firearms with no background check and that crime guns are transferred at gun shows with no records kept of the transaction.

## 2. CURRENT LAW AND REGULATION OF GUN SHOWS

The gun show loophole results both from the existing legal framework governing firearms transactions and the limits on the application of existing laws to gun shows. Gun shows themselves are not subject to Federal regulation. Instead, only transfers by FFLs at gun shows are regulated. Few limitations apply to sales by nonlicensees at gun shows or elsewhere. The Federal legal framework governing gun shows and firearms vendors, as well as the State legal framework governing gun shows, is summarized below.

### **The Federal Framework**

#### **Federal Regulation of Firearms Vendors**

##### *Licensed Firearms Dealers*

The GCA requires that those seeking to “engage in the business” of importing, manufacturing, or dealing in firearms must obtain a Federal firearms license from the Secretary of the Treasury.<sup>23</sup> The Federal firearms license entitles the holder to ship, transport, and receive firearms in interstate or foreign commerce.<sup>24</sup> The bearer of that license, the FFL, must comply with the obligations that accompany the license. In particular, FFLs must maintain records of all acquisitions and dispositions of firearms and comply with all State and local laws in transferring any firearms.<sup>25</sup> They must positively identify the purchaser by inspecting a Government-issued photographic identification, such as a driver’s license. FFLs must also complete a multiple sales report if they sell two or more handguns to the same purchaser within 5 business days. FFLs may not transfer firearms to felons, persons who have been committed to mental institutions, illegal aliens, or other prohibited persons.<sup>26</sup> FFLs also may not knowingly transfer firearms to underage persons or handguns to persons who do not reside in the State where they are licensed.<sup>27</sup>

FFLs must also comply with the provisions of the Brady Act prior to transferring any firearm to a nonlicensee. The Brady Act requires licensees to contact NICS prior to transferring a firearm to any nonlicensed person in order to determine whether receipt of

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<sup>23</sup> 18 U.S.C. §§ 922(a)(1) and 923(a).

<sup>24</sup> See id.

<sup>25</sup> See 18 U.S.C. §§ 922(a)(1), (a)(3), (a)(5), (b)(2), and 923(g).

<sup>26</sup> See 18 U.S.C. § 922(d). The 1986 amendments to the GCA also made it unlawful for any person to transfer any firearm to any person knowing or having reasonable cause to believe that such person is a prohibited person.

<sup>27</sup> See 18 U.S.C. §§ 922(b)(1), 922(b)(3), and 922(x).

a firearm by the prospective purchaser would be in violation of Federal or State law.<sup>28</sup> FFLs must maintain a record but need not contact NICS when they sell from their personal collection of firearms. Federal law requires licensees to respond to requests for firearms tracing information within 24 hours.<sup>29</sup> Moreover, ATF has a statutory right to conduct warrantless inspections of the records and inventory of Federal firearms licensees.<sup>30</sup> An FFL who willfully violates any of the licensing requirements may have his or her license revoked and is subject to imprisonment for not more than 5 years, a fine of not more than \$250,000, or both.<sup>31</sup>

The obligations imposed upon FFLs serve to implement the crime-reduction goals of the GCA. For example, the recordkeeping requirements, interstate controls, and other requirements imposed on licensees are designed to allow the tracing of crime guns through the records of FFLs and to give States the opportunity to enforce their firearms laws.<sup>32</sup>

### *Licensed Firearms Collectors*

The GCA also requires persons to obtain a license as a collector of firearms<sup>33</sup> if they wish to ship, transport, and receive firearms classified as “curios or relics” in interstate or foreign commerce.<sup>34</sup> For transactions involving firearms other than curios or relics, the licensed collector has the same status as a nonlicensee. “Curio or relic” firearms generally are firearms that are of special interest to collectors and are at least 50 years old or derive their value from association with a historical figure, period, or event.<sup>35</sup> A licensed collector may buy and sell curio or relic firearms for the purpose of enhancing

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<sup>28</sup> See 18 U.S.C. § 922(t). A NICS check is not required if the buyer presents to the FFL a valid permit to possess or acquire a firearm that was issued not more than 5 years earlier by the State in which the transfer is to take place, and the law of the State provides that the permit is to be issued only after a Government official verifies that the information available to the official, including a NICS check, does not indicate that the possession of the firearm by the person would violate the law.

<sup>29</sup> See 18 U.S.C. § 923(g)(7).

<sup>30</sup> See 18 U.S.C. § 923(g)(1)(B). Warrantless inspections are limited to those conducted (1) in the course of a criminal investigation of a person other than the licensee, (2) during an annual compliance inspection, and (3) for purposes of firearms tracing. Id. Inspections may also be conducted pursuant to a warrant issued by a Federal magistrate upon demonstration that there is reasonable cause to believe that a violation of the GCA has occurred and that evidence of such violation may be found on the licensee's premises. See 18 U.S.C. § 923(g)(1)(A).

<sup>31</sup> See 18 U.S.C. § 923(e) and 924(a)(1)(D). Under current law, an FFL's failure to perform a NICS check is a misdemeanor.

<sup>32</sup> S. Rep. No. 1501, 22, 25 (1968).

<sup>33</sup> See 18 U.S.C. § 923(b).

<sup>34</sup> See 18 U.S.C. §§ 922(a)(2), (a)(3).

<sup>35</sup> See 27 C.F.R. § 178.11.



his or her personal collection, but may not lawfully engage in a firearms business in curio or relic firearms without obtaining a dealer's license.<sup>36</sup> Recordkeeping requirements are imposed on licensed collectors, and ATF has a statutory right to conduct warrantless inspections of the records and inventory of such licensees.<sup>37</sup> Licensed collectors, like other licensees, are required to respond to requests for firearms trace information within 24 hours.<sup>38</sup> However, licensed collectors are not subject to the requirements of the Brady Act.<sup>39</sup>

### *Nonlicensed Firearms Sellers*

In contrast to licensed dealers, nonlicensees can sell firearms without inquiring into the identity of the person to whom they are selling, making any record of the transaction, or conducting NICS checks.<sup>40</sup> Because nonlicensed gun show vendors are not subject to the Brady Act and indeed cannot now conduct a NICS check under Federal law, they often have no way of knowing whether they are selling a firearm to a felon or other prohibited person. The GCA does, however, prohibit nonlicensed persons from acquiring firearms from out-of-State dealers and prohibits nonlicensees from shipping or transporting firearms in interstate or foreign commerce.<sup>41</sup> Nonlicensees are also prohibited from transferring a firearm to a nonlicensed person who the transferor knows or has reasonable cause to believe does not reside in the State in which the transferor resides.<sup>42</sup> A nonlicensee also may not transfer a firearm to any person knowing or having reasonable cause to believe that the transferee is a felon or other prohibited person.<sup>43</sup> Finally, nonlicensed persons may not transfer handguns to persons under the age of 18.<sup>44</sup> Of

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<sup>36</sup> See 18 U.S.C. §§ 922(a)(1), and 923(a).

<sup>37</sup> See 18 U.S.C. §§ 923(g)(2), (g)(1)(C).

<sup>38</sup> See 18 U.S.C. § 923(g)(7).

<sup>39</sup> See 18 U.S.C. § 922(t)(1).

<sup>40</sup> See 18 U.S.C. §§ 922(t), and 923(g)(1)(A).

<sup>41</sup> See 18 U.S.C. § 922(a)(3). An exception to this rule is provided for sales of rifles or shotguns by licensed dealers to nonlicensed persons if the purchaser appears in person at the dealer's licensed premises and the sale, delivery, and receipt comply with the legal conditions of sale in both the seller's State and the buyer's State. See 18 U.S.C. § 922(b)(3).

<sup>42</sup> See 18 U.S.C. § 922(a)(5). Exceptions to this prohibition are provided for transfers of firearms made to carry out a bequest or intestate succession of a firearm and for the loan or rental of a firearm for temporary use for lawful sporting purposes. Id.

<sup>43</sup> See 18 U.S.C. § 922(d).

<sup>44</sup> See 18 U.S.C. § 922(x). A number of exceptions apply to this prohibition, including temporary transfers in the course of employment, for ranching or farming, for target practice, for hunting, or for firearms safety instruction. These exceptions all require that the juvenile to whom the handgun is transferred obtain prior written consent from a parent or guardian and that the written consent be in the juvenile's possession at the time the juvenile possesses the handgun. Id.

course, because nonlicensees are not required to inspect the buyer's driver's license or other identification, they may never know that the buyer is underage.

***“Engaged in the Business”***

Whether an individual seeking to sell a firearm will be regulated as an FFL or nonlicensee depends on whether that individual is “engaged in the business” of importing, manufacturing, or dealing in firearms. When Congress enacted the GCA in 1968, it did not provide a definition of the term “engaged in the business.” Courts interpreting the term supplied various definitions,<sup>45</sup> and upheld convictions for engaging in the business without a license under a variety of factual circumstances.<sup>46</sup>

In 1986, the law was amended to provide the following definition:

(21) The term “engaged in the business” means--

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(C) as applied to a dealer in firearms, . . . a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms. . . .<sup>47</sup>

The 1986 amendments to the GCA also defined the term “with the principal objective of livelihood and profit” to read as follows:

(22) The term “with the principal objective of livelihood and profit” means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as

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<sup>45</sup> Compare United States v. Gross, 451 F.2d 1355, 1357 (7<sup>th</sup> Cir. 1971) (one engages in a firearms business where one devotes time, attention and labor for the purpose of livelihood or profit) with United States v. Shirling, 572 F.2d 532, 534 (5<sup>th</sup> Cir. 1978) (profit motive not determinative where one has firearms on hand or ready to procure them for purpose of sale).

<sup>46</sup> See United States v. Hernandez, 662 F.2d 289 (5<sup>th</sup> Cir. 1981) (30 firearms bought and sold over a 4-month period); United States v. Perkins, 633 F.2d 856 (8<sup>th</sup> Cir. 1981) (three transactions involving eight firearms over 3 months); United States v. Huffman, 518 F.2d 80 (4<sup>th</sup> Cir. 1975) (more than 12 firearms transactions over “a few months”); United States v. Ruisi, 460 F.2d 153 (2d Cir. 1972) (codefendants sold 11 firearms at a single gun show); United States v. Gross, 451 F.2d 1355 (7<sup>th</sup> Cir. 1971) (11 firearms sold over 6 weeks); United States v. Zeidman, 444 F.2d 1051 (7<sup>th</sup> Cir. 1971) (six firearms sold over 2 weeks).

<sup>47</sup> 18 U.S.C. § 921(a)(21)(C).

improving or liquidating a personal firearms collection; Provided, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. . . .<sup>48</sup>

Unfortunately, the effect of the 1986 amendments has often been to frustrate the prosecution of unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons.

### **Federal Regulation of Gun Shows**

Current Federal law does not regulate gun shows. The GCA does regulate the conduct of FFLs who offer firearms for sale at gun shows. Although the GCA generally limits licensees to conduct business only from their licensed premises,<sup>49</sup> in 1984, ATF issued a regulation allowing licensees to conduct business temporarily at certain gun shows located in the same State as their licensed premises.<sup>50</sup> The regulatory provision was codified into the law as part of the 1986 amendments to the GCA. To qualify for the exception, the gun show or event must be sponsored by a national, State, or local organization devoted to the collection, competitive use, or other sporting use of firearms; and the gun show or event must be held in the State where the licensee's premises is located.

As a result, an FFL may buy and sell firearms at a gun show provided he or she otherwise complies with all the GCA requirements governing licensee transfers. Nonlicensees, however, may freely transfer firearms at a gun show without observing the recordkeeping and background check requirements imposed upon licensees.

### **State Statutory and Regulatory Framework**

More than half of the States impose no prohibition on the private transfer of firearms among nonlicensed persons and do not regulate the operation of gun shows. In some States, the only restrictions imposed on the private sales or transfers of firearms are similar to certain prohibitions set forth by the GCA. For example, Arkansas, Oklahoma, Texas, Louisiana, and Mississippi prohibit the transfer of certain firearms to felons; minors (or minors without parental consent); or persons who are intoxicated, mentally disturbed, or under the influence of drugs. Some States require permits to obtain a firearm and impose a waiting period before the permit is issued (e.g., 14 days in Hawaii). Other States impose additional requirements (such as completion of a firearms safety course in California) to obtain a license or permit. Some impose a waiting period for all firearms (e.g., Massachusetts), others only for handguns (e.g., Connecticut). Maryland directly regulates the sale of firearms by nonlicensees at gun shows, requiring

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<sup>48</sup> 18 U.S.C. § 921(a)(22).

<sup>49</sup> 18 U.S.C. § 923(a).

<sup>50</sup> T.D. ATF-191, 49 Fed. Reg. 46,889 (November 29, 1984).

nonlicensees selling handguns or assault weapons at a gun show to undergo a background check to obtain a temporary transfer permit, and limits individuals to five such permits per year.

Exhibit 2 provides an overview of the laws of those States that regulate the transfer of some or all firearms by persons not licensed as a dealer, and of those States that directly regulate gun shows. None of the solutions proposed in this report will affect any State law or regulation that is more restrictive than the Federal law.

### **3. EARLIER LEGISLATIVE PROPOSALS AND COMMENTS FROM INTERESTED PARTIES**

In developing the recommendations of this report, prior legislative proposals addressing gun shows were considered along with results of surveys of United States Attorneys, interest groups, and individuals concerned with firearms issues. Comments from FFLs and law enforcement officials were also considered.

#### **Legislative Proposals**

In the 105<sup>th</sup> Congress, Representative Rod Blagojevich introduced legislation addressing gun shows, H.R. 3833. Senator Frank Lautenberg introduced a similar bill, S. 2527. The proposed bills generally required any person wishing to operate a “gun show” to obtain a license from the Secretary of the Treasury and to provide 30 days’ advance notice of the date and location of each gun show held. The gun show licensee would be required to comply with the provisions applicable to dealers under the Brady Act, the general recordkeeping provisions of the GCA, and the multiple sales reporting requirements. These requirements would apply only to transfers of firearms at the gun show by unlicensed persons. Unlicensed vendors would be required to provide the gun show licensee with written notice prior to transferring a firearm at the gun show. The gun show licensee would also be required to deliver to the Secretary of the Treasury all records of firearms transfers collected during the show within 30 days after the show.

#### **Responses to Surveys**

##### **United States Attorneys**

The Department of Justice requested information from United States Attorneys regarding their experience prosecuting cases involving illegal activities at gun shows or in the “secondary market.”<sup>51</sup> Those United States Attorneys who reported cases were asked to describe any particular problems of proof that arose in the cases and whether the existing levels of prosecutorial and investigative resources are adequate to address the violations that are identified. Finally, they were asked for their proposals on how to curtail illegal activity at gun shows.

Some United States Attorneys’ offices have had significant experience investigating and prosecuting cases involving illegal activities at gun shows, while others reported no experience with these cases at all. Several common themes emerge from the responses.

There was widespread agreement among United States Attorneys that it can be difficult to prove that a nonlicensed person is “engaging in the business” of firearms dealing without a license under current law. The definitions create substantial investigative and

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<sup>51</sup> The “secondary market” refers to the sale and purchase of firearms after FFLs sell them at retail.

proof problems.<sup>52</sup> Significant undercover work and follow-up by ATF are required to prepare a case against someone for “engaging in the business.”

The United States Attorneys were virtually unanimous in their call for additional resources. The number of ATF agents available to investigate cases in many judicial districts falls far below the number required to mount effective enforcement activities at gun shows. United States Attorneys also noted that it will be difficult to devote scarce prosecutorial resources to gun show cases, so long as a number of the offenses remain misdemeanors.

United States Attorneys offered a wide range of proposals to address the gun show loophole. These include the following: (1) allowing only FFLs to sell guns at gun shows so that a background check and a firearms transaction record accompany every transaction; (2) strengthening the definition of “engaged in the business” by defining the terms with more precision, narrowing the exception for “hobbyists,” and lowering the intent requirement; (3) limiting the number of private sales permitted by an individual to a specified number per year; (4) requiring persons who sell guns in the secondary market to comply with the recordkeeping requirements that are applicable to FFLs; (5) requiring all transfers in the secondary market to go through an FFL; (6) establishing procedures for the orderly liquidation of inventory belonging to FFLs who surrender their license; (7) requiring registration of nonlicensed persons who sell guns; (8) increasing the punishment for transferring a firearm without a background check as required by the Brady Act; (9) requiring the gun show promoters to be licensed and maintain an inventory of all the firearms that are sold by FFLs and non-FFLs at a gun show; (10) requiring that one or more ATF agents be present at every gun show; and (11) insulating unlicensed vendors from criminal liability if they agree to have purchasers complete a firearms transaction form.

A small number of United States Attorneys suggested that existing laws are adequate even though the resources available to enforce these laws are not. While gun shows do not appear to be a problem in every jurisdiction, the majority of United States Attorneys agreed that gun shows are part of a larger, pervasive problem of firearms transfers in the secondary market.

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<sup>52</sup> A recent case of an unlicensed individual who bought and sold numerous firearms illustrates the difficulty involved with prosecuting defendants charged with engaging in the business of dealing in firearms without a license. ATF agents discovered that an unlicensed person had purchased 124 handguns and 27 long guns from an FFL, as well as additional firearms from flea markets and garage sales. When questioned, the defendant admitted that he intended to resell them. At trial, the defendant contended that buying and selling guns was his hobby. The court, relying on the statutory definition, instructed the jury that a person engages in the business of dealing in firearms when it occupies time, attention, and labor for the purpose of livelihood and profit, as opposed to as a pastime, hobby, or being a collector. When the jury asked for a definition of “livelihood,” the court explained that the term was not defined in the law and that the jury needed to rely on its common understanding of the term. The jury acquitted the defendant for engaging in the firearms dealing business. However, the jury convicted the defendant for falsely stating on the firearms transaction record executed at the time of purchase that he was the actual buyer, when in fact, he had intended to resell them.

### **Law Enforcement Officials**

Of the 18 State law enforcement officials who responded to the survey, only 1 opposed new restrictions on gun shows. Seventeen officials share the President's concern with the sale of firearms at gun shows without a background check or other recordkeeping requirements and support changes to make these requirements for all gun show transfers. The majority of respondents urged that any changes apply not only to gun shows but to flea markets, swap meets, and other venues where firearms are bought and sold. Several respondents suggested limits on the number of gun shows or caps on the quantities of guns sold by nonlicensees. Others urged increased cooperation with the United States Attorneys to assist in the prosecution of those individuals who violate Federal firearms laws. Finally, the National Sheriffs Association suggested that gun show operators be required to obtain a permit and notify ATF of any gun show.

### **FFLs**

FFLs submitted 219 responses, of which approximately 30 percent requested additional regulations to prevent unlawful activities at gun shows. Many of these FFLs supported a ban on firearms sales by unlicensed persons or, if permitted, urged that Brady checks be required to prevent prohibited persons from acquiring firearms. Other FFLs expressed frustration that unlicensed persons were able to sell to buyers without any paperwork (and advertise this fact), leaving the FFL at a competitive disadvantage. Others suggested that all vendors, licensed or not, should follow the same requirements whether at gun shows, flea markets, or other places where guns are sold. Many of the FFLs recommending additional regulations provided suggestions, some quite detailed, for closing the gun show loophole. These suggestions included registering all firearms owners, licensing promoters, restricting attendance at gun shows, conducting surprise raids at gun shows, requiring that all transfers go through an FFL, and requiring a booth for law enforcement to conduct background checks for all firearms purchases.

A number of the FFLs who responded believed that the problems at gun shows could be solved if current laws were more strictly enforced. Several of these respondents noted that ATF is already "spread too thin" to enforce additional laws. Others suggested that courts need to do a better job of enforcing the existing laws. Many others preferred stiffer sentences for violators of existing law. More than half, however, stated that new laws or restrictions are not the answer. Of this group, many stated that they do not see any illegal activity at gun shows and concluded that no new laws are necessary. Others expressed their belief that sales of private property should not be federally regulated, or they expressed distrust of the Government in general. Also included in this group were FFLs who reported that they do not sell at gun shows for a variety of reasons but oppose new regulations nonetheless.

### **Interest Groups, Trade Groups, and Other Responses**

Eight responses were received from firearms interest or trade groups. The National Rifle Association (NRA) opposes any changes to existing laws, contending that only 2 percent of firearms used by criminals come from gun shows. The NRA suggested that regulating

the private sale of firearms would create a vast bureaucratic infrastructure and that ATF should instead continue to prosecute those who illegally trade in firearms. The NRA also suggested that many of the current unlicensed dealers would be under ATF scrutiny had they not been discouraged from holding a firearms license. The NRA expressed willingness to publicize the licensing requirements for those who deal in firearms. Similarly, Gun Owners of America recommended no changes to existing law, but suggested a “stop to this insidious ongoing Federal government assault on American citizenry and to return to the rule of law.”

By contrast, the National Alliance of Stocking Gun Dealers (NASGD), a trade association consisting of firearms dealers, suggested that every firearm sale at a gun show be regulated and that the purchaser undergo a NICS check. In addition, NASGD suggested: (1) licensing all gun show promoters, auctioneers, and exhibitors; (2) limiting the number of times an FFL may sell at gun shows in a given year; (3) having nonlicensees comply with the same standards as FFLs; (4) requiring promoters to provide ATF and other authorities with the list of vendors at a gun show; and (5) having promoters maintain firearms transaction records and NICS transaction records for all firearms sold at a gun show.

Handgun Control, Inc. (HCI), suggested that gun show promoters be licensed and that they be authorized to conduct a NICS check on every firearms transfer by an unlicensed dealer. HCI also suggested that a 30-day temporary license be issued (limited to one per year) to any individual wishing to sell at a gun show. The proposed license would permit the sale of no more than 20 handguns, the serial numbers of which would be included in the license application. HCI suggested that “engaged in the business” be defined to limit the number of handguns sold from a “personal collection” to no more than 3 in a 30-day period. This restriction would not apply to sales to licensees or within one’s immediate family. The Coalition to Stop Handgun Violence suggested licensing promoters, requiring a background check on all gun purchases, additional recordkeeping, a limit on the number of firearms purchased by any one person at a gun show, and increased enforcement resources and penalties.

The Trauma Foundation of San Francisco recommended requiring a background check for all firearms sales, licensing promoters, permitting only FFLs to sell at gun shows, and limiting the number of firearms purchased at a gun show. The United States Conference of Mayors supported one-gun-a-month legislation, background checks on all purchases, and increased funding for law enforcement.

Finally, in reply to open letters posted on the Internet, ATF received 274 responses. The vast majority of these responses either opposed any new restrictions on gun shows or favored enforcement of existing law. Approximately 5 percent favored new laws, usually suggesting a background check for firearms purchasers.



#### 4. RECOMMENDATIONS

##### **Summary of the Recommendations**

These recommendations close the gun show loophole by adding reasonable restrictions and conditions on firearms transfers at gun shows.<sup>53</sup> The recommendations also ensure that there are adequate resources to enforce the law and that all would-be sellers of firearms at gun shows understand the law and the consequences of illegally disposing of guns. Each recommendation will be discussed in detail, but they may be summarized as follows:

1. Define “gun show” to include specialized gun events, as well as flea markets and other markets outside of licensed firearms shops at which 50 or more firearms, in total, are offered for sale by 2 or more persons.
2. Require gun show promoters to register and to notify ATF of all gun shows, maintain and report a list of vendors at the show, and ensure that all vendors acknowledge receipt of information about their legal obligations.
3. Require that all firearms transactions at a gun show be completed through an FFL. The FFL would be responsible for conducting a NICS check on the purchaser and maintaining records of the transactions. The failure to conduct a NICS check would be a felony for licensees and nonlicensees.
4. Require FFLs to submit information necessary to trace all firearms transferred at gun shows to ATF’s National Tracing Center. This information would include the manufacturer/importer, model, and serial number of the firearms. No information about either an unlicensed seller or the purchaser would be given to the Government. Instead, as today with all firearms sold by licensees, the FFLs would maintain this information in their files.
5. Review the definition of “engaged in the business” and make recommendations within 90 days for legislative or regulatory changes to better identify and prosecute, in all appropriate circumstances, illegal traffickers in firearms and suppliers of guns to criminals.
6. Provide additional resources to combat the illegal trade of firearms at gun shows.
7. In conjunction with the firearms industry, educate gun owners that, should they sell or otherwise dispose of their firearms, they need to do so responsibly to ensure that they do not fall into the hands of felons, unauthorized juveniles, or other prohibited persons.

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<sup>53</sup> All of the recommendations except number 7 and part of number 5 would require legislation.

## **Explanation of the Recommendations**

### **Definition of Gun Show**

There would be a new statutory definition of “gun show.”<sup>54</sup> The definition would read as follows:

*Gun Show.* Any event (1) at which 50 or more firearms, 1 or more of which has been shipped or transported in interstate or foreign commerce, are offered or exhibited for sale, transfer or exchange; and (2) at which 2 or more persons are offering or exhibiting firearms for sale, transfer, or exchange.

This definition encompasses not only events at which the primary commodities displayed and sold are firearms but qualifying flea markets, swap meets, and other secondary markets where guns are sold as well. Requiring there to be two or more persons offering firearms exempts from the definition FFLs selling guns at their business location, as well as the individual selling a personal gun collection at a garage or yard sale. In addition, the legislation requires a minimum of 50 firearms to be offered for sale in order for an event to become a gun show that is subject to the other new requirements. This minimum quantity ensures that private sales of a small number of firearms can continue to take place without being subject to the new requirements.

### **Gun Show Promoters**

Any person who organizes, plans, promotes or operates a gun show, as newly defined, would be required to register with ATF. Gun show promoters would complete a simple form which entitles the promoter to operate a gun show. The registration requirement would go into effect 6 months after the enactment of the legislation to allow time for gun show promoters to comply.

Thirty days before any gun show, a promoter would be required to inform ATF of the dates, duration, and estimated number of vendors who are expected to participate. This information serves four purposes: First, it advises ATF that a gun show will be taking place. If ATF is in the process of investigating individuals who are violating the law at gun shows in a particular field division, the advance notice will assist ATF in determining whether the target of the investigation might appear at the gun show. Second, the information gives ATF a good idea about the scope and scale of the gun show to enable the agency to make the determination whether ATF should allocate resources to the show for the purpose of investigating possible crimes there. Third, it allows ATF to notify State and local law enforcement about the show, as suggested by

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<sup>54</sup> Although the GCA does not define “gun show,” the GCA does refer to “gun shows” in 18 U.S.C. § 923(j), the exception that permits FFLs to sell firearms away from their business premises under certain circumstances, including “gun shows.”

the National Sheriffs Association. Finally, the notice involves the promoter at an early stage in identifying who is participating at the gun show.

Next, by no later than 72 hours before the gun show, the promoter would provide a second notice to ATF identifying all the vendors who plan to participate at the show. The promoter's notice would include the names and licensing status, if any, of all those who have signed up to exhibit firearms. The primary benefits of this notification are twofold. First, the notice gives ATF specific information about vendors who plan to participate at the gun show, along with their status as an FFL or nonlicensee. For any open investigations, this information would prove extremely useful in ATF's enforcement activities. Second, promoters will learn the identities of the vendors so that they can plan for the show. For example, the promoter can determine which of the FFLs will conduct background checks for nonlicensees and, if a significant number of nonlicensees plan to participate in the show, the promoter can plan to have enough "transfer" FFLs<sup>55</sup> present to meet the demand for NICS checks.

Although vendors who do not sign up for the gun show by the time that the promoter submits the 72-hour notice may still sign up to participate at the show, they will be required to sign the promoter's ledger acknowledging their legal obligations before they may transact business. The promoter will be required to submit the ledger to ATF within 5 business days of the end of the show. All vendors will also be required to present to the promoter a valid driver's license or other Government-issued photographic identification.

A gun show promoter who fails to register or comply with any of these requirements would be subject to having his or her registration denied, suspended, or revoked, as well as being subject to other civil or administrative penalties. Certain violations would be subject to criminal penalties. Vendors who sell at gun shows without signing the promoter's ledger would be similarly subject to civil and criminal penalties. In addition, if the vendor provides false information to the promoter in the ledger, the vendor would be liable for making a false statement.

Imposing these requirements on gun show promoters will make them more accountable for controlling their shows and ensuring that only vendors who comply with the law participate at gun shows. Although promoters will not be directly responsible for the performance of NICS background checks at gun shows, it will be in the promoter's interest to make sure that background checks are being performed in connection with each and every firearms transfer that takes place in whole or in part at the gun show. Gun show promoters profit greatly from the gun sales that take place at gun shows. However, until now, the Federal Government has not imposed any obligations on the promoter to encourage compliance with the law by all of the participants at the gun show. Placing an affirmative obligation on gun show promoters to notify vendors of their legal obligations will go a long way toward ensuring that only lawful transactions take place at gun shows.

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<sup>55</sup> The transfer FFL does not act as the seller, but rather acts voluntarily in connection with a transfer by a nonlicensee or licensed collector.

Requiring vendors to sign the ledger and acknowledge that they have received information about and understand their legal obligations will prevent vendors from claiming that they did not know that they were required to complete all firearms transactions at a gun show through an FFL.

### **NICS Checks**

No gun would be sold, transferred, or exchanged at a gun show before a NICS background check is performed on the transferee. The Brady Act permit exception would apply to firearms sales at gun shows. FFLs who participate in the gun show would be required to request NICS checks for all buyers, whether the FFL sells firearms out of the FFL's inventory or the FFL's personal collection. Nonlicensed sellers at the gun show must arrange for all purchasers to go to a transfer FFL to request a NICS check. Any FFL attending a gun show may act as a transfer FFL to facilitate nonlicensee sales of firearms. However, FFLs will not be required to perform this service; they will do so only voluntarily. FFLs may choose to charge a fee for providing this service. By having the FFL request the background check, the proposal takes full advantage of the existing licensing scheme for FFLs, the FFLs' knowledge of firearms, and the FFLs' access to NICS.

The unlicensed seller may not transfer the firearm to the purchaser until the seller receives verification that the transfer FFL has performed a NICS background check on the purchaser and learned that there is no disqualifying information. The FFL's role is limited to facilitating the transfer by performing the NICS check and keeping the required records. Any FFL or non-FFL who transfers a firearm in whole or in part at a gun show without completing a NICS check on the purchaser to determine that the transferee is not prohibited could be charged with a felony.<sup>56</sup>

Prohibiting any firearms from being sold, transferred, or exchanged in whole or in part at a gun show until the transferee has been cleared by a background check establishes parameters that encompass all vendors, regardless of whether they are licensed. No FFL may claim that a background check is not required because the firearm is being sold out of the FFL's personal collection, nor will the distinction between FFLs and non-licensed dealers make any difference for NICS checks. When any part of the transaction takes place at a gun show,<sup>57</sup> each and every vendor at a gun show will require a transferee to undergo a background check before the firearm can be transferred.<sup>58</sup>

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<sup>56</sup> The legislative proposal would elevate the gravity of the offense of not conducting a NICS check for FFLs from a misdemeanor--which is presently contained in the Brady Act--to a felony regardless of the venue of the transaction.

<sup>57</sup> Requiring a NICS check when "any part of the transaction takes place at a gun show" ensures that buyers and sellers do not attempt to avoid the requirement by completing only a part of the sale, exchange, or transfer at the gun show. For example, if a nonlicensed vendor displays a gun at a gun show but the actual transfer occurs outside the gun show in the parking lot, the vendor is prohibited from transferring the gun without a NICS check on the purchaser.

<sup>58</sup> The recommendations made in this report would be in addition to any requirements imposed under State or local law.

## **Records for Tracing Crime Guns**

Before clearing a transfer of any firearm by a nonlicensee, the transfer FFL would complete a form similar to the firearms transaction record currently used by FFLs. This firearms transaction record would be maintained in the FFL's records, along with the other records of firearms transferred directly by the FFL.

In addition, FFLs would be responsible for submitting to the NTC strictly limited information concerning firearms transferred at gun shows, whether the FFL is the seller or merely the transfer FFL. The information would consist of the manufacturer/importer, model, and serial number of the firearm. No personal information about either the seller or the purchaser would be given to the Government. Instead, as today with all firearms sold by FFLs, the licensees would maintain this information in their files. The NTC would request this information from an FFL only in the event that the firearm subsequently becomes the subject of a law enforcement trace request. In addition, FFLs would complete a multiple sale form if they record the sale by a nonlicensee of two or more handguns to the same purchaser within 5 business days, as is currently required for transactions by FFLs.

This requirement provides a simple and easy-to-administer means of reestablishing the chain of ownership for guns that are transferred at gun shows. If the firearm appears at a crime scene and there is a legitimate law enforcement need to trace the firearm, ATF will be able to match the serial number of the crime gun to the record and identify the FFL who is maintaining the firearms transaction form. ATF can then go to the FFL who submitted the information on the firearm and review the record that is on file with the FFL. This form will contain information about the transferor and transferee, and ATF can trace the firearm using that information. It is important to emphasize that ATF traces guns according to specific protocols and requirements, ensuring that the firearms information will not be used to identify purchasers of a particular firearm except as required for a legitimate law enforcement purpose.

## **Definition of "Engaged in the Business"**

Not surprisingly, significant illegal dealing in firearms by unlicensed persons occurs at gun shows. More than 50 percent of recent ATF investigations of illegal activity at gun shows focused on persons allegedly engaged in the business of dealing without a license. Unfortunately, the current definition of "engaged in the business" often frustrates the prosecution of people who supply guns to felons and other prohibited persons. Although illegal activities by unlicensed traffickers often become evident to investigators quickly, months of undercover work and surveillance are frequently necessary to prove each of the elements in the current definition and to disprove the applicability of any of the several statutory exceptions.

To draw a more distinct line between those who are engaged in the business of firearms dealing and those who are not, and to facilitate the prosecution of those who are illegally trafficking in guns to felons and other prohibited persons--at gun shows and elsewhere--

the GCA should be amended. Accordingly, the Department of the Treasury and the Department of Justice will review the definition of “engaged in the business” and make recommendations within 90 days for legislative or regulatory changes to better identify and prosecute, in all appropriate circumstances, illegal traffickers in firearms and suppliers of guns to criminals.

### **Need for Additional Resources**

To adequately enforce existing law as well as the foregoing proposals, more resources are needed. There are more than 4,000 specialized gun shows per year, and enforcement and regulatory activity must also occur at the other public venues where firearms are sold.

All of the previous recommendations will help close the existing gun show loophole, but they will not completely eradicate criminal activity at gun shows and in the rest of the secondary market. As the review of ATF investigations and United States Attorney prosecutions revealed, a substantial number of the crimes associated with gun shows are committed by FFLs who deal off the book and ignore their legal obligations. While a requirement that all gun show transactions be recorded and NICS checks completed will make it somewhat easier to identify off-the-book dealers, a markedly increased enforcement effort will be required to shut down these illegal markets. Further, ATF will need to focus on preventive educational initiatives, as described below. To accomplish all of these goals, significant resources will be required for more criminal and regulatory enforcement personnel, as well as prosecutors.

Without a commitment to financially support this initiative, its effectiveness will be limited. The Departments of Justice and the Treasury will submit budget proposals to fund this initiative at an appropriate level.

### **Educational Campaign**

Finally, a campaign should be undertaken in conjunction with the firearms industry to educate firearms owners that, should they sell or otherwise dispose of their firearms, they need to do so responsibly to ensure that the weapons do not fall into the hands of felons, unauthorized juveniles or other prohibited persons. The vast majority of firearms owners are law-abiding and certainly do not want their firearms to be used for crime but, under the current system, they can unwittingly sell firearms to prohibited persons.

The educational campaign could involve setting up booths at gun shows to explain the law, encouraging unlicensed sellers to “know their buyer” by asking for identification and keeping a record of those to whom they sell their firearms; developing videos and news articles for promoters, dealers, trade groups, and groups of firearms owners describing legal obligations and liability and the need to exercise personal responsibility; and distributing posters and handouts with tips for identifying and reporting suspicious activity.

## 5. CONCLUSION

Although Brady Act background checks have been successful in preventing felons and other prohibited persons from buying firearms from FFLs, gun shows leave a major loophole in the regulation of firearms sales. Gun shows provide a large market where criminals can shop for firearms anonymously. Unlicensed sellers have no way of knowing whether they are selling to a violent felon or someone who intends to illegally traffic guns on the streets to juveniles or gangs. Further, unscrupulous gun dealers can use these free-flowing markets to hide their off-the-book sales. While most gun show sellers are honest and law-abiding, it only takes a few to transfer large numbers of firearms into dangerous hands.

The proposals in this report strike a balance between the interests of law-abiding citizens and the needs of law enforcement. Specifically, the proposals will allow gun shows to continue to provide a legal forum for the sale and exchange of firearms and will not prevent the sale or acquisition of firearms by sportsmen and firearms enthusiasts. At the same time, this initiative will ensure background checks of all firearms purchasers at gun shows and assist law enforcement in preventing firearms sales to felons and other prohibited persons, as well as inhibiting illegal firearms trafficking. The proposals also ensure that gun show promoters run their shows responsibly, that all firearms purchases at gun shows are subject to NICS checks, and that all firearms sold at the shows can be traced if they are used in crime. Further, these recommendations will guarantee that everyone selling at gun shows understands the legal obligations and the risks of disposing of firearms irresponsibly and that law enforcement has the resources necessary to investigate and prosecute those who violate the law. In short, as requested by President Clinton, the proposals will close the gun show loophole.

Exhibit 1

THE WHITE HOUSE

Office of the Press Secretary  
(Highfill, Arkansas)

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For Immediate Release

November 6, 1998

November 6, 1998

MEMORANDUM FOR THE SECRETARY OF THE TREASURY  
THE ATTORNEY GENERAL

SUBJECT: Preventing Firearms Sales to Prohibited Purchasers

Since 1993, my Administration has worked hand-in-hand with State and local law enforcement agencies and the communities they serve to rid our neighborhoods of gangs, guns, and drugs -- and by doing so to reduce crime and the fear of crime throughout the country. Our strategy is working. Through the historic Violent Crime Control and Law Enforcement Act of 1994, we have given communities the tools and resources they need to help drive down the crime rate to its lowest point in a generation. Keeping guns out of the hand of criminals through the Brady Handgun Violence Prevention Act's background checks has also been a key part of this strategy. Over the past 5 years, Brady background checks have helped prevent a quarter of a million handgun sales to felons, fugitives, domestic violence abusers, and other prohibited purchasers -- saving countless lives and preventing needless injuries.

On November 30, 1998, the permanent provisions of the Brady Law will take effect, and the Department of Justice will implement the National Instant Criminal Background Check System (NICS). The NICS will allow law enforcement officials access to a more inclusive set of records than is now available and will -- for the first time -- extend the Brady Law's background check requirement to long guns and firearm transfers at pawnshops. Under the NICS, the overall number of background checks conducted before the purchase of a firearm will increase from an estimated 4 million annually to as many as 12 million.

We can, however, take additional steps to strengthen the Brady Law and help keep our streets safe from gun-carrying criminals. Under current law, firearms can be -- and an untold number are -- bought and sold entirely without background checks, at the estimated 5,000 private gun shows that take place across the country. This loophole makes gun shows prime targets for criminals and gun traffickers, and we have good reason to believe that firearms sold in this way have been used in serious crimes. In addition, the failure to maintain records at gun shows often thwarts needed law enforcement efforts to trace firearms. Just days ago, Florida voters overwhelmingly passed a ballot initiative designed to facilitate background checks at gun shows. It is now time for the Federal Government to take appropriate action, on a national level, to close this loophole in the law.

Therefore, I request that, within 60 days, you recommend to me what actions our Administration can take -- including proposed legislation -- to ensure that firearms sales at gun shows are not exempt from Brady background checks or other provisions of our Federal gun laws.

William J. Clinton

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## Exhibit 2

**DIGEST OF SELECTED STATES WITH LAWS REGULATING TRANSFERS OF FIREARMS  
BETWEEN UNLICENSED PERSONS OR GUN SHOWS (12/21/98)**

STATE	Regulation of Gun Shows?	Regulation of All Firearms Transfers?
PENNSYLVANIA  18 Pa. Stat. Ann. § 6111; § 6113.	NO.	YES. Nonlicensee wishing to transfer firearm to nonlicensee must do so through licensee or at county sheriff's office. The licensee must conduct background check as if he or she were the seller. Exclusions apply for certain firearms, family member transfers, law enforcement, or where local authority certifies that transferee's life is threatened.
CALIFORNIA  Cal. Penal Code § 12071.1; § 12082.	YES. Must receive state certificate of eligibility to operate gun show.	YES. All transfers for firearms must be through a licensed dealer who must conduct a background check.
ILLINOIS  430 Ill. Comp. Stat. Ann. §§ 65/2(a)(1), 65/3.	NO.	YES. No one may lawfully possess any firearm without possessing a Firearms Owner's Identification Card (FOIC) issued by the State police. Each transferee of any firearm must possess a valid FOIC. Transferor must keep record of transaction for 10 years.
VIRGINIA  Va. Code Ann. §§ 52-8.4:1, 54.1-4200, 54.1-4201.1.	YES. Promoter of firearm show must provide 30 days' notice, and provide pre- and post-show list of each vendor's name and business address.	NO.
DISTRICT OF COLUMBIA  D.C. Code Ann. § 6-2311.	NO.	YES. It is unlawful to possess any firearm that is not registered.
VIRGIN ISLANDS  V.I. Code tit. 23, § 461.	NO.	YES. No transfer of a firearm is lawful without prior approval by Commissioner of Licensing and Consumer Affairs.
FLORIDA	NO.	Under Art. VIII, Sec. 5 of Florida Constitution, counties are now free to impose waiting periods and background checks for all firearm sales in places where public has the right of access; "sale" requires consideration.
PUERTO RICO  P.R. Laws Ann., tit. 25, §§ 429, 438, 439	NO.	YES. All firearms must be registered and transfers must be through a licensed dealer.
NORTH CAROLINA  N.C. Gen. Stat. § 14-402.	NO.	NO. However, no transfer of a pistol is lawful without the transferee first obtaining a license from the county sheriff.
HAWAII  Haw. Rev. Stat. §§ 134-2, 134-3, 134-4.	NO.	YES. No person may acquire ownership of a firearm until the person first obtains a permit from the local police chief. A separate permit is required for each handgun or pistol; a shotgun or rifle allows multiple acquisitions up to one year.

STATE	Regulation of Gun Shows?	Regulation of All Firearms Transfers?
IOWA  Iowa Code Ann. § 724.16.	NO.	NO. However, it is unlawful to transfer a pistol or revolver without an annual permit to acquire pistols and revolvers.
MINNESOTA  Minn. Stat. Ann. §§ 624.7131, 624.7132.	NO.	NO. However, it is unlawful to transfer a pistol or semiautomatic assault weapon without executing a transfer report, signed by transferor and transferee and presented to the local police chief of the transferee, who shall conduct a background check.
MARYLAND  27 Md. Code Ann. §§ 442, 443A(a).	YES. Nonlicensed persons selling a handgun or assault weapon at a gun show must obtain a transfer permit; a background check is conducted on the applicant. An individual is limited to five permits per year.	NO.
MISSOURI  Mo. Rev. Stat. Ann. § 571.080.	NO.	YES. It is unlawful to buy, sell, exchange, loan, or borrow a firearm without first receiving a valid permit authorizing the acquisition of the firearm.
SOUTH DAKOTA  S.D. Codified Laws §§ 23-7-9, 7-10.	NO.	NO. However, it is unlawful to transfer a pistol to a person who has purchased a pistol until after 48 hours of the sale. Exceptions apply for holders of concealed pistol permit.
NEW YORK  NY Penal Law § 400.00(16) and §§ 265.11-13.	NO.	YES. As a general matter, no person may possess, receive, or sell a firearm without first obtaining a permit or license from the State. Thus, all lawful firearms transfers in New York, including those at gun shows, would be between licensees or permittees.
NEW JERSEY  N.J. Stat. Ann. § 2C: 39-3; 58-3.	NO.	YES. It is unlawful to sell a firearm unless licensed or registered to do so. No unlicensed person may acquire a firearm without a purchase permit or firearms purchaser identification card.
NEW HAMPSHIRE  N.H. Rev. Stat. Ann. § 159.	NO.	NO. However, it is unlawful for a nonlicensee not engaged in the business to transfer a pistol to a person who is not personally known to the transferor.
CONNECTICUT  Connecticut General Statute §§ 29-28 through 29-37.	NO.	YES. Anyone who sells 10 or more handguns in a calendar year must have a FFL or a State permit. Nonlicensees wishing to transfer a firearm must receiver from the prospective purchaser an application which is then submitted to local and State authorities. Exceptions are for licensed hunters purchasing long guns and members of the Armed Forces.
MASSACHU- SSETTS Mass. Gen. Laws Ann. Ch. 140 § 129C; § 128A; § 128B.	NO.	NO. However, State law provides that any person may transfer up to four firearms to any nonlicensed person per calendar year without obtaining a State license, provided seller forwards name of seller, purchaser, and information about the firearm to State authorities.

STATE	Regulation of Gun Shows?	Regulation of All Firearms Transfers?
RHODE ISLAND R.I. Gen. Laws §§ 11-47-35, 36, 40.	NO.	YES. No person may sell a firearm without purchaser completing application which is submitted to State police for background check. Seller obligated to maintain register recording information about the transaction, such as date, name, age and residence of purchaser.
MICHIGAN Mich. Comp. Laws §§ 750.223, 750.422	NO.	NO. However, no transfer of a pistol is lawful without the transferee first obtaining a handgun purchase permit from the local CLEO.
NEVADA Nev. Rev. Stat. Ann. § 202.254.	NO.	NO. However, a private person wishing to transfer a firearm <u>may</u> request a State background check on the prospective transferee.

## APPENDIX

### Methodology

The following analyses are based on a survey of ATF special agents reporting information about recent investigations associated with gun shows. The investigations reflect what ATF has encountered and investigated; they do not necessarily reflect typical criminal diversions of firearms at gun shows or the typical acquisition of firearms by criminals through gun shows. Furthermore, they do not provide information about the significance of diversion associated with gun shows with respect to other sources of diversion. Nevertheless, they suggest that the criminal diversion of firearms at and through gun shows is an important crime and public safety problem.

The analyses use data from investigations referred for prosecution and adjudicated, and investigations that have not yet been referred for prosecution. Thus, not all violations described will necessarily be charged as crimes or result in convictions. As a consequence, the exact number of offenders in the investigation, the numbers and types of firearms involved, and the types of crimes associated with recovered firearms may not have been fully known to the case agents at the time of the request, and some information may be underreported. For example, it is likely that the number of firearms involved in the investigations could increase, as could as the number and types of violations, as more information is uncovered by the agents working the investigations.

Information generated as part of a criminal investigation also does not necessarily capture data on the dimensions ideally suited to a more basic inquiry about trafficking and trafficking patterns. For example, investigative information necessary to build a strong case worthy of prosecution may provide very detailed descriptions of firearms used as evidence in the case but may not even estimate, much less describe in detail, all the firearms involved in the trafficking enterprise.

Information was not provided with enough consistency and specificity to determine the number of handguns, rifles, and shotguns trafficked in a particular investigation. Likewise, special agents may not have information on trafficked firearms subsequently used in crime. Such information is not always available. Comprehensive tracing of crime guns does not exist nationwide and, until the very recent Youth Crime Gun Interdiction Initiative, most major cities did not trace all recovered crime guns. The figures on new, used, and stolen firearms reflect the number of investigations in which the traffickers were known to deal in these kinds of weapons. The figures on stolen firearms are subject to the usual problems associated with determining whether a firearm has been stolen. Many stolen firearms are not reported to the police. Such limitations apply to much of the data collected in this research.

Finally, except where noted, the unit of analysis in the review of investigations is the investigation itself. The data show, for example, the proportion of investigations that were known by agents to involve new, used, and stolen firearms, but these figures do not represent a proportion or count of the number of new, used, or stolen firearms being

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trafficked at gun shows. The data show what proportion of investigations were known to involve a firearm subsequently used in a homicide, but not how many homicides were committed by firearms trafficked through gun shows. It was not possible to gather more specific information within the short timeframe of the study.

It was, for the most part, not possible to review and verify all of the information provided in the survey responses. However, ATF Headquarters personnel took a random sample of 15 cases each from the 31 investigations reported to have involved 101-250 firearms and from the 30 investigations reported to have involved 251 or more firearms, and reviewed with ATF field personnel the information leading to those reports. A breakdown of the results of this review showing the basis for reporting the firearms volume is provided below. Based on this review, ATF concludes that the numbers of firearms reported in connection with the investigations have a reasonable basis.

	<u>N = 32*</u>	
Procedure	Number	Percent
Firearms seized/purchased/recovered and reconstruction of dealer records	10	31.2%
Reconstruction of dealer records	9	28.1%
Firearms seized/purchased/recovered	6	18.8%
Reconstruction of dealer records and confidential information	3	9.4%
Firearms seizure and admission by defendant(s)	2	6.2%
ATF NTC compilation and confidential information	1	3.1%
Unknown	1	3.1%

\* This breakdown includes, in addition to the basis for the numbers of firearms reported in the randomly selected cases, the basis for the numbers of firearms reported in the two investigations involving the largest volumes of firearms, 10,000 and 7,000 firearms respectively. The case involving 7,000 firearms used a combination of an audit of firearms seized and the reconstruction of dealer records, while the case involving 10,000 firearms used a combination of NTC records and information from confidential informants.

**Table 1****Initiation of Investigation****N= 314**

<u>Reason</u>	<u>N</u>	<u>Percent</u>
Confidential informant	74	23.6%
Referred from another Federal, State, or local investigation	60	19.1%
ATF investigation at gun show (e.g., gun show task force)	44	14.0%
Trace analysis after firearms recovery	37	11.8%
Review of multiple sales forms	34	10.8%
Licensed dealers at gun shows reported suspicious activity	26	8.3%
Tip or anonymous information	18	5.7%
Field interrogation after firearm recovery	4	1.3%
Gun show promoter reported suspicious activity	2	0.6%
Analysis of out-of-business records	1	0.3%
unknown	14	4.4%

**Table 2****Investigations Submitted by Field Divisions**

N= 314

<u>Field Division</u>	<u>Number of Investigations</u>	<u>Percent</u>
Dallas	43	13.7%
Houston	42	13.1%
Detroit	41	13.1%
Philadelphia	34	10.8%
Miami/Tampa	20	6.3%
Kansas City	19	6.1%
Nashville	16	5.1%
Columbus	15	4.8%
Seattle	11	3.5%
St. Paul	10	3.2%
Louisville	9	2.9%
New Orleans	9	2.9%
Phoenix	8	2.5%
Washington, DC	8	2.5%
Charlotte	8	2.5%
Los Angeles	6	1.9%
Atlanta	6	1.9%
Chicago	5	1.6%
San Francisco	1	0.3%
Baltimore	1	0.3%
Boston	1	0.3%
New York	1	0.3%

**Table 3****Main Subject of Investigation**

N=314

<u>Subject</u>	<u>Number of Investigations</u>	<u>Percent</u>
Unlicensed dealer	170	54.1%
Unlicensed dealer (never FFL)	118	37.6%
Former FFL	37	11.8%
Current FFL and former FFL	8	2.5%
Unlicensed dealer and former FFL	2	0.6%
Current FFL and Unlicensed dealer	4	1.3%
Current FFL/Former FFL /unlicensed	1	0.3%
Current FFL	73	23.2%
Felon purchasing firearms at gun show	33	10.5%
Straw purchasers at gun show	20	6.4%
Unknown gun show source	18	5.7%

Overall, 46.2 percent of the investigations involved a felon associated with selling or purchasing firearms. This percentage was derived **from** aggregate investigations in which trafficked firearms were recovered from felons; unlicensed dealers' criminal histories included felony convictions; felons had purchased firearms at gun shows, and a licensed dealer had a convicted felon as an associate. When only a licensed dealer was the main subject of the investigation, a convicted felon was involved in 6.8 percent (5 of 73) of the investigations as an associate in the trafficking of firearms. When the investigation involved an unlicensed dealer or a former FFL, 25.3 percent (43 of 170) of the investigations revealed that he/she had at least one prior felony conviction.



**Table 4****Firearms Associated With Gun Show Investigations Known to Have Been Involved in Subsequent Crimes**

**34.4 percent of the investigations (108 of 314) had at least one firearm recovered in crime.**

*N=108*

Note: Since firearms recovered in an investigation may be used in many different types of crime, an investigation can be included in more than one category.

<u>Crime</u>	<u>Number of investigations with at least one</u>	<u>Percent</u>
Drug offense	48	44.4%
Felon in possession	33	30.6%
Crime of violence	47	43.5%
Homicide	26	24.1%
Assault	30	27.8%
Robbery	20	18.5%
Property crime (burglary, B&E)	16	14.8%
Criminal possession (not felon in poss.)	15	13.9%
Juvenile possession	13	12.0%

**Table 5****Number of Firearms Recorded in Gun Show Investigations***N=314*

<u>Number of Firearms</u>	<u>Number of Investigations</u>	<u>Percent</u>
Less than 5	70	22.3%
5 - 10	37	11.8%
11 - 20	22	7.0%
21 - 50	47	15.0%
51 - 100	47	15.0%
101 - 250	31	9.9%
251 or greater	30	9.6%
Unknown	30	9.6%

For further details about this information, see the Methodology section of this report.

**Table 6****New, Used and Stolen Guns Known to be involved in Gun Show Investigations**

<u>Type of firearm</u>	<u>Number of Investigations</u>	<u>Percent</u>
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Note: Since more than one type of firearm can be recovered in an investigation, an investigation can be included in more than one category

Used firearms	167	53.2%
New firearms	156	49.7%
Stolen firearms	35	11.1%
unknown	75	23.9%

**Mutually exclusive categories**

New firearms and used firearms	80	25.5%
Used firearms only	62	19.7%
New firearms only	61	19.4%
Used firearms and stolen firearms	13	4.1%
New firearms, used firearms, and stolen firearms	12	3.8%
Stolen firearms only	7	2.2%
New firearms and stolen firearms	3	0.9%
unknown	75	23.9%

**Table 7****Violations in the Main Investigations**

Note: Since an investigation may involve multiple violations, an investigation can be included in more than one category.

<u>Violation</u>	<u>Number of Investigations</u>	<u>Percent</u>
Engaging in the business of dealing without license	169	53.8%
Possession and receipt of firearm by convicted felon	76	24.2%
Illegal sales and/or possession of NFA weapons	62	19.7%
Licensee failure to keep required records	60	19.1%
Providing false information to receive firearms	54	17.2%
Transfer of firearm to prohibited person	46	14.6%
Straw purchasing	36	11.5%
False entries/fraudulent statements in licensee records	27	8.6%
Illegal transfer of firearms to resident of another State by nonlicensee	27	8.6%
Illegal transfer of firearms to resident of another State by licensee	21	6.7%
Receipt and sale of stolen firearms	15	5.8%
Obliterating firearms serial numbers	14	4.5%
Drug trafficking	11	3.5%
Trafficking of firearms by licensee (unspecified violation)	9	2.9%
Transfer of firearm in violation of <b>5-day</b> waiting period	7	2.2%
Illegal out of state sales by nonlicensee	7	2.2%
Licensee doing business away from business premises	5	1.6%
Illegal manufacture and transfer of assault weapon	3	1.0%
Sales by a prohibited person	2	0.6%
Forgery or check fraud to obtain firearms	2	0.6%

**Table 8****Weapons Associated with NFA Violations In Gun Show Investigations**

N= 62

Note: Since investigations may involve different types of NFA violations, an investigation can be included in more than one category. However, “converted guns” have not been included in the “machinegun” count.

<u>NFA violation</u>	<u>Number of NFA investigations with at least one</u>	<u>Percent</u>
Machine guns	33	53.2%
Converted guns	19	30.6%
Silencers	9	14.5%
Explosives (e.g., grenades)	8	12.9%
Grenade launchers	7	11.3%
Conversion kits/ parts	7	11.3%
Other (short barrel	5	8.1 %