IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 07 – 15763
DC# CV 99-4389-MJJ

RUSSELL ALLEN NORDYKE, *et al.*,
Appellants

v.

MARY V. KING, *et al.*,
Appellees

AMICI CURIAE BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., AND THE CALIFORNIA RIFLE & PISTOL ASSOCIATION IN SUPPORT OF THE APPELLANTS AND IN SUPPORT OF REVERSAL

Appeal from the U. S. District Court
for the Northern District of California
D.C. No. CV 99-04389 MJJ

C. D. Michel – S.B.N. 144258
TRUTANICH - MICHEL, LLP
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Counsel for *Amici Curiae*

Stephen P. Halbrook
Law Offices of
Stephen P. Halbrook
10560 Main Street, Suite 404
Fairfax, Virginia 22030
Telephone: (703) 352-7276
Counsel for *Amici Curiae*

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 07 – 15763
DC# CV 99-4389-MJJ

RUSSELL ALLEN NORDYKE, *et al.*,
Appellants

v.

MARY V. KING, *et al.*,
Appellees

AMICI CURIAE BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., AND THE CALIFORNIA RIFLE & PISTOL ASSOCIATION IN SUPPORT OF THE APPELLANTS AND IN SUPPORT OF REVERSAL

Appeal from the U. S. District Court
for the Northern District of California
D.C. No. CV 99-04389 MJJ

C. D. Michel – S.B.N. 144258
TRUTANICH - MICHEL, LLP
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Counsel for *Amici Curiae*

Stephen P. Halbrook
Law Offices of
Stephen P. Halbrook
10560 Main Street, Suite 404
Fairfax, Virginia 22030
Telephone: (703) 352-7276
Counsel for *Amici Curiae*

CORPORATE DISCLOSURE STATEMENT

NATIONAL RIFLE ASSOCIATION

The National Rifle Association of America, Inc., has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

CALIFORNIA RIFLE & PISTOL ASSOCIATION

The California Rifle & Pistol Association has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

Date: September 29, 2008

Respectfully Submitted,
National Rifle Association of America,
Inc.,California Rifle & Pistol Association
Amici Curiae

By Counsel C. D. Michel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

OTHER AUTHORITY (CONT.)

BOOKS & ARTICLES

IDENTITY OF THE *AMICI CURIAE*

National Rifle Association

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has approximately four million individual members and 10,700 affiliated members (clubs and associations) nationwide. NRA's purposes, as set forth in its Bylaws, include the following:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens . . . .

NRA's interest in this case stems from the fact that large numbers of NRA members reside in the States encompassed within the Ninth Circuit and will be affected by any ruling this Court may make concerning whether the right of the

people to keep and bear arms guaranteed in the Second Amendment is protected from State infringement under the Fourteenth Amendment.

California Rifle & Pistol Association

The California Rifle and Pistol Association, Inc. ("CRPA") is a non-profit membership organization with roughly 65,000 members. CRPA is incorporated under the laws of California, with headquarters in Fullerton. Among its other activities, CRPA works to preserve constitutional and statutory rights of gun ownership, including the right to self-defense and the right to keep and bear arms.

Consent to File

All parties have consented to the filing of this *amici curiae* brief.

Date: September 29, 2008

Respectfully Submitted,
National Rifle Association of America, Inc., California Rifle & Pistol Association
Amici Curiae

By Counsel C. D. Michel

ARGUMENT

I. Introduction

This case concerns the validity of Alameda County Code § 9.12.120(b), which provides: "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." It appears to be undisputed that the legislative motive was to ban gun shows, i.e., exhibitions of firearms involving both political speech and commercial speech, including the lawful purchase and sale of firearms. The County allows shows in which other lawful products are bought and sold. This brief focuses on whether the ordinance infringes on the right to keep and bear arms under the Second and Fourteenth Amendments.

II. *Heller* Clarifies That the Supreme Court Has Left Open Whether the Fourteenth Amendment Incorporates the Second Amendment, and Suggests That it Does

District of Columbia v. Heller, 128 S. Ct. 2783 (2008), held that a prohibition on possession of handguns in the home violated the individual right to keep and bear arms guaranteed by the Second Amendment. *Heller* further clarified that its prior precedents have not resolved whether the Second Amendment is incorporated into the Fourteenth Amendment so as to prohibit states and localities from infringing on the right to keep and bear arms, but

strongly implied that it does.

Heller recognizes the right to keep and bear arms as an explicitly-guaranteed right alongside other fundamental rights. "[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."[1] Rejecting the rational-basis standard of review, *Heller* states:

> Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments ...").[2]

Similarly, in rejecting an "interest-balancing inquiry," *Heller* states that the First Amendment contained no exception for unpopular views, and "the Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people . . . ." This "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[3]

---

[1] *Id.* at 2797.

[2] *Id.* at 2818 n.27.

[3] *Id.* at 2821.

Specifically regarding incorporation, *Heller* noted conflicting views in the antebellum era about whether the Bill of Rights applied to the states, discussed Reconstruction views suggesting that the Fourteenth Amendment's framers intended to protect Second Amendment rights, and clarified that its nineteenth-century decisions left the issue open.

First, *Heller* recognized prominent antebellum opinions by state supreme courts that the Second Amendment applied directly to the states.[4] *Heller* also cited decisions upholding state prohibitions on free blacks from bearing arms on the basis that they had no constitutional rights.[5] The Court further quoted antebellum commentators who wrote that the states may not violate the Second Amendment.[6]

---

[4] *Id.* at 2809, quoting *Nunn v. State,* 1 Ga. 243, 251 (1846), that the Second Amendment protects the "*natural* right of self-defense" and explaining:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia,* shall not be *infringed,* curtailed, or broken in upon, in the smallest degree . . . . Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right* . . . .

[5] *Id.* at 2808, citing *Aldridge v. Commonwealth*, 4 Va. 447, 2 Va. Cas. 447, 449 (Gen. Ct. 1824).

[6] *Id.* at 2805-06, quoting William Rawle, *A View of the Constitution of the United States of America* 121-22 (1825), as follows:

> No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if

While *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L.Ed. 672 (1833), opined that the Bill of Rights did not apply directly to the states, that was before adoption of the Fourteenth Amendment, which was intended to overturn *Barron*.[7]

Second, *Heller* discusses in detail the intent of the Reconstruction Congress to protect the right of freed slaves to keep and bear arms from state infringement by its proposal of the Fourteenth Amendment and passage of civil rights legislation. "In 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 free slaves."[8] As the Court noted, "Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they

---

> in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

[7] "Representative [John] Bingham . . . explained that he had drafted §1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), especially in mind." *Monell v. Dept of Social Services*, 436 U.S. 658, 686-87 (1978). On the same page of that speech, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States . . . made so by the Fourteenth Amendment." Cong. Globe, 42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871).

[8] *Heller*, 128 S. Ct. at 2809-10, citing S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998).

infringed blacks' constitutional right to keep and bear arms."[9]

Heller quoted the following from the Freedmen's Bureau Act of 1866: "[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race

---

[9] *Id.* at 2810. *Heller* quoted the following instances:

> A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: "[T]he civil law [of Kentucky] prohibits the colored man from bearing arms. . . . Their arms are taken from them by the civil authorities. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*." H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236. A joint congressional Report decried:
>
> "in some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freemen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.' The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with fire-arms, and they need them to kill game for subsistence, and to protect their crops from destruction by birds and animals." *Joint Comm. on Reconstruction*, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p. 229 (1866) (Proposed Circular of Brigadier General R. Saxton).
>
> The view expressed in these statements was widely reported and was apparently widely held. For example, an editorial in *The Loyal Georgian* (Augusta) on February 3, 1866, assured blacks that "[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." Halbrook 19.

or color, or previous condition of slavery . . . ."[10] As discussed below, the Act was passed by over two-thirds vote of the same Congress that proposed the Fourteenth Amendment.

The Court noted that "Similar discussion attended the passage of the Civil Rights Act of 1871 and the Fourteenth Amendment." "With respect to the proposed Amendment, Senator Pomeroy described as one of the three 'indispensable' 'safeguards of liberty . . . under the Constitution' a man's 'right to bear arms for the defense of himself and family and his homestead.'"[11] The Court quoted similar material on the origins of the Civil Rights Act.[12] *Heller* concluded:

---

[10] *Id.* at 2810-2811, quoting 14 Stat. 176-177 (1866). *Heller* added:
> The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in congressional discussion of the bill, with even an opponent of it saying that the founding generation "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).

[11] *Id.* at 2811, citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866). *Heller* added:
> Representative Nye thought the Fourteenth Amendment unnecessary because "[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense." *Id.*, at 1073 (1866).

[12] *Id.* at 2810-11, quoting Representative Butler as saying of the Act: "Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same." H. R. Rep. No. 37, 41st Cong., 3d Sess., pp. 7-8 (1871).

"It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense."[13]

Third, *Heller* clarified that the Court has never decided whether the Second Amendment applies to the states through the Fourteenth Amendment. Like the First and Fourth Amendments, the Second Amendment recognizes a "pre-existing right" about which the Court stated in *United States* v. *Cruikshank* (1876): "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed . . . ."[14] *Cruikshank*, "in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government." It stated about the Second Amendment right of "bearing arms for a lawful purpose" that "the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes" to the States' police power.[15]

Heller commented: "With respect to *Cruikshank*'s continuing validity on

---

[13] *Id.* at 2811.

[14] *Id.* at 2797, quoting *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876).

[15] *Id.* at 2812-13, quoting *Cruikshank*, 92 U.S. at 553.

incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."[16]

The Court added that its decisions in *Presser v. Illinois* (1886) and *Miller* v. *Texas* (1894) "reaffirmed that the Second Amendment applies only to the Federal Government."[17]

Heller quoted *Presser* as having held that forbidding military organizations or armed parades in cities without authorization did not violate the right to bear arms, noting that the Fourteenth Amendment was not part of that discussion and concluding: "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations."[18]

While *Heller* does not discuss *Miller v. Texas* (1894) further, the Court

---

[16] *Id.* at 2813 n.23.

[17] *Id.*, citing *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886) and *Miller* v. *Texas*, 153 U.S. 535, 538 (1894).

[18] *Id.* at 2813, quoting *Presser* v. *Illinois*, 116 U.S. 252, 264-65 (1886). *Heller* distinguishes "*Presser*'s brief discussion of the Second Amendment with a later portion of the opinion making the seemingly relevant (to the Second Amendment) point that the plaintiff was not a member of the state militia. . . . [T]hat later portion deals with the *Fourteenth Amendment;* it was the *Fourteenth Amendment* to which the plaintiff's nonmembership in the militia was relevant." *Id.*

decided in that case that the Second and Fourth Amendments did not apply directly to the states, and refused to consider whether these provisions applied to the states through the Fourteenth Amendment because that argument had not been made in the courts below.[19]

In sum, *Heller* clarifies that the Supreme Court did not in its prior precedents reject incorporation of the Second Amendment into the Fourteenth Amendment, and strongly suggests that it does. As *Heller* comments, *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."[20]

It is incumbent on this Court to do so.

III. *Heller* Supercedes *Fresno Rifle*, Which Conflicts with Prior Supreme Court Precedent

"Where intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority" — including when the irreconcilability is in the "mode of analysis" and not just square conflict in the specific holdings — "a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having

---

[19] *Miller* v. *Texas*, 153 U.S. 535, 538 (1894).

[20] *D. C. v. Heller* at 2813 n.23.

been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003).[21] *Heller* undermines Ninth Circuit precedent on the meaning of the Second Amendment and on whether it is incorporated into the Fourteenth Amendment.

Heller's holding that the Second Amendment guarantees an individual right to keep and bear arms overrules this Circuit's rulings that it protects only a "collective" state right to maintain militias. See *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996); *Silveira v. Lockyer,* 312 F.3d 1052, *reh. denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).

Fresno Rifle & Pistol Club v. Van de Kamp, 965 F.2d 723, 729-31 (9th Cir. 1992), held that the Second Amendment is not incorporated into the Fourteenth Amendment so as to protect the right to keep and bear arms from State infringement. As *Heller* clarifies, *Fresno Rifle* failed to read prior Supreme Court precedent properly and is inconsistent with *Heller*'s own analysis.

---

[21] "When an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point, a three judge panel of this court may reexamine our precedent to determine its continuing authority." *United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985).

Fresno Rifle held that *Cruikshank*[22] and *Presser*[23] applied even though they mention only the *direct* application of the First and Second Amendments to the States, and did not address whether these are incorporated into the Fourteenth Amendment.

Fresno Rifle stated that since *Miller v. Texas* predated the first incorporation case,[24] "there is no reason to believe that *Miller* left open the incorporation question any more than *Cruikshank* or *Presser*." 965 F.2d at 730. Yet *Miller* held that the Second and Fourth Amendments did not *directly* apply to the states. 153 U.S. at 538. *Miller* explicitly stated that it was *not* deciding the incorporation question of whether the Fourteenth Amendment protects the right to keep and bear arms.[25]

---

[22] *Fresno Rifle* cites *Cruikshank* as having "held" that the Second Amendment does not constrain the States. 965 F.2d at 729. Yet no State action was involved in *Cruikshank*, which concerned the prosecution of *private individuals* for violation of freedmen's rights to assemble and bear arms. 92 U.S. at 554-55.

[23] *Presser* held that a prohibition on unlicensed armed marches in cities "do[es] not infringe the right of the people to keep and bear arms," adding in dictum that the First and Second Amendments do not, in and of themselves, limit state action. 116 U.S. at 265, 267.

[24] *Chicago, B.& Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

[25] "If the Fourteenth Amendment limited the power of the States as to such rights [i.e., the rights to bear arms and against warrantless searches] as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." *Id.* at 538-39. The Court would not hear assignments of error not timely made in the court below. *Id.*

In rejecting the argument "that the Court itself has recognized that the incorporation of the Second Amendment is an open question," *Fresno Rifle* fell back on the fact that "the *Miller* Court cited *Cruikshank* in reaffirming 'that the restrictions of [the Second Amendment] operate only upon the Federal power.'" 965 F.2d at 730. This position is now untenable under *Heller*: "With respect to *Cruikshank*'s continuing validity on incorporation, . . . we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23.

United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), commented on *Cruikshank*, *Presser*, and *Miller*: "As these holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us."

The Ninth Circuit agreed with the above statement in *Silveira,* 312 F.3d at 1067, which noted that "*Fresno Rifle* itself relied on" *Cruikshank* and *Presser*, which were "decided before the Supreme Court held that the Bill of Rights is

incorporated by the Fourteenth Amendment's Due Process Clause." *Silveira*, *id.*, continued:

> Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we 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.

Rather than characterizing those cases as resting on a discredited principle, it suffices to note that these old precedents are simply inapplicable. They held only that the Bill of Rights does not apply directly to the states, and did not consider whether the Fourteenth Amendment incorporates those rights. For that, one must look to twentieth-century jurisprudence.

The Second Amendment describes an explicitly-guaranteed right which is fundamental in the same sense as are other substantive rights in the Bill of Rights. A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).

Now that *Heller* has recognized the Second Amendment as protecting individual rights, it should be recognized as incorporated into the Fourteenth

Amendment as are other substantive rights.[26] "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956). No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

As explained in *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992), the Fourteenth Amendment protects specific Bill of Rights guarantees but is not limited to them:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures;

---

[26] *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states."); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("the right [to assemble] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, – principles which the Fourteenth Amendment embodies in the general terms of its due process clause.").

and so on." (Citation omitted.)[27]

In this post-*Heller* epoch, the following statement is even more compelling: "We should . . . revisit whether the requirements of the Second Amendment are incorporated into the Due Process Clause of the Fourteenth Amendment." *Nordyke v. King*, 319 F.3d 1185, 1193 & n.3 & 4 (9th Cir. 2003) (Gould, C.J., specially concurring) (noting that *Hickman* and *Silveira* were wrongly decided and discussing literature on incorporation).

Another major flaw in *Fresno Rifle* is that it rejected the rule that "in interpreting a constitutional provision, the fundamental principle of construction is to give the provision the effect intended by the framers and the people adopting it." *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1976). "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

Fresno Rifle disregarded these principles by refusing to consider what it characterized as "remarks of various legislators during passage of the Freedmen's

---

[27] *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 (9th Cir. 1989) (same).

Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights act of 1871." 965 F.2d at 730. Actually, the "remarks" directly explained the Fourteenth Amendment – when Senator Jacob M. Howard introduced the Fourteenth Amendment to the Senate in 1866, he referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (May 23, 1866), quoted in *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring).

Moreover, far more was involved than "remarks." Over two-thirds of the same Congress which passed the Fourteenth Amendment also enacted the Freedmen's Bureau Act, which – as *Heller* notes – protected from State infringement the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, real and personal, including the constitutional right to bear arms . . . ."[28] This Act, and the companion Civil Rights Act of 1866, sought to guarantee the same rights as the Fourteenth Amendment.

---

[28] Cong. Globe, 39th Cong., 1st Sess. 3842, 3850 (July 16, 1866), §14, 14 Stat. 173, 176 (1866).

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 423-24, 436 (1968); *Regents of University of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (Marshall, J.).

The Fourteenth Amendment was intended to eradicate state action infringing on the right to keep and bear arms – specifically the Black Codes, under which "Negroes were not allowed to bear arms . . . ." *Bell v. Maryland*, 378 U.S. 226, 247-48 & n.3 (1964) (Douglas, J., concurring). As explained by Circuit Judge Kleinfeld:

> After the Civil War, southern states began passing "Black Codes," designed to limit the freedom of blacks as much as possible. The "Black Codes" often contained restrictions on firearm ownership and possession. . . . A substantial part of the debate in Congress on the Fourteenth Amendment was its necessity to enable blacks to protect themselves from White terrorism and tyranny in the South. Private terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the violence of such groups could only be realistically resisted with private firearms. When the state itself abets organized terrorism, the right of the people to keep and bear arms against a tyrant becomes inseparable from the right to self-defense.[29]

---

[29] *Silveira v. Lockyer*, 328 F.3d 567, 577 (9th Cir. 2003) (Kleinfeld, C.J., joined by C.J.s Kozinski, O'Scannlain, & T.G. Nelson, dissenting from denial of rehearing en banc), citing Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro Americanist Reconsideration,* 80 Geo. L.J. 309, 344-45 (1991); Stephen P. Halbrook, *That Every Man Be Armed* 110-15 (2d ed.1994). Circuit Judge Kleinfeld continued, 328 F.3d at 577 n.53:

> Chief Justice Taney . . . had earlier led the Supreme Court to deny citizenship to blacks precisely because it was so unthinkable they should have the full rights of citizenship-including the right "to keep and carry arms wherever they

Consistent with the language of the Freedmen's Bureau Act, Fourteenth Amendment jurisprudence recognizes protection from state infringement of the "indefeasible right of personal security, personal liberty and private property." *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965). No state may commit "a violation of [the] constitutional right to personal security, a liberty interest protected by the fourteenth amendment."[30] *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989). At the core of the right to personal security is the right to have arms to protect oneself and one's loved ones. "The Second Amendment embodies the right to defend oneself and one's home against physical attack." *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996).

IV. Historically, the Right to Keep and Bear Arms Has Been Regarded as a Fundamental Right

Based on the English experience and the first State constitutions, the County argues that the right to possess firearms was not regarded as fundamental. To the contrary, Second Amendment rights were viewed as fundamental as First

---

went." *Dred Scott v. Sandford,* 60 U.S. 393, 417, 19 How. 393, 15 L.Ed. 691 (1857).

[30] *See also United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220 (9th Cir. 1988), *rev'd on other grounds* 494 U.S. 259 (1990) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.") (quoting 2 J. Kent, COMMENTARIES 1 (1827)).

Amendment rights.

The English Bill of Rights of 1689 declared certain "true, ancient and indubitable rights," including: "That the Subjects which are Protestants, may have Arms for their Defense suitable to their Condition, and as are allowed by Law." *An Act Declaring the Rights & Liberties of the Subject*, 1 W. & M., Sess. 2, c.2 (1689). The only other individual right it recognized was the right to petition. *Id.* A free press and freedom of religion were not mentioned.

The County notes that the arms right "was a qualified right (by class, religion and other factors), and was not enforceable against Parliament." County Br. 71. Further, "Blackstone characterized that right to have arms as 'allowed by law' as an auxiliary, not a primary right." *Id.*

Blackstone stated that the "primary rights, of personal security, personal liberty, and private property," were protected by auxiliary rights, including petition and "the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire . . . ." 1 Blackstone, *Commentaries* *140. The right "of having arms for their defense suitable to their condition and degree, and such as are allowed by law" reflected "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

*139. St. George Tucker, the first commentator on the Constitution, counterposed that the right under the Second Amendment is "without any qualification as to their condition or degree, as is the case in the British government." 1 Blackstone, *Commentaries* *143 n.40 (Tucker ed. 1803).

The English Bill allowed "due restrictions," and as the County notes, "Parliament currently prohibits almost all personal possession of handguns." County Br. 17. Tucker commented how the English game laws only allowed the gentry to keep arms, and that "no others can keep a gun for their defense; so that the whole nation are completely disarmed, and left at the mercy of the government . . . ." *Id.* at *414 n.3. "In America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty." *Id.*

Similary, James Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast with the "several kingdoms of Europe, which . . . are afraid to trust the people with arms." *The Federalist* No. 46, *Documentary History of the Ratification of the Constitution* (1984), vol. 15, at 492-93 (hereafter "*Documentary History*").

The County notes that Parliament had absolute power to legislate over this right. County Br. 19, 22. The Americans rejected this power. Madison's notes

for his speech introducing the Bill of Rights to Congress in 1789 noted a "fallacy . . . espec[iall]y as to English Decl[aratio]n. of Rights – 1. mere act of parl[iamen]t. 2. no freedom of press – . . . arms to protest[an]ts." *Papers of James Madison* (1979), vol. 12, at 193-94. The English Declaration was deficient because it could be repealed by Parliament, failed to mention a free press, and unduly limited the arms guarantee.

The County claims that "Tucker never explicitly linked a personal right to possess firearms to this right of self-preservation" and that "Tucker's reference to the Amendment as the 'true palladium of liberty'" referred to State militia powers. County Br. 28, citing Saul Cornell, *St. George Tucker & the Second Amendment*, 47 Wm. & Mary L. Rev. 1123, 1125-1131 (2006). Yet Tucker actually said about the Amendment:

> This may be considered as the true palladium of liberty. . . . The right of self defense is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever . . . 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.

Tucker, *View of the Constitution*, in 1 Blackstone, *Commentaries* at 300 (Tucker ed. 1803).[31]

---

[31] See further Stephen P. Halbrook, "St. George Tucker's Second Amendment: Deconstructing 'The True Palladium of Liberty,'" 3 *Tennessee Journal of Law & Policy*, No.

The County further asserts: "At the time of the Founding until well after the Second Amendment was ratified in 1791, eight of the original 13 States – Connecticut, Delaware, Maryland, New Hampshire, New Jersey, New York, Rhode Island, and South Carolina – had *no* provision in their constitutions even mentioning arms . . . ." County Br. 32. This is unsurprising in that most of these states had no bill of rights and none mentioned free speech.[32]

The right to arms was considered fundamental in each of the original states. See Stephen P. Halbrook, *The Founders' Second Amendment* (2008), chapters 6 &7 (first state constitutions), 9-11 (state demands for federal bill of rights). Nine states adopted an arms guarantee and/or demanded one for the federal Constitution. Five states had constitutions which did not explicitly recognize the rights to free speech or to arms, and some limited religious freedom. The right to have arms was as fundamental as free speech.

Virginia was the first state to adopt a bill of rights, which recognized a

---

2, 120 (Spring 2007). http://stephenhalbrook.com/law_review_articles/Deconstructing_The_True_Palladium of_Liberty.pdf.

[32] The County further suggests that of the numerous arms guarantees eventually adopted, differing language implies that the right is not fundamental. County Br. at 47. Since the States also adopted varied provisions on freedom of speech and religion, that argument cannot be taken seriously.

militia "composed of the body of the people, trained to arms," but did not explicitly mention arms or speech as a "right." Va. Dec. of Rights (1776), Art. XIII. While not formally proposed, Thomas Jefferson wrote a draft protecting freedom of religion and the press, and that "No freeman shall ever be debarred the use of arms." *Papers of Thomas Jefferson* (1950), vol. 1, at 344-45. Virginia later demanded that the proposed U.S. Constitution be amended to declare: "That the people have a right to keep and bear arms . . . ." Elliot ed., *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), vol. 3, at 658-59 (hereafter "*Debates*").

Pennsylvania was the first state to declare: "That the people have a right to bear arms for the defense of themselves, and the state . . . ." Pa. Declaration of Rights, Art. XIII (1776). Vermont adopted an identical provision. Vt. Const., Art. I, § 15 (1777).

North Carolina declared: "That the People have a right to bear Arms for the Defense of the State . . . ." N.C. Dec. of Rights XVII (1776). Its draftsmen included members of the Continental Congress[33] who wrote: "It is the Right of every English Subject to be prepared with Weapons for his Defense." *North*

---

[33] They were convention President Richard Caswell and Joseph Hewes. *Colonial Records of North Carolina* (1890), vol. 10, at 918-19.

Carolina Gazette (Newbern), July 7, 1775, at 2, col. 3. North Carolina later demanded that the federal Constitution declare: "That the people have a right to keep and bear arms . . . ." Elliot ed., *Debates*, vol. 4, at 244.

New York's constitution had no bill of rights and did not mention speech or arms. N.Y. Const. (1777). It would demand that the federal Constitution declare: "That the people have a right to keep and bear arms . . . ." Elliot ed., *Debates*, vol. 1, at 328.

Massachusetts declared "unalienable rights" of men, including that of "defending their lives and liberties." Mass. Dec. of Rights, Art. I (1780). It further declared: "The people have a right to keep and bear arms for the common defence." *Id.* Art. XVII. Samuel Adams later proposed that the U.S. Constitution "be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . ." *Documentary History* (2000), vol. 6, at 1453.

New Hampshire declared "inherent rights," including "defending life and liberty." N.H. Bill of Rights, Art. II (1784). It did not mention a personal right to speech or arms. But New Hampshire demanded that the U.S. Constitution provide: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." *Documentary History* (1995), vol. 18, at 188.

Rhode Island did not adopt a constitution in the founding period, but demanded that the U.S. Constitution state: "That the people have a right to keep and bear arms . . . ." Elliot ed., *Debates*, vol. 1, at 335. Its first constitution declared: "The right of the people to keep and bear arms shall not be infringed." R.I. Const., Art. I, § 22 (1842).

South Carolina's constitution had no bill of rights, but it decried British oppression against "unarmed people," justifying the colonists in "taking up arms . . . to defend themselves and their properties against lawless invasions and depredations." S.C. Const. (1776).

New Jersey's constitution had no bill of rights, and it limited civil rights to Protestants. N.J. Const., Art. XVIII (1776). Georgia's constitution had no bill of rights. Ga. Const. (1777). Neither mentioned speech or arms.

Delaware's Declaration of Rights did not mention speech or arms, and recognized rights only to Christians. Del. Dec. of Rights, Art. III (1776). Maryland's was the same. Md. Dec. of Rights, Art. XXXIII (1776).

Connecticut did not adopt a constitution in the founding period, but its inhabitants were "trained to arms." Richard Price, *Observations on the Importance of the American Revolution* (1784), 58. Its first constitution declared: "Every citizen has a right to bear arms in defense of himself and the State." Conn. Const.,

Art. I, § 17 (1818).

In sum, the English Bill of Rights recognized only two individual rights – petition and arms. The Americans had more expansive views of the arms right, and, by adopting state guarantees as well as the Second Amendment, removed the legislative power to infringe on it. Historically, the right to keep and bear arms was regarded as fundamental.

V. The Prohibition Here Violates the Right to Keep and Bear Arms

Alameda County Code § 9.12.120(b) provides: "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." This is facially overbroad, in that it is not a reasonable regulation of the place of exercise of the right to keep and bear arms. It is unconstitutional as applied, in that its purpose is to ban gun shows on County property, where other lawful products are allowed to be sold.

First, the ordinance prohibits possession of a firearm on any County property rather than specific, sensitive County places. As *Heller* noted, "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ." 128 S. Ct. at 2816-17.

However, in invalidating the D.C. handgun ban, *Heller* approved of a

decision which "held that a statute that forbade openly carrying a pistol 'publicly or privately, *without regard to time or place, or circumstances*,' . . . violated the state constitutional provision (which it equated with the Second Amendment)." *Heller*, 128 S. Ct. at 2818, quoting *Andrews v. State*, 50 Tenn. 165, 187 (1871) (emphasis added). The ordinance here is overbroad because it includes no reasonable time, place, or manner restrictions.

Second, the purpose of the ordinance is to prevent gun shows at the County fairgrounds, where other lawful products are allowed to be bought and sold. In explaining the right to keep arms for self defense, *Heller* approved the following language: "[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace." 128 S. Ct. at 2809, quoting *Andrews,* 50 Tenn. at 178. In the preceding sentence, *Andrews* stated:

> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

Id.

The constitutional right to possess an object, whether it be a book or a firearm, implies the right to buy and sell such object. "Without those peripheral rights the specific rights would be less secure." *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (holding that free speech and press include "the right to distribute, the right to receive, . . . and freedom to teach").

In light of the above, the Ordinance, by prohibiting mere possession of a firearm on County property, infringes on the right to keep and bear arms, which is guaranteed by the Second and Fourteenth Amendments.

CONCLUSION

The Court should reverse the judgment of the district court, declare as void Alameda County Code § 9.12.120(b), and remand the case for an appropriate injunction against enforcement thereof.

Date: September 29, 2008

Respectfully Submitted,
National Rifle Association of America, Inc.,
& California Rifle & Pistol Association
Amici Curiae

By Counsel C. D. Michel

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached *amici curiae* brief is proportionately spaced, has a typeface of 14 points and contains 7000 words.

Date: September 29, 2008

Respectfully Submitted,
National Rifle Association of America, Inc.,
& California Rifle & Pistol Association
Amici Curiae

By Counsel C. D. Michel

CERTIFICATE OF SERVICE

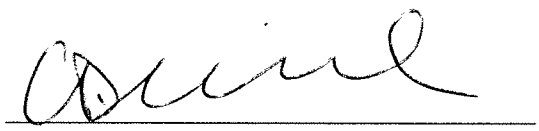
I hereby certify that I caused two copies of the foregoing to be mailed first class, postage prepaid on this 30th day of September, 2008, to:

Donald E. J. Kilmer, Jr.
Law Offices of Donald Kilmer
1261 Lincoln Avenue, Suite 111
San Jose, California 95125-3030

Sayre Weaver, Esq.
Richards Watson & Gershon
355 South Grand Ave.
Los Angeles, CA 90071-3101

T. Peter Pierce, Esq.
Richards Watson & Gershon
355 South Grand Ave.
Los Angeles, CA 90071-3101

Richard Winnie, Esq.
Alameda County Counsel
1221 Oak Street, Suite 463
Oakland, California 94612-4296



C. D. MICHEL