

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

vs.

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

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

**SUPPLEMENTAL REPLY BRIEF
OF APPELLANTS
RE: SECOND AMENDMENT ISSUES**

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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: October 6, 2008



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| Akhil Reed Amar, <u>The Bill Of Rights</u> p. 260 (Yale U. Press 1998) | 27 |
| <u>Black's Law Dictionary</u> 1091 (5th ed. 1977) | 2 |
| 3 Blackstone's Commentaries Ch. 1 (1765-1769) | 12 |
| Stephen Halbrook, <u>St. George Tucker's Second Amendment: Deconstructing 'The True Palladium of Liberty'</u> 3 Tennessee Journal of Law and Policy 120 (2007) | 14 |
| Thomas Hobbes, <u>Leviathan</u> (1651) | 12 |
| Don B. Kates, <u>Genocide, Self Defense and the Second Amendment</u> 29 Hamline Law Review (2006) | 13 |
| Don B. Kates, <u>Handgun Prohibition and the Original Meaning of the Second Amendment</u> , 82 Mich. L. Review 203 (1983) | 14 |
| Davd B. Kopel, Stephen P. Halbrook, Ph.D., Alan Korwin, <u>Supreme Court Gun Cases – Two Centuries of Gun Rights Revealed</u> (Bloomberg Press, Phoenix, AZ, 2004) | 8 |
| Alfred Lief, <u>The Brandeis Guide to the Modern World</u> p. 212 (1941) | 2 |
| Nelson Lund, <u>Outsider Voices on Guns and the Constitution</u> 17 Constitutional Commentary 707-708 (2000) | 14 |
| 1 St, George Tucker, Blackstone's Commentaries With Notes of Reference to the Constitution and Law of the Federal Government 143 n.40 (1803) | 14 |
| 3 James Wilson, <u>The Works of the Honourable James Wilson, L.L.D</u> 84 (Bird Wilson, ed., 1804). | 12 |

I. INTRODUCTION

Our opening (supplemental) brief, asserted that the factual record from the district court suffices to allow this Court to decide whether the challenged ordinance violates the Second Amendment. Appellees apparently agree for they do not suggest in their opening brief that the case be returned to the district court for some further development of the factual record.

Much of Appellees' opening brief seems directed toward arguing that *District of Columbia v. Heller*, 554 U.S. ____ (2008), was wrongly decided. We take the liberty of quoting Appellees' brief back to them: "Needless to say, only th[e] [Supreme] Court may overrule one of its precedents.' *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983)."

Next, like a magical incantation, Appellees keep citing a brief phrase from a footnote in a ten year old book by Justice Scalia – almost as if those words had appeared in a recent Supreme Court opinion. The point is that those words do not appear in *Heller* (which reflects the opinion of The Supreme Court, not the private opinion of one judge).

Moreover the *Heller* opinion itself states that the incorporation issue is still an open question. *Heller*, 128 S.Ct. at 2813 n.23 (2008).

Insofar as a single jurist's private opinions are of interest, we offer Justice Brandeis' view of the fundamental importance of self-defense: "We shall have lost something vital and beyond price on the day when the state denies us the right to resort to force"¹

We concur with Appellees' assertion that Heller holds that gun sales are subject to "regulation." (Appellees' brief, p. 3) That is why we have emphasized the federal regulations, and even more intensive state regulations which our gun shows have always obeyed. Appellants' faithful compliance with these state and federal regulations is an undisputed fact, acknowledged by the California Department of Justice, which the Appellees have conceded. [JSUF ¶¶ 43, 44, 49, 50, 85]

The simple response to Appellees' assertion of the County's power to regulate – is that "regulation" does not mean prohibition. Indeed the word implies that the regulated activity is being allowed to occur. Contra-wise the word "prohibit" literally means "To forbid by law; to prevent; – *not synonymous with 'regulate.'*" Black's Law Dictionary 1091 (5th ed. 1977) (emphasis added)

Appellees ignore the distinction Judge Gould noted in his earlier

¹ Alfred Lief, THE BRANDEIS GUIDE TO THE MODERN WORLD, p. 212 (Little Brown & Co. 1941).

