CIVIL NO: 07-15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs and Appellants,

vs.

MARY V. KING, et al.,

Defendants and Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. MARTIN J. JENKINS,
(CASE NO. CV-99-04389-MJJ)

APPELLEES' SUPPLEMENTAL BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court is aware from Appellee's Answering Brief, the Ordinance challenged in this lawsuit generally prohibits firearms possession on a limited category of Alameda County's own property, consisting principally of open space venues, such as County-owned parks, recreational areas, historic sites, parking lots of public buildings (the State prohibits gun possession within the same buildings), and the County fairgrounds. The existence of a separate corporate body, the Housing Authority of the County of Alameda, precludes the County from owning any residential property. *See* Cal. Health & Safety Code Sections 34240, 34201(c), 34400(d), 34315(b), (e), (f). Because the County owns no residential property, the Ordinance does not reach any residential property. The Ordinance was enacted in the wake of a mass shooting at the County Fairgrounds.

The Supreme Court's recent decision in *District of Columbia v. Heller*, – U.S. –, 128 S.Ct. 2783, – L.Ed. 2d – (2008), mandates several conclusions regarding the challenged Ordinance and the

Second Amendment. First, the Second Amendment is a constraint only on Congress, not the States and their political subdivisions and, therefore, whatever the scope of the right protected by that Amendment, it does not constrain the County. *See* Section III below.

Second, as Justice Scalia has explained, "properly understood, [the Second Amendment] is no limitation upon arms control by the states." Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law*, 136-137, n.13 (Princeton University Press 1997). As explained below, this conclusion is mandated by the nature of the right which the Supreme Court understands and explains in *Heller* is at the heart of the Second Amendment – the right of self-preservation. This conclusion is also mandated by the structure of our federal system, which denies to the national government and reposes in the States, the police power, a power essential to ensuring self-preservation. *See* Sections III.A, F and G below.

Further, under the Supreme Court's modern incorporation test, there would be no basis for incorporating the Second Amendment as a constraint on the States. The relevant historical sources and practices demonstrate that an individual right to possess firearms for

purely personal self-defense purposes is not so rooted in the traditions of this country to be ranked as fundamental. To give but one example, while the first constitutions of the original thirteen States all provided for a right to a jury trial in criminal cases, only one of those constitutions provided for a right to possess "arms" in any context other than public defense. *See* Section III.D.1 below. Many States have never provided constitutional protection for arms possession for purely personal self defense. Of the States that do provide such protection today, in only three have the state courts found the right protected to be fundamental. *See* Section III.G.1 below.

Moreover, even if the incorporation bar did not exist, the Second Amendment is not implicated by the Ordinance. Under *Heller*, the Ordinance is presumptively valid because it regulates "sensitive" venues. The Ordinance is also presumptively valid under *Heller* because the Nordykes challenge the impact of the Ordinance with respect to commercial sales of firearms at their gun shows, and *Heller* states the regulation of commercial sales of guns is presumptively valid. No plaintiff in this lawsuit has ever claimed that the Ordinance burdens his individual right to possess a firearm for the

purpose of self-defense from some sudden and imminent threat of violence. *See* Section IV below. The narrow right acknowledged in *Heller*, individual possession of a handgun in the home for personal self-defense, has no relevance to this lawsuit.

II. THE SECOND AMENDMENT HAS NOT BEEN INCORPORATED THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876), the Supreme Court held that the Second Amendment constrains only the federal government. "The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . ." *Id* at 553.

On the same basis, a few years later, the Court rejected a Second Amendment challenge to the Military Code of Illinois, citing *Cruikshank*. *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed.2d 615 (1886). The Court again relied upon *Cruikshank* in

upholding a Texas ban on carrying dangerous weapons against a Second Amendment challenge: "[I]t is well settled that the restrictions of th[is] amendment[] operate only upon the federal power, and have no reference whatever to proceedings in state courts." *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed 812 (1894).

Heller acknowledges that it had no occasion to opine upon *Cruikshank's* validity today. *Heller*, 128 S.Ct. at 2813 n.23. It nevertheless mentions that *Presser* and *Miller* "reaffirmed that the Second Amendment applies only to the Federal Government." *Ibid.* After *Heller*, the law remains that the Second Amendment constrains only the Federal Government and not the States and their political subdivisions.

This Court expressly observed in *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 729 (9th Cir. 1992), that the Ninth Circuit is foreclosed by *Cruikshank* and *Presser* from considering whether the Second Amendment is (or should be) incorporated through the Fourteenth Amendment. On that issue, "it is for the Supreme Court, not us, to revisit the reach of the Second Amendment." *Id.* at 730. "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, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) (per curiam reversal of Ninth Circuit decision that wrongly concluded Supreme Court precedent no longer good law).

Accordingly, this Court's earlier ruling in *Nordyke v. King*, 319 F.3d 1185, 1192 (9th Cir. 2003), that the Nordykes cannot maintain a claim under the Second Amendment, still stands (although now for a different reason).

III. EVEN HAD THIS COURT NOT PREVIOUSLY HELD THAT THE SECOND AMENDMENT CONSTRAINS ONLY CONGRESS, IT SHOULD SO CONCLUDE BECAUSE, AS JUSTICE SCALIA HAS EXPLAINED, PROPERLY UNDERSTOOD, THE SECOND AMENDMENT IS NO LIMITATION UPON ARMS CONTROL BY THE STATES.

A. As *Heller* Reveals, In Our Federal System, Effectuation Of The Core Right Protected By The Second Amendment Mandates That The Amendment Remain A Constraint Only on Congress.

Justice Scalia, author of the majority opinion in *Heller,* has long maintained that the Second Amendment is a guarantee that the *federal* government will not interfere with "an individual's right to bear arms for self-defense" and that, "properly understood it is no limitation upon arms control by the states." Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law*, 136-137, n.13 (Princeton University Press 1997). The *Heller* decision is fully compatible with Justice Scalia's long-held position that the Second

Amendment is a constraint only on Congress because, while declining to define the scope of the Second Amendment right, what the Court makes clear in *Heller* is that the core right protected by that Amendment is the right of self-defense or self- preservation. 128 S.Ct. at 2798-2799. Within our constitutional system, delineation of this right is left to the "ordinary administration of criminal and civil justice" within the states. *See, e.g.*, *The Federalist No. 17* (Hamilton)("There is one transcendent advantage belonging to the province of the State governments . . . – I mean the ordinary administration of criminal and civil justice.").

The linkage by the *Heller* Court between the Second Amendment and self-defense, a right firmly established in the common law tradition at the time of the Founding, explains why the Second Amendment was understood by the Founders, and should be understood today, only as a constraint against federal invasion of a power reserved to the States – the power to implement, administer, and develop the common law in accordance with the decisions of the people of each State. *See, e.g.*, *The Federalist No. 45* (James Madison), explaining that "[t]he powers delegated by the proposed

Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . .The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and posterity of the State."

In reaching its conclusion about the core right protected by the Second Amendment, the Court in *Heller* relies heavily upon Blackstone's *Commentaries on the Laws of England*, noting that the Court has acknowledged Blackstone's works to constitute "'the preeminent authority on English law for the founding generation.' [Citation]." 128 S.Ct. at 2798. According to Blackstone, the right of personal security is, along with the right to liberty and the right to property, one of the three primary rights of all individuals. 1 Blackstone at 125. Moreover, it is principally for the purpose of achieving personal security that the individual enters into society and "obliges himself to conform to those laws which the community has thought proper to establish" for the "general advantage of the public."

"But every man, when he enters into society, gives, up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain that absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and there would be no security to individuals in any of the enjoyments of life. Political therefore, or, civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."

1 Blackstone at 121.

Blackstone's concept that personal security or self-preservation is best achieved when each individual's "natural liberty" is restrained by laws enacted by the community for the general welfare clearly resonated with the American Founders. John Dickinson, known as the "Penman of the Revolution," one of the most influential delegates to the Constitutional Convention, and the only influential contributor to the U.S. Constitution who actually studied law in England, expanded on this concept in his famous *Letters of Fabius.* *See* Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 Penn St. L. Rev. 415 (2003); *see also* Gregory S. Ahern, *The Spirit of American Constitutionalism: John Dickinson's Fabius Letters*, Vol. XI, No. 2, Humanitas, National Humanistics Institute (1998). These essays, written in defense of the proposed Constitution, were widely published throughout the country in 1788 and profoundly influenced ratification. Natelson, 108 Penn St. L. Rev. at 426-427.

In his Letter III, Dickinson explains that "[e]ach individual then must contribute such a share of his rights, as is necessary for attaining **that security that is essential to freedom**." *Fabius*, First

Series, Letter III (emphasis added). In forming a political society, each individual "contributes some of his rights, in order that he may, from a common stock of rights, derive greater benefits, than he would merely from his own . . ." What the individual would lose by this submission was the "power of doing injury to others - and the dread of suffering injuries from them." What the individual would gain, on the other hand, was "protection against injuries," a "capacity of enjoying his undelegated rights to the best advantage," and the "perfect liberty" that consists in freedom from fear. *Id.*

That individuals must give up their right to use force (the power of doing injury to others) however they choose to achieve security and attain political or ordered liberty, as described by Blackstone, or "perfect liberty" as described by Dickinson, of course includes relinquishment of the right to use deadly force however and whenever one chooses. Thus, among the laws which the "community has thought proper to establish" and to which the individual "must conform" to achieve personal security and ordered liberty, are laws governing the use of deadly force, traditionally a legislative function reserved and entrusted to, the police power of the States.

This is not to say that the common law tradition has not long recognized the right of individuals to defend themselves against sudden and imminent violence. However, as Blackstone's Commentaries on self-defense reflect, even the exercise of that right is defined by the common law, which limits it to "sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law." 4 Blackstone Commentaries at 184. Moreover, the common law has traditionally defined when deadly force may be used in the face of an imminent, violent attack. According to Blackstone, all killing was a breach of the peace and thus a "public wrong." 4 Blackstone at 176-177. There were three kinds of homicide at common law: justifiable, excusable, and felonious homicide. 4 Blackstone at 176-177. According to Blackstone, only when the killing occurred out of some unavoidable necessity, and for the advancement of public justice, or for the prevention of any forcible or atrocious crime, was the killing justifiable. Killing in self-defense was excusable in certain, limited circumstances, and the common law required a person to retreat before resorting to deadly force. *Id.* at 184.

Moreover, in Blackstone's view, the common law tradition rejects the Lockean notion that all manner of force without right upon a person puts that person in a state of war with the aggressor, which thus allows the person attacked to lawfully kill the aggressor. Instead, "the law of England, like that of every other well-regulated community, is too tender of public peace, too careful of the lives of its subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death." 4 Blackstone at 181-182.

As the United States Supreme Court has made clear, it is and always has been the province of the States to legislate and regulate regarding the use of deadly force and the suppression of violence within each State, through the police power, which the Founders "denied the National Government and reposed in the States." *See United States v. Morrison*, 529 U.S. 598, 617-618 (2000) (in which the Court struck down the Violence Against Women Act as beyond the power of the federal government, stating "[t]he regulation and punishment of intrastate violence that is not directed to the

instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States . . . .[internal citations omitted.] Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims.").

Under our constitutional system, it is up to the community, through the exercise of the police power, to determine how to regulate deadly weapons within the context of lawful use of force and criminal use of force, because every weapon that may be an instrument of self-defense is equally capable of being used against another human being as an instrument of violence. As *Heller* makes clear, properly understood, the Second Amendment constrains the federal government from disarming those members of the community who are allowed by the community to possess and use arms for self-preservation, subject to those laws the community has enacted to best secure the safety of all who comprise that community. So interpreted, the Second Amendment is consistent with the long line of cases in which the Supreme Court has respected the "preeminent role of the

States in preventing and dealing with crime" and has expressed reluctance "to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced . . . ." *See Martin v. Ohio*, 480 U.S. 228, 232 (1987) (rejecting a Federal Due Process challenge to a state law placing on the accused the burden of proving the affirmative defense of self-defense by a preponderance of the evidence, and cases cited therein.)[1]

Moreover, the understanding that the Second Amendment constrains only Congress, which lacks power to regulate use of deadly force in the context of assuring public safety, provides congruity between the Amendment and that provision of the English Bill of Rights from which the *Heller* Court traced the Amendment's lineage – An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (English Bill of Rights),

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[1]As a result, the States have had wide latitude in developing the relevant legal doctrines to meet the needs of their communities and there is wide variance from state to state with respect to regulation of dangerous weapons, and the law of self defense, including under substantive and procedural criminal law and under tort law. *See* Section III.G.2 below.

1689, 1 W. & M., Sess.2, ch.2, Article 7. Article 7 provides: "That the Subjects which are Protestants may have Arms for Their Defence suitable to their Condition, and as allowed by Law." The English Bill of Rights applies only against the Crown, not Parliament. As enacted, Article 7 extended the right to personally possess arms to Protestants who otherwise met all conditions Parliament had imposed or might impose on arms possession, and subject to all restrictions on arms possession Parliament had imposed or might impose in the future. *See generally* Lois. G. Schwoerer, *To Hold and Bear Arms: The English Perspective,* 76 Chi.-Kent L. Rev. 27 (2000); *See also* H. Richard Uviller and William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 449-454 (2000). For example, Parliament currently prohibits almost all personal possession of handguns. *See* 1 Blackstone at 139, referencing this provision of the English Bill of Rights as the "fifth and auxiliary right of the subject" and describing it as "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."

(emphasis added). Thus, Blackstone also understood the auxiliary right to have arms as subject to "due restrictions" under all circumstances.

Moreover, Blackstone plainly did not understand that this was an auxiliary right necessary to preserving the people's right to overthrow a government **established by the people**, because he explicitly rejected the Lockean notion that the people had any such inherent right at all:

> "It must be owned that Mr. Locke, and other theoretical writers, have held, that 'there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby forfeited, and devolves to those who gave it.' But however just this conclusion may be in theory, we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of

> government established by that people, reduces all members to their original state of equality, and by annihilating the sovereign power repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual. So long as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control."

1 Blackstone at 157.

As shown above, the *Heller* decision is fully compatible with Justice Scalia's long held position that the Second Amendment constrains only Congress, and protects the right to keep and bear arms against infringement by the federal government. The core right protected by the Amendment, the right of self-preservation (or in Blackstone's vernacular, the primary right of security) is best advanced through the establishment and exercise of the police power,

for the welfare of the individual and the whole community. "Perfect liberty" as understood by the Founders, requires the protection of the individual that is gained through public order. *Fabius*, First Series, Letter III.[2] Thus, incorporation of the Second Amendment against the

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[2]As noted above, Dickinson participated in the federal Constitutional Convention, as one of Delaware's delegates, and is considered one of the drafters of the Constitution. Among other things, he was used as a resource on English common law during the Convention. *See* Natelson, *supra*, at 449-450 (2003) (explaining that when the issue of whether an ex post facto law could be civil as well as criminal in nature, it was Dickinson who examined Blackstone's Commentaries and reported back to the house on that issue). Dickinson was a fierce advocate of federalism, and of retaining strong state governments. The Dickinson Plan, discovered when Dickinson's notes of the Convention were first published, was Dickinson's own draft constitution, and shares aspects of the final document. The Dickinson Plan is believed to have played a significant role in the ultimate decision to enumerate Congressional powers and was prepared during the time that Madison was advocating consolidation. *Id.* at 427, 453 - 457. Dickinson also served as the President of two States, Delaware and Pennsylvania, and campaigned for ratification of the Constitution by composing and publishing the "Fabius" letters in 1788. Delaware then became the first state to ratify the Constitution. Four years later Dickinson presided over the Constitutional Convention that produced the Delaware Constitution of 1792. *Id.* Significantly, neither that Constitution nor its predecessor, the Delaware Declaration of Rights of 1776, contained a "right to bear arms" provision at all. It was not until 1987 that a right to bear arms provision was added to the Delaware Bill of Rights. *See* Dr. Samuel B. Hoff, Delaware's Constitution and Its Impact on Education, on line at http://www.iccjournal.biz/Scholarly_Articles/Hoff.

States would undermine the most fundamental principles of liberty and personal security that underlie all our civil and political institutions.

B. There Is Also No Basis For Incorporating The Second Amendment Under the Supreme Court's Modern Incorporation Test

As noted above, in *Heller* the Supreme Court identified the right of self-preservation as the core right advanced by the Second Amendment. As also discussed above, that "primary right" is deeply imbedded in this country's common law tradition and the scope and legal constraints on that right have evolved in each State in different ways. Effectuation of that right depends upon the police power of the States. Under our constitutional system, it is up to the people of each State to determine how the balance will be struck between use of force and possession of deadly weapons in the context of best ensuring public order, a necessary predicate to the security and "true liberty" of its citizens. As shown more fully below, there is no historic or current consensus by the citizens of the States that

securing an individual's right to possess firearms for personal self-defense against infringement by the State through a constitutional provision is a necessary corollary of protecting the individual's right of personal self-defense. Further, historically, and today, those state constitutional provisions that do protect an individual right to possess firearms are highly individualistic, reflecting how the citizens of those states have struck a balance between weapons control to secure public order and weapons control to promote self-defense. *See* Section III.F below.

Moreover, to the extent that the Second Amendment traces its lineage to Article 7 of the English Bill of Rights, Blackstone characterized that right to have arms as "allowed by law" as an auxiliary, not a primary right. 1 Blackstone at 139. As noted above, it was a restriction only upon the Crown, precluding the Monarchy from disarming those British citizens whom Parliament allowed to possess arms. It was not a fundamental right, or indeed no constraint at all, as against Parliament, whose legislative authority Blackstone acknowledged to be "absolute." 1 Blackstone at 157. For these reasons, and the additional reasons set forth below, the Second

Amendment fails the Court's test for incorporation, and incorporation of that Amendment would be inimical to the right of self-preservation at the heart of the Amendment.

In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (*Duncan*), the Supreme Court iterated the factors informing whether "the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment." *Id.* at 148. The Court observed in the context of the Fifth and Sixth Amendments "[t]he question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' [citation] [or] whether it is 'basic in our system of jurisprudence.' [citation.]" *Id.* at 148-149. Using slightly different phrasing, the Court decided that trial by jury in criminal cases "is fundamental to the American scheme of justice." *Id.* at 149.

A right is fundamental if "necessary to an Anglo-American regime of ordered liberty." *Id.* at 149 n.14. The *Duncan* court observed that various constitutional protections recognized in past

precedents all were fundamental "in the context of the criminal processes maintained by the American States." *Ibid.*

Duncan examined English common law, as analyzed by Blackstone and other commentators, and concluded that the right to trial by jury had existed in England for several centuries. *Id.* at 151. English colonists brought the jury trial system to America, as evidenced by the guarantees in every constitution of the original States. Moreover, every state entering the Union thereafter in one form or another protected the right to a jury trial in a criminal case. *Id.* at 152-154. At the time of *Duncan*, every state mandated jury trials in serious criminal cases. *Id.* at 154.

The practice of examining English common law, and of canvassing the constitutional, statutory, and common law developed by American States, carries forward into later decisions. A plurality of justices (Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas) consulted these sources in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (*Egelhoff*).

In *Egelhoff*, the State of Montana prohibited the trier of fact from considering the voluntary intoxication of the accused in

determining whether he possessed the mental state that was an element of the charged offense. *Id* at 39-40. The plurality determined that Montana's law did not offend the Due Process Clause of the Fourteenth Amendment. *Id.* at 56. The state law was constitutional "'unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [Citation.]'" *Id* at 43 (internal quotations omitted).

The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Id.* at 44 (emphasis added). English common law, as understood by Blackstone and other commentators, treated an intoxicated defendant the same as one who had command of all faculties at the time of the charged offense. Voluntary inebriation did not confer a privilege upon a defendant. *Id.* at 44.

The plurality also recounted the relevant common law developed by states since the early 19th century. A survey of earlier cases revealed that some state courts did consider intoxication in deciding whether a defendant possessed the mental state required for conviction of a particular crime. *Id.* at 46-47. But the consideration

of intoxication in early state decisions did not conclusively establish a fundamental right that intoxication be considered on the issue of criminal intent. *Id.* at 48. That was because "fully one-fifth of the States either never adopted the 'new common-law' rule at issue here [intoxication may be considered] or ha[d] recently abandoned it." *Ibid.* Many states had clung to the English common law rule prohibiting consideration of intoxication – a rule which the plurality found to be justified. Other states had resurrected it. *Id.* at 49. The recent practice of adhering to the English common law rule "alone casts doubt upon the proposition that the opposite rule is a 'fundamental principle.'" *Ibid.*

As shown below, the English common law tradition does not recognize an individual's right to possess a firearm as a fundamental right, and the varied historic practices of the States with respect to the treatment of arms possession demonstrate there is no consensus that arms possession is a fundamental right.

C. The Relevant Historical Sources Support the Conclusion That Individual Arms Possession Is NOT Fundamental To Our System Of Justice.

As noted above, the *Heller* court observed that William Blackstone was "'the preeminent authority on English law for the founding generation.' [Citation.]" 128 S.Ct. at 2798. In his *Commentaries on the Law of England*, Blackstone articulated a primary right of self-preservation or personal security. 1 Blackstone, 125. The goal of achieving personal security was one of the fundamental reasons that human beings enter into society. *Id.*

The *Heller* court nowhere concludes that an individual right to possess firearms for personal self-defense is a fundamental right. The other historical sources cited in *Heller* also do not so conclude. For example, St. George Tucker, the law professor who edited the "most important early American edition of Blackstone's Commentaries," *Heller*, 128 S.Ct. at 2799, wrote that "Americans understood the '*right of self-preservation*' as permitting a citizen to 'repe[l] by force' when 'the intervention of society in his behalf, may be too late to

prevent an injury.'" *Id.,* citing 1 Blackstone's Commentaries 145-146, n. 42 (1803) (emphasis added).

Moreover, Tucker never explicitly linked a personal right to possess firearms to this right of self-preservation. Recent scholarship points out that Tucker's earliest writings on the Second Amendment linked its "bear arms" provision to the States' right to maintain their militias and, further, that Tucker's reference to the Amendment as the "true palladium of liberty" must be understood in the context of his strongly held view that the Second Amendment, with its protection of the militia, was a federalism provision, reserving to the States their existing power to arm their militias. In his early writings, Tucker also explicitly linked the Second Amendment to the Tenth Amendment. *See* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstanding*, 47 Wm. & Mary L. Rev. 1123, 1125-1131 (2006)(tracing the evolution of Tucker's understanding of the Second Amendment).

Tucker shared Madison and Jefferson's belief that the rights of the states and the rights of individuals were intertwined and that

protection of individual rights was ensured by safeguarding the integrity of the States. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 391-398; *see also* Cornell, 47 Wm. & Mary L. Rev. 1123, at 1136. Other scholars have also pointed out the militia-centered comments of Tucker with respect to the Second Amendment. *See* H. Richard Uviller & William G. Merkel, *The Authors' Reply To Commentaries On, and Criticisms Of The Militia, And the Right To Arms, Or, How The Second Amendment Fell Silent*, 12 Wm. & Mary Bill Rts. J. 357, 359-360 (2004).

Tucker's theory of rights also did not link self-defense with a personal, constitutional right to possess weapons Tucker divided rights into four categories – natural, social, civil and political. The individual right of self-defense he placed in the category of natural rights, which had to be substantially narrowed when the individual entered into civil society. The Second Amendment's right to bear arms fit into the categories of political and civil rights. Cornell, 47 Wm. & Mary L. Rev. 1123, 1145-1147 (also noting that Blackstone treated Article 7 of the English Bill of Rights alongside the "political rights" such as the right to petition the government).

Likewise, a number of scholars have noted Justice Joseph Story's emphasis on the militia in connection with the "right to bear arms." *Id.* at 1130-1131; *see also* H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent*, pp. 30-31 (Duke University Press 2002). Thus, the influential authors of the leading legal treatises and writings in the decades immediately following adoption of the Second Amendment did not expound upon a right of arms possession for purely personal self-defense in their expositions on a right of self-preservation or the Constitution.

Using a novel research approach to ascertain whether the term "bear arms" was used to convey one consistent meaning between 1763 and 1791, one scholar has used keyword searching capabilities of the digital archives of Readex's Early American Imprints and Early American Papers and of the Library of Congress, which together contain most of the American newspapers, pamphlets, broadsides, and Congressional proceedings published during this era. He then reviewed the primary sources located as a result of the keyword searches. Most, but not all the sources so located used the term "bear

arms" in a military sense or in reference to issues related to community defense. There was no pattern of consistent use of the term to describe a constitutional right to possess firearms for personal security. In fact, none of the sources linked personal safety with a constitutional right to bear arms. *See* Nathan Kozuskanich, *Originalism, History, and The Second Amendment: What Did Bearing Arms Really Mean To The Founders*?, 10 U. Pa. J. Const. L. 413, 415-438 (2008). Similarly, and as shown more fully below, a review of the state constitutional provisions pertaining to "arms" and the evolution of such provisions also mandates the conclusion that there is no historic or current pattern suggesting that the people of the several states have ever reached a consensus that an individual right to possess firearms for personal self-defense is necessary to our scheme of American justice and ordered liberty.

D. State Constitutions And Statutes In The Founding Era Do Not Support The Incorporation Of The Second Amendment As A Constraint Against The States.

1. The Overwhelming Majority Of The Original 13 States Did Not Provide An Individual Right To Bear Arms In Their Constitutions.

Turning to the "historical practice" that Justice Scalia focused upon in *Egelhoff*, 518 U.S. at 44 (plurality opinion) (joined by Justice Ginsburg concurring, 518 U.S. at 59), a study of the constitutions of the original 13 States shows no common understanding in the Founding Era of an individual right to possess firearms for personal self-defense. 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 (Appendix A).[3] Moreover, none

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[3] The County has filed Appendices concurrently with filing this supplemental brief. Appendix A is a list of state constitutional provisions and some of their antecedents (though not all), prepared by Professor Eugene Volokh and published as *State Constitutional*

(continued...)

of these States rushed to adopt arms language in the wake of the Second Amendment. Connecticut did not adopt a constitutional provision mentioning arms until 1818; Delaware in 1987 (Delaware's Bill of Rights adopted in 1792 included rights mirroring each of the first eight amendments of the new U.S. Constitution **except** the Second Amendment [*see* footnote 2 *supra*]; New Hampshire in 1982; Rhode Island in 1842; and South Carolina in 1895. Among those provisions there is substantial variation in language and in how the state courts have interpreted the scope of the "arms" provision (Appendix A).[4] Maryland, New Jersey and New York have never adopted provisions mentioning arms (Appendix A). Moreover, the early militia statutes of the original colonies did not uniformly require that militia members appear armed with firearms when called into

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[3](...continued)
Rights to Keep and Bear Arms, 11 Texas Review of Law & Politics 191 (2006). This journal is online at www.trolp.org.

[4] The early constitutions (or other governing documents) of some of those eight states included provisions mentioning militias, but even those provisions did not refer to arms and, much less, any individual right to arms. *See, e.g,* Delaware Declaration of Rights of 1776 (Appendix B, section 18); Constitution of New Hampshire - 1776 (Appendix C, p. 2 ¶ 5).

service by the state for common defense. For example, the Georgia Militia Act of 1778 provided that the Governor or "Commander in Chief for the time being" would be responsible for the calling forth of the militia and for arming them. Ga. Act. of Nov. 15, 1778 (Appendix D at p. 20). New York's 1794 Militia Act likewise required the state to purchase and provide arms for militia members. Act of Mar. 22, 1794 N.Y. Laws 503 (Appendix D at p. 27). North Carolina's 1778 Militia Act and Pennsylvania's 1777 Militia Act also required the state to provide the militia members with arms. Act of 1778, 1778 N.C. Sess. Laws 4, § VI (Appendix D at p. 28); Act of Mar. 17, 1777, Ch. 750, § XIV, 9 PA. Stat. 84 (Appendix D at p. 29). Virginia's Militia Act of 1795 also required the Governor to annually procure four thousand small arms to equip militia members when called into actual service. Act of Dec. 26, 1795, Ch. XII, §§ I-III, 1795 Va. Acts 17 (Appendix D at p. 33-34). Thus, both before and after adoption of the Second Amendment, there was substantial variation in the States with respect to how the militia members were to be armed when called forth by the state. There was no uniform

expectation that all militia members would possess arms necessary for state militia service and would come armed when called forth.

Two other States mentioned arms but only with respect to serving in the military. Georgia's Constitution of 1777 provided for bearing arms as a member of a "battalion" (Appendix E, art. XXXV). The Virginia Declaration of Rights adopted in 1776 provided for a militia composed of people "trained to arms" (Appendix F, art. 13).

Only the remaining three states – Massachusetts, North Carolina, and Pennsylvania – had constitutions mentioning the right of "people" or "citizens" to keep and bear arms. But Massachusetts and North Carolina did not tether that right to the individual. Massachusetts in 1780 provided that the right was for the "common defense" (Appendix A). North Carolina's Constitution of 1776 called for bearing arms in "defense of the State" (Appendix A).

Only Pennsylvania's Constitution of 1776 arguably could have been construed as implying an individual right: the right of "citizens" to bear arms in "defense of themselves and the state" (Appendix A). Even that right was limited by the requirement adopted a decade earlier that anyone who refused an oath of loyalty to the

Commonwealth could not possess a firearm. *See* Act of Apr. 1, 1778, ch. 796, §§ 2, 5; 9 Pa. Stat. 238-39 (Appendix D at pp. 29-30). Furthermore, Pennsylvania's arms provision was drafted in the wake of a decades long struggle to achieve community safety. *See* Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 Rutgers L.J. 1041 (2007). Professor Kozuskanich chronicles in detail the events that led to the adoption of the right to arms for purposes of defense. Briefly, beginning in the 1750s, Pennsylvanians grew weary of their Assembly's failure to prevent Indian incursions on the frontier. *Id.* at 1047. "The failure of the provincial Assembly to ensure the safety of its own citizens shaped reactionary constitutional ideology that valued physical protection and community safety." *Ibid.* For the next two decades, loosely organized militias formed to provide that protection. *Id.* at pp. 1048-1057. Finally, in the fall of 1775, the Assembly requested all men from 16 to 50 years of age to acquire military training. *Id.* at 1059. Subsequent to the formal Declaration of Independence the following year, the Constitutional Convention adopted a resolution that all citizens of Pennsylvania should contribute to the defense of

society. *Id.* at 1062. Thus, the guarantee in the Pennsylvania Constitution of the right to bear arms for the "defense of themselves and the State" was focused upon "community safety." *Id.* at 1064. "Indeed, the safety of the whole depended on the contributions and diligence of every individual, and participation in civil society came with certain responsibilities. Bearing arms was the paramount obligation in the new state . . ." *Id.* at 1046. "Defense was for the community, the citizens as a whole, and the responsibility for ensuring community security lay on all of its members." *Id.* at 1065-1066.

Pennsylvania's conception of arms bearing in furtherance of a civilized society protecting public safety echoes Blackstone's view that ordered liberty is achieved only by citizens contributing to the safety of all, and benefitting from that effort, rather than each citizen pursuing his own definition of justice. As the *Heller* court observed, the founding generation surely considered Blackstone the preeminent authority on English law. *Heller*, 128 S.Ct. at 2798.

2. Early State Constitutions and Statutes Reflect That Each State Had Its Own Approach To The Regulation of Arms.

The Supreme Court's modern incorporation approach considers whether the States have ever reached any sort of a consensus in their approach to the constitutional right in question. *See, e.g., Duncan*, 391 U.S. at 152-154 (discussing right to criminal jury trial in early America and in the States); *Egelhoff*, 518 U.S. at 48-49 (examining whether States consider voluntary intoxication in assessing criminal intent). As shown above, there was no consensus at the time of the Founding within the states that individual possession of firearms for purely personal self-defense should be protected by the state constitution at all. Moreover, the states differed then and differ today on the purposes for which "bearing arms" receives constitutional protection. *See* Section III.G.2 below.

From the time of the Founding Era, the States have adopted widely divergent practices with respect to arms. As explained above, eight of the original States had constitutions that originally did not mention arms at all, and some not until more than a century later. The

constitutions of two other States mentioned arms only as related to military service, and did not expressly provide for any "right" to bear arms. Still two others provided a right to arms but only for the common defense. Finally, only one provided a right to arms that even arguably encompassed such possession for purely personal self-defense.

Other constitutional provisions attested to the varied and individual approaches of the States. The Pennsylvania Constitution included a time and place restriction on hunting: Residents "shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed . . ." Pa. Const. of 1776, § 43 (Appendix G). The Delaware Constitution prohibited any weapons at places where local and state officials were elected: "To prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day . . ." Del. Const. of 1776 art. 28 (Appendix H).

Pennsylvania mandated the confiscation of weapons from individuals serving in the militia who refused to swear a loyalty oath.

See Act of Apr. 1, 1778, ch. 796, §§ 2, 5 Pa. Stat. 238-39 (Appendix D at pp. 29-30). Massachusetts did the same. *See* Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31-33 (Appendix D at p. 23) (when an individual refuses to swear or affirm loyalty, the State shall proceed "without Delay, to disarm the said Delinquent, and take from him all his Arms, Ammunition and Warlike Implements."). Virginia also disarmed citizens for failing to take a loyalty oath. *See* Act of May 5, 1777, ch. III, 1777 Va. Acts 8 (Appendix D at pp. 31-32). Moreover, Massachusetts prohibited any person from taking a loaded firearm into any dwelling, stable, barn, out-house, warehouse, shop or building. The fine for violation of the statute was ten pounds, and the firearm was subject to seizure and could then be sold at auction if the jury found a violation of the statute. Act of Mar. 1, 1783, Ch. XIII, 1788 Mass. Acts 218-19 (Appendix D at pp. 25-26).

In *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004), Professors Cornell and DeDino chronicle many of the early statutes regulating the use of firearms. They divide the regulations into several categorical types: (1) statutes providing for confiscation of firearms from those

unwilling to pledge allegiance to the State; (2) statutes regulating use as part of militia obligations; and (3) statutes regulating the storage of gunpowder. *Id.* at 506-512.

In addition to the loyalty oaths required by several states, Connecticut, Massachusetts, New York, and Pennsylvania tightly regulated their militias by defining who was required to participate, who was excused from duty, and what weaponry was required. *Id.* at 508-510. As noted above, New York did not require that militia members possess arms but instead provided them to the militia when called forth. Massachusetts, New York, Pennsylvania and Tennessee regulated the storage and transport of gun powder. *Id.* at 510-512 & n.159.

From the beginning of America there emerged an individual State by State approach to arms regulation. As the Court will see, even as some States added individualistic arms provisions to their constitutions, those constitutional provisions, coupled with statutory law and case law, reflected ever wider differences among the States in their approaches to arms possession and regulation.

E. The Varied And Divergent Approaches To Arms Regulation Continued In The Nineteenth Century.

In the nineteenth century, 27 States either adopted or revised constitutional provisions mentioning arms: Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington and Wyoming (Appendix A). The century no doubt saw an increase in state constitutional provisions expressing a right to bear arms for self-defense, but any discerned commonality in approach to such a right ended with the constitutional text.

Of the 27 States recognizing some sort of arms right, only eight (Connecticut, Kansas, Michigan, Oregon, Rhode Island, South Dakota, Washington, and Wyoming) observed a right to possess arms for self-defense that was not qualified by other constitutional language or by court decision.

The remaining 19 States either did not recognize a right of possession for self-defense at all, or recognized a right of possession

for self-defense that could be regulated by the legislature in various ways. Four of the 19 – Arkansas, Maine, South Carolina, and Tennessee – recognized a right of possession only for the "common defense," and not for self-defense (Appendix A). Even that right was subject to legislative regulation. *See State v. Buzzard*, 4 Ark. 18 (1842) (Arkansas Supreme Court upheld law prohibiting carrying of concealed weapons); *Aymette v. State*, 21 Tenn. 154, 159 (1840) (Tennessee Supreme Court recognized that right to possess firearms subject to legislative regulation). *Aymette* explained that possession of ordinary weapons was not constitutionally protected while possession of weapons commonly associated with militia services was protected ("political right") but also was subject to regulation. The court described several circumstances where the legislature could limit the exercise of the right. "[I]t is somewhat difficult to draw the precise line where legislation must cease and where political right begins, but it is not difficult to state a case where the right of legislation would exist." *Id.* at 159-160.

Seven of the 19 – Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, and North Carolina – observed a right of self-

defense qualified by constitutional provisions either prohibiting the carrying of concealed weapons or authorizing State legislatures to adopt laws regulating or prohibiting the carrying of concealed weapons (Appendix A). Kentucky's 1850 constitutional amendment authorizing the legislature to regulate concealed weapons upended the Kentucky Supreme Court's earlier decision in *Bliss v. Commonwealth*, 12 Ky. 90 (1822). That decision invalidated the State's concealed weapons law under Kentucky's original constitution.

Five of the 19 – Florida, Georgia, Idaho, Texas and Utah – had constitutions expressly providing that their legislatures could regulate the manner in which firearms are used for self-protection or in which the right of self-defense is exercised (Appendix A). Georgia's constitutional provision, adopted in 1865 and revised in 1868 and 1877, was no doubt a rebuke of the Georgia Supreme Court's decision in *Nunn v. State*, 1 Ga. 243 (1846), holding that a gun control law was invalid under the Second Amendment.

Three of the 19 – Alabama, Indiana, and Ohio – limited the constitutional right of self-defense (Appendix A) with case law or

statutes recognizing the legislative prerogative to regulate firearms. *See State v. Reid*, 1 Ala. 612 (1840) (Alabama Supreme Court held state had police power to regulate firearms for safety purposes); *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (Indiana Supreme Court upheld concealed weapons ban). Ohio adopted "An Act to Prohibit the Carrying of Concealed Weapons." Act of Mar. 18, 1859, 1860 Ohio Acts 452 (Appendix I).

Other States parted company with these decisions. For example, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly. Some States held that the right to arms could be denied to free black citizens. *See, e.g., Aldrich v. Commonwealth*, 4 Va. 447, 2 Va. Cas. 447, 449 (Va.Gen.Ct. 1824); *Waters v. States*, 1 Gill 302, 309 (Md. 1843).

The variety of approaches to arms adopted by the States in the nineteenth century is further reflected in their laws, some of which generated the court decisions noted above. In *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L.

Rev. 487 (2004), Professors Cornell and DeDino observed the proliferation of state regulations in this area.

Ohio (in 1859), Tennessee (in 1821), and Virginia (in 1838) criminalized the carrying of concealed weapons with limited exceptions. *Id.* at 513-514 & n.176-180. In 1837, Georgia prohibited the sale of concealed weapons, and Tennessee followed suit in 1838. *Id.* at 514 & n.182-183. Several States and local governments enacted time, place and manner restrictions on firearms use. In 1820, Cleveland prohibited the discharge of firearms. *Id.* at 515 & n.187. Ohio made it a crime to shoot at a target within the limits of any recorded town plat. *Id.* at 515 & n.188. Tennessee adopted a law in 1825 authorizing certain local officials to regulate the shooting and carrying of guns. *Id.* at 515 & n.190.

In addition to the above regulations chronicled by Cornell and DeDino, Kentucky adopted a law in 1813 prohibiting anyone but travelers from carrying "[a] pocket pistol [and other items] concealed as a weapon." Act of Feb. 3, 1813, ch. LXXXIX, 1813 Ky. Acts 100-111 (Appendix J). Louisiana banned the carrying of concealed

weapons the same year. Act of Mar. 25, 1813, 1813 La. Acts 172-175 (Appendix K).

The different and widely varied constitutional language adopted by the States in the nineteenth century, together with their eclectic regulations and the lack of uniformity in the case law, undermine any notion of the developed consensus that courts look for in determining whether a constitutional right should be incorporated.

F. Modern State Constitutions Reflect Splintered Textual Approaches To Arms Regulation.

Six States – California, Iowa, Maryland, Minnesota, New Jersey, and New York – do not have any provision in their constitutions mentioning a right to keep or bear arms (Appendix A).

Ten States – Arkansas, Hawaii, Kansas, Massachusetts, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, and Virginia – have constitutions conferring a right to possess arms only in the context of the defense of, or service to, the State (Appendix A). In those constitutions, the right is qualified by different words and phrases. Arkansas, Massachusetts and Tennessee confer the right for

the "common defense." Tennessee then provides for regulation with "a view to prevent crime." Kansas and Ohio confer the right upon "people" for "their defense and security," and Virginia for the "defense of a free state." Rhode Island is silent with respect to purpose. Hawaii, North Carolina and South Carolina track the language of the Second Amendment.

Within this category of States, the case law has created further division. For example, the highest courts in Kansas and Massachusetts have construed the right in their constitutions as protecting only those who serve in the military. *See City of Salina v. Blaksley*, 83 P. 619, 621 (Kan. 1905); *Commonwealth v. Davis*, 343 N.E.2d 847, 849 (Mass. 1976). Additional case law discussed in the following section shows variance in the views of other States.

Eighteen States – Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Michigan, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, and Wyoming – have constitutions conferring a right to possess firearms for purposes of self-defense or defense of the State (Appendix A). With one exception, each of these constitutions, or

their antecedents, expressly mentions "defense" or "security."[5] But the common language ends there as shown by a comparison of the constitutional provisions in Appendix A.

Florida's Constitution provides that "the manner of bearing arms may be regulated by law." Georgia's states that "the General Assembly shall have power to prescribe the manner in which arms may be borne." Idaho describes the types of laws its legislature may adopt, including those governing (1) concealed weapons, (2) crimes committed with firearms, (3) other acts using firearms, and (4) possession of firearms by felons. Illinois declares that the right is subject "to the police power." The Kentucky Constitution authorizes its legislature "to enact laws to prevent persons from carrying concealed weapons." Texas declares that "the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." The varying provisions in these State constitutions betray any notion of uniformity.

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[5]The Illinois Constitution mentions neither, but uses the phrase "bear arms" (Appendix A). In the context of the Second Amendment, the *Heller* court construed "bear arms" to imply the purpose of "defensive action." 128 S.Ct. at 2793.

The constitutions of the remaining sixteen States confer individual rights broader than "self-defense" with respect to possessing firearms. Those states are Colorado, Delaware, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Utah, West Virginia, and Wisconsin (Appendix A). These constitutions authorize the possession of firearms for the protection of "home," "person," "family," or "property," and in several cases mention "hunting" and "recreational use."

Again, there is marked divergence in language (*see* Appendix A). Colorado, Louisiana, Mississippi, Missouri, Montana, and New Mexico authorize their legislatures to regulate concealed weapons. Nebraska, Nevada, New Mexico, North Dakota, and Wisconsin provide that firearms may be used for certain listed purposes, and also for any "other lawful purposes." Oklahoma acknowledges that nothing in its constitution "shall prevent the Legislature from regulating the carrying of weapons." Utah qualifies the right by noting "nothing herein shall prevent the legislature from defining the lawful use of arms." West Virginia's constitution

implies legislative authority to the extent it provides for "lawful hunting and recreation use."

The variety of provisions in modern State constitutions is itself sufficient to show that no consensus has developed among the States as to the existence of, or the scope of, a constitutional right to possess a firearm for personal self-defense. Some States view the right to possess arms as related to service in the military. Even among the many States that view the right as an individual one, the parameters of the right are different. The case law to which the County now turns reflects further divergence among the States.

G. Current Case Law Reveals Not Only The Broad Array Of Regulatory Approaches Among The States, But Also The Continuing Opportunity For States To Enact Regulations Tailored To Local Conditions.

1. Only Three States Have Held That The Right To Bear Arms In Their Constitutions Is Fundamental.

Of the 44 States with constitutions referring to arms, only three – Montana, Ohio and Wisconsin – have determined that the

right to keep and bear arms is fundamental. Even in those States, the courts have approved regulatory standards that allow the State and local jurisdictions to adopt laws suited to the needs of the polity. *See, e.g., State v. Rathbone*, 100 P.2d 86, 91 (Mont. 1940) (right under Montana Constitution is fundamental and state may regulate that right under police power to extent reasonably necessary to preserve public welfare); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169, 171-173 (Ohio 1993) (right under Ohio Constitution is fundamental and subject to reasonable exercise of the police power); *State v. Cole*, 665 N.W.2d 328, 336-337 (Wis. 2003) (right under Wisconsin Constitution is fundamental and subject to reasonable exercise of police power).

The regulatory standards articulated in these cases – "reasonably necessary to preserve public safety" and "reasonable exercise of the police power" – leave ample room for State and local legislative bodies to craft arms laws tailored to community conditions. After all, whatever the balance of regulatory authority struck between State and local government in a particular State, those

governments are uniquely qualified to determine the needs of their citizens based on a multitude of factors.

2. The Remaining States Have Adopted A Diverse Spectrum Of Arms Regulations Under Flexible Standards Allowing Consideration Of Local Needs.

There are 41 states with a constitutional right to bear arms that has not been held to be fundamental. Nine confer the right in connection with defense or service to the State – Arkansas, Hawaii, Kansas, Massachusetts, North Carolina, Rhode Island, South Carolina, Tennessee and Virginia (Appendix A). In that subgroup of nine, where the constitutional language has been construed as conferring an individual right, courts have regularly upheld a variety of regulations under a deferential standard. *See, e.g., Carroll v. State*, 28 Ark. 99, 101 (Ark. 1872) (prohibition against concealed carrying of deadly weapons upheld as police regulation necessary for benefit of society), more recently cited with approval in *Jones v. City of Little Rock*, 862 S.W.2d 273 (Ark. 1993); *State v. Mendoza*, 920 P.2d 357, 368 (Haw. 1996) (requirement of permit to obtain a firearm a

reasonable regulation under police power); *State v. Dawson*, 159 S.E.2d 1, 10-11 (N.C. 1968) (prohibition against being "armed to the terror of the people" a reasonable regulation bearing "fair relation" to public safety); *Mosby v. Devine*, 851 A.2d 1031, 1039 (R.I. 2004) (law requiring permits to carry concealed weapons a "reasonable regulation by the state in exercising its police power"); *State v. Johnson*, 56 S.E. 544, 545 (S.C. 1907) (local ordinance prohibiting discharge of firearms within city limits a reasonable exercise of police power).

Almost all of the remaining 32 states – those with an individual right to bear arms in their constitutions – allow the regulation of firearms under a reasonableness or other deferential standard. Two of those states – Idaho and Utah – provide for legislative regulation directly in their constitutions (Appendix A). One state – South Dakota – has not yet articulated a standard for evaluating regulations of firearms. Twenty-seven of those States in their case law have used a reasonableness standard to uphold a wide variety of regulations implicating the right to bear arms in their constitutions. A

catalogue of those decisions, most issued by State Supreme Courts, and parenthetical explanations of each, are located in Appendix L.

Only two states – Alaska and New Hampshire – subject regulations of the constitutional right to bear arms to a standard other than reasonableness. *See, e.g., Gibson v. State*, 930 P.2d 1300, 1302 (Alaska Ct. App. 1997) (regulation must bear a "close and substantial relationship" to a legitimate State interest); *State v. Smith*, 571 A.2d 279, 281 (N.H. 1990) (regulation must "narrowly serve[] a significant governmental interest.")

The cases from almost all 50 States provide just a few examples of the vast array of arms regulations adopted by the States and their political subdivisions over the last century. As the Court can see, legislative bodies regulate who may carry or possess a firearm, the type of firearm that may be carried or possessed, the particular use to which a firearm may be put, the particular characteristics of a firearm, the location where a firearm may be brought or used, and any other number of aspects of firearms. The ability of communities across the country to address their own particular safety concerns is born of the reasonableness standard used

by almost all State courts in evaluating regulations against State constitutional provisions. It is therefore not surprising that there is no general consensus among the States as to whether and how particular firearms should be regulated. The only consensus that emerges is that States do not view a right to possess firearms for personal self-defense as a fundamental right.

H. The Regulation Of Arms From The Founding To Today Confirms That The Second Amendment Does Not Operate As A Constraint Against The States.

Taking together the State constitutions, statutes, and case law from the Founding Era through today, it cannot reasonably be said that a right to possess firearms for personal self-defense is "necessary to an Anglo-American regime of ordered liberty" such that it would constrain the States. *Duncan*, 391 U.S. at 149 n.14. Unlike the right to trial by jury in *Duncan*, which existed unadulterated in England for several centuries (*Id.* at 151), and was found in the original State constitutions, there has never been an individual right to possess a

firearm for personal self-defense either under English common law or in the early State constitutions.

Early State constitutions and case law reflect the understanding of American colonists. They, like Blackstone, envisioned a civilized society where firearms could be regulated in furtherance of the greater social good. Future generations of lawmakers and jurists developed a similar view as the States were added to the union and constitutions were drafted and adopted. Thus, there has never been a consensus among the States that arms provisions in their own constitutions have at any time protected a right to possess firearms for personal self-defense.

The *Heller* court found through text and history that it has been understood since the Founding that the Second Amendment constrains Congress from infringing upon an individual's right to possess firearms for personal self-defense. 128 S.Ct. at 2797-2811. That is a far different issue than the issue informing the incorporation analysis under *Duncan* and *Egelhoff*: Whether the States have historically understood their own constitutions to provide for any such right. The above analysis of the text and history of State

constitutional arms provisions, and the interpretation of those provisions by the courts, reveal many understandings of the right to bear arms afforded by States, almost all of which are quite different from the historic understanding of the Second Amendment discussed in *Heller*.

Furthermore, *Heller* itself acknowledges firearms regulation in a way difficult to reconcile with ranking as "fundamental" an individual right to possess a firearm for personal self-defense:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Although we 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.

128 S.Ct. at 2816-2817. The footnote immediately following the above passage states: "We identify these *presumptively valid* regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2817 n.26 (emphasis added).

Describing a regulation impacting a constitutional right as "presumptively valid" is at odds with the notion that the right is "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citation.]" *Egelhoff*, 518 U.S. at 43. One searches in vain for any case that analyzes a regulation impacting a fundamental right where the analysis begins with the presumption that the regulation is valid. Indeed, the Supreme Court has articulated the opposite rule: "It is well settled that . . . if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional'. [Citation.]." *Harris v. McRae*,

448 U.S. 297, 312, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). *Heller's* observation that certain firearms regulations are "presumptively valid" cannot be squared with the position that the individual right to possess firearms for personal self-defense protected by the Second Amendment is fundamental so as to be incorporated against the States and their political subdivisions.

The deferential standard of review employed by an overwhelming majority of States is akin to the presumption of validity recognized in *Heller*.[6] It might seem novel to subject regulation of an enumerated constitutional right to this level of review. But unlike other enumerated rights, the exercise of which does not per se threaten physical harm to others (i.e. expression or practicing one's religion), the exercise of a right involving firearms

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[6]*Heller* in dicta rejects applying "rational basis" review of regulations for purposes of evaluating their validity under the Second Amendment. 128 S.Ct. at 2817 n.27. Rational basis review examines whether a law is a rational means of furthering a legitimate governmental interest. This is different from the reasonable regulation standard employed by the overwhelming majority of States. That standard does not look to the fit between the law and the government's interest. Instead, it evaluates whether a law is a reasonable method of regulating a right so as not to erode the right altogether. *See Mosby v. Devine*, 851 A.2d 1031, 1045 (R.I. 2004).

possession may very easily lead to violence. The deference yielded to State legislatures and local governments in regulating firearms reflects that reality. *Heller*'s potentially broad carve-out of presumptively valid laws – "our list does not purport to be exhaustive," 128 S.Ct. at 2817 n.26 – implicitly acknowledges society's broad objection to the use of guns to kill and injure others. That potential use, and the historic and widespread practice of enacting laws to minimize gun violence and crime, belie any notion that the Second Amendment protects a fundamental right.

IV. EVEN IF THE SECOND AMENDMENT WERE INCORPORATED – AND IT SHOULD NOT BE – THE ORDINANCE IS VALID UNDER *HELLER*.

Under *Heller*, the Federal government may not invade the interest protected by the Second Amendment – the interest in possessing a weapon for self-defense.

Neither the Nordykes nor any other plaintiff asserts any desire to possess firearms on the County Fairgrounds for the purpose of self-defense, the only purpose protected under *Heller*. There is not one

allegation, and much less an established fact, in the record that the Nordykes or other plaintiffs seek to possess firearms on County-owned property for self-defense purposes (*see, e.g.,* Third Amended Complaint – ER II, pp. 284-323).[7] Instead, the Nordykes conducted gun shows on the Alameda County Fairgrounds for the purpose of facilitating the display, exhibition, and sale of thousands of firearms (ER III, p. 444, Fact Nos. 35-36). The purpose of the gun shows was to make a profit; the Nordykes complained that the County's Ordinance prevented them from profitably conducting gun shows at the County Fairgrounds (ER III, p. 442, Fact No. 18). *Heller* does not even suggest a Second Amendment right to possess firearms on government property for purposes of making a profit. Indeed, *Heller* suggests otherwise: "[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." 128 S.Ct. at 2816-2817. *Heller* holds the Second Amendment guarantee as protecting against federal interference a right of self-defense, and not a right to sell firearms.

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[7] Citations to the earlier filed Excerpts of Record appear as follows: ER volume number, page number and, if appropriate, paragraph or line number.

Moreover, *Heller* is a case about the use of handguns in the home. The opening sentence of *Heller* frames the issue decided: "We consider whether a District of Columbia [District] prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." *Heller*, 128 S.Ct. at 2787-2788. The case arose when Mr. Heller applied to register a handgun to keep in his home, and the District refused his application. *Id.* at 2788. In short, the Court examined the Second Amendment's protection of "the possession of usable handguns in the home." *Id.* at 2787-2788.

After concluding that the Second Amendment prohibits the federal government from invading the right of the individual to possess a firearm regardless of participation in a militia, the Court examined the District's law banning handgun possession in the home. *Id.* at 2817-2822. The Court observed that "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 2817. Furthermore, the District's ban prohibited people from using handguns for the "lawful purpose" of self-defense, and the ban extended "to the home, where the need for defense of self, family and property is most acute." *Ibid.* "There are many reasons that a citizen

may prefer a handgun for home defense [followed by list of reasons]." *Id.* at 2818. "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home . . ." *Ibid.* "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment as does its prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense." *Id.* at 2821-2822. Thus, "the absolute prohibition of handguns held and used for self-defense in the home" is invalid. *Id.* at 2822.

The Ordinance at issue here does not regulate the possession or use of handguns in the home. The Ordinance at issue here prohibits the possession of firearms only on the County's *own* property (ER III, p. 440, Fact No. 13). The County owns no residential property.

Heller also proclaims 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*." 128 S.Ct. at 2816-2817 (emphasis

added). These types of regulations are "presumptively valid regulatory measures." *Id.* at 2817 n.26.

The Ordinance at hand, insofar as the Nordykes challenge its application to the County Fairgrounds, prohibits the possession of firearms in a sensitive place. The County owns this property in trust for the public. Cal. Gov't Code § 23004. A year before the Ordinance was adopted, eight people were injured by gunfire in a mass shooting at the County Fairgrounds during the annual County Fair (ER III, p. 438, Fact No. 1). Also, crowd control in open space venues raises particular public safety concerns. The Nordykes' shows brought thousands of firearms to the County Fairgrounds for potential sale (ER III, p. 444, Facts Nos. 35-36). Attendance at each show was at least 4,000 people (ER III, p. 444, Fact No. 37). These circumstances render the County Fairgrounds a sensitive place such that the Ordinance is a presumptively valid regulation of the Nordykes' activities.

Furthermore, the purpose of the Nordykes' shows was to sell firearms (*See* ER III, p. 442, Fact No. 18; p. 444, Fact Nos. 35-36). A

regulation of the "commercial sale of arms" is presumptively valid under *Heller*. 128 S.Ct. at 2817.

In the midst of the historical discussion over the meaning of the Second Amendment's operative clause, *Heller* references that the elements of that clause collectively "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 2797. In light of the facts of *Heller*, this statement is dicta, with no binding force: The holding of the case, and other language in the opinion, show that the quoted language cannot be read to mean that an individual has a right to possess a firearm in any place at any time on the chance the individual might be involved in a confrontation. Such an interpretation would ignore *Heller's* focus on the home-setting, would add to the self-defense linchpin a new "self-offense" rationale, and would nullify the presumption of validity cloaking regulations of firearms in sensitive places, including prohibitions on the carrying of concealed weapons, and prohibitions on possessing certain classes of weapons. Furthermore, the Court clarified that it "do[es] not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Id.* at 2799 (italics original). *Heller*

makes clear that it is limited to holding that the Second Amendment's guarantee protects against federal invasion of the right of individuals to possess firearms for personal self-defense in the event of confrontation in their homes. The Court specifically declined to further delineate the scope of the right. 128 S.Ct. at 2821-2822.

In addition to focusing on the place to which the right of possession reaches (the home), and the purpose for which the right of possession may be exercised (personal self-defense in the event of a confrontation), the Court further limits the scope of the Second Amendment's protection to situations where weapons are used for "traditionally lawful purposes." *See* 128 S.Ct. at 2789, 2815-2816. The County is not aware of any literature and, much less, any authority, suggesting a county must provide its property as a venue for thousands of weapons brought there for the purposes of display and sale, on the theory that commercial activity is supposedly a "traditionally lawful purpose."[8] This stands in sharp contrast to

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[8]Large trade shows involving sales of firearms are not traditional and are a recent development. The recent proliferation in such events results directly from the provisions of the 1986 Firearms Owners' Protection Act (aka the McClure-Volkmer Act) which for

(continued...)

Heller's determination that Americans traditionally have chosen to possess handguns in their homes for purposes of self-protection. *Id.* at 2817-2818. Under this formulation, the Second Amendment does not protect the activities of the Nordykes giving rise to this lawsuit.

Finally, *Heller's* treatment of local firearms regulation lends great weight to the County's authority to regulate uses on its *own* property. The historical sources cited in *Heller*, as discussed above, recognize the need to circumscribe arms possession and arms use consistent with local public safety concerns. Hence, the "presumptively valid" status accorded to the regulation of weapons in sensitive places. As noted in the *amicus curiae* brief filed by the Legal Community Against Violence in January 2008, the California Supreme Court observed that California has already engaged in

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[8](...continued)
the first time liberalized restrictions on licensed firearms dealers to allow licensed dealers to sell firearms at a location other than their licensed premises if that location was a "gun show or event" held in the state in which the dealer is licensed. *See* Tom Diaz, Making A Killing: The Business of Guns in America, at 49 (1999)(citing a letter submitted by the National Alliance of Stocking Gun Dealers to the U.S. House Subcommittee on Crime and Criminal Justice in connection with hearings before that subcommittee).

legislative balancing with respect to public property (Brief at pp. 10-12).

Specifically, in *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 118 Cal.Rptr.2d 746, 44 P.3d 120 (2002), the California Supreme Court observed that the "Legislature has enacted several statutes specifically pertaining to the regulation of gun shows." *Id.* at 864. After canvassing those statutes, the court stated "[e]ven assuming arguendo that a county is prevented from instituting a general ban on gun shows within its jurisdiction, it is nonetheless empowered to ban such shows on its own property." *Id.* at 868. "Thus, a county has broad latitude under Government Code section 23004, subdivision (d), to use its property, consistent with its contractual obligations, 'as the interests of its inhabitants require.'" *Id.* at 870.

This same principle drove the California Supreme Court's decision in the instant case upholding the Ordinance against a state preemption challenge.

> [U]nder Government Code section 23004, subdivision (d), a county is given substantial authority to manage its property, including the most fundamental decision as to how the property will be used, and . . . nothing in the gun show statutes evinces an intent to override that authority.

Nordyke v. King, 27 Cal.4th 875, 882, 118 Cal.Rptr.2d 761, 44 P.3d 133 (2002).

The California Legislature has already balanced some of the interests involved with gun shows, and has left to local regulation the balancing of other interests, particularly with respect to property owned by a local government agency. *Heller* gives no indication of an intent to upset that balance. Indeed, its reliance upon historical resources respecting legislative discretion, and its observation of "presumptively valid" regulations, strongly indicate that at least insofar as California is concerned, *Heller* leaves room for political subdivisions to decide what uses involving firearms are permitted on their property.

V. CONCLUSION

It is one thing to conclude the Second Amendment was intended to create a constitutional barrier so that the federal government, which is denied the power to regulate in the interests of the public health and safety, cannot disarm citizens who wish to have a firearm in the home because they believe it is useful for self-defense. It is quite another to conclude that individual firearms possession for personal self-defense is a right fundamental to the American scheme of liberty and justice. Our English ancestors did not enjoy any such fundamental right because Article 7, the right to have arms under the English Bill of Rights, was a qualified right (by class, religion and other factors), and was not enforceable against Parliament. There is also no evidence that there is, or ever has been, any consensus in this country that individual possession of firearms for personal self-defense is a fundamental right. It is a minority position.

It is also a minority of Americans who choose today to possess a firearm in the home for self-defense. A 1998 study by the National Opinion Research Center and Johns Hopkins Center for Gun Policy

and Research found that only about 35% of American households make that choice. *Fall 1998 National Gun Policy Survey*, Johns Hopkins Center for Gun Policy and Research 1998. Evidence also indicates that by a margin of 3 to 1, Americans today would feel **less safe**, not safer, if others in their community acquired firearms. M. Miller, D. Azrael, D. Hemenway, *Firearms and Community Fear*, Journal of Epidemiology 2000; 11: 709-714. There is credible evidence that this perception is well-founded. A recent ten-year study of the relationship between firearm availability and unintentional death, homicide and suicide for 5 to 14 year-olds across the 50 states showed that children in states with many guns have elevated rates of unintentional gun deaths, suicides and homicides . M. Miller, D. Azrael, D. Hemenway, *Availability and Unintentional Firearm Deaths, Suicides, and Homicides Among 5-14 Year Olds*, Journal of Trauma 2002; 52: 267-75.

These statistics, and many others, indicate that individual firearms possession is a personal choice that can and does have significant, negative health and safety consequences for our communities, giving rise to difficult policy choices. In our

constitutional system, ordinary citizens have a fundamental right to have their state and local legislators make the difficult policy decisions regarding public health and safety. The Second Amendment does not change that equation. It creates no barrier to the County's decision to protect people who use its property, by prohibiting firearms on that property.

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