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' BRIEF IN REPLY TO SUPPLEMENTAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

PAGE(S)

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. *HELLER* LEAVES INTACT THE SUPREME COURT'S PRIOR PRECEDENTS AND *FRESNO RIFLE*, WHICH HOLD THE 2ND AMENDMENT IS NOT INCORPORATED 4

III. THE SUPREME COURT HAS NEVER UNDERSTOOD THE DUE PROCESS CLAUSE, BY VIRTUE OF RATIFICATION, TO INCORPORATE THE BILL OF RIGHTS 6

IV. THERE IS NO SCHOLARLY CONSENSUS REGARDING THE HISTORICAL EVIDENCE OF "ORIGINAL INTENT" OF THE 39th CONGRESS 11

V. THE SUPREME COURT' S SELECTIVE INCORPORATION APPROACH DOES NOT SUPPORT APPLYING THE 2ND AMENDMENT AGAINST THE STATES 20

VI. THE COUNTY'S ORDINANCE IS VALID UNDER *HELLER* 27

VII. CONCLUSION 37

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Adamson v. California,
332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) 7, 20

Agostini v. Felton,
521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) 6

Benton v. Maryland,
395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) 6, 7

Brandenburg v. Ohio,
395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) 33

Burdick v. Takushi,
504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) 31, 33

City of Boerne v. Flores,
521 U.S. 507, 117 S.Ct. 2517, 138 L.Ed.2d 624 (1997) 10

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821) 22

District of Columbia v. Heller,
__ U.S. __, 128 S.Ct. 2783, n.23,
__ L.Ed.2d __ (2008) 1, 2, 4, 8, 9, 20, 21, 24-27, 29, 33-36

Duncan v. Louisiana,
391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) 1, 5

Florida Bar v. Went For It, Inc.,
515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) 30

Fresno Rifle and Pistol Club, Inc. v. Van De Kamp,
965 F.2d 723 (9th Cir. 1992) 1, 4, 5

TABLE OF AUTHORITIES
(continued)

PAGE(S)

Geier v. Am. Honda Motor Co.,
529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) 22

Gregory v. Ashcroft,
501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) 37, 38

Johnson v. Robison,
415 U.S. 361, 375 n.14, 94 S.Ct. 1160,
39 L.Ed.2d 389 (1974) 37

Lochner v. New York,
198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) 11, 27, 28

Malloy v. Hogan,
378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) 7

Marbury v. Madison,
5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) 10

Miller v. Texas,
153 U.S. 535, 14 S.Ct. 874, 38 L.Ed.2d 812 (1894) 4

Montana v. Egelhoff,
518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) 7

Nat'l Treasury Employees Union v. Von Raab,
489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) 30

Nordyke v. King,

27 Cal.4th 875 (2002) 36

Nordyke v. King,
319 F.3d 1185 (9th Cir. 2003) 5, 32, 34, 36

TABLE OF AUTHORITIES
(continued)

PAGE(S)

Palko v. Connecticut,
302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937) 6
Presser v. Illinois,
116 U.S. 252, 6 S.Ct. 580, 29 L.Ed.2d 615 (1886) 4, 7, 8

Silveira v. Lockyer,
312 F.3d 1052 (9th Cir. 2002) 5

State v. Hamdan,
665 N.W.2d 785 (Wis. 2003) 31, 32

The Slaughter-House Cases,
83 U.S. 36, 21 L.Ed. 394 (1872) 7, 8

United States v. Bledsoe,
2008 WL 3538717 at * 3 (W.D.Texas 2008) 34

United States v. Carolene Products,
304 U.S. 144, 152 n. 4, 58 S.Ct. 778,
82 L.Ed.2d 1234 (1938) 29

United States v. Cruikshank,
92 U.S. 542, 23 L.Ed. 588 (1876) 4, 7-9

United States v. Darrington,
351 F.3d 632 (5th Cir. 2003) 34

United States v. Emerson,
270 F.3d 203 (5th Cir. 2001) 34

United States v. Lopez,
514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) 37

TABLE OF AUTHORITIES
(continued)

PAGE(S)

West Coast Hotel Co. v. Parrish,
300 U.S. 379, 57 S.Ct. 78, 81 L.Ed. 703 (1937) 28

OTHER AUTHORITIES:

Akhil Amar & Alan Hirsh,
For The People 174-175 (1998) 21

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149 (abridged ed. 1991) 24

Amendatory Act of July 16, 1866,
ch. 200 § 1, 14 Stat. 173 16-19

Andrea L. Bonnicksen, *Civil Rights and Liberties*
2 (Mayfield 1982) 12

Bernard E. Harcourt, *On Gun Registration, the NRA,*
Adolf Hitler, and Nazi Gun Laws,
73 Fordham L. Rev. 653, 671 (2004) 24

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Gun Rights, and Gun Regulation in the
Reconstruction South, 17 Stan. L. & Pol'y Rev.
615, 622-623 (2006) 14

Civil Rights Act of 1866 19

Cornell & DeDino, 73 Fordham L. Rev. at 522 . . . . . 14, 19

Freedmen's Bureau Act of April 9, 1866, ch. 31,
§ 1, 14 Stat. 27 (1866) 19

TABLE OF AUTHORITIES
(continued)

PAGE(S)

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1 Alb. Gov't L. Rev. 365, 374 n. 40 (2008) 11, 13

Robert J. Spitzer, *Saving The Constitution From Lawyers: How Legal Training And Law Reviews Distort Constitutional Meaning*,
160-164 (Cambridge U. Press 2008) 15

Robert Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi-Kent L. Rev.
349, 361 (2000) 21

Saul Cornell and Nathan DeDino,
A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev.
487, 521 (2004) 12

Saul Cornell, *A Well-Regulated Militia*
174 (Oxford U. Press 2006) 12, 13, 14

Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Commentary
221, 238 (1999) 23

William Blackstone, 1 *Commentaries on the Laws of England* 244 (1765) 23

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court in *Heller* observed its well-established precedent that the 2nd Amendment does not constrain state or local government action. *District of Columbia v. Heller*, __ U.S. __, 128 S.Ct. 2783, 2813 n.23, __ L.Ed.2d __ (2008) (*Heller*). *Heller* did not overrule that precedent, and all lower courts must follow it. This Court followed that precedent in *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992) (*Fresno Rifle*), relying on *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (*Duncan*), a Due Process Clause case.

The Supreme Court has consistently concluded the 14th Amendment does not effect wholesale incorporation of the Bill of Rights. Incorporation has instead proceeded for more than a century through a selective approach. The 2nd Amendment has not been selectively incorporated. The Nordykes misread the precedents and ignore this approach.

The selective incorporation methodology does not support applying the 2nd Amendment to the States. The States have not achieved anything close to consensus on constitutional protection of

firearms possession for self-defense, nor is there probative evidence that such a right is fundamental. *See* County's Supp. Brief at pp. 47-56. *Heller* acknowledges as fundamental a right of self-defense, but does not decide the right to possess firearms is fundamental.

Moreover, under *Heller*, the County's Ordinance is presumptively valid and would pass any level of scrutiny discussed below. As a result, under the rules of judicial restraint, this Court should not even reach the issue of scrutiny.

The Nordykes' supplemental brief exceeds the scope of the Order limiting briefing to *Heller's* impact on this case. As the County's briefs establish, alleged legislative "motive" has no place in constitutional adjudication, and the views of one member of the County's Board of Supervisors about gun shows cannot be transformed into the Board's "motive" in any event. The undisputed evidence shows that the Ordinance was adopted in the wake of a mass shooting on County property, adding to the well-documented increasing gun violence in Alameda County.

As the County's Answering Brief also explains, the Ordinance precludes no First Amendment protected activity in which the

Nordykes wish to engage. They are at liberty to say anything on County property about guns or related issues. The Ordinance is a valid time, place or manner regulation.

The Court should also decline the Nordykes' invitation to second-guess the policy choices of the County's legislative body. The Nordykes assert existing federal and state firearms laws are sufficient to address gun violence and, thus, the Ordinance is unnecessary. But that is not a judicial concern; it is solely a local legislative matter.

Nor does the Ordinance discriminate against the Nordykes. It leaves them in the same position as all other potential patrons of the County Fairgrounds. The Nordykes are free to conduct any activities allowed under the Ordinance, including the historical re-enactments presented by the Scottish Games. But neither the Nordykes, nor any other organization, is permitted to host an event in which people bring thousands of unsecured weapons onto County-owned property.

Finally, the Court should reject the Nordykes' urging to remand this case to the District Court. The facts here are undisputed; the parties filed a lengthy joint statement of undisputed facts in the

District Court. Only purely legal issues follow from the Supreme Court's decision in *Heller*. The point of this extensive supplemental briefing was to obtain a decision on the legal issue(s) left unresolved after *Heller*. Remand is not appropriate.

II. *HELLER* LEAVES INTACT THE SUPREME COURT'S PRIOR PRECEDENTS AND *FRESNO RIFLE*, WHICH HOLD THE 2ND AMENDMENT IS NOT INCORPORATED

This Court is constrained by the Supreme Court's incorporation precedents from applying the 2nd Amendment to the County's Ordinance prohibiting firearms on its own property. *Heller* reaffirms the continuing validity of *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876) (*Cruikshank*); *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed.2d 615 (1886) (*Presser*); and *Miller v. Texas*, 153 U.S. 535, 14 S.Ct. 874, 38 L.Ed.2d 812 (1894) (*Miller*). 128 S.Ct. at 2813 n. 23. In *Fresno Rifle*, this Court acknowledged this trilogy of cases, concluding that they conclusively settled that the 2nd Amendment is not incorporated through the 14th Amendment as

against the States and their political subdivisions. 965 F.2d at 729-730.

The Nordykes misrepresent *Fresno Rifle* as only a "privileges and immunities" case to evade the binding force of these precedents. Were that characterization correct, the *Fresno Rifle* Court would have had no reason to cite to *Duncan*, and reject any argument that *Duncan* establishes the "Fourteenth Amendment automatically incorporates every provision of the Bill of Rights." *Fresno Rifle,* 965 F.2d at 730. *See also Nordyke v. King*, 319 F.3d 1185, 1193 n.3 (9th Cir. 2003) (Gould, specially concurring, rejecting as overbroad the statement in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), that the Bill of Rights is incorporated by the 14th Amendment's Due Process Clause, and stating: "However, the entire Bill of Rights has not been incorporated into the 14th Amendment's Due Process Clause [internal citations omitted]. We have held that the Second Amendment is not incorporated and does not apply to the states [citing *Fresno Rifle*].").

The Nordykes urge this Court to usurp the Supreme Court's prerogative of overruling its own decisions. That is risky business. "'If a precedent of this Court has direct application in a case, yet

appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' [Citation.]" *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

III. THE SUPREME COURT HAS NEVER UNDERSTOOD THE DUE PROCESS CLAUSE, BY VIRTUE OF RATIFICATION, TO INCORPORATE THE BILL OF RIGHTS

Given the controlling law, this Court should not even reach whether the 2nd Amendment should be "selectively incorporated" through the 14th Amendment's Due Process Clause. Controlling law also forecloses the Nordykes' "total incorporation" theory of the 14th Amendment. In *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (*Palko*), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the Supreme Court unequivocally rejected the position that "[w]hatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of

the Fourteenth Amendment if done by a state." *Id.* at 323. "There is no such general rule." *Ibid.* *See also Adamson v. California*, 332 U.S. 46, 53-54, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) (*Adamson*), overruled in part on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (*Malloy*).

The existence and continuing use of the Supreme Court's current "selective incorporation" doctrine destroys any argument that the Court understands or has ever understood ratification of the 14th Amendment as accomplishing "total incorporation" of the Bill of Rights through any of its clauses. *See Montana v. Egelhoff*, 518 U.S. 37, 49, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality) (Due Process Clause does not protect from State action a right to assert a voluntary intoxication defense to a criminal charge).

The Supreme Court has also construed *Cruikshank* and *Presser* as finding that the 14th Amendment's Privileges and Immunities Clause does not "safeguard" the 2nd Amendment against state action. *See Malloy*, 378 U.S. at 4 n. 2. *See also The Slaughter-House Cases*, 83 U.S. 36, 21 L.Ed. 394 (1872).

The *Slaughter-House Cases* were decided in 1872, just four years after ratification of the 14th Amendment. Nothing in that case describes a right to "keep and bear arms" as a guarantee of national citizenship. Yet *Heller* teaches us that from the time of its drafting and ratification, the 2nd Amendment was understood to protect an individual's right to possess firearms in the home for self-defense. Accordingly, when the Supreme Court decided the *Slaughter-House Cases*, *Cruikshank* and *Presser*, it did not consider an individual's right to possess firearms to be a guarantee of national citizenship or a guarantee against state action.

The Nordykes disclaim any reliance on incorporation through the Privileges and Immunities Clause, describing support for that theory as "mixed and murky." *See* Nordykes' Supp. Brief at p. 25. They then build their Due Process incorporation argument on law review articles and books whose authors claim the "original intent" of the 39th Congress was to make the 2nd Amendment applicable to the States through the 14th Amendment's Privileges and Immunities Clause. However, if evidence of the "original intent" of the 39th Congress is "mixed and murky" for the Privileges and Immunities

Clause "incorporation" argument, it is unlikely the same evidence will be persuasive evidence of "original intent" at all.

The Nordykes' 14th Amendment Due Process "original intent" theory cannot be reconciled with *Heller*. If the Supreme Court viewed the 2nd Amendment as already encompassed in the terms of the Due Process Clause by virtue of the 14th Amendment's ratification in 1868, there would be no reason for *Heller* to remind readers that *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S.Ct. at 2813 n.23.

The controlling precedents establish that the 2nd Amendment is a constraint only on Congress unless and until some future Supreme Court decision holds, through selective incorporation, that the right to possess firearms in the home for self-defense is fundamental to our scheme of ordered liberty. Thus, the "original intent" of the framers of the 14th Amendment - whatever it might have been - does not determine the substantive content of the 14th Amendment's Due Process Clause for incorporation purposes

or any other purpose. That is the judiciary's role. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

The Supreme Court has held that Congress does not have the power to decree the 14th Amendment's restrictions on the States. *City of Boerne v. Flores*, 521 U.S. 507, 519-24 117 S.Ct. 2517, 138 L.Ed.2d 624 (1997) (*Boerne*) (holding that the design and text of the 14th Amendment demonstrate Congress has not been given power to determine what constitutes a constitutional violation of that Amendment, and the history of the Amendment confirms that conclusion). With one exception that does not mention *Boerne*, the Nordykes cite only pre-*Boerne* authority for their theory that Congress's "original intent" determines the substantive guarantees of the 14th Amendment (Supp. Brief. at pp. 28-30).

The "original intent" of the 14th Amendment's framers would be relevant, if at all, only on the issue of what it teaches us about the nature of the right, whether fundamental or not. As shown above, that is not an issue this Court should ever reach. Moreover, the reliance of courts on "law office" reconstruction of original intent has led the courts to regrettable outcomes in the past. *See* Jesse Choper,

et al., *Constitutional Rights and Liberties* 50 (9th Ed.) (discussing the significant role of legal treatises, articles, and briefs urging the Due Process Clause as a constitutional limit on government regulation of business in the emergence of economic substantive Due Process, culminating in the *Lochner* era).

IV. THERE IS NO SCHOLARLY CONSENSUS REGARDING THE HISTORICAL EVIDENCE OF "ORIGINAL INTENT" OF THE 39th CONGRESS

Even if the "original intent" of the 39th Congress was relevant, there is substantial scholarly dispute about that intent, contrary to the Nordykes' claim in their supplemental brief (pp. 29-30).

Leslie Goldstein, Judge Hugh M. Morris Professor of Political Science and International Relations, University of Delaware, observed that a "survey of the scholarship on the Privileges and Immunities Clause finds that scholarly opinion on its 'original intent' shares no consensus." Leslie Goldstein, *The Second Amendment, etc.*, 1 Alb. Gov't L. Rev. 365, 374 n. 40 (2008). "[T]here are too many plausible competing accounts of original intent." *Ibid.* Constitutional

scholar Andrea L. Bonnicksen has concluded: "A look at the debates surrounding the framing of the Fourteenth Amendment reveals some evidence that the members of Congress did intend the Amendment's due process clause to incorporate the Bill of Rights, but the more compelling evidence shows otherwise." Andrea L. Bonnicksen, *Civil Rights and Liberties* 2 (Mayfield 1982).

Many individuals were involved in framing and ratifying the Amendment, complicating attempts to derive some collective intention of Congress. "[M]ost striking about the debates over the framing and ratification of the Amendment is how radically different the rhetoric and arguments used by Republicans in Congress were from the way they presented their argument outside the halls of Congress." Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 521 (2004) (describing at pp. 520-521 the different public explanations of the 14th Amendment). Also important is what the people of the States that ratified the Amendment understood its purpose to be. *See* Saul Cornell, *A Well-Regulated Militia* 174 (Oxford U. Press 2006) describing that the Republicans explained

the Amendment's purpose was to require the States to treat their citizens equally).

Congressman John A. Bingham of Ohio, the "chief architect of Section 1 of the Fourteenth Amendment" (*id.* at 172), at one time stated his understanding that the rights of citizens of the States included those in the Bill of Rights. Goldstein, 1 Alb. Gov't L. Rev. at 371. Then, in August 1866, during an election season in which the Amendment was discussed, Bingham explained in a speech that "Section 1 of the Fourteenth Amendment did little more than embody 'in the Constitution the golden rule, learned at the mother's knee, to do as we would be done by.'" Cornell, *A Well-Regulated Militia* 174. Consistent with Bingham's comments, "the ratification debates, of which only two are in extant records, did not discuss incorporation" at all. Goldstein, 1 Alb. Gov't L. Rev at 374 n.40.

There is also no consensus on the relevant historical facts. Proponents of the 14th Amendment "right to bear arms" incorporation theory argue that the 39th Congress was responding to routine disarmament of freed slaves by the Southern States during Reconstruction. *See* Nordykes' Supp. Brief at pp. 29-30. However,

the Southern States of South Carolina, Arkansas and Texas in the post-Civil War era provided arms to freed blacks in connection with opening the ranks of the state militia to them. *See* Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 622-623 (2006).

After Congress disbanded State militias following the Civil War, the Reconstruction Congress created new militias loyal to the Union. Cornell, *A Well-Regulated Militia* 175; Cornell & DeDino, 73 Fordham L. Rev. at 522. The new militias, open to freed slaves, were a high priority for Southern Republicans, who also provided financial backing for arming freed slaves with government-issued weapons. *Ibid.* In South Carolina, the black militias armed by Governor Scott were subsequently disarmed by the Ku Klux Klan. Cornell & DeDino, 73 Fordham L. Rev. at 523-524. The Reconstruction Congress recognized the selective disarming of freed slaves by renegade Southern "militias" and responded by disarming the renegade militias. *Id.* at 522. The Reconstruction Congress had no qualms about

routinely disarming those persons it believed to be disloyal to its cause.

Political Science Professor Robert Spitzer has catalogued many of the historical inaccuracies plaguing the arguments advanced by lawyers and law professors and relied on here by the Nordykes. *See* Robert J. Spitzer, *Saving The Constitution From Lawyers: How Legal Training And Law Reviews Distort Constitutional Meaning*, 160-164 (Cambridge U. Press 2008). Particularly relevant is Professor Spitzer's observation that Stephen Halbrook, an attorney on whose opinion the Nordykes rely heavily, cherry picks language from the Freedmen's Bureau Act and the Civil Rights Act of 1866 to shore up his theory that the 14th Amendment incorporated the Second. *Id.* at 163. But as Professor Spitzer aptly observes, "the Fourteenth Amendment simply does not stipulate anything like a right to bear arms. No court has ever found or suggested that the Second Amendment was somehow repeated, amplified, or elevated by the Fourteenth." *Ibid.*

Halbrook and the Nordykes quote out of context the 1866 amendment to the 1865 Freedmen's Bureau Act (Freedmen's Act),

making reference to the "constitutional right to bear arms." The purpose of the Act and the provision in which the right appears do not support the theory that the 39th Congress intended to make that right a constraint on the States through the Due Process Clause, as Halbrook and the Nordykes argue. The Act undermines that theory.

By the 1865 Freedmen's Act, 13 Stat. 507, Congress had established a Bureau under the War Department, to last during the rebellion and for one year thereafter, to assist refugees and freedmen by providing food, shelter, and clothing. The Bureau's appointed commissioner was authorized to set apart for loyal refugees and freedmen up to 40 acres of lands abandoned in the rebel states or that had been acquired by the United States by confiscation or sale. The Act specifically provided that persons assigned to such lands were to be protected in the use and enjoyment of the land. 13 Stat. 508. The Act was continued for two years by the Act of July 16, 1866, ch. 200 § 1, 14 Stat. 173 (Amendatory Act). Section 14 of the Amendatory Act established military rule in States where the ordinary course of judicial proceedings had been interrupted by the rebellion, extended certain rights and obligations to persons in those states, and charged

the military with enforcement thereof. 14 Stat. 176-177. A second amendment continued the Act to 1869.

In pertinent part, Section 14 of the Amendatory Act provided:

> "[I]n every State or district where the ordinary course of judicial proceedings has been interrupted by rebellion, and until the same shall be fully restored, and in every State or District whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall be restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to have full and equal benefit of all laws and proceedings concerning personal liberty and security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured and enjoyed by the citizens of such

state or district without respect to race or color, or previous condition of slavery.. . .”

Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866).

Section 14 goes on to place the States and districts, whose relations with the government have been discontinued by the rebellion, under the direct rule of the President, who through the Secretary of War was to prescribe rules and regulations, extend military protection and have military jurisdiction over all cases and controversies concerning such rights. Section 14 further makes clear that it has no force and effect in those States whose relations with the government have not been discontinued, and that its provisions shall cease once relations of a State with the government are restored. *Id.*

Section 14 mandated equal treatment of all in the exercise of certain rights specified by the federal government and secured by military rule, in states that no longer had any legislative, judicial, or regulatory authority whatever. The Act did not acknowledge or provide for a constitutional right to bear arms against state action, because the Act had force and effect only in States that were placed under federal military authority. Thus, the Act is not reasonably

susceptible to the interpretation argued by Halbrook and the Nordykes (Supp. Brief at p. 30).

The Nordykes offer a similarly inaccurate spin on the Civil Rights Act of 1866 (Supp. Brief at p. 29). That statute made no reference to a right to bear arms. It provided that "all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to previous condition of slavery or involuntary servitude . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for security of person and property, as is enjoyed by white citizens . . ." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866). Similar to the Freedmen's Bureau Act, the Civil Rights Act aimed to place all persons on equal footing. Concerns about Congress' authority to pass the Civil Rights Act were an impetus for the 14th Amendment. The language of the 14th Amendment is similar to the 1866 Civil Rights Act. Restoration of the rebel States to statehood required that they ratify the Amendment. "[T]he primary impact of the 14th Amendment was to force states to treat all citizens equally." Cornell and DeDino, 73 Fordham L. Rev. at 524.

As Justice Frankfurter aptly observed:

> The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves *witnesses of the process by which the Fourteenth Amendment became part of the Constitution.*

Adamson, 332 U.S. at 63-64 (Frankfurter, J., concurring) (emphasis added).

V. THE SUPREME COURT' S SELECTIVE INCORPORATION APPROACH DOES NOT SUPPORT APPLYING THE 2ND AMENDMENT AGAINST THE STATES

As explained above, this Court should not address here whether the Due Process Clause incorporates the 2nd Amendment. If a court reached that question, *Heller* stands only for the proposition that the 2nd Amendment constrains the federal government from imposing a ban on possession of handguns by law-abiding citizens in the home.

Heller, 128 S.Ct. at 2822. Therefore, the narrow incorporation inquiry would necessarily be whether the "liberty" protected by the Due Process Clause constrains the States from prohibiting possession of handguns by law-abiding citizens in the home. Whatever else the 2nd Amendment may someday be held to protect, if anything, has not been adjudicated.

Accordingly, this Court need not and should not address whether the 2nd Amendment might encompass arms possession to ensure "the people" can rise up against tyrannical government and, much less, whether any such alleged right is "fundamental." However, because Judge Gould commented earlier on this issue in his separate concurrence (319 F.3d at 1196-1198), the County notes here that even law professors Akhil Amar and Alan Hirsch, proponents of this insurrectionist theory, have concluded "it may be a mistake to think of the right to armed revolt as a 'constitutional' right." Robert Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi-Kent L. Rev. 349, 361 (2000) (describing the internal contradictions of the theory), quoting from Akhil Amar & Alan Hirsh, *For The People* 174-175 (1998). Spitzer argues forcefully that no

such right can be read into the Constitution without setting the Constitution at war with itself.

The Constitution gives Congress the powers "to provide for the calling forth the Militia to suppress Insurrections and repel Invasions" in Article I, Section 8; to suspend habeas corpus "in Cases of Rebellion or Invasion" in Section 9; and to protect individual States "against domestic Violence" if requested to do so by a state legislature or governor in Article IV, Section 4. Further, the Constitution defines treason in Article III, Section 3: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies." Just as courts should not read one provision of a statute to conflict with another, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), they ought not read the 2nd Amendment as arming the populace to commit what the Constitution itself deems a capital offense. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393, 5 L.Ed. 257 (1821).

Historian Cornell notes the insurrectionist theory ignores the relationship between the American Revolution and subsequent

American governance: "[M]ost Americans did accept a right of revolution. Such a right, however, was not a constitutional check, but a natural right that one could not exercise under a functional constitutional government." Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Commentary 221, 238 (1999) (emphasis added).

Blackstone rejected as a license for anarchy - and as fatal to civil liberty as tyranny itself - any "right" that would allow individuals to determine when armed force against government is necessary. William Blackstone, 1 *Commentaries on the Laws of England* 244 (1765). The Framers understood the dangers of such a theory from their own experience with uprisings such as Shay's Rebellion and the Whiskey Rebellion. The Civil War taught the same lesson. The 39th Congress needed no reminder that Booth shouted "sic semper tyrannis" as he assassinated President Lincoln.

While some claim gun control eased Hitler's rise to power, instead "[t]he history of gun control in Germany from post-World War I period to the inception of World War II seems to be a history of

declining, rather than increasing, gun control." Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws,* 73 Fordham L. Rev. 653, 671 (2004). It was the inability of the German *government* to remain sufficiently strong and organized that allowed Hitler's "street gangs" to seize control of the State. Alan Bullock, *Hitler, A Study in Tyranny* 149 (abridged ed. 1991).

On the undisputed facts established in the District Court, the Nordykes' challenge to the County's Ordinance arguably does not trigger any Due Process liberty interest, even were a court to incorporate the right acknowledged in *Heller*. As explained in the County's supplemental brief (pp. 61-62), the Nordykes have never alleged that they seek to possess firearms on County property for self-defense (or defense against tyranny), and much less that the Ordinance somehow interferes with their ability to possess handguns in their homes for self-defense. Moreover, the undisputed fact is that the Ordinance does not regulate any residential property (ER III, p. 442, Fact Nos. 22-23).

The Nordykes challenge the Ordinance because it allegedly interferes with their ability to hold a "profitable" gun show on

County-owned property (ER III, p. 442, Fact No. 18). As a result, there is simply no reason for a court to engage in the unnecessary constitutional adjudication of the incorporation issue in this case.

The County Fairgrounds is the only venue where the Ordinance regulates firearms pertinent to the Nordykes' claims. That venue is a "sensitive place" where a prohibition on firearms possession is "presumptively valid" under *Heller*. Thus, under the rule of judicial restraint that counsels avoidance of unnecessary constitutional adjudication, there are numerous reasons why this lawsuit is not one in which the Court should reach the issue of incorporation.

Were a court to decide that issue, the County's Supplemental Brief explains in detail (pp. 7-61) why, under the Supreme Court's selective incorporation approach, the 2nd Amendment right recognized in *Heller* does not constrain State action. (County's Supp. Brief at pp. 51-52). States do not now and never have uniformly recognized any personal right pertaining to firearms possession as meriting constitutional protection. Supp. Brief at pp. 47-51. What is plain is that the right to bear arms protected by State constitutions comes in many different sizes and scopes. In only a very small

minority of States (Montana, Ohio and Wisconsin) have the state courts held that the State's "right to bear arms" provision protects a fundamental right. The Nordykes overlook the distinctions discussed in the County's supplemental brief, and rely on the bare fact, without analysis, that 44 States guarantee a right of some kind to "bear arms."

Nuances in State treatment instead show that the people of different communities have different views on how their communities should strike the difficult balance between firearms possession for self-defense purposes and regulation of dangerous weapons in the interests of public health and safety. There is simply no good reason for the judiciary to assume that the courts are better suited than the people to decide what is "fundamental" with respect to dangerous weapons possession.

The fact that nearly 40 states allow for issuance of a concealed carry permit (Nordykes' Supp. Brief at p. 41 & n.58) is not germane. *Heller* acknowledges that bans on carrying of concealed weapons are presumptively valid. 128 S.Ct. at 2816-2817. It does not follow that handgun possession in the home is fundamental to ordered liberty because the carrying of concealed weapons outside the home is

allowed in some States. Moreover, the Nordykes do not show any consensus on the circumstances under which the concealed carry permit will issue and, much less, any consensus on the many other types of regulations of firearms possession in the various States.

The Nordykes also refer to an amicus brief filed by 31 States (not 32) in *Heller*. 2008 WL 405558. That brief urged, without analysis, that the "right to keep and bear arms under the Second Amendment" is fundamental. *Id.* at *23, n.6. That view sheds no light on whether *State* constitutions and laws historically have treated the right acknowledged in *Heller* – a right to possess a handgun in the home for personal and home defense – as fundamental. The view of 31 States' Attorneys General in 2007, before *Heller* was decided, is beside the point.

VI. THE COUNTY'S ORDINANCE IS VALID UNDER *HELLER*

Some future Supreme Court might follow the trail blazed by the *Lochner* Court in 1905, and find that the 14th Amendment's Due Process Clause applies to state and local regulation of the "liberty" to

"keep and bear arms" just as the *Lochner* Court found the clause to constrain state regulation of the liberty "to contract." *See Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). The future Court would then have to decide what standard of review is appropriate for such regulation. After *Lochner,* the Supreme Court spent three decades attempting to apply a very demanding level of judicial scrutiny to a wide range of state "economic" regulation. It then recognized the futility of such active "second-guessing" of state legislative determinations, and concluded that:

> "[T]he liberty safeguarded [by due process] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391, 57 S.Ct. 78, 81 L.Ed. 703 (1937).

If a future Supreme Court were to conclude the right acknowledged in *Heller* is enshrined in the "liberty" protected by the Due Process Clause, then "[t]here may be a 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...." *Heller*, 128 S.Ct. at 2818 n.27, quoting *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 L.Ed.2d 1234 (1938) (emphasis added). But exactly what level of scrutiny courts should use in determining 2nd Amendment challenges to firearms regulations, *Heller* declined to state. This is another issue of thorny constitutional adjudication that should never be reached in this case; as noted in the County's supplemental brief, the County's Ordinance falls into two of the "presumptively valid" categories recognized in *Heller*. 128 S.Ct. at 2816-2817. Even if a court were to overlook *Heller's* presumptively valid categories, there is **no** recognized level of scrutiny the Ordinance would not survive and, thus, no reason for this Court to decide the thorny constitutional issue of which level applies.

Here, the District Court concluded that the County's Ordinance is narrowly tailored to achieving its objective, and that there is no *non-preempted* less restrictive means of doing so (ER III, pp. 633-635). The County has a compelling interest in preserving public health and safety, particularly considering the mass shooting at the County Fairgrounds the year before the Ordinance was adopted. *See e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (States have compelling interest in protecting public health and safety with respect to licensing and regulating legal profession); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (government's compelling interest in public safety and integrity of international borders outweigh privacy expectations with respect to drug testing). The Ordinance therefore meets strict scrutiny, the most rigorous level of scrutiny in adjudication of constitutional rights.

But given the standards the Supreme Court uses to analyze challenges to legislation impacting certain "fundamental" rights, there is good reason to conclude that the appropriate test for 2nd Amendment challenges to state and local laws would be a

"reasonable" regulation test, should the right ever be incorporated. *See Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (upholding Hawaii's prohibition on write-in voting, and rejecting a strict scrutiny standard, noting that although voting is a fundamental right, that level of scrutiny would tie the hands of the States seeking to ensure equitable and efficient elections, an important regulatory interest). The Ordinance would certainly meet that test.

The reasonable regulation test is also the test the state courts have used almost uniformly for decades in reviewing challenges to state and local firearms regulations under state constitutional right to bear arms provisions. *See* County's Supp. Brief at pp. 51-56. The reasonable regulation standard is not a traditional means/ends test but a test that looks to see whether a nondiscriminatory regulation of firearms goes so far that it effectively eviscerates the core right protected by the state right to bear arms provision. As the Wisconsin Supreme Court observed in *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003), the reasonable regulation standard does not provide a free pass to the legislative branch. That Court canvassed the decisions of other

State Supreme Courts and concluded that a regulation will be upheld as reasonable in some States if it does not amount to a destruction of the right to bear arms, and upheld in other States so long as it does not frustrate or unreasonably interfere with that right. *Id.* at 798-799. The focus is thus on preserving the right, in contrast to rational basis review, under which a regulation will be sustained so long as the government's interest is legitimate and the regulation is rationally related to that interest. The reasonable regulation test also is consistent with Judge Gould's earlier observation that the Court "should recognize that individual citizens have a right to keep and bear arms, subject to reasonable restriction by the government." *Nordyke*, 319 F.3d at 1193 (Gould, J., concurring).

As noted above, the Supreme Court uses the reasonable regulation test in challenges to state election laws, an area of regulation in which the Court recognizes that States have an important regulatory interest, as they do in the area of dangerous weapons control. The Court sustains state election laws where they impose only "reasonable, nondiscriminatory restrictions" upon the fundamental First and 14th Amendment rights of voters. Only when

an election regulation severely restricts the right to vote is it subjected to a strict scrutiny standard. *See Burdick*, 504 U.S. at 434.

There are many reasons why the "pure speech" strict scrutiny standard urged by the Nordykes is inappropriate. Speech does not bestow upon the speaker immediate access to deadly force. Morever, speech that incites others to violence is itself not protected. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Possession of a firearm does bestow on the possessor immediate access to deadly force, and the States have an important interest in regulating the use of deadly force. *Heller* implicitly recognizes this distinction by acknowledging presumptively valid regulations of firearms such as possession prohibitions imposed on persons previously convicted of felonies. Certainly no one would argue that a ban on pure speech by such persons is presumptively valid.

Second, rights deemed fundamental by the Court are certainly not always subject to strict scrutiny. The Court's voting rights cases, referenced above, are but one example. This case is on point. The Nordykes have unsuccessfully asserted at every stage of this case that

the Ordinance infringes their free speech rights. But as this Court observed, if the regulation is not related to suppressing free expression, it "must apply the less stringent standard announced in [*O'Brien*]." *Nordyke*, 319 F.3d at 1189.

The Fifth Circuit's decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), was the first in the nation to conclude that the 2nd Amendment protects an individual right. But that Court later concluded that strict scrutiny does not apply to regulations impacting that right. *See United States v. Darrington*, 351 F.3d 632, 635 (5th Cir. 2003) (noting that if *Emerson* had intended to apply strict scrutiny, it would have done so). *See also United States v. Bledsoe*, 2008 WL 3538717 at * 3 (W.D.Texas 2008) (*Bledsoe*) (post-*Heller* case rejecting strict scrutiny review of federal firearms statute).

In any event, under <u>any</u> of these approaches, the County's Ordinance would be constitutional under the 2nd Amendment. To the extent the Nordykes complain that they can no longer hold a *profitable* gun show (as opposed to any gun show) on County-owned property, nothing in *Heller* requires the County to open its property for that purpose. Furthermore, nothing in the record shows that the

Nordykes are unable to hold their gun show at private venues or on other property not owned by the County.

The Nordykes recast the Ordinance as a regulation of the sale of firearms and then, based on that fiction, they invent a constitutional right under *Heller* to sell or acquire guns (Supp. Brief at pp. 48-49). *Heller* posits no such right. Moreover, the Ordinance does not regulate sales or acquisition. A sale still may be consummated. Buyers may still purchase weapons anywhere, but if they want to physically inspect the weapon, they cannot do so on County-owned property. Furthermore, *Heller* does not even imply a constitutional right to sell or acquire guns. It implies just the opposite with its observation that regulation of the "commercial sale of arms" is presumptively valid. 128 S.Ct. at 2817.

Also misplaced is the Nordykes' focus on California law allowing gun shows that comply with federal and state laws to be held in certain government buildings (Supp. Brief at p. 51). That law has nothing to do with *Heller's* observation that for *2nd Amendment purposes*, laws regulating firearms in sensitive venues are presumed valid. The Nordykes suggest that because California has decided to

allow gun shows in certain government buildings, the County cannot decide to prohibit the possession of firearms on its own property. The Nordykes already lost that preemption argument. *Nordyke v. King*, 27 Cal.4th 875 (2002).

Heller also does not transform the Nordykes' federal equal protection claim into a meritorious claim. The Ordinance treats the Nordykes and their vendors exactly the same as the operators of the Scottish Games. Both groups may hold the events allowed under the Ordinance provided they are conducted in compliance with its terms. The Scottish Games does so. The Nordykes do not. Neither group may hold a gun show that entails persons bringing numerous firearms onto County-owned property that are not in the immediate possession of those persons or else secured. Equal protection would not be implicated unless the Ordinance allowed others to host the type of gun show the Nordykes want, while prohibiting the Nordykes from doing so. That is not the case here.

The Nordykes' equal protection argument also fails because it presumes strict scrutiny is the applicable standard. It would not be the standard even were an equal protection claim implicated here. An

equal protection claim urging differential treatment with respect to a fundamental right does not require strict scrutiny but, rather, entails the same level of scrutiny that would be applied to the underlying substantive guarantee at issue. *See Johnson v. Robison*, 415 U.S. 361, 375 n.14, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). As shown above, that would and should be the reasonable regulation standard, which the Ordinance easily passes.

VII. CONCLUSION

This Court should not decide the incorporation issue at all. When a court reaches that issue, the analysis should provide due deference to the Framers' adoption of the "constitutionally mandated division of authority" between the States and the federal government "'to ensure protection of our fundamental liberties.'" *United States v. Lopez*, 514 U.S. 549, 552, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Federalism protects liberty by recognizing state authority to enact and enforce legislation to safeguard life, liberty, and property in light of local conditions and preferences to which the

States and local governments are often uniquely suited to respond. *See Gregory*, 501 U.S. at 458. Throughout this nation's history, the States and local governments have embraced a variety of constitutional and regulatory approaches to firearms possession. The Nordykes have provided no evidence to the contrary, nor could they. The States' diverse approaches reflect the long-held view that the 2nd Amendment is a limit on federal authority to interfere with firearms possession. It is not a limit on state and local authority to regulate in the first instance.

DATED: October 2, 2008

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(c)(i) of the Federal Rules of Appellate Procedure, this certifies that the Appellees' Brief in Reply to Supplemental Brief of Appellants in the case of Russell Allen Nordyke, *et al*. v. Mary V. King, *et al*., does not exceed 7,000 words, including footnotes and excluding the title page, table of contents, table of authorities, and certificate of conformity. According to the word count function on the word processing program used, this brief contains 6,999 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 2, 2008.

_____

T. Peter Pierce