No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

vs.

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

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

PLAINTIFF-APPELLANTS' FRAP 35(a) BRIEF

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MISCELLANEOUS

CORPORATE DISCLOSURE STATEMENT

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

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

Dated: June 8, 2009

/s/

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INTRODUCTION

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

There are two grounds for *en banc* determination under FRAP 35(a): (1) consideration is necessary to secure or maintain uniformity of the court's decision; and/or (2) the proceeding involves a question of exceptional importance. Plaintiffs/Appellants' response to this Court's May 18, 2009 Order will assume that the call for a vote is based on this case's exceptional importance.

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

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

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

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

JURISDICTION

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

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

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

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

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

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

I. INCORPORATION WAS CORRECTLY DECIDED

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

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

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

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

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

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

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

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

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

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

A. There Are No Facts in the Record Supporting Any Finding That the Nordykes' Gun Shows Impose Any "Burden" on the County.

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

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

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

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

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

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

[3] CA's Gun Show Enforcement & Security Act is attached. Appendix C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Fairgrounds is Not a "Sensitive Place."

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

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

The County presented no evidence – none – that the Fairgrounds (or indeed all county property) is a "sensitive place." How could they? This case was already on appeal out of the district court when *Heller* was filed on June 26, 2008. *Heller's* "sensitive places" concept was set forth in *dicta* at 128 S.Ct. at 2816-17:

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

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

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

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

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

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

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

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

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

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

Consider these additional inferential facts regarding sensitive places:

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

[6] See Appendix D for a copy of the Alameda ordinance.

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

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

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

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

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

compelling interest that they assert.[7] The County has not met that burden, and cannot meet that burden on the facts of this case.

CONCLUSION

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

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

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

Respectfully Submitted on June 8, 2009,

/s/
Donald Kilmer, Attorney for Nordykes

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

CERTIFICATE OF COMPLIANCE

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

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

Date: June 8, 2009

/s/
Donald Kilmer, Attorney for Appellants

APPENDIX A

LexisNexis

LEXSEE 563 F.3D 439

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

No. 07-15763

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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

PRIOR HISTORY: [**1]

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

DISPOSITION: AFFIRMED.

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

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

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

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

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

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

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

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

OPINION BY: Diarmuid F. O'Scannlain

OPINION

[*442] O'SCANNLAIN, Circuit Judge:

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

I

A

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

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

According to the County, the Board passed the Ordinance in response to a shooting that occurred the previous summer at the fairgrounds during the annual County Fair. [1] The Ordinance begins with findings that "gunshot fatalities are of epidemic proportions in Alameda County." *Id.* § 9.12.120(a). At a press conference, the author of the Ordinance, Supervisor Mary King, cited a "rash of gun-related violence" in the same year [**4] as the fairground shooting. She was referring to a series of school shootings that attracted national attention in the late 1990s, the most notorious of which occurred at Columbine High School in Littleton, Colorado. [2]

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

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

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

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

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

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

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

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

B

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

1

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

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

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

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

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

2

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

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

3

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

II

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

To reach this argument on the merits, we must first decide whether *Heller* abrogated *Hickman*. It did. *Hickman* rested on our conclusion that the *Second Amendment* protects only a collective right; *Heller* squarely overruled such conclusion. *See Heller, 128 S. Ct. at 2799* ("There seems to us no doubt, on the basis of both text and history, that the *Second Amendment* conferred an individual right to keep and bear arms."). Thus the basis for *Hickman's* holding has evaporated, and the opinion is clearly irreconcilable with *Heller*. In such circumstances, we consider our prior decision abrogated by higher [*446] authority. [4] *See Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003)* [**11] (en banc).

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

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

A

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

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

1

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

2

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

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

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

3

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

a

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

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

But close examination of our opinion in *Fresno Rifle* defeats such argument. First, we noted that *Cruikshank* and *Presser* [*448] held that "the *Second Amendment* constrains only the actions of Congress, not the states," a proposition that merely follows from *Barron*. *Id. at 729*. Moving from direct application of the *Bill of Rights* to incorporation, we then concluded that *Cruikshank* and *Presser* foreclosed the argument of the plaintiffs that the *Fourteenth Amendment* incorporated the Second. *Id.* [6] As discussed [**17] above, *Cruikshank* and *Presser* involved direct application and incorporation through the *Privileges or Immunities Clause*, but not incorporation through the *Due Process Clause*. This suggests we referred to those cases as shorthand to reject the first two theories, but not the third--selective incorporation through the *Due Process Clause*.

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

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

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

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

Thus, we did not, in *Fresno Rifle*, reach the question of whether the *Second Amendment* is selectively incorporated through the *Due Process Clause*. Perhaps because neither party raised the predicate arguments, we certainly "did not engage in the sort of *Fourteenth Amendment* inquiry required by [the Supreme Court's] later cases." *Heller, 128 S. Ct. at 2813 n.23*. [8] It [*449] is upon that *Fourteenth Amendment* inquiry which we now embark.

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

b

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

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

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

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

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

[**23] liberty," so the Supreme Court has determined, outside the context of incorporation, that only those institutions and rights "deeply rooted in this Nation's history and tradition" can be fundamental rights protected by substantive due process. *Moore v. City of E. Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)* (plurality opinion); *id. at 503 n.10* (noting the similarity between this general substantive due process inquiry and the incorporation test stated in *Duncan*); *see also Glucksberg, 521 U.S. at 721* ("Our Nation's history, legal traditions, and practices . . . provide the crucial guideposts for responsible decisionmaking [in the area of substantive due process]" (internal quotation marks and citation omitted)). The latter line of cases informs our analysis here, because incorporation is logically a part of substantive due process. Indeed, the nonincorporation cases amount to a model for straightforward application of *Duncan* outside the context of criminal procedure. [9]

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

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

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

c

The *Second Amendment* reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *U.S. Const. amend. II*. The prefatory clause of this Amendment describes the right it protects. The Supreme Court has explained that the phrase necessary to the "security of a free State," means necessary to the "security of a free polity." [10] *See* [**26] *Heller, 128 S. Ct. at 2800* (internal quotation marks omitted). Thus the text of the *Second Amendment* already suggests that the right it protects relates to an institution, the militia, which is "necessary to an Anglo-American regime of ordered liberty." *Duncan, 391 U.S. at 149 n.14*. The parallel is striking, particularly because the militia historically comprised all able-bodied male citizens. *Heller, 128 S. Ct. at 2799*.

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

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

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

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

i

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii

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

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

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

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

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

iii

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

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

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

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

iv

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

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

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

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

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

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

d

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

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

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

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

B

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

1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III

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

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

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

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

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

A

1

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

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

2

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

IV

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

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

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

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

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

V

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

AFFIRMED.

CONCUR BY: Ronald M. Gould

CONCUR

GOULD, Circuit Judge, concurring:

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

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

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

APPENDIX B

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs,

vs.

MARY V. KING, et al.,

Defendants.

Case No.: **CV-99-04389-MJJ**

JOINT STATEMENT OF UNDISPUTED FACTS

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

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

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

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

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

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

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

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UNDISPUTED FACT	EVIDENTIARY SUPPORT
26. On October 20, 1999, Plaintiff's Counsel sent a letter to the General Manager of the Pleasanton Fairgrounds requesting contractual and/or legal authority for his request that Plaintiffs provide a written plan for conducting gun shows in compliance with the ordinance.	26. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto. See also Exhibit D attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
27. November 3, 1999, this Honorable Court issued an Order denying Plaintiffs' request for pre-trial injunctive relief.	27. Judicial Notice of Docket Report.
28. Plaintiffs (Nordykes) canceled the gun show scheduled for the weekend of November 6/7, 1999 due to: a. prevent the fraud of hosting a gun-less gun show, b. the Court's November 3, 1999 Order denying injunctive relief, c. the demand by the fairgrounds to produce a written plan for hosting a gun-less gun show, which the Plaintiffs were unable to do. d. cancellation of reservations by several vendors and exhibitors due to the passage of the Ordinance. Defendant's Objection(s): Relevance.	28. See ¶¶ 34 and 35 of the **AMENDED VERIFIED COMPLAINT FOR DAMAGES, INJUNCTION, AND DECLARATORY JUDGMENT.** Entered on the Docket on November 16, 1999.
29. In a December 10, 1999 letter, the Events Coordinator of the Alameda County Fairgrounds released all reserved dates held for Plaintiffs for the year 2000. Defendant's Objection(s): Relevance.	29. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto.
30. On January 5, 2000, the Events Coordinator of the Alameda County Fairgrounds sent a letter to the Nordykes returning their deposits for the year 2000, because Plaintiffs could not produce a plan to hold gun shows (without firearms) that would comply with the Ordinance.	30. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto. See also Exhibit E attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT;** and declaration of Rick Pickering at ¶ 6.

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

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

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

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

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UNDISPUTED FACT	EVIDENTIARY SUPPORT
55. California Penal Code § 12071.4(i) mandates that persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j). Defendant's Objection(s): Relevance and Question of Law.	55. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(i).
56. California Penal Code § 12071.4(k) mandates all persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer. Defendant's Objection(s): Relevance and Question of Law.	56. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(k).
57. California Penal Code § 12071.4(j) mandates that all firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm: (1) The gun owner's signature. (2) The gun owner's printed name. (3) The identification number from the gun owner's government-issued photo identification. Defendant's Objection(s): Relevance and Question of Law.	57. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(j).

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

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

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

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

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

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

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

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UNDISPUTED FACT	EVIDENTIARY SUPPORT
89. Richard Pickering, General Manager of the Alameda County Fairgrounds, has no authority to grant exceptions to Alameda County Ordinances. Defendant's Objection(s): Relevance.	89. See Exhibit 8 attached to Deposition of Rick K. Pickering.
90. Richard Pickering, General Manager of the Alameda County Fairgrounds, referred all decisions about exceptions to Alameda Ordinance to County Counsel and/or the Alameda County Sheriff. Defendant's Objection(s): Relevance.	90. Deposition of Rick K. Pickering. 36: 18 – 39:18 and 72:19 – 75:2. 80: 1 – 10.
END OF DOCUMENT	**END OF DOCUMENT**

The parties agree, by and through counsel, that facsimile signatures shall constitute originals.

SO STIPULATED.

Date: Sept 1, 2006

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

Date: September 1, 2006

T. Peter Pierce
Attorney for Defendants

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APPENDIX C

CALIFORNIA GUN SHOW SECURITY AND ENFORCEMENT ACT OF 2000

CALIFORNIA PENAL CODE SECTION 12071.4

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

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

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

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

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

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

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

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

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

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

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

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

(1) His or her complete name.

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

card number.

(3) His or her date of birth.

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

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

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

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

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

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

(1) The gun owner's signature.

(2) The gun owner's printed name.

(3) The identification number from the gun owner's

government-issued photo identification.

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

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

APPENDIX D

Chapter 9.12
FIREARMS AND DANGEROUS WEAPONS

9.12.120 Possession of firearms on county property prohibited.

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

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

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

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

Government Code Section 53071.5.

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

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

1. A peace officer as defined in Title 3, Part 2, Chapter 4.5 of the California Penal Code (Sections 830 et seq.);

2. A guard or messenger of a financial institution, a guard of a contract carrier operating an armored vehicle, a licensed private investigator, patrol operator, or alarm company operator, or uniformed security guard as these occupations are defined in Penal Code Section 12031(d) and who holds a valid certificate issued by the Department of Consumer Affairs under Penal Code Section 12033, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment;

3. A person holding a valid license to carry a firearm issued pursuant to Penal Code Section 12050;

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

5. A person lawfully transporting firearms or ammunition in a motor vehicle on county roads;

6. A person lawfully using the target range operated by the Alameda County sheriff;

7. A federal criminal investigator or law enforcement officer; or

8. A member of the military forces of the state of California or of the United States while engaged in the performance of his or her duty.

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

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

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

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 REGARDING REHEARING EN BANC

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I. INTRODUCTION

A judge of this Court has called for a vote to determine whether this case will be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a). As shown below, the panel followed controlling precedent and correctly affirmed the District Court's judgment against Plaintiffs ("Nordykes") on their First Amendment and Fourteenth Amendment Equal Protection claims. The panel also followed controlling precedent in holding that the Ordinance regulates conduct that is an exception to the right protected under the Second Amendment. Accordingly, the Ordinance does not implicate the right to keep and bear arms. The panel was thus correct in affirming the District Court order denying the Nordykes leave to amend to allege a claim under the Second Amendment, because that claim would have been futile. *Nordyke v. King, et al.*, 563 F.3d. 439 (9th Cir. 2009) (hereinafter "*Nordyke IV*").[1]

The panel's **holdings** are consistent with prior decisions of this Court. Therefore, en banc review is not necessary to secure or

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[1] The Nordykes conceded at oral argument that it was not necessary for the panel to remand the case for any further factual development.

maintain uniformity of the Court's decisions. None of these **holdings** implicates a matter of exceptional national importance. Accordingly, en banc review is not warranted.

However, in dictum, the panel prematurely and unnecessarily examined whether the right protected by the Second Amendment should be incorporated against states and local governments through the Fourteenth Amendment. Moreover, the opinion disguises this dictum as a holding.

A majority of this Court's judges may conclude there is serious risk that future courts will treat the panel's propositions regarding incorporation as binding precedent, instead of dicta. If so, or if a majority of this Court cannot confidently conclude that the panel's propositions regarding incorporation should be treated as dicta, and rehearing en banc is ordered, then the Court should order rehearing solely on the issue of incorporation of the Second Amendment.

As shown below, on the incorporation issue the panel's conclusions are inconsistent with the controlling precedents of the United States Supreme Court and of this Court, and are in conflict with recent decisions of the United States Courts of Appeals for the

Second and Seventh Circuits. In addition, the incorporation issue is one of exceptional national importance.

II. THE PANEL CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT IN FAVOR OF THE COUNTY ON THE NORDYKES' FIRST AMENDMENT CHALLENGE

The panel correctly affirmed the District Court's judgment in favor of the County on the Nordykes' First Amendment challenge to the Ordinance. The District Court's judgment on this claim is consistent with controlling precedent, and the District Court applied the appropriate level of scrutiny to reach its decision. The panel correctly conducted de novo review of the decision and did not err in affirming that judgment.

As the panel correctly found, when the controlling law is applied to the Nordykes' First Amendment challenge to the Ordinance, that law mandates the conclusion that the Ordinance furthers significant legitimate police power interests, that the Ordinance is unrelated to suppression of free speech, and that any incidental restriction of speech is no greater than necessary to achieve the County's interests. *Nordyke IV*, 563 F.3d at 460-463.

The panel presumed for purposes of argument that "gun possession in the context of a gun show may involve certain elements

of protected speech" and assumed "without deciding, that the Nordykes' possession of guns amounts to speech under the *Spence* test." *Id.* at 460 (citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1974).) The panel then correctly applied the less stringent standard articulated in *United States v. O'Brien*, 391 U.S. 367, 377 (1968) because the Ordinance is "unrelated to the suppression of free expression." *Nordyke IV*, 563 F.3d at 460.

The panel correctly rejected the Nordykes' argument that the court should second guess the legislators' motives in adopting the Ordinance and that the proper focus is on the language of the Ordinance and its impact. *Nordyke IV*, 563 F.3d at 461. Relying on the United States Supreme Court's holding in *O'Brien, supra*, the panel noted that "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." 563 F.3d at 461. The panel also noted that in *Texas v. Johnson*, 491 U.S. 397 (1989) the court determined whether the law at issue was related to the suppression of speech without "psychoanalyzing" its authors. *Nordyke IV*, 563 F.3d at 461.

Both *Texas v. Johnson, supra,* and *U.S. v. O'Brien, supra,* remain controlling law. *See, United States v. Eichman*, 496 U.S. 310 (1990) (affirming the principles of *Texas v. Johnson, supra*). The intent of the legislature is not the salient issue when the express language and application of the Ordinance are constitutional. *See, City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986). Accordingly, the panel properly concluded that the Ordinance's stated purpose, the reduction of gun violence, is a "perfectly plausible" and legitimate legislative purpose, that the *O'Brien* test is the appropriate test for reviewing the Nordykes' challenge to the Ordinance, and that the District Court did not err in holding the Ordinance satisfies the *O'Brien* test. *Nordyke IV*, 563 F.3d at 461-463 (County not required to show the Nordykes' gun shows create or contribute to the problem the Ordinance seeks to address; challenges to the validity of regulation or statute need "not be judged solely by reference to the demonstration at hand," *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984)). Thus the panel correctly applied controlling law to affirm the District Court's judgment on the Nordykes' First Amendment Claim and en banc

review of the panel's holding is not necessary to secure or maintain uniformity of the court's First Amendment case law.

III. THE PANEL CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT IN FAVOR OF THE COUNTY ON THE NORDYKES' EQUAL PROTECTION CLAIM

The panel properly affirmed the District Court's judgment in favor of the County on the Nordykes' Equal Protection claim. *Nordyke IV*, 563 F.3d at 463. In its review of the judgment, the panel performed the equal protection analysis mandated by controlling law, the same analysis the District Court performed. The panel noted that even if the Nordykes were able to demonstrate that the Ordinance creates a governmental classification as described in *Christy v. Hodel*, 857 F.2d 1324, 1331 (1988), "the Nordykes cannot point to a similarly situated 'control group'" as required by *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). *Nordyke IV*, 563 F.3d at 464. The panel continued: "the Nordykes have not argued they could meet the exception's requirement that firearms be secured whenever an authorized participant is not actually using them. No wonder. They have admitted that the very nature of gun shows, in which vendors show weapons to prospective buyers and admirers, makes it impossible." *Id.*

In so holding, the panel applied the equal protection test set forth in *Christy v. Hodel, supra,* and *Freeman v. City of Santa Ana, supra,* both controlling cases. Accordingly, en banc review of the panel's decision rejecting the Nordykes' equal protection claim is unnecessary.

IV. THE FIRST AMENDMENT AND EQUAL PROTECTION ISSUES ARE NOT UNUSUAL OR OF EXCEEDING NATIONAL IMPORTANCE

The challenged Ordinance is a prohibition on possession of firearms or ammunition on County-owned property, except in situations where the firearm is used by an authorized participant of events, and secured from use thereafter. *Nordyke IV*, 563 F.3d at 443-444. An ordinance regulating conduct on County-owned property is not novel or unusual. As the panel correctly noted, the United States Supreme Court recently confirmed that governmental entities have a "great deal of leeway in managing their own property." 563 F.3d at 459, n. 21 (citing *Pleasant Grove City v. Summum*, --- U.S. ---, 129 S.Ct. 1125, 1131 (2009).

Recently in *D.C. v. Heller*, --- U.S. ---, 128 S.Ct. 2783 (2008), the Supreme Court also recognized the preemptive validity of longstanding laws prohibiting the carrying of firearms on certain

government property, specifically government buildings and schools. 128 S.Ct. at 2816-17. The *Nordyke IV* panel correctly concluded "the open, public spaces the County's Ordinance covers fit comfortably within the same category as schools and government buildings." *Nordyke IV*, 563 F.3d at 460. As these cases show, there is simply nothing unusual or novel about a County Ordinance proscribing such conduct on *County*-owned property. Accordingly, en banc review of the panel's holdings affirming judgment in favor of the County on the Nordykes' First Amendment and Equal Protection claims is unnecessary.

V. THE NINTH CIRCUIT PANEL CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ERR IN DENYING THE NORDYKES LEAVE TO AMEND THEIR COMPLAINT TO ALLEGE A SECOND AMENDMENT CLAIM

The panel also correctly held that the District Court did not err in denying the Nordykes leave to amend their complaint to add a claim challenging the Ordinance under the Second Amendment. *Nordyke IV*, at 445. The District Court held such an amendment would be futile. Excerpts of Record ("ER") at p. 227. The rationale for the order, issued February 11, 2005, was this Court's earlier decision in *Nordyke, et al. v. King, et al.* 319 F.3d 1185, 1191 (9th Cir. 2003) (*Nordyke III*). ER at 227.

In *Nordyke III,* this Court held that any Second Amendment claim by the Nordykes was barred by the Ninth Circuit's earlier decisions in *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996). *Nordyke III*, at 1191. Here, the panel held the conduct regulated by the Ordinance, possession of firearms on publicly owned, open space property, is an exception to the right to keep and bear arms protected by the Second Amendment. *Nordyke IV*, at 460. Therefore, leave to amend to allege a Second Amendment claim would have been "futile." *Id.* Accordingly, the panel correctly affirmed the District Court's order denying the Nordykes leave to amend to allege a Second Amendment claim.[2]

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[2] The panel asserted it had to first decide whether *Heller* abrogated *Hickman* because "*Hickman* rested on our conclusion that the Second Amendment protects only a collective right. " *Nordyke IV*, at 445. However, *Hickman* stated an alternative ground for its holding, namely that the Second Amendment is not incorporated against the states, citing *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992). *Hickman*, 81 F.3d at 103, n 10. The panel's actual holding on amendment of the Nordykes' complaint did not require it to ascertain either the nature of the right protected by the Second Amendment, or whether it is incorporated, because the panel concluded the Ordinance regulates conduct that is an exception to the protected right. *Nordyke IV*, at 459-460. Thus, the panel **did not** need to decide whether *Heller* abrogates either *Hickman's* collective right holding, or its alternative incorporation holding.

Specifically, the panel concluded with considerable ease that the government-owned "public spaces" where the challenged Ordinance prohibits firearms possession are "comfortably" within the category of "sensitive places" where bans on firearms possession are "presumptively valid" and that "prohibiting firearms possession on municipal property fits within the exception from the Second Amendment for 'sensitive places' that *Heller* recognized." *Nordyke IV* at 459-460, emphasis added. As a result, the panel also correctly held that amendment of the Nordykes' complaint to allege a Second Amendment claim would have been "futile." *Nordyke IV* at 460.

The County is not aware of any decision by any other court holding that a prohibition of firearms possession on publicly owned property implicates the right protected by the Second Amendment. Accordingly, there appears to be no split in the courts requiring en banc review of this holding in *Nordyke IV* to secure or maintain uniformity of the Court's decisions.

Nor does the panel's holding on this point implicate a matter of national importance. As the panel noted, the Supreme Court has recognized that governmental entities have a great deal of leeway in managing their own property. *Nordyke IV,* at 459, n. 21 (citing

Pleasant Grove City v. Summum, __U.S.__, 129 S.Ct. 1125, 1131 (2009). *See also Heller*, 128 S.Ct. at 2816-17 (acknowledging prohibitions of firearms on publicly owned property such as government buildings and schools are among the "long standing" firearms possession bans that are "presumptively valid.").

However, the opinion's unnecessary exposition on the issue of incorporation of the Second Amendment is seriously problematic. The panel's determination regarding the incorporation question is plainly superfluous to its holding. It was unnecessary, and therefore dictum, for the panel to reach whether the right acknowledged in *Heller* constrains state and local governments through the Fourteenth Amendment, given the panel's conclusion that the challenged Ordinance regulates conduct - possession of firearms in sensitive public places - that is an exception to the right, even when directly challenged under the Second Amendment. *Nordyke IV*, at 459-460, citing *Heller*.

Given principles of judicial restraint, including the avoidance of unnecessary constitutional adjudication, the panel could have, and should have, disposed of the incorporation issue by noting that even if the Second Amendment right were to be incorporated through the

Fourteenth Amendment, *Heller* teaches us that the challenged Ordinance regulates conduct outside the scope of the right protected by the Second Amendment. Accordingly, there is no scenario in which the Nordykes' proposed amendment to allege a Second Amendment claim would be anything but futile.

The opinion treats incorporation as a holding by characterizing it as an issue the panel was required to decide, when it was not. *Nordyke IV,* at 446. By so doing, the panel's opinion creates the potential for substantial confusion.

It is undoubtedly true that "[a] judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'" *U.S. v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring). Nevertheless, as aptly observed by the Hon. Pierre N. Leval, Judge, United States Court of Appeals for the Second Circuit:

> "The problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law….
>
> "We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding – in disguise, so to speak. When we do so, we exercise a lawmaking power that we do not rightfully possess. Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication. When we do

> so, we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided."

Pierre N. Leval, JUDGING UNDER THE CONSTITUTION: DICTA ABOUT DICTA, Madison Lecture, 81 N.Y.U.L.R. 1249, 1250 (Oct. 2006).

The *Nordyke IV* opinion also examines whether, and to what degree, the challenged Ordinance may infringe the "core right" acknowledged in *Heller*, as if that discussion was germane to its holding. *Nordyke IV*, at 459. Having concluded that the Ordinance regulates conduct outside the protection of the right altogether, this discussion was also superfluous.

In short, the panel enunciated the proposition that the Second Amendment is incorporated against the states and local governments through the Fourteenth Amendment. The panel then held that the challenged Ordinance does not implicate the right protected by the Second Amendment, the same conclusion it would have reached had it rejected the proposition that the Second Amendment is incorporated. As Leval explains, where, as here, "the insertion of the rejected proposition into the court's reasoning, in place of the one adopted, would not require a change in either the court's judgment or the reasoning which supports it, the proposition is dictum. It is

superfluous. It had no functional role in compelling the judgment." Leval, 81 NYULR 1249, 1257.[3]

When a court announces a rule of law that has no consequence for the outcome of the case, the court does not have to "pay the price" for the rule it declares, which increases the risk of "defective rules." Also, law "made" through dictum is difficult to correct. A party cannot appeal an erroneous legal rule announced in dictum, and no party will have a motive to try to get the bad proposition corrected. Leval, 1262 -1263.

Lawmaking through dicta has no constitutional legitimacy. Courts make law "because the rule of stare decisis evolved to require that courts judge consistently…. Courts make law only as a consequence of the performance of their constitutional duty to decide

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[3] Leval also discusses why a court may venture beyond the issue in controversy to announce a rule of law (as the *Nordyke* panel did here), one of the "most common manifestations of disguised dictum." "The reasons are numerous and grow in part out of our human frailties. (1) At times our exuberance for a point of view gets out of hand. (2) At times we may devise a strategic gambit in ideological warfare. We may reach beyond the case in order to preempt colleagues who might later decide a further issue in a manner not to our liking. (3) …judges may at times be prey to vanity…(4) We are also tempted by the seductive lure of establishing landmark precedent…" Leval, 81 NYULR 1249, 1263-1264.

cases. They have no authority to establish law otherwise." Leval, 81 NYULR 1249, 1259-1260.

The *Nordyke IV* panel correctly affirmed the District Court order denying the Nordykes leave to amend their complaint to allege a Second Amendment claim because such amendment was futile. The panel correctly held that the Ordinance is presumptively valid, and regulates a subject matter that is excepted from the protection of the right to keep and bear arms. The panel's propositions regarding incorporation of the Second Amendment were not necessary to that holding and should be regarded as without constitutional legitimacy.

VI. ANY EN BANC REVIEW SHOULD BE LIMITED TO THE ISSUE OF INCORPORATION

As set forth above, the **holdings** of this panel were correct, and rehearing en banc is not warranted. If a majority of this Court's judges conclude that there is serious risk that future courts will treat the panel's propositions regarding incorporation as a holding, or a majority cannot confidently conclude that the panel's discussion of the incorporation question should be treated as dictum, and vote to rehear the case en banc, then the County urges this Court to order rehearing en banc solely on the issue of incorporation.

As the Court of Appeals for the Seventh Circuit concluded in its June 2, 2009 opinion in *National Rifle Assn. etc., et al. v. City of Chicago, et al.*, __F.3d ___, 2009 WL 1515443 (7th Cir. (Ill.))(petition for certiorari filed June 3, 2009), the U.S. Supreme Court's holdings in *United States v. Cruikshank*, 92 U.S. 542 (1875), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894) that the Second Amendment applies only to the federal government, are controlling on the issue of incorporation in this case. The Seventh Circuit characterized the *Nordyke IV* panel as concluding "*Cruikshank*, *Presser* and *Miller* may be bypassed as fossils." *Id.* at p. 1. The Seventh Circuit found this view irreconcilable with the repeated admonition of the Justices that the Supreme Court reserves to itself the prerogative of overruling its own decisions. *NRA v. City of Chicago*, *supra*, at 1, 2.

> "Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined the rationale. 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."

Id., citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

The Seventh Circuit also rejected claims that *Cruikshank, Presser* and *Miller* had no direct application because those decisions did not expressly consider the line of argument plaintiffs were presenting to support their argument for incorporation.

> "Plaintiffs say that a decision of the Supreme Court has 'direct application' only if the opinion expressly considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision by the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument."

Id. at 1, 2, citing *Heller*, 128 S.Ct. at 2813 n. 23.

The faulty "direct application" reasoning rejected by the Seventh Circuit in *Chicago/Oak Park*, is the **same** reasoning the *Nordyke IV* panel relied on to bypass this Court's earlier and controlling decision in *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992), that the Second Amendment is not incorporated against state and local governments through the Fourteenth Amendment. *See Nordyke IV,* at 447-448. It is also the faulty reasoning the Nordyke panel used to bypass the controlling holdings in *Cruikshank, Presser* and *Miller*. *See Nordyke IV,* at 448.

The *Nordyke IV* panel was bound by the holdings in *Fresno Rifle, Cruikshank, Presser* and *Miller* on the question of incorporation. If the panel's incorporation determination is viewed as a holding, the panel erred in ignoring these controlling precedents, and en banc review is warranted to secure uniformity of the court's decisions, and because the incorporation question is of national importance.

As the Seventh Circuit also noted, the *Heller* Court's comment that *Cruikshank's* continuing validity was not presented by the case before it, was not an invitation for the inferior courts to go their own ways without regard to *Cruikshank's* holding. For a court to do so undermines the uniformity of national law and may compel the Justices to grant certiorari before they think a question ripe. *NRA v. City of Chicago, supra,* at 2.

Nordyke IV is also at odds with the post-*Heller* decision in *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). Moreover, there are serious flaws in the panel's analysis on the merits of the incorporation issue. The Seventh Circuit rejected as too reductive the panel's focus on whether the right to keep and bear arms is "deeply rooted in this nation's history and tradition. *See NRA v. Chicago*, ---F.3d---, 2009

WL 1515443, p. 2 ("'selective incorporation' cannot be reduced to a formula.").

The Seventh Circuit also noted that individual rights may take a different shape when asserted against a state, rather than the national government, giving examples to illustrate how a particular state's "common law gloss" on the affirmative defense of self-defense could impact how the right is viewed. *NRA v. Chicago*, ---F.3d ---, 2009 WL 1515443, at p. 3. The County raised similar arguments in its supplemental brief on the incorporation issue, which the Nordyke panel rejected. *See* County's Supplemental Brief, at pp. 7 through 21, and *Nordyke IV*, at 456.

Finally, the Seventh Circuit emphasized that the incorporation debate implicates federalism, the Constitution's structural element establishing a "federal republic where local differences are to be cherished elements of liberty rather than extirpated in order to produce a single, nationally applicable rule….Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." *NRA v. Chicago,* ---F.3d ---, 2009 WL 1515443, at p. 3. The County raised similar federalism concerns in its supplemental brief on incorporation, which the *Nordyke IV* panel simply ignored.

See County's Supplemental Brief at pp. 7 through 21, pp. 47-53, and County's Reply Brief to Supplemental Brief of Appellants, at pp. 37-38.

As the Seventh Circuit correctly concluded, "how arguments of this kind will affect proposals to 'incorporate' the second amendment are for the Justices rather than a court of appeals." *NRA v. City of Chicago, supra,* at 3-4. In short, if a majority of this Court understands the panel's holdings to include a holding that the Second Amendment is selectively incorporated through the Fourteenth Amendment, then rehearing en banc solely on the incorporation issue is warranted. The *Nordyke IV* panel erred in reaching that question at all and further erred in its answer to that question.

DATED: June 8, 2009

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CERTIFICATE OF COMPLIANCE

In accordance with the Ninth Circuit Rules, this certifies that the Appellees' Brief Regarding Rehearing En Banc does not exceed 4,200 words, including footnotes and excluding the title page, table of contents, table of authorities, and certificate of compliance. According to the word count function on the word processing program used, this brief contains 4,088 words.

I declare that the foregoing is true and correct

Executed on June 8, 2009

s/ Sayre Weaver
Sayre Weaver

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Debbie Nager Reid
Debbie Nager Reid

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