IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 07 – 15763
DC# CV 99-4389-MJJ

RUSSELL ALLEN NORDYKE, *et al.*,
Appellants

v.

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

AMICI CURIAE BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., AND THE CALIFORNIA RIFLE & PISTOL ASSOCIATION IN OPPOSITION TO EN BANC REVIEW

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

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CORPORATE DISCLOSURE STATEMENT

NATIONAL RIFLE ASSOCIATION

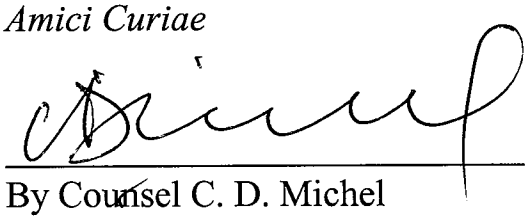
The National Rifle Association of America, Inc., has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

CALIFORNIA RIFLE & PISTOL ASSOCIATION

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

Date: June 8, 2009

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



By Counsel C. D. Michel

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IDENTITY OF THE *AMICI CURIAE*

National Rifle Association

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

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

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

be reheard, en banc, and how that might affect this Court's current ruling that the right of the people to keep and bear arms guaranteed in the Second Amendment is protected from State infringement under the Fourteenth Amendment.

California Rifle & Pistol Association

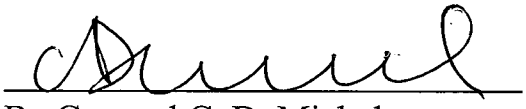
The California Rifle and Pistol Association, Inc. ("CRPA") is a non-profit membership organization with roughly 65,000 members. CRPA is incorporated under the laws of California, with headquarters in Fullerton. Among its other activities, CRPA works to preserve constitutional and statutory rights of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

Consent to File

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

Date: June 8, 2009

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



By Counsel C. D. Michel

ARGUMENT

I. Introduction

The question now before the Court is whether en banc review is warranted for the panel's recent decision in *Nordyke v. King* (*Nordyke V*), 563 F.3d 439 (April 20, 2009). That decision correctly ruled on the issue of Second Amendment incorporation; the panel's logic was inescapable and its ruling inevitable in the wake of *Heller*.[1] Neither party sought review, nor is it warranted.

II. En Banc Rehearing Is Not Favored, Nor Is It Warranted in This Case

Under FRAP 35(a), an en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."

Regarding the first factor, en banc review is *not* warranted because, as

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[1] *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The Court also upheld the district court's grant of Alameda County's motion for summary judgment on Nordyke's constitutional challenges to Alameda County Code § 9.12.120(b). That section provides: "Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." The practical effect of the ordinance was to ban gun shows at the county fairgrounds where the Nordyke's had been conducting them lawfully, and without violent or illegal incident, since 1991. In addition, although this Court found the Second Amendment applicable to state action, it nonetheless upheld the district court's denial of Nordyke's motion for leave to amend their complaint to add a Second Amendment claim. (*Nordyke V* at pp. 443-45.)

discussed in Part III, below, *Nordyke V* doe s not conflict with any of this Circuit's prior rulings that were not abrogated by *Heller*. *Nordyke V*, 563 F.3d at 445-46, *citing Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Thus, review is not required to maintain uniformity.

On the second factor, whether the Fourteenth Amendment incorporates the Second *is* a question of "exceptional importance." But whether it is a difficult question to answer, one that warrants en banc review, is another matter. We submit that it is not; once the right to keep and bear arms was ruled an individual right, its eventual application to the states became inevitable – and Justice Scalia "suggested" as much in none-too-subtle fashion throughout *Heller*.

It would be a futile exercise and waste of judicial resources to revisit the panel's incorporation decision when the panel not only answered it correctly, but did so in an exhaustively researched and well-reasoned decision. Moreover, the panel's decision is in perfect harmony with *Heller*, finding the right to keep and bear arms a fundamental, pre-existing individual right similar to other such rights enumerated in the Bill of Rights – and incorporated by the Fourteenth Amendment. *Heller*, at 2797. Thus, there is little need for en banc review on that point.

To assist the Court in deciding whether en banc review is warranted, we

offer for the Court's consideration a brief analysis of the panel's incorporation holding, why it should be left standing (or affirmed on review), and why the Second and Seventh Circuits erred in refusing to consider the issue. We will also examine the panel's treatment of "sensitive places," another possible basis for review. It is a concept briefly touched on in *Heller* and broadly interpreted by the panel in rejecting the Nordyke's Second Amendment claim.

III. The Court Correctly Ruled on Second Amendment Incorporation

As a preliminary matter, and in light of the Seventh Circuit's decision that it is barred by "direct" precedent from considering selective incorporation of the Second Amendment,[2] we examine whether the Supreme Court has ever ruled upon that issue. The answer is no, both as a matter of law[3] and logic. It is beyond peradventure that, before *Heller*, there could be no case or controversy over selective incorporation, for if the amendment only guaranteed a right of the states, it would be self contradictory to incorporate it into the Fourteenth Amendment."[4]

A. Supreme Court Precedent Does Not Foreclose Incorporation of the Second Amendment by the Due Process Clause of the Fourteenth

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[2] *See NRA v. Chicago*, 2009 U.S. App. LEXIS 11721, *2 (June 2, 2009), following *Malony v. Cuomo*, 554 F.3d 56, 58-59 (2009).

[3] 128 S. Ct. at 2813, n.23 (courts must apply current Fourteenth Amendment jurisprudence).

[4] See also Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257 (1983) (hereafter, "Kates, *Second Amendment*").

Supreme Court decisions from 1876, 1886, and 1894 contain statements to the effect that the Second Amendment does not apply to the States. *See United States v. Cruikshank,* 92 U.S. 542 (1876); *Presser v. Illinois,* 116 U.S. 252 (1886); *Miller v. Texas,* 153 U.S. 535 (1894). But those cases were decided before the advent of the incorporation doctrine, before the Court even hinted that fundamental provisions of the Bill of Rights are incorporated through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226 (1897). Accordingly, none of those cases addressed whether the Second Amendment applies against the states *through* the Due Process Clause of the Fourteenth Amendment. They addressed only whether the Second Amendment applies *directly* against the states—and that is not the question presented here.

As explained in *Heller*, 128 5. Ct. at 2812-13 & n.23, *Cruikshank,* "in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment *does not by its own force* apply to anyone other than the Federal Government." 128 S. Ct. at 2812, *citing* 92 U.S. at 553 (emphasis added). The "limited discussion of the Second Amendment in *Cruikshank,*" *id.* at 2813, simply did not address the

possibility of incorporation of the right to keep and bear arms in the Fourteenth Amendment's Due Process Clause. Indeed, in discussing the application of the Second Amendment, the *Cruikshank* Court took care to note that the "[S]econd [A]mendment declares that it shall not be infringed; but this, *as has been seen,* means no more than it shall not be infringed by Congress." 92 U.S. at 553 (emphasis added). The "as has been seen" language refers to the Court's preceding discussion of the First Amendment: "The First Amendment to the Constitution. . . like other amendments *proposed and adopted at the same time, was not intended to limit the powers of the State governments* in respect to their own citizens, but to operate upon the National government alone." *Id.* at *552* (emphasis added). At this point the *Cruikshank* opinion cites *Barron v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243 (1833).

In stark contrast, the Fourteenth Amendment (1) was *not* "adopted at the same time" as the First and Second Amendments, and (2) was quite explicitly meant to "limit the powers of the state governments." Thus, *Cruikshank's* discussion of the Second Amendment simply reaffirmed the basic principle of *Barron* that the Bill of Rights originally, of its own terms, applied *directly* only to the federal government.

Indeed, the *Cruikshank* opinion did not take up the Fourteenth Amendment

claim until *after* it had disposed of the Second Amendment claim—and then it rested its decision on a principle that is entirely consistent with the incorporation jurisprudence that the Court has subsequently developed. In responding to the contention that the private defendants had somehow violated due process by engaging in "a conspiracy to falsely imprison or murder citizens of the United States," the Court invoked the now familiar maxim that the Fourteenth Amendment addresses only state action and therefore "adds nothing to the rights of one citizen against another." 92 U.S. at 553-54. Instead, it "furnishes an additional guaranty against any encroachment *by the States upon the fundamental rights which belong to every citizen* as a member of society." *Id.* (emphasis added).

The same analysis applies to *Presser* and *Miller,* both of which relied exclusively on *Cruikshank.* Like *Cruikshank,* neither opinion engaged in an incorporation analysis. Rather, both opinions merely reaffirmed *Barron's* holding that the Bill of Rights does not *directly* apply against the states. *See Presser,* 116 U.S. at 264-66; *Miller,* 153 U.S. at 538. In *Presser,* the parties did not even raise the incorporation issue. And in *Miller* the Court explicitly refused to address the question of incorporation through the Privileges and Immunities Clause because the plaintiff had waived that argument: "if the Fourteenth Amendment limited the

power of the states as to such rights . . . we think it was fatal to this claim that it was not set up in the trial court." 153 U.S. at 538. Because the *Miller* Court declined to address the incorporation claim, yet also cited *Cruikshank,* it must have understood that earlier case to do just what it said: to render a holding as to the direct applicability—and *only* the direct applicability—of the Second Amendment. This is confirmed by the fact that a citation to *Barron* appears in the *Miller* opinion in the same string citation as *Cruikshank.* 153 U.S. at 538.

Also instructive on this point is the 1887 case of *Spies v. Illinois* (cited in *Miller* in the same string cite as *Cruikshank),* in which Chief Justice Waite, writing for the Court, cited both his majority opinion in *Cruikshank* and the *Presser* opinion (as well as *Barron*) for the proposition that the Bill of Rights does not apply directly to the states, and declined to address whether the rights enumerated therein applied to the states through the Fourteenth Amendment because the argument was procedurally barred. 123 U.S. 131, 151-52, 166-67, 181 (1887). Thus, the most natural reading of the *Cruikshank/Presser/Miller* triumvirate – indeed, the only reading that comports with the actual text, posture and structure of those opinions—is that they merely reaffirmed the unremarkable constitutional principle that the Bill of Rights, *standing alone,* restrains only the federal government.

In sum, the Supreme Court has never directly addressed selective incorporation of the Second Amendment through the Due Process Clause of the Fourteenth. Thus, this Court is free – and obliged – to rule on that issue.

B. Ninth Circuit Precedent Does Not Foreclose Incorporation

In 1992, the Ninth Circuit, relying on *Cruikshank* and *Presser*, held that "the Second Amendment limits only federal action." *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 731(9th Cir. 1992). Like the cases it relied upon, however, *Fresno Rifle* did not decide whether the Second Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment. Indeed, *Fresno Rifle* itself recognized that *Cruikshank* and *Presser* predated the first incorporation decision, *id.* at 729-30, and the court of appeals addressed only the argument that the Fourteenth Amendment requires total incorporation of the Bill of Rights. *Id.*; *See Nordyke V* 563 F.3d at 447 ("we did not address selective incorporation through the Due Process Clause" in *Fresno Rifle*.)

Moreover, in *Silveira v. Lockyer*,[5] Judge Stephen Reinhardt, writing for the Court, forecast the inevitable resolution of the incorporation issue raised in this

[5] 312 F.3d 1052, 1061, reh. denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 540 U.S. 1046 (2003) (following *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), in finding the "collective rights" model provides the best interpretation of the Second Amendment).

case, and implied the issue could be addressed by the Ninth Circuit if and when presented, stating:

> *Fresno Rifle* itself relied on *Cruikshank* and *Presser*, decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause. Following the now-rejected *Barron v. Baltimore* (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerson*, 270 F.3d at 221 n.13. Because we decide this case on the threshold issue of standing, however, we need not consider the question whether the Second Amendment presently enjoins any action on the part of the states.

Id. at 1067 (underline added, point cites omitted).

Thus, the question presented by this case – whether the individual right recognized in *Heller* is incorporated under the Due Process Clause is still open in the Ninth Circuit. Neither *Fresno Rifle* nor *Cruikshank*, et al., preclude its review.

C. The Decision of the Second Circuit, Followed Recently by the Seventh, Was Wrong; *Nordyke V* Does Not "Overrule" Supreme Court Precedent on Incorporation Because There Is None

The Second Circuit, in one paragraph, dismissed a plaintiff's' Second Amendment challenge to state law prohibiting "nunchakus"(a martial arts weapon), stating: "It is settled law, however, that the *Second Amendment* applies only to limitations the federal government seeks to impose on this right." That

court cited *Presser* in support of its holding, reasoning as follows:

> [W]e "must follow *Presser*" because "[w]here, as here, a Supreme Court precedent '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 the Supreme Court the prerogative of overruling its own decisions.'" *Bach, 408 F.3d at 86* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)) (alteration marks omitted).[6]

Malony's reasoning fails on two points. First, as discussed above, the issue of selective incorporation of the Second Amendment via the Due Process Clause of the Fourteenth Amendment has never been addressed "directly" by the Supreme Court. As the Supreme Court noted in *Rodriguez de Quijas*, the case relied upon in *Malony*, the appellate court decision in that case declared as "obsolete" an earlier Supreme Court case *directly* on point. *Rodriguez de Quijas*, 490 U.S. at 479. The Court rightly opined that that is not the appellate court's role. *Id.* at 484. The panel, here, made no such determination regarding *any* Supreme Court case.

Second, the Supreme Court has not "rejected" the holdings in any of the cases cited above – not *Cruikshank*, *Presser*, *Miller*, nor even *Barron*.[7] These

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[6] *Malony v. Cuomo*, 554 F.3d 56, 58-59 (2009) (italics added); *see also NRA v. Chicago*, 2009 U.S. App. LEXIS 11721, *4-5 (following *Malony*, and adopting its reasoning).

[7] *See, e.g.,* Erwin Chemerinsky CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, 484 (2d ed. 2002) ("[T]he Bill of Rights still applies directly only to the federal government; *Barron v. Mayor of Baltimore* never has been expressly overruled.").

cases remain binding authority, but only on the legal questions presented and resolved in those cases, i.e., whether the Second Amendment applies to the states directly. In fact, *Miller* criticized counsel in that case for *not* raising Privileges and Immunities incorporation in the trial court so the issue could be addressed there, before being raised for the first time on appeal. *Miller*, 153 U.S. 535, 538.

In short, the panel addressed and adhered to binding legal authority – in sharp contrast to the inaccurate statement in *NRA v. Chicago* that the panel, here, "concluded that *Cruikshank, Presser*, and *Miller* may be bypassed as fossils."[8] The panel did not bypass those cases. Rather, it deferred to those cases only on the legal issues presented, not some imagined holding.[9] *Nordyke V* at 446-47. While it is not within the province of appellate courts to overrule outdated – even "fossilized" – Supreme Court cases, neither is it within their province to divine the presumptive rulings of past Courts on legal issues not heard. The Second and Seventh Circuit Court rulings do precisely that when they take the broad ruling in

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[8] *NRA v. Chicago*, 2009 U.S. App. LEXIS 11721, *4. The court in that case provided no citation to the panel's opinion – because the panel made no such statement.

[9] *See* Kates, *Second Amendment* at 253 ("Presumably the attitude toward federalism which led the nineteenth-century Court to reject privileges and immunities incorporation would equally have led it to reject due process incorporation, if anyone had then imagined it. But to apply the *Presser/Miller* reasoning to negate due process incorporation of the second amendment today is to extend those cases beyond their holdings."(footnotes omitted).)

Presser, et al., that the Second Amendment directly restricts only federal acts, divorce it from the case and controversy actually before those courts at the time, and interpose their opinion of how those courts might have ruled – over a century ago – on an issue not before them. The fact remains, those courts did *not* rule on selective incorporation. Further, as *Heller* noted, *id.* at 2813, n.23, appellate courts are bound to resolve that issue when presented, as this panel did here.

D. The Panel Correctly Ruled on Second Amendment Incorporation

The Due Process Clause of the Fourteenth Amendment prohibits states from infringing rights that are "fundamental." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) ("[W]hen the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power."). Indeed, as the author of the *Heller* opinion has explained elsewhere, "virtually all" of the individual rights found in the Bill of Rights have been incorporated against the States via the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring in

judgment); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) ("We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States.")

The panel's examination of Second Amendment incorporation adopts and abides by both the Supreme Court's incorporation doctrine clarified in *Duncan* and the fundamental rights analysis in *Heller*, which is itself an analysis of the foundations and history of the ancient right of self-defense and the right to arms for that purpose. In short, the panel correctly resolved the incorporation issue.

IV. Neither the Fairgrounds Nor County Property Nor Gun Shows Are "Sensitive Places" Nor May Appellees So Designate Them by *Ipse Dixit*

After the panel ruled the Second Amendment applied to state action, it then upheld the subject ordinance, effectively banning Nordyke's gun shows from county property. *Nordyke V*, at 460. It did so, in large part, by broadly applying the "sensitive places" exception mentioned in *Heller*, *id.* at 2817. The "sensitive places" exception can only apply to places like jails, prisons, mental institutions, schools and government buildings – or to places in which it can *factually* be shown that the introduction of firearms poses special problems. Otherwise the exception swallows the rule. And no such showing was made (nor could it be made) as to gun shows or the fairgrounds or county property in general.

Instead of offering facts supporting their "sensitive places" claim, Appellees just baldly declared – and the panel accepted – that their ordinance falls under the "sensitive places" exception. Of particular import here is Appellees' failure to do what they would have done had any such facts existed: ask that the matter be returned to the trial court to allow them to introduce facts showing the "sensitive places" exception to be relevant. And if the panel thought it relevant, the case should have been remanded for further proceedings.

We recognize that *Heller* allows states to designate things that are sensitive as sensitive. That does not mean that public entity litigants may advance "sensitive place" claims arbitrarily, without basis in the record and without identifying any "sensitive places" criteria. But Appellees' own description of what the ordinance covers is: "principally of open space venues, such as County-owned parks, recreational areas, historic sites, parking lots of public buildings (the State prohibits gun possession within the same buildings), and the County fairgrounds." (Appellees' Second Amendment Brief, p. 1.) That is inexplicably broad for a limitation on a constitutional right, one expressly included in the Bill of Rights.

Three points foreclose any "sensitive places" argument in this case. First, gun shows simply do not meet any objective criteria for being "sensitive."

Appellees offered no evidence on point and the panel cites none, accepting as sensitive "gathering places where high numbers of people might congregate. That is presumably why they are called 'open space venues.'" *Nordyke V* at 460.

The second reason is that any claim that gun shows are "sensitive" would be flatly inconsistent with the challenged ordinance. Not only does it nowhere intimate that it is designating places where gun possession raises special concerns, it heedlessly applies it to *all* county properties regardless of their "sensitivity." Moreover, the challenged ordinance expressly allows participants in *other* events at the fairground to have guns. How can the fairgrounds be a "sensitive place" as to guns exhibited at gun shows but not a "sensitive place" as to guns exhibited at other fairgrounds events?

The third reason Appellees refrain from explaining – or proving – their claim that gun shows are "sensitive" is that any such claim contradicts state law. California does forbid firearms in certain specific areas, primarily state or local public buildings, but expressly exempts gun shows from any such treatment. Cal. Pen. Code § 171b.[10]

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[10] *Cf.* The Gun Control Act, 18 U.S.C. § 921, et seq., banning with certain exceptions possession of firearms from areas it deems unsuitable, specifically, federal buildings, with signs conspicuously posted to provide notice of the ban. *Id.* at § 930. Federal law also contemplates and allows for gun show activities, generally, e.g.,18 U.S.C. § 923(j).

Thus, the panel erred by treating any place where people might gather as a "sensitive place," treatment that clearly misreads *Heller's* description of the exception, *id.* at 2817. Why would *Heller* list specific examples of "sensitive places" (prisons, schools, etc.) if that phrase meant *any* place people gather? The panel's analysis also runs headlong into the phrasing of the Second Amendment: a right to keep *and bear* arms. We recognize that the right to bear arms is so far largely undefined in federal caselaw – and that when defined it will doubtless be subject to various regulations. That is an issue for other cases, or at least one requiring further review. What is relevant here is that to classify *any* place where people gather as "sensitive" peremptorily abolishes the constitutional right to bear arms, except perhaps in deserted forests or deserts. The classification also treats *Heller's* holding that the Second Amendment protects in-home possession of handguns for self-defense to be a limiting factor, i.e., that any place outside the home may be a "sensitive" place.

In sum, Appellants' right to raise a Second Amendment claim should not have been trumped by the mere specter of the "sensitive place" exception, with no criteria for defining that exception or evidence supporting its application here.

CONCLUSION

Heller commands that courts faced with Second Amendment questions

"engage in the sort of Fourteenth Amendment inquiry required by our later cases." The panel did so, in accord with *Heller*. Thus there is no need for en banc review. If the Court nonetheless decides in favor of en banc review, it should uphold the panel's decision on incorporation, and remand the case for further proceedings on the panel's erroneous "sensitive places" analysis.

Date: June 8, 2009

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

By Counsel C. D. Michel

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached *amici curiae* brief is proportionately spaced, has a typeface of 14 points and contains 3953 words.

Date: June 8, 2009

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

By Counsel C. D. Michel

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing to be mailed first class, postage prepaid on this 8th day of June, 2009, to:

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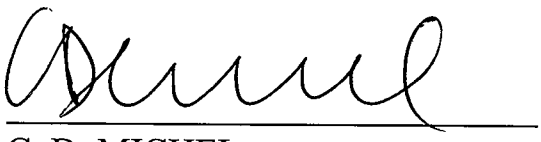

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June 8, 2009

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VIA FED EX OVERNIGHT MAIL

Re: Russell Allen Nordyke et al., v. Mary V. King et al.,
Case No.: 07-15763

Dear Clerk:

Enclosed please find the original and fifty one copies of the "Motion For Leave to File Amicus Brief," and the original and fifty one copies of the "Amicus Curiae Brief of The National Rifle Association of America, Inc., and The California Rifle & Pistol Association In Opposition to En Banc Review" for the above referenced matter. Please file and conform the extra copies provided and send it back in the enclosed self-addressed stamped envelope.

Thank you in advance for your prompt attention to this request. Please feel free to contact me if you have any questions or concerns. You can also reach me by email at cayala@tmllp.com.

Sincerely,
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