No. 07-15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs-Appellants,

v.

MARY KING, et al.,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Northern District of California
Hon. Martin J. Jenkins
(CV-99-04389-MJJ)

BRIEF AMICUS CURIAE OF SECOND AMENDMENT FOUNDATION, INC. IN SUPPORT OF APPELLANTS SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Second Amendment Foundation, Inc., has no parent corporations. No publicly traded company owns 10% or more of amicus corporation's stock.

Dated: October 2, 2008

Respectfully submitted,
Second Amendment Foundation, Inc.
Amicus Curiae

By: _____
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Second Amendment Foundation ("SAF"), a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is a non-profit educational foundation incorporated in 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every state of the Union, including thousands in California.

SAF's members and supporters are directly impacted by Appellees' regulation of gun shows, as well as any court decisions defining the scope of Second Amendment rights which they enjoy exercising. SAF has substantial expertise in the field of Second Amendment rights that would aid the Court in deciding this matter.

CONSENT TO FILE

All parties have consented to the filing of this brief.

ARGUMENT

I. THIS COURT IS REQUIRED TO CONSIDER THE QUESTION OF SECOND AMENDMENT INCORPORATION UNDER THE SUPREME COURT'S MODERN INCORPORATION DOCTRINE.

Appellees correctly observe that only the Supreme Court can overrule one of its precedents. But that truism is irrelevant to this Court's consideration of

Second Amendment incorporation, as there exists no controlling Supreme Court precedent on the subject. The three superannuated cases purported by Appellees to control the incorporation question had long been rendered of questionable value when earlier this year, the Supreme Court specifically instructed that the modern incorporation doctrine controls the Second Amendment incorporation issue. Given the significant intervening changes in the law over the past century, this Court is required to conduct a modern incorporation analysis to decide whether Appellees are bound to respect Second Amendment rights.

A. The Modern Incorporation Doctrine, Not Pre-Incorporation Era Relics, Controls the Question of Second Amendment Incorporation.

Before the Civil War, the states were not considered bound by the Bill of Rights. *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). But *Barron* proved intolerable during Reconstruction. With recalcitrant southern states actively oppressing those just freed from slavery, Congress saw the need to constitutionally define American citizenship and imbue that citizenship with meaningful federal protection. Thus the Fourteenth Amendment was designed and ratified in great part with the express aim of overruling *Barron*.

The Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1.

"[I]n drafting section one," Fourteenth Amendment author Rep. John Bingham

> looked to *Barron* itself for guidance. Within the words of Chief Justice John Marshall he found clear instructions: "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."

Michael Anthony Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 Mo. Law. R. 1, 18 (2007) (hereafter "Lawrence") (quoting Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871); *Barron*, 32 U.S. at 250). The opening words of the Privileges or Immunities Clause thus imitate directly the command of Article I, Section 10 referenced by *Barron*: "No state shall." Bingham made explicit that *Barron*'s suggestion was followed in order to bind the states. *Id.*, at 18-19 and citations therein.

As for the privileges and immunities that "no state shall . . . abridge," these included, at a minimum, the Bill of Rights. "Over and over [John Bingham] described the privileges- or-immunities clause as encompassing 'the bill of rights' – a phrase he used more than a dozen times in a key speech . . ." Akhil Reed Amar, THE BILL OF RIGHTS 182 (1998) (hereafter "Amar"). The Fourteenth

Amendment's Senate sponsor, Senator Jacob Howard, explained the Privileges or Immunities Clause's incorporating scope:

> To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal right guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . *and the right to keep and to bear arms* . . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added).

These and numerous other widely-reported congressional comments expressing the Fourteenth Amendment's repudiation of *Barron* were unopposed. Amar, at 186-87. Indeed, the Fourteenth Amendment's southern opponents understood that the Privileges or Immunities Clause incorporated the Bill of Rights, as did those who promoted the Fourteenth Amendment's ratification among the states. *See discussion in* Lawrence, at 22-27. And arguably, the right to keep and bear arms was the right whose incorporation was most urgently desired. "With respect to the proposed [Fourteenth] Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2811 (2008) (citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866)).

Unfortunately, the Supreme Court's first case interpreting the Fourteenth Amendment gutted the Privileges and Immunities Clause's meaning. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), held that the Privileges or Immunities Clause guarantees only rights that flow from the existence of United States citizenship, such as the rights to diplomatic protection abroad or to access the navigable waterways of the United States. *Slaughter-House* may be binding law, but "'everyone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause." Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi. Kent L. Rev. 627 (1994); *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1121, 1297 n. 247 (1995) ("*[T]he Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992). "Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J. dissenting) (citations omitted). Indeed, Justice Thomas, joined by Chief Justice Rehnquist, declared that he "would be open to reevaluating [the Privileges or Immunities Clauses's] meaning in an appropriate case." *Saenz*,

526 U.S. at 528 (Thomas, J., dissenting).[1]

But beginning with *Chicago, Burlington & Quincy Railroad Co.* v. *City of Chicago*, 166 U.S. 226 (1897), the Supreme Court partially compensated for its *Slaughter-House* error by embarking on a program of finding enumerated rights contained inherently within the Due Process Clause. "It 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." *Twining* v. *New Jersey*, 211 U.S. 78, 99 (1908).

Only in 1925 did the Supreme Court begin directly incorporating enumerated constitutional rights as against the states pursuant to the Fourteenth Amendment's Due Process Clause, holding the States bound by the First Amendment's free speech and press guarantees. *Gitlow* v. *New York*, 268 U.S. 652 (1925). It is now a well-established feature of the American constitutional order that the Fourteenth Amendment's Due Process Clause has a substantive

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[1]"Since the adoption of [the Fourteenth] Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights . . . Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open." *Gideon* v. *Wainright*, 372 U.S. 335, 345-46 (1963) (Douglas, J., concurring) (citation omitted).

dimension, and that deprivation of enumerated constitutional rights is thus largely incompatible with due process. Almost every provision of the Bill of Rights considered for incorporation in the modern era has been incorporated.

Notwithstanding this rather well-known development in American constitutional history, Appellees claim that the question of Second Amendment incorporation is controlled by three relics of the pre-incorporation era: *United States* v. *Cruikshank*, 92 U.S. 542 (1876), *Presser* v. *Illinois*, 116 U.S. 252 (1886) and *Miller* v. *Texas*, 153 U.S. 535 (1894). These cases have not been good law for quite some time. And in *Heller*, the Supreme Court expressly questioned their continuing relevance in light of the modern incorporation doctrine.

> With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry *required by our later cases*.

Heller, 128 S. Ct. at 2813 n.23 (emphasis added).[2]

Heller noted that *Presser* v. *Illinois*, 116 U.S. 252 (1886) and *Miller* v. *Texas*, 153 U.S. 535 (1894) "reaffirmed that the Second Amendment applies only

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[2]Appellees' reliance on language in Justice Scalia's book, suggesting the Second Amendment binds only the federal government, Appellees' Br. 2, is misplaced. This Court is bound by the Supreme Court's modern incorporation doctrine, as indicated by Justice Scalia's opinion for the Supreme Court observing that modern incorporation analysis is "required," *Heller*, 128 S. Ct. 2813 n.23, to decide the question of Second Amendment incorporation.

to the Federal Government." *Id.* But both these cases precede the incorporation era, and suffer from the same flaw that renders *Cruikshank* non-authoritative: an absence of the "required" modern incorporation analysis. *See also Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968) (complete non-incorporation "a position long since repudiated"). *Miller*'s observation that the Second Amendment did not bind the states referenced the Fourth Amendment for the same proposition:

> [D]efendant claimed that the law of the State of Texas . . . was in conflict with the Second and Fourth Amendments to the Constitution of the United States . . . We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and even if he were, it is well settled that the restrictions of *these* amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts.

Miller, 153 U.S. at 538 (citations omitted) (emphasis added). Clearly Appellees would not cite *Miller*'s language for the proposition that the county's Sheriff need not obey the Fourth Amendment. In any event, *Miller*'s non-incorporation language is dicta; the case was dismissed because the constitutional claims were not preserved at trial. *Miller*, 153 U.S. at 537-38.

As for *Presser*, the Supreme Court in that case reasoned that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the National government." *Presser*, 116 U.S. at 265. Among the other amendments suggested by *Presser* as not being incorporated are the First (citing

Cruikshank), Fifth,[3] and Sixth.[4] *Id.* *Presser* relied upon cases that are clearly no longer authoritative, and failed to engage in the now-required incorporation analysis that would not be announced until deep into the following century.

It cannot credibly be maintained that *Cruikshank*, *Miller*, and *Presser* retain any vitality on the question of incorporation. Nor would it be logical to conclude that these cases' *Barron*-style reasoning is authoritative only for the Second Amendment, while no longer applicable to the First, Fourth, Fifth, and Sixth Amendments which they equally condemned as not binding upon the states. The logic, such that it is, of these pre-incorporation relics, cannot be valid with respect to just one portion of the Bill of Rights. *See Heller*, at 2818 n.27 (Second Amendment to be given equal treatment to other enumerated rights).

Judge Reinhardt, in elucidating the "collective right" theory rejected in *Heller*, agreed that *Presser* and *Cruikshank* "rest on a principle that is now thoroughly discredited." *Silveira* v. *Lockyer*, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002), *overruled on other grounds*, *Heller*. In making this observation, Judge

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[3]Takings Clause not incorporated, citing *Barron;* Double Jeopardy Clause not incorporated, citing *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847).

[4]Right to be informed of accusation not incorporated, citing *Twitchell* v. *Commonwealth*, 74 U.S. (7 Wall.) 321 (1869); right to criminal jury trial not incorporated, citing *Murphy* v. *People*, 2 Cow. 815 (N.Y. 1824).

Reinhardt noted that the Fifth Circuit had likewise rejected any authoritative value in these pre-incorporation relics. *Id.* (citing *United States* v. *Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001)).

The modern incorporation doctrine, not relics of the preceding constitutional era, control the question of Second Amendment incorporation.

B. <u>This Court Is Not Bound By Obsolete Precedent</u>.

Appellees claim that this Court's earlier precedent, holding *Presser* and *Cruikshank* control the question of Second Amendment incorporation, is itself controlling. Appellees' Br. 5 (citing *Fresno Rifle and Pistol Club, Inc.* v. *Van De Kamp*, 965 F.2d 723, 729 (9th Cir. 1992)). Such bootstrapping is untenable.

Just as this Court is not bound by Supreme Court precedents that have been effectively overruled by more recent Supreme Court precedent, this Court is not bound by earlier panel decisions since undercut by intervening higher authority. Accordingly, just as *Presser* and *Cruikshank* are themselves no longer controlling authorities (if they ever were), circuit decisions that held them controlling, including *Fresno*, are likewise no longer binding. "[W]e may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point." *Miller* v. *Gammie*, 335 F.3d 889, 899 (9th Cir. 2003)

(en banc) (quoting *Galbraith* v. *County of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002) and *United States* v. *Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985)); *see also United States* v. *Williams*, 435 F.3d 1148, 1161 (9th Cir. 2006) (same); *Taghadomi* v. *United States*, 401 F.3d 1080, 1087 (9th Cir. 2005).

Other circuits similarly recognize that their panel precedents might be rendered obsolete by intervening higher authority. *See, e.g. EEOC* v. *Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005) ("[o]ur decisions do not bind the district court when there has been a relevant intervening change in the law") (citation omitted); *Chisolm* v. *TranSouth Fin. Corp.*, 95 F.3d 331, 337 n.7 (4th Cir. 1996); *White* v. *Estelle*, 720 F.2d 415, 417 (5th Cir. 1983); *Dawson* v. *Scott*, 50 F.3d 884, 892 n.20 (11th Cir. 1995). Indeed, a failure to recognize that intervening Supreme Court precedent has rendered obsolete a decision of this Court has been grounds for summary reversal. *United States* v. *Nachtigal*, 507 U.S. 1 (1993).

"[T]he issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort 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*, 335 F.3d at 900. Second Amendment incorporation may not have been directly at issue in *Heller*, but the Supreme Court's instructions leave little doubt that a modern incorporation analysis is now

"required." *Heller*, 128 S. Ct. at 2813 n.23.

Moreover, in finding that the Second Amendment secures an individual right, the Supreme Court engaged an extensive discussion of how Reconstruction Era Americans viewed the Second Amendment. *Heller*, 128 S. Ct. at 2809-11. "[T]hose born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive." *Heller*, 128 S. Ct. at 2810. It bears repeating that the Supreme Court specifically recounted that the Fourteenth Amendment was intended to apply the Second Amendment to the states:

> With respect to the proposed Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess., 1182 (1866). Representative Nye thought the Fourteenth Amendment unnecessary because "[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense." *Id.*, at 1073 (1866).

Heller, 128 S. Ct. at 2811. And specifically with respect to *Cruikshank*, upon which *Presser* relied, the Supreme Court cautioned that failure to incorporate the First Amendment casts doubt upon that case's vitality.

It is impossible to reconcile the Supreme Court's reliance on a history of Fourteenth Amendment incorporation, specific instruction that modern incorporation analysis is "required," and skepticism of *Cruikshank*, with a notion that *Presser* and *Cruikshank* retain authoritative value. Under the well-established doctrines of this Court rejecting precedent whose foundation has eroded, *Fresno Rifle* is not controlling.

II. THE SECOND AMENDMENT IS INCORPORATED AS AGAINST THE STATES UNDER THE MODERN INCORPORATION DOCTRINE.

In incorporation's early days, the Supreme Court explained that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Palko* v. *Connecticut*, 302 U.S. 319, 324-25 (1937). The Second Amendment, given its forceful command and basis in the inherent human right of self-preservation, would surely pass this test. But the Supreme Court would settle on an analysis proven yet more amenable to incorporation. The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan*, 391 U.S. at 149, or "necessary to an Anglo-American regime of ordered liberty," *id.*, at 150 n.14. *Duncan*'s analysis suggested looking to the

right's historical acceptance in our nation, its recognition by the states, any trend regarding state recognition, and the purpose behind the right.

The right to bear arms clearly meets the modern incorporation standard. "By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, at 2798 (citations omitted). When the Constitution was written, English law had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock* v. *Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). "The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable." William Blizard, "Legality of the London Military Foot-Association" (1780), reprinted in DESULTORY REFLECTIONS ON POLICE 59-60 (1785).

The violation of that right by George III "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 128 S. Ct. at 2799. Responding to British criticism of civilian armament, Samuel Adams declared that "it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights . . . are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs." 1 WRITINGS OF SAMUEL ADAMS 299

(Harry Cushing ed., 1904). Citing Blackstone's "right of having and using arms for self-preservation and defence," Adams added, "[h]ow little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defence at any time . . . ." *Id.*, at 317-18 (emphasis in original).

The Second Amendment "codified a right inherited from our English ancestors." *Heller*, 128 S. Ct. at 2802 (citation omitted). Indeed, when the constitution was considered, demands for a bill of rights prevailed in five of seven constitutional ratifying conventions. The only provisions common to all bill of rights demands were freedom of religion and the right to arms.

Appellees' argument that early American states did not secure a right to arms have been specifically repudiated by the Supreme Court. "Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them – Pennsylvania and Vermont – clearly adopted individual rights unconnected to militia service." *Heller*, 128 S. Ct. at 2802.[5] The other two, North Carolina and

[5]Thus *Heller* rejected Appellees' very creative claim, Appellees' Br. 35-37, that the Pennsylvania Constitution's guarantee "That the people have a right to bear arms for the defence of themselves and the state," Pa. Const. of 1776, art.

Massachusetts, might have been more ambiguous but were judicially suggested as guaranteeing individual rights. *Id.*, at 2802-03. "That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right." *Heller*, 128 S. Ct. at 2803.

To the extent Appellees claim state arms-bearing provisions were collectivist in nature owing to idiomatic understanding of "bear arms," Appellees Br. 30-31, this too has specifically been addressed and rejected – at some length – by the Supreme Court. *See Heller*, 2793-95.

Forty-four of the fifty states secure a right to arms in their constitutions, and of these, fifteen are either new or strengthened since 1970. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. Law & Pol. 191

XIII, somehow fails to secure an individual right. *See also Heller*, at 2793. The individual rights interpretation of "defence of themselves" was first explicated by Justice Wilson in the 18th Century, and remains valid law in the Keystone State today. *See* 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., 1804); *Ortiz* v. *Commonwealth*, 681 A.2d 152, 156 (Pa. 1996). "Themselves" as otherwise used by the Pennsylvania drafters is self-evidently not collective: "[T]he people have a right to hold themselves, their houses, papers, and possessions free from search or seizure. . . ." Pa. Const. of 1776, ch. 1, art. X.

(2006).[6] And in *Heller*, thirty-two states advised the Supreme Court that the individual Second Amendment "is properly subject to incorporation." Brief of Amici States Texas, et al., Supreme Court No. 07-290, at 23 n.6.[7]

The Second Amendment's purpose confirms its incorporation. "The inherent right of self-defense has been central to the Second Amendment right." *Heller*, at 2818. Blackstone described that right as preserving "'the natural right of resistance and self- preservation,' and 'the right of having and using arms for self-preservation and defence.'" *Heller*, at 2792 (citations omitted). The Supreme Court binds the states to respect unenumerated rights which, like the Second Amendment, are rooted in deference to preserving personal autonomy. Observing

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[6]Appellees mischaracterize some state constitutional right to arms provisions as collectivist or unclear where they have been held to guarantee individual rights. *E.g. compare* Appellees' Br. 47 *with State* v. *Foutch*, 34 S.W. 1, 1 (Tenn. 1896) ("[u]nder our constitution every citizen of the State has the right to keep and bear arms for his proper defense, and the Legislature only has power by law to regulate the wearing of arms to prevent crime"); *State* v. *Kerner*, 181 N.C. 574 (1921) (state right to arms individual); *Arnold* v. *Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) (same); *Arkansas Game and Fish Com'n* v. *Murders*, 327 Ark. 426 (1997) (same); *State* v. *Johnson*, 16 S.C. 187 (1881) (same). Appellees' attempts to splinter the states into a multitude of groupings based on the particular wording employed by their constitutional texts, or on whether in Appellees' view the right is individual only by judicial interpretation, is unconvincing. The fifty state constitutions do not typically duplicate each other verbatim, on all matters, in communicating identical concepts.

[7]North Carolina joined the brief's 31 original signatories by letter.

that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law," *Cruzan* v. *Dir., Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) (citation omitted), the Supreme Court recognized a right to refuse life-sustaining medical care. *Id.*, at 278; *see also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Lawrence* v. *Texas*, 539 U.S. 558, 562 (2003) ("liberty of the person both in its spatial and more transcendent dimensions" supports right to consensual intimate relationships); *Rochin* v. *California*, 342 U.S. 165 (1952) (right of bodily integrity against police searches).

It is unfathomable that the states are constitutionally limited in their regulation of medical decisions or intimate relations, because these matters touch upon personal autonomy, but are unrestrained in their ability to trample upon the enumerated right to arms designed to enable self-preservation. If abortion is protected because "[a]t the heart of liberty is the right to define one's own concept of existence," *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992), the right of armed self-defense against violent criminal attack is surely deserving of

incorporation. Indeed, *Casey* invoked the second Justice Harlan's celebrated passage describing the liberty protected by the Due Process Clause as broader than "a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on." *Id.*, at 848 (quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added). Liberty cannot now be defined so narrowly as to exclude one of its more obvious attributes.

The Second Amendment also has another purpose, spelled out in the prefatory clause: preservation of the people's ability to act as militia. *Heller*, at 2800-01. The amendment's framers believed this purpose was "necessary to the security of a free state." U.S. Const. amend. II. By its own terms, the Second Amendment secures a fundamental right.

Appellees' claim that the presumptive validity of certain firearms regulation "cannot be squared with the position that the individual right to possess firearms for personal self-defense protected by the Second Amendment is fundamental," Appellees' Br. 60, is simply wrong. The argument is only plausible if one defines the right to arms so broadly as to include circumstances that historically have been outside the contours of the right. That is not *Heller*'s approach. The language

referenced by Appellees must be read in context. The Supreme Court was describing an "historical analysis" as informing its views of which regulations might be valid, and explained the limitations of the right as definitional: "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that *the right was not* a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, at 2816 (emphasis added).

But Appellees' suggested premise, that fundamental rights are therefore all-but absolute, is itself flawed. If a gun law is to be upheld, it should be upheld precisely because the government has a compelling interest in its regulatory impact. Because the governmental interest may be strong in this arena, applying the ordinary level of strict scrutiny for enumerated rights to gun regulations will not result in wholesale abandonment of the country's basic firearm safety laws. A compelling interest is an aspect of the strict scrutiny test, not a reason to overwhelm the standard. And strict scrutiny is context-sensitive, "far from the inevitably deadly test imagined by the Gunther myth." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vanderbilt L. Rev. 793, 795 (2006). "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors* v.

Pena, 515 U.S. 200, 237 (1995); *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003).

The Fifth Circuit's experience over the past eight years refutes Appellees' binary proposition that the right to arms must either be maximally broad and absolute in all respects, or completely abolished. In 2001, the Fifth Circuit announced a version of strict scrutiny to evaluate gun laws under the Second Amendment, permitting regulations that are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *Emerson*, 270 F.3d at 261; *United States* v. *Everist*, 368 F.3d 517, 519 n.1 (5th Cir. 2004) (strict scrutiny undecided, though "it remains certain that the federal government may not restrain the freedom to bear arms based on mere whimsy or convenience"). The Fifth Circuit has yet to strike down a law for violating the Second Amendment.

That the Supreme Court would allow laws "imposing conditions and qualifications on the commercial sale of arms," *Heller*, at 2817, does not mean that it would sanction *all* conditions and qualifications on the sale of arms – any more than First Amendment restrictions on the time, place, and manner of exercising speech rights means that the government can ban speech at any and all times and places, and as conducted in any and all manners.

Nor is there any logic in Appellees' proposition that the potential misuse of firearms, coupled with "the historic and widespread practice of enacting laws to minimize gun violence and crime, belie any notion that the Second Amendment protects a fundamental right." Appellees' Br. 61. For good reason, all fifty states strictly regulate the practice of law, as do judges inside their courtrooms. But that does not mean the right to counsel is not fundamental. The Vehicle Code, reflecting society's desire to reduce carnage on the highways, does not diminish the right to travel. And of course the licensing of parades and zoning of churches does not render First Amendment rights less important. Indeed, there are no rights that can be said to be completely free of regulatory reach. The Second Amendment cannot be held to such an impossible standard.

III. THE SECOND AMENDMENT HAS NOTHING TO DO WITH THE STATE'S POLICE POWER.

Appellees' contention that the right of self-defense underlying the Second Amendment is the right of states to exercise a police power is specious. Appellees could not more clearly repudiate *Heller*'s core holding than by offering that

> the Second Amendment was understood by the Founders, and should be understood today, only as a constraint against federal invasion of a power reserved to the States – the power to implement, administer, and develop the common law in accordance with the decisions of the people of each State.

Appellees' Br. 8 (citation omitted).

Incorrect. "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." *Heller*, 128 S. Ct. at 2799. Appellees may not agree that *Heller* was decided correctly, but *Heller* is binding law, authoritatively rejecting the notion that the Second Amendment is designed to guarantee any "right" of the states to do anything, or any action by individuals as a collective.

> The first salient feature of the [Second Amendment's] operative clause is that it codifies a 'right of the people.' . . . All [uses of 'right of the people'] unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body.

Heller, 128 S. Ct. at 2790.

Indeed, Justice Stevens' principal dissent in *Heller* adopted the District of Columbia's view, supported by its amici, that the Second Amendment guarantees an individual right, albeit one which may only be exercised to advance a state-sanctioned public purpose. *Heller*, 128 S. Ct. at 2822 ("Surely [the Second Amendment] protects a right that can be enforced by individuals") (Stevens, J., dissenting); Pet. Br., U.S. Supreme Court No. 07-290, at 8; Brady Center Br., U.S. Supreme Court No. 07-290, at 5.

As made clear in *Heller* and discussed *supra*, the right to self-preservation at English law was always an individual right. The auxiliary right to the arms with

which a person would exercise the right of self-preservation is likewise individual in character, and always has been. It is true, of course, that neither Blackstone, nor the early Americans for whom he was the preeminent legal authority, were anarchists. Appellees correctly note that the Framers and recognized that government, the very existence of which deprives people of some liberty of action, can promote individual security. Appellees' Br. 9-12. And there is no question that government can, in the exercise of its police power, regulate the use of deadly force. Appellees' Br. 14-15.

But Appellees err, profoundly, in suggesting that the Lockean bargain of living under a government includes the assignment of all individual self-defense rights to the discretion of the authorities. A bargain of this nature would recall not so much Locke, but Orwell – and it is rejected by the fabric of our legal system.[8]

While states retain a police power, they are under no obligation to exercise it, generally or on behalf of any particular individual. And the right of self-defense imposes no claim as against the state. There is, under the Constitution, absolutely no positive right to police protection. *DeShaney* v. *Winnebago County*

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[8]It is also folly to suggest that an individual's presence in a country signals accession, in some sort of arms-length transaction, to all of that nation's laws and governmental institutions. In any event, no individual would rationally surrender the right of self-defense in an instance where it proved immediately necessary.

Dep't of Social Servs., 489 U.S. 189 (1989); *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005). Under California law, as under the common law in all fifty states and the District of Columbia, the public duty doctrine bars the notion that the police owe citizens a duty to provide protection as a matter of tort law. *Williams* v. *State of California*, 34 Cal. 3d 18, 22-23 (1983)*; Adams* v. *City of Fremont*, 68 Cal. App. 4th 243, 274-75 (1998).

While the California Supreme Court has cautioned that the "immunity cart" not be "placed before duty horse," *Williams*, 34 Cal. 3d at 22, in California, as elsewhere, a powerful Tort Claims Act further bars claims for police protection as a matter of sovereign immunity, even in the unlikely event that a court would find the prohibited duty to provide such protection. Claims for failing to provide police protection, however styled, are generally barred by no fewer than four separate manifestations of codified sovereign immunity. Cal. Gov't Code §§ 815.2(b) (general immunity), 818.2 (immunity for failing to enforce law), 820.2 (discretionary immunity), 821.6 (investigative immunity, generally applied to law enforcement, *e.g. Amylou R.* v. *County of Riverside*, 28 Cal. App. 4th 1205, 1209-10 (1994)). Alameda County is doubtless quite familiar with these features of California law.

If in nature, the individual pre-possesses an inherent right of self-defense and self-preservation, as Blackstone described and as even Appellees appear to acknowledge, that right has never been surrendered wholesale to the state. This much is true of all rights retained by the people. For example, in nature, the individual enjoys complete liberty of movement. As part of the social compact, we recognize the legitimacy of incarcerating certain people. But that is a far cry from giving the state unfettered discretion in jailing individuals. With respect to the inherent right of self-defense, the state, at least, has gone to great lengths to deny having bargained guarantees of personal safety in exchange for the right of self-defense. The state has emphatically disclaimed any responsibility for individuals' personal security.

The Second Amendment's very existence – like the existence of all specifically enumerated rights and, indeed, the Ninth Amendment's instruction that the people retain unenumerated rights – belies Appellees' police-state conception of our government. The very concept of "rights" holds that the individual retains a sphere of autonomy into which the state may not intrude. The Fourteenth Amendment makes clear that the states, no more than the federal government, lack unfettered discretion to violate the rights of the people – including the rights retained by the Second Amendment.

IV. THE AMERICAN BILL OF RIGHTS WAS INTENDED TO IMPROVE UPON THE ENGLISH EXPERIENCE.

Appellees correctly note that the English Declaration of Rights limited only the Crown's authority, not Parliament's. Appellees Br. 22; *Loving* v. *United States*, 517 U.S. 748, 766 (1996). But it is illogical to suggest that this fact renders the right to arms non-fundamental. *Id.*, at 23. Under Appellees' logic, the First Amendment would not be deemed to protect fundamental rights, because freedom of speech and of the press is nowhere to be found in the English Declaration of Rights. It was not until five years following adoption of the English Declaration of Rights that "the press became properly free," upon expiration of a licensing act. 4 St. George Tucker, BLACKSTONE'S COMMENTARIES 152 n.a. (1803). Nothing would prevent the English Parliament today from abridging the freedom of the press and, indeed, modern England's tolerance for free speech and dissent leaves a great deal to be desired by American standards.

Not by accident does the First Amendment open with the words, "*Congress* shall make no law." U.S. Const. amend. I (emphasis added). In England, Parliament could, and still can, make all the laws it wishes restricting the liberties of the press, speech, assembly, and worship, and recognize – as it does – an

official state church (the Church of England). But our Bill of Rights binds *all* branches of government.

This is widely understood to be a key innovation of the American Revolution. As James Madison declared, although "it may not be thought necessary to provide limits for the legislative power in [England], yet a different opinion prevails in the United States." Speech of June 8, 1789, reprinted in CREATING THE BILL OF RIGHTS 80 (Veit et al. eds., 1991). Madison's notes for his speech on the floor of the First Congress, introducing the Bill of Rights, confirm as much:

> fallacy on both sides – espcy as to English Decln of Rts –
> 1. Mere act of parlt.
> 2. no freedom of press – Conscience
> Gl. Warrants – Habs corpus
> Jury in Civil Cause – criml.
> Attainders – arms to Protestts.

12 PAPERS OF JAMES MADISON 193 (Robert Ruthland and Charles Hobson eds. 1977). Madison's notes clearly indicate that the Bill of Rights was intended to remedy defects in the English Declaration of Rights, including limitation of the legislative branch, and extending the arms guarantee to people of all faiths, not merely Protestants as in the English example.

In securing rights not recognized by the English Declaration, and strengthening those rights previously recognized by that document, the Bill of Rights did not reduce the weight of any rights enumerated. Quite the opposite. "There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . ." *Heller*, 128 S. Ct. at 2818 n.27 (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

V. THE RIGHT TO KEEP AND BEAR ARMS PROTECTS COMMERCE IN ARMS.

Appellees correctly note that there is an individual "interest in possessing a weapon for self-defense," Appellees' Br. 61, yet claim there is "not a right to sell firearms." *Id.*, at 62. This is simply error.

"[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579-80 (1980) (collecting cases, and holding First Amendment rights of speech

and press secure right to attend criminal trials).

The right to have and use a constitutionally-protected article includes, obviously, the right to buy, sell, trade, and display such articles. The County cannot ban the sale of books protected by the First Amendment, *e.g. Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (booksellers have standing to assert First Amendment rights of bookbuyers); the sale of contraceptives protected by the right to make family planning decisions, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), or perhaps even the sale of sex toys protected by the recently-recognized right to engage in consensual intimate relationships, *Reliable Consultants, Inc.* v. *Earle*, 517 F.3d 738 (5th Cir. 2008); *but see Williams* v. *Morgan*, 478 F.3d 1316 (11th Cir. 2007).

That such sales take place on public property, without more, is of no consequence. *See*, *e.g. Wexler* v. *City of New Orleans*, 267 F. Supp. 2d 559 (E.D. La. 2005) (enjoining ban on sidewalk book sales); *Washington Free Community, Inc.* v. *Wilson*, 334 F. Supp. 77 (D.D.C. 1971) (enjoining ban on newspaper sales in parks). While not all public property may be suited for commercial sales, or for commercial sales of particular articles, the record is clear that the County permits commerce on its fairgrounds, and more critically – permits the possession and use

of firearms on its fairgrounds – but bars the intersection of the two activities. The only reason for the gun show prohibition is the County's desire to suppress the exercise of Second Amendment rights.[9]

CONCLUSION

Appellants have stated a valid cause of action for violation of Second and Fourteenth Amendments rights.

Dated: October 2, 2008

Respectfully submitted,

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[9]Whatever hypothetical harm might occur at a gun show, the only study examining the impact of gun shows on gun deaths confirms Appellants' peaceful experience. "Gun shows do not increase homicides or suicides," http://www.ns.umich.edu/htdocs/releases/story.php?id=6759 (last visited October 2, 2008).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,998 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: October 2, 2008

CERTIFICATE OF SERVICE

On this, the 2nd day of October, 2008, I served two true and correct copies of the foregoing Amicus Curiae Brief on the following by Federal Express:

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The brief was also filed this day by dispatch to the Clerk via Federal Express.

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

Executed this the 2nd day of October, 2008

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_____
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