

No. 08-1521

IN THE
Supreme Court of the United States

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON,
DAVID LAWSON, SECOND AMENDMENT FOUNDATION,
INC. AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

-v-

CITY OF CHICAGO,

Respondent.

*On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit*

**BRIEF OF *AMICUS CURIAE* JEWS FOR THE
PRESERVATION OF FIREARMS OWNERSHIP
IN SUPPORT OF PETITIONERS**

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November 23, 2009

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INTEREST OF AMICUS CURIAE¹

Jews for the Preservation of Firearms Ownership (“JPFO”) is a non-profit tax-exempt Wisconsin corporation with more than 5,000 members and many more Internet-based supporters. Not a lobbying group, JPFO is an educational organization with a vital interest in preserving the individual right to keep and bear arms. Based upon original historical research and analysis, JPFO has observed that the 70 million innocent civilians murdered in the 20th Century's eight major genocides were direct victims of "gun control" laws and policies that disarmed them.

To JPFO, the Second Amendment to the United States Constitution stands as the Founding Fathers' clear and unmistakable legal statement that an armed citizenry is the bulwark of liberty and provides the fundamental basis for law-abiding Americans to defend themselves, their families, their communities and their nation against all aggressors, including, ultimately, a tyrannical government.

As a civil rights organization, JPFO's paramount interest is the preservation of liberty under the Bill of Rights. A uniform, proper interpretation of the Second Amendment, equally applicable at all levels of government, advances that interest. The instant case represents the first time since the it's landmark decision in *District of Columbia v. Heller* that this Court will have the opportunity to decide whether the Second Amendment applies comprehensively at all levels of government or whether

¹ This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

State and local governments may, notwithstanding the Framers' clear recognition of an individual right to keep and bear arms, disarm the people and render hollow the protections of the Second Amendment -- a provision of the Bill of Rights that is arguably the very last line in the defense of American liberty.

SUMMARY OF THE ARGUMENT

In his dissent in *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003), Judge Kozinski articulated the fundamental concept that “tyranny thrives best where government need not fear the wrath of an armed people.” This simple observation captures the essential nature of the Second Amendment.

Throughout history, the disarmament of populations has all too frequently resulted in genocide and mass oppression. History is replete with this familiar pattern. To hold that the right to keep and bear arms does nothing to prevent disarmament efforts by State and local governments is to disregard what the Framers understood – that individual possession of arms is essential to preventing usurpation by the state.

During the 20th Century, more than 70 million people, after first being disarmed, were slaughtered by their own governments. This pattern appeared in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79) and Rwanda (1994) just to name a few.

In many cases, firearm confiscation proceeded only after the groundwork was laid by purportedly “reasonable” regulation and registration of firearms. History illustrates just how readily the standardless “reasonable” regulation of firearms invites large-scale abuse by the state and ultimately paves the way for wholesale confiscation of arms and the mass slaughter of the disarmed (much like the massive censorship that likely would arise under a rule permitting “reasonable” regulation of speech and press).

The critical role an armed populace plays in resisting tyranny and genocide was amply demonstrated not only by the manner in which a handful of Jews in the Warsaw Ghetto held off the Nazi military machine for nearly a month, but also by the less well-known armed resistance against the Nazis by certain Jews in Poland, Lithuania, and Byelorussia – resistance that resulted in a dramatically greater survival rate for the Jews in those communities who were able to arm themselves.²

Restricting the right to keep and bear arms to apply only against the federal government fundamentally undermines the ability of a population to resist such mass oppression. The Framers of the Fourteenth Amendment understood that State and local governments could disarm the people as easily as the national government. The Second Amendment was created as the final barricade against the unthinkable – the day when the rest of our Constitutional safeguards have failed us and we stand exposed to the brutal reality that so many in history have understood only too late.

Because disarmament so naturally and inextricably goes hand in hand with mass oppression and genocide, and because permitting State and local governments to ignore the right to keep and bear arms fundamentally undermines the Framers' intention that the American people never be stripped of their ability to defend themselves from such tyranny, it is of critical importance that this Court reverse the judgment below.

² Even in our own history we saw African Americans in the South systematically denied arms by State and local governments in an effort to facilitate oppression.

ARGUMENT

THE COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE A RIGHT TO KEEP AND BEAR ARMS EQUALLY ENFORCEABLE AGAINST THE STATE AND FEDERAL GOVERNMENTS IS ESSENTIAL TO PREVENT THE RISE OF TYRANNY AND GENOCIDE

A. The Right to Keep and Bear Arms is Essential to Prevent the Rise of Tyranny and Genocide

. . . the simple truth – born of experience – is that tyranny thrives best where government need not fear the wrath of an armed people.

Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting).

This simple recognition by Judge Kozinski encapsulates the essential nature of the Second Amendment.

The position urged by Respondents, that the guarantee afforded by the Second Amendment is effective only against the federal government, would eviscerate one of the essential purposes of the Second Amendment – to ensure that an armed populace is available to discourage the ambitions of a potential tyrant.

As this Court observed in *District of Columbia v Heller*, 128 S. Ct. 2783, 2801 (2008):

. . . history showed us that the way tyrants had eliminated a militia consisting of all the able bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents.

The propensity for governments to disarm their populations to pave the way for tyranny is well known today and was well known to the Framers. During the course of the 20th century, the human race saw disarmament translate into not simply tyrannical governments but outright genocide, time and time again.

All too many of the great tragedies of history -- Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name a few - - were perpetrated by armed troops against unarmed populations.

Silveira, 328 F.3d at 569-70 (Kozinski, J., dissenting).

Denying the right to keep and bear arms has been a *modus operandi* of official repression since the advent of the modern state. A right to keep and bear arms effective only against federal but not State or local encroachment utterly fails to protect against the very disarmament that the Framers sought to prevent.

Because of the tragic history of citizen disarmament, this Court should declare that the Respondents' approach to the right to keep and bear arms is inconsistent with our Constitution. It would be nonsensical if State and local

governments were permitted to accomplish through the back door the outright disarmament of the people when the federal government is so plainly barred from doing so.

It is sobering to realize that every instance of genocide of the Twentieth Century was preceded by the disarming of a civilian population. More than 70 million people in the aggregate were killed in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79), and Rwanda (1994). AARON ZELMAN & RICHARD W. STEVENS, *DEATH BY "GUN CONTROL:" THE HUMAN COST OF VICTIM DISARMAMENT* 3 (2001); *see also* R.J. RUMMEL, *DEATH BY GOVERNMENT* 3-10 (1997) (comprehensive analysis of genocide resulting from imbalance of power between civilians and governments).

In the past, some oppressive governments have simply engaged in the direct and outright confiscation of privately held weapons prior to committing mass murder. In other cases, however, confiscation only followed after the groundwork had been laid by "reasonable" regulation and registration of firearms. History illustrates just how readily "reasonable" regulation of firearms invites large-scale abuse by the state and ultimately paves the way for wholesale confiscation of arms and the mass slaughter of the disarmed.³

³ Invariably the proponents of "reasonable" firearms regulations intend by this terminology a largely standardless approach which invites the type of abuse which has been rampant worldwide within the last century. One need not

A prime example is the Ottoman Empire's attempted extermination of the Armenians. After deposing Sultan Abdul Hamid II in 1908, the reforming "Young Turks" enacted Article 166 of the Ottoman Penal Code (1911) prohibiting the possession, carrying, and importation of "prohibited weapons" without government permission. ZELMAN & STEVENS, *supra*, at 145. Subsequently the Turkish government ordered that all Armenians turn over all firearms, bombs, and daggers. The government further ordered that the Armenians be deported to concentration camps, and that any Armenians "who dare to use arms" to resist deportation were to be "arrested dead." *Id.* at 136-38 (*citing* Official Proclamation to Deport Armenians, June 26, 1915, Preamble, Item 5, Item 6).

Ultimately, between 1 and 1.5 million Armenians were murdered by their government. The victims had been rendered ill-equipped to raise a hand in their own defense.

In April of 1918, shortly after coming to power, the Bolshevik government that would soon become the Soviet Union enacted its first gun control law, requiring the licensing of all firearms owners through the issuance of "certificates." ZELMAN & STEVENS, *supra*, at 160. As of August 17 of that year, by resolution of the Central Executive Committee, the certificates evolved into registration documents, requiring that gun owners identify with specificity the firearms in their possession. *Id.* at 161.

strain too hard to imagine the type of broad censorship that could be implemented under the guise of "reasonable" regulation of speech or of the press.

In October and December 1918, the government issued a series of decrees providing for the wholesale surrender of firearms by the population. Significantly, however, an exception was carved out for members of the Communist Party. *Id.* at 161-63. In the spring of 1920 war erupted with Poland, and on July 12, 1920 an even more stringent law was enacted further restricting the class of individuals who could possess firearms, imposing criminal liability on officials who failed to strictly enforce the requirements of these laws and empowering the secret police to enforce the firearm confiscation laws. *Id.* at 163-65.

Accordingly, after Stalin rose to power in 1924, the wholesale slaughter of those under Soviet rule was underway, with the population having been rendered utterly unable to resist. Between the forced collectivization of agriculture from 1929 through 1933, the show trials of 1934 to 1938, and the continued slaughter of Soviet citizens both during and after World War II by their own government, the *tens of millions* of Soviet citizens murdered by their own government simply had no recourse. They had been thoroughly disarmed years earlier because they were not Party members, high-ranking officials or otherwise within the class of persons permitted to possess arms. *Id.* at 166-73.

Certainly the most infamous genocide of the Twentieth Century was the Nazi slaughter of the European Jews. Less well-known, however, is the role that legal gun control played. Seemingly innocuous, a 1928 law enacted by the liberal pre-Nazi Weimar government prohibited firearms ownership without a license. After they attained power, however, the Nazis were able to selectively enforce this law

against the Jews. A 1936 memorandum of the Bavarian Political Police documents the procedure:

In principle, there will be very few occasions where concerns will not be raised regarding the issuance of weapons permits to Jews. As a rule, we have to assume that firearms in the hands of the Jews represent a considerable danger to the German people.

Id. at 89-90 (*citing* Bayerische Politische Polizei, Waffenscheinen an Juden, February 5, 1936). Eventually the Nazis ended the “registration” charade. In a series of decrees issued in November 1938, all German Jews were prohibited from possessing firearms. *Id.* at 95-98 (*citing, inter alia, Nazis Smash, Loot and Burn Jewish Shops and Temples Until Goebbels Calls Halt*, N.Y. Times, Nov. 11, 1938, at 1).

In 1938, the Nazis also updated the 1928 law and severely limited and regulated the rights of non-Jews to own firearms. Exempt from this law were “authorities of the Reich,” “various government entities,” and “departments and their subdivisions of the National Socialist Workers’ Party designated by the deputy of the Führer.” *Id.* at 90-91 (*citing* Reichgesetzblatt 1938, I, 265, §11). The Nazi laws thus considerably simplified the job of rounding up Jews and other declared “enemies of the State.”

In his dissent in *Silveira*, Judge Kozinski illustrated the impact of having an armed populace ready to resist a genocidal regime:

If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

Silveira, 328 F.3d at 570 (Kozinski, J., dissenting). *See also* Steven P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483 (2000) (Nazi augmentation of Weimar gun control laws rendered Jews defenseless to officially sanctioned arms roundups and eventual victimization).

In fact, while the armed resistance at the Warsaw Ghetto is well known, less well known are the multiple instances of armed resistance against the Nazis by certain Jews in Poland, Lithuania and Byelorussia, resulting in a dramatically greater survival rate for the Jews in those communities who were able to arm themselves. *See* David B. Kopel, *Armed Resistance to the Holocaust*, 19 J. FIREARMS & PUB. POL'Y 144, 150-58 (2007), <http://ssrn.com/abstract=1022081>.

More recently, the world saw nearly 800,000 defenseless members of the Rwandan Tutsi tribe slaughtered by their Hutu rulers during the Spring and Summer of 1994, due to a 1979 law that left the Tutsi minority largely disarmed. ZELMAN & STEVENS, *supra*, at 123-31 (citing original sources).

The same tragic formula has recently been playing out in Zimbabwe as the government has supported large-scale violence against white land owners and has undertaken a comprehensive round up of firearms owned by those landowners. *Id.* at 183-97 (citing original reports).

Recognizing the critical function of the Second Amendment in preventing tyranny, this Court, in *Heller*, acknowledged that the Second Amendment precludes the federal government from disarming the American people. The Court did not address the question of whether State and local governments may, nevertheless, do that which the federal government may not.

B. The Right to Keep and Bear Arms Must Bind State and Local Governments Through the Fourteenth Amendment Because Disarmament and Subsequent Oppression of the People Could Otherwise be Achieved Indirectly through State and Local Law

Local governments and authorities have a history not only of oppression in their own right but also of assisting in the oppressive activities of national governments. Ignoring this reality would fundamentally undermine the protective value of this Court's ruling in *Heller*.

The Nazis, for example, accomplished their mass killing with substantial assistance from local police units. In his seminal work *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1998), Christopher R. Browning recounts how the German

Order Police, consisting of local police units transformed into genocide squads, were instrumental in carrying out much of the mass killing that was the hallmark of the Nazis' "Final Solution." Browning explained:

In 1938 and 1939, the Order Police expanded rapidly as the increasing threat of war gave prospective recruits a further inducement. If they enlisted in the Order Police, the new young policemen were exempted from conscription into the army. Moreover, because the police battalions – like U.S. National Guard units – were organized regionally, they seemed to offer the guarantee of completing one's alternative to regular military service not only more safely but closer to home. . . .

In late October [1941] the two companies of Order Police and their Lithuanian auxiliaries were ordered by the army to liquidate all the Jews in Slutsk, south of Minsk, a town of some 12,000 inhabitants, one-third Jewish. .

The presence of the Order Police was felt in three ways. First, each of the major towns in the Lublin district had a Schutzpolizei agency. Included in its responsibilities was the supervision of the Polish municipal police. Second, scattered throughout the towns in the countryside were small detachments of Gendarmerie. Finally, three

battalions of Order Police were stationed in the Lublin District.

By the end of September 1942 Reserve Police Battalion 101 had participated in the shooting of approximately 4,600 Jews and 78 Poles and had helped deport approximately 15,000 Jews to the extermination camp at Treblinka.

Id. at 5, 19, 51, 104. Thus, national governments do not enjoy a monopoly on oppression. Fundamental rights are at risk from every level of government.

Civilian disarmament by State and local authorities also played an unfortunate part in our own nation's history of state-approved repression of African Americans. There was a wide variety of "gun control for blacks" legislation, both before and after the Civil War, including both naked prohibition and licensing. ZELMAN & STEVENS, *supra*, at 204 (citing numerous sources).

When slavery was legal, the slave states had comprehensive legal and customary prohibitions on black ownership of firearms. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-American Reconsideration*, 80 GEO. L.J. 309, 335-38 (1991). The authors note that, for example, in Florida "patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process." *Id.* In the North, in contrast, blacks successfully defended themselves against mob violence by bearing arms in their own defense. *Id.* at 341-42 (cited in *Silveira*, 328 F.3d at 569, Kozinski, J., dissenting).

In a telling passage from *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857), Chief Justice Taney noted that black citizenship was unthinkable because blacks would have “the right to keep and carry arms wherever they went.”

Disarmament *routinely* appeared as a component of the post-Civil War Black Codes, laws that were designed to limit blacks’ freedom as much as possible. *Silveira* 328 F.3d at 577. (Kleinfeld, J., dissenting); Cottrol & Diamond, *supra*, at 344. For instance, Mississippi enacted a statute specifically prohibiting freed blacks from owning and possessing any weapon without a license. Louisiana and Alabama followed suit. Cottrol & Diamond, *supra*, at 344-45 nn.176-78 (citing and quoting original sources).

The passage of the Fourteenth Amendment invalidated the expressly racial “gun control” laws, but restrictions on firearms possession continued. Examples included laws that permitted the carrying of military firearms but not inexpensive weapons that freed blacks could afford.⁴ Such laws rendered blacks defenseless in public places where racial attacks often occurred. See Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to be Applied to the White Population:*” *Firearms Regulation and Racial Disparity – the Redeemed South’s Legacy to a National Jurisprudence*, 70 CHI.-KENT L. REV. 1307-35 (1995). “The model of gun control that emerged from the redeemed

⁴ Compare such laws to modern day laws banning so-called “Saturday Night Specials,” the most significant feature of which is not that they are any more deadly than other firearms (which they are not) but that they are inexpensive and thus affordable to the poor for self defense.

South is a model of distrust for the South's untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent." *Id.* at 1333.

The racial design of civilian disarmament laws was no secret. Thus, in *Watson v. Stone*, 4 So.2d 700, 703 (Fla. 1941), in his special concurrence, Justice Buford noted that the Florida gun control provision at issue was specifically passed to "for the purpose of disarming Negro laborers . . . [and] was never intended to be applied to the white population."

The black freedmen understood that their disarmament would only be the beginning of white oppression.

"As one of the disfranchised race," said a Louisiana black, "I would say to every colored soldier, 'Bring your gun home'."

ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 120 (1988).

Legal restrictions on blacks' firearm ownership meant that blacks frequently were unable to protect themselves from white terrorists and lynchings. "Disarmament was the tool of choice for subjugating both slaves and free blacks in the South." *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting).

Further, "[p]rivate terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the

violence of such groups could only be realistically resisted with private firearms.” *Silveira*, 328 F.3d at 577 (Kleinfeld, J., dissenting).

As this Court noted in *Heller*:

A Report of the Commission of the Freedmen’s Bureau in 1866 stated plainly: “[T]he civil law [of Kentucky] prohibits the colored man from bearing arms Their arms are taken from them by the civil authorities Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*. [Emphasis in original.]

128 S. Ct. at 2810.

Thus, the Framers of the Fourteenth Amendment knew all too well the ability of the States to engage in wholesale disarmament of the people. This Court recognized as much in *Heller*:

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.”

Id. at 2811.

Perhaps the most egregious historical example of the grave consequences which can result when the States may

freely ignore the right to keep and bear arms arose in the context of the Colfax Massacre of 1873 -- the horrific event which produced *United States v. Cruickshank*, 92 U.S. 542 (1875).

The Colfax Massacre, in which *between 60 and 80* black freedmen were slaughtered defending the Grant Parish, Louisiana Courthouse, occurred in the aftermath of the contested 1872 Louisiana gubernatorial election. Marching to Colfax to take control of Grant Parish by force, partisans favoring defeated candidate John McEnery arrived on April 13, 1873, killed dozens of black men in the initial fighting and then slaughtered several dozen black prisoners later that evening. CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 90-109, 265-66 (2008).

The perpetrators of the massacre were charged under Section 6 of the federal Enforcement Act of May 31, 1870 which prohibited, in part:

. . . two or more persons [banding or conspiring] together . . . with intent to prevent or hinder [any citizen's] free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States

Cruickshank, 92 U.S. at 548. The Enforcement Act was in part an attempt by Congress to enforce the provisions of the newly ratified Fourteenth Amendment. LANE, *supra*, at 4. The defendants were charged with, among other things,

conspiring to prevent the black freedmen from “bearing arms for lawful purposes.” *Id.* at 553.

In vacating the convictions, this Court refused to acknowledge that the Fourteenth Amendment was created in part as a mechanism for the enforcement of fundamental rights such as the right to keep and bear arms. The Court held that the Second Amendment “means no more than that it shall not be infringed by Congress,” thus rendering the Enforcement Act impotent to punish the disarmament and subsequent massacre of the black freedmen. *Id.*

These Nineteenth and Twentieth Century examples illustrate how well the Framers of the Constitution and the Framers of the Fourteenth Amendment understood the essential role an armed citizenry plays in the defense of a free people. They had before them a rich history of European despotism from which to draw the keen understanding that armed people are free people and thus were unmistakably aware of the essential nexus between firearms ownership and liberty.

Contemporary writings demonstrate that the Framers of the Constitution knew this truth. In the debates over ratification of the Constitution, one New York anti-federalist writing as “Brutus” (thought to be New York judge and convention delegate Robert Yates) noted that the great imbalance of power between government and the people posed a great risk:

The liberties of the people are in danger from a large standing army, not only because the rulers may employ them for the

purposes of supporting themselves in any usurpations of power . . . but there is a great hazard that any army will subvert the forms of government, under whose authority they are raised, and establish one according to the pleasure of their leader.

BRUTUS NO. X, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 287 (Ralph Ketcham ed., 1986)

Alexander Hamilton's answer, in FEDERALIST 29, emphasized how armed citizens would oppose and deter the excesses of a standing army:

. . . if circumstances at any time should 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, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.

THE FEDERALIST NO. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

James Madison, similarly, argued that the American people, unlike most of their counterparts in Europe, have the advantage of being armed, and thus a standing army in the hands of a tyrant could not overcome the collective armed defensive efforts of the citizenry. THE FEDERALIST NO. 46 (James Madison).

On January 7, 1788, “The Republican” affirmed the benefits of maintaining an armed citizenry:

In countries under arbitrary government, the people oppressed and dispirited neither possess arms or know how to use them. Tyrants never feel secure until they have disarmed the people.

THE ORIGIN OF THE SECOND AMENDMENT 190 (David E. Young ed., 1991) (quoting article in *The Connecticut Courant*).

In his dissent in *Silveira*, Judge Kleinfeld noted that the “historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms.” *Silveira*, 328 F.3d at 582 n.76.

The struggle culminated in the drafting of the English Declaration of Rights. In the aftermath of Charles II’s and James II’s attempts to disarm the people, the Declaration of Rights became an explicit condition to the accession of William and Mary to the throne in 1689. It is the Declaration of Rights that forms the basis of Blackstone’s understanding of the basic rights of Englishmen. *Id.* at 582-83.

Aptly describing the Second Amendment as a “doomsday provision,” Judge Kozinski saw the Second Amendment as:

one designed for those exceptionally rare circumstances where all other rights have failed --- where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira, 328 F.3d at 570.

Thus the basic function of the Second Amendment is rendered a nullity if the right to keep and bear arms can be ignored by State and local governments. Such a limitation turns the very concept of self defense on its head. As the bloody history of disarmament has shown, a people can only protect itself when the right to possess basic personal arms is widespread. Protecting the right against federal encroachment yet allowing wholesale violation of the right by State and local officials is no protection at all. Ultimately, such a limited approach still deprives the populace of its ability to defend itself from tyrannical and genocidal rulers, since State and local officials can render the people defenseless as easily as the national government. This much was obvious to the Framers of the Constitution and the Fourteenth Amendment – and also, unfortunately, well known to the tyrants of the Twentieth Century and today.

The great fortune of the American people is that our Constitution was crafted in such a manner as to minimize

the likelihood of needing our arms to oppose a tyranny arising from within. Yet, the Second Amendment was created as the final barricade against the unthinkable – the day when the rest of our Constitutional safeguards have failed us and we stand exposed to the brutal reality that so many in history have understood only too late.

Historical documents disclose the Framers' deep concern about the potential rise of tyranny and the people's means to deter it. See *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 55-87 (2d ed. 1994) (quoting and citing numerous original sources).

The tragic history of civilian disarmament cries a warning against any systematic attempts to render innocent citizens ill-equipped to defend themselves from tyrants, terrorists, despots or oppressive majorities. Given the grave consequences of civilian disarmament and the Framers' express and unmistakable efforts to preclude such disarmament, it is essential that this Court confirm that the Second Amendment right to keep and bear arms is fully applicable against State and local governments through the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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NOVEMBER 23, 2009