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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 Adam Richards, et al.,) Case No. 2:09-cv-01235-MCE-DAD (TEMP)
11)
12 Plaintiffs,) NOTICE OF NEWLY DECIDED AUTHORITY
13)
14 v.)
15)
16 Ed Prieto, et al.,)
Defendants.)

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18 TO THE COURT, DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

19 PLEASE TAKE NOTICE that on May 2, 2011, the Ninth Circuit decided the case of
20 *Nordyke v. King*, ___ F.3d ___, 2011 U.S. App. LEXIS 8906 (9th Cir. May 2, 2011).

21 *Nordyke* is highly relevant controlling authority in this action as it provides
22 instructions for the evaluation of Second Amendment claims. The Ninth Circuit noted that the
23 *Nordyke* plaintiffs, who challenged a ban on the possession of guns on county property as
24 applied to gun shows, “[did] not allege that they wish to carry guns on county property for the
25 purpose of defending themselves while on that property,” *Nordyke*, at *23 (footnote omitted).
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1 Accordingly the Ninth Circuit did not address the question of whether carrying arms in public
2 for self-defense is protected by the Second Amendment, nor did it address the applicability of
3 prior restraint standards to handgun carry license schemes. However, the Ninth Circuit directly
4 addressed several issues that have been briefed by the parties in this matter:
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- 6 • Over Judge Gould’s partial dissent, the Court flatly rejected the “reasonable
7 regulation” standard of review that was proposed by amici in this case.
8 *Nordyke*, at *30-*33.
- 9 • The Court held that “regulations which substantially burden the right to keep
10 and to bear arms trigger heightened scrutiny under the Second Amendment,”
11 *Nordyke*, at *22 (footnote 9: “We need not decide today precisely what type of
12 heightened scrutiny applies to laws that substantially burden Second
13 Amendment rights.”). Accordingly, although strict scrutiny was rejected as the
14 initial test, it remains an open question whether this form of heightened
15 scrutiny is applicable where the burden on Second Amendment rights is
16 determined to be substantial.
- 17 • The Court rejected focusing Second Amendment questions on empirical
18 assessments of a challenged law’s value or effectiveness. “Sorting gun-control
19 regulations based on their likely effectiveness is a task better fit for the
20 legislature.” *Nordyke*, at *18 (citation omitted). The Court indicates primary
21 focus is to be directed at the extent to which a law burdens Second Amendment
22 rights: “Just as important as what *Heller* said about a government-interest
23 approach is what *Heller* did not say. Nowhere did it suggest that some
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1 regulations might be permissible based on the extent to which the regulation
2 furthered the government's interest in preventing crime. Instead, *Heller* sorted
3 such regulations based on the burden they imposed on the right to keep and to
4 bear arms for self-defense.” *Nordyke*, at *16.

- 5
- 6 • Describing “severe” Second Amendment burdens, *Nordyke* referenced the
7 following passage from *State v. Reid*, 1 Ala. 612, 616-17 (1840), as quoted by
8 *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008): “[a] statute which,
9 under the pretence of regulating, amounts to a destruction of the right, or which
10 requires arms to be so borne as to render them wholly useless for the purpose
11 of defence, would be clearly unconstitutional.” *Nordyke*, at *14-*15.

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13 Defendants’ challenged policies clearly impose a “substantial burden” on Plaintiffs’
14 ability to bear arms, as protected by the Second Amendment, within the meaning of *Nordyke*.
15 Any requirement that guns be carried unloaded “render[s] them wholly useless for the purpose
16 of defence.” And under *Nordyke*, the various crime and safety related concerns asserted in
17 defense of the challenged practices are largely, if not completely, irrelevant.

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19 Dated: May 12, 2011

Respectfully submitted,

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