No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

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

vs.

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

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

APPELLANTS' REPLY BRIEF

Donald E. J. Kilmer, Jr.
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, California 95125
Vc: 408/264-8489 Fx: 408/264-8487
E-Mail: Don@DKLawOffice.com

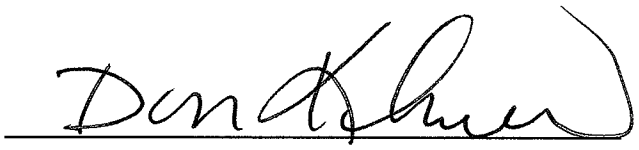
Counsel for Plaintiff - Appellants

CORPORATE DISCLOSURE STATEMENT

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

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

Dated: January 22, 2008



Donald E. J. Kilmer, Jr. [SBN: 179986]
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, California 95125
Voice: (408) 264-8489
Fax: (408) 264-8487
E-Mail: Don@DKLawOffice.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

QUESTIONS PRESENTED FOR REVIEW

1. The trial court made a finding that the Plaintiff/Appellants' possession of guns at gun shows (on county property at the Alameda County Fairground) is sufficiently imbued with expression to warrant protection under the Texas v. Johnson; 491 U.S. 397 (1989) line of cases; did the trial court then err by finding that the ban on gun shows at the County Fairgrounds, as applied to Appellants, did not violate the First Amendment?

2. In applying the more deferential test in United States v. O'Brien, 391 U.S. 367 (1968) to this case; did the trial court nevertheless err by upholding the ban on gun shows at the county fairgrounds?

3. Did the trial court err by dismissing the Plaintiff/Appellants' Free Assembly and Freedom of Association claims?

4. Did the trial court apply the appropriate level of scrutiny when analyzing Appellants' Equal Protection claim, based on an abridgement of First Amendment Rights?

5. Did the trial court improperly deny the Appellants' request for leave to amend their complaint to plead a Second Amendment cause of action?

FIRST AMENDMENT / EQUAL PROTECTION

Although they correctly set forth the rules for evidentiary inferences and standard of review, the tone of the brief submitted by the Appellees reads as if a trier of fact had conclusively established that there was no evidence that the County had a purposeful intent to ban gun shows at the Alameda County Fairgrounds. This is not only factually wrong, but contrary to the appropriate appellate analysis of summary judgment orders.

This appeal was taken from a judgment, predicated on an order granting summary judgment. The Nordykes were the nonmoving party in the trial court and are therefore entitled to have all factual inferences decided in their favor. See: Ventura Packers, Inc. v. F/V JEANINE KATHLEEN, 305 F.3d 913 (9th Cir. 2002).

The standard of review for an order granting summary judgment, is *de novo*. See: Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002).

To give effect to these rules, this Honorable Court must indulge all reasonable evidentiary inferences in favor of the Nordykes; including statements by individual board members that are later ratified by the entire board, and board action which (as this case illustrates so well) sometimes speak louder than words.

When this Court took up the freedom of expression issues in the Appellants' facial challenge, it created a template for this case:

> [...] Nordyke argues that possession of guns is, or more accurately, can be speech. In evaluating his claim, we must ask whether "*[a]n intent to convey a particularized message [is] present, and [whether] the likelihood [is] great that the message would be understood by those who viewed it.*" Spence v. Washington, 418 U.S. 405, 410-11, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974). If the possession of firearms is expressive conduct, the question becomes whether the County's "*regulation is related to the suppression of free expression.*" Johnson, 491 U.S. at 403. If so, strict scrutiny applies. If not, we must apply the less stringent standard announced in United States v. O'Brien, 391 U.S. 367, 377,(1968).
>
> Nordyke v. King; 319 F.3d at 1189, 1190 (2003)

In footnote 3 of that opinion, the court noted that its inquiry into the facial challenge did not foreclose a future "as applied" challenge. What the Court did not say is what level of judicial inquiry was necessary to make this inquiry about whether the County's "*regulation is related to the suppression of free expression.*"

Texas v. Johnson, 491 U.S. 397, requires a significant factual inquiry into at least three (3) separate questions that strike at the core of First Amendment values based on a freedom of expression claim.

The first inquiry is to determine if there is expressive conduct which "*possesses sufficient communicative elements to bring the First*

Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." [Spence v. Washington] 418 U.S., at 410-411." See: Texas v. Johnson, 491 U.S. at 404.

This issue has been resolved. There is no factual dispute regarding the Nordykes' intent to convey a particularized message. But this is not the only factual inquiry nor is it the end of the analysis.

The second inquiry is supposed to determine whether or not the State's regulation is related to the suppression of free expression. Texas v. Johnson, *id.,* at 403. In order to make this inquiry, the Court must first address a related threshold issue: Is the government regulating expression at all? The U.S. Supreme Court explained:

> The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 U.S. at 376-377; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). It may not, however, proscribe particular conduct because it has expressive elements. *"[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."*

> *Community for Creative Non-Violence v. Watt*, 227 U. S. App. D. C. 19, 55-56, 703 F. 2d 586, 622-623 (1983) (Scalia, J., dissenting) (emphasis in original), rev'd sub nom. *Clark v. Community for Creative Non-Violence, supra.* It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.
>
> Texas v. Johnson, 491 U.S. at 406, 407 (1989)

In order to limit the applicability of U.S. v. O'Brien's, *id.*, relatively lenient standard, the Supreme Court stated: "*[W]e have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under O'Brien's less demanding rule.*" Texas v. Johnson, *id.*, at 407. [underline added]

In rounding out the three-part test, Justice Brennan asserted "*A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See [Spence v. Washington] 418 U.S., at 414, n. 8.*" Texas v. Johnson, *id.*, at 404.

A factual dispute exists, but it is not about Plaintiff/Appellants' expressive conduct. It is about whether the County's regulations are related to the suppression of free expression. The County cannot deny the following undisputed facts:

1. Defendant Mary V. King made several statements, which

were later ratified by the Board of Supervisors, expressing ideological hostility to gun shows, the Nordykes, their exhibitors and patrons. This is viewpoint discrimination.

2. The Ordinance itself seeks to regulate expressive conduct with guns for all manner of "***motion picture, television, video, dance or theatrical production or event.***" [i.e., the County is in the business of regulating expression with guns at the fairgrounds.]

3. The County has permitted the expressive use of guns at the fairgrounds for the Scottish Games, while – at the same time – denying the Nordykes the same use of the same fairgrounds. [i.e., this is purposeful discrimination of access to public property based on ideological grounds.]

Because the County cannot deny these facts, they seek favorable inferences of those facts, which is not permitted in a motion for summary judgment; or they ask this Court to short-circuit the Texas v.Johnson, *id.*, analysis in favor of the more deferential tests in U.S. v. O'Brien', *id.*

The Nordykes have already made the case in their opening brief that this "as applied" challenge must first be examined under Texas v.

Johnson, *id.*, they have nothing to add to those arguments in this brief.

However, if the Court does analyze this case under U.S. v. O'Brien's, *id.*, the Nordykes maintain that they should still prevail for the reasons set forth in their opening brief, with the following clarifications:

1. The first prong of the O'Brien test is not limited to a preemption analysis of the government's regulation. It is true that the Nordykes lost the preemption argument in the California Supreme Court. But governments do not act extra-constitutionally only when they violate preemption doctrine. They can violate other provisions of constitutional law by running afoul of: (a) equal protection, (b) separation of powers, (c) the contracts clause, (d) bills of attainder, (e) the takings clause, and (f) due process – to name just a few. The point the Nordykes were making about the Ordinance running afoul of the first prong of the O'Brien test, is that the County's ordinance (and actions) violated equal protection in this case. That is what takes the ordinance outside of the constitutional power of the County.

2. On November 20, 2007, the United States Supreme Court,

granted *certiorari* in District of Columbia v. Heller, U.S. Supreme Court docket number is 07-290. Oral arguments are set for Tuesday, March 18, 2008. If the U.S. Supreme Court upholds the decision of the D.C. Court of Appeals, the decisions in this Circuit denying individuals standing to bring Second Amendment causes of action may be subject to criticism and/or they may be in danger of being overturned.[1] If that is the case, then the Alameda Ordinance would be in jeopardy under the first prong of the O'Brien test under an entirely different theory of constitutionally impermissible government regulation. (e.g., a violation of the Second Amendment).

Under either the Texas v. Johnson or U.S. v. O'Brien line of cases, the Alameda Ordinance "as applied" to the ban on gun shows at the County Fairgrounds is a violation of the First Amendment's guarantee of Freedom of Expression.

The trial court committed error when it granted the County's motion for summary judgment. This court should correct that error.

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[1] Hickman v. Block, 81 F.3d 98 (9th Cir. 1996) See also: Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002) and Silveira v. Lockyer, 328 F.3d 567 (9th Cir. 2003).

FREEDOM OF ASSEMBLY AND SECOND AMENDMENT

Finally, the County's assertion that the Appellants have somehow abandoned their Second Amendment and Freedom of Association claims is misleading. Both causes of action were dismissed under Federal Rule of Civil Procedure 12 without leave to amend in the trial court.

This makes the dismissal order a final/appealable order because an action is effectively terminated if the district court dismisses the complaint without leave to amend. Under such circumstances, the district court "*must have determined that the action would not be saved by amendment.*" See: Scott v. Eversole Mortuary, 522 F.2d 1110, 1112 (9th Cir. 1975); see also: Broam v. Bogan, 320 F.3d 1023, 1025, fn. 1 (9th Cir. 2003) – failure to allow leave to amend supports inference that court intended to dispose of action and make dismissal order appealable; see also: In re Ford Motor Co./Citibank (South Dakota), N.A., 264 F.3d 952, 957 (9th Cir. 2001) – inference of finality further supported by district court's letter sent in compliance with "terminated" actions rule.

The same facts analyzed under the Freedom of Expression claims are applicable to the Freedom of Assembly/Association claims. The trial court's dismissal of those claims can (and should be) reversed for the

same reasons set forth in the First Amendment speech analysis. The only point that was raised by the Appellants' Opening Brief on this issue is that another pending case in this circuit may effect current law while this matter is pending[2].

"*Absent manifest injustice,*" the Ninth Circuit will apply the law in existence at the time the decision is rendered. Consequently, the court takes into account changes in the law occurring after the appeal is filed but before a decision is rendered. See: Miller v. Fairchild Industries, Inc., 885 F.2d 498, 509 (9th Cir. 1989) – court applied California case law decided while case pending on appeal.

The same doctrine (that the court of appeals shall take changes of the law into account on pending cases) holds even more weight with respect to the Second Amendment claim. This Honorable Court has already once stated that the Nordykes are entitled to more favorable treatment of their case under an "individual rights" interpretation of the Second Amendment.

See Nordyke v. King (Nordyke IV), 364 F.3d at 1026 et seq.:

> Whether the Second Amendment guarantees an individual right is more likely to affect the outcome in this case than in *Silveira.* In *Silveira,* the challenge was to

[2] Villagas v. Gilroy Garlic Festival, 2007 U.S. Lexis 22027, Case No.: 05-15725.

> California's ban on assault weapons. Reasonable regulation of the individual right guaranteed by the Second Amendment might well have led to the same result, no relief, as the result reached by the panel using the "no individual right" argument. In this case, by contrast, the result might well have been different if we had not erased the Second Amendment. The ordinance at issue, subject to narrow exceptions, criminalizes any and all possession of firearms on county property. The case before the panel was about apparently law-abiding persons wanting to hold a gun show at a fairgrounds.

Contrary to abandoning their Second Amendment Claim, the Nordykes stand ready and willing to file supplemental briefs after the Supreme Court has rendered its decision in District of Columbia v. Heller, (2007) ___ U.S. ___; 128 S. Ct. 645; 169 L. Ed. 2d 417.

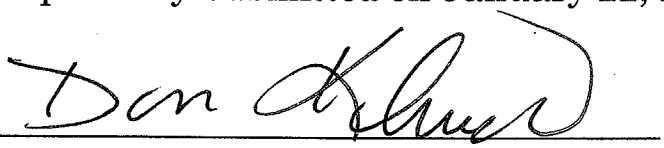
It is for this reason, and to conserve judicial resources, that the Appellants will shortly file a motion for a stay of these proceedings pending the decision by the United States Supreme Court in District of Columbia v. Heller, (2007) ___ U.S. ___; 128 S. Ct. 645; 169 L. Ed. 2d 417. With oral arguments in that case scheduled for March 18, 2008, the wait should not be that long.

CONCLUSION

The trial court erred when it granted the County's motion for summary judgment on the Appellants' First Amendment and Equal

Protection Claims. Furthermore, if the law of this circuit is changed by pending cases in the Ninth Circuit and/or the United States Supreme Court, this Honorable Court should permit the parties to file supplemental briefs addressing those changes.

Respectfully Submitted on January 22, 2008,



Donald Kilmer, Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 2,977 words, excluding the part of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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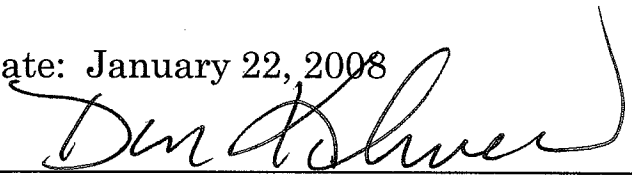
Date: January 22, 2008



Donald Kilmer, Attorney for Appellants

RELATED CASES

Villagas v. Gilroy Garlic Festival, Ninth Circuit.
2007 U.S. Lexis 22027, Case No.: 05-15725.

District of Columbia v. Heller, (2007)
___ U.S. ___; 128 S. Ct. 645; 169 L. Ed. 2d 417