

**CIVIL NO.: 07-15763**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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RUSSELL ALLEN NORDYKE, et al.,

*Plaintiffs and Appellants,*

vs.

MARY V. KING, et al.,

*Defendants and Appellees.*

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APPEAL FROM A JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA  
HON. MARTIN J. JENKINS  
CV-99-04389-MJJ

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**APPELLEES' RESPONSE TO MOTION TO SUPPLEMENT  
FACTUAL RECORD; DECLARATION OF T. PETER PIERCE**

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**RESPONSE TO MOTION TO SUPPLEMENT FACTUAL**  
**RECORD**

Contrary to appellants' assertions in their motion to augment the record, appellee County of Alameda's ("County's") express position throughout the litigation has been that the exception provided at subdivision (f)(4) of the Ordinance is available to any event on the Fairgrounds, including appellants' gun shows, so long as the event is conducted in compliance with the exception. Appellants' motion also ignores the undisputed facts in the record, which establish that neither the County nor the Fair Association, the independent non-profit that operates the Fairgrounds, ever told the Nordykes that the gun show could not avail itself of the exception. Instead, the record establishes that appellants never sought to avail themselves of the exception and chose to cancel their gun show after rejecting the Fair Association's request that they submit a plan for holding the gun show in compliance with the Ordinance.

Appellants filed this lawsuit on September 17, 1999 (*see* Excerpts of Record (ER) Vol. III, p. 442, fact 19) *before* the County amended its Ordinance, adding the safety exception, on September 28,

1999. (*See* ER Vol. III, p. 442, fact 22). The Fair Association had previously requested that appellants submit a written plan showing how they would conduct their gun show under the Ordinance (*see* ER Vol. III, p. 441, fact 15). The Fair Association extended the time for submission of that plan to October 20, 1999, some three weeks *after* the safety exception was adopted. (*See* ER Vol. II, p. 413, first paragraph). Instead of submitting the requested plan, appellants in a letter through counsel refused to do so: “I cannot find any language that requires them to submit a written plan such as the one you requested.” (*See* ER Vol. II, p. 413, third paragraph, second sentence). In further response, appellants then *chose* to cancel their gun show. (*See* ER Vol. III, p. 443, fact 28).

Appellants’ original and First Amended Complaints did not include a Second Amendment Claim and were facial challenges. *See Nordyke v. King*, 319 F.3d 1185, 1190 n. 3 (9th Cir. 2003). They raised a Second Amendment claim for the first time on appeal of the District Court’s order denying them a preliminary injunction. After this Court affirmed the trial court, appellants sought review in the U.S. Supreme Court.

■ The County's brief opposing certiorari explained that the Ordinance's "exception allows firearms possession on County-owned property for events in which that possession can be readily supervised and the firearm is secured when not in the participant's actual possession." (*See* Exhibit "A" to the concurrently filed Motion for Judicial Notice (MJN), page 5, [third page of exhibit], first full sentence). In footnote 6 of the same brief, the County explained that the issue is not whether the appellants' gun shows could take place at the County Fairgrounds at all, but whether appellants believe they could *profitably* hold a gun show under the Ordinance. (*See* Exhibit "A" to MJN, page 5, n.6).

■ After the U.S. Supreme Court refused to hear the case, it was returned to the District Court where appellants pursued as-applied challenges, including an equal protection challenge alleging that the Ordinance unlawfully discriminates against them because the exception is available to the Scottish Games but not gun shows.

Appellants sought leave to file a Second Amended Complaint to allege a Second Amendment claim and the County opposed that request. In its opposition brief, the County expressly stated that appellants are eligible to conduct their gun shows consistent with the exception in the Ordinance but that they had not sought to avail themselves of the benefits of the exception, and in fact, refused to submit a plan to the Fair Association. (*See* Exhibit “B” to MJN, page 3 [second page of exhibit], lines 15-23).

- Appellants then replied to the County’s opposition brief. In their reply brief, appellants *expressly acknowledged* the County’s position that appellants were eligible to hold a gun show consistent with the Ordinance. (*See* Exhibit “C” to MJN, page 9, line 25 [second page of exhibit], to page 10, line 9 [third page of exhibit].) Appellants further asserted the County was taking that position “for the first time in this litigation.” (*See* Exhibit “C” to MJN, page 9, line 27). The County obviously could not have taken a position in 2005, and then have taken that very same position for the first time during en banc argument in 2012, as appellants urge here.

- On June 5, 2006, the County filed a Motion for Summary Judgment, the granting of which resulted in the Judgment on appeal here. In its motion, the County explained in detail that appellants could bring firearms onto the County Fairgrounds for any number of reasons so long as they complied with the Ordinance and, in particular, subdivision (f)(4). (*See* Exhibit “D” to MJN, page 13 [third page of exhibit], lines 1 through 23).
  
- The District Court’s Order granting summary judgment expressly states: “The Ordinance would have, as one of its chief consequences, the effect of forbidding the *unsecured* presence of firearms at gun shows.” (*See* ER Vol. III, p. 619, lines 10-11 [italics added]). The District Court further found that the “exception contains the unqualified word, ‘event,’ that preserves the possibility that any number of events can satisfy the exception provided that the firearms are secured when not in the actual possession of the participant, *including Plaintiffs’ gun shows.*” (ER Vol. III, p. 632, lines 21-23 [italics added]). Appellants have not challenged this finding.

- The County's Answering Brief in this appeal expressly states: "Also furthering [the County's interest in preventing gun violence] is the County's application of the exception to the firearms ban. *Any user of County property who satisfies the exception may possess firearms on County property.*

The Nordykes have decided they cannot make a profit if they adhere to the exception." (Appellees' Answering Brief [filed January 8, 2008], p. 15 [italics added]).

- In the 2009 panel opinion (later vacated), the Court rejected appellants' as-applied equal protection challenge regarding the exception:

"The Nordykes' final claim alleges a violation of the Equal Protection Clause. It revolves around their suspicion that the exception in the Ordinance for certain artistic events, Alameda Code § 9.12.120(f)(4), was designed to favor groups like the Scottish Games over gun

show participants, a favoritism resting on the County's disdain for the 'gun culture.'...

Section 9.12.120(f)(4) exempts from the Ordinance's reach '[t]he possession of a firearm by an authorized participant in a motion picture, television, video, dance, or theatrical production or event,' as long as the participant secures the gun when he is not actually using it. Alameda Code § 9.12.120(f)(4). In other words, the statute distinguishes between those who are authorized participants in the specified productions or events and those who are not. Though this might amount to a classification, the Nordykes cannot point to a similarly situated 'control group.' The Scottish Games, with their historical reenactments, are a very different kettle of fish from the Nordykes and their gun shows. Crucially, the Nordykes have not argued that they could meet the exception's requirements that firearms be secured whenever an authorized participant is not actually using them.



No wonder. They have admitted that the very nature of gun shows, in which vendors show weapons to prospective buyers and admirers, make it impossible.” *Nordyke v. King*, 563 F.3d 439, 463-64 (9th Cir. 2009) (later vacated). The County cites the panel opinion not for any proposition of law, but to show that the issue of whether appellants are eligible to avail themselves of the exception is not new.

- At the first en banc argument in this case held on September 24, 2009, the County’s counsel stated, in response to a question, that if appellants complied with the safety exception requiring guns to be secured when not in the immediate possession of an authorized participant, appellants could hold their gun shows at the County Fairgrounds. (Audio of argument on Ninth Circuit’s website, at 56:17). On rebuttal, appellants’ counsel argued that people who buy a ticket to the gun shows would be “authorized participants.” (Audio at 1:00:45). Chief Judge Kozinski then asked appellants’ counsel: “So, what’s your

problem then? If that's the case, you could hold a gun show." (Audio at 1:00:48).

In contrast, the letters written by former County Counsel Richard Winnie on August 23, 1999 and September 20, 1999, and referenced in appellants' motion, do not support appellants' claim that the County waited until this month to announce that the gun show may avail itself of the exception. The first letter pre-dated the exception to the Ordinance, as appellants admit. The second letter to the County Board of Supervisors characterizes the exception as applying to "certain defined entertainment productions." The letter does not say that gun shows are ineligible, and furthermore, the record plainly shows the Fair Association gave appellants the opportunity to provide a plan for conducting the gun show after the Ordinance was amended.

Having never sought to avail themselves of the exception, appellants are not well-situated to raise rhetorical questions by this motion about the parameters of the exception and how and whether weapons tethered to tables would comply. The record reflects that the County, in responding to questions at oral argument, noted that securing weapons with cables would be one method of complying

with the exception. There may be others. Similarly, this motion is not the proper vehicle for raising issues regarding the Ordinance's prohibition on ammunition. Appellants have never challenged this prohibition. On its face, the Ordinance prohibits ammunition on County-owned property, and clearly defines the term "ammunition." (See ER Vol. II, p. 404, section 9.12.120, subds. (b) & (e)).

Finally, appellants attach to their motion an email accusing the County of falsely stating in a Rule 28(j) letter response that gun shows are eligible to operate under the Ordinance's exception, and demanding that the County retract the statement. The County did not retract the statement. The County did respond to the email, contrary to appellants' (unsworn) statement otherwise. After receiving the email on September 22, 2010, T. Peter Pierce, outside counsel for the County, telephoned Mr. Kilmer and spoke with him. (See attached Declaration of T. Peter Pierce at ¶ 2). Mr. Pierce reminded Mr. Kilmer that the County has consistently taken the position in the litigation that gun shows are eligible to operate under the Ordinance's exception, and that appellants chose not to submit a plan to the Fair Association for that purpose. (See Declaration of T. Peter Pierce at

¶ 2). Mr. Kilmer disagreed. (*See* Declaration of T. Peter Pierce at ¶ 2).

A few days after the conversation, the County filed an updated response to appellants' Rule 28(j) letter, wherein the County expressly stated: The "issue is whether subsection (f)(4) of the Alameda County Ordinance under review is available to Appellants. That subsection allows events on County-owned property when conducted in compliance with the safety requirements set forth in that subsection. Appellees simply stated in their [previous] Rule 28(j) response letter filed on September 22, 2010 that *subsection (f)(4) is available to appellants, as it would be to any other person.*" (Docket Entry 170, filed September 28, 2010, second paragraph [italics added]).

### **CONCLUSION**

The County has consistently represented to appellants, to the District Court, and to this Court, that appellants may conduct a gun show at the County Fairgrounds so long as they do so in compliance with the Ordinance, including subdivision (f)(4) governing secured

firearms. Nothing appellants said at the en banc argument, nor anything they say in their motion, changes that.

Dated: March 29, 2012

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By: s/  
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Attorneys for Defendants and  
Appellees

**DECLARATION OF T. PETER PIERCE**

I, T. Peter Pierce, declare:

1. I am an attorney licensed by the State of California and I am admitted to practice before this Court. My colleague Sayre Weaver and I are the attorneys responsible for representing the County of Alameda in this appeal. I have personal knowledge of the matters set forth below.

2. On September 22, 2010, I received and read the email sent by Mr. Kilmer, a copy of which is attached to appellants' motion to supplement the record. I was alarmed by the accusation that I had misrepresented the record with respect to whether appellants were eligible to conduct a gun show within the Ordinance's exception. I remember telephoning Mr. Kilmer from my cellular telephone in the car that same afternoon (which I confirmed today by reviewing my timesheet for that day). During the call, I reminded Mr. Kilmer that the County has consistently taken the position throughout the litigation that gun shows are eligible to operate under the Ordinance's existing exception, and that appellants are free to submit a plan to the Fair Association explaining how they would comply even though they previously refused to do so. I explained that there was no need for a new, additional exception only for gun shows, as Mr. Kilmer was

suggesting. Mr. Kilmer vehemently disagreed and accused the County of changing its position. He then told me he was disappointed in me and he hung up.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 29, 2012.

s/  
T. Peter Pierce

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 29, 2012.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/  
Clotilde Bigornia