No. 07-15763

In the United States Court of Appeals

for the Ninth Circuit

RUSSELL ALLEN NORDYKE, et al., Plaintiffs-Appellants, vs. MARY V. KING, et al., Defendants-Appellees.	No. 07-15763 Dist. Ct. No. CV-99-4389-MJJ

Appeal from the United States District Court
for the Northern District Of California

BRIEF OF *AMICUS CURIAE* LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE OF THE JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), the undersigned counsel states that *amicus curiae* Legal Community Against Violence is not a corporation.

Dated: January 15, 2008.

By _____
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Amicus curiae Legal Community Against Violence ("LCAV") submits this brief urging affirmance of the judgment in favor of Defendants-Appellees Mary V. King, *et al.* ("the County"). As used herein, "Appellants" will refer to Plaintiffs-Appellants Russell Allen Nordyke, *et al.*, and "AOB" will refer to Appellants' Opening Brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

LCAV is a national law center dedicated to preventing gun violence. Formed by lawyers in the wake of a 1993 assault weapon massacre at a law firm in San Francisco, LCAV concentrates on state and local policy reform. Among other activities, it provides free legal assistance to counties and municipalities in crafting local firearms regulations to fit community needs. As *amicus curiae*, LCAV has provided courts with informed analysis of the legal bases for such local regulation. LCAV has particular interest in and experience with California local gun ordinances.

The parties to this case have not litigated, and this Court and the district court have not decided, the question whether possession of a gun can be "expressive conduct" entitled to heightened protection under the First Amendment. At various points in the eight-year history of this lawsuit, however, the parties, the district court, and this Court all have *assumed* an affirmative answer to that question. As the case returns to this Court on the present appeal, the parties have again assumed that gun possession can be expressive conduct protected by the First Amendment.

LCAV agrees with the County that the judgment should be affirmed regardless of whether, as Appellants contend, the possession of a gun at a gun show can be considered expressive conduct. At the same time, however, LCAV disagrees with Appellants' contention in that regard and believes that a more complete discussion of it will assist this Court in deciding the issues presented, as well as in preparing an opinion that clearly reflects the scope and procedural premises of the Court's ruling. This *amicus* brief is intended to provide the Court with that additional perspective. LCAV also seeks to highlight the importance of the fact that the challenged ordinance restricts gun possession only on the County's own property.

RELEVANT PROCEDURAL HISTORY.

In *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003), *cert. denied*, 543 U.S. 820 (2004) ("*Nordyke I*"), this Court upheld the Alameda County ordinance here at issue against a First Amendment challenge.[1] The Court noted that it was ruling "[i]n the context of a facial challenge." *Id.* at 1190.

> ... Nordyke challenged the law before it went into effect. Accordingly, he mounts a facial challenge, relying on hypotheticals and examples to illustrate his contention that gun possession can be speech.

Id. at 1189.

The Court went on to explain that Appellants' principal argument—that gun possession was "protected expressive conduct" under *Texas v. Johnson*,

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[1] This Court did so after the California Supreme Court rejected a state-law preemption challenge in *Nordyke v. King*, 27 Cal. 4th 875 (2002).

491 U.S. 397 (1989)—was "best suited to an as applied challenge to the Ordinance." *Id.* "Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it." *Id.* at 1190.

> [T]he correct question is whether gun possession is speech, not whether a gun is speech. Someone has to do something with the symbol before it can be speech. . . .
>
> As the district court noted, a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally.

Id. at 1189-90.

In a footnote, the Court "note[d] that our holding does not foreclose a future as applied challenge to the Ordinance." *Id.* at 1190 n.3. This footnote, and the Court's further statement that "[g]un possession *can* be speech" (*id.* at 1190 (emphasis added)), were unnecessary to the Court's decision affirming the denial of a preliminary injunction, and hence were dictum.

After the case returned to the district court, Appellants twice attempted to amend their complaint to assert an "as applied" First Amendment challenge. *See* Order Granting Defendants' Motion for Summary Judgment, filed March 31, 2007 (Dist. Ct. Docket #169-1) ("SJ Order"), at 4-6. The first attempt failed, but the second attempt (*i.e.*, the Third Amended Complaint) survived the County's motion to dismiss. The district court concluded that "Plaintiffs had sufficiently articulated an intent to convey a particularized message that would be understood by those who viewed it." *Id.* at 6.

> Specifically, Plaintiffs alleged that their act of possessing guns at a gun show serves to convey their firmly-held belief that individuals should have a protected right under the Second Amendment to bear arms, that they "support the National Rifle Association's (and the Attorney General's and the Secretary of State's) interpretation of the Second Amendment," and that they disagree with the Ninth Circuit's decision [in *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996)] holding that the Second Amendment "offers no protection for the individual's right to bear arms."

Id. The Third Amended Complaint also alleged that "attendees of a gun show, many of whom are members of the 'gun culture,' would readily perceive that the individual carrying the weapon supports the view that individuals should have a protected right to bear arms under the Second Amendment." *Id.*

In subsequently moving for summary judgment, the County "d[id] not contest that gun possession in the context of a gun show *may* involve certain elements of protected speech." *Id.* at 9 (emphasis added). On that basis, the district court found "a triable issue of fact as to whether Plaintiffs' gun possession in the context of a gun show can qualify as speech and whether Plaintiffs intended to convey a particularized message that was likely to be understood by those who observed it." *Id.*[2] The court then proceeded to grant the County's motion for summary judgment on other grounds.

It is understandable that the County, faced with this Court's dictum that "[g]un possession can be speech" (*Nordyke I*, 319 F.3d at 1190), and the district

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[2] This was not, of course, "a finding that the Plaintiff/Appellant' possession of guns at gun shows . . . is sufficiently imbued with expression to warrant protection" under *Texas v. Johnson* (AOB at viii, first question presented for review).

court's ruling on the motion to dismiss the Third Amended Complaint, elected to base its motion for summary judgment on alternate grounds. Those alternate grounds are more than sufficient to support the judgment, as the County has ably demonstrated in its answering brief. Nevertheless, LCAV is anxious that this Court's opinion not give undue credence to the notion that possession of a gun, at a gun show or elsewhere, is "expressive conduct" protected by the First Amendment.

Moreover, the proposition that the parties have thus far assumed (that gun possession can be expressive conduct) is not so easily separated from the proposition they dispute (whether the County's interest in enacting the challenged Ordinance is related to the suppression of expression). The applicable First Amendment standard--whether strict scrutiny under *Texas v. Johnson*, or more deferential review under *United States v. O'Brien*, 391 U.S. 367 (1968)—hinges on whether the County's purpose is to suppress the message that Appellants are trying to communicate. *See Texas v. Johnson*, 491 U.S. at 403. To resolve that question, it is first necessary to determine precisely what Appellants' "message" is, and how it is communicated.

ARGUMENT

I. THE POSSESSION OF A GUN IS NOT "EXPRESSIVE CONDUCT" PROTECTED BY THE FIRST AMENDMENT.

Appellants devote almost 20 pages of their opening brief to a "*Texas v. Johnson* analysis and argument." AOB at 27-45. The premise of that argument is that "'[a]n intent to convey a particularized message was present, and . . . the

likelihood was great that the message would be understood by those who viewed it.'" AOB at 28 (quoting *Texas v. Johnson*, 491 U.S. at 404, and *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)); *see also Nordyke I*, 319 F.3d at 1189. Strikingly, however, the opening brief never explains *what* "particularized message" Appellants seek to convey.

In their declarations opposing summary judgment, each plaintiff stated that he or she:

> [1] "is a member of the 'gun culture' and . . . possession of a gun at a gun show supports, and is intended to convey, his [or her] belief that the Second Amendment protects an individual right to 'keep and bear arms;'"
>
> [2] "attends gun shows with guns in order to support the NRA by actually engaging in the act of possessing a firearm at a gun show in a jurisdiction ... where that right is called into question by current state and federal case law;" and
>
> [3] thinks "there is a great likelihood that others would understand these messages," based on his or her "own observations of people possessing and handling guns at gun . . . ."

Excerpts of Record ("E.R."), p. 449, ¶¶ 58-60; *see also* E.R., pp. 449-454, ¶¶ 61-63, 65-67, 69-74, 81-83.

As these formulations indicate, Appellants contend that the "communicative aspect of possession of a gun" comes into play *only when the gun is possessed at a gun show*. AOB at 49 n.4; *see also id.* at 33. In that setting, however, "possession" has a rather narrow meaning. The guns that Appellants would "possess" would be those put on display by the gun show promoter. Under California law, which Appellants do not suggest raises any

constitutional problem, such guns must be unloaded and "secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a prospective buyer." Cal. Penal Code § 12071.4(b)(5) (cited in AOB at 18).

In *Nordyke I*, this Court emphasized that "[s]omeone has to do something with the symbol [here, the gun] before it can be speech." 319 F.3d at 1189. What Appellants seek to do, it now appears, is to handle unloaded, inoperable guns in a highly regulated environment where the guns are present for the noncommunicative purposes of sale or display.

Appellants' emphasis on possessing guns "at a gun show" reflects the essentially commercial motivation of this lawsuit: Appellants Russell and Sallie Nordyke want to resume their gun shows on County property. At the same time, however, Appellants' narrow definition of the "expressive conduct" at issue undermines their First Amendment claim. Unlike the display (or destruction) of a flag, which is "a form of symbolism" and "'a short cut from mind to mind'" (*Spence*, 418 U.S. at 410), "possessing" a gun at a gun show has no inherently communicative function. It may signify only that the temporary "possessor" is considering whether to purchase the gun, admiring its design, testing its weight, etc. In short, Appellants have not taken themselves out of the "typical" case in which "a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it" (*Nordyke I*, 319 F.3d at 1190).

Moreover, having limited the "conduct" that they contend is "expressive" to gun possession at gun shows, Appellants also define narrowly the "message" that such conduct supposedly conveys. According to them, gun possession at a gun show communicates the possessor's *opinions about questions of law*—the proper interpretation of the Second Amendment, or the correctness of prior decision of this Court. *See supra*, p. 4. Surely this is a stretch. To say that Appellants were engaged in expressive conduct on this basis is rather like saying that a customer inspecting bottles at a liquor store is expressing support for a broad construction of the Twenty-First Amendment.

Apparently recognizing that their "message" is unlikely to be understood by the general public, Appellants assert that the message is readily perceived by fellow members of the "gun culture" who are present at gun shows. The courts, however, have not extended heightened First Amendment protection to conduct that serves as a code for communication within a particular subculture. In *Spence*, the Supreme Court commented that "it would have been difficult for *the great majority of citizens* to miss the drift of appellant's point at the time he made it." 418 U.S. at 410 (emphasis added). In *Texas v. Johnson*, the Court observed that "[t]he expressive, overtly political nature of this conduct was both intentional and *overwhelmingly apparent*." 491 U.S. at 406 (emphasis added). Plainly that is not the situation here.

Appellants also assert that, as members of the "gun culture," they are a "disfavored group" and the victims of "viewpoint discrimination and cultural warfare." AOB at 20, 62; *see also id.* at 43, 47, 51, 63. Viewpoint neutrality is

an important theme of First Amendment jurisprudence—although, as the County explains in its answering brief, such discrimination is not present here. But mere descriptions of themselves as a disfavored group do not establish that Appellants' conduct is expressive for purposes of *Texas v. Johnson*. Put differently, the fact that guns are possessed by persons holding particular views—such as "cultural and political advocates of the 'Right to Keep and Bear Arms'" (AOB at 63)—does not make such possession expressive conduct.

Just as the opening brief does not identify a "particularized message" implicit in Appellants' conduct, it does not explain how the County's Ordinance has been applied to any particular set of facts. For all practical purposes, Appellants are renewing the same facial challenge to the Ordinance that was rejected in *Nordyke I*. Thus, Appellants' "Statement of Facts" is partly a procedural history; partly a comparative analysis of federal and California gun show regulations; partly an attack on the County's motives (both in blocking gun shows and in permitting the Scottish Caledonian Games); and partly a list of criminal statutes that are violated when someone who has brought a gun onto County property actually opens fire. AOB at 7-27. Nowhere, however, do Appellants describe any specific conduct of their own to which the Ordinance has been applied (or is threatened to be applied). They simply assert that they "are promoters, patrons, and exhibitors of gun shows that have historically taken place at the Alameda County Fairgrounds from 1991 to 1999." AOB at

10. That much was clear in *Nordyke I*. *See* 319 F.3d at 1187-88.[3] As a result, this Court is in no better position than it was in *Nordyke I* to determine "whether the action is protected expressive conduct."

II. THE COUNTY IS ENTITLED TO RESTRICT THE POSSESSION OF GUNS ON ITS OWN PROPERTY.

LCAV also urges the Court to give appropriate weight to the fact that the Ordinance prohibits gun possession only *on the County's own property*. *See* E.R. 442, ¶ 23. As the California Supreme Court said in this very case:

> [U]nder Government Code section 23004, subdivision (d), a county is given substantial authority to manage its property including the most fundamental decision as to how the property will be used and ... nothing in the gun show statutes evinces an intent to override this authority. The gun show statutes do not "mandate that counties use their property for such shows. If the county does not allow such shows, it may impose more stringent restrictions on the sale of firearms than state law proscribes."

Nordyke v. King, 27 Cal. 4th 875, 882 (2002) (quoting *Great Western States, Inc. v. County of Los Angeles,* 27 Cal. 4th 853, 870 (2002)). In *Great Western Shows*, the Supreme Court "perceive[d] nothing in state law that impliedly forbids a county from withdrawing its property from use as a venue for gun show sales based on its own calculation of the costs and benefits of permitting such use." 27 Cal. 4th at 867. "Even assuming arguendo that a county is

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[3] Appellants also state that they have had to cancel gun shows at the County fairgrounds because "gun shows *cannot* take place without guns." AOB at 14-15 (original emphasis). But Appellants' ability to conduct gun shows, profitably or otherwise, is not protected by the First Amendment.

prevented from instituting a general ban on gun shows within its jurisdiction, it is nonetheless empowered to ban such shows on its property." *Id.* at 868.

As the parties have stipulated, ordinances banning gun possession on municipal property are increasingly common in California. E.R., p. 454, ¶ 80. Indeed, California Penal Code Section 171b(1) makes it a criminal offense to "bring[ ] or possess[ ]" a firearm "within any state or local public building or at any meeting required to be open to the public." No one, we trust, would suggest that Appellants were entitled to bring guns to the oral argument of this appeal—although gun possession in that setting would more aptly communicate Appellants' disagreement with this Court's Second Amendment precedents (*see supra*, p. 4) than would possession at a gun show.

Appellants assert that municipalities cannot legitimately seek to minimize civil liability for "the criminal and/or negligent use of firearms" on their property, because they enjoy the protection of the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (codified in relevant part at 15 U.S.C. §§ 7901-7903). AOB at 26, 50-51. Appellants are mistaken. That statute applies only to "causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations." 15 U.S.C. § 7901(b)(1); *see also id.* § 7903(5)(A). It would not apply to a lawsuit against a municipality.

By excluding firearms from its own property, the County is asserting a basic incident of property ownership, without impairing Appellants' rights to

possess guns, or conduct gun shows, on private property. No legitimate constitutional concern is raised by such a policy.

CONCLUSION.

Accordingly, LCAV respectfully submits that the judgment should be affirmed.

Dated: January 15, 2008.

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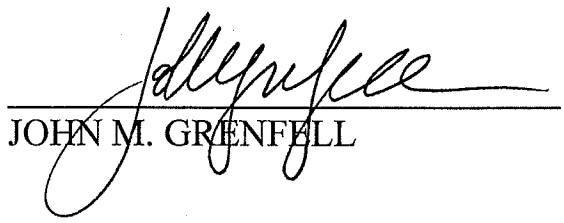
CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and 29(d), that this *amicus curiae* brief is proportionately spaced, has a typeface of 14 points and contains 2,945 words.



JOHN M. GRENFELL

Docket No. 07-15763

PROOF OF SERVICE BY MAIL

I, Lilia H. Jackson, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.

2. My business address is 50 Fremont Street, P. O. Box 7880, San Francisco, CA 94120-7880.

3. I am familiar with Pillsbury Winthrop Shaw Pittman LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

4. On January 15, 2008, at 50 Fremont Street, P. O. Box 7880, San Francisco, California, I served a true copy of the attached document titled exactly **BRIEF OF *AMICUS CURIAE* LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE OF THE JUDGMENT** by placing it in an addressed, sealed envelope clearly labeled to identify the person being served at the address shown below and placed in interoffice mail for collection and deposit in the United States Postal Service on that date following ordinary business practices:

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