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July 12, 2011

**VIA E-FILE**

Ms. Molly C. Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 19339
San Francisco, California 94119-3939

Re: *Nordyke, et al. v. King, et al. -- Case No. 07-15763*

Dear Ms. Dwyer:

This letter responds to the letter filed by appellants on June 24, 2011.

Rule 28(j) authorizes a party to notify the Court of new case law "after the party's brief has been filed – or after oral argument but before decision." A "party's brief" means a merits brief; Rule 28 addresses only the merits briefs on appeal. Rule 28 does not authorize appellants to continue submitting supplemental authorities in support of their pending Petition for Rehearing (Petition). Appellants' letter should be stricken for this reason.

Further, the recently decided case *Sorrell v. IMS Health Inc.*, 564 U.S. __ (June 23, 2011) (*Sorrell*), has no bearing on this Court's opinion filed May 2, 2011.

This Court decided that Alameda County's Ordinance banning the possession of firearms on County-owned property is unrelated to the suppression of free expression. *Nordyke v. King*, 2011 WL 1632063, *12 (9th Cir. 2011). The Court rejected appellants' position that the Ordinance regulates speech based on content. Accordingly, the Court properly applied the intermediate standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

In sharp contrast, *Sorrell* applied heightened scrutiny to a Vermont law which, on its face, "enacts content- and speaker-based restrictions." Slip Op. at p. 8. The statute "disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers." Slip Op. at p. 8. Thus the "law on its face burdens disfavored speech by disfavored speakers." Slip Op. at p. 8. Thus *Sorrell* reaffirms the well-established principle that content-based restrictions are subject to heightened scrutiny. That principle does not apply to a regulation, such as the County's Ordinance, which is content-neutral. *Sorrell* does not apply here and provides no occasion for revisiting appellants' First Amendment claim.

Very truly yours,

s/ T. Peter Pierce
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 July 12, 2011.

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s/ Clotilde Bigornia
Clotilde Bigornia

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July 12, 2011

VIA E-FILE

Ms. Molly C. Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 19339
San Francisco, California 94119-3939

Re: *Nordyke, et al. v. King, et al. -- Case No. 07-15763*

Dear Ms. Dwyer:

This letter responds to the letter filed by appellants on July 6, 2011 regarding *Brown v. Entertainment Merchants Assn.*, 564 U.S. __ (June 27, 2011) (*Brown*).

Rule 28(j) authorizes a party to notify the Court of new case law "after the party's brief has been filed – or after oral argument but before decision." A "party's brief" means a merits brief; Rule 28 addresses only the merits briefs on appeal. Rule 28 does not authorize appellants to continue submitting supplemental authorities in support of their pending Petition for Rehearing. Appellants' letter should be stricken for this reason.

In *Brown*, the Supreme Court invalidated a California law that prohibited the sale and rental of violent video games to minors. Slip Op. at 1. The Court construed the law as a "new category of content-based regulation" focused on curbing speech directed at children. Slip Op. at 6. "Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny – that is, unless it is justified by a compelling governmental interest and is narrowly drawn to serve that interest." Slip Op. at 11. To satisfy this strict standard, the Court required California to "specifically identify an 'actual problem' in need of solving." Slip Op. at 12. California was required to "show a direct causal link between violent video games and harm to minors." Slip Op. at 12.

*Brown* supports this Court's decision that intermediate scrutiny applies to the County's content-neutral Ordinance and that the County is not required to show cause and effect between the Nordykes' gun shows and a threat to public safety. *Brown* reaffirms the principle that intermediate scrutiny of a content-neutral regulation means that "the legislature can make a predictive judgment" of cause and effect between the regulated activity and the danger sought to be regulated. Here, the County had more than "predictive judgment;" it adopted the Ordinance prohibiting firearms possession on County-owned property in the wake of a shooting on the County Fairgrounds during the County Fair.

Nothing in *Brown* suggests that this Court should revisit its prior decision.

Very truly yours,

s/ T. Peter Pierce
T. Peter Pierce

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s/ Clotilde Bigornia
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