No.

In The
# Supreme Court of the United States

RUSSELL NORDYKE and SALLIE NORDYKE, dba TS TRADE SHOWS, JESS GUY, DUANE DARR, WILLIAM JONES, DARYL DAVIS,, TASIANA WERTYSCHYN, JEAN LEE, TODD BALTES, DENNIS BLAIR, R. L. ADAMS, ROGER BAKER, MIKE FOURNIER and VIRGIL McVICKER,
*Petitioners,*

v.

MARY V. KING, GAIL STEELE, WILMA CHAN, KEITH CARSON, SCOTT HAGGERTY, COUNTY OF ALAMEDA, and ALAMEDA BOARD OF SUPERVISORS,
*Respondents.*

**On Petition For A Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioners brought this action in 1999, seeking damages, declaratory and injunctive relief, and attorney fees. They challenged a county ordinance prohibiting them from operating gun shows at the Alameda County Fairgrounds in Pleasanton, California. Over the next 13 years, the Ninth Circuit twice heard the case *en banc* (once by a *sua sponte* order), and once certified a question of state law to the California Supreme Court.

At the second *en banc* oral argument, Alameda County presented a reinterpretation of its ordinance that would allow for gun shows at the fairgrounds. The Ninth Circuit now holds the County to its new interpretation, but affirmed the trial court's summary judgment in favor of the County. Plaintiffs were barred from recovering damages after 13 years of business losses and litigation expenses.

This petition presents two questions:

1. Whether a legal controversy resolved by an appellate court's opinion that holds a defendant to concessions made in the Court of Appeals is a declaratory judgment that can sustain claims for damages and attorney fees and costs?

2. In the alterative, whether this Court should reconsider its CATALYST THEORY holding in *Buckhannon Board and Care Home, Inc., et al. v. West Virginia Department of Health and Human Resources, et al.*, 532 U.S. 598 (2001)?

## PARTIES TO THE PROCEEDINGS

All parties are set forth in the caption.

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 not a publicly traded corporation and 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.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Russell Nordyke and Sallie Nordyke, dba TS Trade Shows, Jess Guy, Duane Darr, William Jones, Daryl Davis,, Tasiana Wertyschyn, Jean Lee, Todd Baltes, Dennis Blair, R. L. Adams, Roger Baker, Mike Fournier and Virgil McVicker, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## DECISIONS BELOW

The June 1, 2012 decision of the United States Court of Appeals for the Ninth Circuit, *Nordyke v. King* 681 F.3d 1041 (9th Cir. 2012)(en banc) is reprinted at Pet. App. 1.

The Mar. 31, 2007, unpublished decision of the United States District Court for the Northern District of California that granted Alameda County's motion for summary judgment is reprinted at Pet. App. 12.

The Feb. 14, 2005, unpublished decision of the United States District Court for the Northern District of California that denied Petitioners leave to amend their complaint to include a SECOND AMENDMENT claim is reprinted at Pet. App. 51.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

The Alameda County Ordinance at issue is set forth in the Pet. App. at 58.

This case requires interpretation of 42 U.S.C. §§ 1983, 1988 and 28 U.S.C.§§ 2201, 2002. These statutes are set forth in the Pet. App. at 62.

## STATEMENT OF THE CASE

After 13 years of litigation, during the second *en banc* oral arguments, the Ninth Circuit took an interest in the County's "re-interpretation" of its own ordinance. This capitulation before the Court of Appeals was an attempt to self-moot the controversy.

The *en banc* panel accepted that re-interpretation and with that development, the Petitioners were barred from recovering many years of economic damages stemming from the County's previous interpretation of its ordinance. Clarity is needed over who is a prevailing party and what constitutes a declaratory judgment in circumstances such as this.

Petitioners had historically hosted and/or attended several gun shows per year at the Alameda County Fairgrounds. The County adopted an ordinance designed and intending to ban gun shows at its fairgrounds by forbidding the possession of firearms and ammunition on all county-owned property. ALAMEDA COUNTY ORDINANCE CODE § 9.12.120.

This interpretation of the ordinance was given purchase by the Ninth Circuit in its certification order to the California Supreme Court. "*The Ordinance*

*would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there*." *Nordyke v. King (Nordyke I)*, 229 F.3d 1266, 1268 (9th Cir. 2000).

The California Supreme Court concurred in that finding in its certification opinion. "*[T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible.*" *Nordyke v. King (Nordyke II)*, 27 Cal. 4th 875, 882 (Cal. 2002).

This case was filed in August of 1999. Petitioner/Plaintiffs' pleadings have always contained a request for declaratory relief under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. §§ 2201, 2202 as part of their challenge to the Alameda ordinance.

Having lost an initial request for a preliminary injunction to enjoin enforcement of the ordinance, the Nordykes and their fellow Petitioner/Plaintiffs have incurred lost profits and other damages since November of 1999.

Years later – though the question of <u>when</u> remains a factual controversy, even among the judges of the most recent *en banc* panel[1] – the County changed the interpretation of their own ordinance such that gun shows now qualify under an exception for "*authorized participants in a motion picture, television, video, dance*

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[1] *Nordyke v. King,* 681 F.3d 1041, 1045 (9th Cir. 2012)(en banc)(O'SCANNLAIN, TALLMAN, CALLAHAN, and IKUTA concurring)

*or theatrical production or event, [...]* "[2] as long as the firearms at gun shows are tethered by a "*sturdy cable attaching the firearm to a fixture, such as a table, [...] much as cell phones, cameras, and other attractive items routinely are displayed for sale.*" *Nordyke v. King,* 681 F.3d 1041, 1044 (9th Cir. 2012)(en banc).

It is undisputed that the County never tendered an Offer of Judgment to the Petitioners pursuant to Fed. R. Civ. Pro. 68 at any time during this litigation.

The Ninth Circuit has issued an opinion that holds the County to its current official interpretation of the ordinance, and on that basis found that Petitioner/Plaintiffs' SECOND AMENDMENT and EQUAL PROTECTION claims were no longer viable. *Nordyke v. King,* 681 F.3d 1041 (9th Cir. 2012)(en banc).

In light of the County's concessions, and construing the June 1, 2012 opinion as the declaratory relief prayed for in their complaint, Petitioner/Plaintiffs subsequently filed procedural motions with the Ninth Circuit seeking: (1) to be named the prevailing party, (2) requesting instructions to the trial court to hold a hearing on damages (28 U.S.C. §§ 2201, 2202) and recovery of fees/costs (42 U.S.C. §§ 1983, 1988).

Alternatively Petitioner/Plaintiffs requested an award of attorney's fees/costs directly from the Court of Appeals under Circuit Rule 39-1, 42 U.S.C. §§ 1983, 1988 and/or the Court's power to award sanctions. All of these motions were summarily denied in an order filed July 10, 2012.

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[2] ALAMEDA ORDINANCE § 9.12.120(f)(4).

Though tedious to read, the best proof that an actual controversy existed between the parties until the County's concessions in the Court of Appeals, would be to recount the procedural history of this case.

*Nordyke v. King*, 229 F.3d 1266 (9th Cir. 2000) (*Nordyke I*) was an appeal from a denial of a request for preliminary injunction seeking to maintain the status quo with respect to the Petitioners' historically law-abiding gun shows at the Alameda County Fairgrounds. This opinion certified a question of state law (preemption) to the California Supreme Court.

*Nordyke v. King*, 27 Cal. 4th 875 (Cal. 2002) (*Nordyke II*) was the opinion from the California Supreme Court. That Court somewhat modified the question presented by the Ninth Circuit panel, but never-the-less found the ordinance to be an appropriate regulation of county property *vis-á-vis* gun shows and therefore not preempted. The California Court did suggest that the ordinance might be preempted in another context. Justice Janice Brown's dissent pointed out that the California Supreme Court's analysis failed to address the impact the ordinance may have on fundamental rights.

*Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003) (*Nordyke III*) was the panel opinion that disposed of Plaintiffs' remaining constitutional claims in their request for a preliminary injunction. This included un-plead SECOND AMENDMENT claims that had been raised ***sua sponte*** by the trial court. The Court of Appeals had granted permission for the parties to address these SECOND AMENDMENT issues in supplemental briefing.

A petition for rehearing and rehearing *en banc* was denied over vigorous dissents suggesting that the case warranted further review. *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004) (*Nordyke III(a)*).

Petitioners then sought a writ of certiorari in the United States Supreme Court. The petition was denied on October 4, 2004. *Nordyke v. King*, 543 U.S. 820 (2004) (*Nordyke III(b)*).

The case was then re-docketed in the trial court where a motion to amend the complaint to add the (then) dormant SECOND AMENDMENT claim was denied and then the case proceeded to judgment in favor of Alameda County by way of their motion for summary judgment. This generated a new round of appeals.

*Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) (*Nordyke IV*) made new law by finding that the SECOND AMENDMENT was enforceable against state action via the FOURTEENTH AMENDMENT "due process" clause. However that opinion was vacated and the case was docketed for *en banc* rehearing pursuant to a rare ***sua sponte*** order from the Ninth Circuit. *Nordyke v. King (Nordyke IV(a))* 575 F.3d 890 (9th Cir. 2009) (en banc).

The *en banc* panel then stayed the case when review was granted in *McDonald v. City of Chicago*, 130 S. Ct. 3020, (2010). The case was subsequently remanded back to the three judge panel in light of that opinion. *Nordyke v. King (Nordyke IV(b))* 611 F.3d 1015 (9th Cir. 2010) (en banc).

*Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011) (*Nordyke V*) was the most recent opinion issued by the

same 3-judge panel who had presided over the case since 2000. (Alarcón, O'Scannlain, and Gould.) That opinion disposed of the FIRST AMENDMENT and EQUAL PROTECTION claims. However it remanded to the trial court for further litigation on the SECOND AMENDMENT claim. Furthermore, that panel promulgated a standard of review for the trial court to use that grafted a burden/balancing test from this Court's abortion rights opinions to analyze SECOND AMENDMENT claims.

A petition for rehearing *en banc* was granted. *Nordyke v. King*, 664 F.3d 774 (9th Cir. 2011).

In another rare, and somewhat controversial move, the Ninth Circuit ***sua sponte*** ordered the litigants to participate in mediation over the vigorous dissents of Chief Judge Kozinski and Circuit Judge Gould. *Nordyke v. King*, 676 F.3d 828 (9th Cir. 2012).

Mediation failed. The *en banc* panel then issued its opinion in *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012). It is this opinion and the subsequent denial of relief requested by the Petitioner/Plaintiffs, that is the object of this petition for a writ of certiorari.

## REASON FOR GRANTING THE PETITION

Petitioner/Plaintiffs' pleadings have always given notice that declaratory relief was a potential remedy in this action to vindicate their constitutional rights. *Steffel v. Thompson*, 415 U.S. 452 (1973).

The Ninth Circuit's latest *en banc* opinion noted the controversy between the parties and then went on

to define the legal relationship between those parties based on the recent concessions the County of Alameda made in the Court of Appeals.

This is the essence of a declaratory judgment.

By refusing to acknowledge its ruling as a declaratory judgment, such that Petitioners would be named the prevailing party, and thus entitled to recover fees and costs, the Ninth Circuit has committed legal error worthy of review by this Court.

The Ninth Circuit compounded that error by refusing the Petitioners' request for a hearing to determine whether they were entitled to further relief (damages) against the County of Alameda based on that declaratory judgment.

By affirming the trial court's summary judgment in favor of the County (and denying Petitioners prevailing party status); while simultaneously holding the County to its current and latest interpretation of the ordinance (with only the "right" to bring a new lawsuit) the Ninth Circuit has cast the Petitioners into a legal no-man's land.

Furthermore, by summarily denying Petitioners' post-appeal motions without issuing a statement of decision, it is impossible to know why the Ninth Circuit simultaneously issued a ruling that Alameda County was bound by its concessions, yet Petitioners were not entitled to prevailing party status and/or recovery of statutory fees/cost and/or entitled to a hearing on damages.

The only clue lies in Alameda County's memorandum opposing those post-appeal motions that

cited the Supreme Court's opinion in *Buckhannon Board and Care Home, Inc., et al. v. West Virginia Department of Health and Human Resources, et al.*, 532 U.S. 598 (2001).

Apparently local governments think *Buckhannon* gives them license to engage civil rights plaintiffs in years of litigation, causing 100's of thousands of dollars in legal resources to be expended and more 100's of thousands in damages, and then, when the specter of an adverse decision looms, they can "voluntarily" cease their constitutionally offensive conduct and escape liability – all because the CATALYST THEORY of recovery under 42 U.S.C. §§ 1983, 1988 cases is a dead letter.

In *McDonald v. City of Chicago*, 130 S. Ct. 3020, (2010) it was pointed out that: "*[...]incorporation of the Second Amendment right will lead to extensive and costly litigation[...]*" *Id.*, at 3047. That litigation will necessarily seek the equitable remedies (injunction and declaratory relief) available under 42 U.S.C. §§ 1983, 1988, to insure that the SECOND AMENDMENT is not treated like a second-class right.

If SECOND AMENDMENT jurisprudence following this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), is to develop among the circuit courts of appeal in the same fashion as other fundamental rights – civil rights litigators and their clients must be given the same procedural and remedial tools used to vindicate the rest of the Bill of Rights.

This is not the first instance of a municipal defendant attempting a slight-of-hand manipulation of

its own laws to self-moot a case and avoid liability in a SECOND AMENDMENT civil rights action. The municipal defendants in *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010) attempted a similar tactic after this Court issued its judgment. See: *National Rifle Assoc. of America, Inc., et al., v. City of Chicago & Village of Oak Park*, 646 F.3d 992 (7th Cir. 2011).

There is some small irony in the Seventh Circuit getting this issue right, just as the Ninth Circuit got it wrong. When this Court was considering the petition for certiorari in *McDonald* those same circuits were split the other way – the Ninth Circuit got it right and the Seventh got it wrong – on the incorporation issue. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009)(Finding the SECOND AMENDMENT incorporated as against state action through the FOURTEENTH AMENDMENT Due Process Clause.] *Cf., NRA of Am., Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009)(Finding that the SECOND AMENDMENT was not applicable to the states.)

While it is possible to distinguish the facts of this case from *Buckhannon* because: (a) there is a judicial opinion commanding the County to adhere to the concessions they made regarding their "evolving" interpretation of their own ordinance, and/or (b) the County waived any "voluntary" capitulation when the court-ordered mediation failed.

But it is also possible that the Ninth Circuit gave the same reading to *Buckhannon* that Alameda County urged in its opposition to the Petitioners' post-appeal motions. Without a statement of decision from the Ninth Circuit stating why the motions were denied and why the County was named as the prevailing party,

this Court should take this opportunity to clarify its doctrine under *Buckhannon*, or simply overrule it.

Any clarification of the *Buckhannon* jurisprudence by this Court would have to include an analysis of whether the action taken by the Ninth Circuit *en banc* panel was indeed a declaratory judgment under 42 U.S.C. §§ 1983, 1988 and/or 28 U.S.C. §§ 2201, 2202; and furthermore, whether a court has the discretion to deny a litigant a hearing to determine whether they are entitled to further remedies once they secure a favorable declaratory judgment.

## CONCLUSION

This Court should grant the writ of certiorari in this case to insure that private litigants who spend the time and money to bring SECOND AMENDMENT claims against tax-payer funded government defendants will not be subject to financially ruinous gamesmanship.

Petitioners pray that this Court grant this petition.

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