No. 07 – 15763 [DC# CV 99-4389-MJJ]

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.

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

APPELLANTS' REPLY RE: MOTION TO SUPPLEMENT FACTUAL RECORD

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REPLY

One problem with Appellees' self-serving *post-hoc* analysis of their own lawyers' written arguments and comments made during oral argument, is that arguments and comments by lawyers are not evidence.

The "evidence" in this case, for purposes of analyzing the Second Amendment claim after a denial of Motion to Amend, would be the facts set forth in the proposed amended complaint. [ER, Vol. I of IV, Tab 1] In order to find that amendment of that complaint would have been futile, the Court is required to adjudicate the facts alleged in the same manner as a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6). *Adorno v. Crowley Towing & Transp. Co.* 443 F.3d 122, 126 (1st Cir. 2006). Which means that the Court must construe the facts plead in the proposed amended complaint in the light most favorable to the Plaintiffs. *Montez v. Department of Navy* (5th Cir. 2004) 392 F.3d 147, 149-150; *Safe Air for Everyone v. Meyer* (9th Cir. 2004) 373 F.3d 1035, 1039.

The "evidence" in this case for purposes of analyzing the First Amendment and Equal Protection Claims in conjunction with a Motion for Summary Judgment is the Joint Statement of Undisputed Facts

(JSUF). [ER, Vol. III of IV, Tab 12] As the non-moving party, Appellants are entitled to have all factual inferences on those claims construed in their favor. *Eastman Kodak Co. v. Image Technical Services, Inc.* 504 U.S. 451, 456 (1992).

Furthermore this Court is required to apply a *de novo* standard of review to FRCP Rule 12(b)(6) orders [*Manzarek v. St. Paul Fire & Marine Ins. Co.,* 519 F.3d 1025 (9th Cir. 2008)] and FRCP Rule 56 orders. *Travelers Cas. & Sur. Co. Of America v. Brennete*, 551 F.3d 1132 (9th Cir. 2009).

The only lawyer whose interpretation of the ordinance matters is County Counsel's, and not because he represents the Appellees in this litigation, but because his office is designated as the government body authorized to interpret the Ordinance as set forth in the **Response to Interrogatory 21.A.**

On this record, County Counsel has provided only two interpretations of the Ordinance as it relates to gun shows: (1) the August 23, 1999 letter addressed to the Alameda fairgrounds manager wherein the Office of County Counsel stated that firearms and ammunition could not be displayed at any gun shows on the premises; and (2) the September 20, 1999 letter to the Alameda Board of

Supervisors wherein County Counsel acknowledged service of this lawsuit brought by gun show promoters, yet assured the Board that the proposed amendments do not make substantive changes to the July 27, 1999 Ordinance. This assurance was made to the Board of Supervisors, one of whom had specifically requested that County Counsel draft an ordinance to "prohibit gun shows on County property." [ER, Vol. III of IV, Tab 12, JSUF ¶¶ 9 – 20]

Ms. Weaver is not County Counsel, neither is Mr. Pierce. Their statements, whether made in written briefs or during oral argument are not evidence. Nor would it matter when they made them as long as those statements continued to be a conversation with themselves about how they may (or may not) have (re)interpreted their client's ordinance. There was nothing in those statements that would bind the County to that (re)interpretation. There is nothing in those statements now that prevents the County from re-reinterpreting their Ordinance if they are successful in convincing this Court that the case is moot. Until/unless the Defendant/Appellees engage the Plaintiff/Appellants in a earnest conversation about a legal remedy (stipulation, consent decree, etc.) to address how gun shows could operate in compliance with the Ordinance (with guns – secured in some manner, with ammunition – displayed

and sold in some manner, and with patrons – who attend the gun show being able to meaningfully handle guns in a way that would permit sales and compliance with state/federal regulatory activities associated with sales), these statements by the County's litigation team are hyperbole.[1]

Furthermore, as late as September 22, 2010, Appellants had offered to engage the county in a dialogue to arrive at a binding interpretation of the Ordinance, as evidenced by the email attached to this motion to enlarge the record. By refusing to negotiate in good faith, the County is – in effect – saying that they continue to reserve the right to (re)interpret their Ordinance at any time and in any manner that meets the subjective intent of their clients. Appellants' rights (whatever they are) cannot be left to such sophistry.

The fairgrounds manager's September 7, 1999 letter, requesting a

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[1] I honestly did not remember the September 22, 2010 phone conversation recounted in Mr. Pierce's declaration until reading it refreshed my recollection. To the extent the Mr. Pierce considers his statements during that call – that no stipulation is required because the County had reinterpreted its ordinance – I suppose it is fair that Mr Pierce considers that his call was a response to my email. To the extent that the County still refused to put their money where their lawyer's mouth was (i.e., open an earnest dialogue about a stipulation about how gun shows might qualify for the Ordinance's exception), I still consider Mr. Pierce's phone call non-responsive to the email.

written plan from the Nordykes on how they intended to hold gun shows in light of the Ordinance – a request not made or enforced against the Scottish Games – enclosed County Counsel's August 23, 1999 letter interpreting the ordinance. Then on September 20, 1999, County Counsel offered his opinion to the Alameda Board of Supervisors that the new amendments made "no substantive changes" to the earlier Ordinance. These are the only two interpretations of the original and amended Ordinance by the Office of County Counsel in the record.

It was not until October 20, 1999 that Nordykes responded to the fairgrounds manager by requesting authority for his request that Appellants submit a plan for holding gun-less gun shows, while at the same time assuring him that they intended to comply with all federal and state laws regulating gun shows.

Furthermore, it was the trial court's November 3, 1999 order denying Plaintiffs' request for injunctive relief that compelled the Nordykes to cancel their November 6/7, 1999 gun show. The next correspondence from the fairgrounds manager was a letter releasing dates for all 2000 gun shows dates and refunding the Nordykes' deposits for those dates. [ER, Vol. III of IV, Tab 12, JSUF ¶¶ 21 – 30]

The Office of County Counsel should be proud that its interpretation of the Ordinance was supported by the California Supreme Court during the preemption litigation. "[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*, 27 Cal. 4th 875, 882. (Cal. 2002) This Court's certification of the preemption question to the California Supreme Court found: "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*, 229 F.3d 1266, 1268. (9th Cir. 2000)

This Court can enlarge the record to clarify this issue and find that voluntary cessation of unconstitutional conduct by a government defendant is not grounds for mooting a case already under review by an appellate court. See generally: *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1982); and *Northeastern Florida Chapter of the Assoc. General Conractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

Respectfully Submitted on April 3, 2012,

/s/
Donald Kilmer, Attorney for Appellants.

CERTIFICATE OF SERVICE

On April 3, 2012, I served the foregoing **APPELLANTS' REPLY RE: MOTION TO SUPPLEMENT FACTUAL RECORD** by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. [By agreement, hard-copy service of County Counsel Richard Winnie has been previously waived by T. Peter Peirce, Attorney of Record for Appellees.]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this April 3, 2012,

/s/ Donald Kilmer

Attorney of Record for Appellants