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' SUPPLEMENTAL BRIEF PURSUANT TO JULY 19, 2010 ORDER

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TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES
FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUTES

LOCAL ORDINANCES

MISCELLANEOUS

CORPORATE DISCLOSURE STATEMENT

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 wholly owned by the Nordykes.

VIRGIL McVICKER is president of the MADISON SOCIETY, a not-for-profit 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.

Dated: August 18, 2010

/s/

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INTRODUCTION

This appeal will require an answer to two questions: (1) are the rights asserted by the Appellants protected by the Constitution, and (2) what level of scrutiny applies to an infringement of those rights?[1]

POSTURE |STATEMENT OF THE CASE

In *McDonald v. Chicago*, 177 L. Ed. 2d 894 (2010), the Supreme Court agreed with this panel's view that the Second Amendment applies to state and local governments through the 14th Amendment Due Process clause. *Nordyke v. King,* 563 F.3d 439 (9th Cir. 2009). On July 12, 2010, the *en banc* panel issued an order vacating that opinion and remanding the case to this panel. Supplemental briefing was ordered on July 18, 2010.

The trial court rejected Appellants' First Amendment and Equal Protection claims and granted summary judgment to the County. Even on appeal, Appellants are entitled to all favorable factual inferences on those claims. *Eastman Kodak Co. v. Image Technical Services, Inc*. 504 U.S. 451, 456 (1992).

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[1] This mirrors the approach taken by the 3rd Circuit in the recent case of *US v. Marzzarella,* 2010 U.S. App. LEXIS 15655 (July 29, 2010). That Court went on in fn.4 to opine: "*We think this implies the structure of First Amendment doctrine should inform our analysis of the Second Amendment*."

The Second Amendment claim is on appeal from the trial court's denial of a motion to amend the complaint. In order to find that amendment of the complaint would be futile, the Court is required to adjudicate facts 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).

Given this case's present posture and the recent developments in Second Amendment law, it is surprising the County has not requested that the matter be returned to the trial court for discovery and further litigation. The Appellants agree that the matter may be resolved by this Court without a remand to the trial court[2], but the consequence of that development has to be a judicial finding that the County has offered **no evidence** to support its bald assertion that banning gun shows at the Fairgrounds, by banning guns at gun shows, will reduce crime in Alameda County.

STATEMENT OF FACTS

The critical facts in this case are undisputed. See Joint Statement of Undisputed Facts reproduced in Appendix A. [ER, Vol III, Tab 12.]

[2] However, the Appellants have never waived any evidentiary burdens imposed on the County by the Fed. R. Civ. Pro. or by a constitutional analysis.

The Nordykes conducted gun shows at the Alameda County Fairgrounds without incident for 10 years before the county enacted the challenged ordinance. (See Appendix B.) The Nordykes have continued to conduct gun shows throughout Northern California without incident of any kind. Special Agents from the California Department of Justice, tasked with enforcing federal and state law at all guns shows throughout California, testified that the Nordyke gun shows comply with all federal and state laws. The County has conceded all of these facts. [JSUF ¶¶ 33, 34, 43, 44, 49, 50, 85]

Pursuant to the Gun Show Enforcement Act of 2000 (Appendix C.) guns at gun shows must be secured in a manner that prevents their operation. The only exception is during an actual demonstration by the seller to a potential buyer so that the condition of the firearm can be inspected. Guns at gun shows may not be handled by minors. Guns that are brought to gun shows by patrons and exhibitors must be tagged and the person responsible for the firearm must have a government issued photo identification. No person may simultaneously possess a firearm and ammunition for that firearm (excepting peace officers). The county concedes that these laws and regulations are obeyed by the Appellants. [JSUF ¶¶ 43, 44, 51, 52, 53, 54, 55, 56, 57]

In contrast, the County-favored Scottish Games bring unregulated firearms onto the fairgrounds for mock battles. The County concedes that the participants in those mock battles load live, albeit blank, ammunition into their firearms, and fire them at one another. There is no evidence that the participants in the mock battles comply with any of the other safety measures required of gun shows by state law. (e.g., restrictions on minors, safety ties, photo-ID, etc...) [JSUF ¶¶ 16, 17, 31, 40, 41, 42]

The Nordykes sought an informal determination from County Counsel whether gun shows are an exception to the ordinance. It is undisputed that the County failed to respond to the Nordykes' inquiries. [JSUF ¶¶ 12, 14, 18, 21, 25, 88, 89, 90]

The County concedes that possession of a gun at a gun show is expressive conduct, thus making that possession a species of speech protected by the First Amendment.[3] Paradoxically, the County has maintained that gun shows and gun sales can still take place on county property (e.g., the Fairgrounds) as long as no guns are present.

[3] Possession of guns at gun shows is expressive conduct, which is likely to be understood by its intended audience. [Order Granting Summary Judgment. ER, Vol. III of IV, Tab: 17, ER page no.: 0625]

Extending this cognitive dissonance, the County has conceded that firearm sales at gun shows require the physical presence of a firearm to insure compliance with state/federal laws regarding firearm sales. Thus the County is making the fantastic claim that its property is simultaneously a zone where guns can still be sold, but that federal/state laws can be disregarded during the sale. [JSUF ¶¶ 14, 38] This is not even a rational interpretation of their own ordinance.

On May 20, 1999, Defendant King sent a memorandum, copied to the Board of Supervisors, requesting that County Counsel research a way to prohibit gun shows at the Fairgrounds. The memorandum bases that request on political philosophy. In press releases and speeches, the County, speaking through King, stated the purpose of the Ordinance: That the county should not provide "*[...] a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism*." [JSUF ¶¶ 9, 11]

Appellants are entitled to the factual inference that their gun shows were targeted for extinction because of the political values expressed at gun shows and the County's disagreement with those values. This is straight up view-point discrimination. See e.g., *Madison Joint Sch. Dist. Wisconsin Employment Relations Comm'n*,

429 U.S. 167, 176 (1976). See also: *Child Evangelism Fellowship of S.C. v. Anderson School Dist. Five*, 470 F.3d 1062 (4th Cir. 2006) ("The 'viewpoint discrimination' prohibited in all forums is 'an egregious form of content discrimination' in which the government 'targets not subject matter, but particular views taken by speakers on a subject.'") Targeting disfavored groups is also relevant to a determination of discriminatory intent. *Rohmer v. Evans*, 517 U.S. 620 (1996).

Though the County claims public safety as a pretext for their ordinance, its has produced no evidence that it will deter the kind of criminal conduct like the horrific shooting at the Alameda County Fair in 1998. The perpetrator of that crime was convicted of pre-existing state law felonies and sentenced to prison. Subsequent to that shooting, the County installed metal detectors at the Fairgrounds to screen for unlawfully carried weapons. [JSUF ¶¶ 1, 2, 3, 48]

ARGUMENT

I. THE RIGHTS ASSERTED BY THE PLAINTIFF/APPELLANTS ARE PROTECTED BY THE UNITED STATES CONSTITUTION.

This case raises First Amendment, Second Amendment and Equal Protection issues in conjunction with historically law-abiding gun shows at the Alameda County Fairgrounds.

A. POSSESSION OF A FIREARM AT A GUN SHOW IS EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT.

The County has conceded this issue in the trial court and the trial court made that finding. See fn. 3, *supra.* Appellants aver that since the Ordinance purports to generally regulate expressive conduct with guns on county property – including exempting the Scottish Games and guns used in motions pictures, television and theatrical productions – that the Ordinance must be subject to the strict scrutiny test laid down in *Texas v. Johnson*, 491 U.S. 397 (1989).

View-point based regulations of speech are subject to strict scrutiny. "*A regulation is content based if either the underlying purpose of the regulation is to suppress particular ideas or, if the regulation, by its terms, singles out particular content for differential treatment.*" *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). The uncontradicted evidence is that the "purpose" of the ordinance is to ban the expressive conduct at gun shows.

Finally, because the County has engaged in a preference for expression with guns by the Scottish Games, over the expression with guns at gun shows, a strict scrutiny analysis is necessary because: "*Quite apart from the purpose or effect of regulating content, [...] the*

Government may commit a constitutional wrong when by law it identifies certain preferred speakers. [...] The First Amendment protects speech and speaker, and the ideas that flow from each." *Citizens United v. F.E.C.,* 175 L. Ed. 2d 753, 899 (2010).

B. POSSESSION FOR EXHIBITION OR SALE OF A FIREARM IS A RIGHT PROTECTED BY THE SECOND AMENDMENT.

The "*central holding in Heller: [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes,* ***most notably*** *for self defense within the home.*" *McDonald v. Chicago*, 177 L. Ed. 2d 894, 922 (2010) (emphasis added). Although self-defense in the home was the concrete right discussed in *Heller;* with this clarification from *McDonald*, the Second Amendment need not be interpreted that narrowly. See: *Nordyke v. King*, 563 F.3d at 458.

Appellants submit that the bundle of rights protected by the Second Amendment includes the right to possess and acquire firearms. There is ample legal authority for the Court to make that finding. Admittedly the Second Amendment does not expressly mention acquiring firearms, but that right is as implicit in the Second Amendment, as the right to acquire books, crucifixes, menorahs and bibles is in the First Amendment.

1. At Least One State Supreme Court has Interpreted the "Right to Keep and Bear Arms" to Include the Right to Acquire Arms.

Since California's Constitution fails to recognize[4] a "right to keep and bear arms," this Court should look to other state constitutions where the right is recognized for guidance.

In *Andrews v. State* – cited favorably in *Heller*, 128 S.Ct. 2783, 2806, 2809, 2818 (2008), the High Court of Tennessee found much in common between that State's guarantee of the "right to keep and bear arms" and the Second Amendment. It held:

> The right to keep and bear arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and purchase and provide ammunition suitable for such arms, and keep them in repair. [...]
>
> *Andrews v. State*, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871).

2. Congress has Recognized that the "Right to Keep and Bear Arms" Includes the Right to Engage in Commercial Transactions to Acquire Firearms.

In 2005 Congress passed the Protection of Lawful Commerce in Arms Act. The PLCAA[5] is founded on the Second Amendment and asserts Congressional authority to protected those rights under the 14th

[4] *Kasler v. Lockyer*, 23 Cal.4th 472, 480 (2000)

[5] Public Law 109-92, 15 U.S.C. § 7901-7903.

Amendment. Congressional purposes are set forth in Section (2)(b):

> (2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.
>
> (3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.
>
> (5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

Similarly, Congress expressed an intent to broadly protect the "right to keep and bear arms" when it passed the Firearm Owners' Protection Act of 1986.[6] The Congressional findings in FOPA bundled the Second with the Fourth, Fifth, Ninth and Tenth Amendments to clarify that the "right to keep and bear arms" includes the practice of allowing licensed gun dealers, under rules and regulations prescribed by the Secretary, to conduct business at temporary locations such as gun shows. The County has conceded that these federal (and state) laws[7] are obeyed by Appellants' gun shows.

[6] Public Law 99-308, 18 U.S.C. § 921 *et seq.*

[7] See: 18 U.S.C. § 923(j), 27 CFR § 478.23, 27 CFR § 478.100 *et seq.*

Congress's recognition that the Second Amendment includes the right to acquire firearms is entitled to deference.

> In *Field v. Clark*, 143 U.S. 649, 691, this court declared that ". . . *the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land*." The rule is one which has been stated and applied many times by this court. As examples, see *Ames v. Kansas*, 111 U.S. 449, 469; *McCulloch v. Maryland*, 4 Wheat. 316, 401; *Downes v. Bidwell*, 182 U.S. 244, 286.
>
> *United States v. Curtiss-Wright Export Corp. et al.*
> 299 U.S. 304, 328; 57 S. Ct. 216, 225 (1936)

With no guidance from the Supreme Court, and a silent California Constitution, this Court is free to consult other state constitutions and Congress for an understanding of the scope of the right and various applications of the Second Amendment.[8]

C. POSSESSION OF A FIREARM AT A GUN SHOW, WHEN GUNS ARE PERMITTED AT OTHER EVENTS AT THE FAIRGROUNDS, IMPLICATES 14TH AMENDMENT EQUAL PROTECTION.

As noted above, guns at gun shows are more strictly regulated than guns at the Scottish Games. Guns at gun shows are **secured**

[8] See also Right to Keep and Bear Arms Report of the Subcommittee on the Constitution of the United States Senate (1982) "*what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner*."

pursuant to state law. [JSUF ¶ 52] While the guns at the Scottish Games are **secured** pursuant to a county ordinance. [JSUF ¶¶ 16, 17, 31, 40-42] The controversy is easily resolved, the Appellants are entitled to the favorable inference that guns at gun shows are either as, or more strictly, regulated than guns at the Scottish Games. *Eastman Kodak Co. v. Image Technical Services, Inc*. 504 U.S. 451, 456 (1992).

An Equal Protection analysis involving a fundamental right (whether First or Second Amendment) requires application of strict scrutiny. See: *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980).

II. THE COURT SHOULD APPLY STRICT SCRUTINY TO THE ALAMEDA ORDINANCE, REGARDLESS OF WHICH CLAIM IS ADVANCED.

What all three aspects of this case have in common, is that once it is established that Alameda's ordinance infringes on Appellants' rights under these constitutional doctrines, the Ordinance must serve some **compelling governmental interest**. Furthermore, the government must demonstrate that: (1) the ordinance was **narrowly tailored** to achieve a legitimate objective and (2) there must be **evidence** for believing the ordinance will work.

A. ALAMEDA HAS FAILED TO DEMONSTRATE A LEGITIMATE COMPELLING INTEREST ADDRESSED BY ITS ORDINANCE.

The County has failed to demonstrate that its ordinance addresses a compelling interest that is not already addressed by the California Penal Code (for prosecuting crimes committed with guns) or by the installation of metal detectors (for detecting unlawfully carried guns). A recent *en banc* panel of this Court struck down regulations of expressive conduct on pubic property on mere intermediate scrutiny grounds, in part because:

> [...] [T]he Supreme Court has consistently struck down prior restraints on speech where a state could achieve its purported goal of protecting its citizens from wrongful conduct by punishing only actual wrongdoers, rather than screening potential speakers.[...]
>
> *Berger v. City of Seattle*, 569 F.3d 1029, 1044 (9th Cir. 2009)

Stripped of any public safety interest that duplicates state law, the ordinance is exactly what Appellees intended – a ban on gun shows at the Fairgrounds. The intention to suppress gun shows is amply illustrated by the ordinance's exemption for possession of guns at the Scottish Games but not gun shows. The difference is that gun display is incidental to mock battles. The display of guns is the *raison d'être* for gun shows.

When fundamental rights are at stake, and the government fails to identify a compelling interest for interfering with those rights then the statute/ordinance in question must give way. See: *Citizens United v. F.E.C.,* 175 L. Ed. 2d 753, 798-799 (2010).

B. THE ORDINANCE IS NOT NARROWLY TAILORED TO ADDRESS A LEGITIMATE COMPELLING INTEREST.

Appellees may argue that their statements about suppressing gun shows should be disregarded. After all, the ordinance makes vague claims about reducing gun violence. That begs the question of method. How could banning guns only from County property reduce gun violence? The county has not produced evidence that gun violence is confined to or different on county property than elsewhere. There is only one, even theoretical, basis for asserting that banning guns from County property could reduce gun violence: Appellees think gun shows promote gun ownership, and that gun ownership means more violence, therefore curbing gun ownership will curb gun violence.

In a post-*Heller*, post-*McDonald* world this argument is *per se* invalid.

> [T]he Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local

> variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "*[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table*." *Heller, 554 U.S., at __, 128 S. Ct. 2783, 171 L. Ed. 2d at 684.* This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.
>
> *McDonald v. City of Chicago*, 177 L. Ed. 2d 894, 928-929

The County has not tied a single crime to the gun shows. Nor has the County even attempted to establish an evidentiary basis for a secondary effects analysis when state action burdens a fundamental right on the grounds of advancing public safety. See generally: *Renton v. Playtime Theatres Inc.* (1986) 475 U.S. 41; and *City of Los Angeles v. Alameda Books, Inc.*, (2002) 535 U.S. 425.

C. THE FAIRGROUNDS IS NOT A "SENSITIVE PLACE."

The County presented no evidence that the Fairgrounds is a "sensitive place." *Heller,* addressed this issue at 128 S.Ct. at 2816-17:

> [W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on ***longstanding prohibitions*** on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. (emphasis added.)

How can the fairgrounds be sensitive to gun show guns, but not the Scottish Games' guns? How can the fairgrounds be a sensitive place if secured guns are possessed at gun shows, but not-so-sensitive when guns are possessed by "*authorized participants in a motion picture, television, video, dance or theatrical production or event, [...]* "? How can the fairgrounds be a "sensitive place" when the ordinance exempts imitation firearms or BB guns and air rifles? An airport "sterile area" would not tolerate the presence of imitation firearms. Licensees with permits to carry firearms under California Penal Code Section 12050 are exempt from the ordinance. A jail or prison does not permit licensees to retain their weapons when visiting inmates.

Local public buildings are exempt from the ordinance. "Local public buildings" are defined in the California Penal Code. But this state law allows guns in government buildings, for the **purpose of conducting a law-abiding gun show**.[9] By its own terms, the Ordinance concedes that the County's local buildings are not "sensitive" when they are hosting "law-abiding" gun shows.

Consider these additional facts regarding sensitive places:

[9] See: Cal. Pen. Code §§ 171b(b)(7)(A) and 171b(b)(7)(B).

- The publication: Gun Shows: Brady Checks and Crime Gun Traces was jointly published in January 1999 by the U.S. Department of Justice, the Department of the Treasury and the BATF. Gun shows are described on page 4. "*Ordinarily, gun shows are held in public arenas, civic centers, fairgrounds, and armories,...*" [10]

- On May 22, 2009, President Obama signed into law a bill, based on the Second Amendment, that permits law-abiding citizens to possess firearms in National Parks – consistent with the law of the state in which the park is located. See: The Credit Card Act of 2009. [11]

These facts can be judicially noticed for the proposition that public places, where many people gather, like: parks, fairgrounds, public arenas, civic centers, and government buildings where gun shows take place, are **not** longstanding examples of historically "sensitive places." Alameda should not be permitted to boot-strap a "sensitive places" designation of the Fairgrounds without evidence or some other compelling reason.

D. THE ORDINANCE CANNOT SURVIVE INTERMEDIATE SCRUTINY.

Even assuming this Court were to diverge from the strict scrutiny analysis suggested by the Supreme Court, and followed by the Third

[10] Available at: http://www.atf.gov/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces.pdf

[11] Public Law 111-24 § 512 (Protecting Americans from Violent Crime).

Circuit[12] and apply intermediate scrutiny to the Ordinance, the Court should still grant relief to the Appellants. The County has not produced any constitutionally sanctioned evidence that the community evil (gun violence) that they claim as the (pretextual) justification for the ordinance can be addressed by a gun ban on county property. Interpreting the rationale set forth in *City of Los Angeles v. Alameda Books, Inc.*, (2002) 535 U.S. 425, the Seventh Circuit held:

> [...] [B]ecause books (even of the "adult" variety) have a constitutional status different from granola and wine, and laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other variables). See *Andy's Restaurant*, 466 F.3d at 554-55. **But there must be evidence; lawyers' talk is insufficient.** (Emphasis added.)
>
> *Annex Books v. City of Indianapolis*,
> 581 F.3d 460, 463 (7th Cir. 2009)

The point is that (adult) books occupy the same relationship to the First Amendment, that guns occupy with respect to the Second Amendment. Restrictions on the right that purport to address some public interest must be based on constitutionally significant evidence.

[12] US v. Marzzarella, 2010 U.S. App. LEXIS 15655 (July 29, 2010)

Finally, the County's Ordinance cannot pass the strict "means and ends" testing currently required under Ninth Circuit law when evaluating "time, place and manner" regulations of expressive conduct. See generally: *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009).

CONCLUSION

This case can be seen as being about commerce in guns. But that view is incomplete. From its inception this ordinance has been about suppressing the display of guns because of opposition to their symbolism and their utility for exercising a fundamental right.

Appellants presented hundreds of declarations from people attesting that they pay to attend gun shows to see exhibits of historical and modern guns and lectures and discussions of guns and their history. In that respect Appellants' gun shows are precisely analogous to the display of weapons in the Arms and Armor Gallery in New York's Metropolitan Museum of Art. Of course, gun shows also display guns for sale – just as art galleries display and sell art reproductions and other artifacts.

The dispositive point is that the County has not presented any evidence that suppressing these First and Second Amendment displays

will accomplish any "compelling" legitimate purpose. Nor has the County demonstrated that its Ordinance is narrowly tailored to achieve their pretextual justifications. Once federal and state laws – both criminal sanctions and the regulation of lawful possession – are taken into account, the Ordinance serves no purpose other than banning gun shows at the Fairgrounds.

Because the Ordinance contains a severability clause, it need not be struck down in its entirety. The Court can simply find that the ordinance is invalid insofar as it bans state-regulated gun shows. This Court should reverse the trial court's summary judgment in favor of the County on the First Amendment and Equal Protection claims; and summarily enter judgment in favor of the Appellants on the Second Amendment claim.

Respectfully Submitted this August 18, 2010,

/s/	/s/
Donald Kilmer	Don B. Kates
Attorney for Appellants	Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32–3(3) because, although the Court's order sets forth a page limit of 15, and this brief contains 4,140 words, excluding the part of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect Version 12 in Century Schoolbook 14 point font.

Date: August 18, 2010

/s/
Donald Kilmer, Attorney for Appellants