APPEAL NO: 07-15763

# IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RUSSELL ALLEN NORDYKE, et al.,

*Plaintiffs and Appellants,*

*vs.*

MARY V. KING, et al.,

*Defendants and Appellees.*

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APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. MARTIN J. JENKINS,
(CASE NO. CV-99-04389-MJJ)

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# APPELLEES' ANSWERING BRIEF

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## TABLE OF CONTENTS

**TABLE OF CONTENTS**
**(continued)**

**PAGE(S)**

## TABLE OF AUTHORITIES

**PAGE(S)**

**CASES:**

## TABLE OF AUTHORITIES
**(continued)**

**PAGE(S)**

## TABLE OF AUTHORITIES
**(continued)**

**PAGE(S)**

## ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly concluded that the County of Alameda defendants were entitled to summary judgment on the First Claim in the Nordykes' Third Amended Complaint asserting an as applied First Amendment challenge. The First Claim challenged as a violation of free expression the County's Ordinance banning the possession of firearms on County property.

2. Whether the District Court correctly concluded that the County of Alameda defendants were entitled to summary judgment on the Second Claim in the Nordykes' Third Amended Complaint asserting an as applied Equal Protection challenge to the Ordinance.

## STATEMENT OF THE CASE

This case has generated three published decisions – two by this Court and one by the California Supreme Court: *Nordyke v. King*, 229 F.3d 1266 (9th Cir. 2000) (*Nordyke I*); *Nordyke v. King*, 27 Cal.4th 875, 44 P.3d 133, 118 Cal.Rptr.2d 761 (Cal. 2002) (*Nordyke II*); and *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003) (*Nordyke III*). The panel to which this appeal is assigned may find it useful to review

those decisions for relevant background. Nevertheless, the statement of the case provided here includes, for the Court's convenience, a summary of the issues decided in the prior appellate proceedings.

Appellants Russell Allen Nordyke and Sallie Ann Nordyke, doing business as TS Trade Shows, along with several other individuals (collectively referred to either as "Nordykes" or "appellants"), filed this action on September 17, 1999 challenging the County of Alameda's adoption of an Ordinance banning the possession of firearms on County property (ER III, p. 440 Fact. No. 19).[1] The Nordykes sued the County of Alameda and the individual members of the County's Board of Supervisors (collectively referred to as "County"). The Nordykes asserted that the Ordinance was preempted by California state gun regulations, and that it violated the First Amendment's guarantee of free expression. *Nordyke I*, 229 F.3d at 1268. The Nordykes sought to enjoin enforcement of the Ordinance and the District Court denied their

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[1] Citations to the Excerpts of Record filed by the Nordykes appear as follows: ER volume number, page number, and such other identifying information (i.e. line number or paragraph number) that may assist the reader. On some pages, the four-digit page number appears near the middle of the page.

application for injunctive relief. *Ibid.* The Nordykes filed an interlocutory appeal to this Court. *Ibid.*

"[M]indful of the considerations of comity when . . . being asked to invalidate, on federal constitutional grounds, a local California law," this Court certified to the California Supreme Court a question of state law that might have resolved the case: "Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?" *Nordyke I*, 229 F.3d at 1267.

The California Supreme Court accepted the certified question and answered as follows: "We conclude that the municipal ordinance in question, insofar as it concerns gun shows, is not preempted. Other aspects of the ordinance may be partially preempted, but we need not address these aspects in this case." *Nordyke II*, 27 Cal.4th at 880.

This Court was then left to decide the remaining First Amendment issue. This Court construed the Nordykes' First Amendment claim as a facial claim because they challenged the law before it took effect. *Nordyke III*, 319 F.3d at 1189. The Court held that the Ordinance on its face does not unconstitutionally infringe

upon expressive conduct. *Id.* at 1190. That holding, the Court noted, did not foreclose a future as applied challenge. *Id.* at 1190 n.3.

While the preemption question was pending in the California Supreme Court, there were several judicial developments relating to the Second Amendment. *Nordyke III*, 319 F.3d at 1188. The Nordykes sought and obtained permission from this Court to file a supplemental brief urging that the Ordinance infringes a right of individuals under the Second Amendment privately to possess and bear firearms. *Id.* at 1188-1189. This Court rejected that claim, concluding that Circuit precedent compelled the conclusion that the Nordykes as individuals lacked standing to raise a Second Amendment challenge. *Id.* at 1192.

After subsequent denials of the Nordykes' Petition for Rehearing En Banc in this Court, and Petition for Writ of Certiorari in the Supreme Court, the case was returned to the District Court for proceedings on the merits (recall that all of the above appellate proceedings resulted from an interlocutory appeal). The Nordykes had filed an Amended Complaint in November 1999 before their interlocutory appeal. Proceedings on the County's motion to dismiss

the Amended Complaint were automatically stayed by the taking of that appeal.

After the case returned to the District Court, the Nordykes filed a motion for leave to file a Second Amended Complaint (ER I, p. 1). The District Court denied that motion to the extent the Second Amended Complaint sought to re-allege the earlier unsuccessful Second Amendment claim (ER I, pp. 226-227) and to allege a new Ninth Amendment claim (ER I, pp. 227-228). The Nordykes say they are now appealing from the denial of their motion to the extent they sought to re-allege a Second Amendment claim. The District Court granted leave to file a Second Amended Complaint to the extent it included various as applied First Amendment claims (ER I, p. 228).

The Nordykes then filed their Second Amended Complaint, including as applied First Amendment claims and their California Constitution counterparts, an Equal Protection claim, and a Due Process claim (ER II, p. 233). Upon the County's motion to dismiss the Second Amended Complaint, the District Court let stand the Equal Protection claim; dismissed the as applied free expression claim with leave to amend; and dismissed the as applied commercial

speech claim, the as applied free assembly and association claim, and the Due Process claim without leave to amend (ER II, pp. 274-280). The California Constitution claims were dismissed with or without leave to amend in accordance with their federal counterparts (ER II, p. 280). The Nordykes say they are now appealing from the dismissal of their as applied free assembly and association claim.

In accordance with the District Court's ruling granting in part and denying in part the County's motion to dismiss the Second Amended Complaint, the Nordykes then filed the operative Third Amended Complaint asserting only an as applied free expression claim (and a counterpart California Constitution claim) and an Equal Protection claim (ER II, p. 284). The County unsuccessfully moved to dismiss the as applied free expression claim and the California Constitution claim (see ER II, p. 354). The County then answered the Third Amended Complaint (ER II, p. 341).

After the parties conducted discovery, the County moved for summary judgment on the Third Amended Complaint (ER II, p. 361). The Nordykes opposed the motion (see ER III, p. 617, line 21-22). The motion proceeded on a Joint Statement of Undisputed Facts

(ER III, p. 438). The County agreed that all of the facts contained in the statement were undisputed, but objected that some of those facts were not relevant under the governing substantive law. Accordingly, the County filed relevance objections regarding those facts (ER III, p. 570). The County also objected to some of the evidence submitted by the Nordykes in opposition to the motion (ER III, p. 570).

On March 31, 2007, the District Court filed an Order granting the County's motion for summary judgment (ER III, p. 617). The District Court first concluded that the Nordykes had standing to assert their as applied First Amendment and Equal Protection challenges (ER III, pp. 623-624). The County has not filed a cross-appeal on this issue and thus does not argue otherwise. The District Court then reached the merits and concluded that there was no issue of material fact with respect to the Nordykes' as applied First Amendment claim, and that the County was entitled to summary judgment on that claim under *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 ("*O'Brien*") (ER III, p. 635). The District Court also concluded that there was no issue of material fact with respect to the Nordykes' as applied Equal Protection claim, and that the County was

entitled to summary judgment on that claim (ER III, p. 640). It is these two aspects of the District Court's ruling – the as applied First Amendment claim (*O'Brien*) and the as applied Equal Protection claim that the Nordykes challenge in this appeal.

There are several aspects of the District Court's Order granting summary judgment which the Nordykes do not challenge here and, therefore, which the County does not address. First, the District Court concluded that the County's Ordinance as applied to the Nordykes is a valid time, place and manner restriction (ER III, p. 635-637). Second, the District Court declined to exercise supplemental jurisdiction over the Nordykes' free expression claim under the California Constitution (ER III, p. 640). Third, the District Court granted the County's motion to strike the Nordykes' expert report (ER III, p. 625 n.12). The Nordykes do not challenge any of these three aspects of the District Court's Order granting summary judgment.

The District Court entered Judgment in favor of the County on May 23, 2007 (ER III, p. 821 [judgment filed May 17, 2007]; III,

p. 854 [docket entry 189 – judgment entered May 23, 2007]). The Nordykes appealed.

## STATEMENT OF FACTS

On July 4, 1998, eight people sustained gunshot wounds at the Alameda County Fairgrounds during the annual County Fair (ER III, p. 438, Fact No. 1). In the wake of that shooting and other documented violence in the area (ER II, p. 404 [subd. (a)]), the County adopted an Ordinance on August 17, 1999 making illegal the possession of firearms on County property (ER III, p. 440, Fact No. 13). On September 28, 1999, the County amended its prohibition on firearms possession by adopting the Ordinance at issue here – Ordinance No. 0-2000-22 ("Ordinance") (ER II, p. 404; III, p. 442, Fact. No. 22). The amendment added an exception to the firearms possession ban for events meeting specified safety criteria (ER II, p. 405 [subd. (f)(4)]). Thus, unless one of the exceptions to the ban is satisfied, a person may not possess firearms on County property. The ban applies only to County property.

The important public safety concern underlying the Ordinance is stated in the findings of the County's Board of Supervisors:

> The Board of Supervisors finds that gunshot fatalities and injuries are of epidemic proportions in Alameda County. During the first five years of the 1990's 879 homicides were committed using firearms, and an additional 1,647 victims were hospitalized with gunshot injuries. Firearms are the leading cause of death among young people between the ages of 15 and 24 in Alameda County. Between July 1, 1996 and June 30, 1997, 136 juveniles were arrested in Oakland for gun-related offenses. On July 4, 1998 a shooting incident on the Alameda County Fairgrounds resulted in several gunshot wounds, other injuries and panic among fair goers. Prohibiting the possession of firearms on County property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the County.

(ER II, p. 404 [subd. (a)]).

The Nordykes began conducting gun shows at the Alameda County Fairgrounds in February 1991 (ER II, p. 286-287, ¶ 17). Their gun shows bring thousands of firearms for display, exhibition, and sale at the County Fairgrounds (ER III, p. 444, Fact Nos. 35-36). Attendance at each gun show at the County Fairgrounds is at least 4000 people (ER III, p. 444, Fact No. 37).

After the ban on firearms possession was adopted in September 1999, the General Manager of the Alameda County Fairgrounds requested from the Nordykes a written plan explaining how they would conduct their gun shows in compliance with the ban (ER III, p. 441, Fact No. 15). In response, the Nordykes notified the County that the ban prevented them from profitably conducting gun shows at the County Fairgrounds (ER III, p. 442, Fact No. 18). The Nordykes then questioned what legal authority the County had for requesting a written plan (ER III, p. 443, Fact No. 26). The Nordykes never submitted the requested written plan (ER III, p. 444, Fact No. 32). Instead, they canceled their gun show scheduled in November 1999 (ER III, p. 443, Fact No. 28) and pursued this litigation.

An event known as the Scottish Games also is held at the County Fairgrounds (ER III, p. 441, Fact No. 16).[2] The Scottish Games involve the display and possession of unloaded rifles, or rifles with blank cartridges in connection with re-enactments of historic gun battles (ER III, p. 441, Fact No. 16; p. 445, Fact Nos. 40-41). Only those persons directly participating in the historical re-enactments may possess a rifle, and those persons are required either to have the firearm in their actual possession, or to otherwise secure it to prevent unauthorized use (ER III, p. 445, Fact No. 42). Thus, the Scottish Games falls under the exception to the firearms ban for events where "the participant lawfully uses the firearm as part of that [event], provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use" (ER II, p. 405 [subd. (f)(4)]).

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[2] The County objected to the relevance of some of the undisputed facts regarding the Scottish Games. The District Court did not rule on those objections. Given the analysis in the District Court's Order granting summary judgment, the County did not subsequently seek a written ruling.

## STANDARD OF REVIEW

"The district court's grant of summary judgment is reviewed de novo." *Qwest Communications, Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006) (citation omitted). This Court "must determine, viewing the evidence in the light most favorable to . . . the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applie[d] the substantive law." *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (citation omitted).

## SUMMARY OF ARGUMENT

The Supreme Court has rejected the view "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 ("*O'Brien*"). Certain types of conduct, such as the destruction of a draft card in *O'Brien*, may be imbued with both speech and non-speech elements. There is no question that the possession of a firearm at a gun show involves elements not

connected to speech. The County has assumed for purposes of this litigation that this conduct may in some instances involve a speech element as well.

The Supreme Court recognized in *O'Brien* its prior decisions in various contexts "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. As discussed below, *O'Brien* articulates four factors for determining whether a governmental interest justifies limitations imposed on First Amendment freedoms. The County's ban on the possession of firearms on County property satisfies each of those four factors.

The Nordykes cannot prevail under *O'Brien*. So, they argue that *O'Brien* does not really apply at all. Instead, they say *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("*Johnson*"), supplies the governing legal standard. *Johnson* holds, in part, that regulations related to the suppression of free expression are evaluated under a strict scrutiny standard. *Johnson*, 491 U.S. at

p. 412. The County explains at the outset below that its Ordinance prohibiting the possession of firearms on County property is not related to the suppression of free expression. The Ordinance is thus subject to the *O'Brien* standard. The District Court correctly concluded that the Ordinance, as applied to the Nordykes, satisfies that standard and is consistent with the First Amendment.

The District Court also correctly decided that the Nordykes' Equal Protection claim fails as a matter of law. The discussion below will show that regulations withstanding First Amendment scrutiny are evaluated under a rational basis standard for Equal Protection purposes. The Ordinance, as applied to the Nordykes, is rationally related to the County's legitimate (and important) interest in preventing gun violence and preserving public safety on County property. Also furthering that interest is the County's application of the exception to the firearms ban. Any user of County property who satisfies the exception may possess firearms on County property. The Nordykes have decided they cannot make a profit if they adhere to the exception. Other groups such as the Scottish Games honor the

exception. These circumstances do not violate the Equal Protection Clause.

The First Amendment and Equal Protection issues are the only ones properly before this Court. The Nordykes include two additional issues in their list of issues presented for review: The District Court's rejection of (1) their Second Amendment claim and (2) their free assembly/freedom of association claim. But the Nordykes fail to present any argument at all on these issues. They have, therefore, forfeited those issues.

Before proceeding to the argument, the County takes this opportunity to correct a misimpression the Court might have formed after reading the "Brief of Appellants." It is unclear whether the Nordykes are asserting that the Judgment should be reversed because the District Court found triable issues of fact as to whether the Nordykes' possession of a gun at a gun show is intended to convey a particularized message and whether the likelihood is great that the message would be understood by those who viewed it. If the Nordykes are asserting a factual dispute as a basis for reversal, they are wrong. The County assumed for the sake of argument in its

motion for summary judgment that gun possession in certain circumstances may convey a message. Hence, the District Court's note that "the County does not contest that gun possession in the context of a gun show may involve certain elements of protected speech." (ER III, p. 625, lines 7-8). Accordingly, the analysis below proceeds on the presumption that protected speech is involved here. There is no factual dispute regarding that issue that would defeat summary judgment.

Finally, the Nordykes have not identified one disputed material fact precluding the entry of summary judgment. That is not surprising because the parties submitted a joint statement of undisputed facts to the District Court. Only issues of law are before this Court.

## ARGUMENT

## I. THE DISTRICT COURT CORRECTLY REJECTED APPLICATION OF THE STRICT SCRUTINY STANDARD EMPLOYED IN *TEXAS V. JOHNSON.*

A. The County's Interest In Preventing Gun Violence and Preserving Public Safety Is Not Related To The Suppression Of Free Expression.

In determining that the constitutional validity of the Ordinance is not evaluated under strict scrutiny pursuant to *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("*Johnson*"), the District Court properly focused on the crux of the Johnson court's analysis. The District Court observed as follows:

> The [*Johnson*] Court reasoned that the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest "related 'to the suppression of free expression'" because the State's concern with protecting the flag's symbolic meaning was

implicated "only when a person's treatment of the flag communicates some message." [citation.]

(ER III, p. 627, lines 4-7).

The County's asserted interest here "is the prevention of violence and the preservation of safety on county property." (ER III, p. 628, lines 11-12; II, p. 404 (subd. (a)). There is no disputing that this is the County's interest. The District Court rejected application of strict scrutiny under *Johnson* because it found that the County's interest was unrelated to the suppression of free expression. (ER III, p. 628, lines 3-15). Unlike the asserted interest in *Johnson* which was implicated "only when a person's treatment of the flag communicates some message," *Johnson*, 491 U.S. at 410, the County's asserted interest in preventing violence and preserving safety is implicated *regardless* of whether a particular gun communicates some sort of message. Whether a gun does or does not communicate a message is irrelevant to the County's interest in public safety. The District Court correctly concluded that the County's interest is unrelated to the

suppression of free expression and, in turn, that the strict scrutiny standard applied in *Johnson* does not apply here.

"If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls." *Johnson*, 410 U.S. at 403. After first rebutting the Nordykes' arguments regarding *Johnson*, the County explains in Part II below that its Ordinance satisfies the *O'Brien* standard.

B. The Nordykes' Fail In Their Quest To Invoke The Strict Scrutiny Standard Applied In *Johnson*.

The Nordykes strive mightily over nearly 20 pages in their brief (pages 27-46) to shoehorn the Ordinance into the *Johnson* framework. Their effort fails for the several reasons that follow.

Underlying the Nordykes' *Johnson* analysis and permeating their entire brief is the erroneous assertion that the Alameda County Board of Supervisors adopted the Ordinance because it disagreed with the Nordykes' political philosophy regarding firearms, and it favored other groups (App. Brief at pp. 11-12, 14, 22, 25-26, 35-37,

42-44). The first problem for the Nordykes is that the factual record does not support their claim. No evidence exists from which a trier of fact could conclude that the Board of Supervisors adopted the Ordinance because it disagreed with some message the Nordykes intended to convey through the possession of firearms. Indeed, one searches the Joint Statement of Undisputed Facts (ER III, pp. 438-456) in vain for any indication that the Board of Supervisors disagreed with any message the Nordykes might convey through gun possession.

Knowing well that they are speculating as to the entire Board's "true motives," the Nordykes focus on the statements of Mary V. King, then a member of the Board of Supervisors (App. Brief at pp. 11-12, 36, 43). Supervisor King expressed dislike for gun shows and denounced them in a memorandum to the County Counsel and in a subsequent press release (see Exhibits "F" and "G" attached to App. Brief). From those statements, the Nordykes leap to conclude that Supervisor King was speaking for the County. Yet there is not a shred of evidence in the record, and the Nordykes do not cite any, that Supervisor King was speaking on behalf of anyone other than herself.

A press release identifying itself as the statement of an individual supervisor can no more be construed as a statement of the entire Board of Supervisors than can a public statement of an individual Ninth Circuit judge be construed as a statement of the entire Court.

The Nordykes' effort to attribute an individual's statement to the entire Board of Supervisors suffers from a flaw even more fundamental than a lack of evidence. As the District Court correctly observed, "the Supreme Court has counseled against consideration of alleged illicit legislative motive in determining a statute's constitutionality. [Citation.] A court may not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive [citation.]" (ER III, p. 631, lines 2-5). The District Court aptly cited Supreme Court precedent to support its conclusion (ER III, p. 631, lines 7-14):

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-

> making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

*United States v. O'Brien*, 391 U.S. 367, 383-384, 88 S.Ct. 1673, 20 L.Ed.2d 672 ("*O'Brien*").

Under *O'Brien*, a law that is constitutional on its face may not be invalidated based on the motive of one or more legislators. This Court has already decided that the Ordinance is constitutional on its

face. See *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003). Yet the Nordykes ask this Court to determine that the Ordinance has been applied unconstitutionally to them based on the statements of an individual legislator. *O'Brien* precludes this Court from doing so.

The Nordykes seek to avoid *O'Brien* on this point by suggesting that courts may consider the motives of individual legislators in determining whether the government adopted a content-based regulation (App. Brief at p. 35). The Nordykes cite no authority for this novel proposition. Furthermore, their suggestion nullifies the *O'Brien* rule that a court, for the reasons explained above, "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383.

The Nordykes fare no better in inviting the Court to inquire into the Board's motive as an "administrative" body (App. Brief at pp. 36-37). After all, it is a *legislative* enactment that is under review here, and *O'Brien* forecloses any inquiry into legislative motive for purposes of evaluating the constitutional validity of legislation.

Also without merit is the suggestion that the County's asserted interest is not implicated on the facts in the record (App. Brief at pp. 30, 33, 37-38). As noted above, the undisputed aim of the Ordinance is to prevent gun violence on, and preserve public safety on, County property (ER III, p. 628, lines 11-12). After reciting all of the statistics regarding gunshot injuries and fatalities in Alameda County, including a shooting on the Alameda County Fairgrounds where the Nordykes held their gun shows, the Ordinance states: "Prohibiting the possession of firearms on County property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the County." (ER II, p. 404 [subd. (a)]). The County's well-documented and well-founded interest in public safety is implicated by an event in which thousands of firearms are displayed for thousands of attendees at the County Fairgrounds (ER III, p. 444 [Fact Nos. 35-37]). Any one of those attendees could possess any of the displayed firearms at will.

It need not be shown that violence erupted during, or that a crime was committed at, one of the Nordykes' gun shows. The County's asserted interest in public safety need not be tethered to the

Nordykes' individual circumstances. *See Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 296-297, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) ("*Clark*") (in *as applied* challenge to regulation prohibiting sleeping overnight in a federal park, "the validity of th[e] regulation need not be judged solely by reference to the demonstration at hand"); *Ward v. Rock Against Racism*, 491 U.S. 781, 801, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("*Ward*") (emphasis added) (even if challenge to municipal noise regulation was an as-applied challenge, city's justification for regulation would be upheld because "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, *not on the extent to which it furthers the government's interests in an individual case.*"); *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1013 n.6 (9th Cir. 1996) (citing above-quoted language in *Ward*) (in defending against as applied challenge to ordinance banning sale of message-bearing shirts on city streets, the validity of the ordinance did not depend on the extent to which it furthered the city's interest with regard to plaintiffs' sales, but depended on the

extent to which it furthered the city's overall goal of protecting public safety).

Confronted with binding authority that it need not be determined whether their gun shows involved the violence and crime targeted by the Ordinance, the Nordykes are left to misconstrue *Johnson* as creating a contrary rule. In *Johnson*, a political protester was convicted of desecrating the American flag by burning it. 491 U.S. at 397. The State of Texas asserted that its interest in preventing breaches of the peace justified the conviction. 491 U.S. at 407. The Supreme Court rejected that assertion, noting that "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag." 491 U.S. at 408. From this language, the Nordykes derive a rule that a government regulation may not be applied to expressive conduct – here, presumed to be the possession of firearms – unless that particular conduct has been shown to cause the evil which the regulation is designed to thwart. But *Johnson* does not create such a rule. Nor could it do so consistently with the principle articulated in *Clark* and *Ward* above that a regulation need not actually further the government's interest in a particular case in

order to withstand an as applied challenge. Indeed, the Supreme Court decided *Ward* on June 22, 1989, just one day after it decided *Johnson*. If, as the Nordykes claim, *Johnson* means that the government must actually show that a particular activity causes the very problem a regulation seeks to eradicate, then the *Ward* case decided the following day is superfluous. Obviously, that cannot be the case.

The *Johnson* court's focus on whether flag burning actually disturbed the peace arose from the premise underlying the State's asserted interest in preventing a breach of the peace: "The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on that basis." 491 U.S. at 408. Here, there is no indication that Alameda County's interest in reducing gun violence was driven by a concern that people taking offense at particular expression will engage in gun violence, or was driven by any other concern relating to expression. As explained above, the County's interest was born of well-documented gun violence in the County, including a recent shooting on the same

property (the County Fairgrounds) where the Nordykes held their gun shows.

In summary, there is no merit to any of the reasons advanced by the Nordykes for subjecting the Ordinance as applied to them to the strict scrutiny employed in *Johnson*. The *O'Brien* test applies, and the County now turns to that issue.

## II. THE DISTRICT COURT CORRECTLY APPLIED THE STANDARD IN *UNITED STATES V. O'BRIEN* IN UPHOLDING THE ORDINANCE AS CONSISTENT WITH THE FIRST AMENDMENT.

In *O'Brien*, the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376. The Court articulated the following standard in evaluating governmental regulation of expressive conduct:

> We think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

The Ordinance as applied to the Nordykes satisfies all four factors of the *O'Brien* standard.

A. The Ordinance Is Within The Constitutional Power Of The County.

The District Court correctly concluded that the County had the constitutional power to adopt the Ordinance (ER III, p. 629, lines 1-10). This Court's earlier decision upholding the Ordinance against a facial First Amendment challenge implicitly recognizes that the Ordinance was within the County's constitutional power. See

*Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003). If the Ordinance fell beyond that power, this Court could not have upheld it.

In the District Court, the Nordykes argued unsuccessfully that the California Supreme Court's decision in *Nordyke v. King*, 27 Cal.4th 875 (2002), somehow stripped the County of its constitutional power to adopt the Ordinance (see ER III, p. 629, lines 6-8). That was a strange argument for the Nordykes to assert because they lost when the California Supreme Court decided that the Ordinance is not preempted by California law.

The Nordykes float an altogether different argument in their brief to this Court – that the County's so-called intent to burden expression translates into an action in excess of its constitutional powers (App. Brief at pp. 48-49). As explained in detail above, there is no evidence that the County adopted the Ordinance for the purpose of burdening expression. Also, as noted above, this Court may not examine the motives of legislators in evaluating the constitutional validity of the Ordinance. *O'Brien* 391 U.S. at 383-384. The Nordykes' argument fails.

The Ordinance falls squarely within the County's constitutional power, satisfying the first *O'Brien* factor.

B. The Ordinance Furthers The County's Substantial Governmental Interest Of Preventing Violence And Preserving Safety On County Property.

The District Court appropriately acknowledged the detailed findings of gun violence made by the County in adopting the Ordinance (ER III, pp. 629-630; II, p. 404 (subd. (a))). In particular, the Ordinance recounts the shooting on July 4, 1998 at the Alameda County Fairgrounds, resulting in gunshot wounds to several people (ER II, p. 404 (subd. (a))). The District Court concluded that the Ordinance's ban on the possession of firearms on County property furthered the substantial interest of preventing violence and preserving public safety.

"[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111,

99 S.Ct. 939, 59 L.Ed.2d 171 (1979). Courts erect such a high hurdle for constitutional plaintiffs because "[courts] generally defer to the legislative body passing the law in determining whether the government's ends are advanced by a regulation." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006).

As the face of the Ordinance makes clear, firearms were involved in over 2,000 deaths and injuries in Alameda County during a five-year period (1990-1995) before the adoption of the Ordinance. Furthermore, during the Independence Day celebration on July 4, 1998, several people sustained gunshot wounds on the same Fairgrounds where the Nordykes held their gun shows. It is reasonable for a legislator to conclude that banning the possession of firearms on County property will reduce the risk of deaths and injuries attributed to guns. This Court should, as did the District Court, defer to the reasoned judgment of the County's Board of Supervisors on that issue.

The Nordykes err in arguing that the Ordinance does not further a substantial governmental interest as applied to their gun shows (App. Brief at pp. 49-50). Whether or not those gun shows

were a source of violence or criminal activity is irrelevant. The County explained above that its interest in reducing gun violence and preserving public safety need not be tethered to the particular circumstances of the Nordykes' gun shows. *See Ward v. Rock Against Racism*, 491 U.S. 781, 801, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 296-297, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1994); *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1013 n.6 (9th Cir. 1996). The County need not demonstrate that the gun shows themselves have been marred by violence or criminal activity. The Constitution requires only a reasonable conclusion that banning the possession of firearms on County property will reduce the risk of deaths or injuries attributable to guns. That conclusion finds solid support in the legislative findings in the Ordinance, which the Nordykes do not challenge. Furthermore, a reasonable legislator would conclude that a ban on possession at any event which brings thousands of guns to a location with thousands of persons (ER III, p. 444, Fact Nos. 35, 37) will reduce the risk of gun violence.

The suggestion that there may be other, more effective means of combating gun violence (App. Brief at p. 50) also is unavailing. This Court has no authority to engage in an after-the-fact determination of whether legislation has been "effective" or "successful" in achieving its stated goal. That type of exercise by the judiciary would amount impermissibly to second-guessing the wisdom of legislators. *See Association of National Advertisers v. Lungren*, 44 F.3d 726, 736 (9th Cir. 1994) (courts should not second guess a legislative decision); *Charter Commc'ns, Inc. v. County of Santa Cruz*, 203 F.Supp.2d 1102, 1109 (N.D.Cal. 2001) (deference to legislative process appropriate because legislators are far better equipped than judiciary to amass and evaluate information bearing upon legislative questions); *PTI, Inc. v. Philip Morris, Inc.*, 100 F.Supp.2d 1179, 1203 (C.D.Cal. 2000) ("it is not the province of the courts to second-guess the wisdom of the legislature's choice" to protect the health and safety of its citizens by decreasing the supply of available cigarettes).

The District Court correctly concluded that the County's public safety interest is sufficiently substantial to justify the impact on any

expressive conduct in which the Nordykes engage by possessing firearms. The Ordinance as applied here therefore satisfies the second *O'Brien* factor.

C. The County's Interest In Preventing Violence And Preserving Public Safety Is Unrelated To The Suppression Of Free Expression.

The County has already explained in its analysis of *Johnson* in Part I.A above that the interest in preventing gun violence and preserving public safety is not related to the suppression of free expression. The District Court correctly decided that "[n]othing on the face of the statute, or its application in the factual record of this case, indicates that the County's interest is related to suppression of Plaintiffs' First Amendment rights of free expression." (ER III, p. 633, lines 2-4).

The Nordykes continue to assert without any evidentiary support that the County has engaged in "the purposeful censoring of the gun culture" through enacting the Ordinance (App. Brief at p. 51). Again, there is not a shred of evidence to support the theory that the

County enacted the Ordinance because it disagreed with someone's viewpoint or belief. Furthermore, as the Court well knows from Part I.B above, the judiciary may not inquiry into legislative motive for the purpose of determining the constitutional validity of a regulation.

The District Court rejected the Nordykes' related hypothesis that the timing of the Ordinance and its exception for certain events is indicative of an intent to suppress the Nordykes' expression. This Court should reject the same hypothesis repackaged in the Nordykes' brief here (App. Brief at pp. 51-52). The Nordykes filed this action on September 17, 1999. The County amended the Ordinance on September 28, 1999 by adding an exception to the ban on firearms possession for certain theatrical and entertainment events (ER II, p. 405 [subd. (f)(4)]); III, p. 442, Fact Nos. 22-24). From this sequence of events, the Nordykes leap to conclude that the Ordinance is related to the suppression of free expression because, they say, the exception is content-based. This sequence does not even come close to showing that the exception or any other part of the Ordinance was based on a disagreement with any message the Nordykes might convey by possessing firearms.

Furthermore, as the District Court astutely observed, "the exception contains the unqualified word, 'event,' that preserves the possibility that any number of events [including Plaintiffs' gun shows] can satisfy the exception provided that the firearms are secured when not in the actual possession of the participant." (ER III, p. 632, lines 21-23). "Plaintiffs offer no specific probative evidence establishing that as applied to Plaintiffs, the Ordinance's exception for entertainment-related events is content-based." (ER III, p. 632-633).

The District Court observed that the Nordykes could conduct a gun show on County property where guns are offered for sale, exhibited, or are discussed (ER III, p. 632 n. 13). But the Nordykes could not continue their historic practice of displaying thousands of unsecured guns on tables for any attendee to pick up and possess temporarily at will (see ER, p. 444, Fact Nos. 35-37). That practice would be inconsistent with the exception's requirement that only an authorized participant may possess a firearm, and when the firearm is not in the actual possession of that participant, it must be secured to prevent unauthorized use (ER II, p. 405 [subd. (f)(4)]).

The Nordykes respond that they could not profitably conduct their gun shows if they were required to change their practice, and that whether they could conduct a gun show without guns is a triable issue of material fact (ER III, p. 442, Fact No. 18; App. Brief at p. 15). This a red herring. The First Amendment does not guarantee plaintiffs a profit on their gun shows. In *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir. 1996), plaintiffs challenged an ordinance regulating adult arcades. *Id.* at 664-665. Plaintiffs argued that the ordinance "would severely decrease [their] profitability." *Id.* at 665. This Court discounted this claim as "irrelevant to the First Amendment analysis." *Id.* at 665. The First Amendment is concerned only with "whether a challenged provision prohibits entry into a market where the aggrieved party might exercise her rights, and distinguishes this inquiry from any examination of success within the market at issue." *Id.* at 666. "[I]n the absence of any absolute bar to the market . . . it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.' [citations.]" *Id.* at 666. "Even if the costs of compliance were so great that World Video would be forced

out of business, the ordinances do not pose any intrinsic limitation on the operation of the arcades, but merely increase World Video's vulnerability to such market forces . . ." *Id.* at 667.

Other circuits agree with the Ninth Circuit on this point of law. *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 47 (1st Cir. 2005) ("[plaintiff's] real complaint is that [the statute] will have the incidental effect of suppressing or eliminating the market demand for the particular type of business advice that [plaintiff] offers . . . . That circumstance does not suffice to hoist the red flag of constitutional breach: the First Amendment does not guarantee that speech will be profitable to the speaker or desirable to its intended audience."); *The Pitt News v. Fisher*, 215 F.3d 354, 366 (3rd Cir. 2000) ("'[E]conomic loss . . . does not constitute a first amendment injury. The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [an] ordinance upon freedom of expression.' [citations.]") (internal quotations omitted). Accordingly, the Nordykes' concerns that they

cannot profitably conduct a gun show are irrelevant to any constitutional analysis.[3]

Because the Nordykes have no constitutional right to conduct a profitable gun show in the first place, and because the Ordinance allows them to conduct a gun show under the same circumstances everyone else must follow (i.e. without attendees possessing firearms), there is no basis for concluding that the County's application of the Ordinance is related to the suppression of the Nordykes' free expression in favor of the content of expression at other events. The Ordinance as applied satisfies the third *O'Brien* factor.

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[3] The Nordykes make much of the passing observations in *Nordyke v. King*, 229 F.3d 1266, 1268 (9th Cir. 2000), and in *Nordyke v. King*, 27 Cal.4th 875, 882, 118 Cal.Rptr.2d 761 (Cal. 2002), that it would be difficult to conduct a profitable gun show without guns. Contrary to the Nordykes' assertion (App. Brief at p. 16), those observations are not "the law of the case." The "law of the case" doctrine preserves throughout the litigation *legal conclusions* reached by an appellate court. "'The law of the case doctrine states that the decision of an appellate court on a *legal issue* must be followed in all subsequent proceedings in the same case.' [citation.]" *In re Rainbow Magazine, Inc.*. 77 F.3d 278, 281 (9th Cir. 1996) (emphasis added). The law of the case doctrine does not apply to passing observations (i.e. whether the Nordykes can conduct a profitable gun show).

D. The Ordinance's Incidental Restriction On The Nordykes' Presumed Expressive Conduct Is No Greater Than Is Essential To The Furtherance Of The County's Interest In Preventing Gun Violence And Preserving Public Safety.

This factor assumes some restriction on protected speech. But the Ordinance does not restrict the Nordykes' protected speech at all. The Nordykes are free to enter County property and say anything they want about guns, the Second Amendment, or any related topic. Presuming that the possession of a firearm in and of itself communicates a message, it is difficult to conceive of any message that possession could communicate that could not be communicated verbally. This contrasts sharply with the expressive conduct – burning an object – in the relevant Supreme Court cases. It is easy to see that burning an object (i.e. a flag or a draft card) communicates a message – presumably disdain for the American government – far more strongly than it could be communicated by denouncing the government verbally. That does not appear to be the case with respect to possessing a firearm.

But even assuming that the ban on possession of firearms on County property in some way restricts expressive conduct, the ban is no greater than is essential to further the County's interest in preventing gun violence and preserving public safety. As the District Court correctly noted, several potentially less onerous alternatives to a ban on possession are preempted by California law (ER III, p. 633, lines 16-20). For example, local governments in California are preempted from regulating the registration or licensing of firearms. *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 862, 44 P.3d 120, 118 Cal.Rptr.2d 746 (Cal. 2002). Accordingly, the County could not adopt as an alternative to a firearms ban a regulation involving the licensing or registration of firearms. If it did, the Nordykes would no doubt challenge it as preempted just as they challenged the current Ordinance as preempted.

As the District Court recognized, the Nordykes' stated purposes for their gun shows demonstrates that the Ordinance restricts their presumed expressive conduct no more than necessary. The Nordykes listed in their Third Amended Complaint (ER II, pp. 296-297, ¶ 59) 15 primary purposes for their gun shows, each of

which is set forth in the District Court's Order granting summary judgment (ER III, p. 634, lines 9-21). The District Court correctly concluded that each of these purposes may be fulfilled without the actual presence of a firearm (ER III, p. 634, lines 23-24). The only listed purpose for which the presence of a firearm may be preferable is the sale of that firearm. But as the District Court noted, "nothing in the Ordinance prohibits such a sale." (ER III, p. 634, lines 25-26). Accordingly, the ban on firearms possession as applied to the Nordykes is no greater than necessary to achieve the County's goal of preventing gun violence and preserving public safety.

The Nordykes respond that their gun shows are not the source of any violence or criminal conduct (App. Brief at p. 53). But as the District Court aptly observed (ER III, pp. 633-634), and as discussed in detail in parts I.B and II.B above, courts may not consider whether a regulation's goals have been achieved in a particular circumstance. That issue is irrelevant to the constitutional validity of the regulation.

The "lesser restrictive means" of curbing gun violence suggested by the Nordykes (App. Brief. at p. 54) are beside the point. Metal detectors and other means of controlling the flow of weapons

onto County property would perhaps allow the Nordykes and others to possess weapons, but *O'Brien* does not require the government to permit the Nordykes to engage in the particular method of communication – possessing firearms – that they believe is the most effective. *Vlasak v. Superior Court of California*, 329 F.3d 683, 691 (9th Cir. 2003) ("*Vlasak*"). In *Vlasak*, this Court upheld under *O'Brien* an ordinance prohibiting during demonstrations the possession of wooden objects exceeding a certain thickness. *Id.* at 685-686. The ordinance prohibited the plaintiff from carrying a large wooden bull hook – a device used to train elephants – during an animal rights demonstration. *Id.* at 691. The court rejected plaintiff's argument that she was entitled to carry the bull hook as the most effective means of communicating her message. "Although non-wooden replicas and pictures of the bull hook may not have the same impact as the real thing, the potential hazards of wielding what is essentially a heavy wooden club in a crowd during demonstrations justified the relatively small burden imposed on Vlasak by the ordinance." *Ibid.* Furthermore, "leaflets, pictures, signs, videotapes,

and press releases" were "other, less hazardous, but still effective, ways of communicating their message." *Ibid.*

Similarly, the potential hazard posed by thousands of guns in a venue with thousands of people justifies requiring the Nordykes to communicate any message with the many other tools available – speech, leaflets, pictures, signs, videotapes, press releases, and replicas of guns to name just a few. The County's Ordinance leaves open multiple avenues of communication. *Vlasak*, 329 F.3d at 691. The Ordinance as applied satisfies the fourth *O'Brien* factor.

The Nordykes fail to identify any disputed fact that is material under the *O'Brien* standard with respect to the application of the Ordinance to their trade shows. The District Court properly granted summary judgment to the County on the Nordykes' First Amendment claim.

## III. THE DISTRICT COURT CORRECTLY DECIDED THAT THE ORDINANCE AS APPLIED TO THE NORDYKES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The District Court properly recognized that the first step in an Equal Protection analysis is to identify how the regulation under review classifies groups of people (ER III, p. 637, lines 16-19). The plaintiff must establish at the outset "that the law is applied in a discriminatory manner or imposes different burdens on different classes of people." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). The classification of groups is not actionable on an Equal Protection theory, however, unless the group to which plaintiffs belong is *similarly situated* to the group to which plaintiffs compare themselves. "Once the plaintiff establishes governmental classification, it is necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared." *Freeman*, 68 F.3d at 1187, citing *Attorney General v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C.Cir. 1982) ("Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances").

The District Court declined to reach the issue of whether the Nordykes are similarly situated to the Scottish Games event operators to whom the Nordykes compare themselves (ER III, p. 638, lines 18-20). However, this Court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning [this Court] adopt[s]." *Atel Financial Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003). This Court may therefore affirm the District Court's grant of summary judgment on the Equal Protection claim because the Nordykes fail to show they are similarly situated to the Scottish Games event operators.

The record shows that the Nordykes' gun shows "bring hundreds, if not thousands, of firearms to one location, where examination is both convenient, and educational." (ER II, p. 299, lines 4-5). These firearms are exhibited, displayed, and sold (ER II, p. 286, lines 23-24). Attendance at each of the Nordykes' gun shows at the County Fairgrounds is at least 4,000 people (ER II, p. 292, line 21). All potential sellers and buyers of firearms must physically examine a firearm before it is sold (ER II, p. 299, lines 21-22).

In sharp contrast, the Scottish Games falls under the exception in the Ordinance to the ban on gun possession (ER II, p. 405 [subd. (f)(4)]). The Scottish Games involve historical re-enactments of gun battles (ER III, p. 445, Fact No. 40). The re-enactments involve rifles with blank cartridges; no ammunition is used (ER III, p. 445, Fact No. 41). Participants are required to have the rifles in their actual possession and when not in their possession, to secure the rifles to prevent unauthorized use (ER III, p. 445, Fact No. 42).

The Nordykes' gun shows, with thousands of individuals being able to handle firearms without oversight of any act of possession, are not similarly situated to the Scottish Games where participants in re-enactments of historic gun battles are required either to have guns in their immediate possession or otherwise to secure them so unauthorized persons will not use them. The Nordykes, therefore, cannot maintain an Equal Protection claim on the theory that the County treats the Scottish Games more favorably than the Nordykes (see App. brief at pp. 40-41). The District Court's grant of summary judgment on the Equal Protection claim should be affirmed on this ground alone.

Even if the Nordykes were similarly situated to the Scottish Games operators, the County need only show a rational basis for distinguishing between the Nordykes and the Scottish Games operators. "'[W]here the law classifies persons on a non-suspect basis for the exercise of liberties which are not fundamental constitutional rights,' the law will be upheld if it rationally relates to a legitimate government objective. [citations.]" *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988). "[T]he government may distinguish between groups if the distinction 'is reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation . . .' [citation.]" *Abboud v. INS*, 140 F.3d 843, 848 (9th Cir. 1998).

As discussed above, the District Court correctly concluded that the Ordinance does not violate the Nordykes' First Amendment rights. When courts have determined that a regulation does not violate a fundamental right, they apply rational basis review for Equal Protection purposes. *See Johnson v. Robison*, 415 U.S. 361, 375 n.14, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right.

However, since . . . the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification [for equal protection purposes] a standard of scrutiny stricter that the traditional rational basis test"); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 54, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (provision of collective bargaining agreement upheld against First Amendment challenge "need only rationally further a legitimate state purpose" to survive Equal Protection challenge). The race and gender discrimination cases which the Nordykes string cite (App. Brief at p. 41) are entirely off point because they do not involve regulations or policies analyzed under both the First Amendment and the Equal Protection Clause, but under only the Equal Protection Clause.

The District Court properly found that the Ordinance and its exception for certain events, as applied to the Nordykes, is rationally related to a legitimate government interest (ER III, p. 639, lines 12-28). Here, the County has made the policy choice through its Ordinance to reduce the risk of gun violence on its own property. The Ordinance bans the possession of firearms on County property

(ER II, p. 404 [subd. (b)]). The County's decision was made in the wake of a shooting on County property, and after hundreds of homicides committed with guns within the County's borders (ER II, p. 404 [subd. (a)]). A legislator would reasonably conclude that the risk of gun violence is greater under the circumstances of the Nordykes' gun shows than it is under the circumstances of one of the excepted events. It is therefore reasonable to apply the firearms ban to an event (1) that has no restrictions on which attendees may possess a firearm, and (2) that does not require firearms to be secured when not in someone's immediate possession. It also is reasonable to except from that ban those events (1) that limit firearms possession only to authorized participants in the events, and (2) that require the firearms to be secured against possession by another person when not in the immediate possession of the original possessor. These differences between the Nordykes' gun shows and the excepted events have a fair and substantial relationship to the Ordinance's legitimate safety purpose of reducing the risk of gun violence on County property.

Finally, the Nordykes are incorrect that the Equal Protection Clause is violated because their gun shows are not included within the Ordinance's exception (App. Brief at p. 42). "The Constitution does not require that laws treat every individual exactly alike [] to withstand constitutional attack." *Mlikotin v. City of Los Angeles*, 643 F.2d 652, 653 (9th Cir. 1981). "Treating two groups differently does not necessarily violate the equal protection [clause]." *California Assn. of the Physically Handicapped, Inc. v. FCC*, 721 F.2d 667, 670 (9th Cir. 1983). "[T]he Equal Protection Clause . . . does not ensure absolute equality." *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). Given the Ordinance's stated goal, the admitted features and circumstances of the Nordykes' gun shows, and the circumstances of the Scottish Games, it cannot be said that the County's distinction between the Nordykes' gun shows and the Scottish Games is arbitrary or unreasonable.

The Nordykes fail to identify any disputed fact that is material to the rational basis review of the Ordinance's application to their gun shows and to the Scottish Games. The District Court properly

granted summary judgment to the County on the Nordykes' Equal Protection claim.

## IV. THE NORDYKES HAVE FORFEITED THE ISSUE OF WHETHER THE DISTRICT COURT ERRED IN DENYING THEIR MOTION FOR LEAVE TO RE-LITIGATE THE SECOND AMENDMENT CLAIM THEY ALREADY LOST IN THIS COURT.

The Nordykes ask as their fifth question presented for this Court's review whether the District Court improperly denied their request for leave to amend their complaint to plead a Second Amendment cause of action (App. Brief at p. viii). Yet, the Nordykes do not present any argument on this issue. Instead, they discuss *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003) where this Court rejected their Second Amendment claim on its merits. *Id.* at 1191-1192 (App. Brief at pp. 57-59). They also mention subsequent developments within the U.S. Department of Justice, and the pending litigation before the United States Supreme Court regarding the District of Columbia's regulation of firearms (App. Brief at pp. 60-

61). Having failed to explain how the District Court erred in denying leave to plead a Second Amendment claim which they already lost in this Court, the Nordykes have forfeited that issue.

> Our circuit has repeatedly admonished that we cannot 'manufacture arguments for an appellant' and therefore we will not consider any claims that were not actually argued in appellant's opening brief. [Citation.] Rather, we 'review only issues which are argued specifically and distinctly in a party's opening brief.' [Citation.] Significantly, '[a] bare assertion of an issue does not preserve a claim.' [Citation.]

*Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("*Washington*").

In any event, for obvious reasons stated in its Order denying leave (ER I, pp. 226-227), the District Court was correct.

## V. THE NORDYKES HAVE FORFEITED THE ISSUE OF WHETHER THE DISTRICT COURT ERRED IN DISMISSING THEIR FREE ASSEMBLY AND FREEDOM OF ASSOCIATION CLAIM.

The Nordykes ask as their third question presented for this Court's review whether the District Court erred by dismissing their free assembly and freedom of association claim. But they never present any argument on the issue in their brief. Instead, in one paragraph, they ask only that the issue be "preserved" depending upon the outcome of another pending case (App. Brief at pp. 55-56). Under the *Washington* case cited immediately above in Part IV, the Nordykes have forfeited the issue.

## CONCLUSION

The County adopted the Ordinance in the wake of a shooting on its own property and in the wake of increased gun violence within its borders. Any incidental impact that a ban on possession of

firearms on County property may have on the Nordykes readily survives First Amendment and Equal Protection scrutiny. The Judgment of the District Court should be affirmed.

DATED: January 8, 2008

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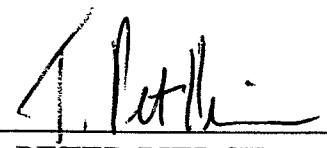
By: 

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## STATEMENT OF RELATED CASES

The earlier appeal in this case, Docket No. 99-17551, is a related case within the meaning of Circuit Rule 28-2.6. The cases designated as related in the "Brief of Appellants" are not related cases.

DATED: January 8, 2008

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## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 28.1(e)(3) and 32(a)(7)(C), and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 10,287 words.

DATED: January 8, 2008

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