No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEAL
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

BRIEF OF APPELLANTS

Donald E. J. Kilmer, Jr.
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, California 95125
Vc: 408/264-8489 Fx: 408/264-8487
E-Mail: Don@DKLawOffice.com

Counsel for Plaintiff - Appellants

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 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: November 12, 2007

Donald E. J. Kilmer, Jr. [SBN: 179986]
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, California 95125
Voice: (408) 264-8489
Fax: (408) 264-8487
E-Mail: Don@DKLawOffice.com

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QUESTIONS PRESENTED FOR REVIEW

1. The trial court made a finding that the Plaintiff/Appellants' possession of guns at gun shows (on county property at the Alameda County Fairground) is sufficiently imbued with expression to warrant protection under the Texas v. Johnson; 491 U.S. 397 (1989) line of cases; did the trial court then err by finding that the ban on gun shows at the County Fairgrounds, as applied to Appellants, did not violate the First Amendment?

2. In applying the more deferential test in United States v. O'Brien, 391 U.S. 367 (1968) to this case; did the trial court nevertheless err by upholding the ban on gun shows at the county fairgrounds?

3. Did the trial court err by dismissing the Plaintiff/Appellants' Free Assembly and Freedom of Association claims?

4. Did the trial court apply the appropriate level of scrutiny when analyzing Appellants' Equal Protection claim, based on an abridgement of First Amendment Rights?

5. Did the trial court improperly deny the Appellants' request for leave to amend their complaint to plead a Second Amendment cause of action?

INTRODUCTION

This case was filed on November 17, 1999. But it really began more than ten (10) years ago with an offhand comment by this Court in Nordyke v. Santa Clara County, 110 F.3d 707, (9th Cir. 1997). [Hereafter: Nordyke 97] The Nordykes prevailed in that matter against the County of Santa Clara on commercial free speech grounds.

In looking at the county's purpose for amending a lease to exclude gun shows from the Santa Clara County Fairgrounds this court noted:

> [T]he Board achieves nothing in the way of curtailing the overall possession of guns in the County." [citation omitted]
>
> Also, the addendum is "more extensive" than necessary, or to use the proper "fit" formulation of the standard, it is an attempt to accomplish what it could have achieved by means of either a properly drafted ordinance or a simple prohibition of gun shows at the Fairgrounds.

Nordyke v. Santa Clara County, 110 F.3d at 713

Alameda took a lesson from this and passed an ordinance banning the possession of guns on county property. The County dressed it up as a public safety measure and claimed that prohibiting the possession of guns on county property would somehow reduce crime in the entire county. Alameda's intention was the same as Santa Clara's: to exclude gun shows and their activities from a public forum.

This case is controversial and has generated vigorous debate both within and without our court system. This case has the capacity to test objectivity. In his concurring opinion in Texas v. Johnson, 491 U.S. 397 (1989), Justice Kennedy stripped the veneer off of the difficult and often underestimated toll that difficult decisions have on judicial officers at all levels of our courts:

> I write not to qualify the words Justice Brennan chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.
>
> The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.
>
> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.
>
> Texas v. Johnson, 491 U.S. at 420, 421 (1989)

JURISDICTION

The trial court had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(3) which provides for original jurisdiction in suits brought under 42 U.S.C. §§ 1983 and 1988. As this action arises under the United States Constitution the trial court also had jurisdiction pursuant to 28 U.S.C. § 1331.

As the Plaintiff/Appellants were also seeking declaratory relief, the trial court had jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202. And to the extent that state law issues were implicated in this case, the trial court had jurisdiction pursuant to 28 U.S.C. § 1367.

The trial court denied the Plaintiff/Appellants leave to amend some of their claims under Federal Rule of Civil Procedure 15 and dismissed several other claims under FRCP 12.

Finally, The trial court entered an order granting summary judgment for the Defendant/Appellees and entering judgment in their favor under FRCP 56 and 58.

Plaintiff/Appellants filed a timely notice of appeal under the Federal Rules of Appellate Procedure 4.

This Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On November 3, 1999 the District Court denied Plaintiffs' Motion for Pre-Trial Injunctive Relief. Plaintiffs filed a timely appeal.

On September 12, 2000, the Ninth Circuit Court of Appeals certified a question of state law with respect to the state law preemption issues to the California Supreme Court under rule 29.5 of the California Rules of Court. See: Nordyke v. King ("Nordyke I"), 229 F.3d 1266 (9th Cir. 2000).

On April 22, 2002, the California Supreme Court issued its answer to the certified question: "*conclud[ing] 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.*" See: Nordyke v. King ("Nordyke II"), 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761 (Cal. 2002).

On July 26, 2002, the Ninth Circuit Panel invited the parties to file simultaneous supplemental briefs addressing the impact of the California Supreme Court's answer to the certified question. At or near the same time, Plaintiff/Appellants requested an opportunity to brief additional First and Second Amendment issues that had developed since the case had first been argued in the Summer of 2000.

On February 18, 2003 the Ninth Circuit issued its ruling published at Nordyke v. King ("Nordyke III"), 319 F.3d 1185 (9th Cir. 2003) upholding the District Court's order denying the Plaintiff's request for a preliminary injunction.

Plaintiff/Appellants requested en banc review. That petition was denied on April 5, 2004. See Nordyke v. King ("Nordyke IV"), 364 F.3d 1025 (9th Cir. 2004).

Plaintiff/Appellants sought a writ of certiorari in the United States Supreme Court, Docket No.: 03-1707. The petition was denied on October 4, 2004.

On February 14, 2005 the District Court issued an order granting in part and denying in part Plaintiffs' motion to file an amended complaint to include causes of action under the Second and Ninth Amendments to the United States Constitution. [ER, Vol. I of IV, Tab: 3, pp. 0226 – 0228. A copy of the order is set forth in the appendix to this brief as Attachment B.]

On March 11, 2005, Plaintiffs filed a Second Amended Complaint as modified by the Court's order. [ER, Vol II of IV, Tab: 4]

On June 10, 2005, the District Court issued an Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiffs'

commercial speech claims and freedom of assembly/association claims, without leave to amend, and permitting the Plaintiffs leave to amend their freedom of expression claims. [ER, Vol. II of IV, Tab 5, A copy of the order is set forth in the appendix to this brief as Attachment C.]

On July 11, 2005, Plaintiffs filed a Third Amended Complaint. The District Court denied Defendants' motion to dismiss the TAC in an order filed September 27, 2005. [ER, Vol. II of IV, Tabs: 6 and 9]

Thereafter, Defendants filed a Motion for Summary Judgment. On or about March 31, 2007, the District Court filed an order granting Defendants' Motion for Summary Judgment. (The order was entered on the docket on April 17, 2007.) [ER, Vol. III of IV, Tab 17, A copy of the order is set forth in the appendix to this brief as Attachment D.]

On April 24, 2007 Plaintiff/Appellants filed a timely Notice of Appeal [ER, Vol. IV of IV, Tab: 30]

On the same day, the Defendant/Appelles file a Motion for Administrative Relief. [ER, Vo.. IV of IV, Tab 32, pp 0852, Docket # 171.]

On May 4, 2007, the District Court filed an order denying Appellee/Defendants' Motion for Administrative Relief. [ER, Vol. IV of IV, Tab 27]

On May 17, 2007 the District Court filed a Judgment in favor of the Defendants based on granting Defendant's Motion of Summary Judgment. [ER, Vol. IV of IV, Tab 29]

On May 25, 2007 Plaintiff/Appellants filed an Amended Notice of Appeal. [ER, Vol. IV of IV, Tab 31]

On July 16, 2007, Plaintiff/Appellants filed a General Order 3.7 Notice "Comeback Case." In an order filed August 10, 2007, this Court filed an order stating that "The panel declines to accept the case as a comeback case under General Order 3.7."

STATEMENT OF FACTS

This appeal arises out of the district court's grant of a motion for summary judgment. The appellants were the nonmoving party in the trial court and are therefore entitled to have all factual inferences decided in their favor. See: Ventura Packers, Inc. v. F/V JEANINE KATHLEEN, 305 F.3d 913 (9th Cir. 2002).

The standard of review for an order granting summary judgment, is *de novo*. See: Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002).

The crucial issue before this Court concerns the First Amendment guarantee that no laws shall be enacted by Congress that abridge the

people's freedom of speech. The 14th Amendment extends this guarantee, and protects the people against abridgments by their state and local governments.

The United State Supreme Court has broadened that guarantee to include a freedom of expression through non-verbal conduct, when there is an intent to convey a particularized message, that is likely to be understood by the intended audience. See: Spence v. Washington, 418 U.S. 405, 410-11 (1974). See also: Texas v. Johnson; 491 U.S. 397 (1989). This is the legal context for analyzing the facts of this case.

The parties filed a JOINT STATEMENT OF UNDISPUTED FACTS (JSUF) in the trial court. That statement of facts is found in the Excerpt of Record (ER), Vol.: III of IV, Tab: 12, pp. 0438 to 0456. For ready reference and the convenience of the court, a copy is set forth in the appendix to this brief as Attachment E. Hereafter, the document will be referred to simply as the JSUF using the Excerpt of Record pagination and/or the paragraph number as set forth in that document.

When this Court took up the freedom of expression issues in the Appellants' facial challenge, it created a template for this case:

> [...] Nordyke argues that possession of guns is, or more accurately, can be speech. In evaluating his claim, we must ask whether "*[a]n intent to convey a particularized message*

> *[is] present, and [whether] the likelihood [is] great that the message would be understood by those who viewed it.*" Spence v. Washington, 418 U.S. 405, 410-11, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974). If the possession of firearms is expressive conduct, the question becomes whether the County's "*regulation is related to the suppression of free expression*." Johnson, 491 U.S. at 403. If so, strict scrutiny applies. If not, we must apply the less stringent standard announced in United States v. O'Brien, 391 U.S. 367, 377,(1968).
>
> Nordyke v. King; 319 F.3d at 1189, 1190 (2003)

In footnote 3 of that opinion, the court noted that its inquiry into the facial challenge did not foreclose a future "as applied" challenge.

The threshold question of whether the possession of guns, as applied to the facts of this case, can be classified as expressive conduct has been answered. The trial court made two findings:

1. That the record contained: *"competent evidence [...] that there is a triable issue of fact as to whether Plaintiffs' gun possession in the context of a gun show can qualify as speech and whether Plaintiffs intended to convey a particularized message that was like to be understood by those who observed it."* [Order Granting Summary Judgment. ER, Vol. III of IV, Tab: 17, ER page no.: 0625, Attachment D herein.]

2. That the County of Alameda had conceded the point. [*Id.*]

Plaintiff/Appellants do not challenge those findings by the trial court, nor have Defendant/Appellees filed a cross-appeal on that issue.[1]

[1] The curiously named: Motion for Administrative Relief [ER, Vol. III of IV, Tab 18], filed by the County after the order granting summary judgment in their favor appears to be an attempt to retract that concession.

To avoid burdening the Court further, only those facts necessary to address the remaining issues for a complete analysis under the Texas v. Johnson, 491 U.S. 397 (1989) line of cases are set forth in the remainder of this Statement of Facts.

The appellants are promoters, patrons, and exhibitors of gun shows that have historically taken place at the Alameda County Fairgrounds from 1991 to 1999. [JSUF, Attachment E, ¶¶ 43,44. See also: DECLARATION OF RUSSELL AND SALLIE NORDYKE, ER, Vol. IV of IV, Tab 25, ER page: 0779]

In other words, the appellants' activities, including but not limited to First Amendment activities at the Alameda County Fairgrounds, were an established and entrenched exercise of rights for several years before the county passed its ordinance burdening their rights in Aug/Sept of 1999. [JSUF, Attachment E, ¶¶ 13, 22]

In Nordyke 97, 110 F.3d at 710, this Court noted that the Code of Federal Regulations § 478.100(b) defines a gun show as follows:

> A gun show or an event is a function sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms in the community.

On July 4, 1998, Jamai Johnson brought a handgun to the county fair at the Alameda County Fairgrounds. He shot several people, and several people were wounded in the ensuing panic and confusion. The annual county fair is not in any way connected with the gun shows hosted/attended by the appellants. Jamai Johnson was arrested and convicted for these crimes and was sentenced to state prison. [JSUF, Attachment E, ¶¶ 1,2,3]

As if to underscore that its legislation is only tenuously connected to that shooting, Mary V. King sent a memorandum to county counsel almost a year later, on May 20, 1999. The memo was copied to all board members, requesting that Mr. Winnie research a way to prohibit gun shows on county property. [JSUF, ¶ 9, Attachment E. The memorandum was authenticated in a response to Request for Admissions, a copy has been lodged with the trial court. For convenience a copy is set forth as Attachment F.]

The memorandum speaks for itself, but for the record it clearly sets forth a purposeful intent, by a majority of the board, based on political philosophy, to take steps to deny gun shows access to county property. [*Id.*]

The County, speaking through Supervisor King, issued a press

release on July 20, 1999. In that press release the County reiterated that the purpose of the pending legislation was to deny gun shows access to the fairgrounds because the County did not agree with the political values of the people attending gun shows. (i.e., 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, Attachment E, ¶ 11. An authenticated copy of the press release and text of the speech is set forth as Attachment G.]

On July 26, 1999, appellants' counsel sent a letter to County Counsel requesting clarification of the ordinance and specifically requesting an interpretation of the Ordinance as it would relate to gun shows at the Alameda Fairgrounds. [JSUF, Attachment E, ¶ 12]

In other words, the County knew that appellants considered the ordinance an infringement on their gun show's First Amendment Activities.

On August 17, 1999, The Alameda County Board of Supervisors adopted Ordinance No.: 0-2000-11, which later became Section 9.12.120 of the Code of Alameda County. On its face, the Ordinance prohibits the possession of guns on county property, including the fairgrounds where Appellants had been hosting their gun shows for almost a decade.

In what can only be described as a display of cognitive dissonance, the County sent a letter to the General Manager of the Fairgrounds on August 23, 1999 "explaining" that the ordinance does not proscribe gun shows, so long as no guns are present at gun shows. [JSUF, Attachment E, ¶¶ 13,14. For convenience, a copy of the letter and the first version of the ordinance is set forth in Attachment H.]

On September 7, 1999, the General Manager of the fairgrounds requested a written plan from the Appellants, asking that they explain how they would conduct their gun shows in compliance with the ordinance. In the mean time, the Scottish Caledonian Games contacted the county, and apparently inquired about an amendment to the ordinance so that they could continue to hold their cultural events at the fairgrounds, which also involved the possession and display of firearms. To date, the Scottish Caledonian Games have never been required to submit a written plan for conducting their cultural events, with guns, in compliance with the Ordinance. Nor does the ordinance command such a written plan. [JSUF, Attachment E,¶¶ 15,16, 17,31]

The Appellants filed this action on September 17, 1999, alleging violations of the First Amendment. [ER, Vol. IV of IV, Tab: 32]

On September 20, 1999, County Counsel sent a letter to the Board

of Supervisors, acknowledging service of the complaint in this lawsuit. The lawyer for the County was advising the Board of Supervisors to adopt revisions to the ordinance. The revisions included an exception for the possession of guns to convey ideas in any "***motion picture, television, video, dance or theatrical production or event***." (Alameda Revised Ordinance § 9.12.120(f)(4)) [JSUF, Attachment E, ¶ 20. For convenience, a copy of the letter and the proposed revision of the ordinance are set forth in Attachment I.]

The County has now gone from censoring the messages they disagree with that are conveyed by the possession of guns at gun shows, to approving of the messages conveyed by the possession of guns by the Scottish Caledonian Games and guns used to convey ideas in any "***motion picture, television, video, dance or theatrical production or event.***" [*Id.*]

The County passed the revised Ordinance on September 28, 1999. It is this revised ordinance that is the subject of this litigation. [JSUF, Attachment E, ¶ 22. For convenience, a copy of revised ordinance is set forth in Attachment A.]

After the trial court denied their request for a preliminary injunction, fearing civil and criminal penalties, appellants were forced

to cancel a gun show set for November 6/7, 1999. Because the Plaintiff/Appellants could not produce a written plan for conducting a gun-less gun show (which is not called for in the ordinance), the manager of the fairgrounds cancelled all future dates reserved for gun shows, and returned Appellants' deposits for all of the guns shows that had been scheduled for 2000. [JSUF, Attachment E, ¶¶ 27, 28, 29, 30]

The County insists that gun shows can take place without guns, the Plaintiff/Appellants (who are in the gun show business) insist that gun shows cannot take place without guns. That makes this issue triable and therefore not ripe for adjudication at the summary judgment stage; notwithstanding footnote 13 in the trial court's order granting summary judgment[2] addressing this same issue. [ER, Vol. III of IV, Tab: 17, ER page: 0632. A copy of the order is set forth herein as Attachment D.]

[2] Footnote 13 in the trial court's summary judgment order tries to salvage the disparate impact of the Alameda ordinance on gun shows by postulating that gun shows can still take place at the fairgrounds, as long as attendees do not actually possess firearms while on county property. The Court also notes that the ordinance does not proscribe the sale exhibition or discussion of firearms on county property. This raises an interesting logistical question: exactly how would the guns which could not be handled by the attendees, but which could be displayed or exhibited, make it onto the fairgrounds in the first place for that display or exhibit? The county has always made it very clear that gun shows were not an exception to their ordinance.

The law of this case is that the ordinance makes gun shows without guns "virtually" impossible. When an appellate court decides a legal issue, whether explicitly or by necessary implication, that decision generally is not open to relitigation in subsequent proceedings in the same case. [See Chevron USA, Inc. v. Bronster, 363 F.3d 846, 849 (9th Cir. 2004); United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186-1187 (9th Cir 2001); Leslie Salt Co. v. United States, 55 F.3d 1388, 1392-1393 (9th Cir. 1995)– even summarily-treated issues become law of the case]

The previous federal and state appellate courts looking at this case have independently come to the same conclusion:

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

The California Supreme Court made a somewhat stronger finding as it looked at the preemption issues:

> [T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible.
>
> Nordyke v. King (Norykde II), 27 Cal. 4th 875, 882.

It is undisputed that the gun shows promoted and attended by the appellants at the Alameda County Fairgrounds were free of any violent crimes and that the appellants have complied with all federal and state firearms laws. It is noteworthy that the Director of the Firearms Division of the California Department of Justice and one of his special agents testified that the Nordykes were in compliance with all federal and state laws regulating gun shows, include the Gun Show Enforcement Act of 2000. [JSUF, Attachment E, ¶¶ 43, 44, 49, 50, 85]

Plaintiff/Appellants do not now, nor have they ever, asserted the right to hold gun shows without regulation. The federal laws regulating gun shows, for which it is undisputed that the appellants are in compliance, include but are not limited to:

1. 18 USC § 923(j) regarding licensing and inspection.
2. Title 27 C.F.R. § 478.23 regarding inspections.
3. Title 27 C.F.R. § 418.100(b) regarding definitions.
4. Title 27 C.F.R. § 478.100(a) regarding posting of licenses.
5. Title 27 C.F.R. § 478.103 (d)-(f) regarding signage and prohibiting minors from possessing hand guns.
6. Title 27 C.F.R. § 100 (c) regarding recordation of sales.

The Gun Show Enforcement Act of 2000 (California Penal Code § 12021.4) became law after the Nordykes were kicked out of the Alameda County Fairgrounds. The California Department of Justice testified that the Nordykes have been in compliance with that law at all

of their other gun shows throughout California. [JSUF, Attachment E, ¶¶49, 50, 51] Contrasting the state laws regulating gun shows, with the Alameda County Ordinance and their polices:

1. California Penal Code § 12071.4(b)(5) requires gun show promoters to verify that all firearms in their possession at the show or event will be unloaded, and that the firearms will be secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a prospective buyer.

   Contrast this with the County's policy of permitting the re-enactors at the Scottish Games to actually load their guns with blanks. Blanks are still ammunition. [JSUF, Attachment E, ¶ 41.]

2. California Penal Code § 12071.4(g) mandates that no person at a gun show or event, other than security personnel or sworn peace officers, shall possess at the same time both a firearm and ammunition that is designed to be fired in the firearm. Vendors having those items at the show for sale or exhibition are exempt from this prohibition.

   Because they are not a gun show, no such requirement is imposed on the Scottish Games.

3. California Penal Code § 12071.4(h) mandates no member of the public who is under the age of 18 years shall be admitted to, or be permitted to remain at, a gun show or event unless accompanied by a parent or legal guardian. Any member of the public who is under the age of 18 shall be accompanied by his or her parent, grandparent, or legal guardian while at the show or event.

   No such requirement in imposed by the Ordinance or on the Scottish Games.

4. California Penal Code § 12071.4(i) mandates that persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j).

   Not require by the Ordinance.

5. California Penal Code § 12071.4(k) mandates all persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer.

   Not required by the Ordinance.

6. California Penal Code § 12071.4(j) mandates that all firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm:

   (1) The gun owner's signature.
   (2) The gun owner's printed name.
   (3) The identification number from the gun owner's government-issued photo identification.

   Not required by the Ordinance.

[See JSUF, Attachment E, ¶¶ 52 – 57]

It would be a reasonable inference to draw from these facts, that gun shows *qua* gun shows are more strictly regulated under Federal and State Law, with regard to responsible gun handling, than any requirement imposed by the Ordinance on: "***motion picture, television, video, dance or theatrical production or event***[s]" which take place on county property with the County's blessing.

Perhaps emboldened by Alameda's early successes in this litigation and the false impression created in the media that the case was over, the counties of Marin, Sonoma and San Mateo, and the city of Santa Cruz have enacted ordinance substantially the same and/or identical to the one challenged herein. [JSUF, Attachment E, ¶¶ 80, 87]

Gun shows at county fairgrounds in Northern California are in danger of becoming extinct, turning the gun culture and those people who promote and patronize gun shows into a disfavored group. [See generally: Rohmer v. Evans, 517 U.S. 620 (1996)]

The County's stated purpose (which appellants maintain is a pretext) for the ordinance is the reduction of gun crime. But even the horrendous shooting that occurred at the fairgrounds during the County Fair (not a gun show) in 1998 would not have been prevented by the Ordinance. Jamai Johnson was already in violation of several state

laws by bringing a concealed and loaded firearm to the county fair. He compounded that crime by the shooting rampage. Even without the County's Ordinance, any District Attorney worth his badge would have charged Jamai Johnson with:

1. Crimes Against Public Justice [See: Penal Code §§ 171b, 171c, 171e, 186.20 et seq.];

2. Crimes Against the Person [See: Penal Code §§ 203, 205, 220, 225 et seq., 240, 242, 245, 246, 246.3, 247];

3. Crimes Against Public Health and Safety [See: Penal Code § 374c];

4. Crimes Against the Public Peace [See: Penal code §§ 403, 404.6, 415, 417, 417.1, 417.6];

5. Malicious Mischief [See: Penal Code § 602.1];

6. Miscellaneous Offenses [See Penal Code § 647c]; and finally,

7. Control of Deadly Weapons [See: Penal Code §§ 12001.6, 12021.5, 12022, 12022.6, 12022.7, 12025, 12031, 12101].

These Penal Code Sections address exactly the same public safety issue (pretext) set forth in Alameda County Ordinance. How can a county ordinance, making it a misdemeanor to possess a gun on county property, prevent the crimes committed by Jamai Johnson, when he took no notice of the restrictions, duties and obligations required of him under existing state law, many with felony sanctions?

In fact, after the July 4, 1998 shooting, the County took steps to control the unlawful possession of deadly weapons at the fairgrounds by the simple expedient of installing metal detectors at the entrance to the fairgrounds. [JSUF, Attachment E, ¶ 48]

In other words, there is an alternative solution for controlling deadly weapons on county property (at least for the fairgrounds) that does not involve banning gun shows.

A final clue, as if one is needed, that demonstrates the County's hostility toward (and targeting of) gun shows, is the undisputed fact that the Caledonian Scottish Games, an apparently favored group, is still permitted to possess firearms on county property for their cultural and expressive activities, while gun shows are still excluded. The County would have this Court believe that the handling of firearms by the attendees of the Scottish Games is somehow different from the handling of guns at a gun show. Those are not the facts.

California's Gun Show Enforcement Act of 2000 is either stricter than, or substantially identical to the County's requirements for handing guns in a "***motion picture, television, video, dance or theatrical production or event.***" . [See JSUF, Attachment E, ¶¶ 16, 17, 31, 39, 40, 41, 42]

Comparing the California Gun Show Enforcement Action with the Alameda Ordinance:

Alameda Ordinance 9.12.120(f)(4)	CA Penal Code § 12071.4
Only authorized participants may handle guns.	See JSUF ¶¶ 52, 53, 54 and 56.
Firearms must be secure when not in actual use.	See JSUF ¶ 57.
Firearm must be lawfully used as part of the production or event.	See JSUF ¶ 3, 43, 44, 46, 47, 49, 50 and 85.

The facts set forth in this statement thus far have addressed the mere possession of firearm on county property. No doubt the County will want to point out that the sale of guns on county property is not regulated by their ordinance, even though possession of a gun is prohibited. Indeed, footnote 13 of the summary judgment order notes that the ordinance does not proscribe the sale [...] of firearms on county property. [JSUF, Attachment E, ¶¶ 46, 47]

In other words, commercial speech associated with guns is treated more favorably (by being left alone), than expressive conduct with guns, which is somewhat regulated for the Scottish Games and "***motion picture, television, video, dance or theatrical production or event***[s]" – and completely banned when it comes to gun shows.

The undisputed facts are that for a lawful sale of a firearm to occur under federal and state law, a firearm must be physically inspected by both the buyer and seller to insure correct documentation of the serial number, make, model and caliber of the weapon. [JSUF, Attachment E, ¶38]

This is actually an instance of how the Alameda Ordinance may frustrate the policy of federal and state firearms laws, by encouraging sales in which the paperwork is not completed properly or accurately.

California law regulating gun sales differs from federal law. All gun sales (except antique firearms) require a 10-day waiting period, a law enforcement background check, proof of safe storage, and proof of adequate safety training. [See generally: California Penal Code §§ 12070, 12071, 12071.1, 12071.4, 12072, 12088.1, 12088.15, 12088.2] There is no "gun show loophole" for firearm sales in California. [JSUF, Exhibit E, ¶ 86]

The ordinance does not even advance gun safety beyond the requirements of state law, for any guns that could be sold on County property. It is a reasonable inference that the County cannot be claiming to address any "secondary effects" of gun sales or possession.

Then there is the issue of how exactly a ban on possession of guns

on county property could have an impact on gun crime throughout the entire county? This Court in Nordyke 97 foresaw this issue.

> Whether the addendum "*directly advances the governmental interest asserted*" must be answered negatively. It is, to repeat, neither an ordinance nor a ban on gun shows. At most, it merely reflects certain concerns about the proliferation of guns and their use in the commission of crimes, while permitting the continuation of gun shows at the Fairgrounds. As Judge Ware noted, "*by banning gun sales only at the Fairgrounds, the Board achieves nothing in the way of curtailing the overall possession of guns in the County*." 933 F. Supp. at 909.
>
> Nordyke v. Santa Clara County, 110 F.3d at 713 (1997)

This case presents the converse question: If an arms dealer can still set up shop at the Alameda Fairgrounds and legally sell all the guns that the market will bear from a catalogue (assuming he can overcome the problems noted above), then the Board achieves nothing in the way of curtailing the overall possession of guns in the County.

The Ordinance does not provide guidance to any county official about how to determine if the possession of a gun for allegedly expressive purposes (e.g., movies, television, video, dance and theatrical events) is permitted or forbidden by the ordinance. [JSUF, Attachment E, ¶¶ 24, 26, 31, 45, 88, 89, 90]

Thus the ordinance gives unfettered discretion to government

officials to decide what is and what is not expressive conduct. What standards are to be applied to exempt the Scottish Games with their guns, but prohibit the gun shows with theirs? It is by no means certain that the Scottish Games even fit within the exception. The closest category is probably "theatrical event", but the undisputed facts are that the guns used at the Scottish Games are for historical re-enactments of battles. How is that any different from a gun show patron admiring historically significant firearms?

The County cannot even claim to be taking steps to avoid future civil liability for the criminal use of firearms on their property. They are in the class of potential litigants protected against frivolous lawsuits seeking deep pockets for the criminal acts of third parties using firearms under Public Law 109-92: Protection of Lawful Commerce in Arms Act, passed by Congress and signed into law on October 26, 2005. [See: Request for Judicial Notice, Filed September 5, 2006. ER, Vol. III of IV, Tab: 13, ER pp., 0462.]

Because the trial court also granted a motion dismissing Plaintiff/Appellants' Freedom of Association and Freedom of Assembly Rights without leave to amend [ER, Vol., II of IV, Tab 5, ER page; 0279]; and because this Court has recently accepted for *en banc* review

a case that will address these issues [Villagas v. Gilroy Garlic Festival, 2007 U.S. Lexis 22027, Case No.: 05-15725]; Appellants respectfully direct this Court to their statements regarding their desire to engage in the fellowship and association of other members of the gun culture for the purpose of expressing their belief in the Right to Keep and Bear Arms. [JSUF, Attachment E, ¶¶ 58 – 85]

FIRST AMENDMENT

Texas v. Johnson Analysis and Argument

In Nordyke III, (including fn. 3) this Court gave the parties, and the trial court an outline for the "as applied" litigation that was yet to come:

> [...] Nordyke argues that possession of guns is, or more accurately, can be speech. In evaluating his claim, we must ask whether "*[a]n intent to convey a particularized message [is] present, and [whether] the likelihood [is] great that the message would be understood by those who viewed it.*" *Spence v. Washington*, 418 U.S. 405, 410-11, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974). If the possession of firearms is expressive conduct, the question becomes whether the County's "*regulation is related to the suppression of free expression.*" *Johnson*, 491 U.S. at 403. If so, strict scrutiny applies. If not, we must apply the less stringent standard announced in *United States v. O'Brien*, 391 U.S. 367, 377,(1968).
>
> Nordyke v. King (Nordyke III); 319 F.3d at 1189 (2003)

The error on the part of the trial court lies in its superficial analysis of both the facts of this case, and the law as applied to these facts. The line of cases requiring analysis arises out of: Spence v. Washington, 418 U.S. 405 (1974), and Texas v. Johnson; 491 U.S. 397 (1989). The trial court's mistake may be understandable given the limited citation from Texas, *id.,* that is set forth in Nordyke III, at 1189.

But the actual holding in Texas v. Johnson, 491 U.S. 397, requires a much more significant inquiry in to at least three (3) separate questions that strike at the core of First Amendment values before a freedom of expression claim is abandoned to the deferential scrutiny of United States v. O'Brien, 391 U.S. 367 (1968).

The first inquiry is to determine if there is expressive conduct which "*possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." [Spence v. Washington] 418 U.S., at 410-411.*" See: Texas v. Johnson, 491 U.S. at 404.

Although the second inquiry is supposed to determine whether or not the State's regulation is related to the suppression of free

expression. Texas v. Johnson, *id.,* at 403. In order to make this inquiry, the Court must first address a related threshold issue: Is the government regulating expression at all? The U.S. Supreme Court explained:

> The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 U.S. at 376-377; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). It may not, however, proscribe particular conduct because it has expressive elements. "*[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.*" *Community for Creative Non-Violence v. Watt*, 227 U. S. App. D. C. 19, 55-56, 703 F. 2d 586, 622-623 (1983) (Scalia, J., dissenting) (emphasis in original), rev'd sub nom. *Clark v. Community for Creative Non-Violence*, *supra*. It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.
>
> Texas v. Johnson, 491 U.S. at 406, 407 (1989)

In order to limit the applicability of U.S. v. O'Brien's, *id.,* relatively lenient standard, the Supreme Court stated: "*[W]e have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under O'Brien's less*

demanding rule." Texas v. Johnson, *id.,* at 407. [underline added]

In rounding out the three-part test, Justice Brennan asserted "*A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See [Spence v. Washington] 418 U.S., at 414, n. 8.*" Texas v. Johnson, *id*., at 404.

The mistake made by the trial court was to set up a model of analysis in which the issues raised in this case under Texas v. Johnson, *id.,* competed on a level playing field with the same issues as they are raised under U.S. v. O'Brien, *supra.* [See Order Granting Summary Judgment. ER, Vol. III of IV, Tab 17, ER, pp. 0626 – 0628 or Attachment D herein.]

As set forth above, the Texas Court makes O'Brien the *default* for analyzing a case about conduct with expressive elements that does not satisfy any of the three (3) inquiries mandated by the Texas opinion. The trial court should have subjected the facts of this case to a full analysis under Texas, using the appropriate level of judicial scrutiny, ***before*** conducting any analysis of the case under the O'Brien standard.

To put this another way, once the expressive conduct enters the sheltered harbor of First Amendment analysis under Texas v. Johnson,

491 U.S. 397 (1989) by establishing that it "*conveys a particularized message, likely to be understood by the those who view it*" Texas, *id.,* at 403, a court should only banish a case back to the rocks and shoals of the highly deferential analysis in U.S. v. O'Brien ***after*** exhausting all of the remaining inquiries raised by the facts of the case under Texas, *id.,* ***and*** that remaining inquiry must be subjected to heightened judicial scrutiny.

It should not be controversial that the remaining inquiries under Texas v. Johnson, *id*., must be analyzed under a stricter judicial review than the deferential standards of U.S. v. O'Brien. The whole point of Justice Brennan's opinion in Texas, *id.,* was to engage in an exacting analysis to distinguish, on the facts of those individual cases, expressive conduct that conveyed a particularized message (i.e., burning a flag), from mere conduct with expressive elements that did not. (i.e., burning a draft card.) The reason for this, is because at this stage of the analysis, the court is investigating whether or not the government is engaging in content-based and/or view-point based regulation of speech. That is why the Texas v. Johnson court examined "*with particular care*" the government's asserted interest when it claimed that it could regulate Mr. Johnson's expressive conduct. Texas, *id*., at 410.

In Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991), Justice Kennedy's concurrence reminded us that compelling interest analysis is not a destination, it is a process of judicial examination. In urging that the compelling interest test was inappropriate once the court had already determined that a regulation was "content-based"; he nevertheless went on to examine those instances when the compelling interest test is still appropriate:

> To forgo the compelling interest test in cases involving direct content-based burdens on speech would not, of course, eliminate the need for difficult judgments respecting First Amendment issues. Among the questions we cannot avoid the necessity of deciding are: Whether the restricted expression falls within one of the unprotected categories discussed above, *supra*, at 127; whether some other constitutional right is impaired, see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976); whether, in the case of a regulation of activity which combines expressive with nonexpressive elements, the regulation aims at the activity or the expression, compare *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), with *Texas v. Johnson*, 491 U.S. at 406-410; whether the regulation restricts speech itself or only the time, place, or manner of speech, see *Ward v. Rock Against Racism*, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); and whether the regulation is in fact content based or content neutral. See *Boos v. Barry*, 485 U.S. at 319-321. However difficult the lines may be to draw in some cases, here the answer to each of these questions is clear.
>
> Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 127, 128 (1991), Kennedy concurring.

Other cases are in accord: Turner Broad. Sys. Inc. v. F.C.C, 512 U.S. 622, 642 (1994); Burson v. Freedman, 504 U.S. 191, 200 (1992); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59 (1983).

Turning now to the Texas v. Johnson inquiries:

Plaintiff/Appellants succeeded in convincing both the trial court and Defendant/Appellees, that "possession of a gun at a gun show" is expressive conduct that "*conveys a particularized message, likely to be understood by those who view it*" see Texas v. Johnson, at 404. The trial court found sufficient triable facts on this issue, and the appellees conceded the point. [Order Granting Summary Judgment. ER, Vol. III of IV, Tab: 17, ER page no.: 0625, Attachment D herein.]

The next logical inquiry is whether *"the State's asserted interest is* [...] *implicated on these facts, and in that event* [whether] *the interest drops out of the picture. See [Spence v. Washington] 418 U.S., at 414, n. 8.*" Texas v. Johnson, *id*., at 404.

The reason this inquiry should be next in line is because it is outcome determinative; for if the court makes a finding that the government regulation burdening expression serves no legitimate purpose the regulation must be struck down.

There are four sources of information subject to judicial scrutiny regarding the County's asserted interest and/or purpose for adopting the ordinance in question: (1) the language of the ordinance itself; (2) legislative intent as expressed by county officials; (3) factual inferences that can drawn from the record as to the efficacy of the ordinance; and (4) the manner in which the ordinance was interpreted and enforced (or not enforced) by the County.

As noted above, the County first passed one version of the ordinance prohibiting possession of guns on county property [JSUF, Attachment E, ¶¶ 13, 14. A copy is also set forth as Attachment H.] After his lawsuit was filed, and after the Caledonian Scottish Games made its inquiries, a revised ordinance was adopted by the Alameda Board of Supervisors. [JSUF, Attachment E, ¶¶ 16, 19, 22. A copy is also set forth as Attachment A.]

The primary difference between the two versions is the exceptions for gun possession on county property when the gun is to be used to express a message in a: "***motion picture, television, video, dance or theatrical production or event***." Alameda Ordinance § 9.12.120(f)(4).

Once it passed this revised Ordinance, the County could no longer credibly assert that they were primarily interested in regulating only

the criminal misuse of guns, for they had now asserted an interest in regulating the expressive use of guns. And because they knew that the appellants had filed this lawsuit before they passed the revision [JSUF, Attachment E, ¶¶ 12 – 25], the failure to include gun shows as an exception alongside "***motion picture, television, video, dance or theatrical production or event"*** is a glaring omission that speaks volumes.

Legislative intent can be discerned by looking at the ordinance itself [§ 9.12.120(a)] and statements by County officials. Appellants are sensitive to the restrictions on making judicial inquiries into "illicit legislative motive", but that rule arises out of United States v. O'Brien, 391 U.S. 367, 383 *et.seq*. (1968)., and, as noted above, we are not at the O'Brien level of scrutiny at this stage of analysis. The inquiry here is to determine if the government has an intent to engage in content-based or viewpoint-based burdens on speech. And viewpoint discrimination by the government is the primary free speech hazard. The First Amendment was written to protect us from that hazard.

See: Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is ... an egregious form of content discrimination."); First Nat'l Bank of Boston v. Bellotti, 435

U.S. 765, 785-86 (1978) ("Especially where ... the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."); City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views ... is the antithesis of constitutional guarantees."); Consol. Edison Co. of N.Y., 447 U.S. at 546 (Stevens, J., concurring) ("A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law abridging the freedom of speech, or of the press.'").

Supervisor King's memo and press release [JSUF, Attachment E, ¶¶ 9, 10, 11. See also Attachments F & G] is a quintessential example of hostility to an idea (the worship of guns as icons of patriotism) and the people who hold those ideas (spineless people hiding behind the constitution) who attend guns shows on county property.

Even if this Court is reluctant to inquire into legislative motive, it should still be permissible to inquire as to an executive and/or administrator's intent and/or motive. The Board of Supervisors have

administrative as well as legislative authority over the County Fairgrounds. [JSUF, Attachment E, ¶ 4.] Even a government interest that is facially neutral "*cannot save an exclusion that is in fact based on the desire to suppress a particular point of view*." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 812 (1985).

If the government's asserted interest is purposeful viewpoint discrimination, a purpose that it cannot have under our Constitution, the analysis could stop here and the Court can strike the ordinance down as a violation of the First Amendment.

In Texas v. Johnson, 491 U.S. 397 (1989), the High Court began an analysis of the asserted government interest by testing the efficacy of a statute banning flag burning against the stated purpose of preventing a breach of the peace:

> If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien's* test applies. See *Spence, supra*, at 414, n. 8. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression. [underline added for emphasis]
>
> Texas v. Johnson, 491 U.S. at 407.

The similarities to this case are striking. The County asserts that it wants to address "breach of the peace issues" by referencing crimes and injuries with guns that are of "epidemic proportions" in Alameda County.

The Supreme Court in the Texas, *id*. at 408, case found that:

> [N]o disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that "no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning." *Id*., at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning. Id., at 6-7

The Court went on to conclude at Texas, *id*., at 410:

> We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "*imminent lawless action*." *Brandenburg, supra*, at 447. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex. Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See *Boos v. Barry*, 485 U.S., at 327-329.

The facts of this case are substantially the same:

1. Despite the fact that the appellants gun shows bring "hundreds if not thousands of firearms into one location" there has not been one report of a violent crime associated with appellants' possession of guns at gun shows at the Alameda County Fairgrounds. [JSUF, Attachment E, ¶¶ 35, 36, 37, 43, 44, 49, 50]

2. The regulations and laws that appellants must comply with to conduct gun shows under federal and state law, are more strict than the permissive rules for possession of guns authorized by the ordinance for "***motion picture, television, video, dance or theatrical production or event***." [JSUF, Attachment E, ¶¶51 – 57]

3. There are sufficiently severe ***felony*** sanctions for the criminal misuse of guns under the state and federal law, that it is beyond imagination to understand how a county ordinance with misdemeanor sanctions can deter gun crime.

4. Then there is the County's installation of metal detectors at the entrance to the fairgrounds, for the purpose of detecting and controlling deadly weapons.[JSUF, Attachment E, ¶48]

5. As noted above, even though the ordinance prohibits the possession of guns on county property, it does nothing to curtail the sale of firearms in Alameda County, even if those transaction occur on county property. [JSUF, Attachment E, ¶¶ 23, 38, 46, 47]

6. Another way of looking at this last point is that commercial speech associated with gun sales is permitted by the Ordinance, but expressive conduct is prohibited. This is not a billboard case, but this Circuit in the recent case of Outdoor Media Group, Inc., v. City of Beaumont, 2007 DJDAR 16455, found that an ordinance that distinguishes between commercial and non-commercial speech was invalid.

If anything, gun shows are even more peaceful than Mr. Johnson's flag burning demonstration and his confrontation with other demonstrators outside the Republican Convention in Dallas in 1984. See Texas v. Johnson, 491 U.S. at 399, 400.

Because the government's asserted interest in "preserving the peace" is not implicated on the facts "as applied" to this case, the Ordinance should be declared invalid.

A final clue as to the validity of the government's asserted interest

is the way in which the Caledonian Scottish Games is treated differently from the appellants' gun show. Essentially this involves an Equal Protection analysis.

Under Fourteenth Amendment analysis, strict scrutiny is applied when a fundamental interest or suspect classification is at stake. See generally San Antonio School District v. Rodriguez, (1973) 411 U.S. 1.

Deprivations of political and associational rights can be analyzed under both the First and Fourteenth Amendments. See Police Department of Chicago v. Mosley, (1972) 408 U.S. 92, 95 n.3 (collecting authorities).

It is under this Equal Protection analysis that any reluctance to inquire into "illicit legislative motive" can be put to rest.

See: Washington v. Davis, (1976) 426 U.S. 229 (superceded by congressional statute which does not require, but which also does not forbid, judicial inquiry into improper legislative motive). See also: Columbus Board of Education v. Penick, (1979) 443 U.S. 449; Personnel Administrator v. Feeney, (1979) 442 U.S. 256; Village of Arlington Heights v. Metropolitan Housing Development Corp., (1977) 429 U.S. 252. See also: City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., for a plurality) (observing that the goal of strict

scrutiny is to "smoke out" illicit governmental purposes (internal quotation marks omitted)).

The County fell all over itself, to amend the Ordinance to order to grant fairground access to the Scottish Games for its cultural events that includes the expressive possession of guns, yet it continues to exclude the gun shows from the same County Fairgrounds.

Indeed the County's desire to favor the Scottish Games, while punishing the appellants' gun shows is an example of purposeful discrimination motivated by animus, and therefore it could have no legitimate purpose. See: Romer v. Evans , 517 U.S. 620 (1996); see also: City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); and Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

The simple expedient of including gun shows as an exception to the Ordinance would have prevented the subsequent eight years of litigation. Because none of the County's asserted government interests are implicated on the facts of this case, this Court should declare the Alameda Ordinance unconstitutional and reverse the decision of the trial court. Texas v. Johnson, 491 U.S. 397.

The only remaining inquiry under Texas v. Johnson, *id.*, is whether the Ordinance, as applied to appellants' gun shows, has the

effect of suppressing appellants' expressive conduct. Again, this Court must "examine this issue with particular care" in order to insure that full First Amendment protection is extended to those activities that convey ideas. Texas, *id.*, at 410.

The inquiry begins by looking at whether or not the Ordinance regulates expressive conduct all. "*[W]e have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under O'Brien's less demanding rule.*" Texas v. Johnson, *id.,* at 407. [underline added]

On the facts of this case, the answer must be yes. Beginning with Mary V. King's May 20, 1999 memorandum to County Counsel requesting a way to prohibit gun shows on county property and her speech condemning gun shows and the people who attend them, it has been apparent that the County has been engaged in impermissible viewpoint discrimination of appellants' expressive conduct and First Amendment activities at gun shows. [JSUF, Attachment E, ¶¶ 9, 10]

Continuing with the facts of this case, Alameda amended its ordinance, apparently in response to inquiries from the Scottish Games, to provide an exception to the Ordinance banning gun possession on county property unless the person possessing guns was conveying ideas

in a "***motion picture, television, video, dance or theatrical production or event***." [JSUF, Attachment E, ¶¶ 22, 23, 24] When the County adopted this revision to the Ordinance, it entered the business of regulating expression with guns on county property.

The failure to include gun shows in that exception is not an oversight on the part of the County. [JSUF, Attachment E, ¶¶ 14 – 25] This is no "incidental" burden on the appellants' First Amendment activities at gun shows. Furthermore, Mary V. King, apparently speaking for the majority of the Board of Supervisors, announced that the ordinance was being passed because of the Board's political beliefs, which are to be contrasted with the political beliefs of people who want to attend guns shows on county property and *"worship guns as icons of patriotism"*. [JSUF, Attachment E, ¶¶ 9, 10, 11. Attachments F and G.]

"*According to the principles announced in Boos, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." Boos v. Barry, supra, at 321.* Texas v. Johnson, *id.,* at 412.

Since it is the gun shows themselves and the expressive conduct that takes place at them that is burdened by the County's ordinance;

and since this Court and the California Supreme Court have already made those exact findings, independent of each other[3], it should be no problem for this Court to conclude, as the Court in Texas v. Johnson did at 491 U.S. 397, 410 *et seq*., that ***as applied*** to the facts of this case, neither the governments' asserted interest in preserving the peace, or the government's interest in regulating expressive conduct at the fairgrounds is enough to overcome the value that the First Amendment places on a free and open debate in the marketplace of ideas, that includes all viewpoints, and all forms of protected expression.

United States v. O'Brien Analysis and Argument

If this Court determines that the trial court correctly analyzed the case under the highly deferential standards of United States v. O'Brien, 391 U.S. 367 (1968), that trial court still incorrectly applied the tests in that case as applied to the facts of this case.

The four-part test under United State v. O'Brien, 391 U.S. 367 (1968) is:

[3] *"The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there*." Nordyke v. King (Nordyke I), 229 F.3d 1266, 1268 and "*[T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible*." Nordyke v. King (Norykde II), 27 Cal. 4th 875, 882.

1. The government regulation must be *"within the constitutional power of government*." O'Brien, at 377.

2. The regulation must further an *"important or substantial government interest*." Id. at 377

3. The government interest must be *"unrelated to the suppression of free expression*." Id. at 377.

4. The "*incidental restriction on alleged First Amendment freedoms*" must be "*no greater than is essential to the furtherance of that interest*." Id. at 377.

Test number #1 does not really require First Amendment Analysis. The rest of the O'Brien test resembles the "Time, Place and Manner." See: City of Renton v. Playtime Theatres Inc., (1986) 475 U.S. 41. In this transition to a discussion of the O'Brien, *id.,* factors, it is appropriate here to interject issues regarding legislative intent to stifle a message because of disagreement with that message. The issue arises under the Texas v. Johnson First Amendment analysis, under prong three (3) of the O'Brien, *id.,* test and as part of any Equal Protection analysis.

It is only under the "*related to expression*" part of the O'Brien test that a court is forbidden to make inquires as to "*illicit legislative*

motive." United States v. O'Brien, 391 U.S. 367, 383 (1968). But the Board of Supervisors acts, not only as a legislative body for the entire County of Alameda, it is also the administrative authority over the Alameda Fairgrounds. [JSUF, Attachment E, ¶¶ 4, 5, 6, 7, 8]

Nor can the government, even under a reduced level of scrutiny, engage in purposeful discrimination against unpopular groups. See: Romer v. Evans , 517 U.S. 620 (1996); see also: City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); and Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

Nor should a government be permitted to punish individuals because of their exercise of individual rights. This is in a sense, harmful in and of itself, quite apart from the harm it causes to the aggrieved individuals. See, e.g., United States v. Lopez, 115 S. Ct. 1624, 1626 (1994) (invalidating a federal law prohibiting possession of a firearm in the vicinity of a school as beyond Congress's power under the Commerce Clause); Bowsher v. Synar, 478 U.S. 714, 734 (1986) (invalidating the Gramm-Rudman-Hollings Act's reporting provisions because they vested executive functions in a congressional official). But see also: Mistretta v. United States, 488 U.S. 361, 390 (1989) (upholding the United States Sentencing Commission); Morrison v. Olson, 487 U.S.

654, 696-97 (1988) (upholding the position of independent counsel).

In recent years the Court's equal protection jurisprudence has tended toward this conception. In Shaw v. Reno, 509 U.S. 630 (1993), for example, the harm "*is, quite literally, the drawing of lines based on race.*"

If this Court must examine this case under the U.S. v. O'Brien, 391 U.S. 367 (1968) tests, it should conduct an inquiry into the legislative and administrative intent of Alameda County. This inquiry need not be conducted under the part of the test that examines burdens on expression, and means tested regulations; but as part of the analysis to determine if the government is conducting itself in a constitutional manner under the first part of the O'Brien, *Id.,* test. After all the government must comply the rest of the U.S. Constitution, including the Equal Protection clause of the 14th Amendment. As noted above, the United States v. O'Brien (1968) 391 U.S. 367 test is only applicable if the facts of the case do not lend itself to analysis under Texas v. Johnson; 491 U.S. 397 (1989) strict scrutiny test. Assuming *arguendo* that the O'Brien, *Id.,* case is applicable on these facts, Plaintiffs provided evidentiary support and/or raised a triable issue of fact regarding the elements of that test.

Remember, Defendant/Appellees concede that possession of a firearm has some communicative aspect[4]. [See Order Granting Defendant's Motion for Summary Judgment, Attachment D herein, pp. 0624 – 0626.]

Prong One of the O'Brien, *Id*., test was not settled when the California Supreme Court ruled on the state law preemption issue. Nordyke v. King ("Nordyke II"), 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761 (Cal. 2002). That opinion only resolved the issue of whether the ordinance was preempted under state gun law. As noted above, appellants urge this Court to conduct an independent analysis on this first part of the O'Brien, *Id*., test.

Under prong Two of the O'Brien*, Id.,* test, the Ordinance, on its face, furthers an important/substantial government interest: public safety on county property. However, in an "as-applied mode" this conclusion is not so clear as it relates to possession of gun shows held at the Fairgrounds. Consider the following facts:

- The County admits that gun shows are not a source of

[4] Interestingly, Plaintiff/Appellants have not made so broad an assertion regarding the communicative aspect of possession of a gun. Appellants have always couched this issue in terms of "possession of a gun at a gun show." That is why Appellants have always argued, and will continue to argue, that the entire Ordinance need not be struck down. Appellants' First Amendment claims can just as easily be protected by adding gun shows to the list of exceptions. See Ordinance sub-section: 9-12-120(f)(4). Attachment A herein.

criminal activity at the County Fairgrounds. [See JSUF, Attachment E, ¶¶ 3 and 43.]

- No violations of federal or state firearm laws occurred at Plaintiff/Appellants' gun shows held at the Alameda County Fairgrounds. [See JSUF, Attachment E, ¶¶ 44, 49 and 50]
- Appellee/Defendants admit the ordinance does not prohibit offers for sale or actual sales of firearms on County property. This puts to rest any assertion by the County that they were trying to address the "*secondary effects*" of gun shows (i.e., gun sales) under the Renton v. Playtime Theatres, Inc, 475 U.S. 41 (1986) line of cases. [See: JSUF, Attachment E, ¶¶ 46 and 47]
- Existing state law demonstrates dramatically that charging gun crimes as felonies already addresses any possible conduct that could be deterred by a mere misdemeanor charge under the County's Ordinance. [See JSUF, Attachment E, ¶¶ 1 and 2]
- Moreover, Defendant/Appellees cannot even claim that they are seeking to mitigate liability for the criminal and/or negligent use of firearms on County property, for they are a

"person" protected by Public Law 109-92: Protection of Lawful Commerce in Arms Act.

Taking up Prong Three of the O'Brien test: Plaintiff/Appellants have already set forth their arguments regarding the purposeful censoring of the gun culture brought about by the enactment and enforcement of the Ordinance. However there is a second, more subtle indicia that the Ordinance is related to the suppression of free expression. Namely the legislative history of the ordinance:

1. On August 17, 1999, when it was first passed into law, the Ordinance made no exception for the prohibition on possessing guns on county property for "entertainment" purposes. [See JSUF, Attachment E, ¶ 13]
2. On September 17, 1999, Plaintiff/Appellants filed this action. [See JSUF, Attachment E, ¶ 19.]
3. Subsequently, the County amended the Ordinance to permit the possession of guns on county property if the possession is related to some type of sanctioned entertainment. [See JSUF, Attachment E, ¶¶ 20 – 24]
4. The entertainment exceptions to the Ordinance are clearly content-based. "*Because the exceptions to the restriction on*

noncommercial speech are based on content, the restriction itself is [based] on content. [citation omitted] It is therefore unconstitutional unless the City establishes the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end," " [citations omitted]

See: National Advertising Co. v. City of Orange, 861 F.2d 246; (9th Cir. 1988).

Analysis under Prong Four of the O'Brien, *Id.,* test yields the most damaging assault on the Ordinance. The problem with Prong Four of this test is that it appears to be constantly in flux. However Justice Harlan's concurring opinion in the O'Brien, *id.,* case is illustrative of the boundaries of that test:

> The crux of the Court's opinion, which I join, is of course its general statement, *ante*, at 377, that:
>
> "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."
>
> I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or

> substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate. [...]
>
> United States v. O'Brien (1968) 391 U.S. at 387 Justice Harlan Concurring.

As noted above, the Alameda Ordinance was drafted and enacted for the purpose of banning gun shows, and according to the Ninth Circuit and California Supreme Court has the effect of making gun shows at the Alameda County Fairgrounds "*virtually impossible*." See: Nordyke v. King (Nordyke I), 229 F.3d 1266, 1268 and Nordyke v. King (Norykde II), 27 Cal. 4th 875, 882, respectively. By making gun shows impossible, when less restrictive means exist to address public safety issues, the Defendants have run afoul of this Fourth Prong of the O'Brien, *Id.,* test. See also: Meyer v. Grant, 486 U.S. 414 (1988).

The Ordinance is not even a lesser restrictive means of achieving the purported "substantial" government interest. Consider the following:

- It bears repeating that Plaintiff/Appellants' gun shows are not the cause of any violent crime or criminal conduct associated with firearms on County property. [See JSUF, Attachment E, ¶¶ 3, 43, 44, 46, 47, 49, 50 and 85.]

- The County has the lesser restrictive means of weapon detection and control in lieu of banning gun shows, by the simple expedient of using the metal detectors they purchased after the July 4, 1998 shooting incident. [See JSUF, Attachment E, ¶ 48.]
- Additionally, the Gun Show Enforcement and Security Act of 2000, California Penal Code § 12071.4, closely mirrors the requirements for gun handling set forth in the Alameda Ordinance's entertainment exceptions and is itself a lesser restrictive means of controlling weapons at gun shows instead of banning the shows outright; and in many ways it is more restrictive of gun and ammunition handling that either the language of the Ordinance or the County's policy of enforcement. [See JSUF, Attachment E, ¶¶ 3, 43, 44, 46, 47, 49, 50, 52, 53, 54, 56, 57 and 85.]
- Finally, as noted above, existing state law punishing criminal and/or negligent use of firearms is also a lesser restrictive means of controlling weapons at the Fairgrounds in lieu of banning gun shows there. [See JSUF, Attachment

E ¶¶ 1, 2 and 3][5]

Even under the intermediate scrutiny, deferential, four part test of United States v. O'Brien, 391 U.S. 367 the Alameda Ordinance is fatally flawed.

This Court should find that the Ordinance does not pass constitutional muster, and reverse the trial court's order granting the County's motion for summary judgment.

Freedom of Assembly and Association

The trial court dismissed Plaintiff/Appellants claims under Freedom of Assembly and Association, without leave to amend, in an order filed on June 10, 2007. [ER, Vol. II of IV, Tab 5, pp. 0274 – 0283, See also Attachment C herein] Because this Court has accepted for *en banc* review a case with similar facts, that will address freedom of assembly and freedom of association, Appellants herein pray to have this issue preserved, with the right to file supplemental briefs, in the event the *en banc* panel substantially modifies the law of the circuit

[5] Appellants are not rearguing preemption, but the list of potential crimes that someone bringing a gun on to county property can already be charged with (when not doing so in conjunction with a gun show) is long, and can carry penalties more severe than a misdemeanor arising from the breach of a county ordinance.

and/or decides an issue that will impact the outcome of this case. See: Villagas v. Gilroy Garlic Festival, 2007 U.S. Lexis 22027, Case No.: 05-15725.

EQUAL PROTECTION

Appellants' Equal Protection arguments are interspersed with the analysis of the various First Amendment issues presented above.

The appellants assert that the trial erred in its Equal Protection analysis, first by finding that no First Amendment values were at risk by the government's discriminatory regulations of the possession of guns on county property, but secondly the appellants would ask this court to reverse the trial court on Equal Protection grounds because even under a rational basis test, the County cannot be permitted to group citizens in to favored (Scottish Games) and disfavored (gun show attendees) groups for impermissible motives animated by differences in political philosophy. See: Romer v. Evans , 517 U.S. 620 (1996); see also: City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); and Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

SECOND AMENDMENT

The Second Amendment to the United States Constitution reads: "*A well regulated Militia, being necessary for the security of a free State, the right of the People to keep and bear Arms, shall not be infringed.*"

In 2003, this Court felt that it was foreclosed from considering Second Amendment issue by this Circuit precedent on individual standing as articulated in Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996). In Nordyke v. King (Nordyke III), 319 F.3d at 1192 fn. 4 (9th Cir. 2003)] the Court said :

> n4 We should note in passing that in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), another panel took it upon itself to review the constitutional protections afforded by the Second Amendment even though that panel was also bound by our court's holding in *Hickman*. The panel in *Silveira* concluded that analysis of the text and historical record led it to the conclusion that the collective view of the Second Amendment is correct and that individual plaintiffs lack standing to sue.
>
> However, we feel that the *Silveira* panel's exposition of the conflicting interpretations of the Second Amendment was both unpersuasive and, even more importantly, unnecessary. We agree with the concurring opinion in *Silveira*: "*[W]e are bound by the Hickman decision, and resolution of the Second Amendment issue before the court today is simple: plaintiffs lack standing to sue for Second Amendment violations because the Second Amendment guarantees a collective, not an individual, right.*" *Silveira v. Lockyer*, 312 F.3d 1094 (9th Cir. 2002) (Magill, J., concurring). This represents the essential holding of

Hickman and is the binding law of this circuit. [...]

> [...] Therefore, despite the burgeoning legal scholarship supporting the "individual rights" theory as well as the Fifth Circuit's holding in *Emerson*, the *Silveira* panel's decision to re-examine the scope and purpose of the Second Amendment was improper. Because "*only the court sitting en banc may overrule a prior decision of the court*," *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993), the *Silveira* panel was bound by *Hickman*, and its rather lengthy re-consideration of *Hickman* was neither warranted nor constitutes the binding law of this circuit. Accordingly, we ignore the *Silveira* panel's unnecessary historical disquisition as the dicta that it is and consider ourselves bound only by the framework set forth in *Hickman*.

Judge Ronald M. Gould's special concurrence called for Hickman to be discarded by the court sitting en banc, or rejected by the United States Supreme Court if this case is granted certiorari. Nordyke v. King (Nordyke III), 319 F.3d at 1194 (9th Cir. 2003).

The Nordykes did petition for rehearing and rehearing *en banc*. The Ninth Circuit stayed consideration of the petition while the case of Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803 (2003) was pending before the United States Supreme Court on a petition for certiorari.

After the *Silveira* petition was denied, the original panel of judges voted to deny rehearing, but grant the petition for rehearing *en banc*.

A majority of the judges sitting on the Ninth Circuit failed to vote in favor of the petition. The order denying rehearing and rehearing *en banc* was filed April 5, 2004. A 35 page concurring and dissenting opinion was filed with the order. See: Nordyke v. King (Nordyke IV), 364 F.3d 1025 (9th Cir. 2004)

Judge KLEINFELD distinguished Nordyke from Silveira in his dissent from the denial of the petition for rehearing en banc. See Nordyke v. King (Nordyke IV), 364 F.3d at 1026 et seq.:

> Whether the Second Amendment guarantees an individual right is more likely to affect the outcome in this case than in *Silveira*. In *Silveira*, the challenge was to California's ban on assault weapons. Reasonable regulation of the individual right guaranteed by the Second Amendment might well have led to the same result, no relief, as the result reached by the panel using the "no individual right" argument. In this case, by contrast, the result might well have been different if we had not erased the Second Amendment. The ordinance at issue, subject to narrow exceptions, criminalizes any and all possession of firearms on county property. The case before the panel was about apparently law-abiding persons wanting to hold a gun show at a fairgrounds.

The trial court denied Plaintiff/Appellants' motion for leave to amend their complaint to formally add a Second Amendment cause of action in an order filed February 14, 2005. [ER, Vol. 1 of IV, Tabs 1, 3]

Submitted with that motion was a request for judicial notice filed

on January 3, 2005 which set forth a significant legal development in Second Amendment jurisprudence.

The United States Justice Department has issued a MEMORANDUM OPINION FOR THE ATTORNEY GENERAL titled: Whether the Second Amendment Secures an Individual Right.[6] The conclusion of the memorandum is that Second Amendment secures a personal right of individuals. The opinion was issued on or about August 24, 2004. It was authored by: Steven G. Bradbury, Principal Deputy Assistant Attorney General; Howard C. Neilson, Jr., Deputy Assistant Attorney General; and C. Kevin Marshall, Acting Deputy Assistant Attorney General. [ER, Vol. I of IV, Tab 2]

Another significant legal development occurred when Congress passed Public Law 109-92: Protection of Lawful Commerce in Arms Act. Plaintiff/Appellants filed a request for judicial notice of this action on September 5, 2006. [ER, Vol. III of IV, Tab 13.]

In that Act, Congress declared that the Second Amendment to the United States Constitution protects the right of individuals whether or not they are members of the militia or engaged in military service.

The Act also went on to state as its purpose the First Amendment

[6] Available online at http:www.usdoj.gov/olc/secondamendment1.htm.

protections of many individuals in the gun culture and firearm industry.

Finally, the most significant recent development in Second Amendment jurisprudence is the docketing of a case out of the District of Columbia Court of Appeals with the United States Supreme Court. The case was initially titled: Parker v. District of Columbia, 478 F.3d 370 (2007). The case struck down, on Second Amendment grounds, the Washington D.C., ban on the possession of various classes of firearms.

It is now titled: District of Columbia v. Heller, the U.S. Supreme Court docket number is 07-290. The docket report is available at: http://www.supremecourtus.gov/docket/07-290.htm. The Case went to conference on October 24, 2007. As this brief is being finalized, interested parties are waiting to see of the High Court will grant certiorari in this high profile case.

If the Supreme Court does grant certiorari, Appellants herein intend to apply to this Court for a stay of this matter pending the decision of the High Court and the right to file supplement briefs.

CONCLUSION

After this lawsuit was filed, with its First Amendment claims, the county amended its ordinance. The amendments permit the possession

of guns on county property to communicate ideas with guns in motion pictures, television, video, dance and theatrical productions.

These *post hoc* amendments, which still exclude gun shows from the fairgrounds, forecloses any possibility of concluding that banning gun shows is merely an incidental restriction on speech that is the result of a rather ordinary public safety ordinance.

The county clearly intended to regulate expressive conduct with guns by exempting motion pictures, television productions, videos, dance and theatrical productions, while it suppressed the expressive conduct taking place at gun shows.

Plaintiff/Appellants contend that viewpoint discrimination and cultural warfare is behind the extinction of gun shows at the Alameda County Fairgrounds [and other bay area venues too].

This court should find that the Ordinance when submitted to a strict scrutiny analysis under Texas v. Johnson; 491 U.S. 397 (1989) must be stuck down or modified.

In the alternative, even if the Ordinance is analyzed under United States v. O'Brien, 391 U.S. 367(1968), it must still be struck down under that test.

The Ordinance denies to the Plaintiffs equal protection of the law

by: (1) Excluding them, with their symbolic possession of guns, from the fairgrounds; (2) based on their viewpoint advocacy of a lawful gun culture; (3) while allowing another group to possess guns at the fairgrounds; (4) based upon a government favored viewpoint of celebrating Scottish heritage.

Finally, if the Unites States Supreme Court grants certiorari in District of Columbia v. Heller, the Appellants respectfully request leave to file a supplement brief in this matter.

That possession of a gun, especially at a gun show, especially by cultural and political advocates of the "Right to Keep and Bear Arms" who are seeking to celebrate and perpetuate this Country's unique heritage and founding, can convey a message is not a particularly new or unique point of view.

This Court should find that the Alameda Ordinance violates our Constitutional heritage under the First, Second and/or Fourteenth Amendments and reverse the trial court.

Respectfully Submitted.

Donald Kilmer for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 13,784 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: November 13, 2007

_____

Donald Kilmer, Attorney for Appellants

RELATED CASES

Villagas v. Gilroy Garlic Festival, Ninth Circuit.
2007 U.S. Lexis 22027, Case No.: 05-15725.

District of Columbia v. Heller,
U.S. Supreme Court Docket No.: 07-290

Parker v. District of Columbia, 478 F.3d 370 (2007)
District of Columbia Court of Appeals

ATTACHMENT A

ORDINANCE NO. 0-2000-22

AN ORDINANCE AMENDING SECTION 9.12.120 OF THE COUNTY ORDINANCE CODE PROHIBITING THE POSSESSION OF FIREARMS ON COUNTY PROPERTY

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA ORDAINS AS FOLLOWS:

SECTION I

That the Ordinance Code of the County of Alameda shall be amended by revising Section 9.12.120 to read as follows:

9.12.120 Possession of Firearms on County Property Prohibited

(a) **Findings.** 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.

(b) **Misdemeanor.** Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor.

(c) **County Property.** As used in this section, the term County property means real property, including any buildings thereon, owned or leased by the County of Alameda (hereinafter "County"), and in the County's possession, or in the possession of a public or private entity under contract with the County to perform a public purpose, including but not limited to real property owned or leased by the County in the unincorporated and incorporated portions of the County, such as the County park in Sunol and the Alameda County Fairgrounds in the City of Pleasanton, but does not include any "local public building" as defined in Penal Code Section 171b(c), where the State regulates possession of firearms pursuant to Penal Code Section 171b.

(d) **Firearm.** "Firearm" is any gun, pistol, revolver, rifle or any device, designed or modified to be used as a weapon, from which is expelled through a barrel a projectile by the force of an explosion or other form of combustion. "Firearm" does not include imitation firearms or BB guns and air rifles as defined in Government Code Section 53071.5.

(e) **Ammunition.** "Ammunition" is any ammunition as defined in Penal Code Section 12316(b)(2).

(f) **Exceptions.** Subsection 9.12.120(b) does not apply to the following:

(1) A peace officer as defined in Title 3, Part 2, Chapter 4.5 of the California

Penal Code (sections 830 *et seq.*) ;

(2) A guard or messenger of a financial institution, a guard of a contract carrier operating an armored vehicle, a licensed private investigator, patrol operator, or alarm company operator, or uniformed security guard as these occupations are defined in Penal Code section 12031(d) and who holds a valid certificate issued by the Department of Consumer Affairs under Penal Code section 12033, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment;

(3) A person holding a valid license to carry a firearm issued pursuant to Penal Code section 12050;

(4) The possession of a firearm by an authorized participant in a motion picture, television, video, dance, or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use.

(5) A person lawfully transporting firearms or ammunition in a motor vehicle on County roads;

(6) A person lawfully using the target range operated by the Alameda County Sheriff;

(7) A federal criminal investigator or law enforcement officer; or

(8) A member of the military forces of the State of California or of the United States while engaged in the performance of his or her duty.

(g) **Severability.** If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

SECTION II

This ordinance shall take effect and be in force thirty (30) days from and after the date of passage and before the expiration of fifteen days after its passage it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.

Adopted by the Board of Supervisors of the County of Alameda, State of California, on the 28th day of September, 1999, by the following called vote:

AYES: Supervisors Carson, Haggerty, King, and Steele - 4
NOES: none
EXCUSED: President Chan - 1

SCOTT HAGGERTY
Vice-President of the Board of Supervisors
County of Alameda, State of California

ATTEST: CRYSTAL K. HISHIDA, Clerk
of the Board of Supervisors, County of Alameda
By

Approved as to Form
RICHARD E. WINNIE, County Counsel
By
LORENZO E. CHAMBLISS

0405

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs,

v.

MARY V. KING, et al.,

Defendants.
/

No. C 99-04389 MJJ

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

INTRODUCTION

In this 42 U.S.C. § 1983 action, Russell Allen Nordyke, et al. ("Plaintiffs") move for leave to file their second amended complaint, to include new causes of action that Mary V. King and the County of Alameda, et al. ("Defendants") violated the Second and Ninth Amendment. Plaintiffs also seek to add "as applied" First Amendment challenges to Alameda County's ordinance prohibiting firearms possession on county-owned property ("the Ordinance"). Finally, Plaintiffs seek to update their complaint by adding the newly elected members of the County of Alameda Board of Supervisors as defendants in the suit. For the reasons set forth below, the Court **GRANTS** in part and **DENIES** in part Plaintiffs' motion.

FACTUAL BACKGROUND

This case arose when the Ordinance allegedly prevented Plaintiffs from continuing their business of organizing gun trade shows on Alameda County Fairgrounds. Plaintiffs have legally conducted trade shows on the fairgrounds since February 1991. The Alameda County Board of Supervisors adopted the Ordinance on August 17, 1999. While gun shows were not banned per se,

the Ordinance effectively prohibited any actual guns from being shown, used or sold on the fairgrounds.

Plaintiffs initially claimed that the Ordinance effectively put a stop to their business and subsequently filed a Motion for a Temporary Restraining Order and Injunctive Relief. On November 3, 1999, this Court denied the aforementioned motions. Following an interlocutory appeal, the Ninth Circuit certified a question of state law regarding a state law preemption issue to the California Supreme Court. On April 22, 2002, the California Supreme Court issued its answer and on February 18, 2003, the Ninth Circuit issued its ruling upholding the District Court's order denying Plaintiffs' request for a preliminary injunction. The Ninth Circuit denied Plaintiffs' request for *en banc* review and the United States Supreme Court subsequently denied certiorari.

LEGAL STANDARD

Where a party seeks to amend a pleading, the decision whether to grant leave to amend is committed to the sound discretion of the trial court. *Waits v. Weller*, 653 F.2d 1288, 1290 (9th Cir. 1981). Federal Rule of Civil Procedure 15(a) provides that "leave [to file an amended pleading] shall be freely given when justice so requires." Four factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue dely, (3) prejudice to the opposing party, and (4) futility. *Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). However, the four factors are not generally accorded equal weight. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). When considering a motion for leave to file an amended pleading, all inferences are cast in favor of granting the motion. *Id.*

ANALYSIS

A. Second Amendment Claim

In their second amended complaint, Plaintiffs seek to add a Second Amendment cause of action against Defendants. Although not specifically claimed in Plaintiffs' first complaint, the Ninth Circuit addressed their potential Second Amendment claim and denied their claim for lack of standing. *See Nordyke v. King*, 319 F.3d 1185, 1192 (9th Cir. 2003).

According to Plaintiffs, whether an individual has standing to sue for violations of the Second Amendment appears somewhat unsettled, as evidenced by the Ninth Circuit's narrow denial

of hearing this issue *en banc*. *See Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004). While Plaintiffs concede that the law of the case probably compels dismissal for lack of standing, Plaintiffs desire to amend their complaint to add a Second Amendment claim in order to perfect the issue in the event that the Ninth Circuit sitting *en banc* or the U.S. Supreme Court grants review in future litigation. By adding a Second Amendment claim, Plaintiffs hope to get another shot in the Ninth Circuit with this issue.

Defendants correctly assert that Plaintiffs have already litigated and lost their Second Amendment claim. "When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court." *U.S. v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986). The Ninth Circuit, in this very case, held that Plaintiffs' lacked standing to assert a Second Amendment violation. *See Nordyke*, 319 F.3d at 1193. Allowing Plaintiffs leave to add a Second Amendment claim would be futile.[1] Therefore, the Court **DENIES** Plaintiffs leave to add this claim.

B. Ninth Amendment Claim

"[T]he Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms." *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). In *San Diego County*, the Ninth Circuit concluded that the plaintiffs could not show legal injury under the Ninth Amendment and thus, lacked standing to challenge a new gun control act. *Id.*

Given the holding in *San Diego County*, Plaintiffs concede, as they must, that the Ninth Amendment does not create an independent right to bear firearms. However, Plaintiffs argue that, somehow, the combination of the Second Amendment and the Ninth Amendment, together, might provide them standing to sue for violations of their Second Amendment rights. While there may some validity to the idea of additional rights being created by the combination of two amendments, the notion that Plaintiffs could have standing in this instance is unpersuasive. The Ninth Circuit has held that individuals do not have standing to sue under the Second Amendment or the Ninth Amendment alone. *See Nordyke*, 319 F.3d at 1192; *San Diego County*, 98 F.3d at 1126. Under these holdings, Plaintiffs lack the standing necessary to bring this action. Accordingly, the Court

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[1]Futility of amendment can, by itself, justify the denial of a motion for leave to amend. *Bonnin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). However, an amendment is futile only if it would clearly be subject to dismissal. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987).

DENIES Plaintiffs' request to add a Ninth Amendment cause of action.

C. "As applied" causes of action

While this Court previously assumed that Plaintiffs' First Amendment claims were "as applied" challenges, the Ninth Circuit construed Plaintiffs' challenges to the Ordinance as facial challenges. *See Nordyke*, 319 F.3d at 1190 (9th Cir. 2003). Plaintiffs' thus seek to clarify their original complaint by adding "as applied" challenges to their First Amendment claims.

Defendants challenge the sufficiency of facts supporting whether Plaintiffs can sustain "as applied" challenges to the Ordinance. For example, Defendants claim that Plaintiffs failed to unsuccessfully apply for a permit for their gun show and therefore may not make an "as applied" challenge.

Whether Plaintiffs' "as applied" challenges are viable should not be decided during a motion for leave to amend. Such issues are "more appropriately raised in a motion to dismiss rather than in an opposition to a motion for leave to amend." *Saes Getters, S.P.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002) (citing William W. Schwarzer, et al., *Federal Civil Procedure Before Trial* § 8:422 (2002)). In fact, Plaintiffs' desire to clarify or add to their First Amendment claims an "as applied" challenge is the direct result of the Ninth Circuit's previous opinion in this case. *See Nordyke v. King*, 319 F.3d 1185, 1190 n.3 (9th Cir. 2003) (noting that their decision does not foreclose an as applied challenge to the Ordinance). Accordingly, the Court **GRANTS** Plaintiffs leave to amend the complaint to add "as applied" challenges to the Ordinance.

D. New Defendants

Finally, Plaintiffs seek to add the newly elected members of the Alameda County Board of Supervisors to their complaint. Plaintiffs argue that under Federal Rule of Civil Procedure 25, they are entitled to change the names of the individual defendants. Defendants argue that this is unnecessary because the Board of Supervisors were originally sued in their official capacity. The Court agrees. There is no need to add individual officers' names to a suit in an exclusively official capacity lawsuit. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). Furthermore, Plaintiffs have offered no response to this argument. Accordingly, the Court **DENIES** Plaintiffs leave to add new defendants.

CONCLUSION

Based on the foregoing reasons, Plaintiffs' motion for leave to add a Second Amendment claim, a Ninth Amendment claim, and to add new Alameda Country board members as Defendants is **DENIED**. However, the Court **GRANTS** Plaintiffs leave to amend their Complaint to add "as applied" challenges to their First Amendment claims.

IT IS SO ORDERED

Dated: February 14, 2005

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

mat

United States District Court
for the
Northern District of California
February 15, 2005

* * CERTIFICATE OF SERVICE * *

Case Number:3:99-cv-04389

Nordyke

vs

King

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 15, 2005, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Donald E. J. Kilmer Jr, Esq.
Law Offices of Donald Kilmer
1261 Lincoln Avenue
Suite 108
San Jose, CA 95125-3030

Richard E. Winnie, Esq.
County of Alameda
Office of County Counsel
333 Hegenberger
Suite 400
Oakland, CA 94621

Sayre Weaver, Esq.
Richards Watson & Gershon
355 South Grand Avenue
40th Floor
Los Angeles, CA 90071-3101

Gary E. Gans, Esq.
Richards Watson & Gershon
44 Montgomery Street
Suite 960
San Francisco, CA 94104-4611

Richard W. Wieking, Clerk

BY: _____
Deputy Clerk

Case: 3:99-cv-04389

Donald E. J. Kilmer Jr, Esq.
Law Offices of Donald Kilmer
1261 Lincoln Avenue
Suite 108
San Jose, CA 95125-3030

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs,

v.

MARY V. KING, et al.,

Defendants.

/

No. C 99-04389 MJJ

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In this 42 U.S.C. § 1983 action, Mary V. King and the County of Alameda, et al. ("Defendants") move to dismiss Russell Allen Nordyke's, et al. ("Plaintiffs") second amended complaint. For the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion.

FACTUAL BACKGROUND

This case arose when an Alameda County ordinance prohibiting firearms possession on county-owned property ("the Ordinance") allegedly prevented Plaintiffs from continuing their business of organizing gun trade shows on Alameda County Fairgrounds. Plaintiffs have legally conducted trade shows on the fairgrounds since February 1991. The Alameda County Board of Supervisors adopted the Ordinance on August 17, 1999. While gun shows were not banned per se, the Ordinance effectively prohibited any actual guns from being shown, used or sold on the fairgrounds.

Plaintiffs initially claimed that the Ordinance effectively put a stop to their business and

subsequently filed a Motion for a Temporary Restraining Order and Injunctive Relief. On November 3, 1999, this Court denied the aforementioned motions. Following an interlocutory appeal, the Ninth Circuit certified a question of state law regarding a state law preemption issue to the California Supreme Court. On April 22, 2002, the California Supreme Court issued its answer and on February 18, 2003, the Ninth Circuit issued its ruling upholding the Court's order denying Plaintiffs' request for a preliminary injunction. The Ninth Circuit denied Plaintiffs' request for *en banc* review and the United States Supreme Court subsequently denied certiorari.

On February 14, 2005, the Court granted in part and denied in part Plaintiffs' motion to file a second amended complaint. Specifically, the Court denied Plaintiffs' motion for leave to add a Second Amendment claim, a Ninth Amendment claim, and to add new Alameda Country board members as Defendants. However, the Court granted Plaintiffs leave to amend their Complaint to add "as applied" challenges to their First Amendment claims. Plaintiffs filed a second amended complaint on March 11, 2005.

In their Second Amended Complaint, Plaintiffs assert that, as applied to their use of the fairgrounds, the Ordinance has the effect of banning gun shows. Plaintiffs also allege that the Ordinance was designed to have the effect of driving Plaintiffs out of business in Northern California.

LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims asserted in the complaint. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337 (9th Cir. 1996). Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991).

In determining a motion to dismiss, courts must assume all factual allegations to be true and must construe them in the light most favorable to the non-moving party. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983). However, courts need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

Courts will dismiss the complaint or any claim in it without leave to amend only if "it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1196 (9th Cir. 1998).

ANALYSIS

"Section 1983 provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virg. Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law, statute, ordinance, regulation custom, or usage. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Ketchum v. Alameda County*, 811 F.2d 1243, 1245 (9th Cir. 1987).

I. First Amendment Claims

A. Free Expression

Plaintiffs allege that the Ordinance violates their freedom of expression under the First Amendment since it makes gun shows at the fairgrounds "virtually impossible." While this Court previously assumed that Plaintiffs' First Amendment claims were "as applied" challenges, the Ninth Circuit construed Plaintiffs' challenges to the Ordinance as facial challenges. *See Nordyke v. King*, 319 F.3d at 1190 (9th Cir. 2003). While the *Nordyke* court rejected Plaintiff's First Amendment facial challenge to the Ordinance, the court also noted that its holding did not foreclose a future as applied challenge to the Ordinance. *Id.* at 1190 n. 3. The court explained that:

> Gun possession can be speech where there is an intent to convey a particularized message, and the likelihood is great that the message would be understood by those who viewed it. As the district court noted, a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waiving a gun at an anti-gun control rally . . . . Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it. The law itself applies broadly to ban the possession of all guns for whatever reason on County property.

Id. at 1190 (citations, internal quotation marks, and alteration omitted).

As the Court previously noted in its preliminary injunction order, the Supreme Court has warned that there is a "limitless variety of conduct that can be 'speech' whenever the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The protection is

not limited to the written or spoken word. A person also may express his thoughts through conduct in which he purposefully engages. The Supreme Court has recognized that such symbolic speech or expressive conduct lies within the confines of the First Amendment's protection of free speech. *See, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966) (silent sit-in by blacks demonstrating against a segregated library); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (students wearing armbands to protest American miliary involvement in Vietnam); *Schacht v. United States*, 398 U.S. 58 (1970) (the wearing of United States military uniforms during a dramatic performance to criticize American intervention in Vietnam).

Here, Plaintiffs have alleged that they have historically brought firearms to the County Fairgrounds for some of the following purposes: 1) mediums of political messages that are inextricably intertwined with the actual firearm; 2) emphasize the miliary and historical importance of guns; 3) instruction in safe and responsible gun storage and handling; 4) facilitation of the legal education of the general public and to inform them of their rights and duties as gun owners under federal and state law.

Based on these allegations, the Court finds that Plaintiffs have not adequately alleged that they intended to convey *a particularized* message by possessing guns on County property. *See Spence v. Washington*, 418 U.S. 405, 410-11 (1974). For example, Plaintiff's mere recital of "political messages that are inextricably intertwined with the actual firearm" fails to allege the "particularized" nature of the political message being communicated by gun possession. Furthermore, given the ambiguous nature of the alleged "political message," it is completely unclear from the face of the complaint that the likelihood was great that this message would be understood by those who received it.

Plaintiffs' additional allegations fare no better. Clearly, for gun possession to constitute speech, there must be a concrete and necessary relationship between the possession of the gun and the message being communicated. *See Nordyke*, 319 F.3d at 1190 ("[A] gun supporter burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally."). In other words, the particularized message being communicated must originate from and be closely tethered to the actual act of gun possession. Here, Plaintiffs' allegations that they

intended to communicate the military and historic importance of guns, the legal education of the general public about guns, and instruct in safe and responsible gun storage and handling are insufficient. Simply stated, these allegations lack the required nexis between the communication (the particularized message) and the actual act gun possession. These intended communications did not stem from Plaintiffs' actual possession of a gun. In fact, each of these messages could have been clearly communicated without the use of a gun at all.

Given Plaintiff's failure to adequately allege that their possession of guns intended to convey a particular message, their "as applied" First Amendment challenge must fail. Accordingly, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' freedom of expression claim with leave to amend.

B. Commercial Speech

Plaintiffs assert that the Ordinance jeopardized Plaintiffs' commercial speech rights. The Ninth Circuit previous considered and rejected this argument. "As possession itself is not commercial speech and a ban on possession at most interferes with sales that are not commercial speech, we agree with the district court's conclusion that the County's prohibition on possession does not infringe Nordyke's right to free commercial speech." *Nordyke*, 319 F.3d at 1191. Accordingly, Defendants' motion to dismiss Plaintiffs' commercial speech claim is **GRANTED** without leave to amend.

C. Free Assembly and Association

Plaintiffs allege that the Ordinance impermissibly infringes on their rights to Freedom of Assembly and Association. Plaintiffs assert that they have historically used the County Fairgrounds to assemble, associate and discuss issues of political and cultural importance. Defendants contend that the Ordinance only bans the possession of firearms, and therefore does not serve to restrain Plaintiffs' ability to assemble and associate.

The right to freely associate with one's fellow citizens for the purpose of uniting around a common cause is not violated unless the regulation at issue "directly and substantially interferes" with the ability to associate for that purpose. *Lying v. International Union*, 485 U.S. 360, 366 (1988). The Court finds that the Ordinance has no such effect. Under the Ordinance, attendees of

the gun shows are capable of gathering together and expressing their views regarding guns in a variety ways, including speeches, leafleting, and sales of express products without the possession of guns. Plaintiffs also remain free to offer to sell and to sell guns, as long as those sales are not consummated on County property. Therefore, the Ordinance does not "directly and substantially" interfere with Plaintiffs' ability to associate with other gun owners and firearm enthusiasts. For these reasons, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' Free Assembly and Association claims without leave to amend.

II. 14th Amendment Claims

A. Equal Protection

Plaintiffs allege that the Ordinance violates their equal protection rights because the County has targeted only gun shows and patrons of gun shows because of their political and cultural views about guns and the role they play in society. Defendants respond that the Ordinance does not treat similarly situated people differently.

In order to establish an Equal Protection claim, a plaintiff must allege "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). Additionally, a plaintiff must allege that "similarly situated" individuals were treated differently. *Id.*

Here, Plaintiffs have adequately alleged that the Ordinance was applied to them in a discriminatory manner. Specifically, the Complaint states that the Ordinance "irrationally discriminates by prohibiting the possession of guns on County property by participants of a gun show, yet allows the possession of guns by authorized participants in 'motion picture, television, video, dance, or theatrical production or event[s].'" (Comp. at ¶104.) The Court also finds that Plaintiffs have adequately alleged that the Ordinance treated similarly situated persons differently. The Complaint states that the County has permitted the possession of firearms at the Fairgrounds for other events, including Outdoor and Sportsman Shows and The Scottish Games. (Comp. at ¶ 103.) Given that Plaintiffs' allegations fulfill the two-prong *Freeman* test, Defendants' motion to dismiss Plaintiffs' equal protection claim is **DENIED.**

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B. *Procedural and Substantive Due Process*

Plaintiffs allege that the Ordinance has deprived them of their liberty and property interests in attending and participating in gun shows for the purpose of advocating their views. The Court disagrees.

To state a procedural due process claim, a plaintiff must first prove that "the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). As noted above, the Ordinance does not have any impact on Plaintiffs' ability to attend and participate in events on County property for the purpose of advocating their views on guns, or other related subjects. The Ordinance simply bans the possession of firearms on County property. Therefore, the Ordinance does not implicate Plaintiffs' asserted liberty or property interests.

Furthermore, Plaintiffs' substantive due process claims must fail. "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal quotation marks and citation omitted). Because the alleged prohibition here is redressable under the First Amendment, Plaintiffs cannot maintain their substantive due process claim.

For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' due process claims without leave to amend.

III. California State Law Claims

To the extent that Plaintiffs' allege that the Ordinance violates freedom of expression, commercial speech rights, and freedom of assembly and association, as those rights are protected by the California Constitution, these claims fail for the same reasons as their federal counterparts.[1] Accordingly, Defendants' motion to dismiss Plaintiffs' California state law claims is **GRANTED**.

[1]This conclusion is not undermined by the fact that the California Constitution has broader protections for free speech rights than the United States Constitution. *See Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 491 (2000).

CONCLUSION

Based on the foregoing reasons, Defendants' motion to dismiss is **GRANTED IN PART AND DENIED IN PART.** Plaintiffs should file an amended complaint, if they so choose, within thirty (30) days from the date of this Order.

IT IS SO ORDERED

Dated: June 9, 2005

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

mat

United States District Court
for the
Northern District of California
June 14, 2005

* * CERTIFICATE OF SERVICE * *

Case Number:3:99-cv-04389

Nordyke

vs

King

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the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 14, 2005, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Donald E. J. Kilmer Jr, Esq.
Law Offices of Donald Kilmer
1261 Lincoln Avenue
Suite 108
San Jose, CA 95125-3030

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Suite 108
San Jose, CA 95125-3030

Richard E. Winnie, Esq.
County of Alameda
Office of County Counsel
333 Hegenberger
Suite 400
Oakland, CA 94621

Sayre Weaver, Esq.
Richards Watson & Gershon
355 South Grand Avenue
40th Floor
Los Angeles, CA 90071-3101

Gary E. Gans, Esq.
Richards Watson & Gershon
44 Montgomery Street
Suite 960
San Francisco, CA 94104-4611

Richard W. Wieking, Clerk

BY: _____
Deputy Clerk

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

168

NORDYKE, ET AL,

Plaintiff,

v.

KING, ET AL,

Defendant.
/

No. C99-04389 MJJ

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Before the Court is Defendants Mary King, Gaile Steele, Wilma Chen, Keith Carson, Scott Haggerty, the County of Alameda, and the County of Alameda Board of Supervisors' (collectively "Defendants" or "County") Motion for Summary Judgment on Plaintiffs' Third Amended Complaint.[1] Plaintiffs Russell Nordyke, Sallie Nordyke, doing business as TS Trade Shows, et al. (collectively, "Nordykes" or "Plaintiffs") oppose[2] the motion. For the following reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment.

BACKGROUND

I. Factual Background

Except as otherwise noted, the Court finds the following facts undisputed.

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, alleging that Alameda County

[1]Docket No. 129.

[2]Docket No. 144.

Ordinance Code Section 9.12.120[3] (the "Ordinance") infringes on their free speech rights in violation of the United States and California Constitutions.[4] The group of Plaintiffs consists of Russell and Sallie Nordyke, who have been promoting gun shows at the Alameda County Fairgrounds ("Fairgrounds") since 1991, as well as twelve gun show vendors, exhibitors, and patrons. The exhibitors at the show include sellers of antique (pre-1898) firearms, modern firearms, ammunition, Old West memorabilia, and outdoor clothing. The gun shows also hosts educational workshops, issue groups, and political organizations.

Plaintiffs' gun shows bring large numbers of firearms to one location. The approximate attendance at one of Plaintiffs' gun shows at the Fairgrounds is 4,000 people. These gun shows involve the exhibition, display, and sale of firearms. When a gun is sold at Plaintiffs' gun shows, both the seller and the buyer physically inspect the gun to insure correct documentation of the serial number, make, model, and caliber of the gun; and also to verify that the firearm may be legally sold.

Plaintiffs allege that they "have historically brought firearms onto . . . the Alameda County Fairgrounds for various symbolic and expressive purposes." They allege that, by prohibiting possession of firearms at the Fairgrounds, the Ordinance prevents them from engaging in this expressive conduct, and makes gun shows virtually impossible.

On July 4, 1998, a shooting occurred at the Alameda County Fairgrounds during the annual County Fair resulting in gunshot wounds to eight people. The shooting was not associated with any of the Plaintiffs or their gun show activities at the Fairgrounds. On August 17, 1999, the County adopted the Ordinance prohibiting the possession of firearms on County Property, including the Fairgrounds. The Ordinance recited the epidemic of gunshot fatalities or injuries in the county as justification. In particular, between 1990 and 1995, 879 homicides were committed using firearms and 1,647 additional victims were hospitalized with gunshot injuries in the County. The Ordinance also recited the July 4, 1998 shooting incident on the Fairgrounds.

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[3]Section 9.12.120(b) provides, "Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. B.) In accordance with Defendants' unopposed request, the Court will take judicial notice of the Ordinance. *Rabkin v. Dean*, 856 F. Supp. 543, 546 (N.D. Cal. 1994).

[4]Docket No. 100, Third Amended Complaint.

The Ordinance was subject to certain limitations and exceptions. County property did not include any "local public building" as defined in California Penal Code section 171b, subdivision (c). (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. C.) Pursuant to an amendment on September 28, 1999, the Ordinance exempted from the prohibition various classes of persons, including peace officers, various types of security guards, persons holding valid firearms licenses pursuant to Penal Code section 12050, and authorized participants "in a motion picture, television, video, dance, or theatrical production or event when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use." (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. F.) The Ordinance would have, as one of its chief consequences, the effect of forbidding the unsecured presence of firearms at gun shows. After passing the Ordinance, the County sought a written plan from Plaintiffs on how Plaintiffs would conduct their gun shows in compliance with the Ordinance.

Plaintiffs subsequently informed the County that Plaintiffs could not practically or profitably conduct a gun show without guns. As a result of the Ordinance, Plaintiffs cancelled a gun show scheduled for November 6 and 7, 1999. Shortly thereafter, the County released all Plaintiffs' reserved dates for the year 2000 and returned Plaintiffs' deposits. As justification, Defendants cited Plaintiffs' inability to produce a plan to hold gun shows without firearms that would comply with the Ordinance. Plaintiffs have held approximately twenty two gun shows in California since 2005.

Other groups, besides Plaintiffs have been affected by the Ordinance. Specifically, during the months of August and September 1999, the Scottish Caledonian Games ("Scottish Games") contacted the County regarding the Ordinance's impact on their cultural events. The Scottish Games involve the possession of rifles with blank cartridges in connection with historical re-enactments of gun battles. The County did not require the Scottish Games to submit a written plan for conducting their event in compliance with the Ordinance.

II. Procedural Background

A detailed summary of the procedural history of this action is helpful in framing the issues currently before this Court.

Initially, Plaintiffs alleged that the Ordinance prevented them from conducting their trade show business and violated their right to free speech. To prevent Defendants from enforcing the Ordinance, Plaintiffs sought a temporary restraining order.[5] After this Court denied Plaintiffs' request, Plaintiffs filed an interlocutory appeal. The Ninth Circuit affirmed, construing Plaintiffs' First Amendment claim as a facial challenge to the Ordinance. *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003). In evaluating Plaintiffs' claim, the Ninth Circuit noted that gun possession may qualify as speech when there is "an intent to convey a particularized message, and the likelihood is great that the message would be understood by those who viewed it." *Id.* (citing *Spense v. Washington*, 418 U.S. 405, 410-11 (1974)). However, because Plaintiffs did not allege that the Ordinance is directed narrowly and specifically at expression, and because possession of a gun is not commonly associated with expression, the court held that Plaintiffs' facial challenge failed. *Id.* at 1190. In a footnote, the court indicated that its holding did not prevent Plaintiffs from bringing an "as applied" challenge to the Ordinance. *Id.* at 1190 n.3.

Seizing on this language, Plaintiffs filed a Second Amended Complaint, re-casting their claim as an "as applied" First Amendment challenge.[6] Specifically, Plaintiffs alleged that as applied to their use of the Fairgrounds, the Ordinance violated their freedom of expression by making gun shows impossible. In support of their position that gun possession amounts to expressive conduct, Plaintiffs alleged that they have historically brought firearms to the Fairgrounds to: (1) serve as mediums of political messages that are inextricably intertwined with the actual firearm; (2) emphasize the military and historical importance of guns; (3) instruct others about safe and responsible gun storage and handling; and (4) facilitate legal education of the public of their rights and duties as gun owners.[7] Defendants moved to dismiss Plaintiffs' claim pursuant to Rule

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[5]Docket Nos. 1 and 38.

[6]Plaintiffs filed an Amended Complaint in November 1999, which Defendants moved to dismiss. However, before the Court could rule on the Motion, Plaintiffs filed their interlocutory appeal. After the Ninth Circuit issued its decision and the case continued in this Court, Plaintiffs filed their Second Amended complaint, superceding the Amended Complaint and mooting Defendants' Motion to Dismiss.

[7]Docket No. 97.

12(b)(6).[8]

This Court granted Defendants' motion reasoning that Plaintiffs had not adequately alleged an intent to convey a particularized message by possessing guns on County property. *See Spence v. Washington*, 418 U.S. 405, 410-11 (1974). This Court stated that Plaintiffs' mere recitals of "political messages that are inextricably intertwined with the actual firearm" fail to allege the "particularized" nature of the political message being communicated by gun possession. Furthermore, given the ambiguous nature of the alleged "political message," it was completely unclear from the face of the complaint that the likelihood was great that this alleged message would be understood by those who received it.

As the Ninth Circuit explained, for gun possession to constitute speech, there must be a concrete and necessary relationship between the possession of the gun and the message being communicated. *See Nordyke*, 319 F.3d at 1190. In other words, the particularized message being communicated must originate from and be closely tethered to the actual act of gun possession. In this case, this Court found that Plaintiffs' allegations that they intended to communicate the military and historic importance of guns, the legal education of the general public about guns, and instruct others in safe and responsible gun storage and handling were insufficient. Simply stated, these allegations lacked the required nexus between the communication (the particularized message) and the actual act of gun possession. These intended communications did not stem from Plaintiffs' actual possession of a gun. In fact, each of these messages could have been clearly communicated without the use of a gun at all. Accordingly, this Court granted Defendants' motion to dismiss Plaintiffs' freedom of expression claim with leave to amend.[9]

Plaintiffs subsequently filed a Third Amended Complaint ("TAC")[10] wherein they re-asserted their as applied First Amendment claim. In an attempt to cure the deficiencies outlined above, Plaintiffs added paragraphs 85 and 86(a)-(g) proffering specific examples of how possession of a firearm at the gun shows conveys particularized messages. (TAC, p. 33, n.5.) Defendants

[8]Docket No. 92.

[9]Docket No. 97.

[10]Docket No. 100.

subsequently moved to dismiss the Third Amended Complaint.

This Court denied Defendants' motion to dismiss and found that although the majority of the supplemental allegations suffered from the same deficiencies as those in the Second Amended Complaint, Plaintiffs had sufficiently articulated an intent to convey a particularized message that would be understood by those who viewed it. Specifically, Plaintiffs alleged that their act of possessing guns at a gun show serves to convey their firmly-held belief that individuals should have a protected right under the Second Amendment to bear arms, that they "support[] the National Rifle Association's (and the Attorney General's, and the Secretary of State's) interpretation of the Second Amendment," and that they disagree with the Ninth Circuit's decision holding that the Second Amendment "offers no protection for the individual's right to bear arms." *Nordyke III*, 319 F.3d at 1191 (citing *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996)).

In denying Defendants' motion, this Court also found that Plaintiffs sufficiently alleged that there was a great likelihood that observers would understand their message. For example, Plaintiffs alleged that the attendees of a gun show, many of whom are members of the "gun culture," would readily perceive that the individual carrying the weapon supports the view that individuals should have a protected right to bear arms under the Second Amendment. Thus, this Court concluded that Plaintiffs had sufficiently alleged that their conduct, at least to the extent described above, constituted speech.

Defendants nevertheless argued that even if Plaintiffs had sufficiently pled an as applied First Amendment claim, Plaintiffs' claim failed because: (1) the Ordinance furthers a substantial public interest in protecting the safety of persons on County property that is unrelated to suppressing speech; (2) a sufficiently important governmental interest in regulating non-speech exists that justifies the incidental limitation on Plaintiffs' First Amendment rights; and (3) the Ordinance is a reasonable time, place, and manner restriction. In responding to Defendants' contentions, this Court explained that such an inquiry would require the Court to consider facts outside of Plaintiffs' Third Amended Complaint exceeding the scope of a Rule 12(b)(6) motion, and therefore were more

appropriately raised in a motion for summary judgment.[11]

Against this backdrop, the Court now examines Defendants' motion for summary judgment as to Plaintiffs' claims under the First Amendment and the Equal Protection Clause of the United States Constitution, and Plaintiffs' freedom of expression claim under the California Constitution.

LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of demonstrating the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file that establish the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this initial burden, the burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Anderson*, 477 U.S. at 247-48. An issue of fact is material if, under the substantive law of the case, resolution of the factual dispute might affect the case's outcome. *Id.* at 248. Factual disputes are genuine if they "properly can be resolved in favor of either party." *Id.* at 250. Thus, a genuine issue for trial exists if the non-movant presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Id.* "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted).

ANALYSIS

I. First Amendment Claim

A. Standing

Before reaching the merits of Plaintiffs' claim, the Court must first address the threshold issue of standing. The County contends that Plaintiffs may not make an as applied challenge to the

[11]Docket No. 112.

Ordinance because they did not subject themselves to the regulation before bringing suit. Plaintiffs argue that the Ordinance makes their gun shows impossible and therefore they have been sufficiently affected to have standing.

Generally, one may not challenge a rule or policy to which one "has not submitted himself by actually applying for the desired benefit." *Madsen v. Boise State University*, 976 F.2d 1219, 1220 (9th Cir. 1992); *see also United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 575 (9th Cir. 1993). A central reason for this requirement is to ensure that the challenged policy actually affected the person challenging it. *See Madsen*, 976 F.2d at 1221-22.

Here, the Court finds that the Ordinance has sufficiently affected Plaintiffs. Following this Court's Order denying Plaintiffs' request for injunctive relief, Plaintiffs cancelled an upcoming gun show due to: (1) potential allegations of fraud in hosting a gun show without guns; (2) Plaintiffs' inability to produce a written plan to the County for hosting a gun show without guns; and (3) the cancellation of reservations by several of Plaintiffs' vendors and exhibitors. These circumstances demonstrate that the Ordinance has already directly affected at least one of Plaintiffs' gun shows at the Fairgrounds. Additionally, as a direct consequence of Plaintiffs' inability to produce a plan for holding a gun show without guns, the County released all of Plaintiffs' reserved dates at the Fairgrounds for the year 2000 and subsequently returned all deposits to Plaintiffs. For these reasons, the Court finds that Plaintiffs' have been actually affected by the Ordinance and that Plaintiffs have standing to make an as applied challenge. *See Madsen*, 976 F.2d at 1221-22; *see also United States v. Baugh*, 187 F.3d 1037, 1041 (9th Cir. 1999) (finding that standing existed even though the as applied challengers to the statute had not applied for a permit).

B. Gun Possession and Free Expression

The threshold inquiry for the Court is whether the act of possessing a gun amounts to speech sufficient to sustain Plaintiffs' First Amendment claim. In evaluating the claim, the Court must inquire whether "[a]n intent to convey a particularized message [is] present, and [whether] the likelihood [is] great that the message would be understood by those who viewed it." *See Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003) (citing *Spence v. Washington*, 418 U.S. 405, 410-11

(1974)). If the possession of a gun is expressive conduct, the question then becomes whether the County's "regulation is related to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Such regulations that are related to a government interest in suppressing expression are subject to strict scrutiny. *See id.*; *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Conversely, regulations that are unrelated to a government interest in suppressing free expression are subject to a less stringent standard. *See O'Brien*, 391 U.S. at 377.

Here, the County does not contest that gun possession in the context of a gun show may involve certain elements of protected speech.[12] As the Court previously noted in its Order denying Plaintiffs' request for a preliminary injunction, the Supreme Court has warned that there is a "limitless variety of conduct that can be 'speech' whenever the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. The protection is not limited to the written or spoken word. A person also may express his thoughts through conduct in which he purposefully engages. The Supreme Court has recognized that such symbolic speech or expressive conduct lies within the confines of the First Amendment's protection of free speech. *See, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966) (silent sit-in by black citizens demonstrating against a segregated library); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (students wearing armbands to protest American military involvement in Vietnam); *Schacht v. United States*, 398 U.S. 58 (1970) (the wearing of United States military uniforms during a dramatic performance to criticize American intervention in Vietnam).

In light of the County's concession, and the existence of competent evidence in the factual record, the Court concludes that there is a triable issue of a fact as to whether Plaintiffs' gun possession in the context of a gun show can qualify as speech and whether Plaintiffs intended to convey a particularized message that was likely to be understood by those who observed it.

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[12]Also before the Court is Defendants' Motion to Strike Plaintiffs' Expert Report and Declarations of Donald Kilmer, Daryl Davis, Duane Darr, Jess B. Guy, Virgil McVicker, Mike Fournier, Russell Nordyke, and Sallie Noryke. (Docket No. 153.) Because the County has conceded for purposes of their Motion for Summary Judgment that gun possession may constitute expressive conduct, the Court finds that Plaintiffs' expert report is not relevant. Furthermore, the Court finds that the expert report does not contain any specialized knowledge to assist the trier of fact understand the evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 591 (1993); Fed. R. Evid. 702. For these reasons, the Court **GRANTS** Defendants' Motion to Strike Plaintiffs' Expert Report. Due to the County's concession, the Court finds that the content of the remaining declarations is irrelevant to the remaining issues. For this reason, the Court **DENIES** Defendants' Motion to Strike, as moot.

Specifically, Plaintiffs have offered evidence that their act of possessing guns at a gun show serves to express their firmly-rooted beliefs that individuals should have a protected right under the Second Amendment to bear arms; that they support the National Rifle Association's interpretation of the Second Amendment; and that they object to the Ninth Circuit's decision holding that the Second Amendment "offers no protection for the individual's right to bear arms." *Nordyke*, 319 F.3d at 1191 (citing *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996)). The Court now turns to whether the Ordinance is related to the suppression of that speech.

C. Is the County's Ordinance Related to the Suppression of Free Expression

Having determined that the issue of whether Plaintiffs' gun possession is expressive conduct is not amenable to summary judgment on this record, the Court now turns to evaluate whether the County's Ordinance is related to the suppression of free expression. *Nordyke*, 319 F.3d at 1189. The parties as an initial matter, dispute the standard of review that guides the Court's analysis of the impact of the Ordinance upon Plaintiffs' right of free expression. Plaintiffs maintain that the asserted governmental interest of the Ordinance, as applied to them, is related to the suppression of their free speech and therefore the Court should examine the Ordinance under the "strict scrutiny" standard set forth in *Johnson*. *See Johnson*, 491 U.S. at 403. Defendants argue that the Ordinance is not related to the suppression of speech and therefore the less strict content-neutral standard set forth in *O'Brien* applies. *See O'Brien*, 391 U.S. at 376-77. Having outlined the parties' respective positions, the Court proceeds to analyze these cases, in the context of the current record, to determine the applicable standard of review which governs the Court's evaluation of the Ordinance at issue.

1. *Texas v. Johnson*

In *Texas v. Johnson*, the Supreme Court held that a Texas statute criminalizing the desecration of venerated objects, including the United States flag, was unconstitutional as applied to an individual, Johnson, who had set fire to a flag during a political demonstration. *Johnson*, 491 U.S. at 420. The Texas statute provided that "[a] person commits an offense if he intentionally or knowingly desecrates [a] national flag," where "desecrate" meant to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." *Id.* at 400 (citing Tex. Penal Code Ann. § 42.09 (1989)). The Court

first held that Johnson's flag-burning was "conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." *Id.* at 406 (citation omitted). The Court rejected the State's contention for the application of the less stringent standard announced in *O'Brien*. *Id.* at 406. The 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." *Id.* at 410. The Court stated that such a restriction will be subject to "the most exacting scrutiny. " *Id.* at 412 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)). Such a level of scrutiny requires the State actor "to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321 (citations omitted).

2. ***United States v. O'Brien***

In *United States v. 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." *O'Brien*, 391 U.S. at 376. *O'Brien* involved a challenge to a federal statute making it illegal to "forge[], alter[], knowingly destroy[], knowingly mutilate[], or in any manner change[] any [Selective Service certificates]." *Id.* at 370 (citing 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act). The Supreme Court stated,

> 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. In finding that the statute met each of these requirements, the Court reasoned that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because the statute was an appropriately narrow means of protecting this interest and condemned only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of the act of burning a registration certificate frustrated the

Government's interest, a sufficient governmental interest was shown to justify the defendant's conviction. *Id.* at 382.

In this case, the Court finds that the *O'Brien* test provides the appropriate standard of review of the Ordinance. Unlike the State's interest in *Johnson*, the County has an interest unrelated to the suppression of free expression. In *Johnson*, the Texas statute focused on the communicative aspect of the actor's conduct by prohibiting desecration of the flag in a way that the actor knew would seriously offend one or more persons likely to observe or discover his action. *Johnson*, 491 U.S. at 400. There, the State's asserted interested in preservation of the flag as a symbol of national unity was an interest directly related to the suppression of the actor's free expression and communicative conduct. *Id.* at 410. Here, the County's interest is not in suppressing Plaintiffs' messages about guns. The interest that fueled the promulgation of the Ordinance at issue is the prevention of violence and the preservation of safety on county property. Thus, in direct contrast to the State's interest in *Johnson*, the County's interest is unrelated to the communicative aspect of the conduct at issue. Because of these differences, this Court finds the *Johnson* strict scrutiny standard inappropriate for the analysis of this case. Instead, the Court will apply the four-part *O'Brien* test.

3. *O'Brien* As Applied to Plaintiffs

The County contends that the Ordinance satisfies the *O'Brien* test and that there are no factual issues that preclude a grant of summary judgment on this record. According to the County, there is an important governmental interest in seeking to ensure public safety on county property, and that the governmental interest is unrelated to the suppression of Plaintiffs' free expression. The County asserts that the incidental restriction on Plaintiffs' ability to conduct their gun shows, in the precise manner Plaintiffs wish, is no greater than is essential to the furtherance of the County's content-neutral interest. In response, Plaintiffs insist that the isolated statements of a particular county legislator evince a content-based legislative motive behind the Ordinance. Plaintiffs posit that such improper motive and the absence of a sufficient governmental interest preclude the Ordinance from satisfying the *O'Brien* test. The Court now turns to the Ordinance as applied to Plaintiffs under the four-part *O'Brien* test.

a. Constitutional Power of Government

The first prong of the *O'Brien* test requires the regulation at issue to be within the constitutional power of the government. *O'Brien*, 391 U.S. at 377. This Court previously concluded that the Ordinance satisfied the first element of the *O'Brien* test in the context of a facial challenge. (Order Denying Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, at ¶. 7-9.) Here, Plaintiffs argue, without any substantive explanation, that the California Supreme Court's decision in *Nordyke v. King*, 27 Cal. 4th 875 (2002) demands a different result. The Court disagrees. The promulgation of the Ordinance is certainly within the constitutional powers of the County. Plaintiffs have failed to identify any triable issues of fact that could result in a different conclusion.

b. Substantial Government Interest

The second prong of the *O'Brien* test requires that the regulation further a substantial government interest. *O'Brien*, 391 U.S. at 377. In applying the second step of the *O'Brien* test, the Supreme Court employs a balancing test, asking whether the alleged governmental interest is sufficiently substantial to justify the resultant impact on free expression. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). In ruling on Plaintiffs' motion for a preliminary injunction, this Court previously concluded that the Ordinance satisfied the second element of the *O'Brien* test in the context of a facial challenge. Now, Plaintiffs argue that "as applied" to gun shows at the Fairgrounds, the Ordinance fails to further a substantial government interest. The Court disagrees with Plaintiffs and finds that the Ordinance does further a substantial government interest as applied to them.

In support of meeting their initial burden, the County points to its findings that during the first five years of the 1990s in Alameda County there were 879 homicides committed using firearms, and an additional 1,647 victims were hospitalized with gunshot injuries. Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. A. The County also found that firearms were the leading cause of death among people between the ages of fifteen and twenty four in Alameda County and that between July 1, 1996 and June 30, 1997, 136 juveniles were arrested in Oakland for gun-related offenses. *Id.* The July 4, 1998 shooting at the Fairgrounds further evidences that the Ordinance

furthers a substantial interest in promoting public safety on county property, and especially at the Fairgrounds. As a result of the County's showing, the burden shifts to Plaintiffs to present specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87.

Plaintiffs argue that the County does not have a substantial interest as applied to Plaintiffs' gun shows. Specifically, Plaintiffs point to the County's admission that there is no evidence of any violent criminal activity occurring at any of Plaintiffs' guns shows. However, Plaintiffs cite no specific facts indicating that the County's findings on gun violence within the county were inaccurate. *See Clark v. City of Lakewood*, 259 F.3d 996, 1015 (9th Cir. 2001) (finding that city may have improperly relied upon certain evidence in passing ordinance, therefore a genuine issue of material fact existed whether the regulation furthered a significant government interest). Similarly, Plaintiffs cite no specific facts rebutting the County's interest in promoting public safety on county property. As a result, Plaintiffs have failed to present evidence establishing the existence of a triable issue of material fact. Therefore, the Court finds as a matter of law that the County's public safety interest is sufficiently substantial to justify the resultant impact on Plaintiffs' free expression and thus satisfies the second part of the *O'Brien* test.

c. Ordinance's Relationship to the Suppression of Free Expression

The third element of the *O'Brien* test requires the governmental interest be unrelated to the suppression of free expression. *O'Brien*, 391 U.S. at 377. Plaintiffs argue that the Ordinance is related to the suppression of free speech because: (1) the County's underlying legislative intent in promulgating the Ordinance was to prohibit gun shows; and (2) the Ordinance includes an exception for entertainment-related events and is therefore content-based. In response, the County argues that its underlying legislative intent is not proper for the Court to consider and that an examination of the Ordinance's exception, in its entirety, demonstrates that the Ordinance is content-neutral. The Court will address Plaintiffs' two arguments below.

First, regarding the County's underlying legislative intent, Plaintiffs argue that the County's public safety interest is a pretextual justification. In support of their argument Plaintiffs point to a statement made by a member of the County Board of Supervisors, Mary King ("King").

Specifically, on May 20, 1999, King sent a memorandum to County Counsel requesting counsel to research a way to prohibit gun shows on county property. However, the Supreme Court has counseled against consideration of alleged illicit legislative motive in determining a statute's constitutionality. *O'Brien*, 391 U.S. at 383. A court may not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. *Id.* As the Court specifically stated in *O'Brien*,

> 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.

Id. at 383-84. Despite the Supreme Court's guidance to the contrary, Plaintiffs cite to four cases in support of their contention that this Court should consider King's statement. However, the authority relied upon by Plaintiffs does not support the proposition that this Court may consider King's statement in determining whether the County's interest is related to the suppression of free expression.

Plaintiffs cite *United States v. Eichman*, 496 U.S. 310 (1990). In *Eichman*, the Supreme Court found that the Flag Protection Act of 1989, 18 U.S.C. § 700, was inconsistent with the First Amendment. *Eichman*, 496 U.S. at 319. In doing so, the Court reasoned that although the Act contained "no explicit content-based limitation, it [was] nevertheless clear that the Government's asserted interest [was] 'related to the suppression of free expression.'" *Id.* at 315 (citing *Johnson*, 491 U.S. at 410). In analyzing the government's interest, the Court did not look to statements made by legislators, but instead the Court examined "the precise language of the Act's prohibitions, [which] confirm[ed] Congress' interest in the communicative impact of flag desecration." *Id.* at 317. Therefore, *Eichman* does not support Plaintiffs' argument that it is proper to consider King's

statements.

The Court finds the remaining authority cited by Plaintiffs regarding the propriety of King's statements does not support their position either. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (rejecting plaintiff's as applied First Amendment challenge and finding that a municipal ordinance banning the posting of signs on public property was content neutral and therefore constitutional under an *O'Brien* analysis); *Perry Educ. Ass'n v. Local Educator's Ass'n*, 460 U.S. 37, 44-49 (1983) (finding that a school district's preferential access to its interschool mail system was not unconstitutional under the First Amendment because the system was not a public forum); *Niemotko v. Maryland*, 340 US. 268, 271-73 (1951) (holding Jehovah's Witnesses defendants' convictions were in violation of their rights to equal protection of the law in exercise of their freedoms of speech and religion protected by the First and Fourteenth Amendments where defendants' only basis for arrest was that defendants were using public park for Bible talks without a permit). The Court finds that it is not proper to consider King's statements. Accordingly, the Court finds that King's statements do not raise a triable issue of fact with respect to the third *O'Brien* factor.

Turning to Plaintiffs' second argument, regarding the Ordinance's exception for entertainment-related events, Plaintiffs claim that the timing and existence of the exception demonstrates that the Ordinance is related to the suppression of Plaintiffs' free expression. However, as the County points out, Plaintiffs fail to explain how the exception is grounded in any disagreement with any message Plaintiffs convey by possessing firearms. Additionally, the exception contains the unqualified word, "event," that preserves the possibility that any number of events can satisfy the exception provided that the firearms are secured when not in the actual possession of the participant, including Plaintiffs' gun shows.[13] As the record indicates, the County has allowed "events," other than "motion picture, television, video, dance and theatrical productions" where the authorized participants have possessed firearms, and those firearms have been secured when not in the actual possession of the participant. (Pickering Decl., at ¶ 13.) Plaintiffs offer no

[13]Admittedly, Plaintiffs would not be permitted to allow the attendees to actually possess the firearms while on county property. However, the Ordinance's exception does not proscribe the sale, exhibition, or discussion of firearms on county property.

specific probative evidence establishing that as applied to Plaintiffs, the Ordinance's exception for entertainment-related events is content-based. Nothing 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. Thus, the Court finds that as a matter of law, the County's Ordinance, as applied to Plaintiffs, is unrelated to the suppression of free expression.

For these reasons, the Court finds that the Ordinance, as applied to Plaintiffs, satisfies the third part of the *O'Brien* test.

d. Narrowly Tailored

The fourth element of the *O'Brien* test requires the incidental restriction on alleged First Amendment freedoms be no greater than is essential to the furtherance of that interest. The County argues that the Ordinance does not restrict speech, and even if it does, the Ordinance is narrowly tailored to achieve the important government interest of protecting public safety. Plaintiffs counter, that the existing state laws intended to punish criminal use of firearms are a sufficient lesser restrictive means of controlling weapons at the Fairgrounds.

This Court has previously addressed the issue of whether the Ordinance is narrowly tailored in its order denying Plaintiffs' request for a preliminary injunction. In examining Plaintiffs' facial challenge to the Ordinance, this Court noted that "several potentially less onerous alternatives . . . are specifically preempted by state law."[14] Currently, in examining Plaintiffs' as applied challenge, Plaintiffs are similarly unable to identify any factual dispute regarding a non-preempted less restrictive alternative. As Defendants correctly point out, it is not appropriate for a court to consider the Ordinance's current success in preventing gun-related crime. *See Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) (stating that the validity of a regulation need not be judged solely by reference to the demonstration at hand in rejecting plaintiffs' as applied challenge to regulation prohibiting sleeping overnight in a federal park); *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) (stating "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

[14]Docket No. 53.

F.3d 1009, 1013 (9th Cir. 1996) (citing *Ward*, stating that the validity of an ordinance banning sales of message-bearing T-shirts on city streets 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). Similarly, the Court cannot consider Plaintiffs' commercial interest in examining the restrictive scope of the Ordinance. *See Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir. 1996).

Plaintiffs' stated purposes for their gun shows demonstrates that the Ordinance is no more restrictive than necessary. Plaintiffs list 15 primary purposes for their gun shows:

> [1] To obtain political information regarding my Constitutional Rights, including but not limited to the right to keep and bear firearms; [2] To assemble with other individuals and organizations to discuss the issues and pending legislation that effect my Constitutional Rights, including but not limited to, my right to own, possess, and trade firearms; [3] To obtain the latest information regarding the safe, responsible and lawful ownership and storage of firearms; [4] To obtain the latest information regarding the firearms industry, with specific reference to developments in technology and safety; [5] to purchase and/or sell firearms, firearm accessories, ammunition, safety devices and gun safes; [6] To petition political candidates, both those elected and currently campaigning, on issues of government policy; [7] To obtain information from political candidates, both those in office and campaigning, on issues of government policy; [8] To obtain and/or offer for sale historical and philosophical information from organizations sympathetic to, but not directly involved, with firearms issues; [9] To obtain information and engage in the trade of stamps and coins; [10] To obtain information and engage in the trade of knives; [11] To obtain information and engage in the trade of antiques and/or other collectibles; [12] To obtain information and engage in the trade of historical and military memorabilia; [13] To obtain information and engage in the trade of political souvenirs such as: buttons, bumper-stickers, t-shirts, books and signs; [14] To circulate and sign petitions for state and local initiatives; [and] [15] To engage in the fellowship and affiliation of like-minded individuals in a market-place of ideas and products, and to enjoy our common culture and collective heritage.

(TAC, ¶ 59 (a) through (o).) As the County points out, each of these purposes may be fulfilled without the actual presence of a firearm. The only putative purpose for which the presence of a firearm is most likely preferable is the sale of a firearm. However, nothing in the Ordinance prohibits such a sale. Although replicas, pictures, or other representations of firearms may not have the same impact as an actual firearm, the potential hazzards of thousands of people wielding firearms together on county property justifies the resulting burden imposed by the Ordinance. *Vlasak v.*

Super. Court of Cal., 329 F.3d 683, 691 (9th Cir. 2003) (finding that a municipal ordinance that resulted in the prohibition of "wooden bull hooks" was narrowly tailored and did not offend animal rights demonstrator's First Amendment rights, in part because replicas and pictures could be used.)

Plaintiffs have not cited to, or proffered, any evidence to suggest that the Ordinance is not narrowly tailored to the County's interest in preventing gun-related crime on county property. For these reasons, the Court finds that there is no triable issue of fact as to whether the Ordinance is narrowly tailored to the County's interests. The Ordinance therefore satisfies the fourth prong of the *O'Brien* test.

For these reasons, the Court finds that the Ordinance, as applied to Plaintiffs, satisfies each part of the *O'Brien* test. The Court therefore **GRANTS** Defendants' motion for summary judgment as to Plaintiffs' First Amendment claim.

D. Time, Place, and Manner Restriction

The County argues that even assuming the Ordinance has an impact on speech, it is nevertheless valid as a reasonable time, place, and manner restriction. Plaintiffs contend that the Ordinance is not a restriction, but instead a prohibition that fails under the test set forth in *City of Renton v. Playtime Theaters Inc.*, 475 U.S. 41 (1986).

The Court finds that the Ordinance is a valid time, place, and manner restriction. The test applied for time, place, and manner restrictions differs from the *O'Brien* test. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649-654 (1981). In order to be a valid time, place, and manner restriction, the regulation: (1) must not be based upon the content of speech; (2) must serve a significant government interest; and (3) must leave open ample alternative channels for communication of information. *Heffron*, 452 U.S. at 649-654 (citations omitted).

In *Clark*, the Supreme Court agreed with the district court's decision in granting summary judgment in favor of the government's regulation. *Clark*, 468 U.S. at 297-98. The Court upheld a regulation, that when applied to the plaintiff demonstrators, prohibited them from actually sleeping in a park where they had constructed "tent cities" near the White House to call attention to the plight of the homeless. *Id.* at 289. First, the Court found that the regulation was content neutral because it

was not applied to regulate the plaintiffs' message. *Id.* at 295. Second, the Court found the regulation served a significant government interest of maintaining parks in an attractive condition, available for all to use. *Id.* at 296. Lastly, the Court found that even though the plaintiffs could not actually sleep in the park, the regulation preserved other avenues of communicating the plaintiffs' message. *Id.* at 295. The Court noted that the regulation did not prevent plaintiffs from leaving their symbolic tents intact. *Id.*; *see also Heffron*, 452 U.S. at 2568 (holding that regulation prohibiting sale or distribution on fair grounds of any merchandise except from fixed locations was a valid time, place, and manner restriction).

Here, the Ordinance meets each of the requirements of a valid time, place, and manner restriction. First, the Court has already found the Ordinance is content neutral as applied to Plaintiffs. Second, the Ordinance furthers a significant county interest in reducing the risk of shootings and gun violence on County property. Furthermore, in examining the County's interest, as applied to the Plaintiffs' gun shows, the Court finds that curtailing the possession of guns on county property has a natural and probable affect of limiting the risk of overall shootings and gun violence on County property. *See Clark*, 468 U.S. at 297 (noting that "it is evident from our cases that the validity of [the] regulation need not be judged solely by reference to the demonstration at hand"). Finally, the Ordinance leaves ample alternate channels for the communication of Plaintiffs' message. The Ordinance does not limit discussion about guns or gun related issues on county property. *See Vlasak*, 329 F.3d at 691 (stating that the First Amendment does not require the government to allow plaintiffs to engage in the particular method of communication which plaintiffs believe to be most effective). Similarly, the Ordinance does not prohibit possession of guns on private property within the County. Furthermore, as the County points out, the evidence in the record indicates that Plaintiffs have had over twenty two gun shows in California since 2005. Plaintiffs have ample alternate channels available for communication of their gun-related messages. As a result, the County has established the absence of a triable issue of material fact.

In response, Plaintiffs cite to no evidence in the record to suggest there is a triable issue of fact regarding any of the factors used to evaluate the validity of a time, place, and manner restriction. Plaintiffs' citation to *City of Renton* is similarly unavailing. *City of Renton* dealt with the analysis of

the city's zoning ordinance prohibiting adult theaters from locating within 1,000 feet of any residential zone and the secondary effects of adult theaters on the surrounding community. *City of Renton*, 475 U.S. at 930-31. In *City of Renton*, the Supreme Court held that the zoning ordinance was a valid time, place, and manner restriction. *Id.* at 932-33.

Therefore, the Court finds there is no basis, on this record, to establish a triable issue of fact as to whether the Ordinance is a valid time, place, and manner restriction. For these reasons, the Court finds the Ordinance to be a valid time, place, and manner restriction as applied to Plaintiffs.

II. Equal Protection Claim

The County insists that Plaintiffs cannot maintain an equal protection claim because Plaintiffs cannot show that the Ordinance is applied in a discriminatory manner or imposes different burdens on different classes of people. Plaintiffs counter that the timing of the Ordinance's exception was discriminatory, that the Ordinance's exception is discriminatory on its face, and that the Ordinance as applied treats Plaintiffs in a disparate manner compared the Scottish Games and Outdoor Sportsman Shows. Plaintiffs contend that their disparate treatment is an equal protection violation of their fundamental right to free speech.

The first step in equal protection analysis is to demonstrate a governmental classification. *Country Classic Dairies, Inc. v. State of Montana, Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people. *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988). It is necessary for a plaintiff to identify a "similarly situated" class against which the plaintiff's class can be compared. *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 goal of identifying a similarly situated class [ ] is to isolate the factor allegedly subject to impermissible discrimination." *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989).

The next step is to determine the applicable level of scrutiny for the classification. *Country Classic Dairies*, 847 F.2d at 596. A legislative classification will be subjected to strict judicial scrutiny if it employs a "suspect" class or if it classifies in such a way as to impair the exercise of a

fundamental right. *Hodel*, 857 F.2d at 1331 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny.") (citations omitted)). However, "where 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 governmental objective. *Hodel*, 857 F.2d at 1331 (citing *Dandridge v. Williams*, 397 U.S. 471, 485, (1970)). The Court now determines whether there exists a relevant classification on this record, and if so, the appropriate level of scrutiny to apply to the classification.

A. Classification

Plaintiffs argue that the Ordinance's exception treats them differently than it treats the Scottish Games and the Outdoor Sportsman Shows. The County argues that Plaintiffs are not "similarly situated" to the Scottish Games, the Outdoor Sportsman Shows, or any other group invoking the Ordinance's exception for authorized participants "in a motion picture, television, video, dance, or theatrical production or event when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use." (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. F.)

However, the Court need not reach the classification issue because, as described below, even if Plaintiffs have successfully established a classification, the appropriate standard of review would be rational basis. As more fully described below, because this Court finds that the Ordinance and its exception is rationally related to a legitimate government interest, Plaintiff's equal protection claim necessarily fails.

B. Fundamental Rights

Plaintiffs' equal protection argument fails because the Ordinance and its exception survive rational basis scrutiny. Plaintiffs' argument here is directed toward securing review under the standard of strict scrutiny, on the ground that the Ordinance and its exception implicate Plaintiffs' First Amendment rights. That contention has been disposed of in the First Amendment discussion above. *See Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 327 (9th Cir.

1996) (finding that the regulation was content neutral and therefore did not trigger strict scrutiny under either the First Amendment or the Equal Protection Clause.) (citations omitted). When the regulation at issue does not violate the individual's exercise of a fundamental right, the regulation need only survive rational basis review for equal protection purposes. *See Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (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 than the traditional rational-basis test"). Above, the Court has already found that the Ordinance and its exception, as applied to Plaintiffs, does not violate their fundamental right of free speech under the First Amendment. In doing so the Court determined that the Ordinance and its exception, as applied to Plaintiffs, furthered a substantial government interest.

Accordingly, the Court also finds that the Ordinance and its exception, as applied to Plaintiffs, is rationally related to a legitimate government interest. As noted previously, the County's interest is to ensure public safety on county property. In support of this interest, the County points to its findings that during the first five years of the 1990s in Alameda County there were 879 homicides committed using firearms, and an additional 1,647 victims were hospitalized with gunshot injuries. Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. A. The County also found that firearms were the leading cause of death among people between the ages of fifteen and twenty four in Alameda County and that between July 1, 1996 and June 30, 1997, 136 juveniles were arrested in Oakland for gun-related offenses. *Id.* As further evidence of their governmental interest, the County cites to the July 4, 1998 shooting at the Fairgrounds. The Ordinance is rationally related to the County's interests because it places restrictions on the particular individuals who may lawfully possess a firearm on county property. The Ordinance's exception is rationally related to the County's interests because it allows for firearm possession in certain circumstances where the individual in possession is a peace officer or other "authorized participant" in an "event." (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. F.) Because the Ordinance and its exception have a rational basis to the County's public safety concerns, and do not otherwise offend Plaintiffs' fundamental rights, Plaintiffs' equal protection claim fails.

For these reasons, the Court finds that the Ordinance, on its face and as applied to Plaintiffs, does not violate the Equal Protection clause. The Court therefore **GRANTS** Defendants' motion for summary judgment as to Plaintiffs' Equal Protection claim.

III. State Law Claim

In addition to Plaintiffs' First Amendment and Equal Protection claims under the United States Constitution, Plaintiffs also allege a freedom of expression cause of action under the California Constitution. (TAC, ¶ 72.) Defendants contend that this Court should decline to exercise supplemental jurisdiction over Plaintiffs' remaining state law cause of action.

As long as the complaint sets forth a claim "arising under" federal law, the district court may adjudicate state law claims that are transactionally related to the federal claim. *See* 28 U.S.C. § 1367(a). The fact that the court rules against plaintiff and dismisses the federal claim prior to trial does not automatically oust the court of supplemental jurisdiction. *See* Judge William W. Schwarzer et al., *Federal Civil Procedure Before Trial* § 2:145.2 (2006). The dismissal is a factor for the court to consider in deciding whether to decline to exercise its supplemental jurisdiction. A court has discretion to retain the supplemental state law claim and grant relief thereon. 28 U.S.C. § 1367(c)(3); *see United Mine Workers v. Gibbs*, 383 U.S. 715, 728 (1966); *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995). The court may decline to exercise supplemental jurisdiction where any of the following factors exist: (1) the state law claim involves a novel or complex issue of state law; (2) the state law claim substantially predominates over the claim on which the court's original jurisdiction is based; (3) the district court has dismissed the claims on which its original jurisdiction was based; or (4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c) (1)-(4).

Here, Plaintiffs have failed to even allege which portions of the California Constitution are implicated under their claim. Additionally, the Court has dismissed Plaintiffs' claims upon which original jurisdiction was based. For these reasons, the Court finds Plaintiffs' California constitutional claims more appropriately litigated in state court.

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CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment as to Plaintiffs' First Amendment and Equal Protection Claims that were based on the United States Constitution. The Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law cause of action.

IT IS SO ORDERED.

Dated: March 31, 2007

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

ATTACHMENT E

Donald E. J. Kilmer, Jr. [SBN: 179986]
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, California 95125
Voice: (408) 264-8489
Fax: (408) 264-8487
E-Mail: Don@DKLawOffice.com

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs,

vs.

MARY V. KING, et al.,

Defendants.

Case No.: **CV-99-04389-MJJ**

JOINT STATEMENT OF UNDISPUTED FACTS

Date: October 3, 2006
Time: 9:30 a.m.
Judge: Honorable Martin Jenkins
Courthouse: U.S. Court House
450 Golden Gate Avenue
San Francisco, CA 94102

The parties hereby stipulate that the following facts are undisputed for purposes of Defendants' pending summary judgment motion. The Defendants object to the inclusion of some of the facts for the reasons noted immediately underneath each particular fact objected to. The undisputed facts set forth herein may be challenged and/or objected to by any party at a later stage of the proceedings in this case, consistent with the Federal Rules of Evidence, the Federal Rules of Civil Procedure and all Local Rules.

UNDISPUTED FACT	EVIDENTIARY SUPPORT
1. On July 4, 1998 a shooting occurred at the Alameda County Fairgrounds (a.k.a. Pleasanton Fairgrounds) during the annual County Fair. The shooting resulted in gunshot wounds to 8 people.	1. Declaration of James Knudsen: Exhibit A attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
2. The July 4, 1998 shooting incident resulted in the arrest and conviction of the shooter: Jamai Johnson. He was sentenced to California State Prison upon conviction.	2. **DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSION:** #26.
3. The July 4, 1998 shooting incident at the Pleasanton Fairgrounds was not associated in any way with any of the Plaintiffs or their activities during gun shows at the Pleasanton Fairgrounds. Defendant's Objection(s): Relevance.	3. **DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSION:** #30 and #31.
4. The Defendant COUNTY OF ALAMEDA BOARD OF SUPERVISORS is the duly elected legislative body with the power to pass ordinances in accordance with the county charter and in accordance with the laws of the State of California. The BOARD OF SUPERVISORS also has ultimate administrative authority over the Pleasanton Fairgrounds.	4. Paragraph 31 of the Defendants' **AMENDED ANSWER TO THIRD AMENDED COMPLAINT.**
5. In 1999, Defendants MARY V. KING, GAIL STEELE, WILMA CHAN, KEITH CARSON, and SCOTT HAGGERTY were the duly elected members of the Board of Supervisors for the County of Alameda, California.	5. Paragraph 32 of the Defendants' **AMENDED ANSWER TO THIRD AMENDED COMPLAINT.**
6. The Alameda County Fairgrounds (aka: The Pleasanton Fairgrounds) is located in Alameda County. Public and private events are scheduled at the fairgrounds on a regular basis.	6. Paragraph 33 of the Defendants' **AMENDED ANSWER TO THIRD AMENDED COMPLAINT.**
7. The Alameda County Fairgrounds is situated within a Public and Institutional zoning district on unincorporated county property within the City of Pleasanton, California. The Fairgrounds were awarded to the County in a Final Order of Condemnation filed on November 17, 1965 "for public purposes, namely, for the construction thereon of necessary public buildings, . . ." [See: County of Alameda v. Meadowlark Dairy Corp, Ltd.; Case No.: 322722] Defendant's Objection(s): Relevance.	7. Paragraph 34 of the Defendants' **AMENDED ANSWER TO THIRD AMENDED COMPLAINT.**

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
8. The Alameda County Fair Association is a non-profit corporation which manages the fairgrounds through an Operating Agreement with the County of Alameda.	8. Paragraph 35 of the Defendants' **AMENDED ANSWER TO THIRD AMENDED COMPLAINT.**
9. On May 20, 1999, Defendant, Mary V. King sent a memorandum to County Counsel – Richard Winnie – requesting that he research a way to prohibit gun shows on County Property. Defendant's Objection(s): Relevance.	9. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #1, #2, and #3. See Exhibit A of the **PLAINTIFFS' REQUEST FOR ADMISSION.**
10. On July 20, 1999, Alameda County Supervisor, Mary V. King issued a press release announcing a proposed ordinance to restrict firearm possession on county property. Defendant's Objection(s): Relevance.	10. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #6, #7 and #8. See Exhibit B of the **PLAINTIFFS' REQUEST FOR ADMISSION.**
11. On July 20, 1999, Alameda County Supervisor, Mary V. King made a speech in connection with the announcement of a proposed ordinance prohibiting possession of firearms on county property. Defendant's Objection(s): Relevance.	11. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #11, #12 and #13. See Exhibit C of the **PLAINTIFFS' REQUEST FOR ADMISSION.**
12. On July 26, 1999, Plaintiffs' Counsel sent a letter to Alameda County Counsel requesting clarification of the terms on the proposed ordinance and requesting informal resolution of any issues relating to implementation and interpretation of the Ordinance as it applied to gun shows. Defendant's Objection(s): Relevance.	12.. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto.
13. On August 17, 1999, the Alameda County Board of Supervisors adopted Ordinance No.: 0-2000-11. Which later became Section 9.12.120 of the Code of Alameda County. The Ordinance prohibits the possession of firearms on County Property, including the Fairgrounds.	13. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #16, #17 and #18. See Exhibit D of the **PLAINTIFFS' REQUEST FOR ADMISSION.**

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
14. On August 23, 1999, Richard Winnie, Alameda County Counsel, sent a letter and copy of the Ordinance to Richard K Pickering, the General Manager of the Pleasanton Fairgrounds. The letter disagrees with the press reports that the ordinance prevents gun shows, and asserts that gun shows may be conducted on the fairgrounds without the presence of firearms. The letter also states that the Ordinance does not proscribe the sale of firearms or ammunition on county property, provided that such articles cannot be displayed on the premises.	14. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #16, #17 and #18. See Exhibit D of the **PLAINTIFFS' REQUEST FOR ADMISSION.**
15. In a September 7, 1999 letter, the General Manager of the Alameda County Fairgrounds requested a written plan from the Nordyke Plaintiffs asking that they explain how they would conduct their gun show at the Alameda County Fairgrounds in compliance with the Ordinance.	15. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto. And Exhibit B attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
16. During the months of August and September, 1999 the Scottish Caledonian Games contacted the Fairground's Manager, the Alameda County Sheriff, Alameda County Counsel and Defendant Scott Haggerty regarding the Ordinance's impact on the Scottish Games held at the Fairgrounds. The Scottish Games involve the display/possession of rifles with blank cartridges in connection with historical re-enactments of gun battles. Defendant's Objection(s): Relevance as to first sentence.	16. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.
17. The Scottish Caledonian Games, another cultural event that takes place at the Pleasanton Fairgrounds, which involves the possession and display of firearms was not required to submit a written plan for conducting their event in compliance with the Ordinance. Defendant's Objection(s): Relevance.	17. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
18. On September 16, 1999, Plaintiffs' Counsel sent a second letter to Alameda County Counsel seeking to avoid litigation regarding the Ordinance and its effect on Plaintiffs' gun shows. The letter also stated that Plaintiffs could not practically or profitably conduct a gun show without guns.	18. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto. And Exhibit C attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
19. On September 17, 1999, the Plaintiffs filed this action.	19. Judicial Notice of Docket Report.
20. On September 20, 1999, Alameda County Counsel Richard Winnie sent a letter to the Alameda Board of Supervisors recommending changes to the Ordinance. Defendant's Objection(s): Relevance.	20. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #21, #22 and #23. See: Exhibit E of the **PLAINTIFFS' REQUEST FOR ADMISSION.**
21. On September 24, 1999, Plaintiffs' Counsel sent a third letter to Alameda County Counsel seeking to avoid litigation and maintain the status quo in order to explore options regarding the Ordinances' application to gun shows at the Alameda County Fairgrounds.	21. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto.
22. On September 28, 1999, The Alameda County Board of Supervisors passed Ordinance 0-2000-22, which amended Alameda County Code Section 9.12.120.	22. See Exhibit A attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
23. The Ordinance still prohibits the possession of firearms on County property.	23. See Exhibit A attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.** 9-12-120(b).
24. The Ordinance contains an exception for the possession of firearms for: "authorized participants in a motion picture, television, video, dance or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use."	24. See Exhibit A attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.** 9-12-120(f)(4).
25. On October 19, 1999, Defendants' Counsel responded to Plaintiffs' overtures to avoid litigation in a letter to Plaintiffs' Counsel.	25. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
26. On October 20, 1999, Plaintiff's Counsel sent a letter to the General Manager of the Pleasanton Fairgrounds requesting contractual and/or legal authority for his request that Plaintiffs provide a written plan for conducting gun shows in compliance with the ordinance.	26. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto. See also Exhibit D attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
27. November 3, 1999, this Honorable Court issued an Order denying Plaintiffs' request for pre-trial injunctive relief.	27. Judicial Notice of Docket Report.
28. Plaintiffs (Nordykes) canceled the gun show scheduled for the weekend of November 6/7, 1999 due to: a. prevent the fraud of hosting a gun-less gun show, b. the Court's November 3, 1999 Order denying injunctive relief, c. the demand by the fairgrounds to produce a written plan for hosting a gun-less gun show, which the Plaintiffs were unable to do. d. cancellation of reservations by several vendors and exhibitors due to the passage of the Ordinance. Defendant's Objection(s): Relevance.	28. See ¶¶ 34 and 35 of the **AMENDED VERIFIED COMPLAINT FOR DAMAGES, INJUNCTION, AND DECLARATORY JUDGMENT.** Entered on the Docket on November 16, 1999.
29. In a December 10, 1999 letter, the Events Coordinator of the Alameda County Fairgrounds released all reserved dates held for Plaintiffs for the year 2000. Defendant's Objection(s): Relevance.	29. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto.
30. On January 5, 2000, the Events Coordinator of the Alameda County Fairgrounds sent a letter to the Nordykes returning their deposits for the year 2000, because Plaintiffs could not produce a plan to hold gun shows (without firearms) that would comply with the Ordinance.	30. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit H attached thereto. See also Exhibit E attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT;** and declaration of Rick Pickering at ¶ 6.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
31. As of November 3, 2005, The Scottish Games have never been required to submit a plan (written or otherwise) about how their show would comply with the Ordinance. Instead, the Alameda County Counsel and Alameda County Sheriff simply "assured" the Fairground's management that the Scottish Games complied with the Ordinance as amended. Defendant's Objection(s): Relevance.	31. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.
32. To date, the Nordykes have not explained how they could conduct a gun show at the Alameda County Fairgrounds (without firearms) consistent with the Ordinance.	32. Declaration of Rick Pickering at ¶ 7.
33. In 2005, the Nordykes held multiple gun shows in California.	33. See Exhibit F attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
34. In 2005, there were at least 22 gun shows in California.	34. See Exhibit G attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
35. Plaintiffs' gun shows "bring hundreds, if not thousands, of firearms to one location."	35. **THIRD AMENDED COMPLAINT** at ¶ 60.g.
36. Plaintiffs' gun shows "involve the exhibition, display and offering for sale" of firearms.	36. **THIRD AMENDED COMPLAINT** at ¶ 17.
37. Attendance at the Plaintiffs' gun shows at the Alameda County Fairgrounds was at least 4,000 people.	37. **THIRD AMENDED COMPLAINT** at ¶ 45.
38. At Plaintiffs' gun shows, in order for a firearm to be sold, it must be physically inspected by both the seller and the buyer to insure correct documentation of the serial number, make, model and caliber of the weapon; and to insure that the firearm may be legally sold. Defendant's Objection(s): Relevance and Question of Law.	38. **THIRD AMENDED COMPLAINT** at ¶¶ 60.i – 60.n.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
39. Fairground's Manager, Richard Pickering, based on his knowledge of firearms and his experience as an NRA instructor is not aware that any firearms subject to the County's ban on possession, and not within an exception to the ban, have been allowed on the Fairgrounds.	39. Declaration of Richard Pickering at ¶ 9.
40. The Scottish Games events held at the Alameda County Fairgrounds involve historical re-enactments of gun battles.	40. Declaration of Richard Pickering at ¶ 13.
41. The General Manager, Richard Pickering, has no personal knowledge of any live ammunition being used in the historical re-enactments that are part of the Scottish Games, and that he would take immediate steps to prevent or prohibit the use of live ammunition in such a situation, and that rifles used during the historical re-enactments are required to be unloaded or loaded with blank cartridges.	41. Declaration of Richard Pickering at ¶ 13.
42. According to Richard Pickering, as part of the Ordinance being enforced, it is only those persons directly participating in the historical re-enactments who may possess a rifle, and those persons are required to have the firearm in their actual possession and when not in their possession, to secure the rifle.	42. Declaration of Richard Pickering at ¶ 13. See also: Exhibit A (§ 9.12.120(f)(4)) attached to **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**
43. Defendants have no evidence of any violent criminal activity occurring at any gun show hosted by the Nordykes and held at the Alameda County Fairgrounds for the years 1991 through Feb. 27, 2006. Defendant's Objection(s): Relevance.	43. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #30.
44. Defendants have no evidence of any violation of federal or state firearm laws occurring at any gun show hosted by the Nordykes and held at the Alameda County Fairgrounds for the years 1991 through February 27, 2006. Defendant's Objection(s): Relevance.	44. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION**: #31.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
45. The Alameda Ordinance contains no language directing any interested party to any particular department or agency of the County of Alameda for decisions regarding interpretations of the Ordinance. Defendant's Objection(s): Relevance.	45. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #35.**
46. The Alameda Ordinance does not prohibit an offer to sell a firearm.	46. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #41.**
47. The Alameda Ordinance does not prohibit the actual sale of a firearm.	47. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #41.**
48. Sometime after the July 4, 1998 shooting, the Alameda County Fair Association purchased metal detectors for the purpose of detecting weapons at the entrance to the County Fairgrounds. Defendant's Objection(s): Relevance.	48. **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #27.**
49. Randi Rossi, the Director of the Firearms Division of the California Department of Justice, is aware of no violations of any state or federal laws occurring at the gun shows hosted by the Nordykes. Furthermore, the Nordykes are in compliance with the promoter requirements of California Penal Code § 12071.4, a.k.a.: Gun Show Enforcement and Security Act of 2000. Defendant's Objection(s): Relevance and Question of Law.	49. Deposition of Randi Rossi. 16:12 – 22:18.
50. Ignatius Chinn, a Special Agent Supervisor with the Firearms Division of the California Department of Justice, is aware of no violations of any federal and/or state laws by the Nordykes while putting on their gun shows. Defendant's Objection(s): Relevance.	50. Deposition of Ignatius Chinn. 12:5 – 12:8.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
51. California Penal Code § 12071.4 otherwise known as the Gun Show Enforcement and Security Act of 2000 became state law after the Nordykes canceled their last show at the Alameda County Fairgrounds in November, 1999. Defendant's Objection(s): Relevance and Question of Law.	51. **REQUEST FOR JUDICIAL NOTICE** Re: LEGISLATIVE HISTORY OF PENAL CODE § 12071.4.
52. California Penal Code § 12071.4(b)(5) requires gun show promoters to verify that all firearms in their possession at the show or event will be unloaded, and that the firearms will be secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a prospective buyer. Defendant's Objection(s): Relevance and Question of Law.	52. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(b)(5).
53. California Penal Code § 12071.4(g) mandates that no person at a gun show or event, other than security personnel or sworn peace officers, shall possess at the same time both a firearm and ammunition that is designed to be fired in the firearm. Vendors having those items at the show for sale or exhibition are exempt from this prohibition. Defendant's Objection(s): Relevance and Question of Law.	53. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(g).
54. California Penal Code § 12071.4(h) mandates no member of the public who is under the age of 18 years shall be admitted to, or be permitted to remain at, a gun show or event unless accompanied by a parent or legal guardian. Any member of the public who is under the age of 18 shall be accompanied by his or her parent, grandparent, or legal guardian while at the show or event. Defendant's Objection(s): Relevance and Question of Law.	54. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(h).

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
55. California Penal Code § 12071.4(i) mandates that persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j). Defendant's Objection(s): Relevance and Question of Law.	55. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(i).
56. California Penal Code § 12071.4(k) mandates all persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer. Defendant's Objection(s): Relevance and Question of Law.	56. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(k).
57. California Penal Code § 12071.4(j) mandates that all firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm: (1) The gun owner's signature. (2) The gun owner's printed name. (3) The identification number from the gun owner's government-issued photo identification. Defendant's Objection(s): Relevance and Question of Law.	57. **REQUEST FOR JUDICIAL NOTICE** Re: California Penal Code § 12071.4(j).

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
58. Plaintiff DARYL DAVIS has testified through declaration, that he is a member of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to "keep and bear arms." Defendant's Objection(s): Relevance.	58. See **DECLARATION OF DARYL DAVIS, Plaintiff.** ¶¶ 10 – 15.
59. Plaintiff DARYL DAVIS has testified through declaration, that he supports the National Rifle Association's interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law. Defendant's Objection(s): Relevance and Question of Law.	59. See **DECLARATION OF DARYL DAVIS, Plaintiff.** ¶¶ 10–15.
60. Plaintiff DARYL DAVIS has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended. Defendant's Objection(s): Relevance and Hearsay.	60. See **DECLARATION OF DARYL DAVIS, Plaintiff.** ¶¶ 16 – 18.
61. Plaintiff DUANE DARR has testified through declaration, that he is a member of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to "keep and bear arms." Defendant's Objection(s): Relevance.	61. **See DECLARATION OF DUANE DARR, Plaintiff.** ¶¶ 8 – 12.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
62. Plaintiff DUANE DARR has testified through declaration, that he supports the National Rifle Association's interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law. Defendant's Objection(s): Relevance and Question of Law.	62. See **DECLARATION OF DUANE DARR, Plaintiff.** ¶¶ 8– 12.
63. Plaintiff DUANE DARR has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended. Defendant's Objection(s): Relevance and Hearsay.	63. See **DECLARATION OF DUANE DARR, Plaintiff.** ¶¶ 13 – 16.
64. Plaintiff DUANE DARR has testified that the physical presence of a firearm is necessary to conduct and contract for the sale of a firearm, especially antique firearms. Defendant's Objection(s): Relevance.	64. See **DECLARATION OF DUANE DARR, Plaintiff.** ¶¶ 13 – 16.
65. Plaintiff JESS GUY has testified through declaration, that he is a member of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to "keep and bear arms." Defendant's Objection(s): Relevance.	65. See **DECLARATION OF JESS GUY, Plaintiff.** ¶¶ 8 – 19.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
66. Plaintiff JESS GUY has testified through declaration, that he supports the National Rifle Association's interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law. Defendant's Objection(s): Relevance and Question of Law.	66. See **DECLARATION OF JESS GUY, Plaintiff.** ¶¶ 8 – 19.
67. Plaintiff JESS GUY has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended. Defendant's Objection(s): Relevance and Hearsay.	67. See **DECLARATION OF JESS GUY, Plaintiff.** ¶¶ 20 – 21.
68. Plaintiff JESS GUY attended the NORDYKE'S gun show at the Santa Clara County Fairgrounds on the weekend of April 8 & 9, 2006. He was present when the pictures that are attached to his declaration were taken and he made the observations set forth in paragraphs 22.a. – 22.s of his declaration. Defendant's Objection(s): Relevance.	68. See **DECLARATION OF JESS GUY, Plaintiff.** ¶¶ 22 – 24.
69. Plaintiff VIRGIL Mc VICKER has testified through declaration, that he is a member of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to "keep and bear arms." Defendant's Objection(s): Relevance.	69. See **DECLARATION OF VIRGIL Mc VICKER, Plaintiff.** ¶¶ 12 – 14.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
70. Plaintiff VIRGIL Mc VICKER has testified through declaration, that he supports the National Rifle Association's interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law. Defendant's Objection(s): Relevance and Question of Law.	70. See **DECLARATION OF VIRGIL Mc VICKER, Plaintiff.** ¶¶ 12 – 14.
71. Plaintiff VIRGIL Mc VICKER has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended. Defendant's Objection(s): Relevance Hearsay.	71. See **DECLARATION OF VIRGIL Mc VICKER, Plaintiff.** ¶¶ 15 – 18.
72. Plaintiff MIKE FOURNIER has testified through declaration, that he is a member of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to "keep and bear arms." Defendant's Objection(s): Relevance.	72. See **DECLARATION OF MIKE FOURNIER, Plaintiff.** ¶¶ 5 – 7.
73. Plaintiff MIKE FOURNIER has testified through declaration, that he supports the National Rifle Association's interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law. Defendant's Objection(s): Relevance and Question of Law.	73. See **DECLARATION OF MIKE FOURNIER, Plaintiff.** ¶¶ 5 – 7.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
74. Plaintiff MIKE FOURNIER has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended. Defendant's Objection(s): Relevance and Hearsay.	74. See **DECLARATION OF MIKE FOURNIER, Plaintiff.** ¶¶ 8 – 9.
75. Plaintiff MIKE FOURNIER does not have a permit to carry concealed weapons pursuant to California Penal Code § 12050.	75. See **DECLARATION OF MIKE FOURNIER, Plaintiff.** ¶¶ 10 – 13.
76. Plaintiff MIKE FOURNIER sells, at his store and at gun shows, many of the same kinds of engraved and commemorative firearms that are shown in the book Steel Canvas – The Art of American Arms, by R.L. Wilson. Defendant's Objection(s): Relevance.	76. See **DECLARATION OF MIKE FOURNIER, Plaintiff.** ¶¶ 10 – 13.
77. Patrons and exhibitors attend gun shows for various reasons, but overwhelming attend them in order obtain political information about their "right to keep and bear arms" and to assemble with like-minded individuals regarding their common culture (i.e., the gun culture.) Defendant's Objection(s): Relevance.	77. See the more than 300 **THIRD PARTY DECLARATIONS IN SUPPORT OF INJUNCTIVE RELIEF** filed on or about September 17, 1999; including the **DECLARATION OF AMY HO** which includes the statistical breakdown regarding statements made by patrons and exhibitors filed the same day.
78. Patrons and exhibitors at Plaintiffs' gun shows are strongly opposed to attending gun shows, and overwhelmingly state that they will not attend gun shows, where the possession of firearms, and the therefore the presence of firearms is prohibited. Defendant's Objection(s): Relevance.	78. See video taped interviews of patrons and exhibitors attending the April 8/9, 2006 gun show at the Santa Clara County Fairgrounds, attached to: **DECLARATION OF PLAINTIFFS' COUNSEL DONALD KILMER RE: TAPED INTERVIEWS AT T.S. GUN SHOW AT SANTA CLARA COUNTY FAIRGROUNDS APRIL 8/9, 2006.**
79. Guns and the possession of guns, especially at gun shows, can convey political messages. Defendant's Objection(s): Relevance and Hearsay.	79. See: **PLAINTIFFS EXPERTS' REPORT.**

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
80. The possession of firearms on county property, and therefore the ability to hold gun shows on county fairgrounds, has been banned in the counties of: Alameda, Sonoma, San Mateo, Marin; and the City of Santa Cruz. Defendant's Objection(s): Relevance and Lack of Foundation.	80. **PLAINTIFFS' INITIAL DISCLOSURES** under F.R.C.P. 26 – See: Exhibit N attached thereto.
81. Plaintiffs RUSSELL and SALLIE NORDYKE have testified through their declarations, that they are members of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, their belief that the Second Amendment protects an individual right to "keep and bear arms." Defendant's Objection(s): Relevance.	81. See: **DECLARATION OF RUSSELL AND SALLIE NORDYKE.** ¶¶ 27 & 28.
82. Plaintiffs RUSSELL and SALLIE NORDYKE have testified through their declarations, that they support the National Rifle Association's interpretation of the Second Amendment; and that they host gun shows with guns, in part, in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (California) where that right is called into question by current state and federal case law. Defendant's Objection(s): Relevance and Question of Law.	82. See: **DECLARATION OF RUSSELL AND SALLIE NORDYKE.** ¶¶ 27 & 28.
83. Plaintiffs RUSSELL and SALLIE NORDYKE have testified that there is a great likelihood that others would understand these messages. This is based on their own observations of people possessing and handling guns at gun shows they host and promote. Defendant's Objection(s): Relevance and Hearsay.	83. See: **DECLARATION OF RUSSELL AND SALLIE NORDYKE.** ¶¶ 29 – 37.

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
84. Plaintiffs RUSSELL and SALLIE NORDYKE are unwilling to commit a fraud upon their regular exhibitors, vendors and patrons by hosting a gun-less gun show. They maintain that the very idea is absurd. Defendant's Objection(s): Relevance and Question of Law.	84. See: **DECLARATION OF RUSSELL AND SALLIE NORDYKE.** ¶¶ 29 – 37.
85. Plaintiffs RUSSELL and SALLIE NORDYKE maintain that they comply with all Federal and State Laws regulating the firearms industry and gun shows in particular, and that they are members of the National Association of Arms, Inc., and that they follow that associations guidelines for conduct safe and lawful gun shows. Defendant's Objection(s): Relevance and Question of Law.	85. See: **DECLARATION OF RUSSELL AND SALLIE NORDYKE.** ¶¶ 29 – 37.
86. There is no gun show loophole at California Gun Shows that comply with California law. Defendant's Objection(s): Relevance and Question of Law.	86. Deposition of Randi Rossi. 11:9 – 16:12. See: **DECLARATION OF RUSSELL AND SALLIE NORDYKE.** ¶¶ 32 & 33.
87. Plaintiffs RUSSELL and SALLIE NORDYKE have sustained monetary losses in the form of lost profits from the ban on gun shows at the Alameda County Fairgrounds. They also have monetary losses (though not sought in this suit) from the ban on gun shows in the Counties of Marin, Sonoma and San Mateo. Defendant's Objection(s): Relevance and Lack of Foundation.	87. See: **DECLARATION OF RUSSELL AND SALLIE NORDYKE.** ¶ 36.d.
88. Alameda County Counsel's Office is authorized to interpret the Ordinance and its exceptions. Defendant's Objection(s): Relevance.	88. **DEFENDANTS' RESPONSES TO PLAINTIFFS' INTERROGATORIES. #21.A.**

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

UNDISPUTED FACT	EVIDENTIARY SUPPORT
89. Richard Pickering, General Manager of the Alameda County Fairgrounds, has no authority to grant exceptions to Alameda County Ordinances. Defendant's Objection(s): Relevance.	89. See Exhibit 8 attached to Deposition of Rick K. Pickering.
90. Richard Pickering, General Manager of the Alameda County Fairgrounds, referred all decisions about exceptions to Alameda Ordinance to County Counsel and/or the Alameda County Sheriff. Defendant's Objection(s): Relevance.	90. Deposition of Rick K. Pickering. 36: 18 – 39:18 and 72:19 – 75:2. 80: 1 – 10.
END OF DOCUMENT	**END OF DOCUMENT**

The parties agree, by and through counsel, that facsimile signatures shall constitute originals.

SO STIPULATED.

Date: Sept 1, 2006

Donald E. J. Kilmer, Jr.
Attorney for Plaintiffs

Date: September 1, 2006

T. Peter Pierce
Attorney for Defendants

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

ATTACHMENT F

BOARD OF SUPERVISORS

MARY KING
SUPERVISOR, FOURTH DISTRICT

MEMORANDUM

TO: Richard Winnie

FROM: Supervisor Mary King

RE: Gun Shows at the Fairgrounds

DATE: May 20, 1999

For about three years I've been trying to get rid of gun shows on County property.

I've gotten the run around from spineless people hiding behind the constitution, and been attacked by aggressive gun toting mobs on right wing talk radio. I still have not been deterred.

It seems to me that now may be the correct political moment in time to rededicate my efforts. I believe it would be the position of a majority on our Board to prohibit the gun shows. Even if the courts strike us down, I think we have a moral obligation to pursue our philosophy in this instance.

Please research this issue and look for the most appropriate way that I might proceed. I would be happy to consider a variety of options.

cc: Susan Muranishi
All Boardmembers

Encl.

1221 OAK STREET • SUITE 536 • OAKLAND, CALIFORNIA 94612 • (510) 272-6694 • FAX: (510) 465-7026
DISTRICT OFFICE: 1426 164TH AVENUE • SAN LEANDRO, CALIFORNIA 94579 • (510) 670-5595 • FAX: (510) 276-5915

ATTACHMENT G

News from
Supervisor Mary King
Fourth District

FOR IMMEDIATE RELEASE

Contacts: Steven Lavoie (510) 531-4694
Tona Henninger (510) 272-6694

Press Conference to Announce New Firearms Ordinance
Sponsored By Supervisor Mary King
Tuesday, July 20, 1999 • 10:00 a.m.
Alameda County Administration Building (Entrance)
1221 Oak Street, Oakland

On Tuesday, July 20, Supervisor Mary King will announce a proposed ordinance to restrict the possession of firearms on county property.

"Last May, following a rash of gun-related violence that stunned the nation, I promised to look at the issue of gun sales in Alameda County. After extensive legal research and input from the communities of interest, I am now prepared to introduce legislation," Supervisor King said.

She will be joined at the press conference by representatives of Teens on Target!, an Oakland-based youth anti-violence organization and by members of the Legal Committee Against Violence, Sheriff Charles Plummer, County Counsel Richard Winnie and members of the Board of Supervisors.

The press conference will take place at 10:00 a.m. on Tuesday, July 20, 1999 at the entrance to the Alameda County Administration Building, 1221 Oak Street in Oakland.

Copies of the proposed ordinance, that Supervisor King will bring before the Board of Supervisors at their next regular meeting on Tuesday, July 27, 1999, will be available at the press conference, along with background information.

1221 Oak Street, Suite 536, Oakland, California 94612
(510) 272-6694 FAX: (510) 465-7628

BOARD OF SUPERVISORS

MARY KING
SUPERVISOR, FOURTH DISTRICT

Supervisor King Speaking on Proposed County Ordinance Adding Section 9:12.120 Prohibiting the Possession of Firearms on County Property

July 20, 1999

Throughout my tenure as supervisor, I have seen the tragedy of gun-related violence that persists in Alameda County.

This is an effort to acknowledge, highlight and remove the county from any real or perceived participation in that scourge.

The costs to the county, in human lives and efforts to save lives of shooting victims, are incalculable.

When this decade is over, more than 1500 Alameda County residents will have been killed by guns in the last ten years, and more than 3,000 will be treated in hospitals for gunshot wounds.

In the first five years of the 1990's, 879 homicides were committed using guns, and 1,647 people injured by firearms were hospitalized in Alameda County.

One of my biggest concerns is the sale of firearms that eventually end up in the hands of youngsters, and of those who will use a gun to commit crimes. Statistics from the Alameda County Department of Public Health illustrate those concerns.

Guns are the leading cause of death for young people (ages 15 - 24) in this county, a fact I find shocking. Between July 1, 1996 and June 30, 1997, in Oakland alone, 136 juveniles were arrested for gun-related offenses, despite restrictions of sales of firearms to minors.

1221 OAK STREET • SUITE 536 • OAKLAND, CALIFORNIA 94612 • (510) 272-6694 • FAX: (510) 465-7628
DISTRICT OFFICE: 1426 164TH AVENUE • SAN LEANDRO, CALIFORNIA 94579 • (510) 670-5595 • FAX: (510) 278-5915

A recent survey by New York Senator Charles Shumer revealed that between 1996 and 1998, 304 weapons used in crimes were sold by a single Alameda County gun dealer.
The rash of school shootings so far this year greatly increased my concern, particularly after guns used in those shocking incidents were traced to purchases made at guns shows.

As you know, the Alameda County Fairgrounds hosts one of Northern California's largest such shows, and I have made previous attempts to remove it from county facilities. I find it ridiculous that the county is participating in this way in the distribution of guns that can so easily fall into the wrong hands. It is also strange to me that a facility owned by the residents of this county, who are suffering so clearly from the criminal use of guns, is expected to provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.

Previous efforts on my part to outlaw these shows on county property were abandoned as the result of court action. Those efforts were attacked by opponents as disrespectful of the Bill of Rights. In fact, I have nothing against the lawful possession of firearms, but I do find that county property is not the place to sell them. Guns should be sold by private, licensed dealers on private property just as liquor sales are restricted to private, licensed establishments.

A sting last May by state agents at a gun show on county property in Pomona produced an arsenal of illegal weapons, including rocket launchers, sold to uncover officers with "no background check, or paperwork," according to state Attorney General Bill Lockyer. I do not accuse vendors at the gun show held at this county's fairgrounds of similar practices, but I am concerned about the potential for similar violations here.

Last year's July 4th shooting incident at the Alameda County Fair further increased my concern about public safety, and it pointed out the dangers posed by armed visitors to that facility – and to other public gatherings on county property.

Then, the school shootings last May, particularly the shocking tragedy in Littleton, Colorado, inspired me to redouble my efforts to help protect this county from gun violence.

At that time, I promised to readdress the issue of gun sales, and to look for ways to help protect the residents of this county from gun violence while sending a clear message that this county government is not in the business of gun promotion! Our lawyers analyzed the options available to us, and after extensive research on their part, along with input from communities of interest, this proposed ordinance was drafted.

The ordinance will also help the county comply with the wishes of the City of Pleasanton, whose zoning regulations prohibit gun sales in the area where the fairgrounds are located. In another action next Tuesday, I will request that the county undertake negotiations to modify our agreement so that Pleasanton's ban on gun sales in the neighborhood of the fairgrounds will apply equally to our property there. The Pleasanton City Council has pledged its full support of my efforts on this issue.

In a letter to my office last month regarding my efforts, Pleasanton's mayor wrote that "there are ample opportunities in Pleasanton and elsewhere for persons interested in purchasing a firearm to do so. We see no reason to continue to allow the use of public property for this purpose" and I share that view.

Make no mistake; some will try to confuse this action with an attack on the right to bear arms. Don't let the gun worshippers convince you that this is an attack on their lawful right to own weapons. It is not. It is simply an assertion of the principle that Public Property should be used for public purposes. The sale of guns is a private industry. That industry should bear full responsibility for the distribution of the product they produce and promote. The business of Alameda County is not the promotion of guns.

This draft ordinance is prepared for discussion purposes. Final comments are welcomed and to the degree appropriate the ordinance will be modified to include them prior to the first reading by the Board of Supervisors.

ORDINANCE NO.

AN ORDINANCE ADDING SECTION 9.12.120 TO THE COUNTY ORDINANCE CODE PROHIBITING THE POSSESSION OF FIREARMS ON COUNTY PROPERTY

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA ORDAINS AS FOLLOWS:

SECTION 1

That the Ordinance Code of the County of Alameda shall be amended to add Section 9.12.120 to read as follows:

9.12.120 Possession of Firearms on County Property Prohibited

(a). 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. 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, with the exception of peace officers in the performance of their official duties, will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the county.

(b). Every person who carries onto County of Alameda (hereinafter "County") property a firearm, loaded or unloaded, or ammunition for a firearm, is guilty of a misdemeanor.

(c). County property includes real property owned or leased by the County, and in County's possession, or in the possession of a public or private entity under contract with the County to perform a public purpose. By way of example, it includes all public buildings owned or leased by the County in the unincorporated and incorporated portions of the County, such as the Alameda County Fairgrounds in the City of Pleasanton.

(d). "Firearm" is any gun, pistol, revolver, rifle or any device, designed or modified to

be used as a weapon, from which is expelled through a barrel a projectile by the force of an explosion or other form of combustion.

(e). "Ammunition" means cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.

(f). This section does not apply to peace officers in the performance of their official duties, or to firearms or ammunition being lawfully transported in a motor vehicle on County roads.

SECTION II

This ordinance shall take effect and be in force thirty (30) days from and after the date of passage and before the expiration of fifteen days after its passage it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.

Adopted by the Board of Supervisors of the County of Alameda, State of California, on the _____day of _____, 1999, by the following called vote:

AYES:
NOES;
EXCUSED:

_____
WILMA CHAN
President of the Board of Supervisors
County of Alameda, State of California

ATTEST: CRYSTAL K. HISHIDA, Clerk
of the Board of Supervisors, County of Alameda

By_____

v:\Fair10

ATTACHMENT H

COUNTY COUNSEL
1221 Oak Street, Suite 463, Oakland, California 94612-4296
Telephone (510) 272-6700 Fax (510) 272-5020

RICHARD E. WINNIE
COUNTY COUNSEL

August 23, 1999

Richard K. Pickering, General Manager
Alameda County Fair
4501 Pleasanton Avenue
Pleasanton, California 94566

Re: Gun Shows; Ordinance Prohibiting the Possession of Firearms on County Property; Ordinance No. O-2000-11

Dear Mr. Pickering

As you know the Alameda County Board of Supervisors adopted the above referenced ordinance on July 27, 1999 and completed its second reading on August 17, 1999. A copy of the ordinance is attached for your convenience.

The ordinance will take effect on September 16, 1999. Pursuant to Section 15 of the Contract Providing for Operation of the Alameda County Fair, (September 23, 1997) the Fairgrounds must be operated in compliance with all applicable laws, codes, regulations and ordinances, including the attached ordinance.

We recognize that some media reports have indicated that this ordinance prevents gun shows. This is not the case. Gun shows may be conducted on the fairgrounds, provided that they comply with the ordinance's restrictions on the presence of firearms and ammunition on County property. Firearm accessories and other paraphernalia that are not within the definitions of section 9.12.120 of the ordinance may be displayed and sold at any gun show. The ordinance also does not proscribe the sale of firearms or ammunition provided that such articles cannot be displayed on the premisies.

If you have any questions please feel free to contact my office.

Very truly yours,

RICHARD E. WINNIE
County Counsel

Enclosure

ORDINANCE NO. 0-2000-11

AN ORDINANCE ADDING SECTION 9.12.120 TO THE COUNTY ORDINANCE CODE PROHIBITING THE POSSESSION OF FIREARMS ON COUNTY PROPERTY

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA ORDAINS AS FOLLOWS:

SECTION I

That the Ordinance Code of the County of Alameda shall be amended to add Section 9.12.120 to read as follows:

9.12.120 Possession of Firearms on County Property Prohibited

(a). **Findings.** 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, with the exception of law enforcement personnel in the performance of official duties, will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the county.

(b). **Misdemeanor.** Every person who carries onto County of Alameda (hereinafter "County") property a firearm, loaded or unloaded, or ammunition for a firearm, is guilty of a misdemeanor.

(c). **County Property.** County property includes real property owned or leased by the County, and in County's possession, or in the possession of a public or private entity under contract with the County to perform a public purpose. By way of example, it includes all public buildings and the surrounding grounds owned or leased by the County in the unincorporated and incorporated portions of the County, such as the Alameda County Fairgrounds in the City of Pleasanton.

(d). **Firearm.** "Firearm" is any gun, pistol, revolver, rifle or any device, designed or modified to be used as a weapon, from which is expelled through a barrel a projectile by the force of an explosion or other form of combustion. It also includes any instrument which expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO_2 pressure, or spring action.

(e). **Ammunition.** "Ammunition" means a cartridge or cartridges composed of cartridge cases, primers, bullets, or propellant powder designed for use in any firearm. It does not include cartridges from which the propellant has been removed and the primer permanently deactivated.

(f). **Peace Officer.** A "Peace Officer" is any person who is a peace officer as defined in Title 3, Part 2, Chapter 4.5 of the California Penal Code (sections 830 *et seq.*) .

(g). **Exceptions.** Section 9.12.120(b) does not apply to a peace officer; a guard or messenger of a financial institution, a guard of a contract carrier operating an armored vehicle, a licensed private investigator, patrol operator, or alarm company operator, or uniformed security guard as these occupations are defined in Penal Code section 12031(d) and who holds a valid certificate issued by the Department of Consumer Affairs under Penal Code section 12033, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment; a person holding a valid license to carry a firearm issued pursuant to Penal Code section 12050; a person lawfully transporting firearms or ammunition in a motor vehicle on County roads; a person lawfully using the target range operated by the Alameda County Sheriff; a federal criminal investigator or law enforcement officer; or a member of the military forces of the State of California or of the United States while engaged in the performance of his or her duty.

SECTION II

This ordinance shall take effect and be in force thirty (30) days from and after the date of passage and before the expiration of fifteen days after its passage it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.

Adopted by the Board of Supervisors of the County of Alameda, State of California, on the 17th day of Aug 1999, by the following called vote:

AYES: Supervisors Carson, King, Steele & President Chan - 4
NOES; Supervisor Haggerty - 1
EXCUSED: none

WILMA CHAN
President of the Board of Supervisors
County of Alameda, State of California

ATTEST: CRYSTAL K. HISHIDA, Clerk
of the Board of Supervisors, County of Alameda

By_____

v:\FAIR10

Approved as to Form
RICHARD E. WINNIE, County Counsel
By: LORENZO E. CHAMBLISS

ATTACHMENT I

COUNTY COUNSEL
1221 Oak Street, Suite 463, Oakland, California 94612-4296
Telephone (510) 272-6700 Fax (510) 272-5020

RICHARD E. WINNIE
COUNTY COUNSEL

Agenda: September 21, 1999

September 20, 1999

HONORABLE BOARD OF SUPERVISORS
County of Alameda
1221 Oak Street, Suite 536
Oakland, California 94612

Re: Amended Ordinance Prohibiting Firearms on County Property

President Chan and Members of the Board

Recommendation:

It is recommended that your Board adopt the attached amended ordinance prohibiting the possession of firearms on County property.

Discussion:

This amended ordinance does not make substantive changes to the ordinance adopted on July 27, 1999. It merely refines and clarifies provisions in the original ordinance in light of comments that we have received and subsequent changes in State law.

In addition to wording refinements, the amendments add a severability clause to the ordinance, eliminate imitation firearms and air guns from the definition of firearm because of State preemption and adds an exception for firearms used in certain defined entertainment productions. (Sections 9.12.120(d) and (f)(4).)

As you are aware, on Friday a lawsuit was filled challenging the ordinance that was adopted in July. These amendments were formulated during August and are not in response to the lawsuit.

If your Board adopts this amended ordinance it will be in effect on October 28, 1999 (assuming a second reading on September 28th).

Respectfully submitted,

Richard E. Winnie
County Counsel

Enclosure

ORDINANCE NO.

AN ORDINANCE AMENDING SECTION 9.12.120 OF THE COUNTY ORDINANCE CODE PROHIBITING THE POSSESSION OF FIREARMS ON COUNTY PROPERTY

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA ORDAINS AS FOLLOWS:

SECTION I

That the Ordinance Code of the County of Alameda shall be amended by revising Section 9.12.120 to read as follows:

9.12.120 Possession of Firearms on County Property Prohibited

(a) **Findings.** 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.

(b) **Misdemeanor.** Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor.

(c) **County Property.** As used in this section, the term County property means real property, including any buildings thereon, owned or leased by the County of Alameda (hereinafter "County"), and in the County's possession, or in the possession of a public or private entity under contract with the County to perform a public purpose, including but not limited to real property owned or leased by the County in the unincorporated and incorporated portions of the County, such as the County park in Sunol and the Alameda County Fairgrounds in the City of Pleasanton, but does not include any "local public building" as defined in Penal Code Section 171b(c), where the State regulates possession of firearms pursuant to Penal Code Section 171b.

(d) **Firearm.** "Firearm" is any gun, pistol, revolver, rifle or any device, designed or modified to be used as a weapon, from which is expelled through a barrel a projectile by the force of an explosion or other form of combustion. "Firearm" does not include imitation firearms or BB guns and air rifles as defined in Government Code Section 53071.5.

(e) **Ammunition.** "Ammunition" is any ammunition as defined in Penal Code Section 12316(b)(2).

(f) **Exceptions.** Subsection 9.12.120(b) does not apply to the following:

(1) A peace officer as defined in Title 3, Part 2, Chapter 4.5 of the California

Penal Code (sections 830 *et seq.*) ;

(2) A guard or messenger of a financial institution, a guard of a contract carrier operating an armored vehicle, a licensed private investigator, patrol operator, or alarm company operator, or uniformed security guard as these occupations are defined in Penal Code section 12031(d) and who holds a valid certificate issued by the Department of Consumer Affairs under Penal Code section 12033, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment;

(3) A person holding a valid license to carry a firearm issued pursuant to Penal Code section 12050;

(4) The possession of a firearm by an authorized participant in a motion picture, television, video, dance, or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use.

(5) A person lawfully transporting firearms or ammunition in a motor vehicle on County roads;

(6) A person lawfully using the target range operated by the Alameda County Sheriff;

(7) A federal criminal investigator or law enforcement officer; or

(8) A member of the military forces of the State of California or of the United States while engaged in the performance of his or her duty.

(g) **Severability.** If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

SECTION II

This ordinance shall take effect and be in force thirty (30) days from and after the date of passage and before the expiration of fifteen days after its passage it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.

Adopted by the Board of Supervisors of the County of Alameda, State of California, on the 21st day of September, 1999, by the following called vote:

AYES:
NOES;
EXCUSED:

_____
WILMA CHAN
President of the Board of Supervisors
County of Alameda, State of California

ATTEST: CRYSTAL K. HISHIDA, Clerk
of the Board of Supervisors, County of Alameda

By_____

Approved as to Form
RICHARD E. WINNIE, County Counsel

By: _____
LORENZO E. CHAMBLISS